REFORMING THE GENERAL PART OF THE CRIMINAL CODE

ANALYSIS OF THE RESPONSES TO THE CONSULTATION PAPER

1. STANDARD OF FAULT IN CRIMINAL NEGLIGENCE

Questions posed:

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?

RESPONSES

Responses to this question were received from 2 community service groups, 1 legal academic, 24 members of the general public, 2 members of the judiciary, 4 women's groups, 1 multicultural group, 2 members of the police, and 3 other federal government departments.

GENERAL PUBLIC

Of the 24 respondents to this question in this category, 9 stated that the characteristics of the accused person should never be taken into account. Some of the reasons given for this view were: we should all stand equal before the law; the Code should reflect national values; individuals must be held accountable for their actions; all perpetrators can foresee the risks of dangerous behaviour; everyone can distinguish between right and wrong.

One respondent stated that some characteristics should be taken into account, but that it depends on the crime. For crimes such as murder, rape and assault, different characteristics should have no bearing. However, 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.

One respondent stated that 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 offences. Drug and alcohol habits should never be taken into account.

Nine respondents stated that some characteristics should be taken into account. Of these, three said that mental and physical disabilities should be considered but not culture nor substance abuse. One said mental disability and drug dependency should be considered, but that even people in these categories should not be immune from penalties, treatment, and restitution. One said mental disability should be considered but not cultural or religious factors. One said that drug and alcohol abuse should not be considered; another said that sexual orientation and substance abuse should not be considered. Finally, one stated that society should not hold people who cannot understand laws to the same standard as those who can.

Two respondents said that any characteristics of the accused ought to be considered. One of these two added that a judge and/or jury cannot consider a crime or an appropriate penalty without this information.

Another respondent said that 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 (due to incapacities that were not self-induced), no criminal fault should be attributed.

Finally, one respondent said that the standard of a reasonable person should remain the yardstick of measurement for criminal responsibility. However, courts can consider the characteristics of the accused on a case by case basis, but this should not be codified.

LEGAL ACADEMICS

For the one legal academic who responded, the choice is between two approaches delineated in the *Creighton* case. 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. a police officer using a gun) would also be relevant. The McLachlin formulation only permits consideration of individual factors when such factors go to the issue of capacity. The respondent prefers 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."

VISIBLE MINORITY AND MULTICULTURAL GROUPS

The Canadian Arab Federation stated that 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. The Federation believes 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.

COMMUNITY SERVICE GROUPS

Both Community Service Groups that responded (Citizens United for Safety and Justice Society and Parkdale Focus Community) were opposed to taking into account the characteristics of the accused. Parkdale Focus Community stated that the accused's characteristics should be considered at the time of sentencing. In their view, behaviour which was drug or alcohol induced should never be taken into account in considering fault.

WOMEN'S GROUPS

The Catholic Women's League of Canada stated that 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.

The three other respondents (The Provincial Advisory Council on the Status of Women-Newfoundland and Labrador, Regroupement Québécois des CALACS, and l'Action Ontarienne contre la Violence Faite aux Femmes) made essentially the same point. In their view, the justice system has not taken women's experiences into account in relation to their victimization by men. 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.

The Regroupement Québécois des CALACS stated as follows: "[translation] 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."

JUDICIARY

[s.21(1)(b)]

POLICE

The two police officers who responded, one from the RCMP and one from the Metropolitan Toronto Police, agreed that the fault level should remain an objective one.

FEDERAL/PROVINCIAL GOVERNMENTS

Two other federal departments responded. Health Canada stated that the personal characteristics of the accused should not be taken into account because they have no bearing on the degree of intent associated with the criminal act. Also, criminal liability should never be determined by the standards of the accused's religion or culture. However, this department did not rule out the idea of comparing the accused's behaviour to that of the social category to which the accused belongs. For example, an accused parent could be judged using the "reasonable parent test".

Canadian Heritage stated that personal characteristics should be considered by the courts and a person should not be considered criminally negligent where he or she was unable to achieve the standard of reasonable care because of personal characteristics outside their control. Provisions should be made whereby sensitivity to one's culture or religion would be taken into account as mitigating factors on sentencing.

2. WAYS OF BEING A PARTY TO AN OFFENCE

Questions posed:

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 circumstances who is in immediate danger of death or serious harm?

RESPONSES

Responses to this question were received from 4 community service groups, 1 legal academic, 23 members of the general public, 4 members of the judiciary, 2 women's groups, 2 members of the police, and 3 other federal government departments.

GENERAL PUBLIC

Of the 23 respondents to this question in this category, 4 stated that, morally, it is a crime not to help prevent a crime or to neglect to help a victim of crime. However, this moral crime should not be made a criminal offence.

One respondent stated that it is a moral crime in both situations and it should be a criminal offence in both situations, while another supported making it a crime not to assist a victim of crime, but with reservations. These reservations are that the penalties ought to be scaled on a continuum from major to minor, depending on the gravity of the crime, the risk to the intervenor, and the relationship between the intervenor and the person at risk. The penalty should not equal that of the prime perpetrator.

Seven respondents stated that it should be a crime to fail to take reasonable steps to aid a victim, when it is safe to do so. But, it should not be a crime to fail to assist in any circumstances. One of the seven added that it should be a crime not to report a crime one has witnessed.

Two respondents rejected both proposals saying that they would make individual citizens into unofficial police officers. Four other respondents also rejected both proposals saying that definitions of when it is "reasonable" and "safe" to intervene are too nebulous and open to interpretation, and that most people are not adequately trained to stop crimes. Along the same lines, another respondent stated that in either situation it should be a crime not to report a crime one has witnessed, but society should not force individuals to offer assistance because normally they are not trained to do so.

Two respondents supported both proposals. One respondent supported the first proposal but not the second.

LEGAL ACADEMICS

The one legal academic who responded stated that we should not provide for this kind of situation. She wrote: "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."

COMMUNITY SERVICE GROUPS

The following community service groups responded: Citizens United for Safety and Justice Society, Parkdale Focus Community, End Violence Against Children, Peterborough Chapter, and Church Council on Justice and Corrections.

Citizens United for Safety and Justice Society and the Church Council on Justice and Corrections stated that 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 that should not be taken in any general way. Citizens United asked the following rhetorical question: 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"? The Church Council asked: what if someone considers abortion to be a crime, should they try to stop it?

The other two community service groups held the opposite view. Parkdale Focus Community stated that 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. This should be a lesser offence than the principal crime. End Violence Against Children added that this is especially important in the case of children. Children need our assistance as they are very vulnerable.

WOMEN'S GROUPS

The two women's groups who responded disagreed. The Provincial Advisory Council on the Status of Women, Newfoundland and Labrador, stated that they do not think it should be a crime to fail to take reasonable steps to prevent or stop a crime in progress, despite the circumstances.

Whereas, the Catholic Women's League of Canada stated that 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 possible to do so." However, that does not mean that a rescuer is to place his/her own life in jeopardy of open attack from the perpetrator committing the crime. This is a moral obligation. To ensure our laws are adhered to, the League stated that it will be necessary to legislate this type of morality.

JUDICIARY

[s.21(1)(b)]

POLICE

The RCMP officer who responded said that he would support this option provided that safeguards were in place to prevent members of the public from taking unnecessary risks. The Metropolitan Toronto Police officer had more pronounced reservations. He said that it is dangerous to procure the assistance of the general public by law. Who decides when it is safe?

