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Fault Element Proposals in the White Paper

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Fault Element Proposals in the White Paper

This paper will review and critique the fault provisions which are contained in section 12 (s.6 of the amending bill) of the Proposals to amend the Criminal Code (general principles), released by the Minister of Justice on June 28, 1993[1]. I have divided the proposals into a number of discrete issues. Within each issue, I will start by stating what the proposals are and what they are trying to do. I will then discuss whether they are trying to do the right things, taking into account the material that I have been provided on the subject, including the work of the Law Reform Commission of Canada[2], the Canadian Bar Association[3], and the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General[4]. As part of this discussion, I will address the question of whether the proposals codify or modify the current law or create new law. I will then consider whether the provisions as drafted convey the policy effectively. Finally, I will suggest any modifications I would make as a result of this review.

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[1] Hereafter referred to as the White Paper.

[2] Report 31 -- Recodifying Criminal Law (Ottawa: Law Reform Commission of Canada, 1987). Hereafter, this Report will be referred to as the LRC Report.

[3] Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code (Ottawa: Canadian Bar Association Criminal Recodification Task Force, 1992). Hereafter, this report will be referred to a the CBA Report.

In addition, reference will be made to the Canadian Bar Association "Submission to the Minister of Justice on the Proposals to amend the Criminal Code (General Principles)", hereafter referred to as the CBA Submission.

[4] First Principles: Recodifying the General Part of the Criminal Code of Canada, the Report of the House of Commons Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General (Ottawa: Queen's Printer, 1993). Hereafter, this Report will be referred to as the Sub-Committee Report.

1. General Fault Element Requirements

The White Paper starts by defining when a person commits an offence and includes a requirement that the person must have "the state of mind specified in the description of the offence or otherwise provided by law" (s.12.1). This provision is somewhat awkward in two ways. First, the use of the word "commit" is somewhat ambiguous; clearly the intent is to include all the actus and mens components but not the defences. However, it takes some work to exptract this from the section. It might be better to have a more general statement that indicates that " a person may be convicted of an offence if ... and no defences apply." Secondly, it is a bit misleading to refer here to "state of mind". Negligence is not really a state of mind. It might be better to say "with the level of fault or state of mind".

The White Paper proposes that there be four possible fault elements for criminal offences — intention, recklessness, criminal negligence and negligence. It then defines each fault element in two ways — first in terms of what that mental element means when it defines a whole offence, and then what it means when it defines each of the conduct, the circumstances and the consequences of an offence. With regard to criminal negligence and negligence, the two parts of the definition are combined into one.

The CBA submission argues that this approach is unduly complicated and lacks clarity. There are, in fact, some advantages to this approach. First, it recognizes the fact that Parliament or the courts may require different levels of fault for different parts of one offence. A uniform application is set out, but the White Paper gives definitions that

make all of the possibilities clear. The CBA Report, on the other hand, seems to attempt to force the legislation into a mental element that may not have been intended by requiring the mental element to apply to all aspects "unless a contrary intent plainly appears." If that is what is wanted, then the CBA approach is more efficient. However, the White Paper is arguably trying to be more sensitive to alternate possibilities and this is best done through the specific detailing that they have employed. There is, of course, a substantive question that underlies this dispute. Since it involves the question of what the appropriate mental element for criminal offences is, I will leave it until the end of my discussion of the substance of the White Paper's mental elements.

Secondly, even if the underlying fault requirements are conceptually the same, using different language to express the mental element in relation to different types of elements may in some cases be clearer. For example, the White Paper uses "intention" with regard to conduct and consequences, but "knowledge" with regard to circumstances. Intention and knowledge are equivalents, but they are used to modify different types of things, and the White Paper recognizes and reflects that distinction. The CBA Report does not use the distinction in this way, but that does not make it better.

