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Department of Justice
Canada

Ministère de la Justice
Canada

Reforming the General Part of the *Criminal Code*

A Consultation Paper

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Foreword

The *Criminal Code* describes behaviour that is against the law. Someone who is found guilty of a criminal offence may face serious consequences, such as having to pay a fine, doing community service or going to prison. The person may also get a criminal record that can limit work opportunities. Because the results of being convicted of a criminal offence are so serious, the law has rules to protect the rights of a person accused of a crime in order to make sure that innocent people are not convicted.

Sections 4 to 45 of the *Criminal Code* set out many of the general rules and principles that apply when a person is charged with a *Criminal Code* offence or an offence under another federal statute. These sections are in Part I of the *Criminal Code*, which is known as the "General Part." The "Special Parts" of the *Criminal Code* contain the actual descriptions of offences.

For a number of years, government officials, lawyers, legal scholars and interested members of the public have been discussing ways to rewrite the General Part so that it better reflects modern Canadian values and court decisions. In 1993, the former government released a "White Paper" called "Proposals to amend the *Criminal Code* (general principles)." Since the publication of the White Paper, the Department of Justice has continued to consult with people about the best ways to change the current law and has developed additional options. The goal is to develop a new General Part which will be more complete and understandable to Canadians, will reflect modern Canadian social values, and will have the respect, commitment and confidence of the people of Canada.

This consultation paper provides information on some key ideas and issues that are central to the development of a new General Part of the *Criminal Code*. Specific questions are raised for your consideration at intervals through the paper. These are intended to help focus the consultation. However, you do not need to limit your comments to these questions.

The Department of Justice invites you to contribute your ideas and suggestions to the General Part law reform process by **February 28, 1995**. Please write to:

General Part Recodification
Communications and Consultation Branch
Department of Justice Canada
Room 124, 239 Wellington Street
Ottawa, Ontario, Canada
K1A 0H8

Thank you for participating in this consultation.

N.B. Another document, called "Toward a New General Part of the Criminal Code of Canada - Details on Reform Options," is available on request. It discusses in fuller and more technical detail the options for changing the law and provides information on past court decisions and the likely effects of reform.

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Introduction

The General Part has not been changed significantly in 100 years

What is the Criminal Code?

The *Criminal Code* is the main Act of Parliament which sets out the criminal law in this country. Parliament approved Canada's original criminal code in 1892, and has changed parts of it from time to time. It has also created other federal criminal legislation over the years.

The *Criminal Code* is roughly divided into three major areas:

1. General Part, Part I (sections 4 - 45)
2. Criminal Offences, Parts II - XIII (sections 46 - 467)
3. Procedure, Parts XIV - XXVII (sections 468 - 840).

The General Part sets out general criminal law rules

What is a general part?

The purpose of the general part of a criminal code is to organize the criminal law in an ordered and understandable way, by setting out general rules that apply to the rest of the criminal code and to other laws which describe criminal offences. These rules or principles, in turn, reflect society's fundamental values.

Typically, a general part sets out the basic principles of criminal liability or responsibility. It includes the defences that an accused can raise, has rules about who is considered to have participated in an offence, and describes crimes such as attempting to commit a crime and conspiring with someone to commit a crime. A general part may also include rules about the persons and the territory to which the criminal law applies.

The General Part needs to be brought up to date

Why reform the General Part?

Generally, those who have studied the General Part of our *Criminal Code* believe that it needs to be changed. The House of Commons Sub-Committee on the Recodification of the General Part of the Criminal Code in its 1993 report, *First Principles: Recodifying the General Part of the Criminal Code of Canada*, recommended that the General Part be recodified without delay.

The General Part still has largely the same structure, style and content it had in 1892. Some people believe it no longer accurately reflects the values and concerns of contemporary Canadian society. It also now seems incomplete and poorly organized. For example, it begins with a section explaining the meaning of a postal card or stamp. Section 20, which declares that certain acts on holidays are valid, fits between section 19 dealing with ignorance of the law and section 21 dealing with parties to offences.

As well, many basic criminal law principles are not now found in the General Part, but rather have been developed by the courts. These are not easy for someone who is not a criminal law specialist to identify.

The White Paper is part of the reform process

What is the White Paper?

The former government issued a White Paper called "Proposals to amend the Criminal Code (general principles)" in 1993, in response to the recommendations of the House of Commons Sub-Committee on the Recodification of the General Part of the *Criminal Code*. The White Paper attempted to address many, though not all, of the matters that should form part of a new General Part. Further study and consultation have led to additional options, but the White Paper proposals remain important and will be referred to throughout this paper.

A new General Part would set the direction for the criminal law

Why are these reforms important?

The rules in the General Part seek to balance the protection of the public with the protection of the rights and liberties of the individual. When Parliament approves a new General Part of the *Criminal Code*, it will be setting the direction for the future criminal law in Canada.

Here are some of the questions that a new General Part could answer.

- How much force can a person use to protect property?
- How should the law deal with drunken criminal behaviour?
- How should the law define the criminal liability of corporations?
- Should someone who is incapable of meeting the standard of the "reasonable person" (for example, because of low intelligence) be found guilty of criminal negligence offences?

The Government is committed to consulting Canadians about important changes to the justice system and involving them in developing a General Part that will truly reflect modern Canadian values. This paper covers a number of key options for reform of the General Part and highlights issues that will particularly benefit from a wide public consultation. Some other General Part issues are mentioned in the Appendix, though they fall outside of the scope of this paper for various reasons.

I. Liability

(a) Fault

Fault is an essential element of a criminal offence

Who can be held responsible for a criminal offence?

Every criminal offence requires "fault". Even if a person does something that the *Criminal Code* says is an offence, the person is not guilty unless the evidence proves fault. "Fault" is often referred to as "state of mind," the "mental element," "culpability" or "*mens rea*" (a guilty mind). The person may, for example, have been genuinely mistaken about what he or she was doing, so the action cannot be considered blameworthy.

There are many different types or levels of fault. The four main ones are intent, recklessness, criminal negligence, and negligence.

