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AN EVALUATION OF

Volume I of Report 30

Published by

The Law Reform Commission of Canada

and Titled

"Recodifying Criminal Law"

for

**The Hon. Mr. Ray HNATYSHYN
Minister of Justice
and Attorney General of Canada**

by

The Canadian Association of Chiefs of Police

August, 1987

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I. INTRODUCTION

The Canadian Association of Chiefs of Police is pleased to benefit the Minister of Justice by this opportunity to report our considered opinions and observations with respect to Volume I of the recently published Report of the Law Reform Commission of Canada titled "Recodifying Criminal Law. It is hoped that the concerns and suggestions conveyed herein will be of benefit to the debate on this issue and that our criticisms will be appreciated in the constructive fashion in which they are offered and intended.

Furthermore, it is trusted that there will be further opportunities in the future to review and comment upon this proposed legislation as may be necessary. Indeed, this Association looks forward to the opportunity of providing additional comments at the invitation and pleasure of the Minister.

The Brief is functionally divided into the following parts:

1. Part I is the Introduction and addresses only the future process of legislative review contemplated by this Association;
2. Part II is a consideration and summary of the major themes which are considered by this Association to be of particular importance;
3. Part III constitutes the most specific submissions of the Association and identifies each section of the draft Act that occasions concern. The principal criticisms, questions, or observations affecting the position which is preferred by this Association is clearly stated. Where appropriate, the action required to satisfy the objection is also set forth;

4. Part IV is a very brief conclusion and summary of the concerns expressed elsewhere in this Brief; and
5. Part V is a collection of four Appendices affecting fundamental matters associated with this Brief which are submitted for the further information and attention of the Minister.

The Minister will be further assisted by a familiarity with the following points which have been relied upon in organizing and preparing this Brief:

1. Unless otherwise stated "the Report" refers to Volume I of Report 30, "Recodifying Criminal Law", and in particular pages 1-95 thereof;
2. Unless otherwise stated "the Appendix" refers to Appendix A contained in the Report, being pages 97-117 thereof; and
3. Unless otherwise stated, a reference to a clause is a reference to the Report, and any reference to a section number is a reference to the Appendix.

Insofar as the Appendix is titled "An Act to Revise and Codify the Criminal Law", and may therefore be presumed to be the final result of the work of the Commission, this Association has chosen to use it as the principal reference for the comments and subject headings herein. This designation has been necessary insofar as there are apparent, and unexplained, differences between the Report and its Appendix.

II. MAJOR THEMES

For the assistance of the Minister, this part has been divided into a number of constituent elements as indicated by the subject headings below.

A. General Limitations

As a preliminary comment, it is submitted that the construction and style of the Commission's report has rendered it most difficult to properly read or comprehend. The lack of concordance between the relevant clauses in the body of the report, and the section numbers in the proposed draft Act, have been particularly troublesome. This difficulty has been further compounded by a surprising number of amendments and changes which appear in the draft Act, but were not a part of the main report.

Similarly, the relative lack of a full and comprehensive justification for the matters finally proposed makes it very difficult

to fully evaluate the comparative merits of the draft Act and the relative parts of the Criminal Code which it may eventually replace. This observation is, of course, entirely inapplicable with respect to all of the current sections of the Criminal Code enumerated in Appendix IV, "Sections in the Criminal Code Omitted From the Draft Act to Revise and Codify the Criminal Law". It is submitted that a comparative analysis of the Criminal Code and the draft Act sustains the impression that the current legislation is much more specific and detailed than that prepared by the Commission. It is therefore of some surprise that the benefits of such a detailed legislative approach might be so easily abandoned at the very time that there is such a high public demand for greater precision in our law. The aforementioned Appendix has therefore been prepared to demonstrate the sizable nature of this potential problem. It is therefore submitted that the cursory dismissal of the current legislation by the Commission, without even the benefit of a comment in its Report, is inappropriate.

There are also a large number of collateral and specific enquiries which cannot be properly addressed yet until the publication and analysis of the following documents or reports:

1. Volume II of this Report, being the conclusion of the "Special Part";

2. The Code of Criminal Procedure; and
3. The Report of the Canadian Sentencing Commission.

Insofar as these publications might affect the contents of Volume I, or the position of this Association as stated in this Brief, it is necessary to reserve the right to modify our comments pending our review of these further reports.

Finally, the actual status of the draft Act is itself far from clear. On page 4 of the report the following proviso is stated:

Our proposed new Code is not yet in the form of a Bill to be presented to Parliament; rather it is a proposal for a new statute. This legislatively drafted version of our proposal indicates what it would look like in statutory form (see Appendix A).

It has therefore been assumed that Appendix A to the report of the Commission is only a proposal for a new statute. If, however, this assumption is erroneous then a correction by the Minister is respectfully requested.

B. The Need for Review

The stated objective of the Commission in Volume I of their report is to create an evolutionary new Code that is comprehensive, logical, organized, coherent, and consistent. In contrast, the legislation which it is to replace is described as "overly complicated" (page 3) and "obsolete" (per Mr. Del BUONO on page 2). However, and in the absence of any further explanation, these bare comments apparently constitute the only justification for the recodification of the criminal law. Although it can be conceded that there are provisions in the Criminal Code that require review, it would have been of great assistance to know more precisely the assumptions and general conclusions which have been relied upon by the Commission.

It is further submitted that the draft Act may not necessarily have simplified provisions of the relevant law which are currently well understood or applied (see, for example, Sections 28, 30, 32, 37 and 38, 48, 57, 58, and 69). Unfortunately, this difficulty is likely only to be realized in the years following the proclamation of this new legislation in ways which are presently unforeseen by the Commission. It is therefore submitted that the obligation to secure legislative simplification ought not to be obtained at the expense of legislative clarity.

C. Definitions

The most systematic criticism of the draft Act is the apparent relative disinterest of the Commission in matters of definition. This deficiency is perceived to be fundamental insofar as simplification and certainty are premised upon a precise attention to detail and interpretation. A failure to be concerned with this subject therefore invites the prospect that the stated goals for this proposed legislation may not be achieved. It is therefore submitted that this subject must be accorded a higher priority.

In Part V of this Brief there are included the following Appendices which, it is submitted, justify the comments made above:

1. Appendix I: This Appendix is titled "Definitions in the Criminal Code Omitted in the Draft Act to Revise and Codify the Criminal Law".

It is presumed that Section 2 of Appendix A to the report of the Commission is the general definition section for the draft Act to revise and codify the criminal law. Its importance to the precision with which that statute may be interpreted is therefore substantial. Although it is recognized that

further definitions may be subsequently provided within the body of Volume II, it is not apparent that this practice has been strongly endorsed in Volume I (reference only Sections 11, 34, 56, 65, and 74(3)). It is therefore inferred that further definitions are unlikely to be added to Section 2.

A comparative analysis with the Criminal Code reveals that significant attention has been given to the process of definition in the current legislation. Such diligence is not, however, apparent in respect of the draft Act to revise and codify the criminal law. The 171 definitions enumerated in this Appendix include only those words or phrases which are not reproduced in the draft under consideration here. Although some of these terms may not be required in this draft, it is submitted that this cannot be adequately or presently determined based upon the contents of Volume I. It is further noted that there is no justification or explanation in the report of the Commission for their exclusion of these terms from the draft Act.

2. Appendix II: This Appendix is titled "Definitions Added or Amended as Between the Report and Appendix A to the Report of the Law Reform Commission of Canada".

It is apparent that there are material differences in the definition sections included within the body and Appendix A of the Commission's report. These inconsistencies impair the credibility of each part, and also complicate the task of the reader. It is respectfully submitted that the lack of any explanation or justification for these changes ought therefore to be remedied by the Minister.

It is noted that there are 24 such alterations or amendments. Insofar as the body of the Commission's report presumably justifies the contents of the draft Act, these additions and amendments create unnecessary confusion. It is for this reason that the attention of the Minister is required.

3. Appendix III: This Appendix is titled "Words and Phrases in the Draft Act to Revise and Codify the Criminal Law Which are Not Defined or Explained".

It is appreciated that not all of the 50 words and phrases from the draft Act which are not defined or commented upon therein, are necessarily amenable to a legislative definition. However, it is our submission that every effort

to achieve that task ought to be pursued. With respect to those terms which might not be so included, it is requested that their meaning or intention be otherwise clarified by the Minister for the benefit of this Association.

D. Elements of the Draft Act

It is submitted that each of the following general issues may have a substantial impact on the administration of justice in Canada:

1. Negligence in the Criminal Law: The increasing role of negligence in the criminal law is demonstrated, inter alia, by Sections 6, 37, 53, and 57. This development is particularly interesting because of the possibility of incurring criminal liability in the abstract through the creation of a mere risk, without the actual sustaining of any hurt or harm (see Section 6(1)(b)(iv) or Section 53). Although the Commission has recognized the problem of defining criminal negligence vis-a-vis civil negligence (see page 66 of the report following clause 10(5) and page 21 in respect of the term "negligently"), this difficulty has apparently been left for "a value judgement in each individual case."

The impact of this trend on the future ability of the police to make an informed and legal determination of liability, and to investigate complaints of abstract criminal negligence, has not been addressed by the Commission. Similarly, the consequential ramifications on the principle of "certainty in the criminal law" are also not considered. It is therefore respectfully requested that the Minister clarify these general issues.

2. Subjective Criminal Law: It is observed that the Commission apparently favours a more subjective approach to the criminal law, rather than the traditional quasi-objective standard. This change is particularly evident in respect of matters affecting the mental element of crime: see Sections 8(c), 11(a), 11(b), 11(c), the alternative Section 14(clause 3(6)), 16(1), 18(1), 18(2)(b), 40(2)(f), 54(1), 54(2), 58, 61, 64, and 64(f). It is respectfully submitted that wherever possible the content of the relevant mental element in any offence should be measured as against the standard of reasonable knowledge or belief, rather than actual knowledge or belief.

The more specific concerns of the Association are, of course, directed at individual offences or draft sections. Without ignoring

the submissions made elsewhere in this Brief, it is suggested that each of the following sections from the draft Act requires some further consideration:

1. Section 13: Immaturity;
2. Section 23: Protection of Persons Acting Under Statute;
3. Section 31: Conspiracy;
4. Section 40(2): First Degree Murder;
5. Section 42: Palliative Care;
6. Section 67: Interference With Personal Security or
Privacy;
7. Section 69: Criminal Intrusion.

It is similarly submitted that each of the following sections, which are now in the Criminal Code but omitted from the draft Act, should be re-introduced:

1. Section 28: Arrest of Wrong Person;
2. Section 30 and 31: Breach of the Peace;
3. Sections 64-67: Unlawful Assembly and Riot;
4. Section 171: Causing a Disturbance;
5. Section 173: Trespass by Night;
6. Section 246: Assaulting a Police Officer;
7. Section 301.2: Unauthorized Use of Computer;
8. Section 311: Automobile Master Key;
9. Sections 327 & 334: Possession of Counterfeiting Equipment
or Paper;

10. Section 387(1.1): Mischief re Data; and
11. Section 415 and 416: Instruments for Counterfeiting.

It is of substantial concern to this Association that group misbehaviour has been largely ignored in the draft Act. The present scope and application of sections 30, 31, 64-67, and 171 enable the police to effectively restore and maintain the public peace when confronted with "parties out of control", unruly demonstrations, disorderly parades, large disturbances, and civil disobedience. It is suggested that proper public respect for the administration of justice requires a legal capacity and authority to deal adequately with such situations.

III. THE DRAFT ACT: THE ELEMENTS

The most specific representations of this Association are addressed chronologically by section number:

Preamble

The Association submits that it is unnecessary to include a preamble in the draft Act. In this regard the majority justification of the Commission on page 7 of their report is adopted.

Section 2: Definitions

Particular comments concerning individual definitions are set out below:

- (a) Person: It is submitted that this definition is deficient for the following reasons:

(1) Although a fetus possesses life, there is no offence for causing harm or death to that life prior to birth. Thus, a criminal act directed against the mother which produces such a tragic result does not incur an additional penal sanction; and

(2) Although the issue of abortion has yet to be dealt with by the Commission, the police will presumably retain the initial ability to commence prosecutions as might be required. Thus, this lack of direction in the draft Act assumes some further significance.