There is, however, a potential negative to the White Paper scheme described above. It depends very much on the division of offences into conduct/omission, circumstances and consequences. While those are useful divisions for analysis in most cases, I am not sure that they are universal enough to be the sole basis of the definition of the mental elements of all offences. While it might be possible to redraft the offences in the Code to fit this scheme, as I read the White Paper, it is intended to work with the Code as it is for the time being and, therefore, current misfits are relevant. Just to give

some examples, in culpable homicide, on which murder, infanticide and manslaughter are based, the "conduct" is "causing death". What is "the act or omission specified in the offence"? In the offence in s. 173, "wilfully doing an indecent act", is indecency a circumstance or part of the conduct? Is a "disturbance" in "causing a disturbance" (s. 175) part of the act/omission or a consequence?

There may be answers to these questions; the problem is that splitting offences into the three different parts requires us to ask the question in many offences. It may be quite conceptually difficult to apply these labels to some current offences, and therefore, the White Paper would require the courts to spend time on some technicalities that do not advance our use of the law in any real way.

A second general issue is raised by the CBA submission on page 7, i.e. that by including references to "otherwise provided by law" and "except where otherwise provided", the White Paper does not bring enough certainty to the mental element. I do not see the problem in relation to the situations where the White Paper uses "except as otherwise provided" because invariably in those cases, the reference is to the Code itself ("by this Act") or to other federal legislation ("or any other Act of Parliament"). All these references do is allow Parliament to select another mental element where that is appropriate. This is not leaving the issue uncertain; it simply allows Parliament to deviate from their basic scheme. There is nothing inappropriate about that unless the basic scheme is the only just scheme. I will deal with that issue as I go through the specific mental elements.

The phrase, "otherwise provided by law", on the other hand, does seem to refer to common law analysis and to bring it within the ambit of the statutory scheme. If this is intended simply to allow the enactment of the general principles without having to review all offences to see how they fit with the scheme, I am sympathetic to the endeavour. It is much more likely that Parliament will be able to handle the general part on its own and it will certainly happen much quicker than if we have to wait for all offences to be reviewed. However, there is nothing in the White Paper to encourage the codification of these mental elements or to discourage the development of further common law "descriptions", with the result that these common law appendages may continue to grow. This is exacerbated by the fact that there is no general default position. If the offence says nothing, these provisions do not provide an answer. They tell the courts how to define a mental element when one exists but not where to find one if nothing is specifically mentioned. This is an enormous gap, if the White Paper is relying on current substantive provisions, and must be filled in if the Code is to provide the kind of information and certainty that it seems to intend.

2. Intention

(a) Act or Omission — s.12.4(2)(a)

Intention is defined with regard to conduct as "means to commit the act or make the omission specified..." This is a good definition, consistent with current case analysis, and fits well with the concept of intention.

(b) Circumstances — s.12.4(2)(b); s.12.3

Intention is defined with regard to circumstances as "knows the circumstance...." Knowledge is the conceptual equivalent of intention for most purposes. In fact, even if intention actually requires something more, e.g. purpose, we usually read it down so that knowledge (i.e. substantial certainty) is enough. Therefore, there is no problem with setting knowledge as the standard of intention with regard to circumstances. One wonders, however, why this provision is necessary. The provision is dealing with the meaning of intention when it applies to circumstances. However, the Code does not normally require "intention" with regard to circumstances. It does require knowledge. Therefore, in almost all cases, the meaning of intention as it applies to circumstances will not be relevant; what will be relevant is the meaning of "know" as it applies to circumstances.

"Know" is defined as "(a) to be aware that the circumstance exists; or (b) to be aware that it is probable that the circumstance exists and to avoid taking steps to confirm whether that circumstance exists." [Note that this applies to all circumstances whether or not they are defined; it is difficult, given the structure of s.12, to figure out when there would be a requirement that an accused "know" a circumstance that is not defined in the offence.]