The Supreme Court of Canada has said that the most serious offences, which carry the most severe punishments, must have one of the two highest levels of fault: intent or recklessness. This means that a person will be found guilty of a serious offence only if he or she meant to do the action (intent) or knew the risks and took them (recklessness).

Some offences in the *Criminal Code*, such as manslaughter, may have a fault level of criminal negligence. In these cases, a person is found guilty if his or her actions were very different (a marked and substantial departure) from what a reasonably prudent person would have done in the same situation. Where criminal negligence is the fault level, it does not necessarily matter what the person meant to do (intent) or meant to risk doing (recklessness). The point is that the person *ought* to have seen the risks of taking that action.

Few offences in the *Criminal Code* have the lowest fault level, negligence. However, negligence is the fault level for many offences in other statutes, such as regulatory legislation like environmental protection laws.

This paper focuses on one issue concerning the fault level of criminal negligence.

Criminal negligence depends on the definition of "reasonable person"

Who is a "reasonable person"?

Criminal negligence is the fault level for such offences as the careless storage of firearms, failure to provide the necessities of life, and one type of manslaughter. For these offences, the fault test is not what the person meant or intended to do, but whether or not the person's behaviour measured up to the standard society expects.

This level of fault measures the accused person's behaviour against what a reasonable person would have done in the same circumstances. Was the accused's behaviour a "marked departure" (significantly different) from what the reasonable person would have done?

The interesting and difficult issue is deciding who is a "reasonable person." In Canada's pluralistic society, is one definition of an "ordinary" or "reasonable" person acceptable? Can the concept accommodate the views and needs of all Canadians, including aboriginal people and others from a wide range of cultural backgrounds? Or should the concept of "reasonable" vary according to certain characteristics of the particular accused?

A flexible concept of the reasonable person could take into account an accused person's ethnic, religious, or cultural background, level of education, or other characteristics. The "reasonable person" would be a reasonable person with those same characteristics. The question would then be whether the accused's behaviour was a marked departure from what the behaviour of a reasonable person with those same characteristics would have been.

Some people argue that this is the only fair and just approach. They say, for example, that a person with poor education or low intelligence should not be held to the usual standard. He or she should be held to the standard of the reasonable person who has not had the advantage of education and is of similar ability.

Similarly, some people with special knowledge or abilities could be held to a standard that is higher than ordinary. For example, a police officer who accidentally discharges a firearm and injures someone could have been expected to be more skilled and careful in the handling of firearms than an ordinary person.

Others argue that the whole point of the criminal negligence level of fault is to set general standards that apply to all Canadians. They fear that a flexible concept of the reasonable person could undermine the values that are essential to Canadian law. For instance, suppose parents come from a culture or religion which believes in spiritual rather than medical treatment for illness, and their child dies after they refuse medical care. Should their criminal responsibility be measured according to the standards of their own culture?

A third approach argues that it is not fair or just to treat people as criminals if they are not *capable* of meeting the ordinary standard. So, the reasonable person standard should be flexible only if the accused person is *unable* to meet the standard because of personal characteristics outside his or her control. Personal characteristics could include physical

characteristics or intellectual characteristics, such as low intelligence. (People who support this approach usually propose that some personal characteristics, such as drug-dependency or alcoholism, should never be taken into account.)

The White Paper takes a slightly different approach. It proposes that when a court decides whether or not the accused person has shown a marked and substantial departure from the standard of a reasonable person, the court should consider the person's awareness of the circumstances. This would allow the court to take into account what the person actually knew, and to determine whether he or she failed to take proper care in light of that knowledge.

QUESTION (1)

Should the criminal negligence standard of fault in some manner take into account the characteristics of the accused person?

Are there some types of characteristics that should never be taken into account?

(b) Ways of being a party to an offence

Aiding or encouraging a person to commit a crime is a crime

Is a witness to a crime committing a crime by doing nothing?

The law currently says that a person who purposely aids or encourages someone who commits an offence is guilty of the same offence. Both the person who actually commits the offence (known as the principal) and the person who aids or encourages the offence (the accomplice), are parties to the offence.

"Encourage" has been interpreted by the courts to mean more than just being there while the crime was committed. A person who watches an assault and does nothing to help the victim is not guilty as a party because he or she did nothing to actively assist or encourage the principal. Simply watching someone commit a crime is not now a crime.

The White Paper does not suggest changing the current law. However, some people think that it should be a crime to be present while a crime is being committed and do nothing to prevent it or to assist the victim. They suggest that the definition of being a party to an offence should be expanded: a person would be a party to an offence if he or she were

present while a crime was being committed and failed to take reasonable steps to prevent the crime, when it would have been safe to do so.

A different approach to the same issue was suggested by the Law Reform Commission of Canada. It recommended that a new crime be created of failing to take reasonable steps, when possible, to assist a person who is "in immediate danger of death or serious harm." The person who failed to assist would be guilty of this new crime as a principal. The duty to assist would apply whenever another person is in danger, whether or not the danger is because of criminal activity. So, there would be a duty to help a victim of a traffic accident, when it is safe and possible to do so.

Those who favour one or both of these new types of criminal liability believe this approach would help prevent some crimes. They want the criminal law to reflect and legally enforce the moral duty to prevent crime and to assist others when it is safe and possible to do so.

Others are concerned that a new duty of this type could reach too far. It might impose duties on a person who witnesses a crime but has no other relationship with those involved in the crime. For instance, if you drove past a liquor store in a hurry to get home and noticed that it was being robbed at gunpoint, should you have a duty to stop or to notify the police? Is it realistic to enforce this type of duty, which would apply to everyone who drives by and sees the crime in progress?

Where there is a relationship between the bystander and those involved in the crime, the issues may be even more complex. If a relative is present when a parent abuses a child, but does nothing to prevent or report the abuse, should the relative who turns a blind eye be guilty of a crime? What if the relative is not present when the abuse takes place but merely suspects that the parent has abused the child?

QUESTION (2)

Should it be a crime to fail to take reasonable steps to prevent or stop a crime or to assist a crime victim when it is safe to do so?

Should it be a crime to fail to assist anyone in any circumstances who is in immediate danger of death or serious harm?

(c) Corporate liability

Corporations can be charged with a criminal offence

How does a corporation commit a crime?

