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TOWARD A
NEW GENERAL PART
FOR
THE CRIMINAL CODE
OF CANADA

A FRAMEWORK DOCUMENT
ON THE PROPOSED NEW GENERAL PART OF THE
CRIMINAL CODE FOR THE CONSIDERATION
OF THE HOUSE OF COMMONS
STANDING COMMITTEE ON JUSTICE
AND THE SOLICITOR GENERAL

*Aussi disponible en français de La révision de la partie générale du code
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Note

This document was prepared by officials of the Department of Justice and members of and consultants with the Law Reform Commission of Canada to assist the members of the Standing Committee with their review of the General Part.

The document attempts to summarize a considerable body of law and a large number of recommendations by a diverse number of governmental bodies and other groups interested in the issues involved in a reform of the General Part. Readers are advised that the case reports and other original documents deal with the points only briefly summarized here in much greater detail than would be possible to reproduce in the limited number of pages of this document. These should be consulted.

Index to references

The Law Reform Commission of Canada

The references are to recommendations contained in Report 31, Recodifying Criminal Law, published by the Law Reform Commission of Canada in May, 1988. This report is a revised and enlarged version of a previous Report 30 published in December 1986.. Both works contain the recommendations of the Law Reform Commission of Canada for a revision of the present Canadian Criminal Code.

Working Group on the General Part

The Working Group on the General Part was established in response to the publication by the Law Reform Commission of Canada of Report 30, "Recodifying Criminal Law" It consisted of officials of provincial departments of the Attorney-General across Canada. The Department of Justice provided the secretariat for the Working Group.

Federal Provincial Working Group on Homicide

The Federal Provincial Working Group on Homicide was set up in 1988 in response to the decision of the Supreme Court of Canada in R v. Vaillancourt which constitutionalized the rules and principles referable to the mental element in the context of homicide.

The Group was comprised of members of the federal and provincial ministries of justice and departments of attorneys general. Its mandate was to

identify and study the current law of homicide and to make such recommendations for its reform as appeared advisable.

Model Penal Code

The Model Penal Code was completed by the American Law Institute in 1962. It was a proposed codification of the criminal law in the United States. The Code has been adopted in various forms by 37 of the 50 states and is therefore a fairly useful example of the criminal law of the United States

New Zealand Crimes Bill

The New Zealand Crimes Bill seeks to revise the law relating to crimes, as found in the New Zealand Crimes Act 1961 currently in force in New Zealand. It is now before Parliament. The Bill represents a step in the process of revision of the criminal law in New Zealand and will undoubtedly be subject to further revision and fine-tuning. As a result, the provisions quoted are useful as preliminary proposals but by no means represent finalized legislation.

English Law Commission's Draft Criminal Code

The English Law Commission's Draft Criminal Code was laid before Parliament in the form of a Bill by the Lord High Chancellor of Great Britain in April 1989. It is under study. It is intended to be a step towards the completion of a comprehensive Criminal Code in England and Wales. The recommended provisions of the Bill will be subject to close scrutiny by the English criminal law community as the draft legislation continues to be studied.

The Australian Draft Bill

The Draft Bill is contained in an interim report entitled Principles of Criminal Responsibility and Other Matters published in July, 1990 by the Committee for the Review of Commonwealth Criminal Law. The report makes recommendations for a new criminal code for the Commonwealth of Australia. It is now being studied before an actual Bill is introduced into Parliament. The report is a very useful study comparing the various proposals for reform in different jurisdictions.

Canadian Association of Chiefs of Police

The Canadian Association of Chiefs of Police completed an evaluation of Report 30 of the Law Reform Commission of Canada in August, 1987. The evalua-

tion was made in response to a request from the Federal Department of Justice for the Association's views on the LRC's Report. It reflects concerns that the Association had with the Report from the perspective of law enforcement and control of crime.

Glossary of terms

Mental element - the mental elements in relation to the material elements of an offence are also known as the mens rea or the fault elements of an offence. Examples of mental elements of offences are intention, knowledge, recklessness, or wilful blindness and negligence.

Material element - the material elements of an offence is a term used to describe what is variously known as the actus reus or the physical element of an offence. The material elements could include one of conduct, circumstances or consequences.

Justification - a justification is a defence which challenges the wrongfulness of an action which technically constitutes a crime. That is, the action, though criminal on the face of it, is justified by the coincidental achievement of some greater social good.

Excuse - an excuse is a defence which concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be, in fairness, attributed to the actor.

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WHY WE NEED A NEW GENERAL PART ?

In 1892, the new Canadian Criminal Code was welcomed in the Senate of Canada by James Gowan, Canada's foremost legal drafter of the day, as most complete codification ever submitted to any legislative body. As such it aimed to be a complete and systematic arrangement of our criminal law. For this purpose it had, as do most criminal codes, both a general and a special part.

In a criminal code, the general part performs three functions. It organizes the criminal law by providing general rules to obviate the need for endless repetition in the offence-creating sections. It rationalizes it by setting those rules out logically and systematically so as to bring order and coherence to it. And it illuminates it by articulating and enshrining its underlying social values.

To do this, the general part of a criminal code as exemplified by the European codes or the American Law Institute's Model Penal Code deals typically with four different matters. First, it articulates the principles of criminal liability or responsibility, the principles of legality, conduct and culpability. Second, it sets out the various justifications, excuses, and other general defences operative in the criminal law. Third, it contains provisions relating to parties to and participation in offences. Fourth, it deals with inchoate crimes like attempt, incitement and conspiracy. In addition, it may include rules regarding criminal jurisdiction.

The General Part of Canada's present Criminal Code fails to perform these functions fully through lack of completeness, generality and orderly arrangement. Lack of completeness results from leaving to common law various matters of general relevance like the basic principles of conduct and culpability and the general defences of necessity and intoxication. Lack of generality is seen in the absence of a general provision on culpability, in the resulting occurrence in two hundred and fifty sections in the Special Part of words like "fraudulently", "intentionally", "knowingly" and "wilfully", and in provisions in numerous other special part sections concerning general defences like mistake, duress, and necessity. Lack of orderly arrangement is evident in the way that rules belonging to the general part are found in three different places - in the General Part of the Code, in its Special Part, and in the common law.

This lack and failure has negative effects. One is to make the Criminal Code harder to read, less manageable for the user and less accessible to the general public. As the Law Reform Commission of Canada put it in a Study Paper entitled Towards a Codification of Canadian Criminal Law " ... the haphazard arrangement of those sections which do deal with the general principles obscures more than clarifies their inter-relationships: this is not to say that there is no logic in the 1955 Code; however, the logic is not apparent - only a specialist can find his way in it." Another is to leave some of the most fundamental provisions of our criminal law - matters of public policy and often acute public controversy - to be found not only in a contemporary document reflecting current social values and created by Canada's elected Parliament but rather in centuries of case law enshrining earlier values and created

by judges who were mostly English and largely working in a totally different social context. As Chief Justice Dickson observed in the Supreme Court decision in Morgentaler: "Courts are not the appropriate forum for articulating complex and controversial programmes of public policy."

Finally, our general part provisions, whether articulated in the Code or left to common law, developed long before the advent of the Charter to which as the supreme law of Canada, they must now be adjusted.

For these reasons, it is highly appropriate that Parliament now take a thorough look at the present General Part with a view to its updating and improvement.