FEDERAL/PROVINCIAL GOVERNMENTS

The responses from Canadian Heritage and Health Canada both supported the idea of making it a crime not to prevent a crime or assist a victim of crime when it is safe to do so. Heritage suggested that a public education campaign would be appropriate if the change to the Code is made. Health Canada particularly supported this option in relation to cases of child abuse. Their response suggested that a definition of "safe" be included to provide guidelines and clarity on this point.

3. CORPORATE LIABILITY

Questions posed:

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?

RESPONSES

Responses to this question were received from 2 community service groups, 1 legal academic, 20 members of the general public, 4 business groups, 1 member of the judiciary, 2 women's groups, 2 members of the police, 1 professional association, and 2 other federal government departments.

GENERAL PUBLIC

All but 1 of the general public who responded supported the first option of extending corporate liability. In this category a clear majority (10 respondents) supported the second option of basing liability on corporate culture. Four respondents opposed this idea. All but 2 respondents supported applying criminal liability to unincorporated groups and organizations.

Few respondents gave reasons for their views, but the tone of a number of the letters suggests that people think corporations do not take enough responsibility for their actions. One respondent said that 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 do this.

On the other hand, one respondent asked how conclusions can be drawn from elusive concepts like "corporate culture"? The 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.

CORPORATIONS/BUSINESS GROUPS

Long, detailed, and carefully reasoned responses were received from the Chamber of Commerce of a city in western Ontario, a large oil company, a large chemical company, and a group of telecommunications companies. These respondents all expressed considerable concern over the options described in this section of the consultation paper. The Chamber of Commerce wrote:

> 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.

Along the same lines, the oil company wrote that "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."

COMMUNITY SERVICE GROUPS

The Union of British Columbia Municipalities was also concerned about this question and it opposed the suggestion 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."

The response of the other community service group was not exactly on point.

LEGAL ACADEMICS

The one legal academic who responded said she was not in a position to comment to any extent on these options, although she found the corporate culture idea interesting. She also pointed out that the identification theory is problematic.

WOMEN'S GROUPS

Both the Provincial Advisory Council on the Status of Women, Newfoundland and Labrador, and the Catholic Women's League supported both the idea of extending corporate criminal liability and of basing liability on corporate culture. The League added that it supports

applying corporate criminal liability to unincorporated groups and organizations. The League also suggested that corporate crimes attract 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."

PROFESSIONAL ASSOCIATIONS

The Institute of Chartered Secretaries and Administrators commented that 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. The Institute also expressed its opposition to the idea of applying corporate criminal liability to unincorporated groups and organizations.

JUDICIARY

[s.21(1)(b)]

POLICE

One RCMP officer agreed that corporate liability should be extended. However, this officer opposed basing liability on corporate culture because this would bring uncertainty to the law and would be difficult to prove, vague, and at risk to successful Charter challenge. He added that extending liability to unincorporated groups, while consistent, would be difficult in practice due to new definitions being required.

A Metropolitan Toronto Police officer agreed that corporate liability should be extended and include unincorporated groups and organizations.

FEDERAL/PROVINCIAL GOVERNMENTS

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

Canadian Heritage wrote that it supports option 2 concerning corporate liability and option 3 pertaining to corporate culture, as set out in the technical paper. As for extending corporate

criminal liability to other organizations, the Department stated that this should be left to the common law.

4. CAUSATION

Questions posed:

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?

RESPONSES

Responses to this question were received from 1 community service group, 1 legal academic, 18 members of the general public, 1 member of the judiciary, 1 women's group, 1 member of the police, and 2 other federal government departments.

GENERAL PUBLIC

Of the 18 respondents in this category, three stated that behaviour should be said to cause a result if it in any way contributes to the result.

Eight respondents agreed that behaviour should be said to cause a result if it contributes to the result in a more than negligible way. Two respondents disagreed with this position.

Two respondents said that behaviour should be said to cause a result only if it contributes substantially to the result. Six respondents disagreed with this idea.

Three respondents agreed that it is necessary to state that behaviour does not cause a result if a new, intervening cause takes over.

Some respondents provided other comments. One stated that differences in the degree of participation can be properly dealt with as a matter of sentencing. One said that if the victim has special vulnerability, the accused's awareness of this weakness should be considered. Two said explicitly that the liability of the original actor should not be limited even if there is an intervening cause. One stated that the accused should be held accountable for what they can reasonably predict will be the outcome.

LEGAL ACADEMICS

The one legal academic who responded said that "the *Cribbin* 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."

The respondent continued by saying that 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.

As an additional point, the respondent stated that the homicide sections of the Code should be redrafted because they are tautological and vague.

COMMUNITY SERVICE GROUPS

Citizens United for Safety and Justice Society stated that the accused should be held responsible for the result as long as the accused's behaviour contributes in a "more than negligible way".

WOMEN'S GROUPS

The Catholic Women's League of Canada stated that behaviour should be said to cause a result if it contributes substantially to the result. 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.

JUDICIARY

[s.21(1)(b)]

POLICE

The one RCMP officer who responded said that the common law should be incorporated into the General Part with respect to result and intervening cause.

FEDERAL/PROVINCIAL GOVERNMENTS

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

Canadian Heritage supports the recommendation that behaviour that contributes "in more than a negligible way" to the result should be said to cause the result. It felt that to require the behaviour to "contribute substantially" would obviate the principles set out in the *Smithers* decision.

5. AWARENESS OF THE CIRCUMSTANCES

Questions posed:

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?

RESPONSES

Responses to this question were received from 2 community service groups, 1 legal academic, 19 members of the general public, 2 members of the judiciary, 1 women's group, 1 member of the police, and 2 other federal government departments.

GENERAL PUBLIC

Of the 19 respondents in this category, nine supported basing the defences in the General Part on a subjective test, while eight supported basing the defences on an objective test. Five respondents supported the idea of defining a reasonable person by looking at an ordinary person. Two respondents supported the idea of defining a reasonable person by looking at an ordinary person with the same characteristics as the accused.

Looked at another way, one respondent supported both the subjective approach to defences and giving the reasonable person the same characteristics as the accused. One respondent supported both the objective approach to defences and giving the reasonable person the same characteristics as the accused. Four respondents supported both the objective approach to defences and defining a reasonable person by looking at an ordinary person.

Some of the reasons given for opposing the subjective test were that in rape cases the accused may argue more frequently that, in their subjective view, the victim had consented. To enshrine such a defence would emphasize the accused's perception of events at the expense of the victim. Similarly, if the accused person's actions were based on an unreasonable understanding of the circumstances then this line of defence would excuse a person for their crime.

In support of the subjective test one respondent said that 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 thereto, the less likely it is that the finder of fact will accept it as creating even a reasonable doubt.

One respondent took a middle position saying that 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.

LEGAL ACADEMICS

The one legal academic who responded said that the subjective element should be addressed section by section rather than by a general provision.

COMMUNITY SERVICE GROUPS

Citizens United for Safety and Justice Society stated that to base a defence on the accused person's subjective view of the circumstances would encourage serious abuse.

The 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.

WOMEN'S GROUPS

The Catholic Women's League of Canada stated that defences should be set out and based on an objective test. 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."

JUDICIARY

[s. 21(1)(b)]

POLICE

The one RCMP officer who responded said that 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.

FEDERAL/PROVINCIAL GOVERNMENTS

Canadian Heritage said that 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 whereby sensitivity to one's culture or religion should be taken into account as mitigating factors in sentencing.

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

6. THE USE OF FORCE TO PROTECT PROPERTY

Questions posed:

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?