A corporation is a legal entity which is legally separate from the people who own, manage, and work for it.

The *Criminal Code* allows corporations to be prosecuted for crimes. However, the *Criminal Code* offences require people to commit them. The Code does not explain how the courts should decide when or through which people a corporation commits a crime.

The courts have developed the "identification" theory to decide when a corporation commits a crime. According to this theory, if a senior representative of a corporation commits a crime in the course of his or her duties, and mostly for the benefit of the corporation, the corporation is also said to have committed the crime. The senior person must be the responsible decision maker in the area concerned. The acts of a junior employee with no managerial authority, for instance, might be a crime committed by the employee, but would not normally be a crime committed by the corporation.

Many people have said that the identification theory of corporate liability has a severe limitation. For a corporation to commit a crime, a person must have committed the crime. However, there may be situations where a number of people have done things on behalf of the corporation. None of those people may have individually done enough to have committed a crime, but through the various people's acts, taken together, a crime has been committed.

The White Paper therefore proposes that a corporation could commit a crime through the acts, taken together, of any number of its representatives. The representatives could be at any level in the corporation, as long as a senior representative knows about the acts and meets the fault requirement — intent, recklessness or criminal negligence, depending on the offence. So, for example, a corporation could be convicted of a crime if junior employees break the law and dump hazardous waste each day, with the knowledge of management.

Some people have suggested that the criminal law should be changed to reflect corporate realities. A recent proposal in Australia suggests that a corporation commits a crime if its "corporate culture" leads to the crime. The prosecution could prove that senior representatives of the corporation created a climate that encouraged employees to disobey legal requirements or at least did not encourage them to obey. Routine management directives to comply with the law would not be sufficient to avoid criminal liability.

Other people are concerned that this approach might leave corporations in a constant state of uncertainty as to whether or not they are committing crimes. Individuals can look at the *Criminal Code* to see exactly what behaviour is a crime, but corporations could be committing crimes whenever their "corporate culture" is inadequate and fails to prevent a crime. Also, for crimes with a fault requirement of intent or recklessness, individuals commit a crime only if they know what they are doing or risking, but corporations could commit a crime merely because of a sloppy corporate culture.

What types of groups are "corporations"?

If corporate criminal liability is to be separately defined, the next question concerns what groups or entities this definition should apply to. If a corporation can commit a crime through the collective acts of several representatives or through its corporate culture, should the same be the case for other profit-oriented bodies? It may be just chance that a group of people do business together as a corporation, rather than through an unincorporated partnership or a limited partnership.

Recently, the Supreme Court of Canada has made it clear that a trade union can commit a crime, even if the union is not incorporated as a society. Should the *Criminal Code* specify that other groups and organizations can commit crimes? If so, should it spell out the types of groups, such as community organizations, churches, Indian bands, or schools, that would be covered?

Some people would argue that special rules about group criminal liability should apply only to organizations formed for the purpose of making profit. They argue that only profit-oriented groups are motivated to commit serious crimes.

Others say that this is not necessarily the case. For instance, representatives of a community organization might be motivated to commit a property offence that would enrich the organization. And some crimes may never be motivated by profit. Members of a church, for example, might commit a crime in practising or defending its beliefs.

QUESTION (3)

Should corporate criminal liability be extended so that a corporation would be guilty of a crime if its representatives' acts, taken together, are a crime (even if no one has committed a crime individually)?

If so, should the liability be based on "corporate culture"?

Should corporate criminal liability also apply to unincorporated groups and organizations, such as partnerships, trade unions, community organizations, Indian bands, and churches?

(d) Causation

When can a person be said to "cause" a result?

Many criminal offences involve a result — for instance, we speak of criminal negligence causing death, assault causing bodily harm, or mischief causing damage to property.

Sometimes it is arguable whether the accused person's wrongful act "caused" the result. The present General Part does not include any general rules about causation. However, the Special Part includes some specific rules about causation that apply only to causing someone's death (sections 224 to 228).

The general rules about causation have therefore evolved through the judge-made case law. In a classic case called *Smithers*, the Supreme Court said that the accused's kick to the victim's abdomen caused the victim's death, even though his asphyxiation might have been caused by malfunction of his epiglottis because of panic or fear. The kick was at least a contributing cause of the death, because it set off the panic or fear that might have been the closest cause of death.

The White Paper proposes codifying this approach. A person's behaviour would be said to cause a result if it makes a "more than negligible" contribution to the result.

What if the victim is especially vulnerable?

Some support this approach because it keeps the so-called "thin skull" rule: the accused must take the victim as he or she turns out to be. If the victim is unusually vulnerable (like the victim in the *Smithers* case) and suffers harm because of a particular weakness, the accused is nonetheless held responsible for the result as long as the accused's behaviour contributed in a "more than negligible" way.

Others say that it is not fair to hold a person criminally responsible for a result that he or she did not expect or see as a risk. The accused person may have had no idea at all that the victim had the particular weakness. In some cases, almost nobody could see the risk of the harmful result.

What if a new cause intervenes?

Some have recommended that the causation rule should also deal with situations where a new, intervening event takes over as the cause of the harm. For instance, suppose a person assaults another person, causing injuries which require medical attention but which are not life-threatening. Driving to the hospital, the victim is involved in an unavoidable traffic accident, and dies as a result.

The Canadian Bar Association and others recommend that the rule on causation should state that a person's behaviour does not cause a result if there is an independent intervening cause of such significance that the person's behaviour is merely the background to the actions that caused the result.

The White Paper does not include such a rule because it was not seen as necessary. If the new, intervening cause is of such significance, the chain of events is broken and the original behaviour of the accused can no longer be described as the "cause" of the result.

QUESTION (4)

Should behaviour be said to cause a result if it contributes to the result in a more than negligible way?

or

Should behaviour be said to cause a result only if it contributes *substantially* to the result?

Is it necessary to state that behaviour does not cause a result if a new, intervening cause takes over?

II. Defences

A defence explains an accused person's behaviour and can reduce the charge or result in a not-guilty verdict

When a person acts against the law, or fails to act in a way required by the law, that person commits an offence. If a person has a legal defence for his or her behaviour, the person may be found not guilty of the offence or may be found guilty of a less serious offence.