WHAT IS A GENERAL PART

A General Part of a criminal code organizes, rationalizes, and illuminates the remainder of the code by setting out the principles and general rules on the necessary conditions for criminal liability, on the various general defences, on participation in other people's crimes and on the commission of incomplete offences. The General Parts of some code, particularly those of Continental European or American origin also set out the possible sanctions which may be imposed following conviction.

The first chapter of a General Part, on necessary conditions for liability, manifests the moral basis of the criminal code: the principle that no one should be criminally liable without some fault. This is made explicit in the conduct and culpability requirements. These specify that no one can be liable without personally performing some act or failing to perform some legal duty and without in either case doing so intentionally or with some other blameworthy state of mind.

The second chapter sets out the general defences. An accused will be free from criminal liability if he or she did not commit the crime charged, if did "commit" it but it is for some special reason exempt from liability, if he or she did the act in question but did so for some special reason qualifying either as a justification or excuse, or if despite his or her commission of the crime there exists some non-exculpatory public policy defence. Accordingly, the defence chapter will contain four types of defences: (1) "not really" defences, where despite apparent commission of the crime some element of the conduct or culpability requirement is missing; (2) exemption defences due to a lack of capacity for criminal liability, eg. lack of sufficient age; (3) "yes but" defences, where there is some justification entitling the accused to act as he or she did or some excuse entitling him or her to be let off for what he or she did; and (4) non-exculpatory defences, like double jeopardy, where despite his commission of the crime further prosecution would be unfair or oppressive.

The third chapter will deal with the involvement in crime of those who do not commit complete crimes but only "further" them. They do so either by trying to commit them or by helping others commit them. The secondary liability they merit imposed by rules on participation and on inchoate offences like attempt and conspiracy.

A General Part also should have a chapter detailing the territorial jurisdictions of the criminal courts. It will provide a general rule, in Canada's case based on the territorial principle and subject to international law principles of diplomatic immunity, that our courts have jurisdiction primarily over crimes committed wholly on Canadian territory. As well, it will provide exceptions to that rule, exceptions conferring jurisdiction in conformity with international law principles over crimes committed wholly or partly outside Canada.

The present General Part

The present partial General Part of our Code (Part 1) is incomplete. It contains provisions on the following general matters: the presumption of innocence (s. 6); the presumption of sanity (s. 16); the exclusion of common law offences (s. 9); the general rule that no civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence (s. 11); the prohibition that no one should be punished more than once for the same offence (s. 12); the principle that no one can consent to having death inflicted on him or her (s. 14) and the rule that certain acts done on holidays are valid (s. 20).

It contains exemptions from criminal liability for children under twelve (s. 12) and for those who are insane at the time of committing the offence (s. 16). The Code in (s. 615) provides an temporary exemption from further proceedings when a person is unfit to stand trial.

It provides the following justifications for otherwise criminal conduct: obedience to de facto law (s. 15); acting under or pursuant to lawful authority (s. 25); use of force to prevent the commission of offence (s. 27); for the arrest of the wrong person (s. 28); when arresting for breach of the peace (s. 31); the use of force to suppress riot (s. 32); self-defence against unprovoked assault (s. 34); self-defence in the case of aggression (s. 35); preventing assault (s. 37); defence of movable property (s. 38); defence with claim of right, (s. 39); defence of a dwelling (s. 40); defence of house or real property (s. 41); asserting a right to house or real property, (s. 42); correction of child by force, (s. 43); master of a ship maintaining discipline, (s. 44); and performing surgical operations (s. 45). Our present General Part also specifically denies a justification where excessive force is used (s. 26).

The present General Part provides very few excuses from criminal liability. Most are instead found in the common law. The General Part does provide an excuse where the person acted under compulsion by threats (s. 17). It denies one where the commission an offence is based on ignorance of the law (s. 19).

The present General Part also contains sections dealing with involvement of person in an offence other than as the principal perpetrator. Section 21 deals with the rules on parties; s. 22 sets out the rule as to counselling an offence; and s. 23 as to being an accessory after the fact.

The present General Part in s. 24 contains provisions on attempts. It also contains provisions dealing with involvement in an offence: parties, s. 21; counselling, s. 22; and being an accessory, s. 23.

The law dealing with the territorial reach of Canadian criminal law is found in a number of Acts. The General Part contains some of those provisions in sections 7 and 8.

THE PRINCIPLE OF LEGALITY

THE PRINCIPLE

No one should be convicted or punished except in accordance with established law.

THE RATIONALE

Conviction and punishment for acts and omissions which were not declared criminal in legislation at the time of their commission is unjust, pointless and self-contradictory. It is unjust because fairness demands that persons should only be punished for conduct which has been clearly prohibited; pointless because punishing someone for conduct which they could not have known was criminal does not deter others; and also unjust because it stigmatizes the morally innocent as wrongdoers.

THE PRESENT LAW

The Charter in s. 11 provides that any person charged with an offence has a right:

- g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

The Criminal Code provides in s. 9 that no person shall be convicted of an offence at common law but that courts still have the power to punish for contempt.

CANADIAN RECOMMENDATIONS

There are a number of options which could be considered in a possible recodification of this principle. The first is to rely solely on the general statement contained in s. 11 of the Charter. The advantage of this option is economy. The principle is stated only once within the supreme law of Canada - the Charter of Rights and Freedoms. The difficulty with this approach is that it would leave the Code incomplete and leave unresolved the Code's non-treatment of contempt of court.

The Law Reform Commission recommended that the following provision replace the present s. 9 of the Code: "No one is liable except for conduct defined at the time of its occurrence as a crime by this Code or by some other Act of the Parliament of Canada." The advantage of including such a provision would be to

make the Code comprehensive by enshrining at its outset this basic principle of criminal justice.

The Commission's proposed provision is more restrictive than s. 11 of the Charter in that it does not provide for offences "contrary to international law or which were determined to be criminal according to the general principles of law recognized by the community of nations". This disadvantage could be overcome by requiring that the Code spell out what these crimes against international law or against the general principles of law recognized by the community of nations are.

The Working Group on the General Part strongly urged that there be no codification of the principle of legality. If, in spite of this advice, it is decided to codify this principle, then its wording must accord directly with the Charter. The Canadian Association of Chiefs of Police also expressed concern that the LRC's provision may be in conflict with the Charter, with international law and the law of the community of nations. Accordingly, the Association recommended that any new provision accord with the Charter.

All formulations proposed to date leave uncertain how contempt of court is to be dealt with. To the extent that it is a power inherent to a court rather than a common-law offence, it should be unaffected by any new section proposed. Both the Commission and the Working Group recommend however that, to the extent that contempt of court is a common-law offence, it be codified.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (ss. 9, 11) provides for a general statement of the principle of legality in a form which is virtually identical to that of the Law Reform Commission. The Bill also codifies contempt of court.

The English Law Commission's Draft Code has no express statement of the principle of legality as such. However, the Draft Code includes a statement to the effect that offences may only be created by and under the authority of Parliament (s. 3) and that all common law offences are abolished (s. 4 (1)).

The American Law Institute's Model Penal Code § 1.05 provides that no conduct constitutes an offence unless it is a crime or violation under this Code or another statute of this State.

ISSUES FOR CONSIDERATION

1. Should the new General Part have a section which sets out the principle of legality or should we simply rely on s. 11 of the Charter?
2. If there is to be a provision in the new General Part should its wording be identical to s. 11 of the Charter?

