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Department of Justice
Canada

Ministère de la Justice
Canada

Reforming the General Part of the *Criminal Code*

**A Summary and Analysis of
the Responses to the Consultation Paper**

Canada

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INTRODUCTION

On November 12, 1994 the Department of Justice released a public consultation paper on reforming the General Part of the *Criminal Code*. The deadline for responding was February 28, 1995 for all issues except criminal intoxication. On this last issue the deadline was shortened to January 10, 1995 due to the pressing nature of the matter.

This document contains a detailed summary of the written responses that were received to the consultation paper. These responses were interesting for several reasons: on certain questions there was unanimous agreement among respondents regardless of their category. On several other questions there was not only no consensus among the various categories of respondents, but also no uniform point of view among respondents within the same category.

For example, on the issue of whether people should be obliged by the criminal law to go to the assistance of someone who is in immediate danger of death, the responses from concerned citizens were no more uniform than those from community service groups. The same can be said of several other issues including the use of force to protect property, mistake of law, causation, trivial violations, and committing a criminal act under duress.

On the other hand, in response to the question on corporate liability the views of both the concerned citizens and the business groups are quite uniform within each category, although diametrically opposed. It is also true that the responses on the issue of criminal intoxication are quite uniform within each category, although in this case the views are essentially all in agreement.

In addition to the summary, both an extended analysis of the responses and a short executive summary of the analysis have been prepared and are included in this document.

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I. LIABILITY

FAULT - GENERAL COMMENTS

COMMUNITY SERVICE GROUPS

Church Council on Justice and Corrections

This group made a number of general comments on the issue of fault. In their view, concepts like "fault" are preferable to other expressions like "guilt" and "culpability" in order to render an understanding of mens rea. "We would favour a notion of "responsibility" in which literally the responsibility of a person in the particular context of an offence must be established. "Fault" in many cases may not lie with a person but in conditions which have to be addressed. In a complex society, it is not enough to put the finger on a particular person, while disregarding systemic conditions."

ACADEMICS

Law professor, Univ. of Western Ontario (these comments relate to the technical paper)

I have problems with the "labelling approach" given that most offences have a number of components and that the mens rea required may be different for each (one example being assault causing bodily harm - the assault requiring intention and the causing of bodily harm requiring either no additional mens rea or objective foreseeability of bodily harm depending which authority you choose). For that reason, the "element approach" seems preferable.

I am not sure what is added by having a mental component re conduct - voluntariness seems to capture what is needed. We need provisions about circumstances and consequences but the provisions about conduct can be omitted.

I have concerns regarding the definitions of intention and recklessness. I am not sure that one should speak of intention in relation to circumstances - surely it is preferable to speak of knowledge? In relation to consequences, this seems a watered down version of oblique intent and is too close to recklessness. It would be preferable to speak of meaning to cause or being aware that it was substantially certain to occur.

The recklessness standard seems pitched too high by requiring that the person be aware of a serious risk. I would prefer to see recklessness defined as the situation where a person is aware of a risk which in all the circumstances it was highly unjustifiable to take. Reference to "serious risk" is ambiguous - it is not clear whether it refers to how likely the risk is to materialize (highly likely, probable etc.) or whether it refers to whether the risk taken was justifiable.

I am not sure we need a general clause on fault requirements for consequences - it should be handled on a section by section basis. I prefer option 3 - but with the modifications suggested above redefining intention and recklessness.

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I think we should avoid defining all terms including negligence - although to avoid confusion with criminal negligence it may be preferable to adopt a different term such as carelessness. This would be yet another element to be defined. Although it is unlikely there would be any offence in the Code which had negligence/carelessness as its key component, it might be thought appropriate to have that standard in relation to a minor component of the offence. Carelessness would be negligence above civil negligence but below the marked departure standard.

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QUESTION 1 — FAULT

Should the criminal negligence standard of fault in some manner take into account the characteristics of the accused person?

Are there some types of characteristics that should never be taken into account?

GENERAL PUBLIC

Havelock

This would simply give accused criminals and their lawyers additional excuses. I really do not care what characteristics the accused has. The purpose of justice and the law is to protect the innocent, law abiding citizen.

North Vancouver

Some characteristics should be considered for some crimes. In crimes such as murder, rape and assault, different characteristics should have no bearing. However, there are differences for offences like financial fraud. An accountant who possesses a high level of financial education and training should be held to a higher standard than an individual with only a secondary school education. Personal traits - race, religion, ethnic origin, sexual orientation - should have no bearing.

St. Catherine's

The characteristics of the accused person should not be taken into account with regard to innocence or guilt but should be taken into account slightly when sentencing, but only in first time offenses. If an individual persists in committing crimes, it should no longer be considered. Drug and alcohol habits should never be taken into account.

Vancouver

I cannot envision a case where harm is done to a person and the perpetrator could not have seen the risks. Drugs, alcohol, reckless driving, abuse: reasonable people take proper care and avoid these situations.

Havelock

Yes - the characteristics should be considered, especially for severe mental illness, victims of war combat and torture, and people with a drug dependency. However, no such person should be immune to penalties, treatment, and restitution. It is just that the treatment should be modified to serve the best needs of both the accused and society.

Guelph

It might consider characteristics like low intelligence and physical attributes, but NOT cultural. Canadian laws should pertain to all who live in this country. Drug addiction and alcoholism should never be considered.

Windsor

In determining who is a "reasonable person" for the purposes of fault, "reasonableness" should not be based on personal characteristics, especially racial and ethnic factors. This suggests the populace should be subdivided - such a notion is abhorrent to our national values as enshrined in the *Criminal Code*. It would make for dangerous and divisive policy. Respondent does not agree in holding people to different standards (ie. police and politicians). We should all stand equal before the law. Cultural practices should not override the tenets of our criminal law - the Code must reflect national values that suggest certain conduct is totally unacceptable, even if tolerated by a minority.

Lakefield

Characteristics of the accused should never be considered.

Windsor

Respondent argued that individuals must be held accountable for their actions, regardless of whether intent is proven or not. In her view, the *Criminal Code* is too lenient. Personal characteristics, such as low intelligence, should not influence the determination of fault. If a person acts in the commission of a crime, he or she is aware of the consequences of their actions.

Saskatoon

Personal characteristics should be considered - a judge and/or jury cannot consider a crime or an appropriate penalty without this information. There are no characteristics which should never be considered.

Victoria BC

All persons are regarded as equal before the law, both in terms of rights and responsibilities. When anyone, regardless of physical or mental incapacity, fails to meet the ordinary standard of care required by law, they should be held liable. If impaired individuals are found to have tried their best to honour the requirements of the law, this may be considered a mitigating factor in sentencing. In instances where the law imposes certain duties or standards of conduct which an individual cannot meet, no criminal fault should be attributed. The respondent's conclusions are based on the belief that the said incapacities are not self-induced.

Peterborough

There is a difficult balance to be struck between ensuring that we have strong, consistent laws and ensuring that the uniqueness of the individual is recognized. There

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should be enough flexibility to allow for recognition of the characteristics of the accused. This is particularly important with regard to mentally handicapped individuals.

Oshawa

Special characteristics should not be considered. Even people with a low IQ should have a basic awareness of right and wrong. Respondent believes that drug dependence and alcoholism should never be taken into account.

Hamilton

Respondent favours the White Paper's approach to criminal negligence. He does not feel that religion, culture or ethnic background should be considered in determining criminal negligence.

Guelph

The standard of a reasonable person should remain a yardstick of measurement for criminal responsibility. We must have simple and accurate means in which to determine moral principles and the inclusion of specific characteristics would undermine this. Characteristics of the accused should be considered by the court on a case-by-case basis - no general defence to be included in the Code. Taking account of individual characteristics in the Code would only remove a standard of fairness which we currently share.

Oshawa

The criminal negligence standard of fault should only recognize mental incompetence - cultural or religious characteristics cannot be modifiers.

Almonte, ON

Some special characteristics should be considered - but I do not believe drug dependency and alcoholism are characteristics; they are diseases that need treatment and not incarceration. There should be overall standards, but each case must consider each individual and his/her circumstances.

(South ON - 905 area code)

Criminal negligence standard of fault should take into account some characteristics such as low intelligence and mental disability (certainly not culture or religion). However, individuals who take substances have an obligation both to themselves and the rest of the public to be aware of the potential results, both mentally and physically. Claiming ignorance of the effects on their behaviour should not provide an excuse for their conduct.

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Puslinch ON

When personal characteristics (ie. ethnic, religious, cultural backgrounds) are taken into account, they must serve as a defence which is consistent with the rest of the laws which apply to the population as a whole.

Peterborough

Individual characteristics should be considered, but should not encompass factors such as drug dependency, ethnic background, and sexual orientation. All Canadians should be treated the same under the law. As for the argument that some people have special knowledge/skills, I believe that everyone is capable of making a mistake and therefore intent would have to be proven as it would in any case.

Eagle Creek BC

We have the right to laws which reflect Canadian values. Persons who are not themselves capable of understanding right from wrong and who commit a crime should not be held to the same standards as others. However, the caregiver to such a person would then be held in some degree responsible and would have to face punishment.

BC

Any attempt to revise the justice system for each individual in Canada is impossible, and circumvents the idea that one justice system should be fairly applicable to all.

Oshawa

Courts should consider personal factors such as mental health problems or a criminal record. Religious, cultural, ethnic factors and education levels should never be considered. If you engage in cultural activities that contravene the laws of your adopted home then you must change to avoid prosecution. Respondent believes we should also avoid considering personal factors such as drug and alcohol abuse as well as any evidence of the accused being abused as a child. "Wrong is wrong is wrong." There cannot be that much variation as to the definition of an average, reasonable person. Ignorance of basic right and wrong is no excuse.

Birmingham, UK

Reasonable person test is objective, and provides a common identity through which to measure the thought processes of other Canadians. Racial, ethnic and cultural differences aside, there must be some common denominator which rests in the reasonable person. To allow the "reasonable person" test to accommodate the flexibility of the defendant's background is to allow the laws of every other society to pervade those which should be unique to Canada. I entirely agree that the whole point of the criminal negligence level of fault is to set general standards that apply to all Canadians.

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ACADEMICS

Law professor, University of Western of Ontario

This question deals with the issue of characteristics of the reasonable person i.e. which formulation is preferable - that of McLachlin J. or Lamer C.J. in *Creighton*. Although it is not entirely clear what results flow from the two different formulations of the test, it would appear that the test proposed by Lamer C.J. would permit consideration of a greater number of individual factors. Thus under the Lamer formulation, issues such as age, gender and mental capacity would be relevant and at the other end of the scale, the fact that an individual had greater skill and knowledge (e.g. police officer's use of a gun) would also be relevant. The McLachlin formulation only permits consideration of individual factors when such factors go to the issue of capacity.

On balance I prefer the McLachlin approach. The idea of a uniform standard which all are expected to meet unless incapable of doing so is attractive. I think this represents a reasonable compromise between the Lamer approach and the more draconian approach of forcing everyone to meet the reasonable person standard, regardless of their incapacity to meet that standard. Under no circumstances should consumption of intoxicants have any bearing on the issue of capacity. However, incapacity test does have problems - witness recent B.C.C.A. decision (*Ubhi*) in which the court took into account the accused's incapacity to appreciate the need to maintain brakes in the context of a very serious accident resulting in death. Perhaps all should be held to the same standard and in such incidents, incapacity should never constitute a defence. If so that might suggest that the more draconian standard (uniform standard for all with no allowance for individual characteristics) should be adopted.

Academics like Don Stuart favour the Lamer approach. But they must justify their approach - what if parents accused of not providing medical care on religious grounds were to be acquitted because of their beliefs? Such decisions are undesirable - as such, I would reject the notion that cultural and religious differences should affect the result. I would suggest that most differences can be taken care of through the sentencing process.

WOMEN'S GROUPS

Halton Women's Place

The court should consider the person's awareness of the circumstances; the court should take into account what the person actually knew to determine whether he or she failed to take proper care in light of that knowledge.

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L'Action Ontarienne contre la Violence Faite aux Femmes, Andrée Côté (long and detailed response)

The move to increase the use of subjectivity in criminal law must be halted, at least in relation to crimes of violence against women. Subjectivity serves only to expand the circumstances in which violent men get off without punishment by using unbelievable excuses regarding what they believed. A violent man could swear that he killed his wife because he honestly believed that she was going to kill him.

The Provincial Advisory Council on the Status of Women, Newfoundland and Labrador

We also believe, and recent research supports our belief, that the justice system has not taken women's experiences into account. The discussion paper's use of gender neutral language ignores the fact that the courts have used male behaviour as the standard to decide what is reasonable and what is not.

We would go further and argue that the courts have displayed a bias against those who are not white, middle-class, heterosexual and male. However, we are not comfortable with defining by inclusion since invariably there are some factors which cannot be anticipated and which may lead to loopholes. Even a flexible definition does not mean women will be treated fairly in the application of the *Criminal Code*.

Gender bias: the individualistic approach of defining reasonable, capability, liability and behaviour reinforces the application of the law in isolation from everything else. The Code does not offer guidelines on addressing bias, nor does it acknowledge its existence.

Catholic Women's League of Canada

All Canadian people should be treated equally under our laws. Allowing a flexible concept of the reasonable person to include various characteristics could dilute situations to such an extent that few could be held accountable for their actions. Therefore, we should all be expected to adhere to the same standards of conformity. Every person is responsible for his or her own actions. It is time to establish a Canadian "culture" and reaffirm the principles and morals upon which this country was founded. It could be exceedingly difficult to determine which other cultures and which aspects of those cultures would be acceptable characteristics. We foresee far too great a time being spent in the courts determining cultural or ethnic characteristics rather than the basic criminal action being tried. Some types of characteristics which should never be taken into account include drug-dependency, alcoholism, insomnia or lack of sleep, ethnic biases or hatreds.

COMMUNITY SERVICE GROUPS

Regroupement Québécois des CALACS (in French)

The question of whether the test should be objective or subjective is the cornerstone of this paper. Should we put ourselves in the skin of men who say they mistakenly thought the victim consented to sexual intercourse, or who say that they killed their spouse in a sudden rage brought on by the woman announcing that she was leaving. The groups we represent are clear in their opposition to the introduction of this type of subjectivity.

Unless he lacked the intent or mental capacity, an individual must be held accountable for the consequences of his actions. The subjective approach focuses attention on the experience and perception only of the accused, rather than on the relational and social context of the crime. For example, research indicates that if a husband and wife are asked to state the number of violent acts that occurred between them during a set time, the woman will give a significantly higher number than the man even though neither is lying. The reason for this is in their different perceptions. Subjectivity is usually used in the defence of men accused of violence against women. The claim of mistaken belief in consent to sex represents a gross disregard for the feelings and integrity of another. It is offensive to acquit someone in this position.

A reasonable person must be defined as one who is free of discriminatory prejudices and who is diligent in respecting the rights of others.

Citizens United for Safety and Justice Society

The *Criminal Code* must apply to all in the same manner. To create different rules for ethnic, intelligence, or any other reason would really destroy respect for laws and be seriously divisive to the Canadian population. This is an appalling suggestion. May we remind you that a victim is no less seriously injured or dead because the perpetrator was of a certain culture or had particular characteristics.

Parkdale Focus Community

The criminal negligence standard of fault should not take into account characteristics of the accused person. The accused's characteristics should be considered at the time of sentencing. Drug or alcohol induced behaviour should never be taken into account in considering fault

VISIBLE MINORITY/MULTICULTURAL GROUPS

Canadian Arab Federation (see also entry under cultural defence).

The whole point of the criminal negligence level of fault is to set general standards that apply to all Canadians. This means that in cases where criminal negligence is the fault level, the accused person's behaviour is measured against what a "reasonable

person" would have done in the same circumstances. Those who support adding culture as a defence argue that it is not fair to treat people as criminals if they are not capable of meeting the ordinary standards because of personal characteristics outside their control. This argument implies that the cultures and beliefs of certain groups of people make them incapable of meeting the ordinary standards of Canadian society. We believe this is a grave assumption. Moreover, creating two levels of standards is an overt discrimination against those who consider themselves citizens of equal rights and responsibilities.

JUDICIARY

s. 21(1)(b)

POLICE

RCMP

The fault level should remain an objective one. To do otherwise would undermine the basic social values and would result in uncertainty and confusion. Personal characteristics can always be considered during sentencing.

Metropolitan Toronto Police

a) No b) No. Given the power of the courts to intercept legislation as against Charter standards, we should follow SCC case law for standards - reference to *R v. Collins* (1987) 33 C.C.C. (3d) 1. The White Paper's approach to reasonable person test seems the best option. Should take into account "fully apprised of the circumstances of the case" as set out in *Collins*. Regarding mental capacity, see *R v. Whittle* (1994) 92 C.C.C. (3d) 11.

FEDERAL/PROVINCIAL GOVERNMENTS

Human Resources Development

[s. 21(1)(a) & (b)]

Health Canada

Should not consider personal characteristics for they have no bearing on the degree of intent associated with the criminal act. Nonetheless, if additional privileges are accorded to an individual, the standard of fault should correspond with the person's level of responsibility and to the level of the privilege granted (ie. parental privilege means parental responsibilities). As a matter of fact, a judge could instruct a jury in cases involving an accused parent, to try the facts of the case according to a "reasonable parent test." Such an approach would be consistent with the provisions set out in the *Convention on the Rights of Children*. Criminal liability should never be determined by the standards of an accused's religion or culture. ie. look at the impact of female genital mutilation.

Canadian Heritage

The Department believes the general principle of option 4(d) should be adopted - "personal characteristics ... should be considered by the courts ... and a person is not criminally negligent where he or she was unable to achieve the standard of reasonable care because of personal characteristics outside the person's control". Provisions should be made whereby sensitivity to one's culture or religion should be taken into account as mitigating factors in sentencing.

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QUESTION 2 — WAYS OF BEING A PARTY TO AN OFFENCE

Should it be a crime to fail to take reasonable steps to prevent or stop a crime or to assist a crime victim when it is safe to do so?

Should it be a crime to fail to assist anyone in any circumstances who is in immediate danger of death or serious harm?

GENERAL PUBLIC

Havelock

Morally, it is a crime not to help prevent a crime or to neglect to help a victim of crime. However, those who try and intervene to stop a crime should not be implicated and given more punishment than the actual criminal, as was the case in some past cases. We do not need a law making it a crime for not getting involved, but we have to find ways of protecting those who do get involved from being improperly implicated and convicted.

North Vancouver

Anyone who, after the fact, realizes that they failed to aid a person in danger will have to deal with their conscience without the need for a criminal charge. It would be hard to determine which circumstances merit a criminal charge (how does one know that their life would be endangered through intervention?).

St. Catherine's

Yes. A person has a moral obligation to prevent or stop a crime or assist a crime victim when it is safe to do so. Morals are part of our Canadian heritage and our law should reflect that obligation. It should be a crime to fail to assist individuals in immediate danger.

Vancouver

There is a moral duty to assist victims, but it should not be a crime to not assist.

Havelock

Supports making it a crime to fail to assist victims, but offers some significant reservations. The penalties ought to be scaled on to a continuum from major to minor, depending upon the gravity of the crime, the risk to the intervenor, and the relationship between the intervenor and the person at risk. Certainly, the penalty should not equal that of the prime perpetrator.

Guelph

It should be a crime to fail to take reasonable steps to aid a victim, when it is safe to do so. It should not be a crime to fail to assist in any circumstances.

Windsor

This may be an attractive proposition, but would it not end up charging individual citizens with a role similar to that of the police? How far will the citizen be expected to become involved in law enforcement?

Lakefield

It should not be a crime to fail to assist a victim, nor should it be a culpable act to refrain from assisting a victim in immediate danger.

Windsor

Not acting to help victims should not be made a crime. This would put the onus and responsibility equal to that of a law enforcement officer on the average citizen of Canada. The violence inherent in many crimes will deter Canadians from intervening in any kind of criminal act.

Saskatoon

It should be a crime to fail to take reasonable steps to aid victims when it is safe and possible so to do. At the very least, it should be a crime to fail to at least try and assist a victim in imminent danger.

Victoria BC

It should be a crime to fail to assist a victim. However, a failure to act should be justifiable where adequate assistance is already at the scene of a crime, or is about to arrive. For a person to intervene, the situation must be safe and pose no serious risks to the health and well-being of the intervenor. Difficult issue to decide, given the many possible scenarios in which victims could be found at some immediate risk.

Peterborough

There should be an obligation to aid victims, but not when a bystander would be exposed to personal danger.

Oshawa

It should be a crime to fail to assist, but not when the victim is in immediate danger of death or serious harm.

Hamilton

I think it should be a crime not to report to the police if you witness a crime or fail to report to the proper authorities if someone is in immediate danger of death or serious harm. To force someone to act in a situation they are not trained to handle or cannot recognize is wrong - the dangers involved in assisting would not be ethical. Although I would like to believe that I would assist, it should not be a legal obligation.

Guelph

It is a sad comment on our present society that this type of legislation must even be considered. Idea's intention is good, but the respondent does not feel it could be effectively enforced. Favours including an obligation to have individuals assist the investigative process and subsequent criminal proceedings.

Oshawa

Failure to assist should NOT be a crime. Definitions of when it is "reasonable" and "safe" to intervene are too nebulous and open to interpretation. In hindsight, it may seem to have been reasonable and safe to intervene, but those judgements are hard to make when one does not appreciate the emotion and panic of the actual situation. Failure to assist someone facing imminent danger is an unenforceable standard. Another solution would be to reduce the likelihood of civil action against those who do choose to intervene (the Good Samaritan).

Almonte ON

Unfortunate that we have to make a law for common sense or altruism. I support the argument that we should do anything in our power and safety to stop a crime. I think that "we" should physically assist another but only if it is safe to do so.