The General Part defines many of the defences available to an accused person. Here are 10 defence-related issues.

(a) Awareness of the circumstances

Should defences be based on an accused person's subjective view of the situation?

There are different views about whether or not a defence should apply if an accused person had the wrong understanding of the facts. For example, a person may intentionally kill someone he believes to be an armed night intruder, when the "intruder" is in fact a roommate creeping quietly home with an unlit flashlight. The person charged with murder wants to rely on the defence of self-defence or defence of property, because he genuinely believed he was in danger, even though this was not actually the case. Should the law say that he should be able to use those defences only if his understanding of the facts was *reasonable*?¹

The defences proposed in the White Paper generally take into account the accused person's understanding of the circumstances in establishing whether that person can rely on a defence. This approach places more emphasis on the accused person's point of view than the current law does. Some people agree with this subjective approach and say it may be fairer and more sensitive to the accused person to consider his or her understanding of the situation when deciding whether a defence should apply. Others worry that this approach could allow an accused person whose actions were based on an unreasonable understanding of the circumstances to defend those actions and get away with criminal behaviour.

-
1. This issue is different from the issue referred to as "Mistake of Fact." In the night intruder example, the person admits that he or she intentionally killed another person. The mistake related only to a defence (that is, the circumstances that would justify the killing). With "Mistake of Fact," on the other hand, the defence is that the fault requirement cannot be proven. On a charge of murder, the person might say that he did not intend to kill another person. Perhaps he thought that he was shooting at a bear, rather than a person.

For example, the White Paper states that a person acts in self-defence if, "in the circumstances as the person believes them to be," the person's acts are "necessary," "reasonable" and "proportionate to the harm" the person is trying to avoid. Therefore, in deciding whether or not an accused person's use of force was in self-defence, a court would ask whether the person's acts were necessary, reasonable and proportionate in the circumstances *as the person understood them to be*. The court would not look at whether the accused's understanding of the circumstances was reasonable or not, according to an objective (or reasonable person) standard. A similar approach is found in the defence of property and the defences of duress of circumstances and duress by threats.

Another option would be to allow an accused person to use a defence only if his or her understanding of the circumstances were reasonable — either from the point of view of a reasonable person or from the point of view of a reasonable person with the accused person's individual characteristics. The determination of what is reasonable is a separate issue.

QUESTION (5)

Should the defences set out in the General Part be based on a subjective test, available to an accused person who acted reasonably *according to his or her understanding of the circumstances?*

- or -

Should the defences set out in the General Part be based on an objective test, available to an accused person who acted reasonably *and whose understanding of the circumstances was that of a reasonable person?* Should the law define a reasonable person by looking at an ordinary person or by looking at an ordinary person with the same general characteristics as the accused?

(b) The use of force to protect property

How much force can a person use to protect property?

The law says that a person can use force to protect property so long as he or she uses no more force than is necessary. The issue here is whether the law should set a clear upper limit on how much force can be used.

The White Paper proposes to allow the use of reasonable and proportionate force to protect property, based on the circumstances known to the person who defends the property. It would set no upper limit on the amount of force that the person could use.

Some people suggest that in exceptional cases a person may end up killing someone while protecting property, and that the law should allow the person a defence. They argue that by not setting an upper limit on the use of force the law remains flexible and can recognize exceptional circumstances.

Others argue that it is never "reasonable" to intend to cause death in protecting property. They say that human life should always be more valuable than property interests and that force intended to cause death or serious harm should not be permitted.

In a new General Part, Parliament could forbid the use of force intended to cause death or serious bodily harm in protecting property. In this way, Parliament would be affirming the importance of life and bodily safety while creating a law that is certain and specific, although inflexible.

Another option would be to reduce murder charges to manslaughter when a person intentionally kills someone in defence of property. The manslaughter offence has no minimum penalty and leaves sentencing decisions to a judge, who can decide on the appropriate punishment on a case-by-case basis.

QUESTION (6)

Should an upper limit be placed on the use of force to protect property? Should the defence be allowed when an accused person intended to cause death or serious bodily harm or when the accused person intentionally exposed another to a significant risk of death or serious bodily harm?

- or -

In appropriate circumstances, instead of being acquitted of murder, should an accused be convicted of manslaughter when deadly force is used to protect property?

(c) Committing a criminal act under duress

When should there be a defence of committing a crime under duress?

Section 17 says that a person will be excused from having committed an offence if the person committed the offence because he or she was forced to do it by threats of death or bodily harm from a person present when the offence was committed. The section 17 defence is not available for several charges, including murder, sexual assault, robbery and assault with a weapon.

Some people suggest that the defence of duress should be available for all offences. They say, for example, that the defence should be available to a bank manager who gives robbers the combination of the vault so that they can later break into it, because of threats of death to his or her family.

The White Paper proposes that the duress defence should apply to all offences except murder.

A compromise position might be to recognize duress as a partial defence to murder. In circumstances where a person killed someone because of duress, the person could be found guilty of manslaughter instead of murder.

QUESTION (7)

Are there crimes, other than murder, for which the duress defence should *not* be permitted?

Should a person who, under duress, killed (or seriously injured) someone be able to use the duress defence and be acquitted? Or should they only be able to use duress as a partial defence to reduce the charge from murder to manslaughter?

(d) Acting as an automaton

Is a person responsible for criminal actions when in a state of automatism?

"Automatism" means a condition in which a person acts without being completely aware of what he or she is doing. For example, a sleepwalker might get out of bed, go to the kitchen and prepare a snack. The sleepwalker has no memory of doing this, although the snack was eaten. The sleepwalker is an "automaton" or in a state of "automatism" when preparing the snack, because the actions were not guided by a conscious mind.

There are many situations where a person may act in a state of unconsciousness or partial consciousness. For example, a person who is hit on the head or a person who takes the wrong medication may become an automaton.

While the actions of an automaton who prepares a snack may be harmless, the actions of an automaton who picks up a knife and stabs someone are not. How should the law deal with a person who does some act which is a criminal offence while in a state of automatism?