3. Should the Code spell out all offences "contrary to international law or which were determined to be criminal according to the general principles of law recognized by the community of nations"?
4. Should instead the Code contain a provision which states that "No one is liable except for conduct defined at the time of its occurrence as a crime by this Code as a crime by this Code or by some other Act of the Parliament of Canada or as an offence under Canadian law or which was criminal according to the general principles of law recognized by the community of nations?"
5. Should the Code codify the offence of contempt of court?
6. If so, should be leave an uncodified residual power to punish for contempt of court ?

CONDUCT AND CULPABILITY

THE PRINCIPLE

Criminal liability should only attach to an act or omission which is culpable and not to a personal status.

THE RATIONALE

Justice dictates that people should only be punished for acts or omissions for which they are blameworthy and not merely for having a status which they have no control over.

THE PRESENT LAW

The Criminal Code has no explicit provision on this matter. Common law, however, which forms the context of interpretation for the Code, has traditionally divided crimes into a physical and a mental element, seeing the former as some act or omission linking the accused with the crime and seeing the latter as some wrongful state of mind such as intention, recklessness, or negligence and regarding both as essential for criminal liability.

Section 7 of the Charter provides that everyone has the right not to be deprived of life, liberty, and security of the person except in accordance with principles of fundamental justice. The requirement of both a physical and mental element in the definition of a crime may be one of these principles of fundamental justice.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended that there be a provision in the General Part of the Code that no one is liable for a crime without engaging in the act or omission specified by its definition and having the mental element specified in its definition or in the general mental element section.

The advantage of including such a provision would be that it would highlight a central premise of our criminal law. Such a provision would explicitly exclude the possible existence of crimes based simply on a person's status. Whether the evidence proved against an accused establishes the existence of the mental elements in relation to the material elements of an offence is a question of fact.

The Working Group on the General Part recommended that there be no codification in the General Part of the general proposition that criminal liability requires a physical and mental element for each crime. Codifying such a general

proposition would be unnecessary as the physical element will be found in the description of the specific crime in the Special Part and the mental element should be provided by a general rule in the General Part.

OTHER JURISDICTIONS

Neither the New Zealand Crimes Bill nor the English Law Commission's Draft Code has a specific provision regarding the necessary coincidence of guilty mind and act. These two Codes assume this proposition to be so fundamental as not to require codification.

The American Law Institute's Model Penal Code § 1.02(1)(c) does not expressly provide that there can be no guilty act without a guilty mind. However, the principle can be inferred from the declaration that one of the general purposes of the provisions of the M.P.C. is to safeguard that conduct for which no fault can be attached is not condemned as criminal.

ISSUE FOR CONSIDERATION

1. As all offences in the Special Part will require some form of conduct and a mental element, is a general rule such as the one proposed necessary ?

CONDUCT: THE GENERAL RULE

THE PRINCIPLE

No one can be held to commit a crime without personally engaging or specifically failing to engage in some act or omission.

THE RATIONALE

In fairness and justice people should only be punished for conduct under their control, i.e. acts and omissions of their own, and not for things outside it like acts of God, acts of other people, and involuntary events like twitches.

THE PRESENT LAW

The need for personal conduct on the part of an accused is not specified in the Criminal Code. Case law, though less than wholly clear, tends to rule out crimes whose material element is a personal characteristic of the accused such as being without visible financial means.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommends that there should be a provision in the General Part that a person be only liable for an act or omission performed by that person. However, no such provision may be needed if every crime is so defined in the Special Part so as to require a personal act or omission on the part of the accused.

The Federal-Provincial Working Group on Homicide recommended that conduct should include any act of a person and any omission to do anything that a the person has a legal duty to do.

OTHER JURISDICTIONS

The American Law Institute's Model Penal Code § 2.01 (1) provides that a person is not guilty of an offence unless his or her liability is based on conduct which includes a voluntary act or the omission to perform an act of which he or she is physically capable.

The Australian Draft Bill (s. 3H) provides that a person is not criminally responsible for doing any act involuntarily or for omitting involuntarily to do any act. An act is involuntary if caused by the application of physical force by another person or was a spasm or convulsion or it was done while he or she was in a

condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) depriving him or her of control of the action.

An act will not be considered involuntary if the involuntariness is caused by anything done or omitted with the fault element of the offence or by voluntary intoxication. Finally, if the accused did an act involuntarily or omitted involuntarily to do an act, because of mental illness or a combination of mental illness and intoxication, he or she must be acquitted by reason of mental illness.

ISSUE FOR CONSIDERATION

Should there be an express provision in the new General Part that, save for limited exceptions, one is only liable for what one does or refuses to do where he or she has a legal duty to act ?

OMISSIONS

THE PRINCIPLE

Although in general, people can only be punished for what they do and not for what they do not do, there are instances when we may wish to punish an individual for a failure to act.

THE RATIONALE

Our criminal law has been based on the premise that in a free society people can reasonably be required not to act in a manner causing harm to others but should not be required to act positively to prevent harm to others. A person should avoid acting to another's detriment but need not take positive steps to confer a benefit on him or her unless the person has some special obligation so to do (see under next heading: Duties). In general, no one is his brother's keeper to this extent.

THE PRESENT LAW

The Criminal Code specifically recognizes liability for omissions in several offences: e.g. failure to provide necessities of life to a child under sixteen and under one's care (s.215(2)(a)); failure to remain at the scene of an accident (s.252(1)); and failure to disperse after the reading of the riot provisions (s.68). Certain other crimes: e.g. result crimes like those of culpable homicide, can be committed by criminal negligence, which is defined to include omitting to do anything it is your duty to do (s.219(1)(b)).

Accordingly, criminal responsibility for omissions in Canada can arise if the statutory offence definition includes omission or there is a legal duty to act recognized by statute or common law.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that the following general provision be placed in the General Part:

- A person is criminally liable for an omission only if
- a) the omission is specified in the definition of the crime; or
 - b) the omission endangers human life and consists of a failure by the person to take reasonable steps

- i) to provide the necessities of life to the person's spouse, child, any other members of the person's family who lives in the same household or anyone under the person's care, if such a person is unable to provide himself or herself with the necessities of life.
- ii) to do that which the person undertook to do,
- iii) to assist those joining her or him in a lawful and hazardous enterprise, or
- iv) to remedy a dangerous situation created by him or within his control.

Adopting such a provision would mean that there would be no liability for omissions unless they are specifically criminalized by act of Parliament or are omissions to perform duties specified in the new General Part of the Code. The advantage of including such a provision in the General Part is to make the Code comprehensive, to highlight a basic principle about omissions, and to clarify that result crimes (crimes consisting of causing harm) can be committed by omission. Such a provision would be unnecessary if each definition of a result crime specifies that the crime can only be committed if the harm is caused either by an unlawful act or by omitting to perform a lawful duty or if the definition of every other crime of omission specifically criminalizes the omission in question.

The Working Group on the General Part recommended that the LRC's proposal be modified so as to omit the clause a) and to modify clause b) so that the list of duties would not be taken as being exhaustive. The Canadian Association of Chiefs of Police questioned whether the mere breach of a duty without causing criminal consequences is fair or justified. The criminal law should be wary of criminalizing a failure to act.