(b) Property: The omissions from this definition are considerable. In its present form, it appears to be directed principally at matters of utilities and certain classes of services. The deletion of legal terms of art such as "real and personal property" in Section 2 of the current Criminal Code are not compensated for insofar as there is no reference to chattels, information, data, trade secrets, or television signals, etc. Furthermore, the doctrine of "ejusdem generis" would appear to preclude such an extended interpretation from the items now listed.

A strict review of the items included in this definition inevitably invites the following questions:

1. What is it that distinguishes a telephone and telecommunications service?;

2. Does the reference to "computer services" mean the software contents of that computer service, or the "computer time", or both?; and

3. Does the word "services" refer to each of the six subjects which precede it, or only the last three?

The difficulties referred to herein are compounded insofar as Section 22 (Defence of Property) permits the defence of only that property in which someone can be in "peaceable possession". It is, of course, difficult to imagine how one can ever be in peaceable possession of "electricity, gas and water and telephone, telecommunication and computer services". Alternatively, if Section 22 is really intended to be concerned with realty, then there should be a reference to that type of property in Section 2.

Finally, it is not clear that the definition of "another's property" in this section is subject to the limitations recognized here in respect of "property". Assuming that it may be, then the use of the former term throughout the draft Act is relatively meaningless.

The Minister is therefore requested to make the appropriate amendments.

Section 3: Principle of Legality

Insofar as this section limits criminal liability to conduct prohibited by Parliament, is it not more restrictive than, and therefore in conflict with, Section 11(g) of the Charter of Rights? In addition to the parameters of this section, the Charter apparently permits criminal liability in respect of an "offence under . . . international law or . . . the general principles of law recognized by the Community of Nations". Some clarification by the Minister with respect to the limitation contemplated by this section is therefore requested.

Section 6: Omissions

It is submitted that this subsection criminalizes the mere creation of a risk in the absence of that risk also materializing in an injury or death to another person (see also section 53). The breach of a mere duty has not previously attracted such liability without some further reference to the consequences of that breach. Is this incorporation of pure negligence into the criminal law justified?

Section 7: Causation

It is submitted that the following questions ought to be pursued in order to define causation with greater precision:

1. Does the word "only" create a limitation which is too restrictive?;

2. Does the word "substantially" impose a burden on the Crown that is incapable of proper definition?; and

3. What is the meaning of the last phrase "no other subsequent unforeseeable cause supersedes the conduct"? Does the occurrence of an "unforeseeable cause" therefore operate to remove criminal liability where it might have existed but for that unforeseeable cause?

Some clarification of these issues by the Minister is therefore requested.

Section 8: Purpose

It is submitted that this section does little to clarify the law. Indeed, the language in clause 2(4)(b) of the Report is simpler and preferred.

With respect to the definition for "purpose" in the draft Act, the following questions are posed:

1. Although this section is apparently drafted conjunctively, should it not be disjunctive?;
2. Is not Section 8(a) a repetition of Section 11(a)?;
3. Is not Section 8(b) a repetition of Section 11(b)?; and
4. Is Section 8(c) drafted with sufficient certainty to include "wilful blindness"?

It is noted that Section 8 also incorporates the residual rule set out in Clause 2(4)(d). It is submitted that the acceptance of "purpose" as the required mental element for a crime unless otherwise stated constitutes a significant change in the general jurisprudence. The common law has, in such situations, traditionally required only a general intention to commit an unlawful act, recklessness, or wilful blindness. However, the interpretation of Section 8, and Sections 11(a) and (b), as noted above, will likely restrict the imposition of liability in such cases in the future. It is submitted that this result is contrary to sound public policy.

The appropriate amendments by the Minister are therefore requested.

Section 9: Recklessness

Like Section 8, it is submitted that this section does little to clarify the law. It is submitted that there is no benefit by defining recklessness merely as conduct which is "engaged in recklessly". Insofar as this mental element is presumably more unreasonable than negligence, its definition in those terms would be of greater assistance than the present draft. Clause 2(4)(b) is still preferred.

When this section is compared with Section 11(c) it becomes apparent that recklessness is not to be considered from a quasi-objective perspective, but from the subjective understanding of the suspect ("if the person is aware"). In the absence of an inculpatory statement, it will therefore become very difficult to successfully prosecute any offence involving recklessness. It is suggested that this assumption of relativity in the criminal law is unreasonable, and that the result noted is inappropriate. These criticisms can, of course, be alleviated by reverting to a recognition of the principle that "a man presumes the natural consequences of his acts".

As with Section 8, the following questions are relevant:

1. Although this section is drafted conjunctively, should it not be disjunctive?; and

2. Is this section, when read in conjunction with Section 11(c), incapable of imposing liability upon the suspect who is "wilfully blind"?

The appropriate amendments by the Minister are therefore requested.

Section 10: Negligence

It is apparent that the Law Reform Commission equates criminal negligence with the concept of gross negligence in civil law. This is unfortunate insofar as that latter term has never been satisfactorily defined in the law, nor is it likely to be. Indeed, this must therefore raise further questions about the application of recklessness. The resolution by a police officer of which of these terms (negligence or recklessness) is applicable in any given situation is thus very problematic and unlikely to do little for the public policy which supports certainty in the criminal law.

As with Sections 8 and 9, it is submitted that this section should be disjunctive rather than conjunctive.

Section 11: Definitions

It is submitted that this section is qualified and limited by Sections 8 and 9 in the manner described in the comments therein.

Section 13: Immaturity

The experience of the police is that children are frequently very mature by the age of 12 years. The manner in which the "age of maturity" is progressing in contemporary society invites the conclusion that this arbitrary choice is in need of review and must be reduced. It is therefore submitted that the Minister should re-assess the age of criminal maturity, or demonstrate that the present rule is still justified. In the alternative, it is submitted that criminal maturity may be properly a matter for subjective assessment in each case.

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.

Section 14: Mental Disorder

As a preliminary comment, it is submitted that the minority opinion and alternative ("or believed what he was doing was morally right") must be rejected. The criminal law should be preserved as the principal protection for society from harmful conduct by permitting the discretion with which such conduct is sanctioned to occur subsequent to a finding of guilt. The creation of a subjective defence which could easily preclude such a disposition is therefore unacceptable.

The ability of the Crown to displace the assertions of an accused as to his moral convictions virtually creates a burden of "proving a negative". This type of onus has previously been avoided for sound reasons of practice and law. It is submitted that such a tradition ought not to be interrupted here.

The following questions are also posed with respect to this section:

1. Is the term "mental disorder" intended to embrace a wider range of maladies than those currently recognized as constituting "insanity"? In particular, will mental disorders include conditions which are psychological only without a physiological basis? If so, does this not invite an assessment of the degree of affliction and therefore the judicial acceptance of temporary disorders similar to those now recognized by Section 16(3) of the Criminal Code? Does not

an affirmative reply to any of these enquiries create a wider scope for this defence than that which is now available?

2. Whereas the Law Reform Commission recommends that the test of a mental disorder be the subject's capability of appreciating "the nature OR consequences" of the conduct, the current Code uses the phrase "nature AND quality". What is the significance of this amendment?

Some clarification of these issues by the Minister is therefore requested.

It is also apparent that the strict wording of this section may preclude court dispositions of "Not Guilty by Reason of Insanity". Presumably those persons who would now be subject to such a finding will be merely judged to be "Not Guilty". It is suggested that this result is inappropriate and protects neither the accused or the public. In this regard it is therefore submitted that the present procedure and law is preferable and ought to be acknowledged in this section.

Section 15: Lack of Control

Some clarification is required in respect of the potential application of Section 15(1)(b). In particular, and with the necessary facts in the appropriate case, will ordinary fatigue be able to excuse a "purpose" crime? For example, will a driver who is impaired (see

Section 58), yet is so fatigued that he did not know of his impairment by reason of his fatigue and its influence upon his self-perception, be excused? Alternatively, if an individual touches someone (see Section 43), but does not realize that fact by reason only of his fatigue, is he innocent of assault? If the answer to any of the questions posed here is affirmative, then it is submitted that this section must be modified.

The specificity of the questions noted above serves also to illustrate the larger issue. 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 "casual shop-lifter" 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) of the Criminal Code.

Section 17: Intoxication

It is submitted that the following questions require some further clarification by the Minister:

1. Is it intended that Section 17 refer only to intoxication by alcohol? In the absence of an amendment to the draft Act this limitation appears to be the position of the Commission. However, it is submitted that this important matter should be clarified and defined with much greater certainty;
2. Is duress intended to have its ordinary meaning of "compulsion by threat"? If so, it is submitted that the scope of this defence will be improperly enlarged by the inability of the Crown to displace the assertion of an accused that he believed he was compelled to consume alcohol or drugs by a third party;
3. Does "compulsion" include an alcoholic compulsion? If so, it is submitted that the scope of this defence is wholly inappropriate; and
4. Will the concept of "reasonable mistake" permit an accused to offer as a defence his own misperception of the quantity of alcohol or drugs that he believed he could consume without becoming intoxicated? If so, it is submitted that the potential scope of this defence is too wide.

The potential complexity of Section 17(1) invites the conclusion that the minority view of the Law Reform Commission on page 29 of their Report is simpler and preferable.

A literal reading of Section 17(2) invites the conclusion that one of the following objectives is sought:

1. that there will be a "special verdict" rendered where an individual is judged with respect to any crime committed by him, to be "guilty while intoxicated"; or
2. that the police, or Crown, will be obliged to anticipate such evidence and therefore to charge the suspect with the substantive criminal offence "while intoxicated".

It is submitted that neither of these two general alternatives is justified by reasons of policy or legal necessity. The acceptance of either will encourage needless litigation when such a factor is now appropriately dealt with only at the time of sentencing. It is suggested that the present treatment by the law of intoxication is therefore preferable.

Section 18: Mistake of Law

It is submitted that the defence of mistake of law should be restricted to only those mistakes which are bona fide and reasonable. Although both of these criteria are arguably established in Section 18(2), it is not apparent that Section 18(1) is similarly affected. In that subsection, unlike Section 18(2), the lack of knowledge or mistake of law is unqualified. It is submitted that this is an error which ought to be corrected.

Notwithstanding the foregoing comments, Section 18(2) is very incomplete. In this regard, the following observations are made:

1. Will the defence created by Section 18(2)(a) always be subject to dismissal where there is proof of publication of the relevant "rule of law"? It is submitted that this subsection should be amended to clearly stipulate that this defence is subject to such a limitation. Alternatively, and insofar as amendments to criminal legislation are invariably published in the Canada Gazette, does this subsection serve any useful purpose?;
2. Subject to the forthcoming Code of Criminal Procedure, is it intended that a superior court of criminal jurisdiction other than a provincial Court of Appeal may be constituted as an appellate court?;
3. Will the application of this subsection in practice create regional differences in the criminal law that are in conflict with section 15 of the Charter of Rights?;
4. Does the concept of "officially induced error of law" in reliance upon an administrative authority create a potential estoppel in favour of the suspect precluding the traditional exercise of discretion by the police or the Attorney General? If the reply to this inquiry is affirmative, then it is

submitted that such an interpretation is contrary to sound public policy.

This Association is, of course, strongly opposed to any potential derogation from the proper and ordinary exercise of police discretion arising out of a reliance on this draft subsection. It is therefore submitted that the authority for such a reliance ought to be deleted. However, and in the alternative, it is suggested that the Minister ought, at the very least, to clearly define and designate every "competent administrative authority", stipulate that the relevant opinion or advice must emanate from a person whose job it is to give such rulings, and restrict the reliance placed on that advice or opinion only to the particular case under consideration. It is suggested that the potential mischief which might be caused to the criminal process, and the public, by the assertion of a general claim to estoppel which cannot be positively refuted at trial by the Crown is unreasonable. For this reason it is suggested that this defence, if it is not repealed, must be as narrowly circumscribed as possible.