At present, the *Criminal Code* does not deal with automatism; however, judges have had to decide what to do in cases raising this issue. Current case law recognizes two types of automatism: "insane automatism" and "sane automatism."

- "Insane automatism" describes the automatism that is caused by a mental disorder, which is defined in the *Criminal Code* as a disease of the mind. It will result in a finding of not criminally responsible on account of mental disorder. The *Criminal Code* currently allows for a range of results, including being sent to a hospital.

- "Sane automatism" is automatism that is caused not by a mental disorder but rather by some external factor. It will result in a verdict of not guilty.

Medical evidence is usually necessary to help the judge or jury decide whether a person was in a state of automatism and the cause of the automatism.

Some people feel that the *Criminal Code* should define automatism and that leaving the law to the courts without any legislation makes it too uncertain. They worry that a finding of sane automatism results in a not-guilty verdict even though there may be public safety concerns about allowing the accused to go free.

The White Paper suggests creating a new verdict of "not criminally responsible on account of automatism," which would allow the court to make an order ranging from discharge to custody in a hospital, as appropriate.

QUESTION (8)

Should the General Part codify the case law to permit an acquittal where the automatism is not caused by mental disorder and to permit a verdict of not criminally responsible on account of mental disorder where that is the cause of the automatism?

- or -

Should the General Part include a special verdict of not criminally responsible on account of automatism which would allow the court to make such an order (e.g. discharge or custody)?

(e) Intoxication as a defence

Should an accused have a defence because he or she was drunk or under the influence of drugs?

The General Part does not include a defence for self-induced intoxication. This defence has been developed by the courts in the case law. According to the case law, intoxication is usually a defence only to crimes of "specific intent." Intoxication is not normally a defence to crimes of "general intent," such as sexual assault.

To commit a "specific intent" offence the accused has to be able to form the specific intent that is an element of the offence. For example, the offence of "break and enter with intent to commit an indictable offence" is a specific intent offence which requires the accused to have had the intention (1) to break and enter (general intent) and (2) to commit an indictable offence once inside (specific intent). If a person's mind is severely clouded by alcohol or drugs to the point that he or she lacks the ability to form the specific intent to commit the crime, then the fault (or the mental element) cannot be proved and the accused cannot be found guilty of the specific intent offence.

For many offences, an accused person who is found to have been unable to have formed the specific intent to commit the offence can still be found guilty of an included general intent offence. For instance, an accused person who, because of intoxication, is not guilty of murder (specific intent) might be guilty of manslaughter (general intent). A person who is not guilty of robbery (specific intent) might be guilty of assault (general intent).

What is the effect of the Supreme Court's decision in the Daviault case?

The Supreme Court stated an exception to these rules about intoxication on September 30, 1994, in the *Daviault* case. The Court said that extreme intoxication (amounting almost to automatism or mental disorder) is a defence to any crime. To come within this exception, the intoxication must be so severe that the person is incapable of forming even the most basic or simple intent to do the act. The Court said that, in those rare situations of such extreme intoxication, it would violate the principles of fundamental justice to convict the accused. The accused may be at fault in having voluntarily become intoxicated, but that fault is not directly linked to the offence (which was sexual assault in the *Daviault* case).

The White Paper proposed following the case law at the time (before *Daviault*) and allowing intoxication as a defence to a crime of specific intent but not to a crime of general intent. People who support this approach say that the law worked well as it was and is better than any of the suggested alternative approaches. They point out that when a person has done harm while drunk to the point of having the defence, there is almost always an included general intent offence for which he or she can be convicted (unless the intoxication is extreme enough for the *Daviault* exception to apply). And the sentence for the included general intent offence can reflect the seriousness of the harm done.

However, some people find the distinction between specific and general intent offences artificial and illogical. They maintain as well that it is hard for a judge to explain to a jury. Instead, they suggest that the defence of

intoxication be made available according to the fault level of the offence. Intoxication would not be a defence to a charge with a fault level of recklessness, criminal negligence or negligence. It would only be a defence when intent is an essential element of the offence.

The approaches discussed so far would not deal with the *Daviault* sort of extreme intoxication, which could still lead to an acquittal in any type of offence. One option for those extreme cases would be to deal with them as cases of automatism. As discussed in the Automatism section of this paper, a new special verdict of "not criminally responsible on account of automatism" could be created, with a range of dispositions, including hospital orders.

Should there be a new offence of criminal intoxication?

Another suggested approach is to create a general new crime of intoxication. If a person is not guilty of an offence because of intoxication, he or she could be found guilty of the offence of criminal intoxication leading to harmful conduct (criminal intoxication leading to assault, criminal intoxication leading to robbery, etc.). The House of Commons Sub-Committee took this approach, recommending that intoxication should be a defence to all offences but calling for the creation of a criminal intoxication offence.

A variation of this approach would create a new crime of intoxicated criminal negligence causing harm. It could apply where the intoxicated person's behaviour was a marked departure from the standard of a sober reasonable person and caused bodily harm or property damage. Another variation would create a new crime of recklessly causing harm. It would require that the person, in becoming intoxicated, was aware of the risk of causing the bodily harm or property damage, but became intoxicated anyway.

People who favour the creation of a new offence point out that this avoids the problematic distinction between specific and general intent offences. Instead, the law focuses on the accused person's self-induced intoxication, which is the essence of the accused's criminal activity.

Others are concerned about this approach. They are worried that if the prosecution has to put forward evidence of a person's state of intoxication (and possibly also that the intoxication *caused* the behaviour), and the judge or jury has to be convinced of the intoxication beyond a reasonable doubt, some accused people who cause harm might "fall through the cracks" and end up being acquitted of both the main offence and the new offence of criminal intoxication.

On the other hand, it could be unfair if a successful defence of intoxication were to result in *automatic* conviction of the new offence of criminal intoxication. What if the person had no reason to think that he or she would do the harm while intoxicated? What if the person had raised several defences (perhaps intoxication, self-defence, and defence of property) and it is not clear which defence, or combination of defences, had been successful?

Another issue is what the punishment for a new criminal intoxication offence should be. The Canadian Bar Association suggested setting the maximum sentence at half the maximum for the main offence. Other people say that this punishment range does not reflect the seriousness of the crime a person might commit while intoxicated.