OTHER JURISDICTIONS

The New Zealand Crimes Bill makes fairly extensive provisions regarding liability for omissions. It outlines the general principle (s. 20) that subject to certain exceptions no one shall be liable for any failure to act. A person will however be liable for an omission whenever an enactment expressly provides that the omission to do an act constitutes an offence or whenever a person causes the death of another by omitting to do that which was his or her duty.

The English Law Commission's Draft Code (s. 16) provides that where an offence consists wholly or in part of an omission, then wherever the Code uses the word "act" it shall be read as including an omission. The Code provision discusses only cursorily the types of offences for which an omission will ground criminal liability.

The American Law Institute's Model Penal Code § 2.01 (3) provides that liability for the commission of an offence may not be based on an omission unaccompanied by action unless the omission is expressly made sufficient to ground liability by the law defining the offence or unless a duty to perform the omitted act is otherwise imposed by law.

ISSUES FOR CONSIDERATION

1. Should there be a provision in the new General Part like the one recommended by the Law Reform Commission ?
2. Should the new provision omit the first part of the L.R.C.'s proposed section: namely, that a person is criminally liable for an omission only if a) the omission is specified in the definition of the crime?
3. Should the provision instead be drafted in the terms of the New Zealand Bill that subject to certain exceptions no one shall be liable for any failure to act. A person would however be liable for an omission whenever an enactment expressly provides that the omission to do an act constitutes an offence or whenever a person causes the death of another by omitting to do that which was his or her duty.

DUTIES

THE PRINCIPLE

Liability should attach to people who wrongfully fail to carry out an undertaking to act for the benefit of another or who fail to discharge the duties of a special relationship (eg. parenthood).

THE RATIONALE

In fairness and justice people should perform the duties they owe to others who rely on them. Children too young to take care of themselves are entitled to rely on their parents to look after them. Others are entitled to rely on those who have voluntarily assumed the burden of acting for their benefit.

THE PRESENT LAW

Many crimes, like homicide and causing bodily harm, consist in causing harmful consequences. Since such consequences may be caused by positive acts or by omissions, these "result crimes" may be committed not only by positive acts but also by omitting to perform a legal duty. Such duties include any duty imposed by common law or statute. S. 215 of the Criminal Code, for example, imposes a duty on numerous persons to provide necessities of life to others.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that there be a provision in the General Part that where failure to act would endanger life everyone has a duty to take reasonable steps:

- (1) to provide necessities, if they can't provide them for themselves, to one's spouse, child under eighteen, other family members in the same household and anyone under one's care;
- (2) to carry out undertakings one has undertaken or assumed;
- (3) to assist people in a hazardous enterprise in which one shares;
- (4) to rectify dangers of one's own creation or within one's control.

The advantage of including such a provision would be to gather round one general principle the present Code provisions in ss. 215 (parents and others), 216 (surgeons etc.), and 217 (undertakings); to generalize such specific provisions as that in s. 263 (duty to safeguard opening in ice) and to extend the ambit of care to include other family members living in the same household, anyone in one's care but un-

able to provide themselves with necessities, and those people such as fellow mountaineers with whom one is engaged in lawful but hazardous enterprises. A possible difficulty with the L.R.C.'s proposition (4) is that one could create dangers wholly unbeknownst to oneself which were perhaps not reasonably foreseeable.

The Working Group on the General Part agreed that the General Part should contain such a provision although they would prefer that the provision be open-ended enough to provide for additional common law and statutory duties. The Group felt that there should be a provision regarding commission by omission under which an individual would be punished for causing a result by failing to act, provided the individual was under a legal duty to act.

The Federal-Provincial Working Group on Homicide recommended that the existing rule on duties be repealed because it is circular, ambiguous and vague. The group recommended that the concept of legal duty be confined to one which is imposed by an Act of Parliament or by an Act of a legislature of a province or territory. The Working Group is of the view that Parliament ought to codify in the Criminal Code all common law duties which it wishes to retain. This is necessary so that person can be aware of the duties which the law imposes on them.

OTHER JURISDICTIONS

The New Zealand Crimes Bill has a very extensive listing of the relevant duties which the criminal law recognizes in the context of omissions (ss. 4, 5). The Bill provides that an individual is under a duty to provide necessities of life to any individual under his or her care who cannot provide them for himself or herself; a duty to have and use reasonable care and skill in doing any act which is dangerous to the life of another; everyone who has a dangerous thing under his or her care and control; a duty to take reasonable precautions against the danger and to use reasonable care to avoid that danger; finally, a duty to do an act the omission of which may endanger the life of another.

The English Law Commission's Draft Code does not have a provision which specifically lists the duties recognized by the criminal law. Instead, the duties are contained in the specific offences themselves.

The American Law Institute's Model Penal Code does not have an express provision which lists the duties imposed by the criminal law. Instead, any such duties shall be found in the definitions of specific offences themselves or in the common law.

ISSUES FOR CONSIDERATION

1. Should there be a general provision in the General Part that specifies the general duties which form the basis of criminal liability?

2. Should there be other duties in addition to or in place of those specified by the LRC which should form the basis of criminal liability?
3. Should any new provision be exhaustive or open-ended as to which duties, if not performed, would lead to criminal liability?
4. Should the Code allow for differences between provinces as to whether an omission will result in criminal liability or not?

DUTIES - MEDICAL TREATMENT EXCEPTION

THE PRINCIPLE

No one need provide medical treatment which is therapeutically useless or to which the patient does not consent.

THE RATIONALE

A doctor undertaking the care of a patient has an obligation to provide such treatment as is required. Treatment which can in no way benefit the patient, however, cannot be reasonably required, for no one can be required to act to no good purpose. And if we are to value the patient's right to choose, treatment which the patient doesn't want cannot be provided at all.

THE PRESENT LAW

S. 45 of the Code provides that every one is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if the operation is performed with reasonable care and skill and it is reasonable to perform the operation, having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.

Further, s. 217 of the Criminal Code provides that everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life. Hence a doctor undertaking to treat a patient is under a duty to continue doing so if cessation would endanger the patient's life. But where the treatment has no therapeutic value, cessation will not endanger life and hence the doctor is under no duty to continue. Where the patient does not consent to the treatment, its provision amounts to an assault (unless it is treatment for alcoholism or drug abuse under s. 255(5) or a mental examination for the purposes of determining pre-trial capacity under s. 537(1)(b)). This is because no one may lawfully have treatment forced upon him or her. Hence, here again there is no duty to continue treatment.

It is unclear what the criminal law compels or prohibits in emergency situations where the patient's consent can not be obtained (e.g. an accident) or where treatment is necessary in order to save the patient's life.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that the General Part contain a provision that no one has a duty to continue medical treatment which is therapeutically useless or for which consent is expressly refused or withdrawn. Adding such a provision to the General Part would clearly declare that there is no duty to treat where the patient explicitly refuses. It also extends the exception with respect to cessation of treatment which does not endanger life to cessation of treatment which is therapeutically useless. It would thus bring criminal law into harmony with current medical practice.

The provision recommended by the Commission does not however specify the requirements for consent nor define what "therapeutically useless" means.

The Working Group on the General Part believed that the term "therapeutically useless" should be defined. The Group also asked who can give or withdraw the consent referred to in the Law Reform Commission's recommendation.