RESPONSES

Responses to this question were received from 3 community service groups, 22 members of the general public, 1 member of the judiciary, 1 women's group, 1 member of the police, and 2 other federal government departments.

GENERAL PUBLIC

Of the 22 respondents to this question in this category, 11 stated that there should be no upper limit placed on the use of force to protect property. Respondents gave the following reasons in support of this position: criminals will be deterred from committing property crimes if they know that owners will use 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.

On the other hand, 7 respondents said that an upper limit should be placed on the use of force to protect property (one of these 7 stressed that very few limits should be placed on an individual's right to protect property). The reason given by three respondents in support of this position is that human life is more valuable than the protection of property.

Four respondents said that in appropriate circumstances an accused should be convicted of manslaughter rather than murder when deadly force is used to protect property. On the other hand, one respondent stated that the use of deadly force to protect property should not result in a conviction of manslaughter rather than murder.

One respondent supported broad discretionary powers which would allow judges to decide whether the use of deadly force to protect property should lead to a charge of manslaughter

instead of an acquittal. One respondent stated that persons who use deadly force to protect their property should be acquitted. The reason given for this is that property offences are not taken seriously enough. 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.

One respondent said that in protecting property the significant risk of death or bodily harm should be relevant in considering how much force was used. Finally, one respondent said that the law in this area should not be changed.

COMMUNITY SERVICE GROUPS

The Church Council on Justice and Corrections and Parkdale Focus Community both supported an upper limit on the use of force to protect property. Parkdale Focus Community explained that it places a higher value on human life than on the protection of property. The Church Council asked why not also place an upper limit on police powers, powers of self-defence and force used to discipline and correct children?

Citizens United for Safety and Justice Society did not support an upper limit. It said that 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.

WOMEN'S GROUPS

The Catholic Women's League of Canada argued 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, this group recommends that an accused be convicted of manslaughter rather than murder when deadly force is used to protect property.

JUDICIARY

[s. 21(1)(b)]

POLICE

The one police officer who responded said that 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. The officer also said that in certain circumstances it may be appropriate to convict an accused of manslaughter.

FEDERAL/PROVINCIAL GOVERNMENTS

Canadian Heritage wrote 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 the 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.

7. COMMITTING A CRIMINAL ACT UNDER DURESS

Questions posed:

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?

RESPONSES

Responses to this question were received from 2 community service groups, 20 members of the general public, 1 member of the judiciary, 2 women's groups, 1 member of the police, and 2 other federal government departments.

GENERAL PUBLIC

Of the 20 respondents to this question in this category, 11 said that there are crimes, other than murder, for which the duress defence should not be permitted. Of these, 3 specified that the other crimes are sexual assault, assault with a weapon, and violent robbery. One of the 11 specified that the duress defence should not be available for murder, sexual assault, and assault with a weapon, but that it should be available for robbery as in the example used in the consultation paper. Another of the 11 specified that the duress defence should not be available for any crime that would result in death or grave danger to the public, but duress should be a mitigating factor on sentencing. Three of the 11 specified that the duress defence should only be available for murder.

On the other hand, 8 respondents said that the duress defence should be permitted in cases involving other crimes. Of these, 3 specified that the duress defence should be available for all crimes including murder.

Three respondents said that section 17 should not be changed.

In answer to the second issue in this question, 3 said that a person who, under duress, killed (or seriously injured) someone should be able to use the duress defence and be acquitted. Seven respondents said duress should only be available as a partial defence to reduce the charge from murder to manslaughter. One other respondent said that in this type of case, the duress defence should not lead to acquittal or a reduced charge. Two other respondents said that a decision on this issue should be left to the discretion of the judge.

COMMUNITY SERVICE GROUPS

The two Community Service Groups that responded (Citizens United for Safety and Justice Society and the Church Council on Justice and Corrections) gave short answers and were divided on the issue of duress.

Citizens United for Safety and Justice Society feared that duress as a defence would result in great abuse. On the other hand, the Church Council on Justice and Corrections stated that the issue of duress should be part of the determination of the circumstances surrounding the offence and the accused's reaction to it.

WOMEN'S GROUPS

The two women's groups who responded approached the question from different points of view. The Catholic Women's League of Canada stated that this defence should not be permitted for crimes such as sexual assault, assault, murder, armed robbery and fraud. In response to the second question, 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. The League added that it agrees with the Law Reform Commission Report #31 statement that "no one may put his own well-being before the life and bodily integrity of another innocent person."

The Regroupement Québécois des CALACS took the viewpoint of women victims of violence who respond with violence. The group wrote that this defence is particularly pertinent to cases of women who live 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. This group believes that this defence ought to be revised in light of the *Lavallée* decision.

JUDICIARY

[s. 21(1)(b)]

POLICE

The one police officer who responded said that the duress defence should not be available for murder, sexual assault, robbery, or any serious assault. However, duress could be permitted as a partial defence to reduce a murder charge to manslaughter. The circumstances and the seriousness of the threat should be considered during sentencing.

FEDERAL/PROVINCIAL GOVERNMENTS

Canadian Heritage wrote that there is support within that department 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.

8. ACTING AS AN AUTOMATON

Questions posed:

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?

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)?

RESPONSES:

Responses to these questions were received from 20 members of the general public, 2 members of the medical community, 1 community service group, 1 women's group, 2 other federal government departments, 1 legal academic, and 1 police organization.

GENERAL PUBLIC:

Respondents from among the general public agreed unanimously that the General Part should not codify the existing case law to permit an acquittal based on automatism. While some agreed a defence of "insane automatism" should be allowed, most felt that mentally incapacitated individuals should not be completely exonerated of crimes. For "sane automatism", it was widely felt that no defence should be available. The most favoured option was the inclusion in the Code of a special verdict of not criminally responsible on account of automatism, which would allow the court to make such an order. Most felt this option provided the courts with the necessary flexibility to deal with specific cases. The suggestions for possible court orders included punitive measures such as confinement of offenders as well as rehabilitation and medical treatment.

Several respondents questioned the entire notion of "sane automatism." It was hard for many to accept that sane individuals could commit crimes without any conscious direction of their actions.

The legal issue of mens rea aside, the general public felt that individuals who choose to impair their abilities must take responsibility for their actions.

MEDICAL COMMUNITY

The Canadian Nurses Association recommended that the concept of automatism be abolished. In their view, behaviour and the function of the body are governed by the mind, whether normal or disordered. The distinction between sane and insane automatism is arbitrary and is not supported by medical evidence. If court orders call for treatment and health care, the Association believes court orders must be monitored closely in order to measure their effectiveness and therapeutic value.

This position is also supported by the Manitoba Association of Registered Nurses and the Canadian Psychiatric Association.

COMMUNITY SERVICE GROUPS

The Church Council on Justice and Corrections argued that the issue of automatism should be addressed as part of a larger category dealing with mental states. In their view, the real problem is with the credibility of the evidence adduced to demonstrate automatism rather than with the formulation of a specific "defence."

WOMEN'S GROUPS

The Catholic Women's League said it would be preferable to have the courts make the order regarding the disposition of the person found not criminally responsible on account of automatism. They fear that any kind of defence could become an excuse for regular substance abusers. For any defence to have validity, the League believes there would have to be stringent regulations concerning the medical evidence which is adduced to demonstrate either sane or insane automatism.

The League also raised the following questions: "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 would the accused eventually attain freedom?"

