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**ANALYSIS OF RESPONSES
TO THE CONSULTATION PAPER ON REFORMING THE
GENERAL PART OF THE CRIMINAL CODE**

EXECUTIVE SUMMARY

Preliminary Remarks:

The following document contains a succinct account of the responses submitted on the General Part consultation paper. This information is intended to provide a quick, cursory overview of the ideas emerging from the consultation responses. A more thorough analysis, with responses organized according to different audience categories, has also been prepared. In addition, a lengthy document containing a summary of every response the department received is available.

1. STANDARD OF FAULT IN CRIMINAL NEGLIGENCE

Respondents from every category were somewhat divided on this question.

Slightly less than half the members of the general public (9 respondents) said that none of the characteristics of the accused should be considered. The majority of responses from this category (13 respondents) supported taking some or all of the accused's characteristics into account in some situations.

In the other categories, 1 multicultural group, 2 community service groups, 5 women's groups, 2 members of the police, and 1 other government department supported not taking the characteristics of the accused into account.

Whereas, 1 other government department supported taking into account all the characteristics of the accused, and 1 academic and [s.21(1)(b)] supported taking into account certain characteristics of the accused such as lack of capacity and mental disability.

Reasons for not considering the accused's characteristics:
- we should all stand equal before the law;
- laws should be uniform and clear;
- individuals must be held accountable for their actions.

Reasons for considering the accused's characteristics:
- people with diminished capacity or mental disability should not be measured against a standard that they cannot meet through no fault of their own.

2. WAYS OF BEING A PARTY TO AN OFFENCE

Respondents in most categories were divided on this question.

Most respondents from the general public either supported the first option and not the second (8 respondents), or opposed both options (11 respondents). Only a small number of concerned citizens supported both making it 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, and making it a crime to fail to assist anyone in circumstances who is in immediate danger of death or serious harm.

In the other categories, 2 community service groups, 1 women's group, 1 police officer, and 2 other government departments supported making it a crime not to assist a victim or someone in serious danger.

[s. 21(1)(b)] 1 academic, 2 community service groups, 1 women's group, and 1 police officer did not support imposing criminal liability in these situations.

<u>Reasons for making it 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, and for making it a crime to fail to assist anyone in circumstances who is in immediate danger of death or serious harm:</u>
- it is morally wrong not to assist a victim or a person in danger and it should be a crime;
- children in particular need this sort of protection.

<u>Reasons for opposing the options:</u>
- individuals should not be forced into becoming police officers;
- terms such as "when it is safe" are too vague;
- most people do not know how to provide assistance to a victim and they should not be forced to try.

3. CORPORATE LIABILITY

The support for and opposition to the issues in this question were divided along fairly predictable category lines.

There was almost unanimous support among the general public for both extending corporate liability and applying criminal liability to unincorporated groups and organizations. There was clear support (10 respondents out of 14) in this category for basing liability on corporate culture.

There was strong opposition to the ideas put forward in this section from all the respondents in the Corporations/Business Groups category, and from 1 community service group. There was also opposition from 1 business-related professional association. [s.21(1)(b)] [s.21(1)(a)] One police officer opposed basing liability on corporate culture, and argued that extending liability to unincorporated groups would be impractical. One other government department said the issue of corporate liability and unincorporated groups should be left to the common law.

Two women's groups, 1 other government department, and 2 police officers supported extending corporate liability. Two women's groups, and 1 other government department supported basing liability on corporate culture. One women's group and 1 police officer supported applying corporate liability to unincorporated groups.

Reason for supporting an extension of corporate criminal liability to include acts of a corporation's representatives, and for basing liability on corporate culture:
- corporations should be held responsible for their actions to a greater extent;
- corporate culture must encourage and reward all employees for obeying not only the letter of the law, but also its spirit.

Reasons for opposing extending corporate criminal liability and basing it on corporate culture:
- the proposal would not require a criminal intent;
- liability based on corporate culture would bring uncertainty to the law and would be difficult to prove, vague, and at risk of a successful Charter challenge;
- corporate culture is far too vague a notion to be workable;
- the elements of a crime cannot be distributed in bits and pieces and remain a mens rea crime.

4. CAUSATION

There was no clear consensus among respondents to this question.

Most of those in the General Public category (17 respondents) stated either that behaviour should be said to cause a result if it contributes to the result in a more than negligible way, or that behaviour should not be said to cause a result only if it contributes substantially to the result. Four respondents said behaviour should be said to cause a result only if it contributes substantially to the result. Three respondents said it is necessary to state that behaviour does not cause a result if a new, intervening cause takes over.

