Report of the Working Group on Chapter 3 of the Law Reform Commission of Canada Report 30, Vol. 1 "Recodifying Criminal Law"

December 1987

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REPORT TO CCSO BY THE WORKING COMMITTEE

ON CHAPTER 3, "DEFENCES", OF THE LAW REFORM COMMISSION'S

REPORT #30 "RECODIFYING CRIMINAL LAW"

December 23, 1987

INTRODUCTION

This is the report of the Working Group on Chapter 3 of LRC Report 30, Recodifying Criminal Law - Volume I, to the Federal-Provincial Coordinating Committee of Senior Officials. Opinions recorded herein are those of the individual members, and are not to be taken as representing official positions of the Government of Canada or any province, or of the federal Minister of Justice or Department of Justice, or of any provincial minister or ministry responsible for criminal justice.

Members: The Working Group was chaired by Mr. Yaroslaw Roslak, Q.C., formerly Director of Appeals, Research and Special Projects, Department of the Attorney General of Alberta. Mr. Justice Roslak was appointed to the Court of Queen's Bench of Alberta on December 18, 1987.

The other members of the Working Group were: Barry Athey, Assistant Deputy Attorney General and Robert Murray of the Office of the Attorney General of New Brunswick; Jeff Casey, Senior Counsel, Crown Law Office - Criminal, Ontario Ministry of the Attorney General; Michel Denis, Bureau des substituts du procureur général du Québec; David McKercher, Counsel, Criminal Law Review, Department of Justice, Canada, who acted as secretary; Robert Mulligan, Crown Counsel, British Columbia Ministry of the Attorney General; and Wayne Myshkowsky, Director of Criminal Prosecutions, Manitoba Ministry of the Attorney General.

The late Mr. Myshkowsky of Manitoba was able to attend only the first meeting and was not replaced at subsequent meetings.

Other Participants: Other individuals who attended one or more of the working sessions and took an active part in the discussions were: E.A. Tollefson, Q.C., Coordinator, Criminal Law Review, Department of Justice, Canada; François Lareau, Counsel, Criminal Law Review, Department of Justice, Canada; Don Piragoff, Senior Counsel, Criminal Law Policy Section, Department of Justice, Canada; and Murray Brown, Assistant Director, Public Prosecutions, Saskatchewan.

Meetings: The members met on five occasions in 1987: June 29-30, September 9-10, September 29-30, October 16 and November 18.

Documents: The documents forwarded to the members before the first meeting and the documents prepared by or on behalf of the members are listed at Appendix A to this report. These documents are available in a cerlox binding.

Minutes: The minutes of the five meetings are available in a cerlox binding.

Methodology followed by the Working Group

For each clause of the LRC report analyzed, we have tried to follow a set pattern. We considered first, whether there were problems with the present law in need of resolution; and second, whether the LRC proposal addressed any problems identified or whether it represented an improvement over the present law. Finally, we explored whether alternative solutions existed or if further work was needed.

The clauses were examined in order except for clauses 3(2), 3(7) and 3(16): these were considered together because members felt they were all related as aspects of the defence of mistake.

Clause 3(1) Lack of Control

1. LRC Proposals

a. Recommendation

3(1) Lack of Control

(a) Compulsion, Impossibility, Automatism. No one is liable for conduct which is beyond his control by reason of:

(i) physical compulsion by another person;

(ii) in the case of an omission, physical impossibility to perform the act required; or

(iii) factors, other than loss of temper or mental disorder, which would similarly affect an ordinary person in the circumstances.

(b) Exception: Negligence. This clause shall not apply as a defence to a crime that can be committed by negligence where the lack of control is due to the defendant's negligence.

[pp. 25-26 of the Report]

b. Appendix A Provision (Draft Legislation)

Absence of Physical Element

15.(1) No person who engages in conduct specified in the definition of a crime is guilty of the crime where that conduct was beyond that person's control

(a) by reason of physical compulsion by another person or, in the case of an omission, the physical impossibility of performing the relevant act; or

(b) for any other reason, other than loss of temper or mental disorder, that would cause an ordinary person to engage in the same conduct.

(2) Subsection (1) does not apply where the relevant state of mind is negligence and the conduct was beyond the person's control by reason of his negligence.

[pp. 100-101 of the Report]

2. Existing Law

a. Criminal Code Provisions

There is no similar provision in the Criminal Code.

b. Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

c. Common Law/Legal Writings

Defences of physical compulsion and physical impossibility are little developed in case law: presumably this issue is more commonly dealt with at the level of prosecutorial discretion. It appears that the defence exists in cases involving physical impossibility. The defence was raised, although it did not succeed on the facts, in Richard Lamer Foundation Inc. v. Construction Office of Quebec (1976), 36 C.R.N.S. 257 (Que. S. Ct)

Case law recognizes the defence of automatism as a transient unconsciousness produced by an external factor, excluding intoxicants and the ordinary stresses of life, but possibly including extraordinary emotional shock. The term "automatism" is used to describe unconscious, involuntary behaviour; the state of a person who, though capable of action, is not conscious of what he is doing. The defence of automatism is based on denial of one of the essential elements of the offence, actus reus, as opposed to denial of mens rea (Rabey v. R., [1980] 2 S.C.R. 513).

3. Comments on Proposals

a. Position and Points in Issue

Compulsion and Impossibility

The members of the Working Group all agree that clauses 3(1)(a)(i) and (ii) are unnecessary and undesirable provisions. Both merely outline a consequence of the culpability provisions in Chapter 2 dealing with the requirement of mens rea and actus reus.

As provisions in Chapter 2 make conduct and culpability prerequisites for criminal liability, the provision here is (as the LRC recognizes at p. 25) "strictly speaking unnecessary".

The term "compulsion" as used by the LRC means physical compulsion only, as distinct from duress. Articulation of physical compulsion as a defence is unnecessary; it would serve no useful purpose and possibly could lead to attempts to argue that it means more than physical compulsion, i.e. that it is an extension of duress. As a practical consequence of the way the criminal law works, the courts will dissect and examine the language of the provision. This is a danger whenever examples of a general principle are elaborated or logical conclusions and inferences are stated.

"Impossibility" as a term also presents problems. It is unnecessary insamuch as it can be equated with mens rea and, as is the case with "compulsion" above, use of the term "impossibility" invites analysis and dissection and possible extension of its meaning by the courts. The term could come to include other sources of impossibility, such as phobias, drunkenness, mental disorder, poverty, or illiteracy. Some members would add legal impossibility, where it is impossible to fulfil a legal precondition to the lawful doing of an act; other members feel that when the precondition cannot be fulfilled, then the act simply cannot lawfully be done.

The members feel that the LRC proposal on compulsion and impossibility could lead to unforeseen and undesirable results.

Automatism

All members agree that clause 3(1)(a)(iii) is unsatisfactory: as drafted, it is over-inclusive. It does not appear to exclude from its ambit intoxication, which is dealt with elsewhere in Report 30 (see clause 3(3)); and more generally, the clause is not restricted to external causes.

Moreover, the objective standard of the "ordinary person" is incompatible with a principle of negating liability for conduct which is actually "beyond the control" of a person.

While the clause goes too far in the sense that it is over-inclusive, in another sense it does not go far enough, in that it does not address directly the issue of automatism, an issue which presents significant policy choices. Among these are the issues of people who become automata through their own fault, and people who, though automata through no fault of their own, are nonetheless dangerous and in need of treatment. In the former case, for example, the intent involved in entering the automatic state could meet the mens rea requirements; in the latter case, the legislation could provide stop-gap measures to hold and treat the accused until a provincial authority can invoke civil commitment procedures to the same ends.

b. Codification

In general, one of the justifications for codifying a defence is to reflect a policy decision to limit the scope or availability of a more general principle; another is to create exceptions where application of the general principle would produce an undesirable result. Consequently, the members feel it is inappropriate to codify anything that is merely a restatement of mens rea, unless it reflects a policy decision of this nature.

All members agree that codification of physical compulsion and physical impossibility is unnecessary and undesirable. Codification is unnecessary, as these matters are consequences of mens rea; and it is undesirable, inasmuch as it is likely to lead to unforeseen or undesirable results.

The members are divided on the issue of whether automatism should be codified; there is slightly more support for codification than for leaving automatism to the development of the common law.

Those favouring codification would include a provision to remove the defence from persons who become automata through their own fault. This is a broader principle than covered by clause 3(1)(b), which limits the application to offences which may be committed by negligence and only excludes automatism resulting from negligence, as opposed to other forms of fault.

c. Recommendations

1. Clause 3(1) should not be codified in its present form (unanimous).

2. The provisions on physical compulsion and physical impossibility, in clauses 3(1)(a)(i) and (ii), should not be codified (unanimous).

3. The defence of automatism should be codified (3 for, 2 against).

4. There should be a legislated provision to catch persons who become automata through their own fault (2 for, 2 against, 1 abstention).

Clause 3(2) Lack of Knowledge

1. LRC Proposals

a. Recommendation

3(2) Lack of Knowledge

(a) Mistake of Fact. No one is liable for a crime committed through lack of knowledge which is due to mistake or ignorance as to the relevant circumstances; but where on the facts as he believed them he would have committed an included crime or a different crime from that charged, he shall be liable for committing that included crime or attempting that different crime.

(b) Exception: Recklessness and Negligence. This clause shall not apply as a defence to crimes that can be committed by recklessness or negligence where the lack of knowledge is due to the defendant's recklessness or negligence as the case may be.

[p. 27 of the Report]

b. Appendix A Provision (Draft Legislation)

Absence of Mental Element

16.(1) No person is guilty of a crime who engages in the conduct specified in the definition of the crime but does not have the relevant state of mind by reason of mistake or ignorance as to the relevant circumstances.

(2) Notwithstanding section 5, a person who is not guilty of a crime by reason of the application of subsection (1) may be found guilty of an included crime or of attempting to commit a different crime if that person believed he was committing that included or different crime.

(3) Subsection (1) does not apply where the relevant state of mind is recklessness or negligence and the person's mistake or ignorance results from his recklessness or negligence.

[p. 101 of the Report]

2. Existing Law

a. Criminal Code Provisions

Mistake of fact has not been the subject of general codification in the Criminal Code, although it is addressed in a number of specific provisions, e.g.: sections 34, 35, 146(1) and (2), 159(6) and 212(b). In addition, s. 7(3) which provides that "every rule and principle of the common law that renders any circumstance a justification or excuse for an act or defence to a charge continues in force" confirms the common law position on mistake of fact.

b. Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

c. Common Law/Legal Writings

A generalized framework of criminal liability has been recognized by the Supreme Court of Canada in R. v. City of Sault Ste. Marie (1978), 2 S.C.R. 1299 which is composed of three categories of offences. First, mens rea offences: those in which the prosecution must prove a culpable mental state in addition to the actus reus. In this context, the culpable mental state may consist of either intention (knowledge, purpose) or recklessness (awareness of a risk that the material circumstances specified in the definition of the offence will occur). Recent cases have clearly established that mens rea in the sense of intention or recklessness is a component of criminal offences, subject to a contrary indication and that, further, the requirement of mens rea extends to all material elements of the offence. (See, for example, Pappajohn v. R. [1980], 2 S.C.R. 120; R. v. Buzzanga and Durocher (1979), 25 O.R. (2d) 705).

While criminal liability may be contingent upon proof of subjective intention or recklessness, it may also be strict. It is competent for a legislature to enact offences which statutorily dispense with the traditional requirement of mens rea and in which, following proof of the actus reus, the burden switches to the accused to avoid conviction by proving the absence of a culpable mental state (that is, non-negligence).

Finally, it is open to a legislature to statutorily create offences in which liability is absolute rather than strict in the sense that proof of the commission of the actus reus is conclusive of liability (Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486).

The continuing viability of this third category of offence is brought into question by Vaillancourt v. R., a Supreme Court of Canada decision rendered on December 3, 1987. The Supreme Court has made it clear in Vaillancourt that one of the principles of fundamental justice is that there can be no punishment without fault or blame; and that "any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes ss. 7 and 11(d)."

The Supreme Court in Pappajohn v. R., supra, established that an honest but mistaken belief in the existence of circumstances which, if true, would make the act for which the accused is charged an innocent act, is a good defence. For offences of strict liability, the mistake must also be reasonable.

It is more accurate to characterize mistake of fact as a negation of mens rea than as the affirmation of a positive defence: mistake is a defence where it prevents the accused from having the mens rea which the law requires for the crime with which he is charged.

Reasonableness of Belief

If the mental element required to constitute the offence is lacking because of a mistake of fact, the offence is not committed and it does not matter whether the necessary mental element is absent due to a reasonable or unreasonable mistake. The existence or absence of reasonable grounds for the accused's belief is merely relevant evidence to be weighed by the trier of fact in determining whether the accused honestly held the mistaken belief asserted. The more unreasonable the mistaken belief asserted, the more likely the trier of fact will conclude that it was not honestly held. (R. v. Moreau (1986), 51 C.R. (3d) 209 (Ont. C.A.) and Pappajohn v. R., supra).