The definition of "know" does raise a few issues. First, to define it as "to be aware that the circumstance exists" does not add anything and in fact may obscure the meaning of "know" by indicating that something less than virtual certainty may be enough. There is nothing wrong with simply allowing the word "know" to speak for

itself; unlike many of the other words that we use, its meaning in criminal law is basically the same as its lay meaning. Thus, (a) could read: "to know to a virtual certainty that the circumstance exists."

The second part of the definition of course adds the concept of wilful blindness. There are two issues here; the first is whether the standard required should always be one of probability. Given that this is the functional equivalent of "knowledge" and must be distinguished from recklessness, it does seem to make sense to require a high level of awareness. The second is whether "to avoid taking steps to confirm whether that circumstance exists" sets a high enough standard. It seems that the most useful word here is "avoid" and that it is capable of carrying quite a lot of baggage, e.g by requiring a deliberate thoughtful omission. However, with no other indication of the reason for the omission, there is danger that this will bleed into recklessness. It would reflect the traditional concept of wilful blindness more completely and be less susceptible to the variations wrought by cases like Sansregret[5] if it at least specified that the purpose of the omission had to be "in order not to know."

(c) Consequences — s. 12.4(2)(c)

According to the White Paper, for the accused to intend a consequence, the accused has either to mean to cause the consequence or to be aware that the consequence will occur in the ordinary course of events. I believe this is intended to

[5] Sansregret v. The Queen, [1985] 1 S.C.R. 570, 45 C.R. (d) 193, 18 C.C.C.(3d) 223.

reflect the traditional concept of intention, as expressed in Buzzanga and Durocher[6]. However, it is open to the possibility of being misinterpreted because it relies on the meaning of "will occur in the ordinary course of events" to express the amount of certainty that must be involved. It might be better to talk about "substantial certainty" rather than to leave it to the interpretation of "will", i.e. to say: "is aware that there is a substantial certainty that the consequence will occur in the ordinary course of events."

(d) Full Offence — s.12.3

Where intention is specified for an offence, rather than for part of an offence, the White Paper defines that as meaning that the intention test for the act/omissison and the knowledge test for the circumstances (both described above) will apply. These are essentially logical and non-controversial. However, with regard to consequences, the White Paper would not apply the meaning of intention for consequences set out in s.12.4(2)(c) but would instead look to the mental element for the consequence "specified or provided by law."

I assume that the reason for this approach is DeSousa[7], where the Supreme Court of Canada indicated that it is neither constitutionally necessary not traditional in common law analysis to have the mental element apply to consequences in criminal offences. This has, of course, been followed by Creighton[8], where the Supreme Court

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[6] R. v. Buzzanga and Durocher (1979), 49 C.C.C.(2d) 369 (Ont. C.A.) at 383-85.

[7] DeSousa v. The Queen (1992), 15 C.R. (4th) 66 (S.C.C.)

[8] Creighton v. The Queen (1993), 23 C.R.(4th) 189 (S.C.C.)

applied a test of objective foreseeability of bodily harm to unlawful act manslaughter, thus allowing both the use of an objective test and having it relate to something other than the necessary consequence specified in the offence.

There are several things that can be pointed out about these cases. First, in DeSousa, the Court actually made no effort to use a traditional common law analysis of the mental element for criminal law offences. They found that there was no mental element attached to "causing bodily harm", other than the objective dangerousness required for the predicate or underlying offence, without even considering (at least at this stage of the analysis) whether mens rea as to consequence should be read into the interpretation of the offence as suggested in Sault Ste. Marie[9] and Pappajohn[10]. In Sault Ste. Marie, a unanimous Supreme Court of Canada said that there is a presumption of subjective mens rea for truly criminal offences. This was totally ignored by the current Supreme Court of Canada. They seemed to assume that as the section said nothing about mens rea for the consequence of bodily harm, therefore there was none.

The Court justified this approach only when it got to the analysis of objective foreseeability with regard to consequences. The Court in essence held that fault in any form was constitutionally required only for some elements of an offence, in particular only for those elements of the offence that were necessary to distinguish the "mentally and morally innocent" from the culpable[11]. Once the accused was engaged in

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[9] R. v. Sault Ste. Marie (1978), 40 C.C.C.(2d) 353 (S.C.C.)