One legal academic and 1 women's group agreed that behaviour should be said to cause a result only if it contributes substantially to the result.

One community service group, 1 women's group, and 1 other government department stated that behaviour should be said to cause a result if it contributes to the result in a more than negligible way.

On the issue of intervening cause, 1 women's group said the new cause must have a greater impact than the original cause in order to allow it to supersede the original act of violence. [s.21(1)(b)] said that it would be desirable to state that behaviour does not cause a result if there is a new intervening cause.

> <u>Reason for saying behaviour causes a result if it contributes to it in a more than negligible way:</u>
> - people must be responsible and accountable for their behaviour;
> - there is no reason to change the position set out in *Smithers*.
>
> <u>Reason for saying behaviour causes a result if it contributes substantially to it:</u>
> - the substantial cause test as set out in *Cribbin* is more easily understood than the de minimis test.

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5. AWARENESS OF THE CIRCUMSTANCES

There was no consensus among respondents to this question.

The respondents from the general public were almost evenly divided on whether the defences in the General Part should be based on a subjective or an objective test. Nine respondents supported using a subjective test, while 8 supported using an objective test. A majority of the general public supported defining the reasonable person by looking at an ordinary person rather than by looking at an ordinary person with the same general characteristics as the accused.

One women's group and 1 member of the police supported basing the defences on an objective test and looking at an ordinary person to define the reasonable person.

[s. 21(1)(a) & (b)] and 1 community service group supported using an objective test. One other government department, 1 women's group, and [21(1)(b)] supported giving the reasonable person the same general characteristics as the accused. One community service group supported using the subjective test.

One legal academic said that the subjective element should be addressed section by section rather than by a general provision.

Reasons for supporting an objective test:
- laws must apply equally to all;
- using the subjective test would make prosecuting criminals very difficult.

Reasons for supporting a subjective test:
- it is a fundamental truth that people see different situations in different ways and the criminal law should recognize this.

6. THE USE OF FORCE TO PROTECT PROPERTY

Respondents from each category were divided on this question.

Exactly half the members of the public (11 respondents) supported having no upper limit on the use of force to protect property. A minority (7 respondents) supported placing an upper limit. Four supported convicting an accused of manslaughter rather than murder when deadly force is used to protect property, while 1 opposed this. Also, 1 said the accused should be acquitted, 1 said this question should be left to the judge's discretion, and 1 said there should be no change.

In the other categories, 2 community service groups and 1 police officer supported placing an upper limit. Whereas, 1 community service group and 1 other government department supported placing no upper limit. One women's group wrote that this issue depends on the particular circumstances in each case.

On the last question, 1 women's group, 1 police officer, and 1 other government department supported convicting an accused of manslaughter instead of murder when deadly force is used to protect property. [s.21(1)(b)] opposed this idea.

<u>Reason for placing an upper limit on the use of force to protect property:</u>
- human life is more valuable than the protection of property.

<u>Reasons for not placing an upper limit:</u>
- criminals will be deterred from committing property crimes if they know that owners will used deadly force to protect their property;
- use of deadly force must be open to owners because they have no way of knowing the extent of the threat they face from an intruder, and when they are protecting their property they are usually also protecting their family;
- intruders onto private property are free to withdraw at any time before deadly force is used on them by the owner;
- the possibility of using deadly force gives people who live far from law enforcement officers a greater sense of security.

7. COMMITTING A CRIMINAL ACT UNDER DURESS

The respondents in most categories were divided on this question.

A slim majority (11 respondents) from the general public category took the position that there are crimes other than murder for which the duress defence should not be permitted. The minority (8 respondents) held the view that the duress defence should be available for crimes other than murder.

On the second question, 7 members of the public supported making duress available only as a partial defence to reduce a charge of murder to manslaughter. Three people supported allowing the accused to use the duress defence and be acquitted.

In the other categories, 1 community service group, 1 women's group, and 1 police officer supported the position that there are crimes other than murder for which the duress defence should not be permitted. Whereas, 1 other government department, 1 community service group, and 1 women's group supported making the duress defence available for crimes other than murder.

In answer to the second question, 1 other government department, 2 women's groups, [s.21(1)(b)] and 1 police officer supported allowing the accused to use duress as a partial defence to reduce the charge from murder to manslaughter.

<u>Reasons for limiting duress to murder:</u>
- there is a high risk that this defence would be abused if it were available for more crimes;

<u>Reasons for expanding the duress defence:</u>
- one must look at all the circumstances of a crime including duress;
- women who are in abusive relationships need the benefit of an expanded duress defence.