OTHER JURISDICTIONS

Neither the New Zealand Crimes Bill, the English Draft Code, nor the American Model Penal Code have a provision similar to the LRC's proposal. The N.Z. Bill (ss. 44, 45) provides protection for doctors by way of justification for any therapeutic treatment with or without the consent of the patient.

ISSUES FOR CONSIDERATION

1. Should there be a provision in the General Part which states that there is no duty to continue treatment which is therapeutically useless or to which the person does not consent?
2. If the answer to question 1 is "yes", a) should the term "therapeutically useless" be defined? and b) Should the requirements of consent be defined more specifically?

CULPABILITY: THE GENERAL RULE

THE PRINCIPLE

No one can be guilty of a crime without acting with a guilty mind - there can be no liability without fault.

THE RATIONALE

No one should be punished without being to blame for what one did, i.e. for acting intentionally, recklessly or negligently.

THE PRESENT LAW

According to common law tradition a wrongful act will not make a person guilty unless done with a wrongful state of mind. Characteristically, therefore, criminal offences require some positive state of mind such as intent, knowledge, recklessness or negligence. While there is no general provision in the Criminal Code to this effect, the definition of each offence usually specifies the requisite state of mind by words like "wilfully", "fraudulently", "knowingly"; "maliciously" and "recklessly".

The present Criminal Code recognises at least three broad levels of culpability:

- (1) intention, expressed in the definition sections by such words as "intentionally", "wilfully", "means to", "with intent", or "for a purpose" and generally held to include actual knowledge, purpose, actual desire, end, aim, objective or design;
- (2) recklessness, found in such definitions as wilfully causing an event to occur (s. 429(1)) and murder (s. 229(a)(2)) and consisting in an accused's persistence in the face of the possibility of bringing about a result prohibited by law despite awareness of the risk that his conduct may do so; and
- (3) negligence, defined in s. 219 as conduct showing "wanton or reckless disregard for the lives or safety of others" - a phrase interpreted by the courts to mean that an accused must show a marked and substantial departure from the standard of a reasonable person.

There are in addition to true crimes thousands of regulatory offences in federal statutes.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that the General Part contain a provision specifying that the mental elements for crimes be either purpose, recklessness or negligence and that there be a further provision to the effect that where the

definition of a crime fails to specify the requisite level of culpability, the definition shall be interpreted as requiring purpose.

Such a provision would avoid a repetition of the culpability requirement, i.e. in purpose crimes; would manifest that all crimes require some level of culpability whether they specify it or not; and would provide a fallback rule where the definition of the offence did not specify the requisite mental state.

A provision which made purpose the mental state required where none was specified would go against the present Canadian case law which makes the residual requirement, intention or recklessness. An alternative to the Commission's proposal would be to make recklessness the residual mental element required.

Another alternative to the Commission's scheme would be to add "knowledge" as a separate mental state. The advantage of doing so would be to recognize a state of mind which is particularly appropriate for crimes like possessing property obtained by crime.

The Working Group on the General Part did not agree with the LRC's proposed provisions. The Group recommended instead that there be only two mental states - intention and negligence. Intention would include recklessness. The Group believed that the terms "intention" and "negligence" should be defined.

The Group would also prefer the residual rule to be that unless otherwise specified, the requisite mental state for a crime is intention which includes recklessness. They also believed that the General Part should contain a specific provision addressing wilful blindness.

The Canadian Association of Chiefs of Police's view is that the default culpability requirement of purpose runs contrary to existing jurisprudence and sound public policy. Requiring the proof of purpose would be a significant restriction on the ability of the Crown to prove that an accused had the requisite mental element at the time of the commission since now all that is required to be proved is a general intention to commit the offence (unless otherwise specified). As a result, if the L.R.C. proposal is adopted in the Association's view, there would be fewer successful prosecutions in the future.

OTHER JURISDICTIONS

Neither the New Zealand Crimes Bill nor the English Law Commission's Draft Code provides a general definition of culpable mental states. The New Zealand Bill ss. 21 -24) provides, as its categories of fault, intention or knowledge, recklessness, recklessness and negligence. The English Code (s. 18) specifies knowledge, intention and recklessness as its fault categories. The English Law Commission's Draft Code (s. 19(2)) also provides that as a general rule, every offence requires a fault element of recklessness with respect to each of its elements other than fault elements, unless otherwise provided.

The American Law Institute's Model Penal Code provides § 2.02 (1) that an individual is not guilty of a criminal offence unless he or she acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offence. The American Law Institute's Model Penal Code §

2.02 (5) provides that when the culpability sufficient to establish a material element of an offence is not prescribed by law, such element is established if a person acts at least recklessly with respect thereto.

The Australian Draft Bill (ss. 3C(2), 3G(1)) provides that culpability levels should include knowingly, intentionally, recklessly and negligently and that in the interpretation of any Commonwealth Act creating an offence it should be presumed unless otherwise provided, that knowledge or intention is required in respect of every element of the offence.

ISSUES FOR CONSIDERATION

1. What mental states should be sufficient to found criminal liability?
2. Should one of those mental states be described as "intention"? What should the definition of "intention" be? Should it include "knowledge"? How should "knowledge" be defined? Should it include "purpose"? How should "purpose" be defined?
3. Should there be a separate mental state described as "recklessness" or should it be part of "intention"? If separate, what should the definition of "recklessness" be?
4. Should there be a separate mental state described as "negligence"? If so, what should the definition of "negligence" be?
5. What should the required mental element be where the Code does not specify one?

INTENTION

THE PRESENT LAW

Intention is expressed in the definitions of offences in the Criminal Code by words like "intentionally", "with intent", "wilfully", "means to" or "for a purpose", terms which are not defined but which are generally held to include actual knowledge, purpose, actual desire, end, aim, objective or design.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that the General Part include a provision that where the definition of a crime requires "purpose" an accused has that state of mind if: a) the person purposely engages in the conduct specified in the definition of the crime; b) the conduct is engaged in purposely in respect of the result so specified; and c) the person knows of any circumstances so specified when he engages in the conduct or is reckless as to whether the circumstances exist or not.

The Working Group on the General Part recommended that the term that should be used is "intention" which is the most prevalent term used today in Canada and that "intention" should include recklessness. The Group believed that the term "intention" should be defined and provide explicitly that the term includes the concept of recklessness.

The Federal-Provincial Working Group on Homicide recommended that the definition of "knowledge" be changed so as to require actual knowledge of the facts or knowledge of sufficient facts to know that other facts are relevant, coupled with a wilful blindness with respect to those other facts. The Group submits that the wilful blindness aspect is essential to the mental state requirement.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (S. 21) provides that a person intends the consequence of any act or omission if the person does or omits to do any act meaning to bring about that consequence or knowing or believing that that consequence is highly probable.

The English Law Commission's Draft Code (ss. 18(b)) provides that a person acts intentionally with respect to a circumstance when he or she hopes or knows that it exists or will exist and to a result when he or she acts either in order to bring it about or being aware that it will occur in the ordinary course of events.

The American Law Institute's Model Penal Code § 2.02 (2)(a) defines intention as being synonymous with purpose. A person acts purposely with respect to a material element of an offence when, if the element involves the nature of his or her conduct or a result thereof, it is his or her conscious object to engage in

conduct of that nature or to cause such a result. However, if the element involves the attendant circumstances, an accused will be said to have acted with purpose if he or she is aware of the existence of such circumstances or he or she believes or hopes that they exist.