(south ON)

NO - you are asking for a difficult judgement call by a witness or bystander. With criminal activities, things are rarely as they appear.

Puslinch ON

No to both questions - most people are not adequately trained to stop crimes. Many aspects of the *Criminal Code* and civil law discourage or make it impossible for the potential victim to prevent or stop crime. Every citizen bears responsibility for preventing and stopping crime. But, respondent feels he must answer no to these questions, because the *Criminal Code* does not give the average person the authority and protection required to intervene directly to prevent and stop crime. New gun control laws excuse the public from the responsibility and places new responsibility on law enforcement officers.

Peterborough

It should be considered a crime not to take reasonable steps to prevent or stop a crime when it is safe to do so. Reasonable steps would have to be specifically outlined. For bystanders, it should merely be a crime not to notify authorities of a crime you have witnessed. However, if one parent is aware of long-term abuse against a child and does not report it, that parent should also be charged.

Eagle Creek BC

Only when one's own life is endangered should it be acceptable not to aid a victim in imminent danger. Otherwise, it should be against the law not to assist. It should be a

crime not to report a crime one has witnessed. Respondent recognizes the problems associated with enforcing such a law.

BC

Yes - it should be a crime to fail to assist a victim or stop a crime. If it is made a crime, this should assist police and victims, and will certainly put some weight of guilt upon gang members who stand by and observe a bullying and beating incident on a lone victim. We have a civil and social responsibility towards our fellow Canadians.

Oshawa

We should assist our fellow citizens up to the point of our own endangerment. But it should only be a minor crime not to assist.

JUDICIARY

s. 21(1)(b)

POLICE

RCMP

Would support this proposal provided that safeguards were in place to prevent members of the public from taking unnecessary risks.

Metropolitan Toronto Police

Yes and no. It is dangerous to procure the assistance of the general public by law. Who decides when it is safe? There is a second issue: is there a common law duty of

persons in authority or representative of the state? See *R v. Nixon*, (1990) 57 C.C.C. (3d) 97.

WOMEN'S GROUPS

Halton Women's Place

A person would be a party to an offence if he or she were present while a crime was being committed and failed to take reasonable steps to prevent the crime, when it would have been safe to do so.

The Provincial Advisory Council on the Status of Women, Newfoundland and Labrador

We don't think it should be a crime to fail to take reasonable steps to prevent or stop a crime in progress, despite the circumstances. From our discussion, we concluded that changing the law could actually make it impossible in some cases to provide assistance. For example, such a law would not take into account the issue of safety for those reporting crimes.

We don't believe the paper dealt adequately with the issue of power and its impact on decisions, nor with the idea of protection and safety for those who report or attempt to stop or prevent a crime.

Catholic Women's League of Canada

There should be a new crime created of "failing to take reasonable steps, when possible, to assist a person who is "in immediate danger of death or serious harm" providing it is "safe and possible to do so." However, that does not mean that a rescuer is to place his/her own life in jeopardy or open attack from the perpetrator committing the crime. This is a moral obligation. To ensure our laws are adhered to, it will be necessary to legislate this type of morality. People who are spectators to a crime like assault should be held accountable. The same for someone who witnesses any form of child abuse - this should be true even if they only suspect child abuse. Our children are defenceless and need the protection of adults.

COMMUNITY SERVICE GROUPS

Citizens United for Safety and Justice Society

While it is desirable to have citizens assist a crime victim it has proven, in our area, to be a gesture that too often results in a fatality. It is a response that must be of an individual nature. While it may be safe for one person to assist, it may not be for another. Further, we have seen the result of the invisible handcuffs placed on our police by the *Charter of Rights and Freedoms*. How can you expect citizens who are not trained either as police or in legal terms to risk being charged for things such as "undue force"?

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Parkdale Focus Community

The failure to take reasonable steps to prevent or stop a crime or to assist a victim when it is safe to do so should be a crime. It should be a lesser offence not as a principal. It should be a crime to fail to assist anyone who is in immediate danger of death or serious harm where it is reasonable in the circumstances and safe to do so.

End Violence Against Children, Peterborough Chapter

Yes, it should be a crime not to prevent or stop a crime or to assist a crime victim when it is safe to do so. This is especially important in cases involving children. Children need our assistance as they are very vulnerable.

The following are reasonable steps that would prevent or stop the habitual offender or re-offender: notification, which would make the public aware when habitual child sex offenders are released back into society; an assault on child statute must be added to the *Criminal Code* as children are virtually defenceless. Sections 155, 152, 145(3) should all be treated as serious offences. Section 75 should be amended to state that offenders should serve their full sentence without parole.

In addition: habitual child sex offenders should only be able to change their name if they retain their old name and join it to the new name with a hyphen; convicted child sex offenders should pay the state for the treatment of the child; if there is more than one victim and many various charges per child, the offender should be charged on each and every count; all convicted abusers should receive mandatory treatment; the most dangerous pedophiles should remain in custody under the *Mental Health Act*.

Church Council on Justice and Corrections

On moral grounds, assisting victims as well as assisting in the solving of crimes is clearly desirable. But to turn moral responsibilities into criminal obligations is a step we would rather not take in any general way. What if someone considers abortion a crime (even if it is not legally defined as such)? Would it not be recklessness to try and assist the victim (unborn child)?

FEDERAL/PROVINCIAL GOVERNMENTS

Canadian Heritage

It should be a crime to fail to take reasonable steps to prevent or stop a crime or to assist a crime victim when it is safe to do so. There will be problems deciding who determines "when it was safe." If it becomes criminally required to intervene, people may become less observant of their surroundings in order to avoid liability. Yet, the Department sees a societal responsibility and does not feel that law enforcement should be left to enforcement officers alone. Perhaps encourage involvement through a public education campaign by educating Canadians on the new requirements of a revised Code.

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Health Canada

Yes - especially in cases of child abuse and child sexual assault. Members of society have responsibility for helping and protecting the vulnerable. Parents who ignore abuse or practice "wilful blindness" should be held accountable - such a parent could be considered an accomplice to the criminal act. This would also be consistent with the tenets of the *Convention on the Rights of the Child*. Such procedures would have to be accompanied by necessary social programs. *Perhaps a definition of the word "safe" should be included in the Code to provide guidelines and clarity concerning what is deemed to be safe.

Human Resources Development

s. 21(1)(a) & (b)

ACADEMICS

Law professor, University of Western Ontario

We should not provide for this kind of situation. I am concerned that it will lead to unwise intervention in potentially dangerous situations - particularly in coming to the aid of a victim of crime. The proposal that strangers should be under a duty to intervene to prevent a child's drowning or to call for help when they see a fire, has greater merit. However, in practice it is going to be difficult to identify which bystanders are deserving of prosecution. On the contrary, vigilantism is a problem and we should not be doing anything to encourage it - an argument can be made that the new proposals may have that effect.

QUESTION 3 — CORPORATE LIABILITY

Should corporate criminal liability be extended so that a corporation would be guilty of a crime if its representatives' acts, taken together, are a crime (even if no one has committed a crime individually)?

If so, should the liability be based on "corporate culture"?

Should corporate criminal liability also apply to unincorporated groups and organizations, such as partnerships, trade unions, community organizations, Indian bands, and churches?

GENERAL PUBLIC

North Vancouver

Yes - corporate criminal liability should be extended, with the proviso that a full examination of the "corporate culture" would be used in determining the sentence. Liability should extend to all groups, including the so-called environmental ones.

Havelock

Yes, criminal liability should be extended to include the acts of corporations' representatives. It should only be based on corporate culture if that culture can be substantiated as corporate policy, whether written down or just assumed as common practice. It should also apply to unincorporated groups, but only if there is broad flexibility in determining liability, taking into account the organizational structure, intent, policy, constitution, etc. and taking into account whether the intent was to serve a greater common good.

Guelph

Corporate liability should be extended in order to make corporations responsible for their representatives' actions. "It's called taking responsibility." The liability could be based on corporate culture and this type of liability should also extend to unincorporated groups.

Lakefield (8 person response)

Corporate liability should be expanded to include acts of representatives. With regard to corporate culture, some of the members of this group found it difficult to define corporate culture, while some defined it as the honesty, ethics, and morals of the governing body of a corporation. Half of this group of eight agreed that this corporate liability should be extended to encompass unincorporated groups, while the other half disagreed.

Penticton BC

Pleased to see proposed changes to the *Criminal Code* which would make it easier to prosecute corporations for fraudulent behaviour. Corporate executives who are responsible for costly corporate disasters (ie. floundering Trust Companies) should be held accountable. Should not be able to seek protection through limited liability.

Saskatoon

Corporate criminal liability should be extended. However, the inclusion of political culture as a determining factor would not be wise (perhaps this could be determined when looking at actions of individual representatives). The liability should not be automatically extended to all non-corporate groups.

Victoria BC

Corporate liability should be extended. Easy to determine when the actions of specific representatives are deemed to be incriminating. The question of the mental element is more difficult. It is very difficult to determine the "mental element" to the corporate entity. Not always easy to identify a managerial class with a single "directing mind." Corporate culture is a nebulous term which is not a monolith: workers and managers often see corporate culture in very different ways. If developed, the same rules for corporate liability should apply to unincorporated groups, provided they are legally recognized entities and their punishment is limited to a monetary penalty.

Peterborough

Corporations and other organizations should be exposed to criminal liability.

Oshawa

Corporate liability should be extended, should be based on assessments of corporate culture, and liability should extend to unincorporated groups as well.

Hamilton

I believe that corporations and unincorporated groups should be subject to criminal liability.

Guelph

The ideas proposed in the questions are too broad. How can conclusions be drawn from elusive concepts like "corporate culture?" Proposal seems to lower the standard of "intent" by holding a corporation responsible for criminal liability without actually identifying specific culpable actions of its representatives.

Oshawa

Corporate criminal liability should be extended and also include other organizations. Culpability should not however be based on such an ambiguous concept like corporate culture. Unless one has worked in a corporation it is near impossible to determine what the actual corporate culture is like.

(south ON)

Corporate criminal liability should be extended and include judgements of corporate culture. It should also include unincorporated groups - in this respondent's view, laws must be applied without exception if they are to be fair and effective.

Puslinch ON

Corporate criminal liability must be extended. Corporate culture must encourage and reward all employees for obeying not only the letter of the law, but the spirit of the law. Unincorporated groups must also encourage and reward all members for obeying not only the letter of the law, but the spirit of the law. Unincorporated groups must also encourage and reward all members for obeying the letter and spirit of the law. This should apply to all groups mentioned in the question and any analogous groups.

Peterborough

Corporate criminal liability should be extended so that a corporation would be guilty based on "corporate culture." It should also apply to unincorporated groups and organizations.

Eagle Creek BC

Corporate criminal liability must be extended, both to corporations and other unincorporated groups.

BC

Favours extension of corporate criminal liability, and believes it should be based on corporate culture if no better definition can be found. It should also extend to unincorporated groups -- if the *Criminal Code* is to represent us all fairly no one group should be exempt from its intentions and penalties.

Oshawa

Yes - people on the job must be held responsible for criminal activity. Only grey area would be how to determine how responsible individual employees would be for exposing criminal activity if they recognized it as such. Corporate liability should apply to all organizations.

Birmingham, UK

(a very good letter, worth viewing in its entirety)

Corporate criminal liability as developed by the common law operates under the doctrine of the identity theory (as developed in Britain, *Tesco Supermarkets Ltd. v. Natrass* [1972] AC 153 and in *Canadian Dredge and Dock Co. Ltd. et al v. The Queen* [1985] 19 C.C.C. (3d)). The United States operates on a system of vicarious liability and aggregation (an expansive approach to liability). This expansive approach is countered by the defence available to the corporation that the employee's actions fell outside the scope of employment. The corporation can defend itself by showing that

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the employee acted for personal gain and contrary to the corporation's interest and that the employee retained the fruits of the wrongdoing.

The Dutch also allow for criminal liability, and their system does allow for aggregation with some limitations. The employee's act can only be regarded as the employer's if: a) it was within the defendant's power to determine whether the employee acted in this way and b) the employee's act belonged to a category of acts "accepted" by the firm as being in the course of normal business operations.

Aggregation or some theory thereof does seem tempting as industry and technology progress to new frontiers. There must be a system to prevent corporate entities from evading the control of the criminal law. But aggregation theory does have problems: "while it correctly recognizes that the harm produced by a corporation can involve the combined activities of a number of persons, it fails to specify what it is that unifies those activities so as to justify attributing responsibility to the corporation. The idea of the "directing mind" works precisely because it analogies corporate with individual human activity. But if that analogy is rejected, then it is not clear what unifies aggregated actions to make them the actions of a company."

There must be a balance struck between trying to make corporations culpable for their actions and open-ended criminal vicarious liability. The theory of aggregation is open to the problem of having a vindictive employee, determined to commit a crime, jeopardizing the moral reputation of the company if it were liable under the principle of aggregation.

Kingston ON

(great letter - worth viewing in its entirety)

Responsibility is hard to determine when dealing with corporate criminal liability. The research holds that responsibility is a highly complex process in hierarchies, because the processes operating in hierarchies act to constrain the free will - and thus the moral responsibility - of employees. Ethical dilemmas dealing with individuals acting alone have a strong component of independent action against society; ethical dilemmas dealing with individuals acting in an organizational context, however, have a strong component of obedience to standards, and these are crimes not of deviance but of compliance. Major problem is that in many corporate crimes intentionality is unclear. A superior can often rightfully claim to be unaware of the probable consequences of following his or her decisions. Organizational structures also pose difficulties for determination of risk: there are inherent limitations in the informational-processing abilities of organizational members. People have to make risky decisions, under uncertain circumstances. Uncertainty and limitations in information processing abilities constrain people's abilities to take account of every decision-making contingency. In a competitive organizational structure, actors are often guided by their own opportunistic goals.

There are also concerns about the proposals to extend liability to the corporation itself. It seems somewhat problematic that a corporation could be charged with an offence even though no single employee was guilty of breaking any law. Will the extension of criminal liability act as a deterrent? People in corporations know the likelihood of being caught in a criminal act is very low and the penalties are minimal.

The concept of corporate culture is also problematic. We have to distinguish between the notion of corporate culture and that of work climate. Academically speaking, climate generally refers to the norms guiding behaviour in an organizational structure. Corporate culture is more all-encompassing, and there is no consensually accepted definition of this concept.

CORPORATIONS/BUSINESS GROUPS

The responses from this category to this question are detailed and carefully reasoned.

The Chamber of Commerce of Kitchener and Waterloo, Terry Flynn, President and Ed Lemont, Chair, Federal & Provincial Affairs Cmtee

We emphasize our serious concerns that "corporate culture" might be considered or adopted in any future legislation as the basis for corporate liability under the *Criminal Code*. The objects of the reform proposals are to make the law more complete and understandable to Canadians, reflect modern Canadian social values, and uphold the respect, commitment and confidence of Canadians. We believe that the "corporate culture" model is inappropriate and inconsistent with these goals. We oppose its adoption as the basis for extending criminal liability in Canada. Such an approach would foster a constant state of uncertainty as to whether or not a corporation is committing crimes. Unlike individuals, who can determine what is a crime, corporations could be deemed criminally liable whenever their corporate culture is inadequate and fails to prevent an offence. When read in tandem with the broad definition of "corporations" in the proposal, criminal liability might be extended even to business relationships which could not otherwise be characterized as possessing a corporate culture. Similarly, for crimes with a fault requirement of intent or recklessness, the "corporate culture" model would allow a finding that a corporation had committed a crime despite a lack of knowledge of what they were doing or risking. We find it offensive to the basic principles of the Canadian justice system that criminal liability be imposed on the basis of a substitute, lesser than constitutionally required, mens rea.

Chemical company, General Counsel & Corporate Secretary

For most of its history the common law required that, in order to be convicted of a criminal offence, a person must have had the requisite state of mind, known as mens rea. As a consequence of the need to demonstrate the requisite state of mind, courts developed the identification doctrine to apply to corporations which are prosecuted for

the commission of criminal offences. Under this doctrine a corporation may be convicted of a criminal offence requiring mens rea if its "directing mind" can be shown to have formulated the requisite intent. For practical purposes the directing mind of the corporation is generally assumed to be resident in the directors and/or senior management of the company. (Description of *Canadian Dredge and Dock Co.*). It hardly needs emphasizing that to be found guilty of committing a criminal offence is to experience one of society's gravest embarrassments. The penalties associated with a conviction can be severe in terms of loss of freedom and/or forfeiture of property. It is for these reasons that courts have been historically circumspect in their approach to accused persons and have developed systematic, logical rules to safeguard rights of the accused, whether an individual or corporation. Until recent times, criminal offences were defined by "bright line" rules. This principle of certainty or expectability is central to the rule of law in a civilized society. Also, there was no place in the criminal law for vicarious liability; the criminal law took aim at personal conduct. Under the regime described it was rare, though certainly not uncommon, for a corporation to be found guilty of a criminal offence. In certain circles, however, principally the Academy, it is evidently a national scandal that there has not been a greater number of corporate convictions since, in such circles, it is an apodeictic truth that profit-oriented corporations are inherently criminal. (Refers to a *Law Times* article by David L. Lewis to the effect that crime is inherent and integral to the corporate enterprise). In the last several decades, a remarkable erosion of venerable substantive and procedural principles and protections which had taken centuries to establish has occurred in relation to corporations. Among these are: mens rea as a prerequisite to criminal sanction; the rule against retroactive liability; rules against self-incrimination; burden of proof on the prosecution; sanctity of the corporate veil; sanctions for misfeasance but not for non-feasance. This spirit appears to animate the consultation documents. The provision described on p. 26 of the technical paper is breathtaking in its vagueness. (Quotes an article by U.S. criminal lawyer Stanley S. Arkin) "U.S. corporations are increasingly the victims of zealous prosecutors who are using vague federal statutes to transform civil regulations into criminal law". The consequences of the proposed changes to corporate criminal liability would be to distort further the criminal law completing a process which has been unfortunately proceeding for several decades.

Oil company, Assistant General Counsel, Corporate

We wish to express our concern over the proposed expansion of corporate liability. These changes have not received the attention that they should. In an attempt to solve what appears to be a largely academic concern, as opposed to any readily identifiable need, the proposals have the potential to significantly expand corporate liability in a fundamentally unjust way. This is not an issue of crimes being committed for which no one is responsible. The individuals who commit crimes are responsible and can be fined or sent to jail. Corporations are currently liable for absolute offences and strict liability offences. Moreover, corporations are liable in mens rea offences where the offence is committed by an officer or manager, if the mind of the manager is

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identified with the corporation (description of *Canadian Dredge* case follows). The proposals extend liability far too broadly. The concept of corporate culture is unbelievably vague, not appropriate to mens rea offences, and adequately covered by due diligence requirements of strict liability offences. Even if the concept of corporate culture is not used, s. 22 of the draft proposal could make a corporation liable for the criminal acts of any employee. A small business person will be liable for the acts of his or her employee if he or she incorporates but not if there is a sole proprietorship. Corporations could be punished in instances where there is neither moral turpitude nor negligence. No public purpose is served by punishing the shareholders where the corporate governing body has been guilty of no wrongful act.

Part 1: this question is circular in nature as it assumes a crime where none would otherwise exist. The elements of a crime cannot be distributed in bits and pieces and still remain a mens rea crime; the answer is no.

Part 2: the concept of corporate culture is vague and subjective; it may have some value in a sociology class, it should not be used in criminal legislation.

Part 3: if groups are going to be held liable for the criminal activity of their members, it should not be limited to corporations and should include political parties.

Telecommunications company, VP, Legal & Corporate Affairs

At present the *Criminal Code* allows corporations to be prosecuted for crimes. However, the *Criminal Code* offences require that people commit those crimes. The Code does not explain how the courts should decide when or through which people a corporation commits a crime in that expressed rules of corporate liability are not at present in the Code. To deal with this legislative vacuum, courts have adopted the "identification" theory to decide when a corporation commits a crime. This theory has been criticized because of its limitation. In particular, for a corporation to commit a crime, a person must have committed the crime. Some have argued that this is especially restrictive in situations where a number of people have done things on behalf of the corporation and the sum total of their actions constitutes a crime. As a result, the paper proposes what the respondent calls the Group theory.

It would appear that the introduction of the Group theory may be in direct conflict with the principles of individual responsibility forming the basis of corporate law principles such as directors' and officers' indemnification and insurance, as well as the trends being established in various provincial regulatory offences. It is submitted that the Group theory may play havoc with the sense of personal responsibility established in provincial regulatory offences pertaining to the environment. Specifically, the Group theory may encourage those individuals in charge in a corporation to close their eyes and let their subordinates, as a group, commit the illegal act. In many such instances the corporation, as opposed to the individual in charge, would be held responsible. It can be argued that it is the very introduction of

the Group theory which may loosen the legal responsibility of officers and directors. It would do this by allowing them to be unaware of the acts of their subordinates, necessitating the introduction of the "corporate culture" theory into law since the latter theory would aim to address the negative corporate culture that the Group theory might cultivate.

Regarding the effect of the proposed amendments on the principles of directors' and officers' liability and insurance, it should be noted that in areas of negligence or criminal negligence where the Group theory could apply such that there would be no need to establish the mens rea of one specific individual, the notion of individual responsibility which forms the basis of directors' and officers' liability would be lessened. Overall, it appears that the introduction of the Group theory and the erosion such introduction may have on individual responsibility, may serve to place a greater financial burden related to illegal acts upon the shareholders of a corporation, instead of upon the individuals in charge of the corporation who actually committed the act in question.