It is further noted that the Law Reform Commission has offered no justification for the creation of this defence in their report, relying only on the inconclusive and obiter comments of the Supreme Court of Canada in R. v. MacDougall (1982), 31 C.R. (3d) 1. Owing to the strong criticisms already made here

it is suggested that the relevant justification, if any, for this sub-section ought to be re-considered with greater attention; and

5. It is apparent that Section 18(2) might transfer a substantial de facto legislative capacity from Parliament to the judiciary. This further assumption of judicial authority has been neither justified or explained by the Commission.

Some clarification of these issues by the Minister is therefore requested.

Section 20: Necessity

It is noted that this defence may have been drafted by the Commission more widely than the judgement of the Supreme Court of Canada in Perka v. R. (1984), 14 C.C.C. (3d) 385, upon which it ostensibly relies. Although Section 20 addresses the balancing of risks which may be associated with immediate serious harm, the Supreme Court has also set out those matters which materially affect this defence. Their criteria numbered 4, 7, 8, and 9 are reproduced below from page 406 of the aforementioned decision:

4. The criterion is the moral involuntariness of the wrongful action;

7. Actions or circumstances which indicate that the wrongful act was not truly involuntary do disentitle;

8. The existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law; and

9. The defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril.

It is submitted that Section 20 does not impose the same stringent standards upon the existence of this defence as have been considered appropriate by the Supreme Court. The Minister of Justice is therefore respectfully asked to clarify the following matters:

1. What is the meaning of "substantially outweighs?;
2. Is Section 20 intended as a statutory equivalent of the judgement in Perka?; and
3. If not, what is the justification for the potential expansion of this defence?

It is further submitted that this Section ought to clearly stipulate the burdens which attach to its application. In particular, it is suggested that such a defence ought to be claimed and proved by the party who relies upon it, without imposing upon the Crown to disprove its application once a claim is merely asserted by the accused. Similarly, it is submitted that any entitlement to a benefit by virtue of this defence must be premised, at the very least, upon its application upon a balance of probabilities.

Section 21: Defence of Persons

Although this Association accepts the proposition that a person must be permitted to resist unlawful force, it is suggested that this draft section is too expansive. Police officers are frequently expected and commanded by the law to use physical force to complete their duties, particularly those associated with arrest. The old maxim of "what the law requires, it justifies" has served well and is probably understood by judges, policemen, and the public. It is therefore regrettable that this honoured and useful principle of the common law might now be derogated from by the draft section.

It is suggested that Section 21 implies that the defence it has created may exist even in the case of a lawful arrest provided only that the subject honestly, but unreasonably, believes that the arrest is illegal. If this interpretation is correct then clearly the old maxim of the common law is no longer applicable as a quasi-objective

standard. Conversely, it is suggested that this is a subject matter which is not properly dealt with on a subjective basis. It is therefore suggested that the potential harm alluded to here far outweighs the benefits and protections of the current law.

As a consequence of the foregoing remarks it is also submitted that there is an alternative remedy to that already suggested. By adopting the proposition that all arrests by the police must be initially presumed to be lawful for the purposes of this section, it is suggested that police officers will be less subject to retaliatory violence. The actual vires of the arrest could then be determined subsequently and judicially, and thereby reserve to the subject all other remedies recognized by law. Such a modified section would expressly state these limitations, thereby expanding the scope of the draft Section 23 to create it as the equal of the current Section 25.

For those reasons already stated it is evident that this draft section may be poorly drafted insofar as it does not reflect sound public policy. As a consequence the following specific enquiries address the substantive issues raised by this draft:

1. If the words "unlawful use of force" in Section 21(1) are intended to be interpreted literally, then it is submitted that the use of force in self-defence is only justified once there has been an actual assault. Such policy is inappropriate and inconsistent with the traditional

understanding of the law. It is therefore submitted that the words identified above be qualified by the addition of the phrase "or reasonably apprehended unlawful use of force".

2. The Law Reform Commission states on page 34 of the Report that "details about force intended to cause death . . . are omitted as relating in reality to the question of reasonable necessity". However, and as has been noted, Section 20(2) apparently precludes the consideration of necessity where death or serious harm is inflicted. It is therefore assumed that there is a conflict between the report and the draft Act. This conflict inevitably creates its own difficulties.

Is it intended that there can never be a reasonable basis for the use of deadly force? Although Section 23(1)(a) infers that such force may be justified, that section is limited to the prevention of the commission of crime. Section 21 is further limited to defence from the use of unlawful force. The complex inter-relationship between these sections, and Section 20(2), therefore does little to assist with the resolution of this critical issue. The Minister is therefore respectfully asked to provide some clarification.

3. Notwithstanding the minimal explanation given by the Commission on page 34 of the Report, it is apparent that this draft section may have reproduced only Section 37 of the

current Code. If so, what is the rationale for the deletion of the present Sections 34 to 36? In particular, what does the Commission recommend in respect of self-defence in case of prior aggression, or the role of provocation? Should these matters not be considered expressly?

4. The inherent limitation of Section 21(2) is unwarranted and inconsistent with the legal protections required by the police to properly execute their duty. Notwithstanding Sections 23(1)(b) or (c), it is apparent that resistance to arrest is not prohibited except within the strict confines of Section 21(2). It is submitted that such a rule may expose the police to an unnecessary risk of confrontation and injury, and that it is inconsistent with proper public policy and respect for the administration of justice.

It is therefore requested that this rule be re-drafted to include a reference to all of those duties or authorities carried out pursuant to Section 23. Such an amendment should also expressly consider the subject matter now addressed by Sections 25(2) and 28 of the Criminal Code. In the alternative it is submitted that Section 21(2) be entirely deleted from the draft Act.

Some clarification of these issues by the Minister is therefore requested.

Section 22: Defence of Property

There is an issue of definition associated with this section. Although some consideration has been given to the term "property" in Section 2(1), is Section 22 really intended to be limited only to matters of "electricity, gas and water and telephone, telecommunication and computer services"? The answer to this question is presumably negative insofar as clauses 3(11) and (12) in the report refer respectively to "moveable" and "immoveable" property. These terms are not, however, defined or referred to in the draft Act. It is therefore submitted that this situation ought to be remedied.

It is also noted that neither Section 22 or Section 43 address those matters now dealt with in Sections 38(2) and 41(2) of the current Criminal Code. In order to permit a person in possession of property to retain that property (as set out in Section 21(1)), and to deal with the trespasser who might merely be resisting the exercise of that property right by a passive presence, it is submitted that some consideration be given to the inclusion of a "deemed assault" vis-a-vis the trespasser. The lack of any explanation by the Commission for this omission is troubling.

With respect to Section 22(2) it is noted that the current law has occasionally recognized, even if only impliedly, that the legitimate defence of property may require the use of deadly force (e.g. Regina v. Kessler, Alberta Court of Queen's Bench, 1987: as yet unreported). The

wisdom of an absolute rule to the contrary must therefore be questioned. Similarly, and of equal concern, is the predicament of a property owner who accidentally kills a trespasser without negligence. Does this draft section compel the conclusion that such an individual must always be charged with an offence? If so, then it is suggested that Section 22 is inflexible and thereby contrary to the best interests of the administration of justice.

Section 23: Protection of Persons Acting Under Statute

This section will have a substantial impact on the police community. In particular, it is submitted that this draft section reduces the legal protections now available to police officers by virtue of Section 25 of the Criminal Code. This observation is premised upon the following:

1. Unlike Section 25(1) of the current legislation, Section 23 is phrased in positive terms without a preface which refers to reliance upon reasonable and probable grounds. It is therefore submitted that Section 23 may not afford any protection to a police officer who acts reasonably and in good faith, yet is innocently in error. The creation of an absolute duty to always be right will inevitably, and adversely, affect the willingness of many police officers to assume the type of initiative which is customarily required in the performance of duty. Similarly, it is regrettable that

the Commission has not seen fit to include any other protections similar to those now addressed by Sections 25(2) and 28 of the Criminal Code.

2. Unlike Section 25(1) of the current legislation, Section 23(1)(a) and (b) are restricted in their application only to the use of force. In contrast, the current legislation is concerned with "anything in the administration or enforcement of the law". This wider protection is, of course, far preferable owing to the very wide range of duties and functions which are expected of police officers in contemporary society.

Furthermore, the restriction of Section 23(1)(c) to acts "required or authorized to be performed by or under an Act of Parliament or an Act of the legislature of a province" is also very limiting compared to Section 25(1) of the current legislation. The Commission has stated on page 37 of their Report that this subsection "refers to particular acts specifically required or authorized and not to a general authorization such as a peace officer's lawful execution of his duty . . .". This restriction and bare comment begs some answer to the following questions:

- (a) What are the police to do when required to "enforce" a vital common law duty that is not now statutorily

expressed? Included with such duties are, for example, the preserving of security for dignitaries; the isolation of crime scenes and the consequential temporary deprivation of property from "owners" of evidence; security on the highways by regulation of motor vehicle traffic; the physical removal of passive trespassers who commit no offence contrary to federal or provincial law; the evacuation of communities during public order emergencies or subsequent to major disasters; etc.

(b) What are the police to do when required to temporarily detain an individual for whom there is not a power of arrest (e.g., a summary conviction offence which has not been "found committing") in order to issue him with an appearance notice? Notwithstanding Section 1 of the Charter of Rights and Freedoms, does the police officer thereby commit an offence of "confinement" contrary to Section 49 of the draft Act?

(c) What are the police to do when required, on a reasonable factual basis, to justifiably contravene a traffic law, etc., in order to properly respond to a matter of emergency duty?

It is submitted that the appropriate amendments are therefore required to preserve those protections now recognized by Section 25(1) of the Criminal Code.

3. What is the meaning of the phrase "endangers human life" in section 21(2)? The determination of such an inquiry in circumstances of extreme urgency is far more difficult and unnatural than the type of self-defence consideration now required by Section 25(3) of the Criminal Code. It is therefore submitted that the concept of self-protection in such situations (which has been expressly rejected by the Commission in Section 21(2)) is far preferable to the abstract obligation proposed by Section 23(2) requiring the determination of the potential endangerment of human life.

The appropriate amendments by the Minister are therefore requested.

Section 25: Mistaken Belief as to Defence

Would it not be more appropriate if the mistaken belief referred to in Section 25(1) was reasonably based? In its present draft it is submitted that the belief required to invoke this defence be subjective only and therefore it is largely beyond the ability of the Crown to refute. It is further submitted that such a mischief is inconsistent with the ordinary burdens justifiably and traditionally recognized by the criminal law.

Section 26: Principals

It is not altogether clear why "principals" and "furtherers" are treated separately in the draft Act. As noted by the Commission, furtherers are all liable to the same penalty as the committor (see justification for Clause 4(2) on page 41); the furtherer "may often be as culpable as the actual committor and sometimes more so"(Ibid); and furtherers may also benefit from the defences which are available to the actual committor (Ibid., page 42). However, and notwithstanding these comments, the Commission does not really explain its rationale for distinguishing between Sections 26 and 28. Some clarification by the Minister would therefore be appreciated.

Section 27: Corporate Liability

Insofar as the Law Reform Commission concedes that it has much work yet to do in respect of this subject, it is submitted that there be a review of the alternative Clause 2(5) on page 23 of the Report. This alternative is preferable to Section 27 as it is drafted more simply yet assigns corporate liability and responsibility for crimes of purpose, recklessness, and negligence. The appropriate amendment is therefore requested.

With respect to the questions and issues raised by the Commission, the following observations are made:

1. Corporate criminal liability ought to be assigned when actions are taken in its name which are criminal in nature, and when the conduct of the relevant directors, officers, or employees becomes known to the company which then avoids the first reasonable opportunity to repudiate that criminal conduct. Indeed, this obligation should be characterized as a positive duty imposed on the employer to prevent the continuation of a collective crime which is known to him. Any breach of this duty should constitute the employer as a furtherer of the crime.

2. The Minister is strongly urged to develop a principle of collective liability which will include other types of collective activity: partnership; and joint ventures by individuals, partnerships, or corporations.