The Australian Draft Bill (s. 3F(1)(a)) provides that a person is taken to act knowingly with respect to a circumstance if the person is aware that the circumstance exists or will exist or that it is probable that it exists or will exist.

The Draft Bill (s. 3F(1)(b)) provides that a person is taken to act intentionally with respect to a circumstance if the person means it to exist or occur or knows that it will probably exist or probably occur.

ISSUES FOR CONSIDERATION

1. Should a mental element "intention" or "purpose" be defined in the General Part at all?
2. If a term is to be defined should it be "intention" rather than "purpose"?
3. Should the concept of "intention" include the concepts of knowledge as well as purpose?
4. Should the concept of "intention" include recklessness or should recklessness be a distinct mental element?

RECKLESSNESS

THE PRESENT LAW

Recklessness is found in the Criminal Code in such crimes as murder and the definition of "wilfully causing an event to occur" in s. 429(2) of the Code. It is nowhere defined but is generally held to consist in persisting in conduct in the face of the possibility that the conduct will bring about a result prohibited by law despite awareness of the risk that this will be the result of one's conduct.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that a provision be included in the General Part that to commit a crime recklessly an accused must act purposely as to the conduct specified by the definition of the crime and recklessly as to the consequences, if any, so specified and as to the circumstances, whether specified or not, and that acting recklessly as to consequences or circumstances means being conscious, when acting, that such consequences will probably result or that such circumstances will probably obtain.

This proposal has the advantage of analyzing the elements of a crime. It has a disadvantage of complexity.

Recklessness could be defined in terms of consciously taking a risk, which in the circumstances known to the accused, is highly unreasonable to take. The advantage of such a definition is to recognize that recklessness involves questions of reasonableness as well as probability - to point a loaded gun at another would generally be considered reckless even though there may be only a small chance of its going off. The disadvantage is the uncertainty resulting from the use of the value-laden term "unreasonable".

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 22) provides that a person is reckless as to any consequence or circumstance if the person does or omits to do the act knowing or believing that there is a risk that the consequence will result or that the circumstance exists or will exist and that this risk is unreasonable to take.

The English Law Commission's Draft Code (ss. 18 (c)) provides that a person acts recklessly with respect to a circumstance when he or she is aware of a risk that exists or will exist and with respect to a result when he or she is aware of a risk that will occur.

The American Law Institute's Model Penal Code § 2.02 (2) (c) provides that a person acts recklessly with respect to a material element of an offence when he or she consciously disregards a substantial and unjustifiable risk that the material

element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him or her, disregarding it involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

The Australian Draft Bill (s. 3F(1)(c)) provides that a person is taken to act recklessly with respect to a circumstance if the person is aware of a risk that it exists or will exist and in the circumstances known to the person, it is unreasonable to take the risk.

ISSUES FOR CONSIDERATION

1. If recklessness is a separate mental state, what should the definition of recklessness be?
2. Should the definition of "recklessness" require that the risk taken be substantial and unjustifiable or unreasonable in the circumstances?

NEGLIGENCE

THE PRESENT LAW

Criminal negligence is defined in s. 219 of the Criminal Code as conduct showing "wanton or reckless disregard for the lives or safety of others". Though this implies that criminal negligence means recklessness, it has been interpreted by the courts as meaning that the conduct must show a marked departure from the standard of the reasonable person.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that the General Part contain a provision that a person is negligent as to conduct, circumstances or consequences if it constitutes a marked departure from the ordinary standard of reasonable care of a prudent person engaging in such conduct, to take the risk. It does not matter whether the person was aware that the circumstances would obtain or consequences would result.

The advantage of the Commission's recommended formulation is precision of analysis into the different elements of crime and adoption of current case law interpretation. The obvious disadvantage is complexity.

The Working Group on the General Part recommended that the test for negligence be an objective one and that the definition of negligence be one of a "marked and substantial departure" or "marked departure from the standard of care of the reasonable person".

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 24) provides that a person is negligent in respect of any act if that act is in the circumstances a very serious deviation from the standard of care expected of a reasonable person.

The English Law Commission's Draft Code does not include negligence as one of its categories of fault.

The American Law Institute's Model Penal Code § 2.02 (2) (d) provides that a person acts negligently with respect to a material element of an offence when he or she should be aware of a substantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that the actor's failure to perceive it involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

The Australian Draft Bill (s. 3F(1)(d)) provides that a person is taken to act negligently with respect to a circumstance if the person's behaviour with respect to

RULE: GREATER CULPABILITY SATISFIES LESSER

THE PRINCIPLE

A person blamed for acting with one kind of culpability, e.g. negligence, can't exonerate himself by showing that in fact he acted with some higher level of culpability, e.g. recklessness or intent.

THE RATIONALE

A person open to blame can't exonerate himself by pleading factors that make the situation not better but worse.

THE PRESENT LAW

There is no provision on this matter in the Criminal Code. However, some basically intention crimes like murder, include reckless and negligence crimes like manslaughter and causing death by criminal negligence. Charged with the former, therefore, an accused may in appropriate circumstances be convicted of the latter. Hence, if when charged with the latter he shows that in fact he committed the former, he can still be convicted of the latter.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that a provision be included in the General Part that where a crime requires negligence, a person may also be convicted for that crime if the evidence shows that the person acted purposely or recklessly. Where the crime requires recklessness, the person may also be convicted if the evidence shows the person acted purposely or intentionally.

The advantage of placing such a provision in the Code is to make explicit a rule not articulated in the Criminal Code. The disadvantage is redundancy in that the rule follows from common sense.

OTHER JURISDICTIONS

The New Zealand Crimes Bill does not have a residual rule.

The Australian Draft Bill provides that the requirement of any fault element is satisfied by proof of a greater degree of fault.

the circumstance is a very serious deviation from the standard of care that would be expected of a reasonable person.

ISSUES FOR CONSIDERATION

1. Should there be a definition of the mental state of negligence in the General Part? If so, what should the definition of that mental state be?
2. Should the definition be a "marked departure from the ordinary standard of care used by a reasonably prudent person"?
3. Should the definition have a qualification that the standard should be a reasonably prudent person with the a number of the characteristics of the accused such as age, intelligence, or physical capacity.

RULE: GREATER CULPABILITY SATISFIES LESSER

THE PRINCIPLE

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THE RATIONALE

A person open to blame can't exonerate himself by pleading factors that make the situation not better but worse.

THE PRESENT LAW

There is no provision on this matter in the Criminal Code. However, some basically intention crimes like murder, include reckless and negligence crimes like manslaughter and causing death by criminal negligence. Charged with the former, therefore, an accused may in appropriate circumstances be convicted of the latter. Hence, if when charged with the latter he shows that in fact he committed the former, he can still be convicted of the latter.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that a provision be included in the General Part that where a crime requires negligence, a person may also be convicted for that crime if the evidence shows that the person acted purposely or recklessly. Where the crime requires recklessness, the person may also be convicted if the evidence shows the person acted purposely or intentionally.

The advantage of placing such a provision in the Code is to make explicit a rule not articulated in the Criminal Code. The disadvantage is redundancy in that the rule follows from common sense.

OTHER JURISDICTIONS

The New Zealand Crimes Bill does not have a residual rule.

The Australian Draft Bill provides that the requirement of any fault element is satisfied by proof of a greater degree of fault.