8. ACTING AS AN AUTOMATON

Respondents from every category were opposed to codifying the case law in order to permit an acquittal based on automatism or a verdict of not criminally responsible on account of mental disorder. The preferred option was to allow the courts to make an order following a verdict of not criminally responsible on account of automatism.

Reasons for opposing acquittal or a verdict of not criminally responsible on account of mental disorder:

- everyone, including to a limited degree mentally handicapped persons, must be held responsible for their actions;
- entire notion of "sane automatism" is illusory and many groups question the medical and scientific evidence adduced in support of this argument;
- any kind of defence based on automatism could become an excuse used by regular substance abusers to avoid responsibility for their crimes;
- must be able to apply liability in cases where people render themselves automatons.

Reasons for supporting a verdict leading to a court order:

- would provide courts with a necessary degree of flexibility to balance the circumstances of the accused against the need for public safety;
- could provide for solutions which address the needs and circumstances of individual cases.

9. INTOXICATION AS A DEFENCE

Respondents from every category were concerned about the defence of intoxication. The general belief was that individuals must be held responsible for their actions whether they are sober or intoxicated. Women's concerns were highlighted in most of the responses.

Respondents were opposed to simply codifying the existing case law. Most felt this response would simply open the door for more decisions like *Daviault* because there are no guarantees that an accused will be liable for an "included general intent offence." The responses revealed virtually no support for the general/specific intent distinction.

With only a few exceptions, respondents believed that intoxication should not be a defence to any crime, regardless of the fault level involved. Any type of defence would send the message that intoxicated individuals are not responsible for all of their actions.

Respondents were also opposed to the creation of a new special verdict of "not criminally responsible by reason of automatism." In fact, most respondents did not accept the argument that individuals can become so intoxicated as to become automatons. In the words of one respondent, "how does an individual who is so drunk possess the motor skills to commit an act like sexual assault?" A number of respondents, including the Addiction Research Foundation, questioned the medical and scientific evidence adduced to support the argument that extreme intoxication can result in a mental state akin to automatism.

Most respondents favoured the creation of a new offence of criminal intoxication as a way of holding intoxicated felons accountable for their actions. Others felt that such a crime would divert attention away from the original offences and would falsely depict alcohol as the source of the criminal actions.

Suggestions for dealing with punishment were varied:

- most felt it should be the same punishment given to felons who are sober;
- a few felt intoxication would warrant a less severe sentence;
- some felt the punishment should be more severe, to reflect the role of extreme intoxication in the commission of the crime;
- some suggested punishment be dealt with at sentencing to allow for judicial discretion;
- a few respondents pointed out that counselling and rehabilitation must supplement retributive measures like incarceration.

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10. MISTAKE OF LAW

Respondents from all categories were quite divided on this issue. While 8 respondents from the general public felt such a defence should be considered (especially in cases of officially induced error), the same number disagreed with the defence altogether. [s. 21(1)(b)] [s.21(1)(b)] 1 community service group, 1 legal academic and 1 other government department supported the defence while 1 police organization, [s.21(1)(a)(b)] 1 women's group and 1 community service group opposed it.

Reasons for denying a defence of mistake of law:
- it is not unreasonable to expect Canadians to know the tenets of the criminal law and to abide by them, regardless of their cultural roots;
- immigrants must know the law, and rather than allow for a defence of ignorance, we should make efforts to educate immigrants and make our laws simpler and more understandable;
- laws reflect our fundamental common values, and therefore ignorance should never constitute a defence;
- this issue can be dealt with during sentencing.

Reasons for allowing a defence of mistake of law:
- with regard to officially induced error, it is absurd to hold an accused accountable for following the guidance of courts (if judges are inconsistent in their interpretation of the law, how can citizens be expected always to get it right);
- serious offenses aside, there are certain actions which are only culpable if one possesses specific knowledge;
- newly arrived immigrants cannot be expected to know every element of our complex criminal law.

With regard to officially induced error, most respondents agreed that this should allow for some form of defence. However, there was no consensus as to the level of judicial jurisdiction which should be relied upon. Most respondents felt a defence of "officially induced error" should only be available for a non-serious offence.

11. PROVOCATION

The vast majority of the respondents were satisfied with the current provisions for murder. However, several objections were raised regarding the suggestion that the defence be expanded and changed.

<u>Arguments for changing and expanding the defence of provocation:</u>
- in extreme circumstances (such as instances of abuse), it is understandable why certain crimes are committed;
- it would give a more solid basis to the battered-woman's syndrome.