FEDERAL/PROVINCIAL GOVERNMENTS

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

The Canadian Heritage Department supported the option of giving courts the discretion to provide orders through a special verdict of "not criminally responsible on account of automatism." The department certainly feels that a distinction should be drawn between voluntarily and non-voluntarily induced automatism.

POLICE ORGANIZATIONS

The RCMP response favoured the creation of a new verdict which would allow the courts to make special orders. In their view, this would give the courts a necessary degree of flexibility and allow judges to safeguard the interests of the accused while also providing for public safety concerns.

LEGAL ACADEMICS

One legal academic responded to this question. Her main concern was that the paper did not deal with "automatism proceded by prior fault ie. the epileptic who drives in disregard of physicians instructions and causes an accident." In her view, the law should continue to impose liability in such cases -- "there is sufficient blameworthiness arising from the decision to disregard a foreseeable risk (assuming the offence is not one which requires higher mens rea than recklessness)."

The professor was also concerned that the proposal of creating a new special verdict would be subject to detention, and could therefore elicit a Charter challenge.

Finally, the professor suggested that the revised General Part define the border between sane and insane automatism. For example, are certain health conditions like diabetes going to be included within sane or insane automatism?

9. INTOXICATION AS A DEFENCE

Questions posed:

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?

RESPONSES:

Responses to the questions under this category were received from 58 members of the general public, 2 MPs, 2 churches, 2 members of the judiciary, 5 police organizations, 3 other federal government departments, 4 legal associations, 5 medical associations, 7 community service groups, 8 women's groups, 2 multicultural/visible minority groups, 1 aboriginal respondent, 1 group of students, 2 legal academics, and 1 non-legal academic.

GENERAL PUBLIC

In every response from members of the general public, the same message emerged: people should be held responsible for their actions regardless of whether they are intoxicated or not. There was little public understanding or sympathy for the legal requirement that the Crown prove an accused intended their actions and possessed the requisite mens rea. Respondents viewed alcohol consumption as an action for which individuals must take responsibility. There was utter outrage at the suggestion that intoxication could ever constitute an excuse or a defence.

Everyone opposed the specific/general intent distinction (although, in most responses it was not clear if respondents really understood the difference between the two). Every respondent opposed the option of having a defence of intoxication against any crime, regardless of the level of fault involved. There was unanimous disapproval for the idea of creating a new

special verdict for offences committed while intoxicated.

Respondents were somewhat divided on the issue of creating a new crime of criminal intoxication. Eighteen favoured the introduction of a new crime while 8 did not. Those opposing the new offence for criminal intoxication generally felt that such a crime would serve as a cover and would cloud the real issues behind the crime. They did not want a focus on alcohol; instead, they felt the focus should be on the crimes themselves, especially in cases involving the abuse of women.

With regard to punishment, 7 felt that individuals should receive the same punishment which is awarded to sober individuals who commit the same crimes. Three respondents argued that crimes committed while the perpetrator is intoxicated should result in stiffer sentences. Another suggestion made by several respondents was that the issue of punishment should be left open and dealt with on a case-by-case basis during sentencing. One respondent suggested that victim impact statments should be included and factored into the sentencing decision. Other respondents felt that punishments should not be solely retributive in nature. One respondent argued that punishment "should be a flexibly applied blend of mandatory rehabilitation, restitution, and incarceration." Another pointed out the need to emphasize counselling, especially for perpetrators who have a problem with alcohol. Others felt punishment should vary according to the nature and severity of the offence and the likelihood of the crimes being repeated.

One final note: it was clear from the general public's responses that the issue of criminal intoxication is of particular concern to women. 27 of the 58 respondents specifically mentioned this issue, and asked that the government consider women's concerns closely when formulating a policy response to this problem.

MEMBERS OF PARLIAMENT

Both MPs who responded relayed the outrage of their constituents in the wake of the *Daviault* decision. In their view, drunkenness should never constitute an excuse or a defence to a criminal offence. With regard to punishment, one MP felt that the sentence for intoxicated offences should be the same as the maximum sentence for the same crime committed by an accused who is sober.

CHURCHES

Responses to this issue were received from two church groups. Both the Belarusian Canadian Coordinating Committee and the Belarusian Autocephalous Orthodox Church argued that intoxication should never serve as a defence for criminal acts. Specific concerns were raised about victims, who often suffer death, bodily harm, as well as mental and emotional anguish at the hands of intoxicated felons. According to the Orthodox Church

response, if individuals cannot handle the effects of alcohol they should not consume it. Also, they argued that the Code should be reformulated so that loopholes will never be found by clever criminals.

JUDICIARY

s. 21(1)(b)

POLICE ORGANIZATIONS

Responses from police organizations were quite varied. The Canadian Police Association felt it was dangerous to respond too quickly simply to appease the alarmist reactions stemming from the *Daviault* decision. Their recommendation was to take the first available case and reargue it before the Supreme Court, statutorily exempting certain offences from the defence of intoxication and justifying the exemption under section 1 -- the Association said they would intervene in the case in support of the government.

A Deputy Commissioner of the RCMP pointed out that simply denying the defence would elicit a host of Charter challenges. In his view, the best response would be to create a new offence of "criminally negligent intoxication causing harm," an offence which rests on the notions of fault and harm rather than intoxication alone.

A spokesperson for the Toronto Metropolitan Police suggested that the General Part codify the existing law (including the general/specific intent distinction), and allow for a new special verdict and a new crime to deal with criminal intoxication.

A respondent from the Canadian Association of Chiefs of Police felt the *Daviault* decision was a major setback at a time when public authorities are striving to enhance the community's confidence in the criminal justice system. Respondent said the Association would likely support the creation of a new offence or an expansion of the negligence provisions in the Code.

FEDERAL/PROVINCIAL GOVERNMENTS

The Department of Canadian Heritage supported the inclusion of a new offence of criminal negligence causing harm in the *Criminal Code*. In their view, the punishment should be less than that for the original or main offence for which the accused is acquitted.

A Department of Justice official supported option six on page 47 of the consultation paper. In his view, voluntary intoxication could negate the mental element of 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 proved on the balance of probabilities that the intoxication rendered the accused in a state akin to automatism or insanity. In that case, the respondent felt the accused should be liable for criminal intoxication, and subject to the maximum punishment. In providing for the maximum punishment, the respondent believes the government would be giving judges enough discretion at sentencing to devise a just and fitting punishment in view of the specific circumstances of each individual case.

LEGAL ASSOCIATIONS

All of the legal associations expressed a hope that the issue of criminal intoxication would be dealt with as part of the broader General Part review. They did not want to see a quick response to the public outcry emerging from the *Daviault* decision. As a respondent from the Canadian Bar Association argued, "we are convinced that it remains 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." However, in the event the government opts for a legislative response (which we now know to be the case), the associations had different proposals for structuring changes to the Code.

Le Barreau du Québec argued that a new special verdict would be preferable over creating a new offence specific to intoxication. In their view, it is important that the new verdict be for voluntary intoxication and not automatism, as automatism requires that the individual not have created the conditions leading to the state.

The Canadian Council of Criminal Defence Lawyers argued that a defence of excessive drunkenness should result in a finding equivalent to "not criminally responsible."

The Criminal Lawyers' Association did not anticipate a flood of cases following the *Daviault* decision and saw no apparent reason to rush and introduce new legislation. However, if new legislation must be introduced, the Association felt 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. In their view, this would necessitate removing a distinction between sane and insane automatism.