Section 28: Furtherance

There is no explanation offered by the Commission for their exclusion of the words "encourages" and "urges" in their re-drafting of Clause 4(2)(a) into Section 28(1). Insofar as these words tend to extend the scope of application of Section 28, it is submitted that they be re-introduced into the draft Act. In the alternative, some explanation for their deletion is requested.

It is submitted that the following questions require some further explanation and attention by the Minister:

1. What is the proper meaning of the phrase "some other crime . . . that involves a similar degree of harm"?
2. Does Section 28(2) permit a furtherer to obtain the benefit of a defence in favour of the principal of the crime even where the facts or law as known by the furtherer (i.e., Sections 16 or 18), had he been the principal, would not have so entitled him? A literal interpretation of this subsection would appear to allow such a result. In contrast, it is submitted that Section 422 of the current legislation would preclude such a possibility. The greater fairness of the current law is therefore much preferred by this Association, and the Minister is consequently urged to retain the status quo.

Section 29: Attempts

It is submitted that it is inappropriate to legislate in favour of criminal attempts in the manner set out in the draft Section 29(1). All too often an attempted crime is merely an intended crime that went wrong. It is therefore submitted that it is contrary to public policy to permit a principal or furtherer to benefit by virtue of his own incapacibilities. For this reason, the explanation of the Commission for halving the maximum penalty in favour of an attempter is perceived to

have been made without any real basis in fact. Similarly, this Association cannot accept the statement that "an attempter creates less actual harm than a successful committor" without some justification being provided.

On a more substantive level, it is noted that Section 29(2) identifies mere preparation as being insufficient to constitute an attempt. Some direction would therefore be greatly appreciated as to the manner in which an attempt may be properly distinguished from mere preparation. In this regard the Law Reform Commission did identify five major tests, and nine minor tests, on pages 51-53 of their Working Paper No. 45, "Secondary Liability: Participation in Crime and Inchoate Offences", published in 1985. The Minister is therefore requested to identify which specific tests are preferable and to determine if they may be incorporated into Section 29(2).

Section 30: Attempting Furtherance

There is no explanation offered by the Commission for their exclusion of the words "encourages" and "urges" in their re-drafting of Clause 4(4)(a) into Section 30(1). Insofar as these words tend to extend the scope of application of Section 30, it is submitted that they be re-introduced into the draft Act. In the alternative, some explanation for their deletion is requested. The Minister is similarly requested to advise if it is his intention to include a reference here to accessories after the fact.

As with Section 28, it is not clear if Section 30(2) permits an attempted furtherer to obtain the benefit of a defence in favour of the principal of the crime even where the facts or law as known by the attempted furtherer, had he been the principal, would not have so entitled him? A literal interpretation of this subsection would appear to allow such a result. In contrast it is submitted that Section 422 of the current legislation would preclude such a possibility. Some clarification of these issues by the Minister is therefore requested.

Finally, and with all necessary modifications, the same objections made in respect of halving the maximum penalty in Section 29 are incorporated here mutatis mutandis.

Section 31: Conspiracy

There are two principal objections with respect to this draft section. Firstly, 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:

1. Is not a "crime"; or
2. Is a breach of a federal statute that does not provide for the potential incarceration of offenders; or

3. Is a provincial statute or municipal bylaw; or
4. Is any other unlawful act, or lawful act to be committed by unlawful means.

It is therefore submitted that the scope of Section 31 is too narrow and that it should be broadened to include those matters which are enumerated herein.

Finally, and with all necessary modifications, the same objections made in respect of halving the maximum penalty in Section 29 are incorporated here mutatis mutandis.

Section 32: Different Crime Committed

It is noted that this draft section differs slightly from Clause 4(6)(c). In that clause the phrase "is liable not only for the crime he agrees to commit and intends to further, but also for any crime. . ." is deleted in favour of "is liable to the punishment prescribed for any other crime" in Section 32. The net difference is that it is no longer clear that the liability created by the draft section is in addition to that imposed with respect to the original or first offence. It is therefore requested that the appropriate amendment be made.

It is further submitted that Section 32(b) will unnecessarily and unreasonably require the Crown to satisfy an onerous burden in respect of the subjective knowledge of an accused. In contrast, it is observed that the equivalent Sections 21(2) and 22(2) of the current legislation define the requisite mental element as "knew or ought to have known". It is submitted that this terminology is preferable to the draft which has used "is, to his knowledge . . .". The proposed restriction of liability to crimes which the furtherer actually knows are a probable consequence serves only to remove culpability for crimes that are unintended even though the furtherer actually intended to commit a criminal act. It is submitted that such a person does not merit more favourable treatment merely because he did not actually foresee the particular crime which did occur. It is therefore requested that the appropriate amendment be made.

Lastly, and of great practical concern, is the potential application of this draft section with respect to undercover police operators and officers. Notwithstanding the discretion not to charge a police officer with an offence which may be exercised by the Attorney General or his agent, it is submitted that the potential existence of a technical crime will likely attract applications by persons apprehended through such operations for a remedy pursuant to Section 24 of the Charter of Rights and Freedoms. The remedy sought will undoubtedly be a dismissal of the original charge, and might further result in civil process against the relevant police officer for malicious prosecution. It is submitted that neither result is desirable, and that therefore

the ability of the police to engage in such operations ought not to be fettered. The appropriate exclusion of this possibility by the Minister is therefore sought, in conjunction with any necessary and complementary modification to the draft Section 23(1)(c).

Section 35: Territorial Jurisdiction

The following questions and observations are posed in respect of this subject:

1. Why has Clause 5(2)(j) in the Report not been reproduced in the draft Act? Does its omission now mean that Canada does not intend to recognize the "universality principle" (see page 50, third full paragraph)?
2. Should Sections 35(1)(h) and (i) limit crimes committed outside Canada by federal employees, or their families as may be appropriate, to only those situations when they are acting in an "official capacity"? In the absence of such a qualification are these subsections discriminatory within the meaning of Section 15(1) of the Charter of Rights and Freedoms?
3. What is the "vires" of Section 35(1)(j) vis-a-vis the issues of extra-territoriality of the criminal law, and judicial jurisdiction over the person?

4. Is not Section 35(1)(n) ultra vires insofar as it is not qualified by reference to piracy aboard a Canadian aircraft or ship?

5. What is the meaning of the words "substantial link" in Section 35(2), particularly in the context described by Section 36(1)(b)?

Some clarification of these issues by the Minister is therefore requested .

Section 38: Manslaughter

Is it the intention of the Law Reform Commission that Manslaughter be otherwise defined as "reckless homicide"? If so, can it be further presumed that the Commission accepts their own definition of that term in Recommendation #8 of Working Paper No. 33, "Homicide", at page 57: ". . . causing death by knowingly exposing another to serious and socially unacceptable risk of death"? If so, would it not be reasonable to conclude that this section, and Sections 39 and 57, may share a common application in respect of motor vehicle accidents caused by impairment which result in death? Some clarification of this issue by the Minister is therefore requested.

By virtue of the aforementioned references it is unclear what this proposed offence defines as wrong. It is submitted that the definition

prescribed for recklessness (see Sections 9 and 11(c)), when coupled with a "socially unacceptable risk of death", compels needless difficulties in defining the parameters of this draft section. Some appropriate clarification by the Minister is therefore requested.

Section 40: Murder

This very important offence is regrettably the subject of little comment by the Commission in their Report. It is submitted that the principal concerns are the following:

1. It is noted that the proposed definition for Murder is apparently much narrower than Section 212 of the current Criminal Code.

Section 40 of the draft Act will establish murder as a purpose offence and therefore disregard the present components of recklessness and indirect causation. It is submitted that this narrowing of the definition is inappropriate as a statement of public policy.

2. It is the Commission's opinion that "ordinary Murder should carry no fixed or minimum penalty". It is submitted that this statement tends to trivialize one of the most heinous crimes that can be committed in a civilized society, and totally disregards the legitimate public expectation for a recognition

of general deterrence in the sentencing process. This conclusion is of even greater surprise insofar as the Law Reform Commission did previously publish its recommendations #11 and #12 on page 86 of Working Paper No. 33, "Homicide", clearly advocating a maximum penalty of life imprisonment for Second Degree Murder, and a minimum penalty with respect to First Degree Murder. It is therefore submitted and recommended that the Minister should disassociate himself from the present position of the Commission as stated on page 55 of their Report.

3. Section 215 of the current Criminal Code expressly deals with the subject of provocation, and its application to murder, in a manner which is fair and consistent with common sense. Unfortunately, it is unclear if this draft section, and Section 15(1)(b) will produce the same result. A literal interpretation of the latter section appears to favour the absolute acquittal of the accused, rather than his conviction for the lesser offence of manslaughter (or negligent homicide?). It is submitted that such a result is inconsistent with the proper administration of justice and the protection of the public. The Minister is therefore urged to re-introduce the status quo by an express recognition of the proper rule of provocation with respect to crimes against life.

Concerning the specific proposals made in respect of First Degree Murder, the following comments and observations are submitted:

1. Section 40(2)(b) should be amended by the inclusion of a reference to conspiracy. It is submitted that without this amendment "professional killers" might be able to avoid an agreement for valuable consideration by an alternative reference to a mere barter of intangible property or favours. Such an agreement is equally reprehensible, but would presumably still constitute a conspiracy.
2. Section 40(2)(c) is seriously flawed by its reference to the word "criminal". If this term implies something different or more substantive than "an offender" then it is submitted that the original drafting of this provision in Clause 6(4)(c) of the Report is preferable. Indeed, it can be reasonably argued that one is not, in law, a criminal until a conviction is registered and sustained. The potential imposition of such an artificial distinction in the draft section is therefore unjustified. Of some further concern is the predicament of the police officer who is carrying out a duty without the imminent prospect of an arrest when he is killed. If such a scenario cannot be included in this subsection then it is submitted that the appropriate amendment be made.

It is further noted that although Section 40(2) does not expressly consider the type of victim, police officers and

correctional guards are likely to be those most affected by Section 40(2)(c). If it is the intention of the Commission that police killings will ordinarily constitute Murder in the First Degree, then it must be questioned why that statement has not been made expressly? It is therefore submitted that the Minister should make the appropriate amendment to so clarify this subsection in a manner similar to Section 214(4)(a) of the current Criminal Code. It is further submitted that such an amendment is clearly justified insofar as such crimes are more properly considered as a direct attack on society, rather than the individual person who has merely assumed that office.

3. It is suggested that Section 40(2)(e) is incomplete for two principal reasons. One of these is associated with an omission, the other from a constructive approach with respect to its present contents.

With respect to the latter issue, it is noted that the robbery offence in Section 80 is a purpose offence, and that a killing during the commission of a robbery is likely to be either unintended or accidental. Almost invariably it will not be, as stated by the Commission on page 54, ". . . a necessary step to some other objective" (presumably the completion of the robbery itself). Thus, the conclusion of the Commission is that these "other unintended killings, whether or not in the course of other offences, are either manslaughter or

negligent homicide . . . the fact that the killing may be worse because done in a robbery can be reflected in the sentence". The statement of justification therefore seems to be in conflict with the inclusion of the reference to Section 80 in Section 40(2)(e). Some clarification is thus required with respect to this matter, and some determination of whether the fact situation described above will result in an offence pursuant to Section 37, 38, or 40(2)(e)?

Concerning the former issue, it is submitted that the law should strongly endorse the proposition that "a man's home is his castle". It is therefore recommended that the offence of Criminal Intrusion in Section 69 be included in Section 40(2)(e).

4. It is submitted that inclusion of the word "knows" in Section 40(2)(f) is restrictive insofar as its subjective basis will substantially reduce the ability of the Crown to refute a claim to this defence. In the alternative, it is submitted that the quasi-objective standard defined by the words "ought reasonably to know" is preferable. The appropriate amendment is therefore requested.
5. With respect to Section 40(3), it is unclear if the present understanding of "planned and deliberate" in Section 214(2) of

the Criminal Code is the same as a "calculated and carefully considered plan". Some further clarification in respect of this matter is therefore requested.