If the introduction of the Group theory has the opposite effect and there are more actions against directors and officers as opposed to the corporation, then the threat of liability from the introduction of such vague legislative provisions could result in the resignation of current directors and officers who would be unwilling to expose themselves personally to financial or penal consequences as a result of the actions of corporate employees which may be beyond their control or sphere of influence. Instead, the Minister should consider following the *B.C. Company Act*, and disqualify persons from becoming corporate directors if they have been convicted of certain crimes; or, providing certain tax incentives to corporations or directors and officers for behaviour which reflects a predetermined public good; or, enacting express criminal provisions within specific pieces of legislation where certain actions are deemed to be necessary and desirable public goods.

The "corporate culture" theory being considered has not yet been introduced into law in any other country; as a result, thought must be given to whether we want to encumber Canadian corporations with such vague legislation when corporations in no other country are subject to the same burden.

The proposals could extend to the activities of Canadian corporations or their subsidiaries outside Canada. If the proposed amendments are intended to function like the U.S. *Foreign Corrupt Practices Act*, then it would be preferable to amend specific pieces of legislation rather than introduce the general Group or "corporate culture" theories.

Under this type of regime, directors and officers who choose to stay on or accept corporate appointments may become overly cautious and conservative in their

direction of the business with the potential result that the company may become less competitive.

However, if the Minister is determined to move forward with the above regime, there are many questions to be asked. For example: how would the intention of a corporation be defined? How does one evaluate, using objective standards, the "corporate culture" as an "intention" on the part of the corporation? What further steps are required of a corporation to show that it has created an acceptable "corporate culture"? To what degree must there be involvement on the part of a senior representative? Who is captured by the term "senior representative"? To what extent must a "directing mind" be aware of the activities and to what degree of specificity? Will such awareness be measured by subject standards or objective ones? Another issue is that the term "corporate culture" is not defined in the paper.

The following two elements in particular must underpin the introduction of any new legislative provisions regarding corporate liability in the *Criminal Code*: the language of any new provisions must be clear enough that directors and officers are able to understand the duty or standard that they must meet in order to be able to adequately protect themselves from liability over actions which they may have no control over; and, to the extent possible, any offence must be a strict liability offence thereby allowing directors and officers a due diligence defence.

WOMEN'S GROUPS

Halton Women's Place

Would support this idea except that one could have a group that participated in criminal activity while engaged in agency approved activity (e.g. a protest march) but got carried away and cause damage to property.

Catholic Women's League of Canada

We agree that a "corporation could commit a crime through acts, taken together, of any number of its representatives." Those in charge must be held accountable for their actions and those of their employees. One of the penalties for this type of crime should be large financial penalties, coupled with the officers and management of the entity being made to serve the time should the corporation be found guilty of any crime. This will ensure greater supervision of their employees and create greater accountability. An excuse of sloppy "corporate culture" policies must never be permitted. Corporate criminal liability should not be extended to include "not for profit" unincorporated groups or corporations. The directors of such groups are volunteers, and if they were to be held accountable, such organizations might cease to exist.

The Provincial Advisory Council on the Status of Women, Newfoundland and Labrador
We agree that corporate criminal liability should be extended so that a corporation would be guilty of a crime if the acts of its representatives, taken together, are a crime (even if no one has committed a crime individually). We believe that each corporation has its own corporate culture which sets norms for behaviour, and these cultures can encourage negative behaviours such as harassment.

COMMUNITY SERVICE GROUPS

Democracy Watch (lengthy response, including a copy of a discussion paper listing proposed mechanisms which could be used to monitor, discourage, and punish corporate crime).

Democracy Watch "urges the government to extend corporate criminal liability so that a corporation would be guilty of a crime if its representatives' acts, taken together, are a crime (even if no one has committed a crime individually)."

Democracy Watch has a specific proposal to resolve the dilemma over corporate criminal liability: "we propose that the *Criminal Code* be amended so that it would be a crime for a corporation to have a standard operating procedure (SOP) that allows employees to execute their responsibilities in an illegal manner without senior executives (ie. persons who are part of the directing mind of the corporation) being notified. This amendment would encourage a corporation to establish an SOP that requires notification of senior executives, thereby making it easier to hold senior executives liable when a crime is committed. If the corporation does not establish the SOP, the courts would have evidentiary grounds for holding the corporation liable."

In their view, this standard should be applied as broadly as possible "so that actors cannot pick and choose among institutional structures seeking a specific one which will allow them to engage in irresponsible decision-making."

As present, Democracy Watch feels that Canada's existing corporate structures allow people to use the "veil" of corporate citizenship to avoid the responsibilities faced by individual Canadians.

Church Council on Justice and Corrections

Concerned about the limitations surrounding the use of corporate culture. However, in their view, it does not seem fair that corporate bodies should be able to claim rights, such as limits on search and seizure intended for persons, without having to face personal liabilities. CAUSATION - causality is a good scientific concept in terms of the behaviour of objects under specified conditions over which the object has no control. Much harder to define with regard to corporations.

Union of British Columbia Municipalities

The issue of corporate liability is a major concern. Local governments are faced with an increasing number of liability cases in an effort to make them responsible for activities which go well beyond their intended role. We do not support the suggestion in the paper that the liability of corporate executives be expanded. We do not believe that the liability of elected officials, in the case of local government a mayor or a councillor, should be expanded to cover a broader range of activities undertaken by local government employees. We suggest that local government be recognized as a level of government under the *Criminal Code* in the same manner as the family and provincial governments are and that its elected officials and others be exempt from criminal charges.

PROFESSIONAL ASSOCIATIONS

Osler, Hoskin & Harcourt

This law firm prepared a general letter which outlined the issues raised in the consultation paper on corporate criminal liability. The paper was prepared for the firm's corporate clients in order to inform them of the government's intentions and to give them an opportunity to respond.

The letter spoke at length about the issue of mens rea and how it relates to criminal liability. It emphasized the distinction between primary and vicarious liability and suggested that the adoption of a theory of vicarious liability could result in "corporations being held criminally liable for the acts of every employee rather than only those employees who are found to be directing minds of the corporation."

A major issue was the degree of involvement required for a directing mind to be implicated in a criminal act. The letter pointed out how the level of involvement "has been watered down to mere awareness instead of active participation" over time. The following questions were raised: "To what extent must a directing mind be aware of the activities and to what degree of specificity? Will such awareness be measured by subjective standards (ie. what the directing mind actually knew) or objective standards (ie. what a reasonable person would have known in the circumstances)? To what extent would management be required to know the activities of junior employees?"

The firm cautioned that "the effective delegation of business activities and the efficiency of the corporation itself could be compromised if too onerous a burden is imposed on management personnel."

The letter also pointed out that "corporate culture" is a highly problematic concept. In their view, it is not clear from the consultation paper "what course of conduct would constitute the creation of a climate or environment that encouraged disobedience of legal requirements."

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In their view, corporate culture would introduce a great deal of uncertainty for corporations. As well, they also believe "it is likely to be difficult, under an approach to criminal liability that focuses on corporate culture, to identify the levels and individuals within the corporation to which mens rea is attributed. The gap is significant because many criminal defences are based on a lack of mens rea."

The Institute of Chartered Secretaries and Administrators

If a corporation can be prosecuted and convicted on the strength of a poor "corporate culture", then the Code should establish presumptions or safe harbours which will encourage, protect and comfort those corporations wishing to establish and foster a "good citizen" type of corporate culture.

For instance, if a corporation establishes a code of proper corporate conduct and takes regular and ongoing steps to ensure that its employees, including its senior management, are aware of the code and are diligent in its observance, then such corporation should enjoy the presumption that it had a good "corporate culture". If such a corporation is nevertheless convicted under the Code, then the creation and maintenance of a proper code of corporate conduct should serve as a mitigating factor in sentencing.

Next, we wish to comment on the definition of corporation. We believe any such corporation should have a formal and hierarchical structure, including an established procedure to elect directors and appoint officers whose duties and responsibilities are defined. If such a structure does not exist, as in the case of a partnership or proprietorship, then it should be impossible for a court to find an imputed or deemed knowledge within the directing mind of the organization, through its corporate culture or otherwise. That is, mens rea could only be attributed to such an organization through the specific knowledge of a partner or the proprietor, or through the wilful neglect and reckless disregard of such persons concerning such knowledge.

JUDICIARY

[s. 21(1)(b)]

POLICE

RCMP

Corporate liability should be extended. Liability based on corporate culture would bring uncertainty to the law and would be difficult to prove, vague, and at risk to

successful Charter challenge. Extending liability to unincorporated groups, while consistent, would be difficult practically due to new definitions being required.

Metropolitan Toronto Police

a) yes b) unable to answer c) yes. When a corporation or unincorporated group is involved in criminal activity through reckless intent or wilful blindness, it could be classed as a criminal offence. See *R v. Sansregret* (1985) 18 C.C.C. (3d) 223.

FEDERAL/PROVINCIAL GOVERNMENTS

Legal Services, Human Resources Development

s. 21(1)(a) + (b)

Occupational Safety and Health Branch, HRDC

s. 21(1)(a) + (b)

Department of Canadian Heritage

The Department supports Option 2 concerning corporate liability on page 26 of the Detailed Options for Reform and Option 3 pertaining to corporate culture on page 27. As for extending corporate criminal liability to other organizations, the Department feels that this should be left to the common law.

Legal Services, Human Resources Development

s. 21(1)(a) & (b)

...
[

s. 21(1)(a) & (b)

LEGAL ACADEMICS

Law professor, University of Western Ontario

The identification theory is problematic. The suggestion of changing the test to focus on "corporate culture" sounds interesting. However, I am not in a position to comment on the problems of such an approach. I wish the consultation paper had been more specific with regard to corporate culture so that I may have commented more extensively.

QUESTION 4 — CAUSATION

Should behaviour be said to cause a result if it contributes to the result in a more than negligible way? Or

Should behaviour be said to cause a result only if it contributes substantially to the result?

Is it necessary to state that behaviour does not cause a result if a new, intervening cause takes over?

GENERAL PUBLIC

Havelock

Yes - behaviour should be said to cause a result if it in any way, shape, or form contributes to the result in any case.

St. Catherine's

Behaviour should be said to cause a result only if it contributes substantially to the result - if a new, intervening cause takes over they should only be responsible to a lesser degree since they contributed but did not directly cause the results.

Havelock

Argues that behaviour should be said to cause a result if it contributes to the result in a more than negligible way. It should not have to contribute substantially. I believe that the connection between the original and the intervening cause should be retained and treated symbiotically.

Guelph

Behaviour should be said to cause a result if it contributes to the result in a more than negligible way - however, it is necessary to exclude situations where behaviour does not cause a result because of a new, intervening cause.

Lakefield

The present law is satisfactory.

Victoria BC

Agrees with the *Smithers* rule -- differences in the degree of participation can be properly dealt with as a matter of sentencing.

Peterborough

If the victim has special vulnerability the accused's awareness of this weakness should be considered. Total blame should only be assigned if behaviour contributes substantially, and if a new cause takes over this should also be considered.

Oshawa

Behaviour should be said to cause a result if it contributes in a more than negligible way. Does not have to be a substantial contribution nor is the liability limited if there is an intervening cause.

Hamilton

Behaviour should be said to cause a result if it contributes to the result in a more than negligible way. Yes - it is necessary to state that behaviour does not cause a result if new and intervening causes take over.

Guelph

I feel it is an established principle in law that an accused is held accountable for what they can reasonably predict will be the outcome. I do not feel that this standard should be changed. If a "reasonable person" should have seen a particular result, then the accused should be held accountable for their actions.

Oshawa

Behaviour should be said to cause a result if it contributes to the result in a more than negligible way. People must be responsible and accountable for their behaviour. The role of intervening events is best left to judicial discretion in individual cases.

Almonte ON

The initial act must be seen as the factor causing the result. In my opinion, if a person is involved in any violent act against another, the accused is guilty of the more serious crime.

(south ON)

Behaviour should be said to cause a result if it contributes in a more than negligible way - should not be limited only to substantial contributions. Behaviour can still cause a result even if a new, intervening cause takes place.

Puslinch ON

It is necessary to state that behaviour does not cause a result if a new, intervening cause takes over. I support the recommendations of the Canadian Bar Association. It reflects "root cause analysis" and places all fault where it is most deserved.

Peterborough

Behaviour should be said to cause a result if it contributes to the result in a more than negligible way.

Eagle Creek BC

If my actions in any way affect the health of another then I must be accountable regardless of the outcome. If my actions are minor in the overall scheme of events then punishment should follow suit.

BC

Behaviour should be said to cause a result if it contributes to the result in a more than negligible way. With regard to new, intervening causes, a judge can take this into consideration when the facts are presented to him/her.

Oshawa

The accused should be responsible for any action (ie. an attack) regardless of the actual outcome. New causes do not alter the facts of the initial actions.

LEGAL ACADEMICS

Law professor, University of Western Ontario

Cribbin, a recent Ontario C.A. decision suggests that there is little difference between the de minimis and substantial cause tests. However, on balance I prefer the latter because it is more widely used and its meaning is more immediately obvious. I am troubled by s.12.2 of the White Paper which indicates that the present code section (s. 224 et seq) are to be retained. Those sections are very poorly drafted - they are tautologous and vague and for that reason are virtually ignored by the courts. They must be redrafted. I think it would be a mistake to have a new general causation section at the beginning of the Code and to leave to homicide sections unamended: it would be preferable to deal with the issue at the same time. With regard to intervening causes, the basic problem is that there are a multitude of different situations and it is difficult to capture the essence of them in a single phrase. Option 3 (technical paper) is probably as good as we can get.

Parties - The word "abet" should be replaced but it is not clear what should be put in its place. "Encourage" seems a good option as long as it is not interpreted to require that the encouragement had any effect on the other accused's conduct. Supply of materials is sometimes problematic in terms of how specific the knowledge of the supplier must be. Proposed changes re 21(2) have raised a number of problems in the homicide area. The perpetrator is liable for murder and then we get into the liability of the aider under 21(1) or 21(2) (recent SCC decision in *Davy*). There are so many possibilities re both murder and manslaughter for the aider - including the possibility that the perpetrator might be guilty of murder while the aider guilty of manslaughter. I wonder if it is appropriate to deal with this or to do it under the homicide section.

JUDICIARY

[s. 21(1)(b)]

000771

POLICE

RCMP

The common law should be incorporated into the General Part with respect to result and intervening cause.

FEDERAL/PROVINCIAL GOVERNMENTS

Legal Services, Human Resources Development

[s. 21(1)(a) + (b)]

Department of Canadian Heritage

The concept of "contributing" to an offence would appear central to many statutes where a less than one-to-one relationship exists between an action and a result. The Department supports the recommendation that behaviour that contributes "in more than a negligible way" to the result should be said to "cause" the result. This is already a well-established common law principle and would codify current practices. It is felt that to require the behaviour to "contribute substantially" would obviate the principles set out in the *Smithers* decision. Such an approach could then consider the magnitude of contribution and sensitivity as part of the sentencing process.

WOMEN'S GROUPS

Halton Women's Place

Agree that behaviour should be said to cause a result if it contributes to the result in a more than negligible way.

L'Action Ontarienne contre la Violence Faite aux Femmes, Andrée Côté (long and detailed response)

The criminal law must return to stating that a person is taken to have intended the consequences of his acts that could reasonably be expected to follow. This does not mean that the perceptions of the accused must be ignored, but rather that the focus must not be solely on the perceptions of the accused.

Catholic Women's League of Canada

Behaviour should be said to cause a result if it contributes substantially to the result. We do not need to extend already long trials with an argument as to what constitutes more than negligible. Substantially would mean more than the normal or usual. As for the "new intervening cause," that cause must have a greater impact than the original cause in order to allow it to supersede the original act of violence or whatever criminal activity took place. It is our belief that people have to be responsible for the consequences of their actions. People always have a choice and once a choice is made, they are accountable for their actions.

COMMUNITY SERVICE GROUPS

Citizens United for Safety and Justice Society

The accused should be held responsible for the result as long as the accused's behaviour contributes in a "more than negligible way". In the example used for a new intervening cause we suggest that the individual would not have been in an unavoidable traffic accident if he had not been on his way for medical treatment as a result of the first incident. While they may not be directly responsible for the death, there must be some responsibility for the original offence.

II. DEFENCES

QUESTION 5 — AWARENESS OF THE CIRCUMSTANCES

Should the defences set out in the General Part be based on a subjective test, available to an accused person who acted reasonably according to his or her understanding of the circumstances? Or

Should the defences set out in the General Part be based on an objective test, available to an accused person who acted reasonably and whose understanding of the circumstances was that of a reasonable person? Should the law define a reasonable person by looking at an ordinary person or by looking at an ordinary person with the same general characteristics as the accused?

GENERAL PUBLIC

North Vancouver

If it appears to a person on whom an intrusion is being made that it is a case of kill or be killed, then their actions would be reasonable and a plea of self-defense legitimate. In the case of an intrusion on a woman, where it was a case of kill or be raped, the same defence would be applicable. I do not think killing in this case should be considered defence of property as in Question 6.

St. Catherine's

A defence should be available to the accused person who acted reasonably according to his or her understanding of the circumstances. ie. during a break-in during the middle of the night, one would have to (for the safety of yourself and your family) presume there was danger and act accordingly.

Vancouver

Law should define "reasonable person" by looking at an ordinary person,

Havelock

The defences set out in the general part should not be based on a subjective understanding of reasonableness under given circumstances. It should be based on an objective test, although I am concerned that, under some circumstances, weight should be given to subjective perceptions, as described in the first part of question five. Furthermore, I suggest that the definition of an ordinary person have the same characteristics as the accused. In other words, the same standard ought to be applied, unless the accused is a recidivist.

Windsor

If defence is based on the accused's subjective view of a situation, there exists serious potential for abuse. For example, in rape cases the accused may argue more frequently that, in their subjective view, the victim has consented. To enshrine such a defence would emphasize the accused's perception of events at the expense of the victim - provide another means for the offender to escape liability.

Lakefield

The defences set out in the General Part should be based on an objective assessment of reasonableness, and not just the accused's subjective assessment.

Windsor

Should not be based on subjective understandings. If the accused person's actions were based on an unreasonable understanding of the circumstances this line of defence would excuse a person for their crime.

Saskatoon

Those hearing specific cases must use their common sense and life experience to judge with. An astute questioner should be able to soon determine the level of the accused's understanding. To write such explicit and detailed differences into law only provides for more, not less, ambiguity and cause for legal objection.

Victoria BC

The first option is appropriate. While it may appear to allow the rogue to swear to believing whatever suits his defence, the fact-finding process provides some protection for the public. For the greater the divergence between the accused's professed belief about the circumstances and what a reasonable person would have understood with respect there to, the less likely it is that the finder of fact will accept it as creating even a reasonable doubt. However, should only be a general rule which is separate from situations where the *Criminal Code* imposes an objective standard of liability.

Peterborough

A person's understanding of a situation is important to determining their innocence or guilt. ie. a mentally challenged individual should have their infirmities considered in sentencing.

Oshawa

Should be based on a subjective analysis of the situation. Respondent feels this should be the case when one is called upon to protect one's property, as is suggested in #6.

Hamilton

Defence should be based on a subjective test set out in the General Part.

Guelph

Should rely on the standard of the reasonable person. The reasonable person standard should be defined according to the expectations of Canadian society and not be subject to the characteristics of an accused. It is a social responsibility not a standard that can be changed by an accused who happens to be on trial. If an accused's actions are limited to their understanding of the circumstances then this understanding must pass the standard of the reasonable person.

Oshawa

An objective test, based on what a reasonable person would have done, should be used. General characteristics of the accused should not be considered. We need a Canadian standard, devoid of specific cultural and religious factors. Such factors can be considered during sentencing.

(south ON)

Defences should be based on an objective test of what would have been reasonable under the circumstances for an ordinary person.

Puslinch ON

Agrees with the position of the White Paper, that the law should take the subjective position of the accused into consideration.

Beaver Creek BC

No subjective tests at all. An ordinary person will suffice for the law to study.

BC

A person must be judged on his personal understanding of the situation. The judge can decide whether the accused is a "reasonable person" early on in the trial by receiving testimony on his general social behaviour and understanding, and proceed with the trial on that basis throughout the whole trial. If he is deemed "unreasonable" early on in the trial, then the judge will have to take that fact into consideration through the ensuing evidence also. If the accused is "bereft of reason" then that is an insanity defence.

Oshawa

The defences set out in the General Part should be based on a subjective test, available to the accused person who acted reasonably according to his or her understanding of the circumstances.

WOMEN'S GROUPS

Halton Women's Place

The defence should be based on a subjective test, available to an accused person who acted reasonably according to his or her own understanding of the circumstances.

L'Action Ontarienne contre la Violence Faite aux Femmes, Andrée Côté (long and detailed response)

The reasonable person should be defined according to the Supreme Court of Canada decision in Lavallée. That is, both the context of the events and their objective reality must be taken into account.

Catholic Women's League of Canada

Defences should be set out, based on an objective test, and the definition of a "reasonable person" should be set out in the Code. To allow a defence based on the accused's understanding of the circumstances would extend trials unreasonably. It is our fear that this action could also lead to further ethnic division within the country and bring further problems of racism and hatreds than already exist in Canada. Natives with status should be able to be dealt with under native laws, but only in those areas where native councils have undertaken this type of responsibility. Not all native councils are at this stage of development; therefore some provision must be made where natives would not be allowed to "fall between the cracks" should their legal systems not be in place.

COMMUNITY SERVICE GROUPS

Citizens United for Safety and Justice Society

To base a defence on the accused person's subjective view of the circumstances would encourage serious abuse.

Church Council on Justice and Corrections

Favours the use of a subjective approach. "Subjective" and "objective" are not a question of mind vs. fact but a matter of perception of a given set of "facts" by a particular person.

FEDERAL/PROVINCIAL GOVERNMENTS

Department of Canadian Heritage

The Department is opposed to using a subjective test with respect to the availability of the defences set out in the Code. It supports the use of an objective test, available to an accused person who acted reasonably and whose understanding of the circumstances was that of a reasonable person, with the same general characteristics

as the accused. Consideration should, however, be given to the point made in the General Comments section at the beginning of the document concerning the cultural diversity issue. Provisions should be made where by sensitivity to one's culture or religion should be taken into account as mitigating factors in sentencing.