<u>Arguments against changing and expanding the defence of provocation:</u>
- there is a possibility of this defence being abused and used profusely to defend against crimes like murder;
- "the defence of provocation is a male-oriented excuse for battering women" -- "provocation is often used erroneously to discriminate against women in homicides after the fall-out of domestic violence.";
- provocation is a matter which can be considered during sentencing;
- women and children would be better protected if sudden acts of rage and the slow-building effects of abuse were dealt with under self-defence and self-preservation;
- in cases of prolonged and severe domestic abuse, a defence is already recognized in the case law (no need to expand provocation);
- provocation should not be a defence because it in no way removes guilt or responsibility for the commission of criminal acts -- it should be viewed as a mitigating factor during sentencing.

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12. CULTURE AS A DEFENCE

Every respondent was opposed to a general cultural defence. They stated that such a defence would undermine the tenets of the criminal law and the principle of equality before the law. A few respondents were prepared to accept specific cultural defences for minor offenses (e.g. wearing a ceremonial dagger). If culture and religious factors are to be considered at all, respondents felt they should be dealt with during sentencing. It was suggested by a few respondents that cultural defences might be acceptable for aboriginal Canadians.

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13. TRIVIAL VIOLATIONS

There was no clear consensus among respondents on the issue of including a defence of de minimus in the revised General Part. Among members of the general public, 11 favoured the defence while 8 were opposed. The defence of de minimus was supported by 1 church and [s.21(1)(b)] It was opposed by [s. 21(1)(b)] 1 police organization, 3 government departments, 1 community service group, and 2 women's groups.

Arguments in favour of a de minimus defence:
- there is already too much litigation in this country;
- such a defence would lighten the burden on the court system.

Arguments against including a de minimus defence:
- not necessary, because police and prosecutors already screen all criminal charges -- in fact, introducing a de minimus defence might actually congest the court system further;
- it is difficult to determine when a crime is trivial - who would make this delicate decision? Women's groups feel many of their concerns are often trivialized by the justice system;
- the defence might be expanded over time to reach offences which are not trivial;
- separation of trivial and serious offenses is a false distinction;
- letting trivial acts go unpunished sets the stage for serious crimes to occur in the future;
- allowing any crime to go unpunished sends the wrong message to our young people;
- if a trivial offence resulted in a trial, it could be dealt with by absolute and conditional discharges anyway.

14. COMMON LAW DEFENCES

Most respondents favoured the retention of common law defences, with only 4 respondents from among the general public opposing the idea.

Arguments made in favour of judge-made defences included:
- they allow for a necessary degree of flexibility in the criminal law;
- without such defences, the criminal law could not evolve and take account of changing realities and social mores.

The handful of respondents who did oppose common law defences raised the following arguments:
- given present concern over judicial power and its balkanizing effect on citizens, common law defences should be eliminated and the criminal law should be defined with maximum precision;
- common law defences can undermine Parliament's prerogative to set the rules of criminal liability;
- allowing common law defences means leaving the issue of defences open to the personal interpretation and experience of individual judges -- too much judicial discretion could ultimately lead to more "politicized" judicial appointments.

15. PREAMBLE OR STATEMENT OF PRINCIPLES AND PURPOSES

Respondents were quite divided on the issue of including a preamble in the revised General Part. While 7 members of the general public supported the idea, 10 opposed inclusion of a preamble. The idea was supported by 2 churches, 3 women's groups and 1 community service organization. Two government departments [s.21(1)(b)] 1 police organization, and 1 women's group opposed the idea. Most of the respondents who supported a preamble did so because they had specific issues and concerns which they wished to see addressed in the proposed statement of principles.

Arguments in favour of a preamble:
- it would set out the fundamental tenets of the criminal law and serve as a set of guiding principles for judges to follow;
- it would highlight our values and give much needed coherence to our criminal law; set "national standards" for everyone to follow;
- it is Parliament's role to determine and set out the purposes and principles of the criminal law;
- preamble could include the specific concerns of women, and ensure that the criminal law is not applied in isolation.

Arguments against including a preamble:
- a clearly defined set of principles would be too restrictive and would deny the criminal law a necessary degree of flexibility;
- if too open-ended, a preamble would allow for too much interpretation and endless legal wrangling;
- it would be impossible to achieve consensus on the wording of such a preamble;
- general preamble might undermine the whole purpose of codification, which is to clearly define the criminal law;
- it could result in unnecessary complexities and even more litigation.

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