[10] Pappajohn v. The Queen (1980), 52 C.C.C.(2d) 481 (S.C.C.)

[11] DeSousa, supra at 85.

dangerous activity, he or she was culpable and the consequences were relevant only to the seriousness of the offence. They asserted that "no principle of fundamental justice prevents Parliament from treating crimes with certain consequences as more serious than crimes which lack those consequences....Conduct may fortuitously result in more or less serious consequences depending on the circumstances in which the consequences arise. ... The implicit rationale of the law in this area is that it is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused.... Courts and legislators acknowledge the harm caused by concluding that in otherwise equal cases a more serious consequence will dictate a more serious response"[12]. One problem is that this analysis is based on an assumption about what the "legislature" has said about the fault element which is at odds with traditional statutory interpretation in criminal law. In other words, Parliament, by leaving it open, may not have meant that no fault is required. Thus, there is no reason that Parliament cannot resolve this now by clarifying how it wants the fault element to apply. The constitutional standard is very low, arguably at the absolute liability level (although it is unclear why DeSousa required at least an objective foreseeability of harm in the predicate offence if some foreseeability of harm was not necessary for the main offence). Moreover, while the Supreme Court appears unwilling to read fault requirements for consequences into offences, Parliament is free to set a higher standard if it wishes. Therefore, the next question is what standard it should set.

It is important to recognize that the argument referred to above, as a justification for the Supreme Court stance, has little to do with the fault element. The argument is

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[12] DeSousa, supra at 85-86.

based almost solely on the act. It is clearly appropriate to make an offence more serious if harm results. It is fine to have a progression from, say, assault, to assault causing bodily harm, to aggravated assault, to manslaughter. But it is inappropriate to ignore the fault element in the progression. If, as Sopinka states in DeSousa, the criminal responsibility is for equally reprehensible acts, why is it appropriate to distinguish them? The offences get more serious (and carry higher penalties) because the elements of the offences get more serious. But if the criminal responsibility remains the same, then the Court is essentially punishing a person who is morally innocent of the specific offence for which they are being convicted. That is the problem. And just as it would be wrong to convict someone of assault if they had no idea that what they were doing might inflict force on someone else, so it would be wrong to convict them of assault causing bodily harm if they had no idea that the force they were inflicting might harm the victim. If the harm matters, the accused's attitude to it matters too.

There have long been arguments that the test of causation is insufficiently sensitive since it does not react to the fortuitousness of the consequence. In fact, that is not an argument about the fact of causation but about responsibility, about culpability. The Supreme Court here removes from the analysis the last remnant through which the concern about responsibility for the consequences could be addressed. It is, of course, possible to justify objective fault elements as fair, but not when society is convicting and punishing at a level appropriate for a person who was aware of the risk. The Supreme Court has simply not recognized or dealt with that problem. That does not mean, however, that Parliament should follow the same route.

The current draft of s.12.3, when considered in conjunction with DeSousa means that for intentional offences with consequences, unless a specific fault is written in, the law will include no fault element or, at most, objective foreseeability of harm (perhaps at a level of significance commensurate with marked departure). This is not appropriate for an intentional offence. There is no reason, when the whole offence is intentional, not to require the intentional standard under s.2.4 to be met with regard to every element; anything less is arguably inconsistent. This would leave the debate where it belongs, in the question of whether the intentional requirement applies to the whole offence or only to portions of it.