Legal Services, Human Resources Development

s. 21(1)(a) + (b)

JUDICIARY

s. 21(1)(b)

POLICE

RCMP

Defences should be based on an objective standard and the reasonable person should remain an ordinary one. Personal characteristics can come into play during sentencing.

LEGAL ACADEMICS

Law professor, University of Western Ontario

Prefers the option outlined in 2(b) on page 15 of the Technical Paper. The word "deliberately" should be inserted before the words "to avoid" in order to make the wilful aspect of "wilful blindness" more clear.

With changes, the resulting provision should read as follows: "to be aware that there is a serious risk that the circumstance exists and deliberately to avoid taking steps to confirm whether that circumstance exists."

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Defences - subjective element - this should be addressed section by section rather than by a general provision.

000779

QUESTION 6 — THE USE OF FORCE TO PROTECT PROPERTY

Should an upper limit be placed on the use of force to protect property? Should the defence be allowed when an accused person intended to cause death or serious bodily harm or when the accused person intentionally exposed another to a significant risk of death or serious bodily harm? Or

In appropriate circumstances, instead of being acquitted of murder, should an accused be convicted of manslaughter when deadly force is used to protect property?

GENERAL PUBLIC

Havelock

Any reformed law should give individuals more control to protect their personal property. This proposal appears to be a way of protecting the true criminals and taking away rights from the innocent victims. If criminals thought they might be seriously hurt by committing a crime, they might be deterred.

North Vancouver

There should be no upper limit on the use of force since I see no way in which the defender can tell when the force he is using to defend his property is sufficient to stop the intrusion. (setting a deliberate booby trap designed to kill would be going too far).

St. Catherine's

No - an upper limit should not be placed on the use of force to protect property. When defending one's property, there are instances when one would have no way of knowing the extent to which the perpetrator of the crime may go to and therefore property owners should be allowed to use whatever force deemed necessary.

Havelock

In general, an upper limit should be defined. What if, for example, there is a strong potential for violence or threat to one's life, or to one's family? Exceptional context and circumstances have to be considered. I would support broad discretionary power by the judiciary ie. not every circumstance should lead to a mandatory charge of manslaughter.

Guelph

There should be an upper limit placed on use of force to protect property. The defence should be allowed in instances where the accused intended to cause death or serious bodily harm or exposed another to these risks. The use of deadly force to protect property should not result in a conviction of manslaughter rather than murder.

Windsor

Respondent disagrees with restrictions on use of force to protect property. Any type of limitation fails to recognize that a person protecting property is also likely defending himself/herself as well as their family. An owner has no reasonable idea of what an intruder's intentions are - moreover, it is the offender who has created the situation by threatening the owner's property. If anything, the General Part should emphasize that an owner has a legitimate right to take all reasonable steps to defend himself/herself and their family.

Lakefield

No limit on the use of force.

Windsor

A person should be allowed to use force to protect their property. Human life should always be more valuable than property. Force intended to cause death or serious harm should not be permitted. The only excuse for taking another life is self-defence.

Saskatoon

Property owners have a right to defend or protect their property. Intentional, wilful harm done in the process of protection must also be prosecuted in relation to the original perpetrator's action and result.

Victoria BC

Very few limits on an individual's right to protect property. The limit to be imposed is that the force used should be no greater than reasonably necessary in the circumstances; it should be based on some consideration of how compelling the reasons were for protecting the property.

Peterborough

In protecting property the significant risk of death or bodily harm should be relevant in considering how much force was used.

Oshawa

There should be no upper limit in place.

Hamilton

No upper limit should be set on the use of force to protect property or life. You should not be contemplating prosecuting someone who was a victim of crime or thought he was going to be victimized. A Canadian should be able to take the measures they see fit to protect their lives, their families' lives and their property. You should not be convicted of manslaughter or murder when deadly force is used to protect property or lives.

000781

Guelph

The present legislation and case law address this issue in an accurate and fair manner. I do not feel that this topic should be included in the amendments to the *Criminal Code*.

Oshawa

No upper limit should be placed on the use of force to protect property. The lack of consequences for invasion of property has resulted in a general feeling among the criminal element that only "murder" is a serious crime.

Almonte ON

If the only thing in jeopardy is the property, then there should be an upper limit established and implemented. Human life should always be more important than property. "Should be methods in place so the police can react prior to crimes being committed. Community policing should be viewed as an option."

(south ON)

Defence should be allowed - but accused should still be convicted of manslaughter if they use deadly force in an effort to protect their property.

Puslinch ON

No upper limit should be placed on the use of force to protect property. This defence is justified even when the accused person intended to cause death or serious bodily harm. No - the accused should not be convicted of manslaughter. Property offences are not taken seriously enough - many go uninvestigated. The only real deterrent against property crimes is the fear that an owner will use force to defend their property. The right to own property is a central tenet of our Canadian value system. Criminals must be held responsible for their actions in this area.

Peterborough

In appropriate circumstances, instead of being acquitted of murder, an accused should be convicted of manslaughter when deadly force is used to protect property.

Beaver Creek BC

No upper limit on the protection of property. Allows people who live far from enforcement officers to have a greater sense of security. I would agree to a lesser charge of manslaughter with the caution that every avenue of guilt or innocence be thoroughly explored.

BC

No upper limit should be placed on defence of property. If deadly force is required to protect property, and the perpetrator is an adult and aware of the consequences, he is responsible for his own dangerous conduct. He has had the option of withdrawing from the encroachment at any time previous to the offence.

Oshawa

Human relations are more important than property considerations. Protection of property can never be a defence unless not defending the property may result in harm to some other person at that time. A person can be expected to return reasonable force if during a property invasion they are threatened or accosted. There should be an upper limit, to be adjudicated by individual judges. An acquittal for murder in such cases should lead to conviction for manslaughter.

WOMEN'S GROUPS

Halton Women's Place

An upper limit should be placed on the use of force to protect property because life is more valuable than property.

In terms of protecting oneself, self-defence must be considered. Battered Woman Syndrome has often been cited in cases where women have killed their partners. Circumstances and an understanding of the dynamics of women's lives in these situations is necessary to fully appreciate the experiences of women who lived with abusive partners.

Catholic Women's League of Canada

We wonder how an upper limit can be set as each circumstance will be different. It makes sense to us that a person should have the right to "the use of reasonable and proportionate force to protect property based on the circumstances known to the person who defends the property." In this way each case would be judged on its own merits. Depending on circumstances, we recommend that an accused be convicted of manslaughter rather than murder when deadly force is used to protect property.

COMMUNITY SERVICE GROUPS

Citizens United for Safety and Justice Society

When someone invades another's home or premises the intent and actions of the intruder are unknown to the owner. One must act on impulse and the greatest instinct is to protect family and oneself. It is logical to conclude that when a person is protecting their property they are also fearing the worst. It is the perpetrator who has caused the situation.

Parkdale Focus Community

In appropriate circumstances, instead of being acquitted of murder, an accused should be convicted of manslaughter when deadly force is used to protect property.

Although a person has a right to protect property we wish to affirm the importance of

000783

life and bodily safety. If the accused had no fear of personal harm then deadly force should not be condoned in the protection of property.

Church Council on Justice and Corrections

Favours an upper limit - but why limit its scope to defences of property? Why not include police powers, powers of self-defence and force used to discipline and correct children?

FEDERAL/PROVINCIAL GOVERNMENTS

Legal Services, Human Resources Development

[s. 21(1)(a) + (b)]

Department of Canadian Heritage

The Department is of the view that the law should remain flexible and that no upper limit should be set on how much force can be used to protect property. While there is currently no upper limit placed on "peace officers," there remains the test of protecting life to justify lethal force. A similar perspective would be appropriate in protection of property where no threat to life exists. If the force resulted in death, the Department's position is that whenever appropriate the option of a charge of manslaughter as opposed to "murder" should be considered.

JUDICIARY

[s. 21(1)(b)]

POLICE

RCMP

There should be a limit on the use of force to protect property. Human life is always more important than property interests. Today there is no longer a need to defend one's property by using such force. In certain circumstances it may be appropriate to convict an accused of manslaughter.

QUESTION 7 — COMMITTING A CRIMINAL ACT UNDER DURESS

Are there crimes, other than murder, for which the duress defence should not be permitted?

Should a person who, under duress, killed (or seriously injured) someone be able to use the duress defence and be acquitted? Or should they only be able to use duress as a partial defence to reduce the charge from murder to manslaughter?

GENERAL PUBLIC

Havelock

If someone is under true duress, they should be able to protect themselves. Approves of defence of duress because it empowers victims and innocent citizens, not criminals.

St. Catherine's

The duress defence should not be permitted for sexual assault, robbery and assault with a weapon as well as murder.

Havelock

Duress defence should not be applicable for rape, violent robbery, and major assault. The whole idea of duress bothers me for it seems potentially a very large escape hatch. Perhaps under rare circumstances duress may be taken into consideration.

Guelph

There are crimes, other than murder, for which the duress defence should not be permitted. Someone who kills or injures under duress should be able to use the duress defence to be acquitted.

Lakefield

Duress should be admissible for any offence. The exceptions under Section 17 should be eliminated. Duress defence should be available to an accused - but only as a partial defence, reducing the charges from murder to manslaughter.

Windsor

When a person is forced under duress to participate in a crime, the sentence should be lessened to deal with this situation.

Saskatoon

Certainly the defence of duress should not apply to murder, sexual assault and assault with a weapon, but there must be cases where it should be able to be used for robbery (such as the consultation document describes). Duress as a partial defence should also be available.

Hanover ON

There are crimes other than murder for which the duress defence should not be permitted: they include sexual assault, robbery, or assault with a weapon. Please do not change section 17. A person who, under duress, has committed any of the above offences, should not be able to use the duress defence even as a partial defence. We need to show that human life is of great value and people should not be killed or assaulted because of duress.

Victoria BC

An individual should not be allowed to plead duress as a defense to any crime that is likely to result in death or grave danger to the public -- ie. providing terrorists with a nuclear bomb. Duress would no doubt be a mitigating factor in sentencing though. I would favour allowing a plea of duress to result in a charge of murder being reduced to manslaughter, for under the present law if murder is found the court has no discretion as to sentencing.

Peterborough

The duress defence should be permitted in other cases. Whether this defence would lead to acquittal or a reduced sentence would depend on the judge's discretion and the circumstances of the individual case.

Oshawa

There are crimes, other than murder, for which there should be no duress defence. Should not be able to use the duress defence to either seek an acquittal or a reduced sentence.

Hamilton

No other crimes except murder should allow for the duress defence. When duress is used as a defence it should reduce the charge to manslaughter.

Guelph

I feel that the defence of duress should remain unchanged within the *Criminal Code*. It should not be accepted as a general principle for the defence of an accused in all offences.

Oshawa

Duress should be permitted for more than murder as a partial defence. Whether a defence of duress should result in an acquittal should be left to the judge/jury to decide.

(south ON)

There are crimes other than murder for which the duress defence should not be allowed. Duress defence for murder should not lead to an acquittal. They should only be able to reduce the charge from murder to manslaughter.

Puslinch ON

NO - duress should be a full defence for all crimes, including murder in extreme cases. A person should be able to use duress as a partial defence for murder. It could reduce a charge of murder to manslaughter, or perhaps even a complete acquittal.

Peterborough

Duress should be used only as a partial defence to murder.

Beaver Creek BC

A defence of duress could be used if it can be proven such was the case beyond any doubt. This defence should also be available for crimes other than murder. If a person is forced to do something unlawful while under threat to family or self then acquittal should be automatic.

BC

Duress must be a defence against all crimes. Duress should be available as a defence, and if so defended, an accused should be acquitted of the crime.

Oshawa

The duress defense should apply to all cases except murder. It could be used as a partial defence to reduce the charge from murder to manslaughter.

WOMEN'S GROUPS

Halton Women's Place

If one is forced at gunpoint to do something or if one's children's lives are threatened, perhaps duress should be a consideration for a reduced sentence.

Catholic Women's League of Canada

This defence should not be permitted for crimes such as sexual assault, assault, murder, armed robbery and fraud. Duress could be used as a partial defence, but the onus must remain on the accused person to show that the duress was sufficient that he/she in fact did fear for his/her own life. We agree with the Law Reform Commission Report #31 statement on page 35 that "no one may put his own well-being before the life and bodily integrity of another innocent person."

COMMUNITY SERVICE GROUPS

Citizens United for Safety and Justice Society

Again, we visualize great abuse by the use of duress as a defence. In the mentioned case of a bank manager giving information to robbers, we would presume that the

000787

manager would immediately report the incident to police and bank officials so that action could be taken that would prevent the robbery from taking place.

Church Council on Justice and Corrections

It should be part of the determination of the circumstance surrounding the offence and the accused's reaction to it.

Regroupement Québécois des CALACS (in French)

This defence is particularly pertinent to cases of women who lived in a violent relationship with a man. It should be remembered that women who are subjected to serious physical abuse often have nowhere to escape to. This defence should specify that the threats can be directed at a third party, for example a child. We believe this defence ought to be revised in light of the *Lavallée* decision.

FEDERAL/PROVINCIAL GOVERNMENTS

Department of Canadian Heritage

There is support within Canadian Heritage for the recommendation that the "duress" defence be extended so as to apply to all offences except murder. In addition, with respect to the crime of murder, an accused should be allowed to use duress as a partial defence to reduce the charge to manslaughter.

Legal Services, Human Resources Development

[s. 21(1)(a) & (b)]

JUDICIARY

[s. 21(1)(b)]

POLICE

RCMP

Should not be available for murder, sexual assault, robbery and any serious assault. It could be permitted as a partial defence to reduce the original charge. The circumstances and the seriousness of the threat can be considered during sentencing.

QUESTION 8 — ACTING AS AN AUTOMATON

Should the General Part codify the case law to permit an acquittal where the automatism is not caused by mental disorder and to permit a verdict of not criminally responsible on account of mental disorder where that is the cause of the automatism? Or

Should the General Part include a special verdict of not criminally responsible on account of automatism which would allow the court to make such an order (e.g. discharge or custody)?

GENERAL PUBLIC

North Vancouver

Does not accept the suggestion that acts like sleep-walking occur without any recollection at all by the individual in question. Ie. how can you commit an assault or murder without any recollection at all? Respondent would reject any defence based on a claim of automatism.

St. Catherine's

A provision to treat automatism in a manner similar to mental disorder would at least allow the court to recommend confinement and medical treatment. Under no circumstances should the courts be permitted to acquit someone under the defence of automatism.

Vancouver

Supports a special verdict of not criminally responsible on account of automatism - does not support an automatic acquittal.

Havelock

The General Part should include a special verdict of not criminally responsible on account of automatism because this allows for more flexibility, ie. to put a person in custody when he or she may do harm to him or herself; or for treatment/rehabilitation.

Guelph

The General Part should include a special verdict of not criminally responsible on account of automatism.

Windsor

In genuine cases of insane automatism, it may well be possible to allow a defence or a finding of not guilty on the basis of mental disorder. "Sane automatism" or self-induced disorder should not be looked upon as a defence to serious crimes.

Lakefield

The General Part should codify the case law to permit an acquittal where the automatism is not caused by a mental disorder. It should not however include a special verdict of not criminally responsible on account of automatism.

Windsor

Mental illness should not completely exonerate a person from being punished for a violent crime. Sane automatism which is self-inflicted should never be used as a defence for an indictable offence. A person is responsible for criminal actions when in a state of automatism. The General Part should not codify the case law to permit an acquittal where the automatism is not caused by mental disorder and to permit a verdict of not criminally responsible. If an accused voluntarily indulges in alcohol/drugs, they should not be able to use automatism as a defence against rape and other serious crimes.

Saskatoon

Concerned about this defence of insane automatism; in cases where this defence is proven, the court must bear responsibility for making an order concerning the person.

Victoria BC

There is widespread concern regarding the outright acquittal of the so-called "non-insane automaton" -- the current law is clearly unsatisfactory. The solution proposed in the second option, which focuses on the issue of whether the accused at the time of committing the offence had the capacity to make a reasoned choice of what to do, happily meets the concerns for public safety, while at the same time providing a legally justifiable basis for creating a special verdict. It gives court authority to impose orders until the authorities are satisfied that the risk of repetition is minimal.

Peterborough

A verdict of not criminally responsible on account of automatism should be allowed.

Oshawa

Respondent does not agree with either a law to permit an acquittal for acts committed by "sane automatons"; nor does the respondent agree with the creation of a new verdict of "not criminally responsible on account of automatism."

Hamilton

The General Part should include a special verdict of not criminally responsible on account of automatism which would allow the court to make such an order (discharge or custody).

Oshawa

The General Part should include a special verdict of not criminally responsible on account of automatism, which would allow the court to make such an order.

Almonte ON

I believe that if help is needed for the individual either insane or sane automatism should be granted as a defence. Judge should look to see whether an accused poses a danger to themselves or others. Perhaps the *Mental Health Act* would provide a good reference for this type of situation.

(south ON)

The General Part should not codify a verdict of not criminally responsible on account of mental disorder where the cause is automatism. Nor should it include a special verdict of not criminally responsible on account of automatism.

Peterborough

The General Part should include a special verdict of not criminally responsible on account of automatism which would allow the court to make such an order.

Beaver Creek BC

If a person brings upon themselves the condition of automatism through improper use of drugs, prescription or otherwise, no such defence would apply - a defence is unnecessary.

BC

I view automatism with much scepticism, and do not believe that a serious crime can be committed as an automatic act; there is too much involved in a crime for it to be a simple robotic act.

Oshawa

The General Part should codify the case law to permit an acquittal where the automatism is caused by mental disorder but also allow the court to apply a discharge to custody in a hospital, as appropriate.

MEDICAL COMMUNITY

Manitoba Association of Registered Nurses

We endorse the response of the Canadian Nurses Association.

Canadian Nurses Association

We support the Canadian Psychiatric Association's recommendation that the concept of automatism be abolished. We support their view that the behaviour and the function of the body is governed by the mind, whether normal or disordered. The distinction between sane and insane automatism is arbitrary and not supported by research. Rather than being recognized as automatism, we support the view that such a state of mind be considered as a "mental disorder". We suggest close cooperation

between Justice and the CPA to ensure that the language accurately reflects current medical concepts.

We believe that monitoring to evaluate the effectiveness of the court order regarding client outcome is also necessary. It is important that there be both the necessary health care resources and evidence of therapeutic value for the use of hospital treatment to be considered as an option.

WOMEN'S GROUPS

Halton Women's Place

We would have to study this further in order to have an opinion.

Catholic Women's League of Canada

It seems preferable to us to have the courts make the order as to the disposition of the person found not criminally responsible on account of automatism. It would be difficult to codify case law to sufficiently cover all the aspects of automatism. We fear that this defence could become an excuse used by substance abusers. For the defence to have validity, there will have to be stringent regulations concerning the medical evidence that would have to be presented for both sane and insane automatism. The burden of proof would have to remain with the accused person who is using it as a defence. Where would persons judged "insane automatons" be placed in view of the closure of psychiatric hospitals and wards across the country? Who is going to determine that this "insanity" is no longer present and how will the accused eventually attain freedom?

COMMUNITY SERVICE GROUPS

Church Council on Justice and Corrections

Since we cannot find a section on "mental disorder" or "insanity," we find it difficult to address this rarely used although often cited defence. It has to be part of a larger category which deals with mental states, whether they are medically defined as "disorder" or not. In any case, the major problem, it seems to us, is the credibility of evidence rather than the formulation of a specific "defence."

FEDERAL/PROVINCIAL GOVERNMENTS

Legal Services, Human Resources Development

[s. 21(1)(a) - (b)]

Department of Canadian Heritage

The Department supports the position that the General Part should include a special verdict of "not criminally responsible on account of automatism" which would then give the court the discretion to discharge the accused or remand him to custody, hopefully in a hospital. There must, however, be some distinction between voluntarily and involuntarily induced automatism. It is also felt that the issue of automatism should be dealt with in the *Criminal Code* in order to provide a common perspective on an issue that the courts have already had to consider.

LEGAL ACADEMICS

Law professor, University of Western Ontario

The proposal is fine, but I have one problem: what about automatism preceded by prior fault e.g. the epileptic who drives in disregard of physicians instructions and causes an accident? This is not discussed under automatism and so I am not sure how this issue will be dealt with. My own preference is to continue to impose liability in such a case - there is sufficient blameworthiness arising from the decision to disregard a foreseeable risk (assuming the offence charged is not one which requires higher mens rea than recklessness). However, if so, there must be a recognized exception to the voluntariness principle. (This finds support in Sopinka J's dissenting judgement in *Daviault*).

In light of *Parks*, some reforms are required. I note that the intention is to maintain the distinction between insane and non-insane automatism but to bring the latter closer to the former in terms of burden of proof and potential consequences. However, there are problems. X kills Y and pleads automatism. The Crown tries to establish mental disorder and the court, following *Parks*, uses a combination of the external/internal and recurring danger tests. The accused is acquitted rather than found N.C.R. That must mean that there has been a finding that he is not a continuing danger to society. However, if the new proposal is implemented he would fall within the new special verdict and would be subject to detention. This could result in a Charter challenge, on the basis that there is no reason for his detention if he is not a danger to society. S.1 might be used to save it.

We have to define the border between sane and insane automatism. Are certain health conditions (i.e. diabetes) to be included within sane or insane automatism? If mental disorder was expanded to include all forms of automatism, it would have to exclude concussion and intoxication.

000793

POLICE

RCMP

The new verdict and the availability of special orders would give the necessary flexibility to the courts. Must also recognize public safety concerns and allow for corrective measures.