ISSUES FOR CONSIDERATION

1. Should there be a such residual rule as to mental elements in the General Part?
2. If so, what should the residual mental element be?

WILFUL BLINDNESS

THE PRINCIPLE

Wilful blindness is equivalent to knowledge.

THE RATIONALE

A person who suspects a fact, realises its probability but refrains from finding out because he wants to be able to deny knowledge is as blameworthy as one who actually knows it to be true - he almost knows and he intends to cheat the administration of justice.

THE PRESENT LAW

The rule against wilful blindness has been a source of controversy in recent years. It differs from recklessness as follows. Recklessness requires actual knowledge of a risk and subsequent persistence in the face of it, whereas wilful blindness consists in awareness of a need for some inquiry into a risk together with refusal to make such inquiry due to a desire not to know the truth.

The concept is used to convert an awareness of a possibility into certain knowledge.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that no special rule be placed in the General Part about wilful blindness but recommended that those labouring under mistake of fact due to their own recklessness or negligence have no defence to crimes of either recklessness or negligence respectively. The advantage of this approach is to avoid special provisions dealing with an area that can be dealt with equally well using more general principles. The disadvantage is the inclusion of arbitrary specific rules.

The further disadvantage is that the above strategy will not apply to commission of crimes that require purpose or intention, and further that it draws no distinction between wilful blindness on the one hand and recklessness and negligence on the other. One alternative to the Commission's approach may be to include a provision that where an accused suspects that certain facts exist but abstains from ascertaining them, any resulting mistake of fact is no excuse. The advantage of such a provision would be that this reflects criminal law tradition and

highlights the distinction between the concepts of wilful blindness and those of recklessness and negligence.

The Working Group on the General Part recommended that the the General Part contain a specific provision addressing wilful blindness.

The Federal-Provincial Working Group on Homicide recommended that wilful blindness be retained and apply where the offender had a subjective awareness of facts which in his or her own subjective state of mind made an enquiry as to further facts relevant and the offender wilfully decided to be blind to such facts or wilfully declined to make reasonable inquiries about them.

OTHER JURISDICTIONS

The New Zealand Crimes Bill does not have a provision on the General Part.

The English Law Commission's Draft Code (s. 18 (a)) provides that a person acts "knowingly" with respect to a circumstance not only when he is aware that it exists or will exist, but also when he avoids taking steps that might confirm his belief that it exists or will exist.

The American Law Institute's Model Penal Code § 2.02 (7) provides that when knowledge of the existence of a particular fact is an element of an offence, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

ISSUES FOR CONSIDERATION

1. Should there be a explicit provision in the General Part dealing with wilful blindness?
2. If not, should there be a provision like that recommended by the Law Reform Commission that those labouring under mistake of fact due to their own recklessness or negligence have no defence to crimes of either recklessness or negligence respectively?

CONSENT TO DEATH: NO DEFENCE

THE PRINCIPLE

It is no defence to a charge of murder that the victim consented to be killed.

THE RATIONALE

Life is of such value that its taking cannot be sanctioned by the victim but only by the state.

THE PRESENT LAW

Although the victim's lack of consent may or may not be an element of crimes of homicide or of unlawfully causing bodily harm, s.14 of the Criminal Code contains a provision to the effect that no person is entitled to consent to have death inflicted upon himself or herself and that such consent does not affect the criminal responsibility of any person who inflicts death.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended eliminating this provision in a new General Part. The advantage is the elimination of a provision that is unduly narrow insofar as it deals only with homicide and not with unlawful harm. The disadvantage is that it leaves the present legal position unchanged and makes no provision for mercy-killing.

One alternative which would have the effect of imposing an even more restrictive rule would be to provide that consent of the victim is no defence to either homicide or unlawfully causing bodily harm.

If instead the intention is to permit consent to be defence to a killing, this would have to be made explicit in the General Part along with the rules attendant the giving of such consent.

The Working Group made no recommendation on this issue. The Federal-Provincial Working Group recommended that special further study be made of euthanasia, aiding suicide, and infanticide. The Law Reform Commission has already produced a Working Paper and Report to Parliament on this subject.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 43) provides that the consent of a person killed does not protect any party to the killing from criminal responsibility.

The English Law Commission's Draft Code has no provision regarding consent to death.

The American Law Institute's Model Penal Code makes no express provision concerning whether consent to death is an excuse. Instead, it § 2.11 provides that consent to bodily harm may be a defence so long as the harm consented to is not serious. Thus by implication, consent to death will not afford a killer a defence.

ISSUES FOR CONSIDERATION

1. Should this provision be kept in a new General Part or should the issue of consent to the infliction of bodily injury and/or death be dealt with in specific sections of the Code?

CORPORATE LIABILITY

THE PRINCIPLE

Corporations should be liable for their wrongdoing as are natural persons.

THE RATIONALE

Corporations are equally capable as natural persons of causing wrongful harm and justice requires that they be held criminally responsible.

THE PRESENT LAW

S.2 of the Criminal Code provides that the terms "everyone", "person", "owner" and similar expressions include bodies corporate, but it leaves to case law the task of working out rules to determine when a body corporate is liable for committing an offence. According to the case law, a corporation is criminally responsible for actions done by those forming its "directing mind" acting within the scope of their authority. Such responsibility does not depend on formal delegation, express authorization by the board of directors or even awareness on their part. The corporation will not, however, be responsible for acts committed totally in fraud of the corporation or intended for the exclusive benefit of the directing mind itself.

The degree of involvement necessary to constitute a directing mind is to be determined on the facts of each case, but the courts have been prepared to find that the directing mind may reside in such low-level officials as sales managers or accountants.

CANADIAN RECOMMENDATIONS

The Law Reform Commission was divided on this issue. The majority recommended that a provision should be placed in the General Part that a corporation should be liable for conduct committed on its behalf by its directors, officers, or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy and further that it should be liable for crimes of negligence even if no director, officer or employee is individually liable for the same offence.

The advantage of such a provision would be to codify the law on corporate liability and permit liability for negligence resulting from organizational process where no individual is necessarily liable. The disadvantage is that it fails to attach criminal liability for purpose and recklessness crimes where the wrongdoing results from organizational process.

The minority recommended that a corporation should be criminally responsible for conduct committed on its behalf by its directors, officers or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy even if no director, officer or employee is individually liable for the same offence.

The advantage of this version of the provision is to allow liability for organizational wrongdoing in purpose and recklessness crimes as well as in crimes of negligence. The disadvantage is that this still fails to deal with situations where the corporation acquiesces in employee wrongdoing which is unauthorized but which benefits the corporation.

An alternative would be to include a further provision imposing liability on a corporation that knows of the action of its officer or employee, stands to benefit from it and fails to repudiate it. The advantage of such a provision would be to prevent corporations from conniving at and thereby benefiting from the wrongdoing of its employees. Even with this further provision, however, the criminal law would still not deal with wrongdoing by unincorporated bodies which may be as large, wealthy and powerful as their incorporated counterparts.

This could be provided for by widening the provisions to impose collective liability in appropriate circumstances on all business structures, e.g. partnerships or joint ventures. The advantage of this additional provision is establishing a general principle of group liability to replace the present arbitrary discrimination between incorporated and unincorporated bodies. The disadvantage may be the political repercussions of applying criminal liability under this principle to trade unions.