Honest Belief and Wilful Blindness

Although the honesty of a belief will support a mistake of fact defence even where it is unreasonable, a finding of wilful blindness as to the facts about which the honest belief is asserted will vitiate the defence. Where wilful blindness is shown, the law presumes knowledge on the part of the accused:

Sansregret v. R., [1985] 1 S.C.R. 570. Liability in wilful blindness is founded on the accused's fault in deliberately failing to enquire when he knows there is reason for enquiry. This is distinct from recklessness, wherein fault is founded on consciousness of a risk and proceeding in the face of it.

Transferred Mens Rea

A problem arises when the mistake of fact not only negates the mens rea required for the offence charged but produces the mens rea required for another offence. At common law , in order for mistake of fact to exculpate the accused, the mistake was required to be "innocent" in the sense that if the facts had been as the actor supposed them to be, no wrong would have been committed. (R. v. Prince (1875), 13 Cox C.C. 138.)

The issue arose in R. v. Ladue (1965), 4 C.C.C. 264 in which the appellant had been convicted of indecently interfering with a dead woman after attempted intercourse. Ladue's defence was that he thought the woman was alive although had the facts been as he supposed them to be, he would have committed the offence of rape or attempted rape. The mistaken belief entertained by Ladue was deemed to be legally irrelevant. While clearly the mistake was such as to negate the mens rea for the crime charged (and thus on an application of conventional principles ought to have absolved him of liability) the Yukon Territorial Court of Appeal sustained the conviction on the basis that "an intention to commit a crime, although not the precise crime charged, will provide the necessary mens rea". Thus, if the accused, due to a mistake of fact, lacks the mens rea of the offence charged, but has the mens rea of another offence, notwithstanding the principle of concurrence, the mens rea of the uncharged offence will be matched with the actus reus of the offence charged to sustain liability.

Tranferred mens rea was also applied in R. v. Kundeus (1976), 2 S.C.R. 272. The accused had been charged with trafficking in a restricted drug while acting under the mistaken belief that he had been trafficking in a controlled substance. Notwithstanding the existence of mistake of fact, conviction of the greater crime was upheld by a majority of the Supreme Court of Canada on the basis that there was not "an honest belief amounting to non-existence of mens rea".

Mistake and Voluntary Intoxication

Intoxication may induce a mistake of fact. In crimes of specific intent an honest but mistaken belief induced by intoxication as to the existence of an essential element of the offence negates criminal liability, even though the mistake is

not reasonable: R. v. Moreau, supra. Intoxication, however, cannot negate the intent to cause the actus reus or recklessness as to the causing of the actus reus that is sufficient for criminal lability in crimes of general intent. Where the mistake is induced by voluntary intoxication, the mistake on policy grounds will not excuse an accused in cases of general intent.

3. Comments on Proposals

a. Position and Points in Issue

The members do not agree with clause 3(2) as drafted: it leaves certain policy issues unresolved, and more fundamentally, it may be better to deal with the matter of clause 3(2) in the context of the mens rea provisions. Where a mistake of fact relates to an element of an offence, the offence simply is not made out and a separate provision is not necessary.

Generally, therefore, mistake can be regarded as merely a corollary of mens rea: it represents an assertion of innocent intention rather than a defence. If it is possible to draft a satisfactory statement of the normative concept of criminal blameworthiness, it may be redundant to make a special provision for mistake.

The members feel clause 3(2) is more properly a liability-creating provision than a defence; its only virtue would be to create exceptions, where appropriate as a matter of policy, to the general principle that liability requires the specific mens rea inherent in the offence charged. However, the members feel the LRC has not accomplished this in its draft of clause 3(2).

There are a number of unresolved issues which are of sufficient importance to warrant treatment in a separate rule if they do not follow as a matter of inference from the basic mens rea principle.

Transferred Mens Rea

In particular, if the LRC draft includes the provision in s. 5 of Appendix A

> 5. A person commits a crime only by engaging in the relevant conduct with the state of mind specified in the definition of the crime or section 8.

then the draft must also contain a provision to deal with persons charged with committing one crime where they thought they were committing a different crime.

The members feel that such a provision would be better included as a subsection of s. 5 of the draft, rather than in the part on defences.

In any case the members are not satisfied that the Commission's solution (essentially, the minority position in Kundeus) is the correct one. Members considered other possible solutions: the majority position in Kundeus; or convicting the person of the offence charged but substituting the penalty range for the offence the accused thought he was committing. Most members agree with the sentiment expressed by Laskin, C.J.C., dissenting in Kundeus, that it is inconsistent with our legal tradition to convict anyone on the basis of a mens rea for an offence different from the offence charged. Moreover, since Vaillancourt, it is probably not possible to do so.

The members agreed that this is an important problem of policy which the LRC has not solved.

Reasonableness of Mistake

Under the present law, a mistake must be honest, but it is not required to be reasonable. The members are not all satisfied that this position is correct; some feel strongly that as a matter of policy, a mistake should be reasonable, and that acting unreasonably, particularly where bodily harm results, represents a degree of fault sufficient to found criminal responsibility.

Other members feel that honesty is the more appropriate test, since it can take into account particular characteristics of the accused; and this aspect should not be abandoned, wherever the accused has those characteristics through no fault of his own.

The members are unable to take a definitive position on this issue but all members agree it is an important policy area requiring further study. The LRC did not address this issue.

Mistake of Fact Resulting from Voluntary Intoxication

Mistake caused by intoxication is another issue not directly addressed by the LRC. All members agree with the general principle that, if a mistake of fact is due to voluntary intoxication, then the mistake of fact defence should not apply.

Members feel the law should not protect anyone who, through his own conduct, prevents himself from being in a position to know facts which, had he known them, would preclude him from committing an offence. Further work on this issue is required: members did not reach conclusions concerning the level of intoxication required or the penalty structure which should be associated with the scheme.

Resolution of this issue also requires discussion of whether the law should continue to distinguish between offences of specific intent and general intent. That issue arises in Chapter 2 but has not been addressed. The discussion in Chapter 2 addressed two levels of culpability: intention (which by definition would include recklessness) and negligence.

Wilful Blindness, Recklessness, and Negligence

The LRC failed to address the issue of mistake arising from wilful blindness on the part of the accused. It is not clear whether this could be covered by the concept of recklessness outlined in clause 3(2)(b). The members agree that wilful blindness and recklessness should be addressed as an aspect of a general statement or definition of *mens rea* in Chapter 2; as such, the provision would be included in s. 8 of the draft in Appendix A of the LRC Report. Some members feel that as recklessness imports knowledge, in the sense of consciousness of risk, it is inconsistent to treat it as part of a defence of "lack of knowledge" under clause 3(2).

In any case the members feel there should be more study of the issues of recklessness and negligence. Clause 3(2)(b) would impose liability only in respect of offences which can be committed by recklessness or negligence.

Some members feel that recklessness or negligence should simply vitiate the defence, and liability would therefore be imposed in respect of any type of offence.

The members of the Working Group studying Chapter 2, which contains the provisions on *mens rea*, were unable, in the time available for this study, to devise a statement or definition of *mens rea* which they find satisfactory.

The members agreed unanimously that more study is needed, both on developing a statement or definition of *mens rea* and on resolving outstanding issues, including mistake of fact caused by intoxication; wilful blindness and recklessness; negligence; transferred intent (*Kundeus*-type cases); and the question of honest as opposed to reasonable belief.

b. Codification

The members are generally agreed that codification of the principle in clause 3(2) is unnecessary, but until the *mens rea* problem is resolved no definitive conclusion can be reached.

c. Recommendations

1. If possible, clause 3(2) should not be codified separate from the treatment of *mens rea* in the draft code. Further work should be done on *mens rea* to arrive at a statement or definition of *mens rea* which will comprise the general principle in clause 3(2) (unanimous).

2. If a mistake of fact is due to voluntary intoxication, then the mistake of fact defence should not apply (unanimous).

3. Further work should be done on outstanding issues, including:

   (i) mistake of fact resulting from intoxication;

   (ii) wilful blindness and recklessness;

   (iii) negligence;

   (iv) transferred intent;

   (v) honest vs. reasonable belief.

   (unanimous).

Clause 3(7) Mistake or Ignorance of Law

1. LRC Proposals

a. Recommendation

3(7) Mistake or Ignorance of Law. No one is liable for a crime committed by reason of mistake or ignorance of law:

(a) concerning private rights relevant to that crime; or

(b) reasonably resulting from

(i) non-publication of the law in question,

(ii) reliance on a decision of a court of appeal in the province having jurisdiction over the crime charged, or

(iii) reliance on competent administrative authority.

[p. 31 of the Report]

b. Appendix A Provision (Draft Legislation)

Justifications and Excuses

18.(1) No person is guilty of a crime who engages in the conduct specified in the definition of the crime but does so by reason of a lack of knowledge of or mistake as to the law relating to private rights and those rights are, by reason of the definition of the crime, relevant.

(2) No person is guilty of a crime who engages in the conduct specified in the definition of the crime but does so by reason of a lack of knowledge of or mistake as to the law that reasonably results from

(a) the non-publication of a rule of law; or

(b) his reliance on the decision of an appellate court in the province where the crime is alleged to have been committed or on the opinions or advice of a competent administrative authority in that province.

[pp. 101-102 of the Report]

2. Existing Law

a. Criminal Code Provisions

s. 19 Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

b. Other Statutory Provisions

(i) Statutory Instruments Act, s. 11(2)

11.(1) Subject to any regulations made pursuant to paragraph (c) of section 27, every regulation shall be published in the Canada Gazette within twenty-three days after copies thereof in both official languages are registered pursuant to section 6.

(2) No regulation is invalid by reason only that it was not published in the Canada Gazette, but no person shall be convicted of an offence consisting of a contravention of any regulation that at the time of the alleged contravention was not published in the Canada Gazette in both official languages unless

(a) the regulation was exempted from the application of subsection (1) pursuant to paragraph (c) of section 27, or the regulation expressly provides that it shall apply according to its terms before it is published in the Canada Gazette, and

(b) it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the regulation to the notice of those persons likely to be affected by it.

(ii) Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

c. Common Law/Legal Writings

Apart from the doctrine of officially induced error, a person's mistaken belief concerning the relevant criminal law does not afford a defence; an accused's mistaken belief that his conduct did not contravene the criminal prohibition is not a defence: R. v. Metro News Ltd (1986), 53 C.R. (3d) 289; leave to appeal to S.C.C. refused 29 C.C.C. (3d) 35.

An honest but mistaken belief concerning property rights, although a mistake of civil law, may provide a complete defence of colour of right or mistake of private law: R. v. Lilly, [1983] 1 S.C.R. 794; R. v. Howson (1966), 47 C.R. 322 (Ont. C.A.).

An apparent mistake of law may be found to be a mistake of fact and accordingly a good defence may be available:

> R. v. Woolridge (1979), 49 C.C.C. (2d) 300 (Sask. Prov. Ct.) (honest but mistaken belief that divorce final being good defence to charge of bigamy; mistake of fact); see also R. v. Gould, [1968] 1 All E.R. 849 (C.A.); R. v. Phillips (1978), 44 C.C.C. (2d) 548 (Ont. C.A.) (accused acting under mistake of fact concerning prohibited weapon); R. v. Darquea (1979), 47 C.C.C. (2d) 567 (Ont. C.A.); Thomas v. R. (1937), 59 C.L.R. 279 (Aust. H.C.) (mistake as to existence of compound event of mixed fact and law being mistake of fact); R. v. Prue; R. v. Baril, [1979] 2 S.C.R. 547 [B.C.] (ignorance of driving disqualification being mistake of fact); but see R. v. MacDougall, [1982] 2 S.C.R. 605 [N.S.].

Officially induced error of law is a common law defence. If a person does his best to conform his conduct to the law but is misled by officials charged with the administration of the law, he is not doing anything at odds with the legal policy that "ignorance of the law is not an excuse". To obtain the benefit of this defence the evidence must disclose that the official whose advice was followed was involved in the administration of the law in question, and that the opinion of law given appeared to be reasonable in the circumstances.

> R. v. Flemming (1980), 43 N.S.R. (2d) 249 (Co. Ct.); see also R. v. MacDougall, supra, (defence of officially induced error may be recognized); but see R. v. MacIntyre (1983), 24 M.V.R. 67; leave to appeal to S.C.C. refused 2 O.A.C. 400; R. v. Cancoil Thermal Corp. (1986), 52 C.R. (3d) 188 (Ont. C.A.) (officially induced error recognized for regulatory statute); R. v. Bouchard (1984), 15 C.C.C. (3d) 282 (Que. S.C.) (due

diligence on basis of lawyer's advice not made out); R. v. Sangha (1984), 29 M.V.R. 28 (B.C. Co. Ct.) (defence of officially induced error considered); R. v. Campbell (1972), 21 C.R.N.S. 273 (Alta. Dist. Ct.) (accused convicted even where accused relying on decision of superior court judge); R. v. Potter (1978), 3 C.R. (3d) 154 (P.E.I.S.C.); Cambridgeshire & Isle of Ely County Council v. Rust, [1972] 3 All E.R. 232 (D.C.).