QUESTION (9)

Should the new General Part codify the existing law? If so, should it continue to use the specific/general intent distinction? Or, should it say that intoxication may be a defence to offences which require intent or knowledge, but not to offences which require recklessness, criminal negligence or negligence?

Should extreme intoxication result in a new special verdict of "not criminally responsible by reason of automatism" (with a range of orders, from discharge to a hospital order) instead of an acquittal as in *Daviault*?

Should a new crime to deal with criminal intoxication be added to the *Criminal Code*?

If so, how should it be structured (e.g. criminal intoxication leading to harm, or criminal negligence causing harm, or recklessness causing harm)?

What should be the punishment for the new crime?

(f) Mistake of law

Should ignorance of the law be no excuse?

Section 19 of our present General Part states that ignorance of the law is not an excuse for committing an offence. The Supreme Court has said that a mistake about the law is also not a defence.

This approach has traditionally been justified on the basis that the criminal law represents our fundamental common values, which we can all be expected to know. Also, from a practical point of view, the Crown would have great difficulty proving that every accused person knew the details of the law they are charged with violating.

Courts have developed some exceptions to the principle that ignorance or mistake of law is no excuse. The main one is referred to as "officially induced error." A person may have a defence of mistake as to the law if he or she asked a responsible official about the details of a law and was given incorrect information and relied on that information. This exception has developed in relation to complex regulatory laws, which are not necessarily based on fundamental values that all Canadians are expected to share.

Some people have suggested that a new General Part should recognize additional exceptions. One suggestion is that a person would have a defence of mistake of law if he or she relied on a decision of a Court of Appeal of their province or territory, which was later overturned on appeal by the Supreme Court of Canada. Those who support such an exception say that to convict a person in this case would be to say that they should know the law better than the Court of Appeal.

Others, however, say that there is no reason in principle to limit this exception only to Courts of Appeal. If it is extended to *any* court decision, though, it will be almost impossible to convict a person for some offences (pornography offences, for instance), because there may be some court case somewhere in favour of the law as the accused would like it to be.

Such an exception might also put juries in impossible positions. According to most of the proposals, the exception would be available only if the accused's reliance on the court decision was reasonable. If juries are to be asked whether it was reasonable to rely on a court decision, they will presumably have to decide whether the decision was obviously wrong in law, whether the court or judge was a well-respected one, and similar issues which are outside the normal jury function.

Mistake of law should also be examined from the perspective of Canada's multicultural and aboriginal makeup. Is it accurate today to speak of a common set of shared Canadian values that are so fundamental and well-accepted that everyone can be deemed to know and understand them? Some say that the principle that ignorance or mistake of law is not an excuse should be revised, to take into account the experience of aboriginal and new Canadians, whose value system may be different from that of the mainstream. Others say that the very nature and purpose of our criminal law requires that it recognize a set of shared values. To give special recognition to other value systems would be to place at risk the rights of some groups we wish to protect, but which do not enjoy similar respect in some other cultures.

QUESTION (10)

Should the new General Part recognize any exceptions to the rule that mistake or ignorance of the law is no excuse?

If so, should it codify the exception for "officially induced error"? Should such an exception apply only to regulatory offences, or should it apply to all laws?

Should reliance on a Court of Appeal decision (which turns out to be wrong) be a defence? If so, should this exception apply to lower court decisions as well?

(g) Provocation

When should provocation be a defence to a charge?

Section 232 of the *Criminal Code* defines provocation as a "wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control", provided the person acted "on the sudden and before there was time for his passion to cool."

Provocation is a partial defence only to a murder charge. A successful defence of provocation results in the accused person being convicted of manslaughter instead of murder.

The White Paper does not include a provision on provocation, but the Canadian Bar Association has recommended that provocation be available as a defence to all crimes, not just to murder. It suggests that a successful

provocation defence be a partial defence and that the maximum punishment be reduced to half the maximum punishment for the offence.

People who support this approach say that it reflects compassion for human weakness and recognizes that there are situations where wrong has been done but for understandable, though not entirely excusable, reasons.

Others argue that the defence of provocation should be eliminated rather than expanded. They say that the provocation defence discriminates because of a person's gender by requiring the violent response to be "on the sudden" and in the heat of "passion." They say that this tailors the defence to male violence, which often results from sudden rage. The requirement that the violence be "on the sudden" seems to make the defence inapplicable to many women in domestic violence situations whose violence against their partners may result from the slow-building effect of years of abuse by their partners.

Some people suggest that if the defence of provocation remains for murder, a new, parallel defence of provocation should be added to reflect compassion for the situations women are in. The new defence could reduce a murder charge to manslaughter when the murder was provoked by prolonged and severe domestic abuse or oppression. The defence could recognize the slow-building effect of such abuse.

QUESTION (11)

Should the partial defence of provocation for murder be removed from the *Criminal Code*?

Should the partial defence of provocation be available for all offences?

Should the partial defence of provocation be changed to include both "sudden" acts of rage and the slow-building effect of prolonged and severe abuse?

(h) Culture as a defence

Should a person be excused from some criminal responsibility because of cultural background?

Canadian society has changed dramatically since the *Criminal Code* was enacted more than a hundred years ago. Canada has been transformed into a more diverse society in terms of race, ethnic origins, religion and culture. Along with this has come an increase in the variety of religious beliefs and cultural and ethnic practices.

Criminal laws tend to reflect, to a certain degree, religious beliefs and cultural practices. As our society becomes more pluralistic, there is an increasing awareness of groups whose religious beliefs and cultural practices differ from those of the majority of Canadians. There is also an increasing recognition of possible conflict between the beliefs and practices of such groups and those of the majority, as expressed through the criminal law.

The Parliamentary Sub-Committee examining the recodification of the General Part described the *Criminal Code* generally, and the General Part in particular, as "a statement of the most basic rules that we as Canadians believe should govern our relations with each other." It went on to say, however, that "the more those rules are informed by the views of members of Canadian society, the better they will reflect the reality of modern Canada and the greater the likelihood they will be respected."