The appropriate amendments, attention, and clarification of the Minister is therefore requested.

Section 41: Helping to Commit Suicide

There is no explanation offered by the Commission for their exclusion of the words "encourages" and "urges" in their re-drafting of Clause 6(5) into Section 41. Insofar as these words tend to extend the scope of application of Section 41, it is submitted that they be re-introduced into the draft Act. In the alternative, some explanation for their deletion is requested.

Section 42: Palliative Care

It is submitted that the Law Reform Commission has virtually endorsed euthanasia, and explained their opinion (on page 57 of the Report) by the mere statement that such a practice "brings the Code into line with current moral thinking". In this regard it is noted that there is no specific justification provided, nor is there any comment with respect to the traditional position of the criminal law as embodied in Section 14 of the Criminal Code. Some clarification of

these matters is therefore requested in order to facilitate the debate of the fundamental issue raised.

On a more substantive basis, it is submitted that if the procedures contemplated by this section are allowed to be introduced in practice, then their exercise must be judicially regulated and supervised. It is submitted that it is inappropriate to require only a medical review of such an important process affecting human life when, in contrast, the control of mere property rights is so tightly supervised by the law.

Finally, it is debatable if the express reference to Sections 37 - 41 improperly widens the scope of application of this section. A strict interpretation of Section 42 might preclude a prosecution against a doctor who negligently or recklessly kills a patient who would not otherwise have died but for the negligent or reckless medical treatment administered. In such circumstances what is the rationale for providing virtual immunity to the doctor from prosecution pursuant to Sections 37 or 38? Although the Commission has not addressed this subject, it is submitted that the attention and clarification of the Minister is required.

Section 43: Assault

This Association endorses the law of assault as it is presently understood and stated in Section 244(1) of the Criminal Code. Insofar

as the draft Section 43 may not reflect the status quo the Minister is urged to make the necessary and appropriate amendments. It therefore follows logically that this Association does not favour the inclusion of the word "offensively" in this section.

Section 44: Infliction of Harm

It is submitted that there may be a significant difference between the ordinary definition of "harm" as stated in Section 2(1), and the explanation of that term by the Commission on page 59 of their Report. It is the apparent opinion of the Commission that such a term includes "impairment of psychological functions". Although this perspective may be appropriate and correct, it is submitted that the matter ought to be addressed expressly. There will be, of course, significant issues of police interest (e.g. causation; intervention or passage of time; de minimus non curat lex - mere upset?; etc.) arising out of the acceptance of such a proposition. The appropriate consideration is therefore requested of the Minister.

In respect of Section 44(2)(a), it must be presumed that a physician incurs no liability by assaulting an unconscious patient in order to administer medical treatment. However, it is unclear if such a defence is to be premised on this section, or Section 20? Some clarification by the Minister would therefore be appreciated. Similarly, the Minister is asked to clarify the interpretation of the proviso to this subsection, and its relationship to Section 42.

In respect of Section 44(2)(b), it is submitted that this draft exception has been too narrowly defined. For example, as fighting in hockey is prohibited by the rules it is not presumably a sporting endeavour conducted "in accordance with the rules governing that activity". This potential criminal liability is, of course, at odds with the traditional understanding of this activity by most Canadians. It is therefore submitted that this section ought to be re-drafted to more closely resemble the legal status quo. This might be accomplished merely by excluding any reasonably foreseeable harm arising from the sport.

The necessary and appropriate amendments are therefore requested of the Minister.

Section 45: Harassment

It is submitted that this section is subject to the following questions:

1. What is the meaning of the word "harassment"? If this word includes the type of activity now addressed by Section 381(1)(c) to (g) of the Criminal Code, would it not be advantageous to include similar examples here?
2. What is the meaning of the phrase "thereby frightens him"? Is this phrase not highly subjective and therefore discriminatory

with respect to those persons who do not frighten easily, or who will not admit their fright? If so, does this lack of a quasi-objective standard introduce an uncertainty in the criminal law which is undesirable?

Some clarification of these matters is therefore requested from the Minister.

Section 46: Threatening

It is submitted that the distinction between this section and Section 45 is unclear in the absence of an explanation by the Commission. It is therefore submitted that some further reference to the types of activity now addressed by Section 381(1)(a) and (b) of the Criminal Code would clarify the proposed law. The appropriate amendment by the Minister is therefore requested.

Section 47: Threats of Immediate Harm

This Association is concerned with the lack of application of this offence in respect of immediate threats against "another's property". The publication of such a threat is very likely to result in apprehensions by a potential victim similar to those experienced when personally threatened, and may thereby encourage an actual physical confrontation. Is it not the function of the criminal law to minimize

the potential and risk of such violence by prohibiting it in any form?
The appropriate amendment by the Minister is therefore requested.

There are a number of questions associated with the use of the word "immediate":

1. In order for a threat to be immediate must the hurt, harm, or death be imminent, or even inevitable? Alternatively, is the element of immediacy equivalent to the understanding of "present ability" in Section 244(1)(b) of the Criminal Code?
2. What is the rationale for using the element of time to distinguish between the potential application of Section 46 or Section 47? Would it not be more consistent with the format of the draft Act to consider time as an aggravating factor in relation to Section 46?
3. Will the lack of sufficient immediacy constitute Section 46 as an included offence to Section 47?

Some clarification by the Minister of the above noted issues would be appreciated.

Section 48: Extortion

Although it is very difficult to define the "reputation of a

person", it is submitted that some further consideration of the following matters is required:

1. Consistent with Sections 262 and 266 of the current Criminal Code, would it not be useful to define the manner in which the "reputation of a person" may be harmed for the purposes of the criminal law? In particular, should there be an express statement making reference to exposure to hatred, contempt or ridicule?

2. Will a threat to institute civil proceedings constitute an offence against this proposed section?

Some clarification by the Minister of the above noted issues would be appreciated.

Section 51: Child Abduction

There is no explanation offered by the Commission for their deletion of the words "or keeps" in their re-drafting of Clause 9(3) into Section 51. Insofar as the inclusion of these words would preclude the unlawful keeping of a child after the obtaining of lawful custody, it is submitted that they be retained. To do otherwise will label the criminal law as one dimensional, and may encourage the improper manipulation of custody disputes. It is therefore submitted that the Minister re-introduce the words "or keeps" into this section.

It is further noted that words "parent" and "guardian", which were included in Clause 9(3), have also been omitted from this section without explanation by the Commission. In order to preserve the type of rights now addressed in Section 249(2) of the Criminal Code it is submitted that these terms also be re-introduced. The appropriate amendment is therefore requested by the Minister.

It is further submitted that the following questions are also relevant and require some attention:

1. Is there any contemplation of introducing a proviso or defence to this section similar to that now stated in Section 250.4 of the Criminal Code? If not, should there be?
2. Although the Commission has adopted the age of 14 years based upon its understanding of concepts of child development, could the rights of a guardian or parent be better protected before the child reaches the age of majority? How is this section applicable, if at all, with respect to a parent or guardian whose under-age child leaves without his authority, but is not abducted?

Some clarification by the Minister in respect of the above noted issues is therefore requested.

Section 53: Endangerment

There is no explanation offered by the Commission for their deletion of the words "purposely" and "recklessly" in their re-drafting of Clause 10(1) into Section 53. Insofar as these words may tend to broaden the scope of application of this section, it is submitted that they be re-introduced in the draft Act. In the alternative, some explanation for their present exclusion is requested.

It is further submitted that it is unclear if "creates" includes "causes". Insofar as this section is ostensibly concerned with matters of negligence, and also apparently compliments Section 6, it is submitted that "causes" or "conduct causes" may be more appropriate. It is otherwise most difficult to contemplate the creation of an omission. The appropriate amendment is therefore requested by the Minister.

Section 54: Failure to Rescue

Police officers are all too frequently required to assist with rescues, render emergency assistance, or otherwise prevent suicides. It is submitted that each of these duties might be adversely affected by this draft section. Immediate issues arise with respect to the legal role of the police contemplated by this section when attempting or evaluating rescues, and the individual responsibility of police officers vis-a-vis ordinary citizens in such situations. For example,

is it not reasonable to anticipate that this section will require the police to arrest a subject on the mere suspicion that he has taken an overdose of dangerous pills, even though the subject denies that act? Furthermore, if this suspicion is proved incorrect will the arrest be an unlawful assault that is not excused by the present drafting of Section 23? Although the creation of such a positive obligation may be generally beneficial, it is submitted that the responsibilities and authorities of those most likely to be affected should be expressly considered. The appropriate amendments by the Minister are therefore requested.

It is submitted that the following specific questions also require the attention of the Minister:

1. There is no explanation offered by the Commission for their substitution of the word "realizing" in favour of "perceiving" in their re-drafting of Clause 10(2)(a) into Section 54(1). Is there a difference in meaning between these words? If so, what is it?
2. Is the phrase "any other valid reason" in Section 54(2) intended to convey the same meaning as "reasonable excuse"?
3. Where a person is exempted from attempting a rescue pursuant to this section, should he not be at least required to seek whatever other reasonable assistance might be available?

Some clarification by the Minister of the above noted issues is therefore requested.

Section 55: Impeding Rescue

There is no explanation offered by the Commission for their substitution of the phrase "who faces" in favour of "endanger" in their re-drafting of Clause 10(3) into Section 55. Is there a difference in meaning between these phrases? Some clarification by the Minister of this issue is therefore requested.

Section 57: Dangerous Operation of Vehicle

It is submitted that the incorporated definition of a "vehicle" artificially excludes a humanly powered means of transportation (e.g., a bicycle) which can be operated as dangerously as a vehicle on a highway or elsewhere. It is therefore submitted that some reconsideration with respect to this matter is required.

A further substantive limitation is noted with respect to the use of the words "another person". It is submitted that the construction of this section must exclude any assessment of the risk of death or serious harm that the driver creates in respect of himself. It must therefore logically follow that a charge will be unsuccessful unless there is a passenger in the vehicle or the roadway is otherwise occupied with a reasonable number of other vehicles or pedestrians. It

is submitted that the imposition of such artificial parameters is inconsistent with the general deterrence of the type of conduct addressed by this section. It is further submitted that the use of the phrase "another person" also imposes an unreasonable and unnecessary burden upon the police and the Crown to prove an actual risk of death or serious harm to that other person. The appropriate amendments by the Minister are therefore requested.

It is also noted that there are a number of differences between this section and its original draft:

1. There is no explanation offered by the Commission for their deletion of the words "purposely" and "recklessly" in their re-drafting of Clause 10(4) into Section 57. Insofar as these words may tend to broaden the scope of application of this section, it is suggested that they be re-introduced in the draft Act. In the alternative, some explanation for their present exclusion must be requested.
2. There is no explanation by the Commission for their deletion of the words "in such condition of disrepair" in their re-drafting of Clause 10(4) into Section 57. Insofar as these words may tend to broaden the scope of application of this section, it is suggested that they be re-introduced in the draft Act. In the alternative, some explanation for their present exclusion must be requested.

Lastly, it is suggested that those comments made in respect of Section 53 pertaining to the use of the word "creates" are equally applicable here mutatis mutandis with all necessary modifications to suit the subject matter.

Section 58: Operation of Vehicle While Impaired

It is suggested that the public disapproval of this menacing type of offender is well-justified, notwithstanding the continued willingness of so many to risk committing this crime. The Canadian Association of Chiefs of Police is similarly resolved to oppose any initiative which compromises the law as it is presently drafted and understood. For this reason the continued inclusion in Section 58 of the phrase "he knows or ought to know that" cannot be endorsed. The explanation of the Commission on page 66 of their Report that this is "essentially a crime of negligence . . . (and the phrase noted above). . . is inserted for policy reasons . . ." is unacceptable. It is therefore suggested that the Minister undertake to complete the necessary and appropriate amendment to delete this phrase.

As with Section 57, it is further suggested that the definition of "vehicle" artificially excludes bicycles which can be as dangerous as any vehicle when operated upon a highway by an operator who is impaired. It is therefore suggested that there be some reconsideration by the Minister with respect to this matter.