The proposition that mistake of law cannot negate liability is open to two interpretations: "If the rule... is interpreted in light of the modern meaning of the term 'excuse' in the criminal law, the rule would not exclude a defence of lack of mens rea which is based on mistake of law. The rule would simply exclude a special excusing defence in circumstances where the definitional elements of an offence are present. In other words, if the actus reus occurred and was accompanied by the mens rea, it would be immaterial that the accused did not know that an offence was being committed... Often, however, it has been interpreted more broadly as meaning that ignorance of the law is no defence. The result for mens rea offences has been to exclude a defence of lack of mens rea as well as a special excusing defence." (E. Colvin, Principles of Criminal Law, 126)

The interpretive ambiguity inherent in section 19 of the Code is further compounded by the difficulty in distinguishing between mistakes of fact and law. (See, for example, R. v. Baxter (1982), 6 C.C.C. (3d) 447 - accused convicted of possession of a prohibited weapon contrary to s. 88(1) of the Criminal Code despite lack of knowledge that weapon was prohibited contrasted with R. v. Phillips, supra, in which accused was acquitted on the same charge due to his failure to appreciate that his knife had the material characteristics which brought it within the definition of a prohibited weapon; R. v. Prue; R. v. Baril, supra, and R. v. MacDougall, supra, both of which involved offences of driving while disqualified in ingorance of the disqualification. In the former, the mistake as to entitlement was characterized as a mistake of fact, in the latter, a mistake of law.) As Colvin has observed (at 128), "the contrast demonstrates the poverty of the distinction between law and fact for the explanation of where a mistake about legal circumstances will or will not permit a defence." It is however apparent that certain mistakes as to legal circumstances will be permitted to negate mens rea.

While it is difficult to predict when a mistake as to legal circumstances will be classified as one of fact rather than of law, the following factors have been identified as relevant:

a) When the mistake relates to a matter of general law rather than a mistake as to the application of general

law to a specific situation, it is likely to be classified as a mistake of law. (See Molis v. R. (1980), 2 S.C.R. 356; R. v. Darquea and Martyn, supra; R. v. Shymkowich (1954), S.C.R. 606.)

b) Mistakes in relation to matters of criminal and public law are likely to be characterized as mistakes of law; those in relation to civil or private law are likely to be viewed as mistakes of fact. (R. v. Walker and Somma (1980), 51 C.C.C. (2d) 423.)

c) Classification may be determined by reference to the impact of denying a defence of mistake upon the character of the offence. That is, "in certain mens rea offences, a legal circumstance is so central an element that to exclude a defence of mistake with respect to it would be to remove the mens rea status of the offence" and, as a result, it would be unjust to deny the defence "where an offence has been designed so that it should import mens rea and yet practically permits a mens rea issue to be addressed only with respect to a circumstance of law." (Colvin, 134-135)

As the above examples illustrate, certain mistakes of law will be available to negate mens rea and will, in such circumstances, be classified as a mistake of fact.

As the preceding discussion illustrates, notwithstanding Criminal Code section 19, mistakes of law are operative (in the sense of excusing liability) in several contexts. First, mistakes of law may negate mens rea when "an offence description includes some such phrase as "without colour of right" or the mistake has been classified as one of fact". (See D. Stuart, Canadian Criminal Law (1982), 273). Further, when the mistake of law is due to non-publication of the law or officially induced error, it is possible that the mistake will provide a defence although the precise limits of this defence are unclear.

As a final note, if Vaillancourt is taken to the limit, the Charter may require a general defence of mistake of law. Where an accused can only be punished where he has fault, the defence may now be available wherever the evidence shows the accused had no fault by virtue of his actual ignorance of the relevant law.

3. Comments on Proposals

a. Position and Points in Issue

Private Law

The members are unanimous in rejecting clause 3(7)(a) as not being an improvement over the existing law governing mistake of law concerning private rights. The members also agree that the concept of "the law relating to private rights" calls for a definition, to avoid the sort of confusion that exists in the present law over whether mistake as to private rights is a species of mistake of fact, or whether it is a mistake of law and an exception to the general principle that ignorance of the law is no excuse.

Non-publication

The members are evenly split on the issue of whether there should be a provision embodying the principle in 3(7)(b)(i), precluding conviction in respect of non-published laws. The members who are opposed feel that the clause presents no improvement over the present law.

Two members feel the provision is unnecessary since non-publication is already a common law defence, and a statutory defence (s. 11(2) of The Statutory Instruments Act in the case of regulations); and in addition, non-publication would offend the constitutional requirement of notice founded on s. 7 of the Charter.

Some members feel there is a need for a more precise provision giving clearer guidance as to what constitutes "publication"; examples of areas where problems can arise are the ever-growing lists of prohibited and restricted weapons and drugs. One member feels the provision should make it clear that there is not only an onus on the Government to bring its laws to the attention of the people but that there is also an onus on the people to inform themselves of the law in areas that concern them.

All members agree that the defence should not be based on reliance but should be available to everyone as determined by an objective standard of publication. Members are divided on whether the provision should apply to all laws or only to regulations; some members feel the provision is unnecessary in the context of statute law because passage of statutes is a public exercise in itself, taking place in open Parliament.

Mistake of Law Resulting from Appellate Decisions

The members agree with the general principle that a decision of an appellate court in a province regarding the law should apply generally to all persons while that judgment remains in force. However, this is a consequence of the hierarchical court structure and it is unnecessary to legislate the principle.

Codification of this principle in general and of the LRC draft in particular presents some problems. It is not clear, for example, whether "an appellate court in the province" is restricted to the court of appeal or would include appeals in the lower courts from summary conviction matters. In addition, there may be equality problems under s. 15 of the Charter resulting from conflicting court of appeal decisions in different provinces. Moreover, it is not clear what would happen if an accused person claimed reliance on appellate decisions in other provinces, where therewas no appellate decision on point in his own province.

Officially-Induced Error

The members agree unanimously that clause 3(7)(b)(iii) should be omitted, as other remedies are more appropriate: estoppel, abuse of process, stay of proceedings, or mitigation of sentence, depending on the circumstances of the case. Members also feel the provision is deficient in not giving guidance in delineating membership in the class of "competent officials" whose advice would give rise to such a defence. One member feels that if it were appropriate to found a defence on official advice, it should equally be appropriate to found a defence on the advice of competent counsel.

b. Codification

Most of the members favour codification of the principles governing mistake of private law; the concept of mistake as to private rights is an area for policy decision. In particular, the concept of "the law relating to private rights" calls for definition and clarification, to avoid the sort of confusion existing in the present law over whether mistake as to private rights is a species of mistake of fact or whether it is a mistake of law and an exception to the general principle in s. 19 of the Criminal Code that ignorance of the law is no excuse.

One member feels that express codification is not necessary because in fact, where ignorance of the law negates mens rea, non-liability would follow from the general principle in Chapter 2 that mens rea is a prerequisite to criminal liability. It is the rule that "ignorance of the criminal law is no excuse" which needs to be stated, as an inculpatory exception to this general principle.

Other members agree with this as a technical point but feel it would be a useful exercise to articulate the principle in the interests of clarity. Although in a sense it states the reverse side of the mens rea provisions, as a matter of policy our interest is to exclude the defence of ignorance of the law except where to do so would be unfair to the accused.

Most of the members feel this is an area where codification should be attempted, although in the time available they were unable to elaborate and agree upon the particulars. This area of the law represents an extension of liability over the general principle of mens rea and therefore is a matter of public policy for decision which should be taken overtly by parliamentary initiative rather than by the courts.

c. Recommendations

1. Clause 3(7)(a) should be rejected as drafted (unanimous).

2. Clause 3(7)(b)(i) should be omitted (3 for, 3 against).

3. Clause 3(7)(b)(ii) should be omitted as unnecessary (unanimous).

4. Clause 3(7)(b)(iii) should be omitted (unanimous).

Clause 3(16) Mistaken Belief as to Defence

1. LRC Proposals

a. Recommendation

3(16) Mistaken Belief As to Defence.

(a) General Rule. No one is liable if on the facts as he believed them he would have had a defence other than an exemption under clauses 3(4), 3(5) and 3(6).

(b) Exception. This clause does not apply where the accused is charged with a crime that can be committed through negligence and the mistaken belief arose through his negligence.

[p.39 of the Report]

b. Appendix A Provision (Draft Legislation)

25.(1) No person is guilty of a crime who engages in the conduct specified in the definition of the crime but mistakenly believes in the existence of a circumstance that, if it existed, would provide a defence under the law except a defence under section 13 or 14.,

(2) Subsection (1) does not apply where the relevant state of mind is negligence and the mistaken belief is a result of that negligence.

[p. 103 of the Report]

2. Existing Law

a. Criminal Code Provisions

The definition of many of the excuses and justifications contained in the present Criminal Code permits such defences to be asserted notwithstanding the presence of a mistake. Examples include s. 17 (duress: "A person... is excused... if he believes..."), s. 34 (self-defence: "Every one... is justified if... under reasonable apprehension... and he believes on reasonable and probable grounds"; and, similarly, s. 35), s. 27(b) (use of force to prevent commission of an offence: "Every one is justified... to prevent anything being done that, on

reasonable and probable grounds he believes..."), and s. 28 (arrest of wrong person: "Where a person... believes, in good faith and on reasonable and probable grounds..."). In other cases, the definitions do not expressly permit the defence to be asserted in the face of mistake: for example, s. 37.

b. Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

c. Common Law/Legal Writings

The common law governing defences grounded in mistake of fact is unclear, although it appears an excuse may be asserted where the mistake is an honest one, but a justification may be asserted only where the mistake is reasonable (see E. Colvin, Principles of Criminal Law, pp. 166-169).

However, since Perka and Vaillancourt, the principle is becoming firmly established in Canadian law that there can be no punishment without fault, without some kind of moral blameworthiness. With this principle established as part of the panoply of the criminal law in general and fundamental justice in particular, sections 7 and 11(d) of the Charter will require that the defence be made available.

The issue of an objective or subjective test for belief remains to be resolved.

3. Comments on Proposals

a. Position and Points in Issue

The members agree clause 3(16) is insufficient as drafted, although they accept the general principle that there should be a defence of mistake as to facts grounding a defence.

Some members feel the issue of mistaken belief as to defence should be resolved in the context of a general statement or definition of mens rea. Other members feel that there are enough

significant policy issues involved to warrant treatment in a separate rule; moreover, mistake as to the facts grounding a defence is distinct from mistake as to an element of the offence because the former, unlike the latter, is not resolved as a mere consequence of the principles of mens rea. In mistaken belief as to defence, the definition of the offence is committed by a person who does the act intentionally, i.e. with the requisite mens rea. If the facts were as he believed them, then the act would be justified in the circumstances or its author would be excused. However, where the facts are not as believed, there is in fact no justification and the author is not excused as he believed he was; and the mens rea remains intact. It is at the level of blameworthiness or fault of the author that the defence, if any, must operate.

Nevertheless, it may be possible to accommodate mistaken belief as to defence into a statement of mens rea, depending on the scope of the definition.

Mens rea has two distinct aspects, descriptive and normative. Descriptive mens rea refers to various states of mind - intentionally, recklessly, knowingly, negligently - which the definition of an offence may require to exist in the author before he can be convicted of the offence. It is the descriptive mens rea which is negated by mistake of fact as to an element of an offence (LRC clause 3(2)).

Normative mens rea consists of blameworthiness, the fault necessary to sustain a conviction. It is the expression which stands for the principle that there can be no criminal responsibility without fault. This is the level of excuses and it is at this level that LRC clause 3(16) must operate.

The members of the Working Group for Chapter 2 have not agreed on any general statement of mens rea. If the statement ultimately developed deals with both descriptive and normative mens rea, then conceivably it could accommodate both 3(2) and 3(16). If the statement is confined to descriptive mens rea, 3(16) must be dealt with separately.

It is not known what statement for mens rea the members of the Working Group for Chapter 2 will devise; some members of that Working Group feel it is not possible to devise a general statement. Some of the members of the Chapter 3 Working Group feel there are enough independent issues in clause 3(16) to warrant treatment in a separate rule in any case.

Those independent issues include wilful blindness; the effect of intoxication on mistake of facts grounding a defence; and whether the applicable test for mistake should be objective

(reasonable belief) or subjective (actual belief). In general, the same issues arise here as in respect of the defence of mistake in clause 3(2), above, and are discussed in that part of this report. Members feel that final resolution of these issues will require more intensive study of the policy implications and theoretical problems than was possible in the context of the present exercise.

b. Codification

Three members feel the number of areas in clause 3(16) requiring policy decisions dictates that a provision addressing the issue should be codified. Two members feel that it should be possible to devise a statement of mens rea which will accommodate all these concerns, and there should not be a codified defence of mistaken belief in a defence.

c. Recommendations

1. Reject clause 3(16) as drafted (unanimous).

2. More work should be done towards the development of a general statement of mens rea, to allow a determination of whether the substance of clause 3(16) should be codified directly or dealt with as an aspect of mens rea (unanimous).