Given our changing Canadian society and the increased likelihood of conflict between some cultural and religious practices and the criminal law, the fundamental question is whether the criminal law should be amended to accommodate such cultural and religious practices.

It has been suggested that this could be done by adding a general cultural defence to the General Part. Such a defence would recognize the importance of beliefs and practices of other cultures. The person would be found not guilty for conduct that would otherwise be criminal when the person acted in accordance with his or her customs or beliefs.

Some people are concerned that a cultural defence would create many legal problems. It would be difficult to list the various customs and beliefs that would be a valid defence to a criminal charge. It would allow some people a defence for certain types of behaviour while holding other people responsible for the same actions. It could be difficult for an accused person to prove his or her customs, making the defence hard to use. And it could put certain people at risk. For instance, if a person believes that a sick child should be treated only by spiritual means, then the child might not benefit from the full protection of the law. Or, if a person's customs

allow for the use of violence in resolving family disputes, then children, spouses and other family members would be at risk.

Others have suggested that instead of a general cultural defence, some crimes could have specific defences based on a person's culture or religious beliefs or practice. For example, people who carry ceremonial knives as part of their religious observances could be exempted from the *Criminal Code* offences concerning the carrying of concealed weapons. In a similar way, an exemption or an accommodation could be created for persons whose religious or cultural practices involve the use of prohibited drugs. Some think that persons whose culture or religion permit marriage to more than one spouse should be accommodated or exempted.

QUESTION (12)

Should the General Part include a general cultural defence?

Should a general cultural defence apply to religious beliefs?

Instead of a general cultural defence, should some crimes have specific defences which would allow for different behaviour because of a person's culture?

(i) Trivial violations

Should de minimis be part of the criminal law?

It is not entirely clear whether the saying *de minimis non curat lex* ("the law does not concern itself with trifles") applies to criminal prosecutions at present. Some judges and legal scholars, though not all, take the view that it does, and that a judge, after deciding that the person committed the offence, may dismiss the case if it is too trivial to be worth a conviction.

The *de minimis* defence is sometimes raised in drug cases that involve only a tiny quantity of the drug, in theft cases where the value of the stolen property is very low, or in assault cases where the injury is extremely minor.

The Canadian Bar Association proposed that *de minimis* should be codified in the new General Part. It would apply when the judge decides that the person did indeed commit the offence but, in view of the nature of the

conduct and all the circumstances, the violation was too trivial to be worth a conviction. The accused person would have to prove that the violation was too trivial to be worth a conviction. If the judge agreed, the result would not be an acquittal; instead, the judge would enter a stay of proceedings.

Those who support this approach argue that it allows the courts to ensure that the criminal law and the criminal justice system are used for serious cases only. People would be protected from criminal conviction and penalties for relatively trivial misconduct. It would also make clear in the law whether *de minimis* is a defence or not and when it can apply. In codifying the defence, the new General Part could state that it does *not* apply to certain offences, and could put restrictions on when it can apply to other offences.

Others argue that the defence of *de minimis* is not necessary. They say that, in Canada today, police and prosecutors screen all criminal charges, and only the more serious cases go to court. Trivial violations are usually sent to out-of-court diversion programs, unless the person is a repeat offender or there is a particular reason to prosecute in criminal court. A codified defence of *de minimis* might conflict with the operation of these programs. Moreover, when minor violations do go to criminal court, penalties are flexible and include conditional or absolute discharges, and pardons may be available at a later stage.

They argue as well that a defence of *de minimis* would increase the length and complexity of trials. A case that appears to the judge to be trivial may in fact, when seen in context, require more serious measures to be taken. For example, theft of a 50-cent newspaper from a box may seem trivial in the individual case, but could be a thousand-dollar-a-day problem on a city-wide basis. If prosecutors have to call evidence to justify prosecutions that seem trivial, minor cases will take much more court time than they now do.

QUESTION (13)

Should the new General Part include a defence of *de minimis*, by which a person who has committed an offence would not be convicted if the offence is too trivial to be worth a conviction, in view of the circumstances, including the person's background and the context of the offence?

(j) Common law defences

The present General Part contains only some of the available defences

Federal legislation or statutes are Parliament's statement of the law. Where Parliament has chosen not to address a particular rule or principle for criminal cases, courts apply the judge-made case law.

Section 9 of the General Part of the *Criminal Code* states that the courts cannot create crimes: the only crimes are those which are set out in federal legislation. (The one exception to this is the crime of contempt of court.) Crimes in Canada are created by Parliament, not the courts.

Concerning defences, however, the present General Part leaves a significant role to the courts. Subsection 8(3) allows courts to recognize defences which are part of the judge-made case law. The defence of necessity is one such common law defence that is not written into the *Criminal Code*. The partial defence of intoxication is another.

Some people think that a recodified General Part should no longer allow the courts the power to recognize new defences. They say that the whole purpose of a recodification is for Parliament to clearly state the rules of criminal liability, including the defences. If the courts can recognize additional defences that are not set out in the General Part, the law is more uncertain and less accessible to the non-specialist.

The White Paper proposed that subsection 8(3) remain in the General Part, so that courts could continue to recognize new defences. Those who favour this approach argue that it gives the criminal law the flexibility to grow with the times. Developments in medical, behavioural, social and other sciences, may give rise to defences which we cannot now imagine. The Parliamentary Sub-Committee concluded that this approach would allow the criminal law and the criminal justice system to reflect and accommodate the experiences of women, aboriginal people, ethno-cultural groups and other equity-seeking groups as Canadian society changes.

It has also been pointed out that the *Canadian Charter of Rights and Freedoms* in any event provides the courts with a non-codified source of potential new defences. Section 7 of the Charter declares that 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." This means that courts may recognize a defence if they believe that failure to do so would be fundamentally unjust. If the courts recognize a defence on the basis that the Charter requires it, the defence is then difficult for Parliament to change or remove, even if Parliament wishes to do so. It is better therefore to provide the courts with the

flexibility in the *Criminal Code* to recognize non-codified defences where appropriate, so that the courts will not have to resort to the Charter.

QUESTION (14)

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

III. Preamble or Statement of Purposes and Principles

What is a preamble or statement of purposes and principles?