QUESTION 9 — INTOXICATION AS A DEFENCE

Should the new General Part codify the existing law? If so, should it continue to use the specific/general intent distinction? Or, should it say that intoxication may be a defence to offences which require intent or knowledge, but not to offences which require recklessness, criminal negligence or negligence?

Should extreme intoxication result in a new special verdict of "not criminally responsible by reason of automatism" (with a range of orders, from discharge to a hospital order) instead of an acquittal as in *Daviault*?

Should a new crime to deal with criminal intoxication be added to the *Criminal Code*?

If so, how should it be structured (e.g. criminal intoxication leading to harm, or criminal negligence causing harm, or recklessness causing harm)?

What should be the punishment for the new crime?

GENERAL PUBLIC

Lakefield, Ont

(group response); The existing law should be amended to eliminate specific intent and only general intent should remain. Seven members of this group agreed that intoxication should never be used as a defence, while one member tells that intoxication could be used as a partial defence. Extreme intoxication should not result in a new special verdict. A new crime should be added to the Code to deal with criminal intoxication; no opinion on how this should be structured. Some members felt that intoxication should not reduce the punishment, whereas some members held the view that punishment should be as much as doubled for an offence committed while intoxicated.

San Francisco

Why weren't Blair & Daviault held responsible for substance abuse which resulted in physical abuse? Have they no mental capacity to stop themselves from consuming an excess of alcohol? Please consult with the NAC.

Chicago

I was shocked by the decision. It is very disturbing to me that a person's level of intoxication can be used as a defence. This implies that intoxication is considered to be a reasonable explanation or a justifiable cause for violence against women. In my opinion, the reason someone acts violent towards another person is irrelevant. The justice system should strengthen laws and enforcement procedures to protect women.

000795

Elfros, SK

In my opinion, self-induced intoxication should never be allowed as a defence. Nobody knows what intent another person has formed, possibly before drinking alcohol, which can cause the person to carry out a criminal action when sufficiently intoxicated to relax the inhibitions against that behaviour. Possibly there should be a new crime, along the lines of criminal negligence causing harm. People must realize that taking responsibility for their own actions is a primary concern of the state and therefore intoxication is not a defence for violent crimes. The sentencing must therefore reflect the seriousness of the particular crime.

LA, CA

Please strengthen laws and enforcement procedures that protect women. Please consult with the NAC.

Austin, Texas

Canadian women need protection from the legal system.

Anonymous

Men don't commit these crimes because they are intoxicated; they commit them because they can get away with them. It's time to hold all people responsible for their actions, including their choice to become intoxicated and their criminal behaviour while under the influence.

Amherst, Mass.

Please strengthen laws and enforcement procedures that protect women. Please consult with the NAC during the review of the General Part.

Montreal

Please strengthen laws and enforcement procedures that protect women. Please consult with the NAC during the review of the General Part.

Burlington, Ontario

Please strengthen laws and enforcement procedures that protect women. Please consult with the NAC during the review of the General Part.

Elora, Ontario

Please strengthen laws and enforcement procedures that protect women.

Oberlin, Ohio

The law should not condone the use of intoxication as a defence in cases of rape and battery any more than it does in cases of driving accidents. The message otherwise is that crimes against women are not as serious. Justice should consult the viewpoint of women on this.

000796

Colchester, Connecticut

Please consult with women's groups during this review. I strongly protest the Supreme Court ruling. The Justice Minister's proposal to classify this as criminal intoxication is no solution to the problem of how to discourage men from sexually assaulting and beating women. The flaw in the ruling is that it ignores the fact that a state of intoxication is a personal choice and is completely within an individual's responsibility, as opposed to insanity, which is not. Women's groups must be included in the consultation.

Culebra, PR

Please consult with women's groups, as the NAC recommends.

Syracuse, NY

Please consult with women's groups as recommended by the NAC. I don't believe the Justice Minister's proposed criminal intoxication offence will minimize cases of violence against women. Men don't commit these crimes because they are intoxicated; they commit them because they can get away with them. The criminal intoxication offence would condone this. People must be held responsible for their actions including when they are intoxicated.

Havelock, Ontario

Extreme intoxication should not result in a new special verdict. There should be a new crime to deal with criminal intoxication, along the lines of criminal negligence causing harm. The punishment should be a flexibly applied blend of mandatory rehabilitation, restitution, and incarceration.

Scarborough, Ontario

I do not support the creation of a new offence of criminal intoxication; where would we draw the line. I believe that an individual who becomes so inebriated that they are no longer in control of their actions is in need of counselling and should not be exempt from the law that is supposed to protect our society.

North York, Ontario

Intoxication should never be used as a defence. If someone commits a crime while intoxicated they should be held responsible for their actions including getting extremely intoxicated. Why would someone be excused because they were intoxicated?

Guelph, Ontario

Extreme intoxication should result in a new special verdict of not criminally responsible by reason of intoxication. There should be a new crime to deal with intoxication. The penalty should be the maximum for the main offence.

000797

Windsor, Ontario

The General Part should correct the Court's error by quashing the intoxication defence, and making persons who drink or take drugs responsible for their subsequent criminal actions. Even providing for a lesser offence of intoxication is not acceptable, for it will only provide a continual source of defences to enable criminals to seek lesser sanctions, or no punishment, for serious offences.

Coquitlam, BC

Supports the NAC calling for the Department to consult with women's groups. I implore you to create firm laws which hold the individual accountable for his or her actions regardless of drug or alcohol abuse. We, as a society, need to make the eradication of violence against women a priority for the sake of future generations.

Ottawa

Supports the NAC calling for the Department to consult with women's groups.

Vancouver, BC

Yes, there should be a new crime to deal with criminal intoxication; negligence or recklessness if breathalyser testing is not sufficient to stand out in court. Penalty should be same as for the crime committed.

Delta, B.C.

A victim of harm from someone who is very intoxicated should be given the same consideration as a victim of a drunk driver.

Peace River, Alberta

Supports the NAC calling for the Department to consult with women's groups.

Two Rivers, WI

Supports the NAC calling for the Department to consult with women's groups.

New Glasgow, N.S.

Supports the NAC calling for the Department to consult with women's groups.

Minneapolis

Supports the NAC calling for the Department to consult with women's groups.

Bowling Green, Ohio

In Canada there is a great need to strengthen laws and enforcement procedures that protect women. This is evidenced in the use of alcohol intoxication as the excuse for a formal denial of responsibility in the cases of Henri Daviault and Carl Blair.

000798

North Vancouver, B.C.

The *Daviault* case is another example of giving the accused rights which go beyond the bounds of reasonableness. That same defence is now being used in drugs cases, and undoubtedly there are defence lawyers actively seeking other substances which can be used to obtain an acquittal for their client. While intoxication may be a defence in cases of general versus specific intent, it is obvious that the accused in this case had the specific intent of sexual assault. Under serious intoxication most people simply pass out; if they are mobile they can hardly be at the extreme stage of intoxication. To give them a defence of automatism and not hold them criminally responsible would be criminal. Intoxication is a self-inflicted condition and should not be a permitted defence. For an extremely intoxicated driver to kill an innocent party, and then get a reduced sentence, or be set free because they claim to be too drunk to intend to kill someone, is the very reverse of Justice. Crimes committed while intoxicated should carry their normal sentence, with an additional penalty added because of drunkenness.

Havelock, Ont.

Intoxication is no excuse for committing a crime. It should be an offence to be intoxicated, which if you read the laws of the land close enough, it already is. If you can use intoxication for an excuse to get off a murder or assault charge, why can't you get off on a drunk driving charge?

Oakville, Ont.

I think your plan to create new crimes to allow for prosecution of criminal intoxication is a good idea and a necessary signal to potential abusers. I hope that your definition of intoxication includes both drunkenness and voluntary use of drugs that were not prescribed.

Oshawa, Ont.

Criminal intoxication should be added to the *Criminal Code*. Punishment should match the established standard for the loss of life or property damage as if the defendant had not been intoxicated. A person who drinks or takes drugs to excess either knew or ought to have known that he or she may act in a manner much differently than if sober [sic]. The excuse of intoxication must be removed as a viable defence for acts which society doesn't condone.

Guelph, Ont.

It is my opinion that an accused is accountable for his actions and should be subject to punishment for those actions.

Guelph, Ont.

I don't think that intoxication should be used as a defence to offences that require intent or knowledge, or other offences. I don't think that someone who has committed a crime should be acquitted because of extreme intoxication or automatism.

I don't believe a new crime to deal with criminal intoxication should be added to the *Criminal Code* for the reasons stated on page 18 last paragraph. I think that people have to become more responsible for their actions as opposed to less responsible.

Gloucester, Ont.

Extreme intoxication should be a crime. Anyone that encourages or aids the state of extreme intoxication, should be charged with the crime as well. The courts should decide whether there is substantial departure from the standards of reasonable people.

Anonymous

The General Part should codify the existing law. The specific/general intent distinction should be discarded without exceptions. Extreme intoxication should not result in a new special verdict. A new crime to deal with criminal intoxication should be added to the Code. Intoxication causing minor injury: 5 years in prison. Intoxication causing major injury or death: 15 years in prison without parole.

Phoenix, AZ

The *Daviault* decision is preposterous. Regardless of whether they drink or not, men are responsible for their behaviour. That is the problem - men are not held responsible for their behaviour starting at a very young age (boys will be boys). Yet women suffer from their violence. It simply gives men a reason to drink - to escape punishment for the violence they intended to commit. After working in the field of battered women for 18 years, I can tell you that men do not beat or rape women because they are drunk. They do it because they can. You have just given them one more reason to continue it. I urge you to reconsider these rulings.

St. Catherine's

Intoxication should not be a defence as a person would not do anything while under the influence of alcohol or drugs that they would not do while sober. There is no evidence that shows that extreme intoxication leads to automatism; therefore, no person should be acquitted on those grounds. Ordering a person to a rehabilitation program is not feasible because it is a proven fact that a person cannot be rehabilitated unless that individual admits he/she has a problem and wants rehabilitation. An intoxicated person who commits a crime should be charged with the crime itself, not intoxication.

Windsor

Respondent views the decision in *Daviault* as an assault by the Supreme Court on female victims: why is it that women still have not been able to establish that all men who commit crimes of violence against women, be it spousal assault, rape or murder - should be held responsible for their crimes and changing their behaviour? A new offence of "criminal intoxication" would not solve the problem of extreme drunkenness and associated violent crimes. The new offence would only cloud the real issues. In many cases, plea bargaining would be a real issue because the accused

would receive a lesser charge and worst of all would be fully acquitted of the main offence and the new offence of criminal intoxication. The resulting punishment will not reflect the seriousness of the crime a person might commit while intoxicated.

Saskatoon

Respondent believes that a new crime dealing with criminal intoxication should be added to the *Criminal Code*. It should not result in a new special verdict of "not criminally responsible by reason of automatism."

Hanover ON

The General Part should not include a defence for self-induced intoxication. People in our country have the freedom to use alcohol, but with freedom comes responsibility. If they break the law when they are drunk they must be held responsible for their actions. If they are not held responsible, what will stop them and many others from doing the same thing over again? We must uphold the laws and not lessen them, which would result in peoples lives and well-being being placed at greater risk.

North Bay ON

The General Part should codify the existing law, but it should not continue to rely on the false distinction between specific and general intent. Respondent believe that a new crime to deal with criminal intoxication should be added to the revised *Criminal Code*. It should be structured as follows:

- 1) The intoxication defence should only be allowed for crimes involving mens rea, because intoxication can incapacitate the formation of intent - when intent is not an issue, intoxication does not make a difference i.e. for someone charged with manslaughter, an acquittal could not depend on a defence of intoxication - acquittal must be achieved through other defences.
- 2) A person acquitted of murder (or any other serious offence) because of the intoxication defence would be automatically convicted of criminal intoxication leading to the death of a person -- and these two criminal charges would have the same sentence.
- 3) Intent would lie in the person's intent to consume alcohol -- any consent to consume alcohol is an assumption of the risks, including the risk of perpetrating dangerous crimes such as rape and murder.
- 4) A mentally sane person who was not coerced to consume alcohol, would be assumed to be aware of the consequences of consuming alcohol, including the potential to lose control of one's senses.

- 5) In consuming alcohol, the accused has intended; becoming intoxicated is not accidental; and even though the intent is of a second-order it is still relevant - and is in essence the cause of the criminal action.

Victoria BC

With regard to first question, respondent believes we should stay with existing law. If an accused lacks the necessary intent, they should not be convicted of that offence. Daviault: problem lies not with the Court but in the inadequacy of the law. Need to create a special verdict to deal with automatism. Also need to create a new crime, which the author would structure as follows:

RECKLESS IMPAIRMENT

- 1) Every one is recklessly impaired who allows his or her mental ability to become impaired through ingestion of substances under circumstances where her or she knows, or ought to know, that such impairment may endanger the life or safety of another person or the security of the state.
- 2) If accused is charged with an offence, and Court finds they would have been convicted, but for their impairment (as outlined in subsection one), the court shall find they were recklessly impaired and convict them with the offence of being recklessly impaired
- 3) The maximum punishment for committing an offence while recklessly impaired is the same as the maximum punishment for the offence itself.

Peterborough

Although intoxication can cloud judgement some penalty is important to discourage increasing use of intoxication as an alibi. A criminal intoxication category would allow this.

Oshawa

The new General Part should codify the existing law, but there should be no distinction between specific and general intent. There should be a new crime of criminal intoxication leading to harm. The punishment for this crime should be commensurate with the harm done.

Hamilton

Intoxication should not be allowed as a defence period. New laws should be written to show Canadians that if they drink to the point of rendering themselves unable to judge criminal actions then they must face the same punishment as someone who committed the same crime sober.

Gloucester

Extreme intoxication should be a crime. Anyone that encourages or aids the state of extreme intoxication should be charged with the crime as well. The courts should decide whether certain actions represent a substantial departure from the standards of reasonable people. "Victims should be more involved in the court process -- court should take the advice of victims and their families on sentencing."

Almonte ON

Appalled by the Daviault decision. Ingestion of alcohol or drugs should never be an excuse for a crime. If a man is capable of sexual assault obviously he was capable of the act of erection which is not possible in an overly intoxicated state. This decision really reflects an overall pattern of "trivializing crimes against women." Wants to see the severity of these crimes reflected in sentencing. We should not wait for crimes to happen before we begin to take action (crime prevention).

Borden ON

Support the NAC's actions against Supreme Court decision in Daviault. We need to change our laws and demand that our court system treat drunkenness equally, regardless of whether it was someone behind the wheel or someone battering his wife. Minister Rock's crime of "criminal intoxication" would not solve the problem because its message is that alcohol could be a defence rather than an offence. We firmly believe that any individual is responsible for consuming alcohol and the actions which ensue from their drunkenness. Generally speaking, the government needs to strengthen laws to protect women and consult more with groups like MADD.

Montreal

In order to strengthen laws and enforcement procedures which protect women, please formally consult with women's groups as part of the review of the *Criminal Code*.

Ruthven ON

Condoning "criminal intoxication" creates the ticket and the excuse, creates the perfect safe setting that would perpetuate violent acts against women, children and some men. As the *Criminal Code* is being reviewed, women's groups need not only to be consulted, but they need to be at the table while decisions are being made.

Fort Smith Arizona

Encourages Department to listen to NAC and strengthen laws so as to protect women. Consult with women's groups.

Puslinch ON

A new crime to deal with criminal intoxication should be added to the *Criminal Code*. Clearly the individual's behaviour caused the result. When behaviour causes harm to an identifiable victim, a criminal offense has occurred and the situation should be covered by the *Criminal Code*. Punishment should range from severe fines to long

prison terms depending on the nature of the crime and the probability that the crime would be repeated.

Peterborough

Under no circumstances should intoxication be used as a defence.

Beaver Creek BC

The law should state in the clearest terms possible that intoxication is no defence. Extreme intoxication should carry with it its own criminal charge. Acquittal would be a non-issue. Punishment would fit the crime.

BC

I do not want intoxication to be used as a defence in any criminal offence. Disagrees with the creation of a special verdict of "not criminally responsible by reason of automatism." Only the crime should be considered, and not the state of the accused. If anything, extreme drunkenness should be considered as "doubly indicting." Responsibility for one's actions before the law is the key to successful law enforcement and thus protection for us all from wilful crime.

Oshawa

Extreme intoxication is not a defence in any crime. A new crime to deal with criminal intoxication should be added to the *Criminal Code*. It should be structured as criminal intoxication leading to harm and the penalties should be the same as they would be applied for a person in a non intoxicated state.

MPs

Fred Mifflin, MP, Newfoundland

I do not believe intoxication is an excuse for any act committed as a result of this condition. Intoxicated persons, like all others in our society, are responsible for their own actions.

Jim Hart, MP, BC

My constituents are outraged that intoxication could be used as a defence. If it is necessary to have a separate law regarding criminal intoxication, the sentence should carry the same maximum sentence as the crime committed.

CHURCHES

Belarusian Canadian Coordinating Committee

We strongly oppose the rule that extreme intoxication may be a defence to any crime, especially to crimes that cause death or bodily harm, mental and emotional anguish. Who will protect the victims?

Belarusian Autocephalous Orthodox Church

Intoxication should not be a defence against any criminal activity. If a person cannot handle intoxicant substances, he or she should abstain from it. If a person commits an offence whilst under the influence of a substance, he/she should be held responsible for the crime, same as any other individual. The Code must be constructed in such a manner that no loopholes could be found by clever criminals, who will use any excuse to commit a crime and get away with it.

JUDICIARY

s. 21(1)(b)

POLICE

Scott Newark, Canadian Police Association

Responding to a particular judgment is always a dangerous way of making law. The decision is poorly reasoned and will not likely be followed by our generally sensible trial courts. The proposed offence of criminal intoxication is itself fraught with difficulties, as the paper notes. The notion of not criminally responsible on account of automatism with possible hospital orders stretches the purpose of Part XX.1 of the Code. The point, which should be maintained, is that it is appropriate for society to prohibit anti-social conduct which occurs when a person is grossly self-intoxicated and to use the criminal law to do so. Recommendation: take the first available case in which this bad judgment is used and re-argue it before the Supreme Court, and our Association will intervene; and statutorily exempt the appropriate offences from such a defence and justify this using section 1 of the Charter.

RCMP

There is a need for remedial legislation. The best response would be the creation of an offence of criminally negligent intoxication causing harm. This rests on the notion of fault and causing of harm as opposed to intoxication alone, which is quite appropriate. This offence would naturally be an included offence to the main offence. The sentence should be the same as the maximum for the main offence. An amendment to say that an intoxication defence is not available for crimes of violence against people is fraught with Charter difficulties.

Metropolitan Toronto Police

The General Part should codify the existing law and should continue to use the specific/general intent distinction. Extreme intoxication should result in a new special verdict. A new crime to deal with criminal intoxication should be added to the Code. Unable to give informed opinion on structure or punishment of new crime. (Contains detailed explanations for views, including case citations)

Brian J. Ford, Canadian Association of Chiefs of Police

(Interim response) The decision in Daviault is most disturbing, both in its result and its implications. For a person to consume an enormous amount of alcohol, commit a horrendous act of violence and degradation and then successfully claim that he does not remember, is simply unacceptable. In my mind, this is distinct from cases of automatism due to the voluntary nature of the consumption of alcohol. The result, regardless of the logic of the court in arriving at the conclusion, will lead to unjust and bizarre results and will contribute to a complete lack of confidence and credibility of our communities in the justice system. It strikes me that in these times when public authorities are striving to enhance the community's confidence in the criminal justice system, this decision is a setback. Therefore, I am confident our Association will enthusiastically recommend a legislative response, such as the creation of a new

offence or an expansion of the negligence provisions. I endorse the Minister's speedy reaction which displays his understanding of the devastating effects of this judgment.

FEDERAL/PROVINCIAL GOVERNMENTS

Department of Canadian Heritage

The Department supports including a new crime of criminal negligence causing harm in the *Criminal Code* to deal with criminal intoxication. The punishment for this new crime should be less than that for the original or main offence for which the accused is acquitted.

Legal Services, Human Resources Development

[s. 21(1)(a) - (b)]

Department of Justice regional office

With regard to self-induced intoxication [s. 23]

[in regard to the suggestions put forward in the consultation paper, I would strongly support option six (p.47) if only because of its simplicity: "voluntary intoxication could negate the mental element of the specific intent offences or offences of intention and knowledge. However, in relation to general intent offences or offences of recklessness criminal negligence and simple negligence voluntary intoxication could succeed only if the accused provided on the balance of probabilities that the intoxication rendered the accused in a state akin to automatism or insanity. In the latter case, the accused could be liable for criminal intoxication. Maximum penalty for the offence of criminal intoxication involving death of another individual: the maximum punishment should be equivalent to criminal negligence causing death, which is life imprisonment. That would give the sentencing judge enough discretionary headroom to structure a just and fitting sentence for the specific facts before him/her. For bodily harm (including sexual assault), the maximum sentence should not be any less than the tariff for the substantive criminal behaviour.]

MEDICAL COMMUNITY

Manitoba Association of Registered Nurses

We endorse the response of the Canadian Nurses Association.

Judith A. Oulton, Canadian Nurses Association

We believe strongly that the status quo is not an acceptable option and an amendment to the Code is necessary. Intoxication is not an excuse for violence and must therefore not be used as a legal defence. The myth that violence is usually caused by substance abuse encourages a view of perpetrators as not being responsible for their

actions due to impairment. We recommend legislation that disallows intoxication as a defence; individuals must take responsibility for their own actions and should not be able to claim immunity from punishment because of self-induced intoxication. It is important that the creation of a criminal intoxication offence not worsen the situation by allowing for the use of intoxication (as opposed to the current case law of extreme intoxication) as a defence. We do not support the proposal for criminal intoxication sentences being set at one-half of the maximum for the primary offence.