3. The present law, which requires that in order for mistake to be a defence, the mistake has to be honestly held (as tested by reasonableness) is not adequate and a purely objective test of reasonableness should be substituted, to the effect that no one is criminally liable for reasonable conduct, including due care for the safety and security of innocent persons, under a reasonable belief that the conduct is lawful (the members were split on this point: 2 for, 3 against).

Clause 3(4) Immaturity

1. LRC Proposals

a. Recommendation

3(4) Immaturity. No one is liable for conduct committed when he was under twelve years of age.

[p.29 of the Report]

b. Appendix A Provision (Draft Legislation)

13. A person is not criminally liable for conduct engaged in by him while he was under twelve years of age.

[p. 100 of the Report]

2. Existing Law

a. Criminal Code Provisions

s. 12 No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of twelve years.

b. Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

S. 7 and 11(d) of the Charter would require this protection for any child or any person who, whether on account of his youth and inexperience or for any other reason, in fact lacks the capacity to form the intention necessary to commit a criminal

act. S. 12 of the Charter probably would preclude imposing criminal penalties on very young children even if they in fact had the capacity to form criminal intent. The particular age limit chosen is a policy decision; there is nothing in the Charter which would require it to be twelve rather than seven or ten or fourteen.

c. Common Law/Legal Writings

Common law on this point has been superseded by s. 12 of the Criminal Code.

3. Comments on Proposals

a. Position and Points in Issue

All members agree the particular age limit chosen is a matter of policy; none has any objection to the choice of twelve.

Some members feel the provision really involves a question of the application of the Code, rather than a defence. They therefore feel it should be an element of Chapter 1 (the application section) of the LRC draft code, rather than part of the section on defences.

Some members feel that the Code should contain a specific provision that it applies in other respects, such as arrest or search and seizure, to persons under twelve; even though children may not be subject to conviction for an offence, they should feel bound by the criminal law.

b. Codification

All members agree the provision should be codified. Members have identified various drafting concerns with clause 3(4) and prefer the present s. 12 of the Criminal Code.

c. Recommendations

1. The present s. 12 of the Criminal Code should be retained (unanimous).

2. Further consideration should be given to the question of which part of the Code this provision belongs in (unanimous).

Clause 3(3) Intoxication

1. LRC Proposals

a. Recommendation

3(3) Intoxication

(a) General Rule. No one is liable for a crime for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.

(b) Proviso: Criminal Intoxication. Notwithstanding clauses 2(2) and 3(3)(a):

(i) unless the intoxication is due to fraud, duress, compulsion or reasonable mistake, everyone falling under clause 3(3)(a) who satisfies all the other elements in the definition of a crime is liable, except in the case of killing, for committing that crime while intoxicated;

(ii) everyone who kills another person while intoxicated, and who falls under clause 3(3)(a), is liable for manslaughter while intoxicated and subject to the same penalty as for manslaughter.

[Alternative

3(3) Intoxication

General Rule. No one is liable for a crime for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.

Exception. This clause shall not apply as a defence to a crime that can be committed through negligence unless the intoxication arose through fraud, duress, compulsion or reasonable mistake.]

[pp. 27-28 of the Report]

b. Appendix A Provision (Draft Legislation)

17.(1) No person is guilty of a crime who engages in the conduct specified in the definition of the crime but does not have the relevant state of mind by reason of intoxication resulting from fraud, duress, compulsion or reasonable mistake.

(2) Notwithstanding section 5, a person who engages in conduct specified in the definition of a crime but who does not have the relevant state of mind by reason of intoxication, other than intoxication resulting as described in subsection (1), is guilty of committing the crime while intoxicated.

[p. 101 of the Report]

2. Existing Law

a. Criminal Code Provisions

The Criminal Code makes no reference to the defence of intoxication.

b. Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

c. Common Law/Legal Writings

The defence of intoxication is structured on the following principles:

a) Involuntary intoxication, in other words, intoxication that is not the accused's fault, constitutes a valid and complete defence to any charge, whatever the nature of the intent required, if, as a result or the intoxication, the accused did not have the intent to commit the crime charged.

b) Voluntary intoxication, apart from self-induced intoxication to give an accused the courage to commit a crime, which will never be a defence, can constitute a defence to a crime that requires a specific intent.

c) Voluntary intoxication will never be a defence to a crime that requires a general intent.

(The distinction between these two types of crime has often been severely criticized and arguments have been made in favour of its elimination: see Leary v. R., [1978] 1 SCR 29, opinion of Dickson J. This distinction has been rejected by the High Court of Australia and by the South African Court of Appeal.)

d) In cases where intoxication is a possible defence, the accused need only present evidence that raises a reasonable doubt that he had not formed the necessary intent to commit the crime charged.

e) If involuntary intoxication of an accused leads him to do something which is not intentional, the defence put forward will then be automatism and it can be a defence to any crime, regardless of the type of intent required (general or specific): R. v. King (1982), 67 C.C.C. (2d) 549 (Ontario CA). The decision sought will then be outright acquittal and it will be sufficient to raise a reasonable doubt.

f) If, on the other hand, the intoxication resulting in automatism is voluntary, in other words, it does not result from fraud, duress, compulsion or reasonable mistake, the only defence will be intoxication and not automatism. R. v. King, supra.

g) Any person charged with a crime committed while he was insane, if the mental illness results from intoxication, will be able to raise the defence of insanity, not the defence of intoxication. In such a case the defence of insanity will have to be established on a preponderance of the evidence; it can be a defence to any crime (whatever the nature of the intent required); the decision sought will be acquittal on account of insanity.

3. Comments on Proposals

a. Position and Points in Issue

All members agree that neither the majority nor the minority proposal of the LRC is acceptable. These proposals would eliminate the troublesome distinction between general and specific intent offences which forms the basis of the common law defence of drunkenness. It would also generally eliminate the possibility of escaping criminal liability due to drunkenness by providing sanctions for crime while intoxicated. However, while that thrust is desirable, it is contradictory to provide that the offence is committed while intoxicated at the same time as recognizing that intoxication can eliminate the mens rea element of a crime.

Members feel it is contentious to propose finding guilty of a crime one who is acknowledged to be not guilty, lacking mens rea. Further, it is altogether unclear what such a conviction would signify; whether it would be a qualified conviction, an included conviction, or a conviction for a specific offence of "crime while intoxicated".

The question of penalty also presents problems. LRC members have said elsewhere that the sentence would be the same whether an offence was committed or committed while intoxicated. If that is the case, it seems pointless to have the provision.

The treatment of previous convictions also poses a problem. Logically, conviction would call for a fixed penalty: since there is no mens rea to consider, the only pertinent fact is intoxication. Yet it would be inappropriate to ignore consequences of the act and the presence or length of an antecedent record.

Application of the provision to homicides leads to absurd results. Under clause 3(3)(b)(ii), one who kills another while intoxicated is liable for manslaughter while intoxicated. Manslaughter is elsewhere defined as a reckless homicide. Thus, under the provision, intoxication would reduce liability in the case of murder or first degree murder; would have no effect on liability in the case of manslaughter; and would increase liability in the case of negligent homicide.

Finally, the clause does not deal directly with a number of subsidiary issues, including: voluntary intoxication whose purpose is to provide the courage to commit an illegal act; and voluntary intoxication resulting in automatism, mental disorder, or mistake of fact.

All members agree that the present defence of intoxication cannot be justified on the basis of principle. The distinction between specific and general intent offences, on which the defence is based, presents a significant conceptual problem. One member feels it is justifiable as a practical solution to the need to protect the public from persons who become intoxicated and act in a way that is dangerous to others.

Several members are concerned by the inability of the present law to deal with persons who, while intoxicated, commit offences of general intent. These members agree that, as a matter of policy, it is necessary to deal with people who commit criminal acts and who otherwise would be entitled to a complete acquittal due to a lack of mens rea resulting from voluntary intoxication. Complaints have been made at meetings of the Coordinating Committee of Senior Officials and the Uniform Law Conference that for offences of specific intent having no included offence of general intent (for instance, break and enter, theft or mischief), people are being acquitted by virtue of their intoxication. This problem will be compounded if our Supreme Court follows decisions in Australia and South Africa eliminating the distinction.

One policy option is to create an offence of voluntarily becoming intoxicated in circumstances where one is likely to interfere with, or become a danger to, the person or property of another. All but one of the members agree with the following formulation for such a provision:

> The defence of intoxication should not apply to any crime, unless there is a total loss of self-control, or unconsciousness; in which case the accused shall be subject to conviction for a separate offence of becoming intoxicated in a situation where there is a potential risk of interference with, endangerment of, or harm to, the person or property of another.

The members wish to point out in this report that such a provision is narrower than that represented by the LRC majority proposal which would catch everyone for "committing... [a] crime while intoxicated".

The advantage of such a provision is that it would punish the person for what he actually did; that is, becoming intoxicated and causing harm as a result. The court would consider the mens rea when the person begins to drink, and the actus reus of excessive drinking. Further work is required to determine the appropriate penalty structure to go with such a provision.

b. Codification

All members but one agree that the defence of intoxication should be codified, since the defence raises significant policy issues which should be decided by Parliament rather than the courts. The other member would prefer to retain the common law defence, which he feels is preferable to any of the codification proposals we have seen.

All members agree, however, that the present defence probably cannot be made to work without the present mens rea structure which distinguishes between specific and general intent. Retention of the present defence, either in the common law or in codified form, would have to be predicated on maintaining this distinction. Therefore it is not possible to choose between options without taking a position on mens rea.

The Working Group for Chapter 2 has not settled on whether there should be a general statement of mens rea in the Code or if so, what form it should take.

c. Recommendations

1. Clause 3(3) should be rejected (unanimous).

2. There should be a codified rule concerning intoxication (4 for, 1 against).

3. The defence of intoxication should not apply to any crime, unless there is a total loss of self-control, or unconsciousness; in which case the accused shall be subject to conviction for a separate offence of becoming intoxicated in a situation where there is a potential risk of interference with, endangerment of, or harm to, the person or property of another (4 for, 1 against).

Clauses 3(5) and 3(6) Unfitness to Plead and Mental Disorder

LRC Proposals

a. Recommendations

3(5) Unfitness to Plead. Any person who, at any stage of the proceedings, is incapable of understanding the nature, object or consequences of the proceedings against him, or of communicating with counsel owing to disease or defect of the mind which renders him unfit to stand trial, shall not be tried until declared fit.

[p. 29 of the Report]

3(6) Mental Disorder. No one is liable for his conduct if, through disease or defect of the mind, he was at the time incapable of appreciating the nature, consequences or legal wrongfulness of such conduct [or believed what he was doing was morally right].

[p. 30 of the Report]

b. Appendix A Provision (Draft Legislation)

14. A person does not commit a crime if, at the time of the relevant conduct, the person, by reason of mental disorder, is incapable of appreciating the nature or consequences of the conduct or of appreciating that the conduct constitutes a crime.

[p. 100 of the Report]

[Appendix A does not contain a provision corresponding to clause 3(5)]

These issues have been addressed by the Mental Disorder Project which has superseded the work of the Law Reform Commission. The policy issues have already been addressed and largely resolved in the Federal-Provincial Forum.

All members agree that clauses 3(5) and 3(6) are not satisfactory and are superseded by the Mental Disorder Project. The members agree in preferring the proposals of the Mental Disorder Project to those presented in Report 30.

c. Recommendation

1. That the Working Group defer to the proposals of the Mental Disorder Project in respect of clauses 3(5) and 3(6) (unanimous).

Clause 3(8) Duress

1. LRC Proposals

a. Recommendation

3(8) Duress. No one is liable for committing a crime in reasonable response to threats of immediate serious harm to himself or another person unless he himself purposely kills or seriously harms another person.

[p. 32 of the Report]

b. Appendix A Provision (Draft Legislation)

19.(1) No person is guilty of a crime who engages in the conduct specified in the definition of the crime but does so by reason of a threat of immediate serious harm, whether to himself or to another person.

(2) Subsection (1) does not apply where engaging in the conduct is not a reasonable reaction to the threat or where the person purposely kills or purposely inflicts serious harm on another person in reaction to the threat.

[p. 102 of the Report]

2. Existing Law

a. Criminal Code Provisions

17. A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 249 to 250.2 (abduction and detention of young persons).

b. Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

c. Common Law/Legal Writings

Persons charged with the commission of any offence (including those excepted from the operation of s. 17) as aiders or abettors, or as participants in the carrying out of a common unlawful purpose, are entitled to rely on the common law defence of duress: Paquette v. R., [1977] 2 S.C.R. 189. In Paquette, the Supreme Court held s. 17 exhaustive with respect to perpetrators or co-perpetrators, but recognized the preservation of the common law defence by virtue of s. 7(3) of the Criminal Code permitting parties as defined by s. 21(1)(b) or (c) or s. 21(2) to raise the common law defence of duress. This is important because of the exclusions contained in s. 17, most of which are not applicable to the defence at common law.