A representative of the National Criminal Justice Section of the Canadian Bar Association argued in her response that the Section is absolutely opposed to any changes which would diminish the availability of a defence as a result of drunkenness for specific intent offences. The Section favours the retention of the specific/general intent distinction. However, they believe the Code might be amended to specify that a defence of intoxication should not be available for any general intent offence which is a crime of violence (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." According to this respondent, punishment under this verdict should aim to rehabilitate offenders and protect public safety.

MEDICAL ASSOCIATIONS

Most respondents in this category were opposed to allowing intoxication as a defence to any crime. The Canadian Nurses Association called for legislation which would disallow intoxication as a defence. In their view, the link between substance abuse and violence is a myth which encourages a view of perpetrators as being unaccountable for their actions due to impairment. The Association's view is also supported by the Manitoba Association of Registered Nurses.

A representative of Whitehorse Medical Services Limited and the Yukon Medical Association advanced a similar view. According to this respondent, drunkenness which leads to criminal behaviour should be a criminal offence, with punishment appropriate to the crime perpetrated while under the influence of alcohol.

The Canadian Public Health Association called for a broad based approach to countering violence. While intoxication may increase a person's propensity and capacity for violence, they do not believe it can be seen as the root cause of violent acts. ,To counter violence, CPHA believes that "fiscal and social reform are required to reduce economic inequities and address the conditions that lead to violence; as well, health policies are needed to improve prevention, early intervention, and treatment of violence."

In their response, members of the Addiction Research Foundation questioned the scientific basis of the *Daviault* conclusion that extreme intoxication can result in a state akin to automatism. This group does not feel that an act committed under the influence of alcohol is any different from the same act committed by an individual who is sober. They oppose the inclusion of a defence of extreme intoxication or automatism in the Code.

COMMUNITY SERVICE GROUPS

Again, the respondents in this category were generally opposed to a defence of intoxication and emphasized the need for individual responsibility in the criminal law.

The Victim Services Advisory Committee of St. John's, Newfoundland called for the recognition and protection of victims in the *Criminal Code*. If the Code is amended to include a defence of criminal intoxication, this committee believes that the punishment should be equal to the existing sentencing patterns for offences where intoxication is not an issue. Le Regroupement Québécois des CALACS was opposed to allowing an intoxication defence and did not favour the creation of a new offence of criminal intoxication. The Parkdale Focus Group also opposed a defence of intoxication. Victims of Violence, Canadian Centre for Missing Children, argued that the government must hold intoxicated offenders accountable for the crimes they commit.

The Church Council on Justice and Corrections argued that, while drunkenness should not be a specific defence, it should influence the nature of the charge and may even influence sentencing. While the Council believes intoxicated persons must be held responsible for their actions, they do not believe a new law should be based on the traditional proposition that the aim of criminal law is punishment.

The Citizens United for Safety and Justice Society suggested that intoxication should never constitute a defence. This group favoured the creation of a new crime of criminal intoxication, with that crime providing for further sanction in addition to the penalty for the original crime.

While the National Crime Prevention Council Secretariat was appalled at the *Daviault* decision and eager to see a legislative responses put before Parliament, they still argued that intoxication should remain a credible defence when alcohol consumption is not self-induced.

WOMEN'S GROUPS

Women's groups indicated that they want the government to appreciate the gender bias underlying the issue of criminal intoxication (many women feel the bias is not recognized by judges and others working in the criminal justice system). Generally speaking, the defence of drunkenness is viewed as an excuse used by men to avoid punishment for abusing women. All the groups felt that men must be held responsible and punished for their actions. While they wanted to deny the defence of drunkenness, not all of the groups favoured the creation of a new crime.

The Coordinator of the Alberta Council of Women's Shelters pointed out in her response that sexual assault requires certain motor skills, and that little evidence has been adduced to show how a perpetrator can commit such an assault while so impaired as to be classified as an automaton.

Members of the Newfoundland and Labrador Provincial Advisory Council on the Status of Women suggested in their letter that alcohol is often consumed by men to remove inhibitions intentionally.

Some women's groups, who oppose a new offence of criminal intoxication, believe that such an offence would deflect attention away from men's blameworthiness to alcohol. These groups do not see alcohol as the cause of violence.

The Catholic Women's League suggested that a new crime be introduced into the Code, and that the punishment be stringent. As part of the punishment, members of the League suggested that perpetrators 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 and alcohol.

The National Association of Women and the Law thought it was unfortunate that the Supreme Court focused on the "mens rea" requirements of the law without really considering the equality guarantees set out in the Charter. In their view, the government should codify a new section in the Code barring the intoxication defence for all crimes involving male violence against women and children. The Association believes that such an offence could be justified constitutionally under the Charter. A representative of the Ontario Association of Interval and Transition Houses also argued that the Charter should be employed by the government to balance the equality rights of victims against those of the men committing these crimes.

It was also suggested that, if allowed to continue, the defence of drunkenness could be used to argue mistaken belief in sexual assault cases. Some women's groups feel that the drunkenness defence will deter women from seeking their rights to protection from police and the courts.

VISIBLE MINORITY/MULTICULTURAL GROUPS

A respondent from the National Congress of Italian Canadians called for the introduction of a new offence of intoxicated criminal negligence causing harm or death. Respondent also favoured the abolition of the specific and general intent distinction.

A representative of the National Council of Jamaicans expressed concern that an intoxication defence could lead to blatant abuses of human rights. Respondent did not favour the creation of a new offence, and cautioned the government against acting too quickly in the wake of the *Daviault* decision. If a new offence is created, the Council believes it should be phased in over a couple of years to allow for public education.

ABORIGINAL

A paper was submitted to the Department, commenting on the issues in the consultation paper from a First Nations women's perspective. The author suggested that Parliament should maintain the specific/general intent distinction while forbidding the use of the

intoxication defence for general intent offences. The author called for widespread study of the issue, with careful consideration for the particular concerns of women on this issue. According to this respondent, when alcohol use is considered at the sentencing stage it should be an aggravating factor rather than a mitigating factor.

STUDENTS

Eight students from an Ontario High School wrote the government to express their discontent with the *Daviault* decision. The students felt that individuals must be held responsible for their actions when they are intoxicated. Some members of the group favoured the creation of a new offence (a type of criminal negligence). As for sentencing, the group was divided as to whether the punishment should be the same or less stringent for crimes committed by intoxicated individuals. One member of the group said that the severity of the punishment should depend on whether the accused intended to commit the crime before he or she got drunk.

LEGAL ACADEMICS

A joint response to the paper was submitted by two University of Ottawa law professors. The professors felt that a quick response could have adverse consequences by over simplifying issues that are much more complicated than the question of extreme drunkenness. The drunkenness issue cannot be separated from the broader issue of criminal responsibility. If legislation has to be advanced quickly, the professors recommend a law which would limit the number of offences for which the intoxication defence could apply. They believe the government could invoke section 33 of the Charter to uphold this policy. They also believe that extreme intoxication should be classed as a form of automatism which would require treatment.

NON-LEGAL ACADEMICS

A professor from the Department of Sociology at New York University applauded the government for closing all loopholes associated with chemical-induced, temporary insanity. The respondent wants policy makers to draw the distinction between alcohol consumption and abuse. In her view, "the chemicals are the excuse, not the cause." Most people who batter and abuse women do so whether they are sober or drunk. In her letter, she encourages the government to work with women's groups on this matter.

10. MISTAKE OF LAW

Questions posed:

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?