Canadian Public Health Association

(Reference to a November 10, 1994 paper entitled "Violence in Society: A Public Health Perspective", sent to DM; we would like to commend the Minister on this consultation process; we were pleased with both the paper and the time given for responding). The fact that intoxication can successfully be used as a defence against acts of violence, as in Daviault, is a concern for CPHA. As was stated in the paper, "legislation and justice reform are required to protect all members of society and hold perpetrators of violence accountable for their action". While intoxication may increase a person's capacity for violence, it cannot be seen as the root cause of a violent act. CPHA believes that "fiscal and social reform are required to reduce economic inequities and address the conditions that lead to violence; and that health policies are needed to improve prevention, early intervention and treatment of violence".

Whitehorse Medical Services Ltd., Roger Mitchell, President, Yukon Medical Association
The Association is outraged that an individual's behaviour would be excused because of alcohol overdose. We would like to see drunkenness which leads to this type of behaviour become a criminal offence, with punishment appropriate to the crime perpetrated while under the influence of alcohol. People are responsible for their actions.

Addiction Research Foundation, Toronto (Also sent a paper on alcohol consumption and legal responsibility in German law).

(detailed response). The availability of the defence of automatism arising from intoxication should be severely restricted, if not eliminated completely, as automatism is not a consequence of intoxication that is supported by scientific evidence. The codification of a defence of intoxication (in the absence of automatism) should be conducted in such a way that there is no opportunity for an expansion of its applicability to situations to which it does not currently apply. It is sound public policy that the revised Code maintain that one is personally responsible for offences committed while intoxicated. The revised Code must not propose, nor be interpreted as stating, that an offence committed while intoxicated is by that fact a lesser offence than the same action committed while sober. We recommend: that a defence of automatism due to intoxication not be added to the revised Code, or that it be severely restricted.

LEGAL ASSOCIATIONS

Barreau du Québec

We recommend that the intoxication issue be dealt with as part of the General Part review. If this is not possible, we prefer the option of creating a special verdict over the option of creating a new offence specific to intoxication. It is important that the special verdict be for voluntary intoxication and not for automatism because automatism requires that the individual not have created the conditions leading to the state. For example, our members cannot accept that a diabetic who commits an offence after neglecting to take insulin could not benefit from the automatism defence, whereas someone in a state of voluntary intoxication could.

Canadian Council of Criminal Defence Lawyers, Brian Greenspan

We are concerned that the decision has been misinterpreted as to its limited application. All of us responsible for criminal justice in this country have been ineffective in educating the public. We are concerned that the response to the judgment may be fast-tracked, which would be unfortunate. We respectfully urge you to deal with this as part of the General Part review. However, if there must be fast-track legislation, we take the position that the defence of excessive drunkenness should result in a finding equivalent to "not criminally responsible".

Criminal Lawyers' Association, Bruce Durno

In our view, there is no need to introduce new legislation to "remedy" the Supreme Court's decision. The impetus for the public concern is a misunderstanding of the judgment. There is no flood of cases using the judgment. However, if legislation must be introduced, it is our view that a verdict of not guilty based solely on the defence of excessive drunkenness for a general intent offence should result in a finding equivalent to "not criminally responsible" on account of automatism. This would necessitate removing a distinction between sane and insane automatism.

Michelle Fuerst, Chair, National Criminal Justice Section, Canadian Bar Association

The Section remains convinced that it is preferable to deal with fundamental issues concerning criminal liability by way of comprehensive reform, rather than on a piecemeal basis as is proposed on the issue of criminal intoxication. It is our belief that the extent of the application of Daviault may have been exaggerated by the media. It will also be instructive to await appellate court review of cases in which accused have been acquitted based on Daviault. A careful reading of the decision makes it clear that a complete acquittal based on the defence of intoxication is to be the exception, not the rule. The Section is fundamentally opposed to any changes which would diminish the availability of a defence as a result of drunkenness for specific intent offences. The distinction between general and specific intent offences should be retained. The Code might be amended to specify that the defence of intoxication not apply to any general intent offence which is a crime of violence. We believe this proposal could be justified under section 1 of the Charter. Alternatively,

extreme intoxication could remain a defence to all general intent offences, but a defence that leads only to a special verdict of "not criminally responsible". Such verdict would then invoke treatment and other alternatives, which might address both the rehabilitation of the offender and the public's safety concerns.

WOMEN'S GROUPS

Halton Women's Place

Intoxication should never be a defence under any circumstances.

L'Action Ontarienne contre la Violence Faite aux Femmes, Andrée Côté (long and detailed response)

Bill C-72 is encouraging and it represents a willingness on the government's part to consider the views of women. The preamble indicates Parliament's willingness to recognize the true extent of the harm that violence causes to women's lives. However, it would have been preferable to specify that the intoxication defence does not apply to crimes involving any violation of a person's physical or sexual integrity. It would also have been better if the bill had specified that the intoxication defence does not apply to crimes of specific intent such as sexual interference with children.

The Provincial Advisory Council on the Status of Women, Newfoundland and Labrador

We don't agree with this kind of defence because it is used primarily to absolve the accused from responsibility for his crimes. This defence is one in which gender biases are manifested quite clearly. We believe men should be liable for the charge of assault and for extreme intoxication. While we recognize that it is not a crime to consume alcohol, we also recognize that human behaviour changes with the consumption of alcohol. We suspect that the consumption of alcohol is often used to remove inhibitions intentionally.

Catholic Women's League of Canada

The General Part should attempt to codify the existing laws using specific/general intent distinctions. No - extreme intoxication should not result in an order which releases the accused from being responsible for his/her actions and the harm caused to others. Yes - there should be a new crime dealing with criminal intoxication leading to harmful conduct. The person who claims the defence of intoxication should have to suffer the same consequences or penalties as if the person had been sober when committing the crime. The person had a choice to become intoxicated and remains responsible for all actions committed - drunk or sober. Punishment for this new crime should be very stringent. We suggest that as part of the penalty these people should be forced to do community service in an environment which exposes them to the pain and suffering which can be caused by violence and accidents involving drugs or alcohol.

Canadian Advisory Council on the Status of Women

(long, detailed paper). The paper explores the advantages and disadvantages of several options without clearly recommending one.

National Association of Women and the Law, Louise Shaughnessy

We support the positions expressed by women's groups at the December 9 meeting. The judgment focused on mens rea rather than on the equality guarantees in the Charter. For this reason we believe that it would be constitutional for the government to legislate on this. We propose that a new section of the *Criminal Code* bar the intoxication defence for any crimes involving male violence against women and children including murder.

Alberta Council of Women's Shelters, Arlene Chapman, Provincial Coordinator

The Council believes that drinking is a voluntary act. People who commit a crime while under the influence of alcohol must be held accountable for the crime they have committed. Sexual assault requires motor skills; where is the medical evidence that extreme intoxication completely impairs all motor skills? Legislation must be put in place to disallow this defence. If the suggestion of creating a new crime of criminal intoxication is adopted, the penalty for this must carry the same weight as the crimes committed while not under the influence.

Eileen Morrow, Lobby Coordinator, Ontario Association of Interval and Transition Houses

We believe that the disproportionate use of this defence to excuse violence against women calls for responses employing the Charter to balance the equality rights of women victims with those of the men committing these crimes. Using drunkenness to excuse violence against women and children has long been used to minimize and deny the actual intent of male violence to establish and maintain power and control over women and children. We believe that even while intoxicated, individuals continue to act within socially constructed value systems. We are opposed to the use of the defence of "automatism" in crimes against women and children. We are concerned that the defence of drunkenness is successfully being linked to mistaken belief in sexual assault cases. We believe the drunkenness defence will negatively impact on women's willingness to seek their rights to protection from police and courts. An offence of criminal intoxication would do nothing to break the ongoing linking of violence and substance abuse. In short, we agree with the position of the national women's groups as expressed in the December 9 meeting.

Faye Davis/Janice Gingell, Co-Coordiators, Provisional Association of Transition Houses Saskatchewan

Criminal Code drafters need to recognize that the current application of Daviault is caused by gender bias within the criminal justice system. Federal and Provincial Justice Departments need to adopt an immediate action plan to educate professionals working within the system. We note the continuing problem caused by the appointment of judges who fail to have the life experience or educational background

which would allow them to understand gender issues. Amendments relating to automatism and intoxication should be made in the context of other changes to liability and defences under the Code. It is however important that the changes take place expediently. Voluntary intoxication should never excuse personal violence. We do not feel that the intoxicated man who attacks his female partner should be treated much differently than the sober violent man. This is because we do not see alcohol as the cause of the violence.

Anne Nicholson, Chairperson, Prince Edward Island Advisory Council on the Status of Women

(November 14 letter to the Minister attached). We recommend that the Minister of Justice act immediately to ensure that drunkenness can no longer be used as a defence for any crime. By clarifying this in the Code, a clear message will be sent to the legal community, including the judiciary, and to the general public that the drunkenness defence will not be permitted for any abuse or crime.

COMMUNITY SERVICE GROUPS

St. John's (Newfoundland) Victim Services Advisory Committee

The *Criminal Code* needs to be amended to ensure that victims are protected, and the responsibility lies with the offender. In the present situation, the Code is allowing the offender to commit these offences with impunity. Therefore, is the Code meeting the goal of protecting society? This philosophically raises the question of whether the rights of the individual should override the rights of society to feel protected. We feel there should not be a special verdict of "not criminally responsible for reason of automatism". If the Code is amended to include a defence of criminal intoxication, then the punishment should be equal to the existing sentencing patterns for offences where intoxication is not an issue.

Regroupement Québécois des CALACS (in French)

We recommend not creating a new offence of criminal intoxication, and we recommend specifically prohibiting the use of the intoxication defence in cases involving incest, sexual abuse, and assault. (The reasons given in the letter are not summarized because the letter was received in mid-April).

Parkdale Focus Community

There should not be a defence of voluntary intoxication. The *Criminal Code* is a guide on which to judge a person's behaviour in an orderly society. By legislating intoxication as a defence to criminal behaviour, the Code is carving out a standard of behaviour that is different for those who are voluntarily intoxicated than for ordinary persons. The defence of voluntary intoxication should be removed from the Code and be considered at sentencing. Creating a new crime is an attempt to close a loophole in the Code.

The General Part should recognize a general defence of self-induced intoxication while maintaining the distinction between general and specific intent. Voluntary intoxication could negate the mental element of specific intent offences or offences of intention and knowledge. In relation to general intent offences or offences of recklessness, criminal negligence and simple negligence, voluntary intoxication could succeed only if the accused proved on the balance of probabilities that the intoxication rendered the accused in a state akin to automatism or insanity. In the case of automatism or insanity, the accused could be made liable for criminal intoxication.

Church Council on Justice and Corrections

It surely should not be a defence although it may well influence the nature of the charge (i.e. murder/manslaughter) and may influence sentencing. The Supreme Court was legally correct in Daviault even if this decision is considered socially and politically as being stupid. But do we really want a court to be political, preferring exigency over law? If a new law is constructed, it should not be based on the traditional proposition that the aim of criminal law is punishment. Of course, a person should be responsible for the consequences of becoming intoxicated and subject to redressing the harm done as well as preventing further occurrences. Painful consequences have to be accepted. Concepts of "guilt" and "punishment" just confuse the issues.

National Crime Prevention Council Secretariat

The members of the Council support a review of legislation regarding criminal intoxication. Alcohol abuse harms relationships and leads to increased crime and victimization. We are outraged that voluntary intoxication has been used with success as a defence in several recent cases. Alcohol alters one's ability to attend to the environment and thus it may limit the ability to form criminal intent. However, we believe that Canadian society could not survive the chaos that would ensue if voluntary intoxication were to become a widely-used, successful defence. Alcohol by its nature has disinhibitory properties hence recklessness and unsafe behaviour is an expected consequence of ingestion. Pathological intoxication with alcohol must be understood to be a rare and narrowly-defined medical condition. It is imperative that legislation clearly define the criminal responsibility of those persons who choose to become intoxicated and while under the influence of a drug known to disinhibit behaviour and impair judgment, commit a criminal act. The Council believes that non self-induced consumption of alcohol should still remain a credible defence.

Noreen Provost, Coordinator, Citizens United for Safety and Justice, North Vancouver, B.C.

It has been our long standing belief that self-induced intoxication should never be permitted as a defence for any criminal offence. People must be held responsible for their actions. Responsibility remains with the individual when they willingly decide to partake of any form of intoxicating substance. If the intoxication of the offender has been forcibly caused then charges should be laid against the person responsible. Our members feel that there should be a new crime for criminal intoxication but that

it should be an additional penalty to that for any crime committed. There is an offence for causing a disturbance while drunk and for drunk driving; it is therefore illogical to excuse a person for a criminal offence committed while intoxicated.

Victims of Violence, Canadian Centre for Missing Children, Ottawa

(Interesting and thoughtful response). Individuals must be held responsible for their actions, especially when those actions cause harm and suffering to another individual. This must hold true even when their actions are committed while in a state of self-induced intoxication. Anyone who chooses to get drunk or high and commits a crime while in that state is a person that must be held accountable. Victims of Violence and Canadians call upon the government to ensure that such offenders are held accountable for crimes they commit. Individuals who commit a criminal offence while in a state of self-induced criminal intoxication are not morally blameless, and must therefore be held responsible for such actions. We recommend that anyone who is charged with a criminal offence and successfully uses the drunkenness defence be convicted of the original offence charged while intoxicated. The distinction between general intent and specific intent should be codified. The range of sentencing should be wide to reflect the range of possible situations and offences. We would support the maximum sentence of 14 years suggested by Senator Gigantes. The fact that the Court limited their decision only to extreme drunkenness is irrelevant if men misinterpret it.

VISIBLE MINORITY/MULTICULTURAL GROUPS

National Congress of Italian Canadians

It is well known that alcohol acts as a disinhibitor and therefore makes an otherwise rational person act in a criminal manner. It is respectfully submitted that the approach to be used in dealing with the Daviault situation is the introduction of a new offence of intoxicated criminal negligence causing harm or death. Sentencing should be like that for impaired driving causing bodily harm or causing death. I am in favour of abolishing the distinction between specific and general intent offences.

R. F. Kirkland, President, National Council of Jamaicans

An accused should not have a defence because he or she was drunk. Most people ought to know the dangers of getting intoxicated. The availability of an intoxication defence could lead to blatant abuses of human rights. There should be no new offence of criminal intoxication. If a new offence is created it should be phased in over 1 to 2 years to allow for education. The members feel distaste over the need to make a quick decision to change the existing law.

ABORIGINAL

Corinne McKay, paper entitled "Reform of the Law of Intoxication: A First Nations Women's Analysis"

(detailed response). Parliament should maintain the general/specific intent classification, and bar against the use of the intoxication defence for general intent offences. Parliament should conduct a comprehensive study on the ways in which Daviault could be limited. Women's interests should be addressed. The options for addressing Daviault should be carefully considered. When alcohol use is considered at the sentencing stage it should be an aggravating factor rather than a mitigating factor.

STUDENTS

Timmins High and Vocational School, law teacher sent letters from 8 students in his law class.

Of the 8 students, all believe that people should be held responsible for their actions even when they are intoxicated. Six students think that a new crime should be created to deal with people who commit crimes while intoxicated. Four students suggested that the new crime be a type of criminal negligence. Six of the students commented on what sentence would be appropriate and three stated that it should be shorter for crimes committed while intoxicated, two believe that the sentence should be the same, and one said it should depend on whether the accused intended to commit the crime before he or she got drunk.

LEGAL ACADEMICS

Two professors of law, University of Ottawa

(Detailed response) The judgment illustrates the need to reform general principles in criminal law. A quick legislative response could have adverse consequences by over simplifying issues that are much more complicated than the question of extreme drunkenness. We don't see how the drunkenness issue can be separated from the general question of criminal responsibility. If legislation must be advanced now, it should be in the form of limiting the offences to which the defence could apply. The government could use section 33 of the Charter. Also, a good option is to class extreme intoxication as a form of automatism which would require treatment. In our opinion, Bill S-6 illustrates the dangers of legislating quickly without regard for general principles.

000815

NON-LEGAL ACADEMICS

Department of Sociology, New York University

I am writing to applaud all efforts to close the loophole of chemical-induced temporary insanity. I have worked with battered women for many years and I have gained simple wisdom: men (and a few women) abuse because they can. I have known of hundreds of batterers and every one who successfully dealt with chemical convictions became a sober batterer. The chemicals are the excuse, not the cause. I implore you to consult with women's groups and experts. I ask you to keep in mind and balance the fact that it is mostly men who batter women, **and** that men batter other men and that women batter other women (and in a very few rare cases, their male partner).

000816

QUESTION 10 — MISTAKE OF LAW

Should the new General Part recognize any exceptions to the rule that mistake or ignorance of the law is no excuse?

If so, should it codify the exception for "officially induced error"? Should such an exception apply only to regulatory offences, or should it apply to all laws?

Should reliance on a Court of Appeal decision (which turns out to be wrong) be a defence? If so, should this exception apply to lower court decisions as well?

GENERAL PUBLIC

Havelock

Opposes ignorance as any type of defence.

North Vancouver

Given the large number of laws and their complexity, it may be asking too much for citizens to know the law on all occasions. Ignorance of the law should be a valid defence. If the different levels of the judiciary are so inconsistent and varied in their interpretation of similar laws, how can citizens (especially an accused) be expected to understand the law?

St. Catherine's

NO. Our laws represent our fundamental common values and as such ignorance is no defence.

Havelock

There should be exceptions to the rules surrounding mistakes or ignorance - we must take into account the heterogenous mix of cultures in Canada. This should be codified and applied only to regulatory laws. Alliance on a Court of Appeal decision would be acceptable, but not lower court decisions.

Guelph

There should be exceptions. The General Part should codify the exception for "officially induced error" but it should apply only to regulatory offences and not to all laws. Reliance on either a Court of Appeal decision or lower court decision should serve as a defence.

Lakefield

There should be no exceptions to the rule that mistakes or ignorance of the law are no excuse.

000817

Windsor

Ignorance of the law should be no excuse. No the exception should not be codified for officially induced error. This should apply to all laws.

Saskatoon

Ignorance of the law is not an excuse. New Canadians must be made sufficiently aware of our criminal laws in order to prevent them from engaging in criminal activity. While most Canadians do not know the details of the criminal law any more than in a general and human way, they know enough to avoid criminal activity. Reliance on a court of appeal or lower court decision should not serve as a defence.

Victoria BC

Officially induced error should be recognized as an excuse, and it should apply to all laws. The burden of proving reliance on the error should lie with the accused. I suggest that the exception be limited to decisions of the Court of Appeal of the province where the crime was committed.

Peterborough

Mistake or ignorance of the law should be an allowable excuse if there is a valid reason for the "ignorance" -e.g. if the person is a recent immigrant from a country which allows the act and if no personal injury to others is involved.

Oshawa

The Code should allow for exceptions to the rule that mistake or ignorance is no excuse. It should codify the exception for "officially induced error" and it should apply to all laws. Exceptions should apply to both Court of Appeal decisions and lower court decisions.

Hamilton

The General Part should recognize exceptions to the rule that mistake or ignorance of the law is no excuse. Officially induced error should be an exception to all laws and only Court of Appeal decisions which turn out wrong can be a defence.

Guelph

Ignorance of the law should never be allowed as a defence for any offence.

Oshawa

"Officially induced error" should be an exception to all laws. We still must abide by the general principle that ignorance is no excuse and this applies equally to all Canadians despite multiculturalism. If a Court of Appeal were to make a mistake of law, the accused should not be responsible for their error and a defence should be allowed.

(south ON)

Mistake or ignorance of the law should not be an excuse. "Officially induced error" might be an acceptable defence, but not for all crimes. Court of Appeal or lower Court decisions should not provide defences. Respondent feels we must avoid any course of action which could end up causing a double standard in the justice system.

Puslinch ON

Yes - there should be exceptions. The *Criminal Code* no longer reflects the fundamental values of Canadians. This is partially due to the diversity in the Canadian cultural background and mainly due to the passing of laws which reflect the interests of particular groups, rather than Canadians generally. A mistake or ignorance of the law is quite understandable under such circumstances. *Criminal Code* is very complex - easy to see how many Canadians, especially people new to Canada, would have difficulty understanding the exact letter of the law.

Peterborough

The new General Part should codify the exception for "officially induced error" to apply to regulatory offences.

Beaver Creek BC

"Officially induced error" would be the sole exception to a rule declaring ignorance or mistake no excuse.

BC

Mistake or ignorance should never constitute an excuse. A new General Part should codify an exception for "officially induced error" with reliance on a Court of Appeal decision.

Oshawa

Mistake of law should be a defence when accused can reasonably establish that they were ignorant of the law. Reliance on a Court of Appeal decision should be a defence if it involves best knowledge at that time. The exception could be applied to a lower court decision as well.

JUDICIARY

s. 21(1)(b)

POLICE

RCMP

The law should remain the same. Again, the seriousness of the error and the reasonableness with regard to the circumstances can be considered during sentencing.

FEDERAL/PROVINCIAL GOVERNMENTS

Department of Canadian Heritage

On the general question of exceptions to the rule that mistake or ignorance of the law is no excuse, the Department feels that consideration must be given to the diversity of the Canadian populace, while culture should not be a defence so as to avoid criminal liability, provisions should be made whereby sensitivity to one's culture or religion could be taken into account as a mitigating factor in sentencing. There is consensus within the Department on including "officially induced error" as an exception to the rule that ignorance or mistake of law is not a defence. This "officially induced error" should apply to all laws. For the purposes of clarity, it might be useful to have a definition/explanation of "officially." The Department also supports reliance on a Court of Appeal decision as a defence.