The most significant decisions in this area have emerged from the House of Lords and the English Court of Appeal in the last two decades. (See Regina v. Hudson, [1971] 2 Q.B. 202 (C.A.): D.P.P. v. Lynch, [1975] A.C. 653 (H.L.): Regina v. Graham (1981), 74 Cr. App. R. 235 (C.A.): and Regina v. Howe, [1987] 2 W.L.R. 586 (H.L.)). Generally these decisions have articulated the defence being available to both principals and parties for all offences with the single exception of murder, in which case neither the principal nor a party may rely upon it. Threats of death or serious physical injury whether express or implied are necessary to successfully establish the defence but it is not necessary the threats be immediate in every case. As a matter of public policy the defence appears limited by the imposition of an objective test to the effect that "a person of reasonable firmness with the characteristics and in the circumstances of the defendant could not have been expected to resist." (see Regina v. Howe). It appears that the common law as reflected in the judgments above differs significantly in a number of areas from the codified Canadian position. This is specifically evident in four respects:

a) the common law excludes the defence only in areas of murder while Parliament has enumerated an extensive list of offences in which duress may not be raised by a perpetrator.

b) the common law defence requires evidence of threats of death or serious physical injury. Prior to its amendment in 1982 s. 17 required threats of immediate death or grievous bodily harm which was then altered by the deletion of the word grievous;

c) it is not always necessary under the common law that the threats be immediate whereas this is an explicit requirement of s. 17; and

d) the common law has imposed an objective test (a person of reasonable firmness) for determining the quality of the threats. Section 17 codifies the subjective test in the words "if he believes that the threats will be carried out".

3. Comments on Proposals

a. Position and Points in Issue

Members feel s. 17 of the Code presents various problems. A number of these were identified:

(i) Since Paquette, the availability of the defence is dependent upon the degree of participation in the offence. This creates uncertainty in the law, particularly in the context of charging a jury. Moreover, it is inconsistent: the law elsewhere treats parties and principals the same; the accused is convicted of committing the offence, whether as party or principal. The degree of involvement is only taken into account on sentencing.

(ii) The availability of the defence in s. 17 is determined by listing the offences in respect of which it may not be claimed. Some of these, such as treason and robbery, cover a broad range of activity which can vary from the potentially lethal to the relatively innocuous. Some members feel it would be more appropriate to determine the scope of the defence according to a criterion of serious harm rather than the type of offence.

(iii) The defence is not available in response to threats in respect of third persons. Although extending it as proposed in clause 3(8) renders the issue of

immediacy of the threat problematic, some members feel such an extension would be appropriate on policy grounds.

The members feel that clause 3(8) is inadequate. A number of issues are not satisfactorily addressed:

(i) Parties; clause 3(8) does not resolve the issue of differential liability of parties and principals which now exists between s. 17 and the common law.

(ii) The threat of "serious harm" represents a fluid concept which may not represent a high enough threshold for triggering the defence.

(iii) Clause 3(8) dispenses with the conspiracy or association exception; joining such a group represents a degree of fault sufficient to preclude claiming the defence later.

(iv) Clause 3(8) only precludes the defence where the person "himself purposely kills" another. This is broader than the common law defence (which would not be available to a party to a murder) and the term "purposely" excludes reckless and negligent killings.

(v) Clause 3(8) would exclude the defence where another person is killed or seriously harmed; this does not cover some offences which ought to be included, such as high treason or attempted murder; and possibly also other serious crimes against public interest that do not involve treason or direct harm to an individual - for example, extraordinary and catastrophic environmental damage.

(vi) Clause 3(8) does not address what would happen when a different crime is committed from that which the person under duress intended or reasonably could have expected.

b. Codification

The members feel the defence of duress, as now, should be codified; however, they feel the provision should address parties as well as principals, to eliminate the split between the Code and the common law that exists at present.

c. Recommendations

1. S. 17 of the present Criminal Code is unsatisfactory and should be replaced or amended (3 for, 1 against).

2. Clause 3(8) should be rejected (unanimous).

3. Further work is needed to identify and resolve policy issues in order to develop a satisfactory replacement for s. 17. Particular consideration should be given to the means chosen for defining the scope of the defence; possible options include listing precluded offences or establishing a criterion such as "offences involving serious harm to the person" (unanimous).

4. The defence should be available to persons responding to a credible threat made against a third person (unanimous).

5. The provision should be retained that the defence is not available to a person who has joined an organization or conspiracy knowing that, by his membership, he may be subject to duress (unanimous).

Clause 3(9) Necessity

1. LRC Proposals

a. Recommendation

3(9) Necessity

(a) General Rule. No one is liable if:

(i) he acted to avoid immediate serious harm to person(s) or damage to property;

(ii) such harm or damage substantially outweighed the harm or damage resulting from that crime; and

(iii) such harm or damage could not effectively have been avoided by any lesser means.

(b) Exception. This clause does not apply to anyone who himself purposely kills or seriously harms another person.

[p.33 of the Report]

b. Appendix A Provision (Draft Legislation)

20.(1) No person is guilty of a crime who engages in the conduct specified in the definition of the crime but does so in order to avoid immediate serious harm to himself or to another person or damage to property where such harm or damage

(a) substantially outweighs the harm or damage resulting from the conduct; and

(b) could not have been avoided by other means that would have resulted in less harm or damage.

(2) Subsection (1) does not apply where the person purposely inflicts serious harm on another person.

[p. 102 of the Report]

2. Existing Law

a. Criminal Code Provisions

There is no specific provision in the Criminal Code providing for the defence of necessity.

b. Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

c. Common Law/Legal Writings

In Canada, the existence of the defence of necessity has only been recently recognized by the Supreme Court. The defence has been recognized as an excuse, implying no vindication of the deeds of the actor, the underlying rationale of the defence being that it is inappropriate to punish actions which are normatively involuntary: Perka v. R., [1984] 2 S.C.R. 232.

The defence of necessity is strictly confined and is available only where there is an urgent situation of clear and imminent peril when compliance with the law is demonstrably impossible. Normally, voluntariness can be presumed, but if the accused places sufficient evidence before the court to raise an issue that the situation created by external forces was so emergent that failure to act would endanger life or health, and, upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue.

At a minimum, the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable.

A further requirement for a successful necessity defence is that compliance with the law be demonstrably impossible. If there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of necessity and human instincts.

The final requirement for a necessity defence is that the harm inflicted must be less than the harm sought to be avoided.

The fact that the accused was engaged in illegal or immoral conduct when the emergency arose will not disentitle an individual to rely on the defence of necessity.

3. Comments on Proposals

a. Position and Points in Issue

Members feel that the availability of the defence of necessity should be strictly controlled. Some feel the LRC draft of clause 3(9) does not fully capture all the restrictions enumerated in Perka.

Perka recognizes the defence of necessity as an excuse. Members feel the LRC should have addressed the issue of whether necessity can ever be a justification or whether it should be restricted to an excuse. Two members feel it should never be a justification; two members however feel that in some circumstances, it could be a justification, and this aspect should be explored. They feel further work is needed to explore this issue.

There is a division of opinion amongst members over whether clause 3(9) would allow a person to substitute his subjective interpretation of a balancing of harms for the objective standards of the criminal law. Some members hold the view that it would; others are of the opinion that it is possible to interpret the clause objectively, as requiring a precondition of actual and immediate serious harm, substantially outweighing that which would result from the crime, and which actually could not effectively be avoided by any other means.

Members note that the restriction in clause 3(9)(b) ("This clause does not apply to anyone who himself purposely kills...") presents two problems. First, it does not preclude the defence for parties to a homicide, and it is not clear whether, as a matter of policy, this distinction should be made. Second, the exception excludes the defence where the accused "purposely kills", but not where there is a reckless or negligent killing.

Some members feel that an absolute exclusion on killing or seriously harming may not be appropriate, and that an objective test of balancing the opposing harms would be preferable. Members identify this as a policy issue requiring further study and decision.

Another policy issue which the LRC has not addressed in its draft is the question of whether, in any defence involving a balancing of lesser evils, there should be incorporated a requirement to compensate third parties for resultant damage.

One member raises an issue related also to the defences of duress, defence of the person and defence of property. He feels all of these defences should be looked at together with necessity to consider the possibility of consolidating them as a single defence. He feels this would avoid the criticism sometimes levelled at the present Code that it contains sections which are prolix and repetitive. He feels there is a recurring principle in all these defences of permitting people to act reasonably as long as the harm thereby avoided is greater than the harm inherent in the act.

b. Codification

Although recognized in the common law, this defence is not addressed in the present Criminal Code. The members are divided on whether the defence of necessity should be codified or left to the common law. Some members feel that, as with other possible limits on criminal liability, the policy questions arising from the imperatives of necessity ought to be settled by Parliament. If the defence is to be recognized, they feel it is preferable for the courts to have principles to follow in making a decision. The conditions in clause 3(9) are a detailed expression of reasonableness in balancing competing interests, which is the essence of other aspects of necessity recognized in the criminal law such as duress, self-defence and defence of property.

Some members are seriously concerned that to give the defence of necessity legislative expression would result in increased use and broader application. They would prefer to leave the defence to the courts and not legislate unless the jurisprudence broadens the defence unduly. One of the main reasons for their rejection of codification is the concern that codification would permit an individual's subjective assessment of conflicting evils and opposing values to override the public values imposed by the criminal law. They also note the small number of cases recognizing the defence of necessity in Canada and are concerned that the concept has not been explored sufficiently to foresee the consequences of codification.

c. Recommendations

1. Necessity should be addressed in the Criminal Code (3 for, 2 against).

2. Clause 3(9) presents problems and further work should be undertaken before consideration is given to codification of a provision to replace the common law in this area. The LRC draft of clause 3(9) is a good basis for further discussion, however (unanimous).

Clause 3(10) Defence of the Person

1. LRC Proposals

a. Recommendation

3(10) Defence of the Person

(a) General Rule. No one is liable if he acted as he did to protect himself or another person against unlawful force by using such force as was reasonably necessary to avoid the harm and hurt apprehended.

(b) Exception: Law Enforcement. This clause does not apply to anyone who uses force against a person reasonably identifiable as a peace officer executing a warrant of arrest or anyone present, acting under his authority.

[p.34 of the Report]

b. Appendix A Provision (Draft Legislation)

21.(1) No person who uses force to protect himself or another person from the unlawful use of force is guilty of a crime if the force used is reasonably necessary to avoid the hurt or harm apprehended from the unlawful use of force.

(2) Subsection (1) does not apply where the person uses force against a peace officer who is executing a warrant of arrest or against a person acting under the authority of a peace officer in the execution of a warrant of arrest, if the peace officer is reasonably identifiable as a peace officer.

[p. 102 of the Report]

2. Existing Law

a. Criminal Code Provisions

Defence of the person is covered by sections 34 through 37 of the Criminal Code. Sections 26, 27, 30, 31 and 215(4) also address issues relevant to defence of the person.

> 34.(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
>
> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and
>
> (b) he believes on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.
>
> 35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault upon himself by another may justify the use of force subsequent to the assault if
>
> (a) he uses the force
>
> (i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and
>
> (ii) in the belief, on reasonable and probable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;
>
> (b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and
>
> (c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

37.(1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

27. Every one is justified in using as much force as is reasonably necessary

(a) to prevent the commission of an offence

(i) for which, if it were committed, the person who committed it might be arrested without warrant, and

(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable and probable grounds he believes would, if it were done, be an offence mentioned in paragraph (a).

30. Every one who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace, for the purpose of giving him into the custody of a peace officer, if he uses no more force than is reasonably necessary to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace.

31.(1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists him is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable and probable grounds, he believes is about to join in or renew the breach of the peace.

(2) Every peace officer is justified in receiving into custody any person who is given into his charge as having been a party to a breach of the peace by one who has, or who on reasonable and probable grounds he believes has, witnessed the breach of the peace.

215.(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

Section 34 justifies the use of necessary and proportional force in self-defence, where the defender has not provoked the assault. Proportionality is not an explicit requirement but equivalences are set out (grievous bodily harm for grievous bodily harm, death for death). This leaves open the possibility that fairly significant pain and suffering, or even injuries short of "grievous bodily harm", could be inflicted where necessary to prevent a trivial assault (e.g. a savage punch to the solar plexus where the aggressor would otherwise tweak one's cheek).

Section 26 precludes a qualified defence of excessive force in self-defence, but on its wording this section applies only where the prerequisites of the justifications are not fulfilled, and does not impose an overall proportionality requirement.

Section 35 outlines the conditions under which an aggressor (one who, without justification, has either used force or provoked the use of force) may justify the use of force to defend himself against a retaliatory attack. He is justified where it is necessary to protect himself from death or grievous bodily harm provided that he neither attempted to cause death or grievous bodily harm to the other nor intended that result when he instigated the exchange; he must also, where possible, retreat and decline further conflict.

Section 36 defines "provocation".

Section 37 justifies the use of necessary and proportionate force to defend oneself "or any one under his protection". Section 27(a)(ii) justifies the use of force necessary to prevent an offence "that would be likely to cause immediate and serious injury to the person or property of anyone", and s. 30 justifies the use of necessary and proportionate force to prevent the continuance or renewal of a breach of the peace. Thus a person may be justified in using force to defend another who is not "under his protection".

