I would like to thank Anne Stalker for her permission to reproduce this document.

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Professor Don Stuart
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Dear Don:

Thank you very much for your letter and accompanying materials concerning the Canadian Bar Association Task Force Report on Principles of Criminal Liability. I agree entirely with your efforts to have the academic criminal law community respond in a way that might be useful to the sub-committee of the Standing Committee on Justice and the Solicitor General that is considering codification of the "general part".

I have reviewed both the C.B.A. Report and your Brief, albeit in a hurried fashion, and, for the most part, strongly endorse your comments. In particular, I agree that the C.B.A. approach to the codification of the culpability requirements is an improvement on the Law Reform Commission proposals but that negligence should be included and that the usual standard should be recklessness and not intent. I mention these specifically because to my mind they are the most important aspects of both the C.B.A. Report and of your proposed brief. However, with the two exceptions mentioned below, I agree generally with your comments in all respects.

One point on which I have reservations is the question of whether to allow common law defences. The C.B.A. suggests this be left open; you suggest it be closed and reliance instead placed on s.7 of the Charter. I am ambivalent on this question. I can certainly see the value of codifying defences, and the confusion that allowing common law defences creates. However, I am not convinced that that problem is worse than denying an accused the opportunity to even argue for a new development in the law. You comment on the uncertainty created by the common law development of duress in relation to parties. Unfortunately, the alternative was to have convictions in those cases. Furthermore, it is only through the discussion in the courts of these kinds of defences that they gain enough solidity and shape to be

legislated. Parliament just does a better job when most of the kinks have been worked out within our own system. Finally, while you would leave open potential developments under the Charter, the effect would be to constitutionalize all further non-legislative development and I truly have doubts about the wisdom of such an approach. That would not leave Parliament (or even, to some extent, the Courts) free to tidy the developments up.

My concerns about omitting common law developments in defences become much stronger if the recklessness test adopted does not include an "unreasonable to take the risk" aspect. If it does not, that part of the test would have to be supplied by the defences and they are clearly not yet equal to that task. Overall, I would feel more comfortable continuing to allow for common law defences, with an invocation to Parliament to take responsibility for codifying such defences in a timely manner.

The second point on which I would express reservations is with regard to transferred intent. Your brief takes no issue with the C.B.A. Report's very limited acknowledgement of transferred intent (they would allow it only with regard to included offences). I prefer the Law Reform Commission's model which, I believe, looks behind the technical requirement of congruent act and mens to the underlying principle of culpability for actual wrong-doing. There would be too much potential for avoidance of the criminal law in cases where culpability and wrong-doing are clear particularly with regard to drug offences. In fact, the C.B.A. proposal for attempts may cover most of these situations but to rely on attempts may lead to real problems of charging which the Law Reform Commission's proposal would avoid.

With the above caveats, I agree with your submission, and I appreciate the opportunity to participate in this response. Please do not hesitate to contact me if I can be of further assistance.

Yours sincerely,

M. Anne Stalker

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