RESPONSES:

Responses to the questions under this category were received from 20 members of the general public, 2 members of the judiciary, 1 police organization, 3 other federal government departments, 2 community service groups, 1 women's group, and 1 legal academic.

GENERAL PUBLIC

Respondents from among the general public were quite divided on the issue of whether mistake or ignorance of the law should constitute a defence. While 8 respondents felt such a defence should be considered, the same number disagreed with the idea altogether. Most opponents of this defence felt that it was not unreasonable to expect Canadians to know the tenets of the criminal law and to abide by them, regardless of their cultural roots. Even if Canadians do not know the precise details of the criminal law, one respondent felt that citizens know enough about the law "in a general and human way" to avoid criminal activity.

Two respondents felt that the multicultural complexion of Canada justified the inclusion of a defence of mistake of law. In their view, new immigrants to Canada can not be expected to know all the details of the criminal law. Given the complexity of the *Criminal Code*, ignorance or mistake of the law is understandable. Others acknowledged the difficulty faced by new immigrants, but felt that greater efforts must be made to educate newly arrived immigrants. Allowing excuses for law-breaking is not, in their view, the appropriate way to respond to this problem. In the words of one respondent, "the laws represent our fundamental common values and, as such, ignorance is no defence."

As for the issue of "officially induced error", only one respondent openly opposed it while ten said it should be included. However, most proponents of this defence argued that it should only be available for offences which are not serious. Most would limit its scope to regulatory offences and only two respondents envisioned a defence of "officially induced

error" which would be applicable to all laws. Seven respondents felt that a Court of Appeal decision would be appropriate for this defence and four would allow for such a defence to be based on lower court decisions.

With regard to "officially induced error", a number of respondents pointed out how absurd it was to hold an accused accountable for following the guidance of courts. As one respondent asked, "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?" Those who commented on this issue seemed to agree that an accused should not be faulted for following the direction of a court.

JUDICIARY

[s. 21(1)(b)]

POLICE

The RCMP argued that the law should remain the same. In their view, the seriousness of the error and the reasonableness with regard to the circumstances should be considered during sentencing.

FEDERAL/PROVINCIAL GOVERNMENTS

Three government departments responded. The Department of Canadian Heritage argued that, in view of the diversity of the Canadian population, culture should not be a defence to criminal liability but should be taken into account as a mitigating factor during sentencing. This department also agreed with the inclusion of a defence of "officially induced error" which would apply to all laws. They would support reliance on a Court of Appeal decision as a defence.

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

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

Health Canada said mistake or ignorance should not serve as an excuse or a defence. In its view, "proper steps and orientation materials are provided by governments to inform new immigrants about what is acceptable and unacceptable behaviour in Canada and which ones are in contravention of Canadian criminal legislation." Citizens entering Canada have a responsibility to be informed about the criminal law.

WOMEN'S GROUPS

The Catholic Women's League of Canada argued that the *Criminal Code* contains values which we should all be expected to know. The League opposes a defence of mistake of law. In their response, they encouraged the government to do more to assist newly arrived immigrants learn about Canadian laws and customs.

COMMUNITY SERVICE ORGANIZATIONS

The Citizens United for Safety and Justice Society argued that there should be no excuse for ignorance of the law. Rather than include ignorance of the law as a defence, they suggested that the law be rewritten in simple terms so that citizens can understand it better. The Church Council on Justice and Corrections argued that there are certain acts of evil for which there can never be a defence of ignorance. However, they believe that the situation is different when actions cannot be labelled culpable without specific knowledge. They propose that a simple question be asked: "can the offender reasonably be assumed to have known that she or he engaged in unlawful behaviour."

LEGAL ACADEMICS

One legal academic raised a number of important issues in this area. In her view, there is certainly a problem with expecting the average citizen to have a better knowledge of the law than the judges. However, she is still concerned that some "maverick" decisions might be used to circumvent the law before the loophole is plugged. With regard to the extention of a defence of officially induced error, the professor believes this would depend on the type of offence in question.

11. PROVOCATION

Questions posed:

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 effects of prolonged and severe abuse?

RESPONSES:

Responses to this question were received from 20 members of the general public, 2 members of the judiciary, 1 police organization, 2 other federal government departments, 1 community service group, 1 women's group, 1 medical association, and 1 legal academic.

GENERAL PUBLIC

Of the 20 respondents in this category, 14 felt that the partial defence of provocation for murder should remain in the *Criminal Code*. Only two felt that this defence should be removed from the *Criminal Code* altogether. One female respondent felt that the defence of provocation is often "used erroneously to discriminate against women in homicides after the fall-out of domestic violence." In her view, "the result of this defence is that murder charges are reduced to manslaughter charges which do not reflect the violent and horrific nature of the crime. It gives men permission to murder without full consequences." Another female respondent argued that the "defence of provocation is a male-oriented excuse for battering women." However, the vast majority of the responses pointed out that, in extreme circumstances (ie. instances of abuse), it is understandable why the murder was committed. As one respondent said regarding the provocation defence, "having this as part of the *Criminal Code* allows the person to be punished for the crime while still reflecting society's understanding of how circumstances contributed to the crime being committed." While two other respondents did not believe the provocation defence should be eliminated for murder, they still expressed reservations about the defence. One individual did not want provocation to be abused and used profusely as a defence against virtually every murder offence. Another respondent would support the complete removal of the defence of provocation if the minimum penalty for murder was removed as well. In that case, provocation would be a matter to be considered during sentencing.

Respondents were more divided on the issue of extending the defence of provocation to all other offences. Ten felt it should be extended while 5 were opposed to an extension of the defence. One respondent felt that an extension of this defence would "allow too much leeway and would provide perpetrators with a loophole which they could abuse." Conversely, another response from a group of eight men suggested that the word "partial" be deleted altogether, allowing for a complete defence of provocation. This group also felt provocation should be allowed as a defence to a charge which does not include a lesser or included offence (ie. murder/manslaughter).

Fifteen respondents felt that the defence should be changed to include both "sudden" acts of rage and the slow-building effect of prolonged and severe abuse. Only 2 disagreed. One dissenter felt these factors should be admissible, but only at the discretion of the judge. The other dissenter expressed reservations about the entire notion of a partial defence of provocation. In her view, sudden acts of rage and the slow-building effects of abuse should not be included - instead, long-term abuse should fall under self-defence and self-preservation for women and their children.

JUDICIARY

[s. 21(1)(b)]

POLICE

The RCMP argued that provocation should not be extended to other offences. In their view, there is a place for this defence in cases of prolonged and severe domestic abuse, as is recognized in case law.

FEDERAL/PROVINCIAL GOVERNMENTS

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

Respondents from Health Canada felt the partial defence of provocation should not be available for any offence other than murder and only in cases involving the slow-building effect of prolonged and severe abuse (emotional, psychological, physical etc.). In their view, 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 the slow-building effect of prolonged abuse as corroborated by expert-witness evidence.

COMMUNITY SERVICE GROUPS

The Citizens United for Safety and Justice Society would accept the current provocation defence but would not expand it any further to encompass all offences. With regard to murder, they believe that the courts have recognized the situation of women who suffer due to the slow-building effects of prolonged abuse.

WOMEN'S GROUPS

The Catholic Women's League wished to maintain the current defence of provocation for murder and also called for an expansion of this partial defence. However, they recommended a strong burden of proof be required of the person using the defence. In their view, provocation should be viewed as a mitigating factor to be considered during sentencing. However, provocation in no way removes guilt or responsibility for the commission of criminal acts.