3. Recklessness

(a) Act/omission — s.12.5(2)(a)

The requirement here is the same as for intention, i.e. "means to commit the act or make the omission specified. It is a little unclear why this should be so. While, in most cases, the requirement of voluntariness will have a similar effect, in some offences the act element may be sufficiently complex that it could be committed recklessly (i.e. the accused being aware of a serious risk that the act/omission will occur). This really reflects a concern related to some I raised earlier, e. g. with regard to the relevance of unspecified circumstances (at page) and the difficulty of defining offences clearly in terms of act, circumstances and consequences (at p.). The White Paper appears to recognize only inconsistently the potential complexities in the descriptions of offences. I

would feel more comfortable if this were worked out more thoroughly. Moreover, there is really no need for this provision if it is identical to intention (except perhaps to deal with some left-oever offences). Parliament should take care to specify intention in relation to act/omission in all cases and not use recklessness with regard to act/omission at all, since that would be clearer and less misleading.

(b) Circumstances — s.12.5(2)(b); s.12.5(3)

According to the Qhite Paper, recklessness as to circumstances means that the accused is "aware of a serious risk that the circumstances exist". "Serious risk" means either a substantial risk or a risk, whether or not it is substantial, that is highly unreasonable to take. Basically, this seems to correspond to the current meaning of recklessness, as defined in cases like Buzzanga and Sansregret. However, it should be noted that there is overkill in the definitions of serious risk, in that substantial risks that are highly unreasonable to take are covered in both (a) and (b). In fact, I would suggest that even substantial risks should amount to recklessness only if they are unreasonable to take. Surgery, for instance, may carry with it substantial risks and yet, if they are reasonable, they would be acceptable ones to take. It is hard to think of an equivalent example for circumstances, but all that means is that all substantial risks are unreasonable to take. In any event, I would suggest that (a) is unnecessary and potentially unjust and should be removed.

(c) Consequences — s.12.5(2)(c); s.12.5(3)

Recklessness as to consequences is defined as being "aware of a serious risk that the consequence will occur". With the amendment to the definition of serious risk suggested above, this provision reflects current law and seems fair and workable.

(d) Full Offence — s.12.3(1); s.12.5(3)

Where the offence as a whole is described as requiring recklessness, the fault required will be the same as that for recklessness as to the individual components of the act/omission and circumstances but, as with intention, require "the state of mind specified in that description or otherwise provided by law with respect to the consequences ...". As with intention, this last seems an unnecessary attempt to follow the interpretation of the Supreme Court in recent cases, and results in an injustice by not requiring recklessness as to the important element of consequences. It is always possible for Parliament to deviate and require less in any particular offence, but the general provision should require recklessness with regard to every element of a recklessness offence.

4. Criminal Negligence — s.12.6

This provision deals with each element of an offence and the full offence at the same time because criminal negligence means the same with regard to all of them. It states that, to be criminally negligent in committing an offence or element of an offence, the person "(a) in doing anything, or (b) in omitting to do anything that it is the person's

duty to do," must show "a marked and substantial departure from the standard of reasonable care". Subsection (2) then defines duty as "a duty imposed by law."

Before considering "a marked and substantial departure" I would like to address the basic set-up of this provision. It is clearly based on the current criminal negligence section of the Code, s.219. However, s.219 is not defining a "state of mind" or a fault element; it is defining an offence. The offence being defined is the functional equivalent of the tort of negligence. It is Parliament's recognition that not all forms of dangerous conduct can be foreseen and therefore specifically defined in the various offences in the Code. To handle this problem, it sets a standard to be used to assess other kinds of dangerous conduct or omissions and make them criminal offences. Personally, I find this a necessary and useful technique and I would not want the Code to be without it. However, it does not define a fault element but an offence. There is therefore no need for the definition of the fault element of criminal negligence to duplicate it in its entirety. Section 12.6 would make much more sense if (1)(a) and (b), and (2) were removed. Subsection (2) (the definition of duty) should be included elsewhere and apply more generally. It has no special relevance to the fault element of criminal negligence but it is an important provision for general application.