Lastly, it is regrettable that this section is not accorded a similar treatment to that now provided for by Section 239(2) and (3) of the Criminal Code. It is submitted that the commission of the offence created by Section 58 justifiably warrants special concern where that prohibited conduct results in bodily harm or death to another person. The Minister is therefore requested to review this matter and make the necessary and appropriate amendments.

Section 59: Failure or Refusal to Provide Breath Sample

It is noted that the Commission has stipulated purpose as the requisite mental element for commission of this crime. Could it not also be committed recklessly? Some clarification upon this point by the Minister would be appreciated.

It is further suggested that consideration be given here to the lawful demand for samples of blood where the prevailing conditions are similar to those now described in Section 238(3) of the Criminal Code. The relevant authority should, of course, enable police officers to demand and obtain blood samples for the purpose of testing for either alcohol or drugs. The appropriate amendment by the Minister is therefore requested.

Section 60: Failure to Stop at Scene of Accident

It is suggested that the proof of this offence will be much easier where there is also a concurrent presumption similar to that now described in Section 236(2) of the Criminal Code. The appropriate amendment by the Minister is therefore requested.

Section 61: Operation of Vehicle While Disqualified

As with Section 58, it is suggested that the inclusion of the phrase "he knows that" is unnecessary and inappropriate. It is of greater public benefit to presume that anyone convicted of a vehicle crime will be aware of that fact and not be ignorant of the consequence which inevitably follows. In this regard it is suggested that this offence, rather than Section 58, is more likely to be committed by negligence instead of purposely. It is therefore suggested that the Commission has erred in this regard, and therefore the Minister should be obliged to make the appropriate amendment to delete the phrase noted above.

Section 62: Unsafe Vehicle

It is suggested that it would not be inappropriate to also include "care or control" within the parameters of this offence. This proposition is supported by the reasonable inference that a person in care or control is next likely to operate that vehicle. Such an

amendment would be of greater public benefit and avoid a consideration of this initial stage as an attempted offence contrary to Section 62, thereby preserving the following two advantages:

1. Consideration of the crime of attempted negligence, with the attendant legal contradictions of those terms, is unnecessary; and
2. The suspect would be liable to the full penalty rather than just half as stipulated by Section 29(1).

The appropriate amendment by the Minister is therefore requested.

Section 63: Interference With Transportation Facilities

It is suggested that this section is properly subject to the following questions:

1. Although Clause 10(9) refers to "transportation", Section 63 is apparently limited by its substitution of the word "vehicle". Does this unexplained amendment improperly narrow the scope of this section or otherwise constitute a significant deficiency?
2. There is no explanation by the Commission for their initial treatment of this section in the Report as a purpose offence, and their subsequent re-drafting of it in Section 62 as an offence of negligence. What is the reason for this? Is not

this offence, in fact, more likely to be committed on purpose?

Owing to the comments herein the preference of this Association is for a retention of Section 232 of the current Criminal Code.

Section 64: Aggravating Circumstances

All of those comments made in respect of Section 40(2) are adopted here mutatis mutandis with all of the modifications necessary to suit the present context.

Section 65: Definitions

It is suggested that the following observations and questions require some further study by the Minister:

(a) Optical Device: It is suggested that, at the very least, this definition should be restricted to electronic devices. Such a definition would therefore also be consistent with the Law Reform Commission's own recommendation #10 on page 22 of their Working Paper No. 47 "Electronic Surveillance". Insofar as there has not been any intervening explanation by the Commission with respect to this matter, it is suggested that their initial determination is more appropriate.

(b) Surveillance Device: It is apparent that the definition now proposed will include ordinary tape recorders and other equipment commonly available to the general public. Particularly within the context of the absolute prohibition contained in Section 84(b) it is suggested that this definition is much too broad.

The appropriate amendments by the Minister are therefore requested.

Section 67: Entry to Install Instrument

In 1986 the Law Reform Commission published Working Paper No. 47, "Electronic Surveillance" wherein it was concluded on page 21 that "there is little evidence at present that the use of optical devices has led to serious abuse or problems of unjustifiable intrusion into privacy". Following a very brief consideration of potential areas of future research it was concluded with respect to this issue on page 22, that this was an area upon which a recommendation could not yet be made. Instead, it was suggested that "the entire field of surreptitious optical surveillance requires study". It is therefore against this background that this Association is now required to respond to a comprehensive and restrictive initiative that is not complimented by any further explanation or justification.

It is suggested that by their own admission, the Law Reform Commission has not identified a need to judicially supervise the police use of optical devices. The rationale is therefore premised upon an

anticipated need to preclude the police from doing "indirectly what the law otherwise prohibits". It is, of course, suggested that the further study referred to by the Commission in their Working Paper has not, and cannot, substantiate this undeserving remark.

On a more substantive level, it is suggested that each of the following observations and questions requires the attention of the Minister:

1. With respect to Section 67(1), is it not appropriate to also include an alternative reference to prior judicial authorization following the phrase "without consent of the owner or occupier of premises"? It is suggested that the present draft, in the absence of such a further reference, will allow entry only with the consent of the owner or occupier. For reasons which are self-evident it is suggested that such a situation is unreasonable and unresponsive to the legitimate requirements of effective policing.

It is further submitted in respect of this draft sub-section that the judgement of the Supreme Court of Canada in Reference Pursuant to Section 27(1) of the Judicature Act, (1985) 2 W.W.R. 193, has already defined the proper parameters for this type of legislation. In the absence of the most compelling contrary justification, of which there is none, it is suggested that it is now improper to rescind such a lawful,

effective, and popular legal standard. The Minister is therefore urged to review the aforementioned judgement of the Supreme Court and to introduce the appropriate amendment to reflect his acceptance of that decision.

2. With respect to Section 67(2), what is the duty of a police officer who may be required to conduct a search for the purpose of determining the most suitable location for installation of the authorized device? Similarly, what is his duty if he locates criminal contraband or evidence either in "plain view" or while conducting the search referred to herein? Would it not be more appropriate to delete this subsection entirely and therefore to permit subsequent judicial scrutiny on a case-by-case basis with reference to Sections 1, 8, and 24 of the Charter of Rights and Freedoms?

3. With respect to Section 67(3), is not the use of force to gain entry a practical improbability? The benefit of optical and surveillance devices is negligible unless they are installed and used in conditions of secrecy. It is therefore suggested that this subsection cannot serve any useful purpose. Indeed, this subsection may even work a great public disservice if a police officer is surprised and confronted by an unsuspecting occupier who then proceeds to initiate an assault. It is suggested that the exclusion of application of Section 23 in these circumstances might preclude a legal self-defence by the police officer. Such a result is, of course, unwarranted.

The Minister is therefore requested to clarify the points in issue addressed herein and to make the appropriate amendments to this section.

Section 68: Disclosure of Private Communications

It is noted that there is no explanation by the Commission for the following amendments which have been made in the re-drafting of Clause 11(5) as Section 68(1) of the draft Act:

1. It is presumed that Section 68(1) must refer to a private communication "that has been intercepted by a surveillance device". Although included in Clause 11(5), this phrase is deleted from this section; and
2. Section 68(2)(g) is a new addition not previously included in the Report.

Some further clarification by the Minister with respect to these matters is therefore requested.

Section 69: Criminal Intrusion

It is suggested that the offence of criminal intrusion, formally known as "Break and Enter", is improperly included in Division VII as a mere crime against personal security and privacy. This offence is one of the most prevalent property crimes in our society and also one of the most traumatic for its many victims. Would it not therefore be

more appropriate to enhance the importance of preserving private premises from unlawful physical intrusion by giving this offence separate legislative attention?

On a more substantive level, it is suggested that each of the following observations and questions requires the attention of the Minister:

1. Insofar as there cannot apparently be an unlawful entry, or trespass, to property outside of a building, how does the Commission propose to replace Section 173 of the Criminal Code? Although this current section would seem to be of little interest or consequence to the Commission, its breach is very frequently cause for substantial alarm by homeowners. It is therefore suggested that there ought be some reconsideration of this matter; and
2. Is it the intention of the Minister to constitute the unlawful entry of a commercially registered vehicle as criminal intrusion?; and
3. Although Section 69 creates a purpose offence, is criminal intrusion not also capable of being committed recklessly? However, and even if this assumption is correct, then it is evident that Section 12 will preclude a conviction in these circumstances. It is suggested that such a result may bring the administration of justice into disrepute.

The Minister is therefore requested to make the appropriate amendments.

Section 70: Theft

It is suggested that the alternative Clause 13(1) on page 78 of the Report is not to be preferred.

Notwithstanding our general acceptance of Section 70, this approval is guarded by virtue of the following concerns:

1. It is suggested that the reference in Section 72 to "another's property" must exclude any consideration of the contemporary understanding and acceptance of special property interests. Does this drafting thereby preclude a prosecution against someone who "steals" his own property? Will this section detract from the right of bailors to obtain goods during the execution of civil process? If the answer to either of these questions might be in the affirmative then it is submitted that special property interests ought to be expressly considered;
2. It is suggested that the social acceptance of divorce and matrimonial separation require a consideration of joint property interests as between a man and wife. It is suggested that the absence of consideration for this special, but very

common, case will cause undue and unnecessary complications with respect to the interpretation and application of Section 70; and

3. Is it intended that the words "dishonestly appropriates" will recapture the meaning now ascribed to "colour of right"? If not, perhaps the Minister could explain the distinction between these phrases. Alternatively, if they are intended to be equals then it is submitted that the latter is preferable.

The Minister is therefore requested to make the appropriate amendments.

Section 71: Dishonest Obtention of Benefit

It is suggested that the alternative Clause 13(2) on page 78 of the Report is not to be preferred.

Section 72: Fraud

It is suggested that the following observations and questions require some further study and attention by the Minister:

1. With respect to Section 72(1), it is noted that there is no explanation by the Commission for their deletion of the word "dishonestly" when re-drafting Clause 13(3) as Section 72(1).

It is suggested that the re-introduction of this word would benefit the common understanding of this aspect of the law.

2. It is further suggested that the phrase "omission to disclose a fact" ought to be further clarified as including any fact which is past, present, or anticipated in the future.
3. With respect to Section 72(1)(a), it is suggested that the reference merely to "property" will artificially limit the application of this subsection in the manner suggested in the comments in respect of that term in Section 2(1) herein. It is suggested that "another's property" should therefore be substituted.
4. With respect to Section 72(1)(b), it is noted that there is no explanation by the Commission for their substitution of "financial loss" in favour of "economic loss" as used in Clause 13(3) of the Report. Is there a difference in these terms? Given the judgment of the Supreme Court of Canada in R. v. Olan, Hudson and Hartnett (1978), 41 C.C.C. (2d) 145, would it not be more appropriate to maintain the status quo by use of the term "economic loss"?

The Minister is therefore requested to make the appropriate amendments.

Section 73: Fraudulent Misrepresentation

It is suggested that this section would benefit by the re-introduction of the presumption now stated in Section 320(4) of the Criminal Code. The Minister is therefore requested to make the appropriate amendment.

Section 74: Forgery of Public Documents

It is suggested that the full benefit of this section will be further appreciated by a consideration of the following:

1. It is suggested that social insurance identification cards, and other federally issued identification documents, be added to the list of items enumerated in Section 74(3). The abuse of such "public documents" is frequently a great burden to the police and the public and therefore deserves this greater protection.

It is further noted that there is a substantive gap apparent between those classes of documents which are deemed by this section to be "public", or "private". In addition to social insurance cards (which have already been addressed herein), provincial driver's licences, provincial birth certificates, provincial marriage certificates, etc. are not dealt with at all. Would it not therefore be more appropriate and

beneficial to create a new sub-section (4) that deemed all documents that are not public documents to be private documents?