Section 215(4) provides that the partial defence of provocation has no general application in the case of one who is

arrested illegally. It does not, as has been suggested, restrict the right of self-defence against illegal arrest. As Grant Smyth Garneau writes in "The Law Reform Commission of Canada and the Defence of Justification", (1983) 26 C.L.Q. at p. 130:

> ...subsection 215(4) relates to the defence of provocation in cases involving the use of excessive force to resist illegal arrest and does not in any way restrict the use of deadly force in a justifiable self-defence situation involving illegal arrest.

There is some inconsistency arising out of the multiplicity of sections. For example, there is variation on the requirement of proportionality of response. Further, while all provisions require that the use of force be necessary, there is variation in the conditions under which necessity operates. Section 34(1) justifies the use of non-lethal force where necessary; it does not import the excuse of mistake (through having a requirement that the subject believe in the necessity). Section 34(2), dealing with force causing death or bodily harm contains the condition that the subject is "under reasonable apprehension" of death or bodily harm, and that "he believes on reasonable and probable grounds" that it is necessary. Section 35 contains the same conditions as s. 34(2) but s. 37 merely justifies the use of force "to defend himself or anyone under his protection from assault".

b. Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

c. Common Law/Legal Writings

The jurisprudence has provided elaborations on the statute law. Thus, a person defending himself under s. 34 must use only proportional force but is not expected to weigh to a nicety the exact amount of force: R. v. Baxter (1975), 33 C.R.N.S. 22 (Ont. C.A.).

Under s. 34(2) the reasonable apprehension of death or grievous bodily harm must satisfy an objective standard. However, the belief of the accused that he cannot otherwise preserve himself from death or grievous bodily harm is based on a subjective standard. The accused's subjective belief that he was in imminent danger of death or grievous bodily harm and that his action was necessary in self-defence is required to be based on reasonable grounds: R. v. Bogue (1976), 30 C.C.C. (2d) 403 (Ont. C.A.); R. v. Baxter, supra; R. v. C., [1966] 1 C.C.C. 380 (Sask. Q.B.).

The case law provides elaborations on other Code provisions as well but these will not be catalogued here.

3. Comments on Proposals

a. Position and Points in Issue

All members agree that defence of the person should be codified. They all agree that the present law is unsatisfactory. The multiplicity of provisions is aimed at comprehensiveness, but excessive complexity has resulted in uncertainty. The complexity of the scheme makes charging the jury difficult and extends the litigation process.

All members agree that the general thrust of clause 3(10) has potential, but it is not wholly satisfactory. The members identify the following potential problem areas and policy issues which should be given further consideration.

The draft should capture a proportionality requirement in the use of defensive force; it is not clear that "reasonably necessary" accomplishes this.

The present Code provisions include an express prerequisite of retreat where death or serious bodily harm is involved. This may be covered by the term "reasonably necessary" in clause 3(10)(a) but the LRC offers no explanation in this regard. Members feel that the policy concern represented by the retreat provision in the present Code is serious enough that further consideration should be given as to how that policy concern is addressed.

Members identify self-defence by an aggressor and excessive self-defence as other important policy concerns which should be specifically considered in the drafting of a general provision.

Some members are concerned that the use of the term "apprehended" in clause 3(10)(a) imports into this defence the defence of mistake of fact. Defence of the person is a justification and mistake of fact is an excuse, and they feel it

will lead to confusion and uncertainty in the law to include two different types of defence within a single provision. In particular, it would make for complicated jury charges.

Clause 3(1) would extend the existing defence of self-defence to defence of any person, without the limitation that there be a special responsibility or duty toward the other person. This raises the policy issue which should be considered whether there should be a special limitation to curb activities of vigilantes, officious intermeddlers and groups such as the New York-based "Guardian Angels".

The members all agree that clause 3(10) should justify not just the use of force, but omissions and acts other than the use of force which may be reasonable in defence of the person, but which would in themselves otherwise be criminal (for example: theft, confinement, damage to property, possession of a weapon, omitting to perform a lawful duty).

Finally, the members have reservations about clause 3(10)(b). One member feels that the exception should not be restricted to execution of an arrest warrant in isolation from other forms of process within a peace officer's duty, such as a warrantless arrest or search of the person. Another potential problem is that such a restriction on a person's right of self-defence may run contrary to s. 7 of the Charter without being demonstrably justifiable under section 1.

b. Codification

All members agree that defence of the person should be codified; it is already included in the Code, but the complexity should be reduced.

c. Recommendations

1. The present law is unsatisfactory and should be recodified (unanimous).

2. Although clause 3(10) is in principle satisfactory, further work should be done to ensure the draft adequately addresses the policy concerns identified (unanimous).

Clauses 3(11) and 3(12) Protection of Property

1. LRC Proposals

a. Recommendations

3(11) Protection of Movable Property. No one in peaceable possession of movable property is liable for using such force, not amounting to purposely killing or seriously harming, as is reasonably necessary to prevent another person from unlawfully taking it, or to recover it from another person who has just unlawfully taken it.

[p. 35 of the Report]

3(12) Protection of Immovable Property.

(a) General Rule. No one in peaceable possession of immovable property is liable for using such force, not amounting to purposely killing or seriously harming, as is reasonably necessary to prevent trespass, to remove a trespasser or to defend the property against another person unlawfully taking possession of it.

(b) Exception. This clause does not apply to a peaceable possessor without a claim or right who uses force against a person who he knows is legally entitled to possession and who enters peaceably to take possession of that property.

[p.35 of the Report]

b. Appendix A Provision (Draft Legislation)

22.(1) No person in peaceable possession of property is guilty of a crime if he uses force

(a) to prevent another person from unlawfully taking, or committing a trespass with respect to, the property;

(b) to retake the property from a person who has just unlawfully taken it; or

(c) in the case of property that is land, to remove a trespasser from the land.

(2) Subsection (1) does not apply where the person

(a) purposely kills or purposely inflicts serious harm on another person; or

(b) uses more force than is reasonably necessary for the purposes described in that subsection.

[p. 102 of the Report]

2. Existing Law

a. Criminal Code Provisions

Defence of property is covered by section 27 and sections 38 through 42 of the Criminal Code.

27. Every one is justified in using as much force as is reasonably necessary

(a) to prevent the commission of an offence

(i) for which, if it were committed, the person who committed it might be arrested without warrant, and

(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable and probable grounds he believes would, if it were done, be an offence mentioned in paragraph (a).

38.(1) Every one who is in peaceable possession of movable property, and every one lawfully assisting him, is justified

(a) in preventing a trespasser from taking it, or

(b) in taking if from a trespasser who has taken it,

if he does not strike or cause bodily harm to the trespasser.

(2) Where a person who is in peaceable possession of movable property lays hands upon it, a trespasser who persists in attempting to keep it or take it from him or from any one lawfully assisting him shall be deemed to commit an assault without justification or provocation.

39.(1) Every one who is in peaceable possession of movable property under a claim of right, and every one acting under his authority is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

(2) Every one who is in peaceable possession of movable property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it.

40. Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority.

41.(1) Every one who is in peaceable possession of a dwelling-house or real property and every one lawfully assisting him or acting under his authority is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

(2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation.

42.(1) Every one is justified in peaceably entering a dwelling-house or real property by day to take possession of it if he, or some person under whose authority he acts, is lawfully entitled to possession of it.

(2) Where a person

(a) not having peaceable possession of a dwelling-house or real property under a claim of right, or

(b) not acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right,

assaults a person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be without justification or provocation.

(3) Where a person

(a) having peaceable possession of a dwelling-house or real property under a claim or right, or

(b) acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right,

assaults any person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be provoked by the person who is entering.

b. Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

c. Common Law/Legal Writings

As in the case of defence of the person, the jurisprudence fleshes out the Criminal Code provisions.

Some anomalies arise. For example, under s. 40, a person in peaceable possession of a dwelling-house is justified in using "as much force as is necessary" to prevent forcible entry; but the case law would preclude killing in defence of property unless it arises under self-defence, s. 34: R. v. Clark (1983), 5 C.C.C. (3d) 264 (Alta. C.A.). However, see also R. v. Scopellitti (1981), 63 C.C.C. (2d) 481 (Ont. C.A.), where use of deadly force was justified under s. 27.

Under s. 41(2), a trespasser who resists an attempt by a person in peaceable possession of real property to remove him or prevent his entry is "deemed to commit an assault without justification or provocation". Case law makes it clear that the deeming requires forceable resistance, and mere passive resistance is not assault: R. v. Baxter (1975), 33 C.R. N.S. 22 (Ont. C.A.); R. v. Scopellitti, supra; R. v. Richardson (1983), 8 C.C.C. (3d) 309 (N.S. C.A.); R. v. Kellington (1972), 7 C.C.C. (2d) 564 (B.C. S.C.).

3. Comments on Proposals

a. Position and Points in Issue

All members agree that this area of the law should be recodified; the present law is not only too complicated, but in some respects incomprehensible, at least in terms of charging a jury. One of the requirements of a criminal code is that people ought to be able to regulate their behaviour to conform to it. Members agree that the primary object in recodification should be to simplify and clarify the provisions.

Members have not reached a consensus on the appropriate contents of the law, but identify a number of important policy decisions which will have to be resolved.

The members agree that the possibility should be explored of using a common provision to cover all types of property; provided that this approach is compatible with addressing all of the specific policy considerations, once these have been sorted out. One member feels that there is a fundamental difference between real estate and other forms of property, and the provision should reflect a higher degree of protection for real estate.

One policy issue of particular importance is the question of limiting recourse to forcible redress where people have the option of enlisting the civil courts to redistribute their property interests. The problem of permitting self-help is complicated by the fact that feelings can run high where property is at stake and parties' rights are often unclear because property interests are divisible; and property law is a complex area. Moreover, rights can be effectively frustrated in some cases by requiring the claimant to pursue a civil remedy.

The present Code attempts to sort out these problems by spelling out, for every situation, who can defend property; what kind of property can be defended; against whom one can defend property; and what amount of force can be used to defend it. The alternative, and the route followed by the LRC, is to etablish a general provision and simply rely on a "reasonableness" limitation to control its application; but this can result in

uncertainty. However, neither approach deals directly with the issue of limiting recourse to violence; it is accomplished by implication, rather than expressly stated. Members agree that the issue of limiting use of force is of sufficient importance that it should be addressed directly.

Members identify "claim of right" as an important policy issue which the LRC has not addressed directly in sufficient detail, and more generally, an area where insufficient scholarship has been applied. It is not a complete answer to characterize a claim of right as a mistake of fact or of private law. For example, priority of rights may not simply be identified and declared, but established by the court. This would be so in any case of a dispute over jointly-held property, or in adverse possession cases. The issue has implications for both mens rea and actus reus: where there is a claim of right there may be no intent to deprive and the property taken may not in fact be the property of the person it is taken from.

Some members feel that an important difficulty with clauses 3(11) and 3(12) is that they depend on the concept of "peaceable possession", which is not defined in a satisfactory way. The mere existence of a property dispute implies that continued possession negates "possession in circumstances unlikely to lead to violence", as the LRC defines "peaceable possession in its commentary on clause 3(11). In the common law, "peaceable possession" simply referred to the manner in which a person came into possession of the property: if it was by theft or robbery, then possession was not "peaceable".

Members note a discrepancy between the LRC proposals and its comment on the proposals. The comment indicates that clauses 3(11) and 3(12) distinguish between movable and immovable property: clause 3(11) would allow a person in peaceable possession of movables, whether or not with a claim of right, to defend his possession against anyone trying to take it, whether or not with a claim of right. The effect of this would be to eliminate s. 38(2) of the present Code. However, clause 3(11) as drafted permits one to use force only against "unlawful" taking, and it is not at all clear how one asserting a lawful claim to property against one with no such claim is acting "unlawfully", so as to trigger the defence in clause 3(11). This distinction is not reflected in the draft in Appendix "A".

Two members feel that there may be a place for some form of the "deemed assault" provisions in s. 38(2) and 41(2) of the present Code, and that these should not be eliminated without further debate. Other members are content that these should be eliminated.

The members all agree that the defence should be available against damage to or destruction of property, as well as against "taking".

Members are divided on the issue of whether there should be an express and absolute exclusion of deadly force in protection of property. Some members feel that the restriction to use of force which is "reasonably necessary" is itself sufficient as a general principle, and would preclude deadly force in most cases. Members agree that, if deadly force can ever be justified in respect of property, it would only be very rarely. If there is to be an express restriction on deadly force, members feel it is inconsistent to preclude killings done "purposely" but not "recklessly".

b. Codification

All members agree that this area of the law should be codified. As discussed above, the present law presents problems, and members agree that the primary object of any redrafting exercise in this area should be to simplify and clarify the provisions. The defence of property scheme is practically incomprehensible to a jury. Members are not satisfied that the drafts of clauses 3(11) and (12) have achieved this object.