The requirement of marked and substantial departure is a reflection of current law in that the offence of criminal negligence has been interpreted as requiring at least that as a fault element and the Supreme Court of Canada in the Creighton quartet seems to require it as a constitutional necessity for all objective tests in the criminal sphere. In fact, unlike others, I read Creighton as requiring this level of fault even for predicate offences, even though I agree that, when the Court is actually applying the

test, the "marked and substantial" part gets lost. However, I would view that as simply an oversight or a poor application of the test, rather than as an expression of what the Supreme Court views as the appropriate test.

The major concern in the application of this test has, of course, been the extent to which the individual characteristics of the accused can be taken into account, with the majority allowing them in only when they affect capacity and the minority allowing them to be considered in all cases where they are not in the accused's control. The majority would therefore never allow the individual characteristics of the accused to apply to require more of the accused than of the reasonable person, while the minority would. The majority would also not normally allow the age, education and experience of the accused to affect what was reasonable for him to do, while the minority would. (However, note that the majority would allow age, education and experience of the accused to be taken into account if they would affect the ability of the accused to appreciate the risks associated with the conduct. This suggests that the distinction between the majority and the minority is not as significant as might first appear, and that through a generous interpretation of the meaning of "incapacity", they might in fact be very close.)

It may be that the majority is dealing with criminal negligence more as an "actus" requirement than as a fault requirement. Their insistence on uniformity is much more relevant to setting standards of conduct than to assessing what a person should or should not be aware of. However, be that as it may, there is a lot to be said for a fault standard that considers what was reasonable for a person-like-the-accused to understand

about the dangerousness (or other criteria) of his/her conduct. This would still mean that if the reasonable person-like-the-accused would not engage in the behaviour with their level of knowledge and experience, the accused who does engage in the conduct cannot use his or her ignorance as an excuse. There do not seem to be many dangers attached to this concept and it is clearly fairer to the accused. Moreover, as mentioned above, I do not see this as totally contray to the majority Supreme Court position, except perhaps where the personal characteristics of the accused would in fact raise the standard of care. The difficulty in my opinion, is in drafting the obligation.

Section 12.6(3) has been read by some as helping in this process. It requires the court, when determining if a person has shown a marked and substantial departure from the standard of reasonable care, to take into account the person's awareness of the circumstances, whether or not the circumstances are specified. Presumably this does not mean that the person is to be judged on the basis of what they were subjectively aware of, regardless of whether or not that awareness was reasonable (although it could be read that way.) I read it as codifying McIntyre's test in Tutton; in other words, as requiring the court to assess the situation from the accused's perspective, as long as that perspective is reasonable. If, in fact, it goes further and has no reasonableness requirement, it undermines the whole criminal negligence test since the person may have shown a marked departure in coming to the awareness. The problem, of course, is that if the awareness has to be reasonable, it may not allow in personal characteristics since they are not part of the reasonable person. It may not, therefore, solve the problem raised above, although it is still useful on its own merits. However, in any event, it

seems clear that s.12.6(3) is ambiguous. This could be resolved by adding "if that awareness is reasonable" after "shall take into account the person's awareness".

The main problem is that, as it currently stands, s.12.6 does not allow the court to consider even the capacity of the accused to meet the standard of reasonable care. I would like to see an effort to define the "standard of reasonable care" in such a way that it allows at least capacity, and perhaps more, to be considered. This may be very difficult to do, even if there is consensus on the benefit. A few possibilities follow:

> "...shows a marked and substantial departure from the standard of reasonable care which the person is capable of achieving."

> "'Reasonable' means reasonable in light of the age, intelligence, education, experience and other relevant characteristics of the person."

> "'Reasonable' refers to a standard of reasonableness which the person is capable of achieving."

5. Negligence

It is likely that a fault element for criminal offences based on a negligence standard is unconstitutional. Therefore, I do wonder why this is here. Is it intended to apply only to federal offences that are not in the Code?