MEDICAL ASSOCIATIONS

The Canadian Public Health Association (CPHA) argued that any changes to provocation should reflect "the real threat of violence which women face in Canadian society."

LEGAL ACADEMICS

One legal academic raised a number of issues concerning provocation. In her view, provocation is related to the issue of formation of intent. If an individual acts on the basis of "sudden rage", they may lack the necessary intent to be convicted of murder and therefore have no real need to invoke provocation. Provocation also becomes significant in cases where the provocation results in the accused intending to kill in retaliation - this should be borne in mind when deciding whether to abolish this partial defence. She does not support expanding provocation to all offences. As she states in her response, "provocation 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 with provocation and is more compatible with self-defence.

12. CULTURE AS A DEFENCE

Questions posed:

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?

RESPONSES:

Responses to these questions were received from 27 members of the general public, 2 churches, 3 visible minority/multicultural groups, 4 other government departments, 4 members of the judiciary, 1 police organization, 3 community service groups, 1 women's group, 1 medical association and 1 legal academic.

GENERAL PUBLIC

Every respondent in this category disagreed with the inclusion of a general cultural defence in the revised General Part. Most feared that such a defence would result in an erosion of the values enshrined in our *Criminal Code* and produce inconsistencies in the law. A few respondents were prepared to accept specific cultural defences for minor offences (e.g. wearing a ceremonial dagger). While some felt that cultural and religious factors were important in applying the criminal law, they argued that they should be dealt with as special, mitigating factors during sentencing.

CHURCHES

Both the Lutheran Church of Canada and the Greek Orthodox Diocese of Toronto opposed the idea of a general cultural defence. They both wanted to avoid the appearance of prejudice and preferential treatment in the application of the law. However, the Lutheran Church was prepared to accept specific defences based on culture. In their view, such specific defences would be more manageable because they would be administered on a case-by-case basis.

VISIBLE MINORITY/MULTICULTURAL GROUPS

The Federation of Sikh Societies of Canada wrote and expressed their desire to have the *Criminal Code* amended so as to change sections which could possibly prohibit Sikhs from carrying kirpans at all times. They did not comment on the inclusion of a general cultural defence.

The Canadian Arab Federation argued that, with the exception of the First Nations peoples, culture should not be used in defining fault or as a defence. Interestingly, they argued that the inclusion of a general cultural defence would hurt "the so-called ethnic minorities" by further accentuating the existing state of disharmony between their culture and that of the "mainstream." They also pointed out that religions and cultures are not monoliths; they are often interpreted differently by their followers, and it would be next to impossible for the courts to reach any consensus on any particular set of religious or cultural values.

FEDERAL/PROVINCIAL GOVERNMENTS

Health Canada opposed the idea of cultural and religious defences. In their view, such defences would result in horrible practices such as female genital mutilation. It also said such a defence would be inconsistent with Convention on the Rights of the Child and the spirit of the *Charter of Rights and Freedoms*.

The Department of Canadian Heritage also opposed incorporating "culture" as a defence. However, the Department did support the inclusion of provisions whereby sensitivity to one's culture or religion would be taken into account as a mitigating factor during sentencing. In the view of Canadian Heritage officials, such provisions would be consistent with the culturally diverse nature of the Canadian population.

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

[s. 21(1)(b)]

COMMUNITY SERVICE GROUPS

Community service groups voiced unanimous disapproval of this proposal. The Citizens United for Safety and Justice Society referred to the cultural defence as an "outrageous situation." In their view, it would be divisive and harm national unity. The Union of British

Columbia Municipalities also felt that a cultural defence could potentially undermine respect for the law and heighten cultural tensions. The "Repeal 43 Committee" (which wishes to have the section of the *Criminal Code* allowing for corporal punishment of children removed) opposed cultural and religious defences. In their view, corporal punishment is reflected in many religious beliefs and section 43 is an example of the danger associated with codifying certain religious and cultural practices. The Church Council on Justice and Corrections also opposed the idea of a general cultural defence.

MEDICAL ASSOCIATIONS

Canadian Public Health Association (CPHA) was concerned about the types of illicit drugs which are commonly used for religious and cultural reasons. They did not think cultural and religious values should excuse people for using these drugs. In fact, they argued that recent immigrants should be made aware of the adverse effects of such drugs and would like to see the harmful nature of such drugs reflected in the *Food and Drug Act*.

WOMEN'S GROUPS

The Catholic Women's League of Canada argued that there should be no general cultural defence. They did note an exception in the case of native Canadians: "provision must be made for some crimes to have a specific defence which would allow for different behaviour because a person is of native culture."

LEGAL ACADEMICS

A law professor who responded found the idea of a cultural defence "troubling." In her view, we need to send out a strong message that everyone is expected to abide by certain rules and permitting variation according to culture and religion is the very antithesis of that message.

POLICE

The RCMP argued against the inclusion of a general cultural defence.

JUDICIARY

s. 21(1)(b)

13. TRIVIAL VIOLATIONS

Question posed:

> Should the new General Part include a defence of de minimus, 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?

RESPONSES:

Responses to this question were received from 19 members of the general public, 1 church, 3 members of the judiciary, 1 police organization, 3 government departments, 2 women's groups, and 1 community service group.

GENERAL PUBLIC

Of the 19 respondents in this category, 11 argued in favour of a defence of de minimus. One person felt there is already too much litigation in this country and that a de minimus defence would help curb it. An opponent of de minimus argued the defence is not necessary because police and prosecutors already screen all criminal charges. In other words, trivial violations are already dealt with through out-of-court diversion programs, and unless a person is a repeat offender, trivial crimes can be dealt with out of the courtroom even in the absence of a de minimus defence. However, many of these respondents were "cautious proponents." While they supported the principle of de minimus, some pointed out how difficult it is to determine when a crime is actually trivial. Another proponent expressed some concern that the defence might come to be extended and reach non-trivial offences like assault.

Eight respondents voiced opposition to this defence for various reasons. One opponent felt that any offence, for which the prosecutor feels court time is warranted, should be addressed at trial. In his view, that option should be left open for any offence. Some opponents felt that the separation of serious and trivial violations reflects a false distinction. In the words of one respondent, "to break the law is to break the law." Another person argued that "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." It was felt that allowing young people to escape criminal responsibility for trivial crimes simply sends the wrong message.

CHURCH

The Greek Orthodox Diocese of Toronto argued that recognition of a de minimus defence has worth. However, the defence should stand on its own merits and not be supported because of its specific relevance to issues of cultural difference.

JUDICIARY

s. 21(1)(b)

POLICE

The RCMP argued against the codification of a de minimus defence. In their view, 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

One respondent from Health Canada felt that a defence of de minimus would further congest the justice system. The respondent pointed out that the police already deal with violations they view as trivial outside 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. Therefore, at present, it is unlikely that trivial violations will end up before the courts.

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

Canadian Heritage also opposed a defence of de minimis. In their view, it would only increase the length and complexity of trials.

COMMUNITY SERVICE GROUPS

The Citizens United for Safety and Justice Society did not see the need to include a defence of de minimus because it is already true that trivial violations rarely reach court.

WOMEN'S GROUPS

The Catholic Women's League of Canada does not believe "de minimus" is a necessary defence. At present, the police and crown counsel do not proceed unless, in their view, the offence is serious enough to take up the time of the courts. Measures are already taken to ensure there are no court backlogs. The Newfoundland and Labrador Provincial Advisory Council on the Status of Women also opposed the de minimus defence. They were concerned about who would make the delicate decision as to what constitutes a "trivial violation." They were also worried that women's concerns might be labelled trivial by the justice system. They argued as follows: "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."