2. It is suggested that the possession of equipment which is capable of producing the contraband listed in this section is also of great potential mischief. In the absence of such an offence, either here or in Section 84, it is presumed that the police could not adequately deal with the situation unless the equipment was being operated at the time of seizure. It is therefore suggested that there be some reconsideration of the type of offence now dealt with in Section 416 of the Criminal Code.
3. With respect to Section 74(2) is not the offence considered there also likely to be an offence contrary to Section 72?
4. With respect to Section 74(3)(c) is it appropriate to classify the official seal of a private corporation as a public document? Although this point may be considered to be trifling, it does serve to complicate and confuse the public policy supporting this draft section.

The Minister is therefore requested to make the appropriate amendments.

Section 77: Fraud on Creditors

It is suggested that this offence would be justifiably broadened by the inclusion of "another's property" after the word "property". With this addition it would preclude a person from defrauding his creditors by concealing or disposing of property which is owned by his spouse, assuming that such property is otherwise susceptible to attachment.

The Minister is therefore requested to make the appropriate amendment.

Section 78: Fraud on Creditors

It is suggested that this section should expressly address the subject matter of Section 397 of the current Criminal Code. The provisions therein have been relied upon extensively during recent periods of economic recession.

The Minister is therefore requested to make the appropriate amendment.

Section 80: Robbery

It is suggested that this crime may be further aggravated by any one of the following matters which are not presently considered:

1. The wearing of a mask during the commission of the robbery;
or
2. The "use of a weapon, or an imitation of a weapon" rather than
just a "weapon"; or
3. The commission of the robbery in concert with another person.

Of greater concern is the use of the phrase "...at the time" in Section 80(2). While this term apparently adds little to the element of time required in the preceding sub-section, it can be reasonably argued that the lack of a mere passage of time is a constituent element in aggravated robbery. The actual moment when the weapon may be used will thus become a technical component, rather than a feature of the offence. It is suggested that this type of legal drafting adds little to the law, yet increases needlessly the probability of litigation.

The Minister is therefore requested to make the appropriate amendments.

Section 81: Vandalism

It is noted that in Clause 17(1) of the Report, this offence can be committed either purposely or recklessly. However, in Section 81 the reference to purpose has been omitted without explanation. Would it not be more satisfactory to retain the original construction without inviting recourse to the application of Section 12(1)?

It is further submitted that the following questions are appropriately considered by the Minister:

1. Should it not also be a crime to interfere with another's property, even if there is not any damage or destruction?
and
2. Notwithstanding the disclaimer of the Commission on page 85 of their Report, should not computer data and other intangible property also be protected by this section?

The Minister is therefore requested to make the appropriate amendments.

Section 82: Arson

Those comments in Section 81 with respect to "purpose" are adopted here mutatis mutandis.

The Minister should also note that this Association has previously submitted a brief in respect of the particular subject matter addressed by this section. The submissions made in the aforementioned document continue to properly represent the opinion and position of this Association in respect of arson.

Section 84: Possession of Prohibited Things

Those comments made in respect of Section 74 concerning the possession of counterfeiting equipment are adopted here mutatis mutandis with any necessary modifications to suit the present context.

With respect to Section 84(b), those comments made in respect to Section 65 concerning surveillance devices are also adopted here mutatis mutandis with any necessary modifications to suit the present context. In particular, it is submitted that Section 178.18 of the current Criminal Code is a more accurate and limited expression of the public policy affecting this issue.

It is further recommended that Section 84 be amended to include a reference to automobile master keys. The widespread circulation of such items would occasion substantial potential for public mischief. It is therefore recommended that the status quo of Section 311 of the Criminal Code be re-introduced in this draft Act.

The Minister is therefore requested to make the appropriate amendments.

Section 87: Possession of Things Obtained by Crime

It is submitted that this offence would be enhanced by a specific and express inclusion of the phrase "proceeds of crime". Such an

initiative would also be consistent with the previously expressed concerns of the government. The Minister is therefore requested to make the appropriate amendment.

IV. CONCLUSION

While there may be many more matters deserving of recognition, the subjects noted above are considered by the Canadian Association of Chiefs of Police to be the most important. In this regard, the Association urges the Minister to direct his attention, and favourable consideration, to those matters which are set out in Parts II and III of this Brief. The Association can also reassure the Minister of our continuing intention to participate fully in this review of the criminal law.

ALL OF WHICH IS SUBMITTED

AN EVALUATION OF

"RECODIFYING CRIMINAL LAW"

by

THE LAW REFORM COMMISSION OF CANADA

for

The Hon. Mr. Roy HNATYSHYN
Minister of Justice
and Attorney General of Canada

by

The Canadian Association of Chiefs of Police

APPENDIX I

Definitions in the Criminal Code Omitted
in the Draft Act to Revise and Codify
the Criminal Law

AN EVALUATION OF
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APPENDIX I

Definition in the Criminal Code Omitted in the
Draft Act to Revise and Codify the Criminal Law

It is presumed that Section 2 of Appendix A to the report of the Commission is the general definition section for the draft Act to revise and codify the criminal law. Its importance to the precision with which that statute may be interpreted is therefore substantial. Although it is recognized that further definitions may be subsequently provided within the body of Volume II, it is not apparent that this practice has been strongly endorsed in Volume I (reference only Sections 11, 34, 56, 65, and 74(3)). It is therefore inferred that further definitions are unlikely to be added to Section 2.

A comparative analysis with the Criminal Code reveals that significant attention has been given to the process of definition in the current legislation. Such diligence is not, however, apparent in respect of the draft Act to revise and codify the criminal law. The list which follows herein includes only those words or phrases which are not reproduced in the draft under consideration here. Although some of these terms may not be required in this draft, it is submitted that this cannot be adequately or presently determined based upon the contents of Volume I. It is further noted that there is no justification or explanation in the report of the Commission for their exclusion of these terms from the draft Act attached as Appendix A to their report.

The definitions presently contained in the Criminal Code and which are omitted from the draft Act to revise and codify the criminal law are the following:

WORD/PHRASE

CRIMINAL CODE SECTION

1. Abandon	2 & 196
2. Accredited Hospital	251(6)
3. Act	2
4. Accused	448
5. Aircraft	196
6. Analyst	238(1)
7. Antique Firearm	82(1)
8. Appearance Notice	448
9. Approved Container	238(1)
10. Attorney General	2
11. Approved Hospital	251(6)
12. Approved Instrument	238(1)
13. Approved Screening Device	238(1)
14. Authorization	178.1
15. Automobile Master Key	311(5)
16. Bank-Note	2
17. Bet	179(1)
18. Board	251(6)
19. Bodily Harm	245.1(2)
20. Break	282

<u>WORD/PHRASE</u>	<u>CRIMINAL CODE SECTION</u>
21. Canadian Forces	2
22. Cattle	2
23. Cheque	320(5) & 322(3)
24. Chief Justice	178.15(4)
25. Chief Provincial Firearms Officer	82(1)
26. Child	196
27. Civil Aircraft	76.3(2)
28. Clerk of the Court	2
29. Coastal Waters of Canada	299(6)
30. Commissioner	82(1)
31. Common Bawdy House	179(1)
32. Common Betting House	179(1)
33. Common Gaming House	179(1)
34. Communicating	281.2(7)
35. Company	358(2)
36. Complainant	2
37. Computer Program	301.2(2)
38. Computer Service	301.2(2)
39. Computer System	301.2(2)
40. Counsel	2
41. Counterfeit Money	406
42. Counterfeit Token of Value	406
43. Court	2
44. Court of Appeal	2
45. Court of Criminal Jurisdiction	2

WORD/PHRASE

CRIMINAL CODE SECTION

46. Credit Advanced	305.1(2)
47. Credit Card	282
48. Crime Comic	159(7)
49. Current	406
50. Custodian	444.1(1)
51. Data	301.2(2)
52. Day	2
53. Defamatory Libel	262
54. Disorderly House	179(1)
55. Disqualification	242(5)
56. Distinguishing Mark	375(3)
57. Document	282
58. Document of Title to Goods	2
59. Document of Title to Lands	2
60. Dwelling House	2
61. Election Document	335(2)
62. Electromagnetic, Acoustic, Mechanical or Other Device	178.1 & 301.2(2)
63. Enactment	5(3)
64. Escape	137(3)
65. Everyone	2
66. Evidence	107
67. Exchequer Bill	282

<u>WORD/PHRASE</u>	<u>CRIMINAL CODE SECTION</u>
68. Exchequer Paper	282
69. Exhibition	189(3.1)
70. Explosive Substance	2
71. Expose	196
72. Fair	189(3.1)
73. False Document	282
74. Feeble-Minded Person	2
75. Firearm	82(1)
76. Firearms Acquisition Certificate	82(1)
77. Firearms Officer	82(1)
78. Form of Marriage	196
79. Function	301.2(2)
80. Gaming	179(1)
81. Gaming Equipment	179(1)
82. Genocide	281.1(2)
83. Goods	337
84. Government	107
85. Guardian	138 & 196
86. Hate Propoganda	281.3(8)
87. Her Majesty's Forces	2
88. Highway	2

<u>WORD/PHRASE</u>	<u>CRIMINAL CODE SECTION</u>
89. Identifiable Group	281.1(4) & 281.2(7)
90. Indictment	2
91. Insurance Charge	305.1(2)
92. Intercept	178.1 & 301.2(2)
93. Internationally Protected Person	2
94. Judicial Proceeding	107
95. Justice	2
96. Keeper	179(1)
97. Lawyer	444.1(1)
98. Local Registrar of Firearms	82(1)
99. Lottery Scheme	190(4)
100. Lumber	299(6)
101. Lumbering Equipment	299(6)
102. Mark	334(3)
103. Means	251(3)
104. Military	2
105. Military Law	2
106. Minister of Health	251(6)
107. Motor Vehicle	2
108. Municipality	2

<u>WORD/PHRASE</u>	<u>CRIMINAL CODE SECTION</u>
109. Newly-Born Child	2
110. Newspaper	261
111. Night	2
112. Obscene	159(8)
113. Offence	178.1 & 301.2(2)
114. Offender	2
115. Offensive Weapon	2
116. Office	107
117. Officer	444.1(1)
118. Officer in Charge	448
119. Official	107
120. Official Fee	305.1(2)
121. Overdraft Charge	305.1(2)
122. Owner	2
123. Permit	82(1)
124. Place	179(1) & 306(4)
125. Possession	3(4)
126. Prison	2
127. Prohibited Act	52(2)
128. Prohibited Weapon	82(1)
129. Promise to Appear	448
130. Prosecutor	2
131. Prostitute	179(1)

<u>WORD/PHRASE</u>	<u>CRIMINAL CODE SECTION</u>
132. Provincial Court Judge	2
133. Public Department	2
134. Public Officer	2
135. Public Place	138 & 179(1)
136. Public Stores	2
137. Qualified Medical Practitioners	238(1) & 251(6)
138. Qualified Technician	238(1)
139. Recognizance	448
140. Registrar of Motor Vehicles	243(7)
141. Registration Certificate	82(1)
142. Regulations	82(1)
143. Required Deposit Balance	305.1(2)
144. Restricted Weapon	82(1)
145. Riot	65
146. Seditious Libel	60(2)
147. Sell	178.1 & 301.2(2)
148. Solicitor	178.1 & 301.2(2)
149. Stamp	334(3)
150. Statement	107 & 281.2(7)
151. Steal	2
152. Summons	448
153. Superior Court of Criminal Jurisdiction	2

<u>WORD/PHRASE</u>	<u>CRIMINAL CODE SECTION</u>
154. Telecommunication	287(1)
155. Territorial Division	2
156. Testamentary Instrument	2
157. Theatre	138
158. Therapeutic Abortion	251(6)
159. Three Card Monte	189(2)
160. Trade Combination	425(2)
161. Trading Stamps	337
162. Trustee	2
163. Undertaking	448
164. Utter	406
165. Vehicle Identification Number	312(3)
166. Vessel	196
167. Warrant	448
168. Weapon	2
169. Writing	2
170. Witness	107
171. Wreck	2

AN EVALUATION

of

"RECODIFYING CRIMINAL LAW"

by

The Law Reform Commission of Canada

for

**The Hon. Mr. Ray HNATYSHYN
Minister of Justice
and Attorney General of Canada**

by

The Canadian Association of Chiefs of Police

APPENDIX II

**Definitions Added or Amended as Between the Report
and Appendix A to the Report of the Law Reform
Commission of Canada**

An Evaluation
of
"Recodifying Criminal Law"
by
The Law Reform Commission of Canada
for
The Hon. Mr. Ray HNATYSHYN
by
The Canadian Association of Chiefs of Police

APPENDIX II

Definitions Added or Amended as Between the Report
and Appendix A to the Report of the Law Reform
Commission of Canada

Further to the comments of this Association included within Appendix I, it is apparent that there are material differences in the definition sections included within the body and Appendix A of Volume I of the Commission's Report. These inconsistencies impair the credibility of each part, and also complicate the task of the reader. It is suggested that the lack of any explanation or justification for these changes ought to be remedied or commented upon by the Commission.