Apart from that, this section is modelled on the criminal negligence section and essentially the same comments apply. Paragraphs (a) and (b) and subsection (2) should be omitted. If this is to apply only to regulatory offences, it is probably unnecessary to fit the reasonable person with the capacities of the accused, since the concept of regulation ensures that the accused is put on notice as to the requirements and obligations they must meet. If, however, this is intended to apply to purely criminal offences, the concept of reasonableness must be somewhat flexible, as discussed in the previous section.

6. General Fault Requirement

One of the most fundamental differences between the White Paper's general fault principles and those of the LRC and CBA Reports is that these provisions do nothing more than define the fault element that is specified for the offence through another medium -- either in the description of the offence (i.e. by Parliament) or by judicial analysis. There is not even a "default" provision which indicates which fault element is appropriate when none is specified. Both the LRC and CBA proposals fix on the highest standard -- intent or purpose -- when the offence does not specifically identify the level of fault.

The White Paper can avoid doing this because it is intended to work with the common law, and not be a substitute for it. Therefore, there will always be a relevant fault element, whether it is established by Parliament or by the courts. The problem is that recent experience has shown us that the courts cannot be relied on to value certainty enough to set rules and stick with them. The criminal law fault element will probably always be in a state of flux as long as the courts can set the fault element, probably because it seems so important to get it right, to make it work in this case. That is not a bad goal, but it has its costs, and the primary cost is the certainly and reliability of the law.

If it is considered more just to use the general principles to set the basic fault standard for criminal offences, I would suggest that it not be intention. Intention has always been too high a test for most offences; that is why the concept of recklessness was developed. Therefore, it is senseless to set it as the default position. Rather, the basic fault element should be the fault that has become the basic mens rea in criminal law -- recklessness.

The issue that is left is the proper position of criminal negligence within the law. In the last year and a half, criminal negligence has become the basic fault element for most consequences, and the Supreme Court has indicated that this allows a proper balance of concern for the accused and concern for the society. I have indicated above that I do not consider it appropriate for consequences in general to be treated differently from the other elements of offences since they all contribute to the seriousness of the offence. However, I do not want that to be taken as indicating that I do not approve of criminal negligence in the criminal law. Indeed, especially if it can

be shaped to accord with the true capabilities of the accused, it is the only way by which society can require people to take account of and be responsible for their activities.

Generally, it seems to me that the best scheme would have a hierarchy of offences based on a single act component with different elements. Then, if a person did **X** (i.e. meet the act requirements of a criminal offence), the most serious level of the offence would require intention with regard to all of the elements, the middle level would require recklessness with regard to all of the elements and the lowest level would require criminal negligence with regard to all of the elements. This would preserve the integrity of the fault element while allowing maximum flexibility to address dangerous and harmful conduct.

The White Paper does not really have room for such a scheme in the general fault provisions. However, especially if the definitions are amended as I have suggested, it can still be done by gradually amending the offences to correspond to these definitions and to the hierarchical fault structure set out above. In many ways, it is better to put that structure within the offences themselves, for the sake of clarity and readability. I would urge the government to continue this work and make those changes.

Finally, both the LRC and the CBA Reports have provisions that specifically state that the lesser fault includes the greater. Thus, if the offence is defined as requiring recklessness but the accused acted intentionally, the accused would still be guilty. The White Paper does not have such a provision. It may be that its usefulness is partly reduced because these provisions can still rely on the common law and this is part of the common law. However, the definitions of the fault elements are now codified and they

do not include this rule. The other possibility is that the definitions themselves are adequate to include the higher level. In fact, I found it difficult to conceive of any such situation which would not be covered by the definitions. Thus, such a provision may not be necessary, especially as most judges would be willing to read it in in any event.

7. Conclusion

I found the general structure and approach of the White Paper's fault principles quite useful. If the division into act/omission, circumstances and consequences is workable, then the approach makes the document quite accessible. The fact that it relies on the common law detracts from its accessibility but may be expedient and even necessary for any change to take place. The actual definitions used can be improved in some areas, both in the wording and in the analysis, but provide a good basis for discussion and development.