C. Recommendations

1. The present law is excessively complex and should be recodified (unanimous).

2. Although clauses 3(11) and 3(12) are an improvement over the present law, in that they represent a simpler and more straightforward approach, further work should be done to ensure that the draft adequately addresses the policy concerns identified. Further work is also necessary to determine the appropriate resolution of the policy concerns identified (unanimous).

3. The absolute exclusion on deadly force should be omitted; it is sufficient to require that use of force be limited to that which is reasonable and necessary (3 for, 2 against).

4. The defence should be available against damage to or destruction of property, as well as against taking it (unanimous).

5. The defence should be a general one, relating to all types of property, provided that this is consistent with addressing all of the specific policy considerations (4 for, 1 against).

6. The provision should make allowance for defensive conduct (acts and omissions) other than the use of force (unanimous).

Clause 3(13) Protection of Persons Acting under Legal Authority

1. LRC Proposals

a. Recommendation

3(13) Protection of Persons Acting under Legal Authority.

(a) General Rule. No one is liable for:

(i) using such force as is reasonably necessary to prevent a crime likely to cause death, serious harm to the person or serious damage to property;

(ii) using such force as is reasonably necessary to effect an arrest authorized by law; or

(iii) performing an act required or authorized by or under federal or provincial statute or for using such force as is reasonably necessary to do so.

(b) Exception. This clause does not apply to anyone who purposely kills or seriously harms another person except where reasonably necessary to arrest, to prevent the escape of, or to recapture one who is dangerous to life.

[p.36 of the Report]

b. Appendix A Provision (Draft Legislation)

23.(1) No person is guilty of a crime who

(a) uses such force as is reasonably necessary to prevent the commission of a crime that is likely to cause the death of or serious harm to another person or serious damage to property;

(b) uses such force as is reasonably necessary to effect the arrest of a person as authorized by law; or

(c) performs any act that is required or authorized to be performed by or under an Act of Parliament or an Act of the legislature of a province and uses such force as is reasonably necessary to perform the act.

(2) Subsection (1) does not apply where the person purposely kills or purposely inflicts serious harm on another person, except where such an act is reasonably necessary to effect the arrest or recapture of, or prevent the escape of, a person whose being at large endangers human life.

[p. 103 of the Report]

2. Existing Law

a. Criminal Code Provisions

25.(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person,

(b) as a peace officer or public officer,

(c) in aid of a peace officer or public officer, or

(d) by virtue of his office,

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, he or any person who assists him is, if he acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

27. Every one is justified in using as much force as is reasonably necessary

(a) to prevent the commission of an offence

(i) for which, if it were committed, the person who committed it might be arrested without warrant, and

(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable and probable grounds he believes would, if it were done, be an offence mentioned in paragraph (a).

30. Every one who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace, for the purpose of giving him into the custody of a peace officer, if he uses no more force than is reasonably necessary to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace.

A number of other Criminal Code sections are referred to by the LRC in its Report: sections 28, 29, 31, 449 and 450, dealing with arrest; and sections 32 and 33, dealing with suppression of riots. These are not reproduced here, as they more appropriately fall under the rubric of police powers and procedures, which the LRC will address in greater detail in its forthcoming code of criminal procedure.

b. Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

c. Common Law/Legal Writings

Most of the case law relates to elaboration of the ambit of what, at common law, a peace officer or police officer or other person, is "required or authorized ... to do... in the administration or enforcement of the law". A very broad interpretation is given to the scope of duties of peace officers and police officers. Judicial response to this issue ranges from the very expansive view taken in Moore v. R., [1979] 1 S.C.R. 195 to the more restrictive approach in R. v. O'Donnell and Cluett (1982), 3 C.C.C. (3d) 333 (N.S. C.A.).

Although s. 30 of the Code justifies interference to prevent a breach of the peace, there is no offence in Canada of breach of the peace and it is not clear what, if any, scope breach of the peace has apart from conduct that is otherwise criminal.

3. Comments on Proposals

a. Position and Points in Issue

The members agree that there is a need to review sections 25 to 27 of the present Criminal Code, mainly to consolidate the law and to reduce the complexity of the scheme. While it is not as intricate as the sections on defence of the person or defence of property, it presents many of the same problems in charging a jury, for example, in cases where police officers are charged with assault: the justifiability of the application of force will depend on whether the officer was acting within the scope of his duty.

Some members have concerns about other aspects of the present provisions: for example, s. 25(4) of the present Code imposes no proportionality requirement on the use of force to make an arrest. The subsection would justify killing a fleeing shoplifter if there were no other way to stop him. Some members feel a line should be drawn short of this.

The members agree that the policy on police powers in some areas (e.g. powers of entry) that are inadequately spelled out at present should be supplemented. It is understood however that the LRC will address police powers more fully in its forthcoming code of criminal procedure.

The members agree that clause 3(13) is not a satisfactory solution to the problems posed by sections 25 to 27 of the present Criminal Code.

Members identify a number of problems. Clauses 3(13)(a)(i) and (ii) contain provisions which could better be covered elsewhere. Clause 3(13)(a)(i) repeats concepts contained in

clauses 3(10), (11) and (12) (defence of the person and property) which could well be incorporated into those sections. Clause 3(13)(a)(ii), the proposal on arrest, is appropriate though lacking in detail. Apparently, this and other police powers will be elaborated by the LRC in its procedural code, and if that is the case it is unnecessary here.

The reference to provincial statutes in clause 3(13)(a)(iii) creates the possibility of raising a provincial statute as a defence to a criminal charge under a federal statute. Members feel this would be inappropriate; while allowance must be made for administering and enforcing other statutes, care must be taken not to shield conduct generally authorized by another statute but carried out in circumstances that contravene criminal standards.

One member, noting that this clause is not merely a defence but provides positive authority for persons to take action in enforcing the law, feels clause 3(13)(a)(i) presents an important policy consideration: what limitations do we want to place on persons generally, and what encouragement do we want to give them, to enforce the law even where it does not concern them specifically? This would address the "Guardian Angels" question alluded to above. Restrictions can be passed relating to who can act, when they can act, and what class of crimes they can act on. Members are not satisfied that these policy concerns are adequately addressed in this clause; they feel more work is necessary to determine the appropriate limits.

One member notes that the formulation in clause 3(13)(a)(iii) may eliminate common law duties as a source of justification; he feels this would be unduly restrictive of the police officer, who would then have to find a specific section in a statute to justify his conduct.

Clause 3(13) justifies only the use of force. Members agree this should be extended to reasonable conduct, other than use of force, necessary to prevent crime.

As in the section on defence of property, some members question the necessity of the absolute restriction on deadly force in clause 3(13)(b). They feel "reasonably necessary" is a sufficient restriction which would exclude deadly force in most cases. If, however, there is an express restriction, members feel it is inconsistent to preclude killings which are done "purposely" but not those done "recklessly".

One member notes that clause 3(13)(a)(i) departs from the standard in s. 27(a)(ii) of the present Code, in that it dispenses with the requirement of immediacy for serious injury. The LRC gives no explanation for the change. The member feels this is an important policy issue which should not be dismissed without debate.

The general rule in clause 3(13)(a)(iii) would permit use of force to perform acts required or authorized "by or under federal or provincial statute". This differs from the general rule in s. 25(1) of the present Code which permits acts required or authorized "in the administration or enforcement of the law". All members agree that the distinction is an important one: the Commission's proposal is much broader than the Code provision, encompassing areas such as questioning witnesses in an investigation, which the police officer is authorized to do but which it is not desirable to see accomplished by force.

Members note that the LRC draft does not address the question of providing immunity from civil liability in respect of conduct which is justified under the criminal law. In the present Code there is a distinction between excuses and justifications, with justifications having the effect of providing protection not only from criminal liability but also from civil liability. All members agree that this is an important policy question which should be addressed: in order to ensure that a police officer feels at liberty to carry out his duties in a proper fashion, it may be necessary to go further than merely protecting him from prosecution under the Criminal Code.

b. Codification

All members agree that the law in this area should be codified. Some adjustment to sections 25-27 of the present Code is desirable, at least to reduce the complexity. In addition, some aspects of the law are unclear and not comprehensive.

c. Recommendations

1. The present law on lawful authority, including sections 25-27 of the Criminal Code and the relevant common law, needs attention and simplification, and should be recodified (unanimous).

2. Clause 3(13) should be rejected as not representing a satisfactory solution to the problems posed by sections 25 to 27 of the present Criminal Code or to the other policy issues raised (unanimous).

3. Further work should be done towards resolving the policy issues raised (unanimous).

Clause 3(14) Authority over Children

1. LRC Proposals

a. Recommendation

3(14) Authority over Children. No one is liable who, being a parent, foster-parent or guardian or having the express permission of such a person, touches, hurts, threatens to hurt or confines a child in his custody in the reasonable exercise of authority over such child.

[Alternative - A minority of Commissioners would not provide for such a defence.]

[pp.37-38 of the Report]

b. Appendix A Provision (Draft Legislation)

52. Sections 43 and 49 and sections 46 and 47 where threats to hurt only are involved do not apply in respect of reasonable discipline imposed on a child who is less than eighteen years of age by a person who has custody of the child or has access rights in respect of the child pursuant to a court order or an agreement between the parents of the child or by a person whom the custodian has expressly authorized to discipline that child.

[p. 110 of the Report]

2. Existing Law

a. Criminal Code Provision

43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

b. Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

c. Common Law/Legal Writings

Current case law concentrates on setting the bounds of what amount of force is "reasonable under the circumstances". Reasonable force is determined on objective and subjective considerations such as the nature of the offence, age and character of the child, gravity of punishment, general circumstances and injury, if any: R. v. Duperron (1984), 43 C.R. (3d) 70 (Sask. C.A.). The Supreme Court of Canada in Ogg-Moss v. R., [1984] 2 S.C.R. 173 has refused to extend the ambit of "children" in s. 43 to include retarded or other "child-like" adults, or to consider a counsellor in an institution for the care of the mentally retarded as either a "teacher" or a "person standing in the place of a parent".

Historically, at common law, parents were justified in correcting their children by force, as were masters their servants and apprentices. Discipline could be severe, and on occasion deaths resulted. S. 43 should not be viewed as an enabling provision permitting parents to discipline their children, since the defence exists at common law in any case, but as a limiting provision restricting any such application of force within reasonable bounds.

3. Comments on Proposals

a. Position and Points in Issue

The primary issue here is not to improve on s. 43 of the present Code but to determine whether, as a matter of policy, the defence should be permitted at all. The members are split on this issue, as is the LRC; a minority of the LRC recommended there be no provision for such a defence. This is an issue which does not present significant technical problems but which can only be settled at the policy level.

The consequence of child correction being a common law defence is that repeal of s. 43 as the minority of the LRC suggests, would not eliminate the defence as long as section 7(3), preserving common law defences, is in the Code. Revival of the laxer limits of the common law defence cannot be regarded as a desirable aim. If the option of eliminating the defence altogether is chosen, this must be done expressly.

Members identify a number of pertinent issues.

First is the issue of whether this or a similar provision is acceptable as an attempt to put reasonable restrictions on parental behaviour which is seen as inevitable, quite apart from the issue of whether it is justifiable according to common law principles.

Second is the issue of whether it should be available to teachers (and possibly others) as well as parents.

Third, if the provision is justifiable, on what basis? Possibilities include de minimis non curat lex, necessity, law enforcement, or recognition of the special parental role in socializing the child. Against this is the bad example that physical chastisement sets for a child that use of force is a suitable method for resolving conflicts.

In any decision to accept or reject this provision, its rationale must be explored: is the purpose correction or punishment of the child? The two principles overlap to a considerable extent but can be distinguished as in the former case, focusing on the interests of the child, and in the latter case, on the interests of society (in matters of a sub-criminal order).

Fourth, it may be appropriate to recognize the distinction between "infliction of pain" and the use of force. Comparing the roles of parents and teachers, where we might permit the former to inflict pain (by spanking, for example), we might permit the latter to use force only (e.g. ejecting an unruly child from a classroom, as opposed to administering the strap).

A decision to reject the use of force against children entails a consideration of whether the effects of using alternative methods of guiding a child's development are more or less deleterious than the use of force. For example, if parents are forbidden recourse to force, instead of administering a quick slap they may employ psychological or emotional tactics which might cause more harm in the long term.

A further policy option is to eliminate the defence and deal with cases at the level of prosecutorial discretion; for example, requiring the consent of the Attorney General to continue a prosecution. The sentencing option does not avoid the policy question of determining whether such parental behaviour is or is not justified, but presumes that it is not. The option of prosecutorial discretion has two weaknesses: unlike a judicial determination of reasonableness, the exercise of prosecutorial discretion is not reviewable; and because of this, it is even more important to establish legislated criteria to determine when a parent will be sanctioned for the use of force, and when not. One way or another the fundamental policy question must be addressed.

b. Codification

The question of codification entails a consideration of whether the elimination of the provision would eliminate the defence, in view of its independent existence at common law. It appears that a codified rule is called for.

It is a question of policy whether the codified rule should continue, alter, or eliminate the present rule. Members do not have a consensus on this area.