Legal Services, Human Resources Development

s. 21(1)(a) + (b)

Health Canada

Mistake or ignorance of the law should not serve as an excuse. Proper steps and orientation materials are provided by governments to inform new immigrants about what is acceptable and unacceptable behaviour in Canada and what cultural practices contravene Canadian criminal legislation. Presumably, citizens entering the country have a responsibility to be well-informed as to what is unlawful behaviour in Canada.

WOMEN'S GROUPS

Halton Women's Place

The new general part could recognize exceptions to the rule of mistake or ignorance of law in so far as the exceptions are reasonable.

L'Action Ontarienne contre la Violence Faite aux Femmes, Andrée Côté (long and detailed response)

The continuing emphasis on the subjectivity intention puts at risk the advances of the rape-shield legislation in the area of mistake of fact. As a result, it is important that the General Part contain a section stating that section 273 is expressly exempted from the general statements on intention and is protected from Charter challenge. The reform of the criminal law must reinforce the rule limiting the use of the defence of mistake of fact in cases of sexual assault.

Another approach would be to state that an error in relation to consent in circumstances in which the Code presumes that there is no consent, amounts to an error of law rather than of fact and thus is inadmissible as a defence.

Catholic Women's League of Canada

The General Part should not recognize any exceptions. The *Criminal Code* contains values which we should all be expected to know. Anyone coming to Canada knows that we obviously have laws governing us, otherwise it would not be considered the best country in the world to live in. Individuals entering the country should find out what the laws are. We are not doing enough to assist newly arrived immigrants to learn about Canadian laws and customs. The exception of "officially induced error" should only be available upon written evidence of the inducement. Reliance on a Court of Appeal decision may be a partial defence, but the defence should not apply to lower Court decisions.

COMMUNITY SERVICE GROUPS

Citizens United for Safety and Justice Society

There should be no excuse for ignorance of the law. This again could lead to tremendous abuse. Rather than include ignorance of the law as a defence, laws should be re-written in simple terms so that citizens can understand them.

Church Council on Justice and Corrections

Historically speaking, evils that could be recognized by anybody did not result in a defence of "ignorance of the law." The situation is different when actions may not be recognized as culpable without specific knowledge. Surely a court would have to consider, in cases involving regulatory offenses, strict liability, whether a sufficient effort had been made to bring a legal restriction to the attention of the kind of person the offender represents. The simple question: the offender can reasonably be assumed to have known that she or he engaged in unlawful behaviour.

LEGAL ACADEMICS

Law professor, University of Western Ontario

What about mistake of law affecting formation of mens rea (ie. *Docherty* (1989) 72 C.R. (3d) 1 (S.C.C.)? This consultation paper raises some issues not raised in the Technical Paper: the issue of reliance on court decisions. There is certainly a problem with expecting the average citizen to have a better knowledge of the law than the judges. However, I am a little concerned that some "maverick" decisions might be used to circumvent the law before the loophole is plugged.

Extension of officially induced error to all laws? - Seems to depend on the type of offence in question. For instance if it involved something like driving while disqualified and the accused had relied on representations an argument can be made that it should be available as a defence. However, I am not sure how far this could be extended into other areas.

QUESTION 11 — PROVOCATION

Should the partial defence of provocation for murder be removed from the *Criminal Code*?

Should the partial defence of provocation be available for all offences?

Should the partial defence of provocation be changed to include both "sudden" acts of rage and the slow-building effect of prolonged and severe abuse?

GENERAL PUBLIC

North Vancouver

Degree of provocation should be taken into account in murder cases. In other cases, a partial defence of provocation should be available and include both the "sudden" and "slow build" effects, and be available to both men and women (even though it occurs most often with men abusing women.)

St. Catherine's

The defence of provocation should not be removed. While there is no excuse for murder, in extreme circumstances it is understandable why the murder was committed (ie. abuse). Having this as part of the *Criminal Code* allows the person to be punished for the crime while also reflecting society's understanding of how the circumstances contributed to the crime being committed. However, it should not be allowed for all offences - allowing too much leeway would give perpetrators of crime a "loophole" which they could abuse. The provocation defence should be changed to include "sudden" acts of rage and "slow-building effects" in extreme circumstances.

Havelock

The provocation defence should be maintained; it should be available for all offences and should be changed to include both "sudden" acts of rage and the slow-building effect of prolonged and severe abuse.

Guelph

The defence of provocation should not be removed. However, it should not be available for all offences. The partial defence of provocation should be changed to include both "sudden" acts of rage and the slow-building effects of prolonged and severe abuse.

Lakefield

The defence of provocation should not be removed. This group unanimously agreed that provocation should be a defence for all offences and that the limitation of "partial" should be deleted. The partial defence of provocation should be changed to include both "sudden" and slow-building effects of prolonged and severe abuse.

000823

Several of the members of this group argued that provocation should be allowed as a defence to a charge that does not contain a lesser and included offence.

Windsor

Provocation should not be used as a defence for all murder offences. This type of defence has been used erroneously many times to discriminate against women especially in homicides after the fall-out of domestic violence. The results of this defence is that the murder charge will be greatly reduced to manslaughter which does not reflect the horrific and violent nature of the crime. It gives men permission to murder without full consequences.

Saskatoon

Defence of provocation should not be removed. The partial defence of provocation should be available for all offences. It should be expanded to include both "sudden" acts of rage and the slow-building effect of prolonged and severe abuse.

Victoria BC

Provocation is really a matter which should be considered at the sentencing stage. I would only see a justification for removing the defence of provocation for murder if the minimum penalty for murder was removed as well. I do not think there is any need to extend provocation as a defence in non-murder cases. I would agree that the law should recognize the slow-building effect of prolonged and severe abuse. Lavallée case is a prime example of an instance where the provocation defence should have been available.

Peterborough

The defence of provocation should be available for all offences and should apply to both sudden and slow-building acts of rage.

Peterborough

The partial defence of provocation for murder should not be removed from the Code. The provocation defence should not be available for all offences. It should be changed to include both sudden and "slow-building" acts of rage.

Hamilton

The partial defence of provocation for murder should not be removed from the *Criminal Code* and it should be available for all offences. It should also include sudden acts of rage as well as the slow-building effects of prolonged and severe abuse.

Guelph

Provocation should not be allowed as a defence for any offence. People must be held accountable for their actions.

Oshawa

All offences should have the partial defence of provocation available under both "sudden" acts of rage and the slow-building effect of prolonged and severe abuse.

Almonte ON

The defence of provocation is a male oriented excuse for battering women. The sentences are already very lenient in these matters - it would be ludicrous to half the maximum punishment with this defence. Sudden acts of rage should be taken out. Long-term abuse should fall under self-defence and self-preservation for women and their children.

(south ON)

Partial defence of provocation should not be removed, but it should not be extended to cover all offences either.

Puslinch ON

A defence of provocation should be a partial defence for all crimes. Yes - it should include sudden acts of warranted rage and the slow-building effect of prolonged and severe abuse.

Peterborough

The partial defence of provocation should be changed to include both "sudden" acts of rage and the slow-building effect of prolonged and severe abuse.

Beaver Creek BC

Provocation should be kept as a defence for murder and should be allowed in other crimes as well. It should however stay a defence of "crime of passion." I am not sure what to suggest regarding murder after prolonged abuse.

BC

The defense of provocation for murder should not be removed from the Code. The provocation defence should be available for all offences. The defence should be changed to include "sudden acts of rage" and "slow-building" effects - but this should only be admissible upon the discretion of the judge.

Oshawa

The partial defence of provocation for murder should be removed from the *Criminal Code*. The partial defence of provocation should be changed to include both sudden acts of rage and the slow-building effect of prolonged and severe abuse.

JUDICIARY

[s. 21(1)(b)]

[s. 21(1)(b)]

POLICE

RCMP

Provocation should not be extended to other offences. There is a place for provocation though, in cases of prolonged and severe domestic abuse. This is recognized in the case law.

FEDERAL/PROVINCIAL GOVERNMENTS

Legal Services, Human Resources Development

[s. 21(1)(a) + (b)]

Health Canada

The partial defence of provocation should not be available for any offence other than murder and only in cases of slow-building effect of prolonged and severe abuse (emotional, psychological, physical, etc.). The partial defence of provocation should be changed but only to include cases where the sudden act of rage was instigated as a result of "slow-building effect of prolonged and severe abuse", which is corroborated by expert-witness evidence.

MEDICAL COMMUNITY

CPHA

Our paper mentioned under question 9 states that "one quarter of all women have experienced violence at the hands of a current or past marital partner. More than one in ten women who reported violence in a current marriage have, at some point, felt their lives were in danger". We believe that the *Criminal Code* should reflect this real threat of violence that women in Canada face.

WOMEN'S GROUPS

Halton Women's Place

The partial defence of provocation should be changed to include both sudden acts of rage and the slow building effect of prolonged and severe abuse. Again, it is a matter of the criminal justice system being sensitive to, educated about and ready to respond to the unique situations faced by abused women. However, in no way should the criminal justice system allow a man's behaviour toward his spouse be said to be the result of provocation.

L'Action Ontarienne contre la Violence Faite aux Femmes, Andrée Côté (long and detailed response)

One option is to prevent the use of the provocation defence in cases of family violence and violence against women. The second option, which we prefer, is to abolish the defence of provocation. The defence amounts to a normalization of violence and the state should not promulgate rules that legitimate violence.

The General Part should state that defences of rage including provocation, and psychological shock are not recognized. In particular, the defence of provocation serves only to excuse male rage against women. It is striking that the defence of provocation will not help women or people of colour who fight back against the abuse and insults of whites.

The Provincial Advisory Council on the Status of Women, Newfoundland and Labrador

We think there is a need to distinguish between provocation as a defence (used in situations where your buttons are pushed to the limited) and provocation as self-defence (used in situations where you need to take action to keep safe). The arguments in the paper on a provocation defence for battered women don't address how this defence could be protected from misinterpretation (reference to an article by Elizabeth Comack on the battered wife syndrome).

We believe the defence of provocation should be removed from the Code, and that it should not be applied as a defence in all criminal offences. We don't accept provocation as a valid defence because it allows the offender to absolve himself of responsibility for abuse by saying to the victim "you made me do it".

Catholic Women's League of Canada

The partial defence of provocation for murder should not be removed from the *Criminal Code*. Provocation as a defence should be available for other offences as well. We recommend that a strong burden of proof be required of the person using this defence. We believe that both "sudden acts of rage" and "the slow-building effect of prolonged and severe abuse" are definitions of "provocation". "Provocation" is a mitigating circumstance which can have a bearing on the length or type of

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sentence, but which in no way can be used to remove guilt or responsibility for the crime in question.

COMMUNITY SERVICE GROUPS

Regroupement Québécois des CALACS (in French)

The defence of provocation largely developed in cases in which a man committed acts of family violence against a woman. In the case of murder, this defence sends the message that it can be legitimate, and therefore reasonable, to kill someone due to sudden anger. For the reasons already stated (the perspective of women must be included). It would be greatly prejudicial and discriminatory to include acts of sudden rage in the defence of provocation. For a man to kill his wife in a sudden rage is not reasonable.

Citizens United for Safety and Justice Society

We would not expand the defence of provocation. In the case of murder, we feel that courts have recognized the situation of a woman who kills due to the slow-building effects of prolonged and severe abuse.

LEGAL ACADEMICS

Law professor, University of Western Ontario

Provocation - expand or abolish? Even if we abolish provocation it would still be relevant to the issue of formation of intent. Thus if X is provoked and flies into a rage and kills the provoker - it could be argued that X did not have the requisite intent for murder and there is no real need to use provocation. Provocation becomes significant in cases where the provocation results in the accused intending to kill in retaliation. I think that should be borne in mind when deciding whether to abolish this partial defence.

I do not support extending provocation to cover offences other than murder - it is always relevant in sentencing anyway and I think the expansion would send out the wrong message. The situation of battered women does not fit well within provocation - it is more compatible with self-defence.

QUESTION 12 — CULTURE AS A DEFENCE

Should the General Part include a general cultural defence?

Should a general cultural defence apply to religious beliefs?

Instead of a general cultural defence, should some crimes have specific defences which would allow for different behaviour because of a person's culture?

GENERAL PUBLIC

North Vancouver

There should be absolutely no cultural defense. Too many different groups would have to be catered to - hard to determine what groups constitute a legitimate culture and religion. Which religions and cultural groups would the government recognize. It would be hard to accommodate religious tenets and cultural practices which directly conflict with our important laws.

Edmonton, Alberta

Letter refers to a Globe and Mail article of November 14/94 - argues that most Canadians are fed up with this kind of nonsense.

St. Catherine's

Absolutely not. The laws of our country should reflect our traditional Canadian culture. One cannot accommodate all cultures without sacrificing one's own culture and values. It would be impossible to allow for all cultural backgrounds and still maintain law and order in our country as deserved by the public as a whole.

Vancouver

No cultural defence - too difficult to list the number of different cultures and beliefs. Would result in inconsistencies in the application of criminal law.

Havelock

A general cultural defence should be included only for minor offences. Religious beliefs should only apply to specified, minor offences. I believe that it is Canada's obligation to orient every new Canadian to our mores, customs and values. I do not think we are doing enough in this respect. Only minor crimes should have specific cultural defences. Certainly, customs that hurt no one should not be penalized (ie. the wearing of turbans or daggers).

Oakville

The idea of allowing a cultural defence is fundamentally flawed. In practical terms, this law would likely apply to recent immigrants of non-European descent. It would

be a serious departure from the concept of equality before the law. In effect, it makes second/late generation Canadians and European immigrants more equal than non-European immigrants. Respondent suggests that we review laws concerning polygamy, wife battery and the carrying of concealed weapons such as knives and swords. For each of these laws we should ask if a) we want to continue with the law in Canada and b) we should remove the law because it provides little benefit to Canadian society and therefore offends certain cultural groups unnecessarily. Any law we choose to continue with must apply to everyone in Canada. Suggests that we catalogue "sensitive but necessary" laws and make them available to potential immigrants in order to make them aware of our laws and to aid them in their decision over whether they should immigrate to Canada.

North York, ON

Opposes cultural defence. Criminal law must apply to all citizens equally. It would be too difficult to try and accommodate every other culture, despite the fact we are a multicultural nation. Respondent does not feel we should in any way sacrifice the Canadian values embedded in our system of law in order to incorporate other cultures and lifestyles. In her view, part of coming Canada includes a willingness to accept and abide by our system of laws.

Guelph

There should be no cultural defence in the General Part, and there should be no specific defences for some crimes either.

Windsor

This idea is the least acceptable of all the proposals in the consultation paper. Adding a defence that would recognize the cultural practices of minorities as somehow exempt from the general criminal law is contrary to our notion of a national criminal law binding on all citizens. The Code should reflect national standards, and not be bent to accommodate the wishes of every cultural minority.

Lakefield

No cultural defence at all.

Windsor

Raises a host of cultural and religious practices in her letter which are common in foreign jurisdictions, and clearly in defiance of the Canadian sense of justice. Concludes that the General Part should not include a general cultural defence. A general cultural defence should not apply to various religious beliefs. Crimes should not have specific defences which allow for different behaviour because of a person's culture.

Saskatoon

Recourse to an appeal to cultural or religious cause and effect should be allowed, but if the defences were too specific this could lead to endless arguments.

Hanover ON

No cultural defence should be included. There are simply too many different cultures/religions to accommodate, and so many foreign practices are anathema to the tenets of our criminal law. People must try and maintain their cultures within the confines of our law. Nor should there be specific defences which would allow peoples of certain cultures and religions to escape the provisions of our laws. Our laws have important purposes; there are reasons why people should not carry knives, have more than one wife, or use prohibited drugs.

Victoria BC

Important that the criminal law does not criminalize behaviour unnecessarily. Consultations should be undertaken to ensure there is no unnecessary interference with cultural/religious practices. But, law should apply to everyone equally. Cultural and religious practices should be dealt with as special factors at sentencing.

Peterborough

Cultural and religious defences should be allowable in some cases but not in the cases which involve child abuse, injury to others etc. Perhaps an expert panel could decide if this is allowable.

Oshawa

There should be no general cultural defence, nor should there be any partial defences to certain crimes.

Hamilton

The only cultural defence in the General Part should apply to Native Peoples. Also a lesson could be taken from our Native brothers and sisters that when a crime is committed rather than criminal sentences, retribution to the victim could be a better sentence. The general cultural defence should not apply to religious beliefs or be based on a person's cultural background.

Guelph

A cultural defence by an accused should not be allowed under any circumstances. Individuals should be held accountable for their offences against Canadian society and not a culture they have left behind in a foreign land.

Oshawa

Neither cultural nor religious beliefs should be included in the General Part. The laws of Canada must stand for our national credos. If culture or religious factors bear

any consideration in the commission of a crime, they should be dealt with in sentencing as a mitigating circumstance.

Almonte ON

I do not believe aboriginal people fall into this category as they should be rulers of their own people. Otherwise, our laws should be for all Canadians (consider how absurd acts like female castration are in light of our Canadian values). Human rights should be of paramount importance. If, however, the impugned action does not impact on others (such as carrying a ceremonial dagger), this should be taken into if culture is claimed as a defence.

(south ON)

No general cultural defence. The law in any country is designed to protect and serve everyone equally. In Canada we have many different cultures and religions which are recognized. Too difficult to try and accommodate them all without causing discrimination. General Part should spell out a code of behaviour for all Canadians that will be clear and specific in its endeavour to protect the life and freedom of everyone.

Puslinch ON

There should not be a general cultural defence. All laws in Canada should recognize the diversity of culture and should not offend anybody. There should be no need to excuse any culture from any section of the law. Equality in the law - if one group is allowed to carry concealed weapons, all Canadians should be extended this privilege.

Peterborough

No general cultural defence should be included.

Beaver Creek BC

No - forget even attempting a general cultural defence. Common standards for all Canadians.

BC

No general cultural defence. To enter into "cultural differences" in a court of law is discriminatory to society as a whole and would separate the *Criminal Code* into multitudinous layers of unmanageable concepts. To have a *Criminal Code* at all, it must be one law for all citizens.

Oshawa

We should recognize the importance of the beliefs and practices of other cultures only as long as they do not contravene the laws of the land. Immigrants should be made aware of the expectations of them as new citizens of Canada. There should be a cultural defence in all non-violent crimes.

CHURCHES

Lutheran Church of Canada

Against culture as a general defence. There is the risk that people could be held variously "innocent" or "guilty" for the same act, depending on their cultural background, thus giving the appearance of discrimination and prejudice in administering justice. Criminal law must be consistent. Specific defences based on culture might be allowed. This is more manageable because it would be administered on an individual case-by-case basis.

Greek Orthodox Diocese of Toronto (a 10 page paper on multiculturalism is attached). The General Part ought not to embrace the divisive notion of "a general cultural defence"; in the absence of a "general cultural defence", no application to religious beliefs is possible nor ought there to be consideration of "a general religious defence"; the General Part ought not to recognize "specific cultural defences", which similarly lack legal and logical justification.

FEDERAL/PROVINCIAL GOVERNMENTS

Health Canada

No - would result in such horrible practices as female genital mutilation. The adoption of this approach would contravene article 24(3) of the Convention on the Rights of the Child, which states that "state parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." A general cultural defence would be inconsistent with the spirit of the *Charter of Rights and Freedoms*, which states that all Canadians have equal rights. The *Charter of Rights and Freedoms* provides for constitutional challenges when an individual feels that his cultural rights have been violated.

Department of Canadian Heritage

As has been indicated previously, the Department is generally opposed to incorporating "culture" as a defence so as to avoid criminal liability. Nevertheless, provisions should be made whereby sensitivity to one's culture or religion should be taken into account as a mitigating factor during sentencing given the culturally diverse nature of the Canadian population.

Legal Services, Human Resources Development

[s. 21(1)(a)+(b)]

s. 21(1)(b)

JUDICIARY

s. 21(1)(b)

s. 21(1)(b)

POLICE

RCMP

No cultural defence.

MEDICAL COMMUNITY

CPHA

We attach [not attached to the copy I received] a copy of our 1993 resolution on Qat. The intent of this resolution is to control the availability of Qat, not to criminalize those found to be using it. Given its widespread use and religious connections, public education efforts will be needed, particularly with recent immigrants, to raise awareness and understanding of the serious adverse effects of Qat. We would like the harmful nature of this drug to be recognized under the *Food and Drug Act*, so it can be a controlled substance.

WOMEN'S GROUPS

Halton Women's Place

The General Part should not include a general cultural defence. The use of drugs and the carrying of concealed weapons is prohibited in Canada. These are fundamental community standards.

Catholic Women's League of Canada

No general cultural defence. Newcomers to Canada must be prepared to abide by our laws. New Canadian citizens should keep their ethnic culture and background as a proud heritage, but should follow Canadian laws and traditions in their dealings with other citizens of the country. We cannot constantly be bending over backwards to accommodate all cultures, or we will end up losing our own Canadian identity. If a cultural defence were included, what parts of the country would it apply to? Would this undermine fairness in the application of laws toward all citizens? Provision MUST BE MADE, however, for some crimes to have a specific defence which would

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allow for different behaviour because a person is of native culture. Here again, care would have to be taken that the accused did not escape all accountability for his/her actions because of cultural differences.

COMMUNITY SERVICE GROUPS

Union of British Columbia Municipalities

We feel that the introduction of a general cultural defence under the *Criminal Code* could potentially undermine respect for the law and heighten cultural tensions. Local government is concerned that the establishment of a cultural defence under the Code could lead to the creation of different levels of justice based on race and culture. We would suggest that the concept of equality before the law should be maintained and that one set of laws should apply to all Canadians.

Citizens United for Safety and Justice Society

This is an outrageous suggestion. While the country is concerned about unity, this would be one of the most divisive moves one could consider. This does not even warrant discussion as we would not wish to be part of completely destroying respect for the justice system.