It has been noted that each of the following words or phrases is defined in the body of the report, but not in Appendix A being the draft Act to revise and codify the criminal law:

WORDS OR PHRASES

1. agent
2. another's premises
3. appropriate
4. Canadian aircraft
5. Canadian ship
6. consent
7. criminal rate
8. dwelling house
9. enters
10. exclusive economic zone of Canada
11. fishing zones of Canada
12. forge
13. inland waters
14. internal waters of Canada
15. non-disclosure
16. premises
17. representation
18. territorial sea of Canada
19. weapon

Conversely, the terms noted below are defined in Appendix A, but not in the main body of the report:

1. conduct
2. crime
3. operate
4. public document
5. vehicle

Finally, it is observed that there is a material difference in the definition of "harm" as between the body of the report and Appendix A. In particular, the former includes the words "permanently or temporarily" which are omitted from the latter.

Insofar as the body of the Commission's Report presumably justifies the contents of Appendix A, the additions and amendments enumerated herein create unnecessary confusion. It is the opinion of this Association that each of these matters ought therefore to be addressed separately and clarified.

AN EVALUATION
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APPENDIX III

Words and Phrases in the Draft Act
to Revise and Codify the Criminal Law
Which are Not Defined or Explained

AN EVALUATION OF
of
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APPENDIX III
Words and Phrases in the Draft Act
to Revise and Codify the Criminal Law
Which are Not Defined or Explained

The Canadian Association of Chiefs of Police has already expressed considerable concern with respect to matters of definition in Appendices I and II herein. The importance of attention to such detail is, in the opinion of this Association, critical to the proper understanding of the draft Act to revise and codify the criminal law. With specific reference to that draft Act, being Appendix A to Volume I of the report of the Law Reform Commission of Canada, this Association has identified a number of terms which are not defined or commented upon in that report.

It is appreciated that not all of the words and phrases enumerated herein may be amenable to a legislative definition for inclusion in the draft Act. However, it is the submission of this Association that every effort to achieve that task ought to be pursued. With respect to those terms which might not be so included, it is requested that their meaning or intention be otherwise clarified for the benefit of this Association.

The words and phrases of concern to the C.A.C.P. are the following:

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APPENDIX III

<u>SECTION</u>	<u>WORD OR PHRASE</u>
2(4)	competent
6(1)(b)(i)	necessaries of life
6(1)(b)(i)	any other member of his family
6(1)(b)(iii)	hazardous enterprise
6(2)	therapeutically useless
7	substantially contributes
7	supersedes
14	mental disorder
15(1)(b)(for any other reason
18(1)	private rights
18(2)(a)	rule of law
18(2)(b)	appellate court
19(1)	immediate serious harm
19(2), 20(2), 22(2)(a), 23(1)(a), 23(2), 54(1), 54(2), 55, 57, 62 & 63	serious harm
20(1)(a)	substantially outweighs
21(2)	under the authority of a peace officer
22(1)	peaceable possession of property
23(1)(a)	serious damage to property
24	superior officer
24	manifestly unlawful
27(1)	persons with authority over the formulation or implementation of corporate policy
28(1)	incites

<u>SECTION</u>	<u>WORD OR PHRASE</u>
28(1)	that involves a similar degree of harm
29(2)	mere preparation
30(1)	does not completely perform
33(5)&(6)	does not clearly establish
35(1)(i)	member of the family
35(2)(b) & 36(1)	substantial link
40(2) & 64(a)	torture
40(2)(c) & 64(c)	a criminal
40(3)	compassionate motive
45	harasses
48	harm the reputation of a person
51	lawful custody
54(2)	any other valid reason
55	impedes the rescue
61	prohibited or otherwise disqualified
62	fit and safe for operation
65	surveillance device
69(3)(c) & 80(2)	weapon
69(5)(b)	commercial purpose
70	dishonestly appropriates
74(3)(a)	currency
81	useless or inoperative
85(a)	prohibited weapon
85(a)	restricted weapon
88	things

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APPENDIX IV

Sections in the Criminal Code Omitted from the Draft Act
to Revise and Codify the Criminal Law

AN EVALUATION OF
"RECODIFYING CRIMINAL LAW"

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APPENDIX IV

Sections in the Criminal Code Omitted from the
Draft Act to Revise and Codify the Criminal Law

The stated objective of the Commission in Volume I of their Report is to create an evolutionary new Code that is comprehensive, logical, organized, coherent, and consistent. In contrast, the legislation which it is to replace is described as "overly complicated" (page 3) and "obsolete" (per Mr. Del BUONO on page 2). However, and in the absence of any further explanation, these bare comments apparently constitute the only justification for the deletion of the Criminal Code sections enumerated in this Appendix. It is the submission of the Canadian Association of Chiefs of Police that this deficiency is of substantial significance and ought therefore to be corrected.

A comparative analysis of the Criminal Code and the draft Act to revise and codify the criminal law sustains the impression that the current legislation is much more specific and detailed than that proposed to replace it. It is therefore of some surprise that the benefits of such a legislative approach might be abandoned at the same time that there is such a high public demand for greater precision in our law. It is for this reason that the reluctance of the Commission

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APPENDIX IV

to address each section, even briefly, is regrettable.

In preparing the list of sections which follows, this Association has observed the following general guidelines:

1. Those Code sections which are expressly addressed by a section in the draft Act are not included here, even where the draft section has not met with the approval of this Association;
2. Those Code sections which are expressly identified in the Report as being replaced by a draft section are also not included in this Appendix, even where the draft section has not met with the approval of this Association; and
3. Those Code sections which may be addressed by Volume II of the Commission's Report, or the separate Code of Criminal Procedure, are similarly excluded from the list in this Appendix.

It is thus submitted that the Commission has not provided a justification for the deletion of any of the following sections:

APPENDIX IV

1.	SECTION 2.1	(descriptive cross references)
2.	3	(postcard a chattel, value)
3.	4	(Canadian Forces not affected)
4.	10	(civil remedy not suspended)
5.	14	(consent to death)
6.	15	(obedience to de facto law)
7.	18	(compulsion of spouse)
8.	19	(ignorance of law)
9.	23	(accessory after the fact)
10.	26	(excessive force)
11.	30	(preventing breach of peace)
12.	31	(arrest for breach of peace)
13.	33	(duty of officers if rioters do not disperse)
14.	36	(provocation)
15.	37	(preventing assault)
16.	44	(master of ship maintaining discipline)
17.	64	(unlawful assembly)
18.	65	(riot)
19.	66	(punishment of rioter)
20.	67	(punishment for unlawful assembly)
21.	68	(reading proclamation)
22.	69	(offences related to proclamation)
23.	70	(neglect by peace officer)
24.	71	(unlawful drilling)

APPENDIX IV

25.	SECTION 73	(forcible entry)
26.	76.1	(hijacking)
27.	76.2	(endangering safety of aircraft)
28.	76.3	(weapons and explosive substances on civil aircraft)
29.	115	(disobeying a statute)
30.	116	(disobeying order of court)
31.	117	(misconduct of officers executing process)
32.	129	(compounding indictable offence)
33.	130	(corruptly taking reward for recovery of goods)
34.	131	(advertising reward and immunity)
35.	132	(prison breach)
36.	134	(permitting or assisting escape)
37.	135	(rescue or permitting escape)
38.	226	(neglect to obtain assistance in childbirth)
39.	227	(concealing body of child)
40.	229	(administering noxious thing)
41.	230	(overcoming resistance to commission of offence)
42.	231	(traps likely to cause bodily harm)
43.	234	(failure to keep watch on person towed)
44.	246	(assaulting a police officer)
45.	250.3	(defence - Sections 250 to 250.2)
46.	250.4	(defence - Sections 249 to 250.2)

APPENDIX IV

47.	SECTION 281.1	(advocating genocide)
48.	281.2	(public incitement of hatred)
49.	287	(theft of telecommunication service)
50.	288	(theft by or from person having special property or interest)
51.	290	(theft by person required to account)
52.	291	(theft by person holding power of attorney)
53.	292	(misappropriation of money held under direction)
54.	296	(criminal breach of trust)
55.	300	(destroying documents of title)
56.	301	(fraudulent concealment)
57.	301.2	(unauthorized use of computer)
58.	304	(stopping mail with intent)
59.	311	(automobile master key)
60.	314	(theft from mail)
61.	323	(pretending to practice witchcraft)
62.	328	(counterfeit proclamation)
63.	329	(telegram in false name)
64.	330	(false messages and indecent telephone calls)
65.	335	(damaging documents)
66.	336	(offences in relation to registers)
67.	339	(using mails to defraud)
68.	340	(fraudulent manipulation of stock exchange)

APPENDIX IV

69.	SECTION 341	(gaming in stocks or merchandise)
70.	342	(broker reducing stock by selling for his own account)
71.	343	(fraudulent concealment of title documents)
72.	344	(fraudulent registration of title)
73.	345	(fraudulent sale of real property)
74.	346	(misleading receipt)
75.	347	(fraudulent disposal of goods on which money advanced)
76.	348	(fraudulent receipts under Bank Act)
77.	349	(saving)
78.	351	(fraud in relation to fares or transportation)
79.	353	(seizure of precious metals)
80.	354	(offences in relation to mines)
81.	355	(books and documents)
82.	356	(falsifying employment record)
83.	357	(false return by police officer)
84.	358	(false prospectus)
85.	359	(obtaining carriage by false billing)
86.	360	(trader failing to keep accounts)
87.	361	(personation with intent)
88.	362	(personation at examination)
89.	363	(acknowledging instrument in false name)
90.	364	(forging trademark)

APPENDIX IV

91.	SECTION 365	(offence - Section 364)
92.	366	(passing off)
93.	367	(instruments for forging trademark)
94.	368	(other trademark offences)
95.	369	(used goods sold without disclosure)
96.	371	(falsely claiming Royal Warrant)
97.	372	(presumption)
98.	373	(offences in relation to wreck)
99.	374	(distinguishing mark on public stores)
100.	375	(removing marks without authority)
101.	376	(selling defective stores to Her Majesty)
102.	377	(unlawful use of military uniforms)
103.	378	(military stores)
104.	380	(criminal breach of contract)
105.	381.1	(threat to commit offence against internationally protected person)
106.	382	(offences by employers)
107.	384	(issuing trading stamps)
108.	387(1.1)	(mischief in relation to data)
109.	387.1	(attack on internationally protected person)
110.	392	(setting fire by negligence)
111.	393	(false alarm of fire)
112.	394	(interfering with saving of wrecked vessel)

APPENDIX IV

113.	SECTION 395	(interfering with marine signal)
114.	396	(removing natural bar without permission)
115.	397	(occupant injuring building)
116.	407	(begins to make counterfeit money)
117.	408(b)	(possession of counterfeit money)
118.	410	(uttering counterfeit money)
119.	411	(uttering coin)
120.	412	(slugs and tokens)
121.	414	(defacing current coins)
122.	415	(printing circulars in likeness of notes)
123.	416	(instruments for counterfeiting)
124.	417	(conveying instruments for coining out of mint)
125.	418	(advertising and dealing - counterfeit money)
126.	419	(when counterfeit complete)
127.	420	(counterfeit money - seizure)
128.	424	(conspiracy in restraint of trade)
129.	425	(trade combination)