In the Commission's legislative draft (Appendix "A" to Report 30) the substance of clause 3(14) is found at s. 52 in the Special Part of the draft. The members all agree that this is a defence, and belongs in the General Part with the other defences rather than in the Special Part, where the LRC has placed it.

One member felt that codification should be avoided because the principle of permitting the strong (adults) to use force against the weak (children) is repugnant and should not be enshrined in the Code.

c. Recommendations

1. Clause 3(14) should be rejected as not being an improvement on present s. 43 (unanimous).

2. Use of force by teachers should not be permitted (unanimous).

3. There should be a provision permitting parents to apply reasonable force by way of correction (3 for, 2 against).

4. In view of the split in Recommendation 3, this is a policy issue for Parliament to decide (unanimous).

Clause 3(15) Superior Orders

1. LRC Proposals

a. Recommendation

3(15) Superior Orders. No one bound by military law is liable for anything done out of obedience to his superior officer's orders unless those orders are manifestly unlawful.

[p.38 of the Report]

b. Appendix A Provision (Draft Legislation)

24. No person bound by military law to obey the orders of a superior officer is guilty of a crime by reason of engaging in conduct pursuant to an order of the officer that is not manifestly unlawful.

[p. 103 of the Report]

2. Existing Law

a. Criminal Code Provisions

The justification of acting pursuant to superior orders is limited in the Criminal Code to riot situations (s. 32(2)).

4. Nothing in this Act affects any law relating to the government of the Canadian Forces.

7.(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada

32.(2) Every one who is bound by military law to obey the command of his superior officer is justified in obeying any command given by his superior officer for the suppression of a riot unless the order is manifestly unlawful.

32.(5) For the purposes of this section the question whether an order is manifestly unlawful or not is a question of law.

b. Other Statutory Provisions

(i) Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(ii) National Defence Act

73. Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.

120(1) An act or omission

(a) that takes place in Canada and is punishable under Part XII of this Act, the Criminal Code or any other Act of the Parliament of Canada; or

(b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part XII of this Act, the Criminal Code or any other Act of the Parliament of Canada;

is an offence under this Part and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

129. All rules and principles from time to time followed in the civil courts in proceedings under the Criminal Code that would render any circumstances a justification or excuse for any act or omission or a defence to any charge, are applicable to any defence to a charge under the Code of Service Discipline, except in so far as such rules and principles are altered by or are inconsistent with this Act.

(iii) The Queen's Regulations and Orders for the Canadian Forces

Article 19.015 Every officer and man shall obey lawful commands and orders of a superior officer.

Notes (B) and (C) to article 19.015 provide further guidance:

> (B) Usually there will be no doubt as to whether a command or order is lawful or unlawful. In a situation, however, where the subordinate does not know the law or is uncertain of it he shall, even though he doubts the lawfulness of the command, obey unless the command is manifestly unlawful. For example, if the subordinate were uncertain as to the legal meaning of the word emergency (defined in section 2 of the National Defence Act), he shall obey a command of an officer, purported to be made under s. 219 of the National Defence Act, to seize private property in an emergency.
>
> (C) An officer or man is not justified in obeying a command or order that is manifestly unlawful. In other words, if a subordinate commits a crime in complying with a command that is manifestly unlawful he is liable to be punished for the crime by a civil or military court. A manifestly unlawful command or order is one that would appear to a person of ordinary sense and understanding to be clearly illegal; for example, a command by an officer or man to shoot another officer or man for only having used disrespectful words; or a command to shoot an unarmed child.

c. Common law

In situations not related to the suppression of riots (which is governed by s. 32(2) of the present Code), the common law defence of acting pursuant to superior orders is roughly similar to the rule set out in s. 32(2). Thus, Keighly v. Bell (1866), 176 E.R. 781 (officer or soldier justified in acting under not manifestly unlawful orders of a superior); R. v. Thomas (1815), 105 E.R. 897; R. v. Smith (1900), 17 Cape S.C.R. 561 (Special Ct. of Cape Colony) (South African soldier shooting farmhand under orders from superior; soldier acquitted of murder); Commonwealth v. Shortall, 55 A.R. 952 (Penn. S.C. 1903) (soldier bound to obey orders of superior; orders protecting soldier); New v. McCarthy, 33 N.E. (2d) 570 (Mass. S.C. 1941); State v. Roy; State v. Slate, 64 S.E. (2d) 840 (N.C. S.C. 1951) (order by superior officer to assault female not justified; order unlawful and not related to military duty); R. v. Perzenowski; R. v. Wolf; R. v. Busch (1946), 3 C.R. 254 (Alta. C.A.) (orders no excuse for killing fellow prisoner of war); R. v. Kaehler (1945), 83 C.C.C. 353 (Alta. C.A.) (prisoner of war convicted for stealing car).

3. Comments on Proposals

a. Position and Points in Issue

Most of the members feel that the current law (s. 32(2), limited to riot situations) is preferable to proposal 3(15). The members generally recognize the potential for problems in the area not covered by s. 32(2). However, because the military is not currently active in Canada and cases seldom arise, some members feel there is no need to seek to improve the provision.

Some of the members feel the present law is unsatisfactory to the extent that more work is required. They feel the limited provision in the present Code is not sufficient. They consider 3(15) a sensible starting-point for discussion, but feel it is a very specialized area, requiring more study; and in particular, that there should be consultations with the military, since these matters concern them.

The main policy issue is that it is contrary to principles of military effectiveness to expect soldiers to question orders; and given the command structure and flow of information in the context of military operations, it may be quite impossible for a common soldier to determine (or even suspect) that what he is being ordered to do is an unlawful act. Crimes need not go unpunished because the officer issuing an unlawful order can be made accountable.

To punish acts which the soldier does not know are illegal fails on the basis of the principle of deterrence: those who act out of ignorance cannot be deterred.

Clause 3(15) contains an exception where the order is "manifestly unlawful". The proposal has a problem in this respect: it does not address the case where, objectively speaking, the order is not "manifestly unlawful" but subjectively, the soldier knows it is unlawful.

S. 73 of the National Defence Act only requires obedience of lawful orders; however, other provisions (Notes B and C to Queen's Regulations and Orders, article 19.015) require the soldier to obey even if he doubts the lawfulness or the order, provided it is not "manifestly unlawful". Some members feel it is anomalous for one federal statute to require obedience to dubious orders while there is no accompanying protection in the Code for following this directive and obeying an order that is in fact unlawful, even though not manifestly so.

b. Codification

The members are divided on whether the codified defence should be made general or whether it should continue to be limited to riot situations.

Some drafting problems are identified. Members note that the "manifestly unlawful" criterion does not cover situations where the order is not "manifestly" unlawful but subjectively, the soldier knows that the order is in fact unlawful.

Further work in this area and policy decisions should be premised on consultations with the military.

c. Recommendations

1. The statutory defence should continue to be limited to riot situations, as in s. 32(2) of the present Code (3 for, 2 against).

2. More study should be carried out in this area and there should be consultations with the military before any policy decision is made (2 members strongly recommend this; 3 members are not opposed).

General Issues

Justifications and Excuses

The first issue addressed by the Working Group was the necessity of maintaining a distinction between justifications and excuses. This was discussed at length and revisited from time to time throughout the series of meetings. The LRC (at p. 31) proposed no longer to categorize defences as one or the other, arguing that there is overlap, particularly in the defence of necessity.

In one view, necessity can be considered an excuse where it brings about a state of moral involuntariness in the person claiming the defence, where in the circumstances he or she could not be expected to act differently; and as a justification where, viewed objectively, the harm resulting from the act complained of substantially outweighs the harm that would result from acting in any other way. The latest elaboration of the defence of necessity in Canada, by the SCC in Perka, has not fully explored nor finally established the parameters and application of the defence.

Whatever the practical difficulties may be of formulating the distinction, it became evident in the course of the discussions that the characterization of a defence as either excuse or justification is necessary in its application. There are two significant practical effects of the distinction. First, excuses (such as mistake, duress, insanity, automatism) are personal to the accused and cannot be claimed by parties to the offence, whereas justifications (law enforcement, defence of the person) are determined by circumstances and may be claimed by third parties.

Second, justifications bear on the wrongfulness of the act, and excuses on the blameworthiness of an actor. The distinction is an important one. A justified act (such as the application of force where necessary to effect a lawful arrest) is not an "unlawful" act, whereas an excused act (such as the application of force by an insane person) is still unlawful, though the actor may not be convicted for it. Thus one is justified in using force to defend himself against an insane attacker, but not against a lawful arrestor. Unless the legal theory recognizes a distinction between justification and excuse, there is no basis for distinguishing between the position of a person attacked by a madman and the position of one subjected to necessary force by a police officer in execution of a lawful arrest.

All members of the Working Group agree that the distinction (recognized in the law at present) should be maintained. It is not clear whether the intention of the LRC is to eliminate the

distinction or simply to cease to categorize the defences explicitly; but it is generally felt that the LRC treatment of this issue obscures rather than simplifies.

Consolidation of Defences

One member has raised the possibility of consolidating a number of defences (necessity, duress, defence of the person and property), inasmuch as, in broad outline, they illustrate the same general principle: permitting people to act reasonably as long as the harm avoided is greater than the harm inherent in the act.

Members note that in some civil law jurisdictions, a single provision governs defence of the person and property. The consolidation of the defences of different types of property is a subsidiary aspect of this discussion.

In general, separate provisions are appropriate wherever special policy considerations arise that do not follow as a matter of logic from the broad general principle.

A broad attempt at consolidation may be useful, even if its result is the conclusion that the defences should remain separate; the consideration of common elements may result in an overall simplification by casting light on other aspects, formerly treated as special rules, which may be superfluous as variant expressions of a common principle. This process may also serve to eliminate inconsistencies, where variants of a common principle have been resolved at different times in different ways.

Codification

This whole exercise raises a fundamental policy question: is it necessary to embark on a project of recodification of the defences in criminal law or should only incremental changes be made?

Every member agrees that the presently codified defences in the Criminal Code ought to be assessed for revision.

All members agree that some of the defences recommended by the LRC in Report 30, which are not presently codified, ought to be. Although they are not in complete agreement in detail, they feel all of these defences should be considered for either codification or abolition, or to be left to the common law.

The members have considered four other defences, which were not considered by the Commission in Report 30:

de minimis
entrapment
abuse of process
abandonment (of attempts or conspiracies)

There is a fairly even division of opinion: some members feel these should be included in the group of defences which should be considered for codification, abolition, or being left to the common law. Other members feel these areas should be left to the courts and are opposed to consideration of any legislative action.

Some of the members feel there is a case for reconsideration of the criminal law defences, given the state of some of the codified defences and the number of defences which are not codified at all.

To some extent it is an abdication of responsibility and almost anti-democratic to leave issues to the courts where Parliament could set the standards. Against this, some members argue that some defences come up so seldom that it is not worthwhile to legislate; and for some defences, it is not possible to set out the appropriate parameters with any degree of certainty.

The first group of members feel that parameters of defences are essentially policy questions, and inherently appropriate for Parliamentary initiative. If the parameters chosen prove to be inappropriate, the legislation can be changed. Moreover, while it may not be possible to set out the appropriate parameters, this may be symptomatic of insufficient study of the legal problem, or insufficient sounding of public opinion or the concerns of interest groups, on a policy question. But just because it may be premature to formulate legislative provisions, it does not mean that the matter should be consigned for all time for the courts to decide.

Two members have expressed concern that codification of the little-used defences would elevate their status as defences and lead to an inappropriate increase in frequency of use. Other members argue this is one, but only one, of the relevant factors in making a policy decision; and ultimately, the decision may be not to legislate, or to abolish the defence. If we recognize the defence at all, it should not be left to the courts without parameters. There may be a problem of unequal treatment, where judges are given no guidelines.

Additional Issues

De Minimis

De Minimis was dealt with obliquely in the Preamble to Report 30: "The criminal law should fulfil this function by prohibiting and punishing culpable conduct which causes or threatens serious harm". However, the Report contains no direct discussion of the issues involved.

Entrapment

The LRC has indicated that entrapment will be considered in the Code of Procedure; however, the members feel it is not merely a procedural matter but a substantive ~~offence~~ defence, at least at the level of policy and theory, and merits fuller consideration in this context.

Abuse of Process

Some members feel that if abuse of process, like other defences is going to be applied in fact by judges in appropriate circumstances, the policy as to what constitutes "appropriate circumstances" should be determined by Parliament, not the courts. Other members feel, since appropriate cases seldom arise, these defences should remain in the common law.

At bottom, all members agree that these defences, like the others, represent issues which require a policy decision one way or another; and the LRC has not dealt with the policy issue. Therefore, further consideration of these issues is needed.

Conclusion

In considering the Commission's proposals, the members of the Working Group on Chapter 3 of Report 30 find many areas of agreement, and many areas of disagreement. They are in general agreement however that the LRC work as a whole is not a complete or final product. Many unresolved policy questions remain as well as questions of detail to be elaborated.

In some areas, there has simply been insufficient study in the literature to permit a conclusion, or on which to found a policy decision. More work will have to be done to fill in the gaps and work out the details.