Repeal 43 Committee

(A copy of the Committee's April 1994 brief is attached). Section 43 is based to a large extent on the religious idea of disobedience as a sin and the belief that the Bible requires parents to ensure their children's obedience through physical chastisement. The section is therefore a clear example of how a religious belief has been used to justify acts that would otherwise be illegal and that are now increasingly seen as harmful to children in particular and society in general. Religious beliefs and practices must be distinguished. Canadians are free to hold whatever cultural or religious beliefs they wish. However, if these beliefs result in practices that are harmful or infringe basic human rights such as the right to security of the person, they should not be sanctioned by our *Criminal Code* as legitimate defences. Section 43 must be repealed.

Church Council on Justice and Corrections

It follows from what has been said before that behaviour and actions which flow from a recognized cultural form should be considered in terms of coming to an understanding of the offence. Whether it mitigates liability or increases it can only flow from a social policy which is sensitive to social change and should be clearly pronounced by legislations and/or the courts.

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VISIBLE MINORITY/MULTICULTURAL GROUPS

Federation of Sikh Societies of Canada

Long (33 pages, including appendices on the 5K and on consolidated Indian legislation on the kirpan) paper in support of amendments to the *Criminal Code* to alter sections that could prohibit Sikhs from carrying their kirpans at all times.

Canadian Arab Federation

We welcome the amendment of the General Part of the Code. Introducing positive changes to the General Part to make the Code accurately reflect the values and concerns of the increasingly diverse Canadian society is commendable.

We believe that with the exception of the First Nations, culture should not be used in defining fault or as a defence. We strongly believe that the proposed amendments would create more serious problems and would not lower the potential for conflicts between the beliefs and practices of different groups forming Canadian society. Adding culture as a characteristic or as a defence will negatively affect the position and the future of the so-called ethnic minorities, and further accentuate the existing state of disharmony between these cultures and the culture of the mainstream. The Code need not be amended to accommodate the cultural and religious practices of some groups that differ from those of the majority because these cultures and religions are capable of accommodating and assimilating new values that would improve the life of those who hold them.

The proposed amendment also raises a practical concern. Cultural and religious values are by no means monolithic. People who believe in certain religions do not unanimously subscribe to a single interpretation of the teachings of that religion.

Culture as a defence will, we believe, justify the abuse of women and children. It is known that many different cultures and beliefs support the supremacy of men over women in society. By adding culture as a defence, it is possible that the achievements of women in Canadian society will be reversed drastically as some men will find it easy to get away with assaulting women and children by using their cultures as shields.

Considering culture as a defence for certain groups would be a serious loophole that will encourage some people to deliberately commit certain offences. Exemption of certain harmful behaviour from being considered as *Criminal Code* offences jeopardizes the confidence of Canadians in the law and its universality.

LEGAL ACADEMICS

Law professor, University of Western Ontario

This proposal troubles me a great deal. I can see no justification for this. I believe that we need to send out a strong message that everyone is expected to reach a certain level of behaviour and permitting variation according to culture, religion etc. is the very antithesis of that message. I believe this new defence would open up a real Pandora's box of problems!

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QUESTION 13 — TRIVIAL VIOLATIONS

Should the new General Part include a defence of de minimis, by which a person who has committed an offence would not be convicted if the offence is too trivial to be worth a conviction, in view of the circumstances, including the person's background and the context of the offence?

GENERAL PUBLIC

North Vancouver

I question the need for a de minimis in law. If the prosecutor feels that case warrants court time, because of factors over and above the seemingly simple facts of the case, they should have that option. Would also depend on the type of offence and the circumstances under which it occurred (ie. the context and circumstances surrounding an assault).

St. Catherine's

No. To break the law is to break the law ... no compromises can be made in that area or the wrong message is being sent out. Statistics show that approx. 85% of perpetrators of crime are repeat offenders and in most cases the crimes become more serious. They must know from their first offense that breaking the law is wrong and will not be tolerated.

Havelock

Agrees with de minimis as a defence. There is too much litigation in this country as there is. Young Offenders especially should not be incarcerated, but given a chance for restitution, treatment and of course, in extreme cases, incarceration, but never without appropriate modification programs. Unfortunately, the cult of individualism has eroded our sense of community values and responsibilities.

Guelph

General Part should include a defence of de minimus.

Lakefield

No de minimis defence.

Windsor

Not necessary for de minimus defence to be part of the criminal law. Police and prosecutors screen all criminal charges. Trivial violations are sent to out of court diversion programs. Unless a person is a repeat offender, this can be used to remedy the problem.

Saskatoon

There should be room for a defence of "de minimis" as there is now against frivolous claims.

Victoria BC

I would agree with a de minimis defence, although it is not always easy to determine what is trivial.

Peterborough

Offences should be dismissed and resolved on a personal level if too trivial for court.

Oshawa

The defence of de minimis should exist.

Hamilton

General Part should include a defence of de minimis.

Guelph

The consideration of the defence of de minimis is not necessary in the *Criminal Code*. The issue is well addressed prior to criminal proceedings.

Oshawa

Yes - there should be a defence of de minimis.

Almonte ON

We would have to be careful to ensure important crimes never result in a defence of de minimis ie. assault. A definition of which crimes would fall under this category would have to be included and listed in the Code.

(south ON)

It should include a defence of de minimis.

Peterborough

NO - a defence of de minimis should not be added to the General Part.

Beaver Creek BC

The "de minimis" defence should be left as it is now.

BC

There should be no de minimis defence.

Oshawa

As parents and citizens of a wider reality, there is no such thing as a de minimis defence. Each triviality that goes unpunished by the law places the seeds of future

acts of contempt for the laws and values held by our society. An individual's background and the circumstances of the event could be taken into consideration, as well as intent.

CHURCHES

Greek Orthodox Diocese of Toronto

It is possible that recognition of such a defence has worth. If it does, it should stand on its own merits and not be supported because of its specific relevance to issues of cultural difference, although in the absence of specific prohibitions it goes without saying that it should not be denied to a defendant attempting to invoke it in relation to personal background or any other circumstance.

JUDICIARY

s. 21(1)(b)

POLICE

RCMP

De Minimis should not be codified. Police and crowns already use their discretion in trivial matters. There is also the option of conditional or absolute discharges and suspended sentences or probation.

FEDERAL/PROVINCIAL GOVERNMENTS

Health Canada

A defence of de minimis would further congest the justice system and impede on the administration of justice to deal effectively with more serious cases. Police are the first in the decision-making process to charge or not charge. If the police feel that the young person is involved in a trivial violation, the police typically deal with case in a

pragmatic way rather than deal with it through the Courts. The police also make decisions in conjunction with crown attorneys who are responsible for balancing the justice system's organizational needs while ensuring proper administration of justice. As a result of this "funnel effect" within the judicial process in Canada, it is unlikely that trivial violations will end up in Court. If the Crown attorney elects to charge and prosecute, this is done to protect the public in such cases. The trivial aspect associated with the charge can be alleviated in changing the sentencing objective and choosing alternatives such as diversion programs or suspended sentences. This practice will avoid bringing the administration of justice into disrepute.

Legal Services, Human Resources Development

s. 21(1)(a) & (b)

Department of Canadian Heritage

The Department is opposed to incorporating a "de minimis" defence into the Code; it is not necessary and would increase the length and complexity of trials. It is better to seek ways of ensuring that trivial actions are not placed before the court.

WOMEN'S GROUPS

Halton Women's Place

With respect to trivial violations, it would appear that there is no merit in changing the current practice.

The Provincial Advisory Council on the Status of Women, Newfoundland and Labrador

We don't believe the General Part should include a defence of de minimis. These questions need to be answered: who will define trivial? Who will select the criteria which will be used to assess a person's background or to establish the context of the crime? From our work and observations, we conclude that women's experiences have been trivialized by the justice system. We also believe that including such a distinction in the law will reinforce negative attitudes towards women's complaints. Because there is very little understanding of the dynamic of fear in abusive relationships, many judges dismiss certain incidents as trivial.

Catholic Women's League of Canada

We do not believe that this is a necessary defence. The police and Crown Council do not proceed unless, in their opinion, the offence is serious enough to take up the time of the courts. Both are very aware of the backlog of court cases and the length of time it takes to get a case through the courts.

COMMUNITY SERVICE GROUPS

Citizens United for Safety and Justice Society

We do not see the need to include the defence of de minimis. It is true that trivial violations rarely reach court.

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QUESTION 14 — COMMON LAW DEFENCES

Should the new General Part allow the courts to continue to recognize common law defences?

GENERAL PUBLIC

North Vancouver

Very concerned about judge-made laws undermining the wishes and intentions of Parliament. Any defence which is allowed in a particular case should only apply to that case, and not automatically become the law of the land (referring here to Daviault). Too much power has already been deflected from Parliament to the Supreme Court. (Concerned about future judicial appointments becoming more "political" under the lobbying power and influence of special interest groups.)

Vancouver

It is up to Parliament to state the rules of criminal liability, and not the courts.

Havelock

We should maintain common law defences. The inherent flexibility should result in a higher degree of appropriate justice, one that should reflect evolving mores.

Guelph

The General Part should continue to allow courts to recognize common law defences.

Lakefield

The General Part should continue to allow courts to recognize common law defences.

Windsor

The recodified General Part should no longer allow the courts the power to recognize new defences. Parliament needs to clearly define the rules of criminal liability, including the defences. Unfortunately, giving judges and courts too much lee-way waters down our excellent *Criminal Code*. This leaves our *Criminal Code* open to each judge's interpretation of the law and the personal experience that he or she comes from.

Saskatchewan

Respondent felt very strongly that the new General Part should allow the courts to continue to recognize common law defences.

Victoria BC

The General Part should allow the Courts to continue to recognize common law defences, for the reasons outlined in the consultation paper.

Peterborough

Common law defences should still be allowed.

Oshawa

Common law defences should still be allowed.

Hamilton

General Part should continue to allow the courts to recognize common law defence.

Guelph

The courts should be allowed to recognize common law defences.

Oshawa

Yes - common law defences should be allowed - the Charter has become a safe-haven for criminals.

(south ON)

Yes - common law defences should be allowed - provided this does not interfere with the administration of fundamental justice.

Puslinch ON

Courts must continue to recognize common law defences. New laws require new defences. Many new laws go far beyond the fundamental values of a great number of Canadians. The courts must continue to recognize a defence when failure to do so would be fundamentally unjust.

Peterborough

Yes - courts should continue to recognize common law defences.

Beaver Creek BC

In the past decade, some of the worst decisions in Canadian judicial history have been tendered by our judges. Some degree of control must be exercised over the judiciary.

BC

I do not like the concept of vague, uncodified defences in general, but neither do I think that the *Charter of Rights and Freedom* is sufficiently clear to make a consistent interpretation as to what could be a defence and what could not.

Oshawa

The new General Part should allow the courts to continue to recognize common law defences.

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LEGAL ACADEMICS

Law professor, University of Western Ontario

It is not a bad idea to continue to recognize common law defences which can be developed as the need arises. However, one problem is that courts don't always seem to know what is a defence and what is part of the Crown case - see for example the decision in *Jobidon* (S.C.C.) where Gonthier J. seems to think that consent is a defence.

JUDICIARY

s. 21(1)(b)

POLICE

RCMP

Yes - General Part should continue to acknowledge common law defences.

FEDERAL/PROVINCIAL GOVERNMENTS

Legal Services, Human Resources Development

s. 21(1)(a) + (b)

Department of Canadian Heritage

The Department supports the continued recognition by the courts of common law defences. While the law must be rewritten occasionally to codify existing changes, the latitude to recognize new situations needs to remain in the General Part.

Department of Justice Regional Office

It is evident that the legal community is becoming increasingly frustrated by the rather wide scope of interpretations that judges put on primordial common law concepts.

Too, given that this country has become so culturally diversified if not balkanized, the prevailing wisdom suggests that concepts involving serious criminal jeopardy, or providing a defence to such jeopardy be defined with maximum precision.

WOMEN'S GROUPS

Halton Women's Place

The General Part should allow the courts to continue to recognize common law defences.

Catholic Women's League of Canada

The *Criminal Code* is based on the fundamental principles of the Common Law which itself is grounded in important Judeo-Christian values. These norms must be maintained, despite the many varied cultures and religions which have migrated to this country. There can be no absolute codification of each and every offence, problem and issue which confronts us daily. We have to keep our Code based on the community norms, not on some cultural divergence for a small minority. We must take strong measures to ensure that we do not dilute our sense of freedom and justice because of the requests for change from a small portion of the population.

QUESTION 15 — PREAMBLE OR STATEMENT OF PURPOSES

Should the new General Part include a preamble or statement of purposes and principles (relating to the General Part as opposed to the entire *Criminal Code* or the criminal law as a whole)?

If so, what should it contain?

GENERAL PUBLIC

North Vancouver

Should not include a preamble or statement of purposes. This would only further muddy the waters and lead to esoteric and lengthy arguments in court.

Vancouver

Unnecessary. The less verbiage the better.

Havelock

Yes, the revised General Part should include a preamble. It should contain:

- 1) rationale for the revision
- 2) goals and objectives for the revised document
- 3) synthesis of the law
- 4) procedure for future revisions/criteria
- 5) the inherent role of law in Canadian society; eg. to protect, root out causes of criminality, educate the public, modify criminal behaviour, etc.

Windsor

The *Criminal Code* is much more than an ordinary statute. As a way of guiding judges as to how they should enforce the law, a preamble would be quite useful.

- 1) it could set out the prime purpose of the law to be the protection of the public
- 2) it could also suggest that the prime purpose of the criminal law is a search for the truth - exclusion of evidence should be discouraged whenever possible
- 3) preamble could state that it is the function of the courts to ensure that all relevant facts are before them
- 4) reaffirm the fact that the *Criminal Code* exists to punish and that punishment and retribution should be used to reflect society's abhorrence of anti-social acts.

Lakefield

Group voted unanimously that there is no need to include a preamble.

Windsor

In order for our *Criminal Code* to be applied as originally intended, Parliament needs to set some strict guidelines for Judges to follow. This has become a necessity so

there are some assurances that the *Criminal Code* is enforced and that sentencing is applied to an offence with consistency. This would ensure that both the law and criminal sanctions are more certain and consistently applied. Preamble could insist on coherence and consistency in the criminal law.

Saskatoon

Favours the inclusion of a preamble in a new General Part.

Peterborough

A preamble might be restrictive unless it was quite general and flexible.

Oshawa

If properly written, a preamble would provide much needed coherence to the criminal law and the criminal justice system, while explaining Parliament's rationale for bringing in a new General Part to the *Criminal Code*. Could highlight our current fundamental values as a guide to both interpretation and application of the criminal law.

Hamilton

Should not include a preamble because this would only lead to endless legal wrangling.

Guelph

No - the reason for our criminal law in society should be quite obvious. A statement of purpose would be very hard to word, and to reach a consensus on its content. Rather than act as an aid to the law it would further cloud arguments and result in endless wrangling in cases.

Oshawa

There should be no preamble. These extra words would be used by lawyers trying to unravel the fabric of the law as it is written.

(south ON)

There should be no preamble or statement of purposes. Rather, the new General Part must contain a complete understanding of all purposes as well as a fully explained and operational set of principles.

Puslinch ON

General Part must have a preamble - it should include a statement of values. It should also define guidelines for the definition of a criminal offence. The preamble should also put a limit on the extent to which personal liberties can be taken away by the *Criminal Code* for the general good of society.

Peterborough

No preamble is required.

Beaver Creek BC

General Part can do without a preamble.

Oshawa

Dump the preamble. It would be redundant and time consuming. Let the specific laws speak for themselves and let them be applied evenly and justly.

CHURCHES

Lutheran Church of Canada

In general, changes to the *Criminal Code* should not be made unless they will lead to a clearer understanding of the intent and purpose of the law and to a fair and balanced exercise of justice in accordance with the normal and traditional values of Canadian society.

Mennonite Central Committee of Canada

We believe the articulation of such principles is crucial to the entire *Criminal Code*. We argue for a "restorative approach" which calls for the righting of the wrong between victim and offender, and all other related entities, including the wider family and community. The *Criminal Code* would then serve a symbolic function of underscoring our national standards vis-a-vis criminal acts, but then would channel the offender into a track where reintegration is available to all willing to take responsibility for their actions. These "restorative principles" should be enshrined in a preamble. Among the principles should be a commitment to establish a "first track" response to crime which encourages the perpetrator to move towards taking responsibility, righting the wrong, and being reintegrated into the community. Would like a communal response to crime, in which everyone in the community is called upon to work towards righting the wrongs which lead to offences, bringing healing to the victim, and reintegrating the offender into the community. This would include dealing with systemic issues such as social welfare, classism, and racism.

FEDERAL/PROVINCIAL GOVERNMENTS

Department of Justice regional office

In general, we are moving in the direction of more codification - let us make such codification simple to understand and apply. The very advantage of codification is that it makes law very definite by proscribing a zone of fault around a proscribed activity (ie. self-induced intoxication). To over explain the defences and jeopardy

involved regarding this activity would be to defeat the whole purpose of this enterprise.

Department of Canadian Heritage

While the Department does not support the idea of a preamble it might be useful to include, as part of a public education campaign, a statement of fundamental principles pertaining to the General Part of the *Criminal Code* emphasizing the relationship between these principles and the criminal law. It will also be important to ensure that the language used in the General Part is straightforward and clear so that it can be understood by members of the general public.

Legal Services, Human Resources Development

[S. 21(1)(a) + (b)]

JUDICIARY

[S. 21(1)(b)]

POLICE

RCMP

No - it would result in increased complexities and uncertainties and unnecessary litigation.

WOMEN'S GROUPS

Halton Women's Place

There should be a statement of purposes and principles that could include statements of parliamentary reasons and fundamental values.

L'Action Ontarienne contre la Violence Faite aux Femmes, Andrée Côté (long and detailed response)

The preamble to the Code should be a declaration of intentions on the objectives of the criminal law, which would "codify" the egalitarian orientation of the Charter. The preamble should explicitly recognize that violence against women is a fundamental breach of their human rights which has an important historical context. The preamble should recognize that in the past the laws and the rules controlling the police and the judiciary in relation to violence against women were, directly or

indirectly, discriminatory to women. The preamble should specify that the object of the criminal law is to protect women from discrimination based on their sex, ethnic origin, colour, religion, age, aboriginal status, sexual orientation, immigration status, and mental or physical deficiency.

Catholic Women's Association of Canada

NO - if there were to be a preamble, the wording would probably take two or three years of debate to be agreeable to everyone. If the wording is too broad, it will be ineffective. If it is too narrow, it will be contentious.

The Provincial Advisory Council on the Status of Women, Newfoundland and Labrador

We think a preamble is important in providing a framework for the Code. The law cannot be applied in isolation; it needs to have context and background. However, the justice system has relied too much on a particular experience and a particular background, with the result that the justice system has not met women's needs because it has been designed to meet men's needs. Women do not respect the Code because it does not work for them.

COMMUNITY SERVICE GROUPS

Regroupement Québécois des CALACS (in French)

Bill C-49 contained a preamble which we believe was beneficial and educative. In order to confirm the role of the *Criminal Code* in the fight against violence against women we recommend the inclusion of a preamble in the General Part.

Church Council on Justice and Corrections

Yes - but there has to be a great deal of discussion before a decision can be made about what such a statement should contain.

Citizens United for Safety and Justice Society

It is our contention that the preamble of the Charter should be changed to emphasize the importance of respecting other's rights and the rule of law. Under our justice system a criminal act is a crime against society and the direct victim is considered to be a witness. It is therefore a fact that under the present wording the Charter benefits the individual criminal at the expense of safety and society.

OTHER COMMENTS

COMMUNITY SERVICE GROUPS

Ethics Scan Canada

A general reflection on law, ethics, and the role of criminal law in our society. Changes to the *Criminal Code* should recognize, reflect and nurture ethical behaviour. Revisions to the Code should reflect contemporary cultural realities, but not at the risk of situational realities replacing ethical verities or undermining universally accepted ethics. Ethical defences have more substance and social legitimacy than do most cultural values, which may be more transitory and special-interest-based, or both.

Regroupement Québécois des CALACS (in French)

Criminal law can conform to social values or, at other times, it can lead public opinion and create new norms. Criminal law is part of the solution for social problems that become dangerous or unacceptable. In this regard, criminal law will play an important role in combating violence against women. Women have traditionally been excluded from the places where the values that go into the Code are defined. For this reason, it is important to bring a feminist analysis to bear on the Code. This will identify overt discrimination but we must proceed to investigate the systemic discrimination against women including erroneous assumptions about women.

Canadian Medical Association

The proposed recodification aims to make the Code simpler, clearer and more readily understandable by all Canadians and to bring the Code up to date so that it applies to Canadian society today. Although CMA is pleased to play a part in this process, we are concerned that the interests of Canadian physicians and patients have not been given adequate consideration. (Reference to enclosed copy of CMA's Brief to the House of Commons Sub-Committee of the Standing Committee on Justice and the Solicitor General on the Recodification of the General Part of the Canadian Criminal Code, submitted October 19, 1992).

As stated in the brief, for the General Part to achieve its goals with respect to physicians and the practice of medicine, it must explicitly recognize medical practice as a legitimate sphere of activity, distinct from the wrongs that the criminal law seeks to address; clarify the ambiguities in the current law, particularly with respect to the obligations of physicians in the initiation and cessation of treatment; and address the differences in the clinical and criminal law definition of death.

We are disappointed that none of these are dealt with in the consultation paper. CMA and its members continue to be concerned that advances in the science of medicine and changes in Canadian society have created a tension between the apparent

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requirements of the Code and medical practices that are considered appropriate and desirable. This tension continues to cause uncertainty as to what constitutes appropriate conduct in a particular medical context. We believe that the Code will not be adequately brought up to date unless the concerns raised in the CMA brief are met.

Brian Jarvis
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