A preamble is a statement that introduces the legislation or statute that it accompanies. It may set out Parliament's reasons for the legislation. A recent example is Bill C-49 which amended the *Criminal Code* provisions on sexual assault in 1992. It included a preamble which explained in some detail the social and legal problems to which Parliament wished to respond in the Bill.

The role of a statement of purposes and principles is, as its name suggests, to set out the purposes and principles of the legislation. It may, like a preamble, express Parliament's reasons for the legislation, but with less detail as to the social or legal background leading to the legislation. The *Young Offenders Act* contains a statement of purposes and principles to guide the courts when they are interpreting and applying that Act.

The *Criminal Code* does not at present have a preamble or statement of purposes and principles. The suggestion that a new General Part should contain one has led to a great deal of discussion and no clear consensus.

The Law Reform Commission was divided over this part of its proposed new General Part. The majority recommended not having a preamble or statement of purposes and principles. The Canadian Bar Association recommended that the new General Part have one. The Barreau du Québec expressed reservations. The Parliamentary Sub-Committee was divided, but the majority was in favour.

What would a preamble or statement of purposes and principles add to the General Part?

Those in favour of a preamble or a statement of purposes and principles suggest that it could help the courts to interpret and apply the new general principles in the way that Parliament intends. This would be especially useful in difficult or borderline cases. It could also guide police, prosecutors, and other key people in the criminal justice system, directing them to perform their duties in accordance with the set of values which Parliament has set out.

They add that the *Criminal Code* is more than an ordinary statute: it is a document of fundamental importance that has a strong impact on all Canadians. A preamble or statement of purposes and principles would be one way of emphasizing its importance and of providing coherence to the criminal law and the criminal justice system.

Those who oppose a preamble or statement of purposes and principles say that it is unnecessary because the new General Part will by definition express the purposes and principles of the criminal law. A set of further

principles would be superfluous. It would also "freeze" the social policy of the time, rather than allowing for evolution of the principles over time.

They also say that it would not be useful. Any attempt to express in a few lines all the general purposes and principles of the criminal law (if that could in fact be done) would be too vague and general to be helpful. Also, some of the fundamental values of the criminal law are in conflict with each other. The difficult task of the courts is to balance those values in the individual case; the values are relatively easy to identify.

Finally, they are concerned that a preamble or statement of principles would lead to a lot of extra litigation. Take for example the well-accepted principle that the criminal law should be used with restraint. If this non-controversial principle were set out in a preamble or statement of purposes and principles, would it become a basis for challenging every step taken in the criminal justice system? For example, it could be asked, and litigated, in every case whether the police acted with restraint, whether the Crown might have chosen a more restrained form of proceeding, and so forth.

What could a preamble or statement of purposes and principles contain?

There are different types of matters a preamble or statement of purposes and principles could address. A preamble could set out the reasons why Parliament is bringing in a new General Part. (Some of the possible reasons are discussed earlier in this paper.) A preamble could also explain how Parliament intends the new General Part to interrelate with the old General Part and the judge-made case law: is Parliament simply codifying legal principles that existed before but were not written in the General Part, or is Parliament overruling some of the previous law?

A statement of purposes and principles could set out the fundamental values that Parliament wishes to guide the interpretation and application of the new General Part. It would be necessary to decide whether the statement of purposes and principles would apply to the General Part, or to the whole *Criminal Code*. Although the discussion arises mostly in the context of the General Part, many of the proposals would apply to the criminal law as a whole.

QUESTION (15)

Should the new General Part include a preamble or statement of purposes and principles (relating to the General Part as opposed to the entire *Criminal Code* or the criminal law as a whole)?

If so, what should it contain?

Conclusion

This consultation paper seeks your views on some key General Part issues and options. Your comments on other General Part issues are also welcome.

All the replies we receive will be carefully considered in the process of refining the proposals for a new General Part of the *Criminal Code*. Your comments and suggestions will be helpful to the Department.

Please submit your comments by **February 28, 1995**, in writing to:

General Part Recodification
Communications and Consultation Branch
Department of Justice Canada
Room 124, 239 Wellington Street
Ottawa, Ontario, Canada
K1A 0H8

We look forward to hearing from you.

To obtain a copy of the technical paper, "Toward a New General Part of the Criminal Code of Canada - Details on Reform Options," or a copy of The White Paper, please contact the Department at the above address or telephone (613) 957-4212.

APPENDIX

Some General Part issues not dealt with in this paper

APPENDIX

What this consultation paper does not deal with

This consultation paper does not cover every possible General Part issue. For example, it does not deal with the defence of mistake of fact, because the major problems with that defence were addressed in a 1992 law, Bill C-49. Mistake of fact had often been raised by an accused person in sexual assault cases. The accused would argue that he or she did not have the degree of fault required for a conviction, having made a mistake about the complainant's consent to the sexual activity - "I thought there was consent." The law now prohibits the mistake of fact defence where the accused did not take reasonable steps to make sure that the complainant did indeed consent. And mistake of fact is not a defence if the mistake came about because of the accused person's intoxication, recklessness or wilful blindness to the truth.

For a variety of reasons, this paper does not discuss a number of other General Part issues. These include: the way to deal with the physical element of an offence, some fault elements of crimes, attempts to commit an offence, people who counsel others to commit offences or conspire with others to commit offences, impossibility, other defences (such as entrapment, emergency surgical or medical treatment), the principle of legality, omissions, extraterritorial jurisdiction, double jeopardy, the treatment of people who act under legal authority or have been given orders to act a certain way, and the rules concerning people who have authority over children.

Some General Part issues are already being separately considered by Parliament. For example, section 13 of the *Criminal Code*, which states that no one under the age of 12 years shall be convicted of a criminal offence, will be discussed by the House of Commons Standing Committee on Justice and Legal Affairs in its planned review of the *Young Offenders Act*. Section 14, which deals with the issue of consent to death, is being considered by a Senate Committee that is looking at end-of-life issues such as euthanasia, assisted suicide, palliative care and cessation of treatment.

Finally, some General Part sections could be changed to simply modernize the language without changing their meaning.

Even though these issues are not discussed in this paper, your views on any of them are welcome.