14. COMMON LAW DEFENCES

Question posed:

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

RESPONSES:

Responses to this question were received from 19 members of the general public, 2 members of the judiciary, 1 police organization, 3 government departments, and 1 women's group.

GENERAL PUBLIC:

Of the 19 respondents in this category, a large majority (14) felt that the provision of the Code allowing judges to recognize defences which are part of the judge-made case law should remain. Most argued that such defences allow for a necessary degree of flexibility in the criminal law. Without such flexibility, many feared the criminal justice system would not be able to evolve and take account of changing realities and mores.

However, the 4 respondents who were opposed voiced serious concerns. In their view, judge-made law has the potential to undermine Parliament's perogative to set the rules of criminal liability. One opponent argued that "giving judges and courts too much leeway would water down the *Criminal Code* by leaving it open to each judge's interpretation and the personal experience which they come from." Another respondent argued that the courts (specifically the Supreme Court) already has too much power, and that an increase in judicial power could have the undesired effect of politicizing judicial appointments. Those who oppose common law defences generally feel that judges render poor decisions.

JUDICIARY

[s.21(1)(b)]

POLICE

In their response, the RCMP argued that the General Part should continue to acknowledge common law defences.

LEGAL ACADEMICS

One law professor felt it was a good idea to maintain common law defences. This provision in the General Part allows for common law defences to be developed as the need arises. However, the respondent feared that courts do not always know how to differentiate between a defence and an argument which is part of the Crown case - author refers to Justice Gonthier's decision in *Jobidon* where he seems to think that consent is a defence.

FEDERAL/PROVINCIAL GOVERNMENTS

Two respondents from other government departments favoured the retention of common law defences, again because of the inherent flexibility which they provide. One of them argued that "while the existing law must be rewritten occasionally to codify existing changes, the latitude to recognize new situations needs to remain in the General Part." However, one member of the Justice Department raised concerns about the common law defences. In his opinion, "the legal community is clearly becoming increasingly frustrated by the rather wide scope of interpretations that judges put on primordial common law concepts. 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 a jeopardy, be defined with maximum precision."

WOMEN'S GROUPS

The Catholic Women's League wrote a response stating their hope that the Judeo-Christian values which inform much of the common law be maintained. Moreover, they argued that "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." However, their response was ambiguous on the issue of common law defences. They were not really specific about how they thought their "values" would be best upheld - through codification or a flexible provision allowing for common law defences.

15. PREAMBLE OR STATEMENT OF PRINCIPLES AND PURPOSES

Questions posed:

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?

RESPONSES:

Responses to this question were received from 17 members of the general public, 2 church groups, 3 other federal government departments, 2 members of the judiciary, 1 police organization, 3 women's groups, and 2 community service organizations.

GENERAL PUBLIC

The 17 respondents from the general public were quite divided on the issue of including a preamble or statement of principles. Seven indicated that they would favour its inclusion. Among those favouring its inclusion, it was generally felt that a statement of principles would set out the fundamental tenets of the criminal law and serve as a set of guiding principles for judges to follow. One respondent felt it would give "much needed coherence to the criminal law and the criminal justice system as a whole ... by highlighting our current fundamental values." It was also felt that it is Parliament's role to determine the objectives of the criminal law and set clear guidelines for courts to follow.

Two respondents set out suggestions as to what should be included in a preamble. One felt that the preamble should contain a rationale for the revisions to the Code, a set of goals and objectives for the revised document, a synthesis of the objectives of the criminal law, a procedure for further revisions, and a statement as to the inherent role of law in Canadian society. The author felt that part of the "inherent role" of law should be to protect the public, root out the causes of criminality, and educate the public about crime.

The other suggestion was that the preamble state that the primary purpose of the criminal law is the protection of the public. As well, it was suggested that the preamble state that the criminal law aims to discover the truth, ensure all the relevant facts are presented at trial, and punish in a way which reflects society's abhorrence of anti-social acts.

Ten of the respondents opposed the inclusion of a general preamble. Some felt that a clearly defined set of principles would be too restrictive and would deny the criminal law of a necessary degree of flexibility. However, most feared that if the statement of principles was

not specific enough, it would provide too much room for interpretation and result in confusion and endless legal wrangling. Another respondent pointed out that it would be very hard to word a preamble and next to impossible to reach any kind of consensus on the principles and values which should be reflected in a preamble.

CHURCH ORGANIZATIONS

The Lutheran Church of Canada favours the inclusion of a statement of principles. In their view, these changes to the *Criminal Code* should include a preamble which 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.

In its response, the Mennonite Central Committee of Canada argued that the articulation of basic principles in the form of a preamble is central to the entire *Criminal Code*. They believe a preamble would set out clearly national standards for criminal acts. However, they believe that the preamble should also call for a "restorative approach" which channels offenders toward rehabilitation and reintegration when possible. This group also calls for a communal response to crime, in which members of the community work to "right the wrongs" and reintegrate offenders. As part of this communal approach (which they would like to see integrated directly into a preamble) the Mennonite Committee would include tackling systemic issues such as social welfare, classism, and racism.

FEDERAL/PROVINCIAL GOVERNMENTS

One Justice employee felt that, if we are moving in the direction of codification, then we should make the codified material simple to understand and apply. The inclusion of a general statement of principles could undermine the purpose of the codification exercise, which is to make laws definite by proscribing a zone of fault around a proscribed activity. The other response, which was from a federal department, also opposed the inclusion of a preamble. However, the department did recommend, as part of a public education campaign, a statement of fundamental principles and objectives pertaining to the revised General Part of the *Criminal Code*. In its response, the department also stressed the importance of using straightforward and clear language in the reformed General Part so that it can be easily grasped by members of the general public.

JUDICIARY

[s.21(1)(b)]

POLICE

The RCMP argued against the inclusion of a preamble or statement of principles. In their view, it would only result in increased complexities and uncertainties as well as unnecessary litigation.

WOMEN'S GROUPS

There were three responses from women's groups. Regroupement Québécois des CALACS favoured the inclusion of a preamble. This group noted how Bill C-49 contained a preamble which, in their view, had a beneficial and educative effect. In order to confirm the role of the *Criminal Code* in the fight against violence against women, this group recommended the inclusion of a preamble in the General Part.

The Provincial Advisory Council on the Status of Women (Newfoundland and Labrador) also felt it was important to include a preamble. In their view, a preamble is important in providing a framework for the Code. When the law is applied in isolation, the context and background which reflect the specific concerns of women are often forgotten. If the *Criminal Code* is going to reflect and meet women's needs, this committee feels women's specific concerns must be contained in a statement of principles in the Code.

The Catholic Women's League opposed the idea of a preamble because the wording would probably take two or three years of debate before a consensus of any sort would emerge. They also cautioned against the pitfalls of having a preamble which is either too specific or too broad: "if the wording is too broad, it will be ineffective but if it is too narrow, it will be contentious."

COMMUNITY SERVICE GROUPS

The Church Council on Justice and Corrections liked the idea of a preamble, but felt there would have to be a great deal of discussion before a decision could be made as to what such a statement should contain. The Citizens United for Safety and Justice Society argued for a change to the preamble of the *Charter of Rights and Freedoms*. In their view, there should be a new emphasis on respecting others' rights and the rule of law. Again, they are concerned that the Charter and the criminal law are benefitting the individual criminal at the expense of victims and community safety.

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August 1995