The Working Group on the General Part recommended that the criminal liability of corporations be retained. Further it recommended that a corporation be criminally liable for all crimes of negligence where the individuals acted under the apparent authority of the corporation unless the corporation can show that it took all reasonable steps to prevent the commission of the crime. This proposal is less restrictive than that of the LRC and better reflects today's corporate structure and functioning.

The Canadian Association of Chiefs of Police recommended that any new provision on corporate liability impose create a positive "policing" duty on an employer to prevent the continuation of a crime which is known to him or her.

OTHER JURISDICTIONS

The New Zealand Crimes Bill does not make any provision as such regarding corporate liability.

The English Law Commission's Draft Code (s. 30) provides that a corporation may be guilty as either a principal or an accessory of an offence if one of its controlling officers, acting within the scope of his or her duties and with the fault required is concerned in the offence. The Draft Code defines a controlling officer as being a person participating in the control of the corporation in the capacity of a director, manager, secretary or other similar officer. Furthermore, a controlling

officer is concerned in an offence if he or she does, procures, assists, encourages or fails to prevent the acts specified for the offence.

The American Law Institute's Model Penal Code § 2.07 provides that both a corporation and an unincorporated association may be convicted of an offence in one of two ways. First, if the offence is a violation or the offence is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations or unincorporated associations plainly appears and the conduct is performed by an agent of the corporation or association acting in behalf of the corporation or association within the scope of his or her employment, except that if the law defining the offence designates the agents for whose conduct the corporation or association is accountable or the circumstances under which it is accountable, such provisions shall apply. A second situation creating criminal liability for a corporation or association arises when the offence consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law.

A third means by which criminal liability may arise but only for a corporation is if the commission of the offence was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his or her office or employment.

The Australian Draft Bill (s. 4BA) provides that in relation to offences not involving fault where the offence is stated in terms that are capable of applying to the corporation as well as to the director, servant or agent, the latter's conduct if acting within the scope of his or her office, employment or engagement and, where relevant, state of mind, are to be attributed to the body corporate.

In relation to other offences, conduct engaged in by a controlling officer of a corporation acting within the scope of his or her office, employment or engagement and, where relevant, state of mind would be attributed to the corporation. Conduct engaged in by any director, servant or agent of a corporation acting within the scope of his or her office, employment or engagement and, where relevant, the state of mind of such person would be attributed to the corporation if the corporation failed to take measures that, in the circumstances, were appropriate to prevent, or reduce the likelihood of, the commission of the offence. There would be a defence that the corporation had taken measures appropriate in the circumstances to prevent, or reduce the likelihood of, the commission of the offence.

In relation to any offence, where a corporation has authorized a person to communicate to other persons on its behalf or has conducted itself so as to give other persons reason to believe that a person is authorized by the corporation to so communicate in relation to a matter, the conduct of this person by way of communication in relation to the matter and, where relevant, the state of mind of the person in making that communication, are to be attributed to the corporation.

ISSUES FOR CONSIDERATION

1. Should a provision be placed in the General Part that would make a corporation liable for conduct on its behalf by either a director, officer, or employee acting within the scope of his or her authority and identifiable as a person with authority over the formulation or implementation of corporate policy?
2. Should a corporation be liable for crimes of negligence even if no director, officer, or employee would be individually liable for the crime?
3. In accordance with the view of the minority of the Law Reform Commission should a corporation also be liable for crimes the mental state for which is intention or recklessness even if no individual director, officer, or employee would be liable? Should it only be so liable if it knew of the action if its director, officer, or employee, stood to benefit from the action, and did not repudiate it?
4. Would a better formulation of the principle of corporate liability be as proposed by the Working Group, namely, that a corporation be criminally liable for all crimes including crimes of negligence where the individuals acted upon the apparent authority of the corporation unless the corporation can show that it took all reasonable steps to prevent the commission of the crime?
5. Should whatever provisions which are adopted also apply to unincorporated bodies?

CAUSATION

THE PRINCIPLE

No one is criminally liable for harm without in some way causing that harm.

THE RATIONALE

People should only be punished if they are to blame and not for things beyond their control which they did not cause.

THE PRESENT LAW

Some offences in the Criminal Code are in part defined by certain consequences which follow an act. For example, the consequence penalized in homicide is death; in certain forms of aggravated assault, bodily harm; and in wilful damage to property, damage.

Generally, an accused is said to have caused harm if it would not have resulted without his or her conduct. That is, had the accused not behaved in the manner that he or she did, the harm would not have occurred. In the rare case where more than one person was sufficient to cause the harm, the case must be decided on the facts using the principle that one of the individuals must have caused the harm.

The Criminal Code makes special provisions under s. 222 for causation in the context of culpable homicide. An accused will only be held criminally responsible for the death of another person if he or she causes the death of that person either directly or indirectly regardless of the means.

For causation to be made out, the accused need only have substantially contributed to the death. Hence it is no defence that the death could have been prevented by resort to proper means, that its immediate cause was the administration of proper or improper treatment applied in good faith, that it resulted partly from the victim's own unforeseeable characteristics - in law you take your victim as you find him or her - or that it was merely accelerated by the act of the accused. Moreover, an accused will even be responsible for another's death if he or she causes that other, by threats or fear of violence or deception to do anything that causes his or her death.

An accused is not criminally liable, however, for causing another's death by any influence of the mind alone unless that other is a child or a sick person and the accused causes the death by wilfully frightening that other.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that a provision be placed in the General Part which states that a person causes a result when his or her conduct substantially contributes to it and no other unforeseen and unforeseeable cause supersedes that conduct. The advantage of placing such a general provision in the Code is to replace specific provisions by a general principle thereby making the Code comprehensive. Such a provision would also clarify the meaning of "cause". The disadvantage of inserting such a general provision in the General Part is that it attempts, without adding much clarity, to give a general rule to deal with a multiplicity of difficult questions of fact, logic and value. The alternative would be to provide for special rules about causation in the special part offences, as does the present Code. The disadvantage of leaving it to the Special Part is that causation questions can arise with respect to any result offence and not just homicide. Special causation rules are either reiterations of common sense or else arbitrary departures from it.

The Working Group on the General Part recommended that there be no general rule about causation but rather the question of whether the accused caused the harm be left to individual cases.

The Canadian Association of Chiefs of Police recommended that further inquiry be made into two specific areas concerning causation. First, does the word "substantially" impose a burden on the Crown that is incapable of proper definition? Second, what is the meaning of the phrase "no other unforeseen and unforeseeable cause supersedes it"? Does the occurrence of an "unforeseen and unforeseeable cause" therefore operate to remove criminal liability where it might have existed but for that cause?

The Federal-Provincial Working Group on Homicide recommended the following definition of causation specifically as it relates to causing death : "Everyone causes death, when his or her conduct significantly contributes to death, notwithstanding that there may be other significant contributory factors and that such conduct may not alone have caused death."

OTHER JURISDICTIONS

The New Zealand Crimes Bill has no express separate provision on causation, preferring instead to address the issue as it arises in specific offences.

The English Law Commission's Draft Code (s. 17) provides that an individual causes an event when he or she does an act which makes a more than negligible contribution to its occurrence or he or she omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence. This rule does not apply when there is an intervening cause which the person neither foresaw nor reasonably could have foreseen and which is the immediate and sufficient cause of the result. Moreover, this provision only applies to the actual committers of the act and does not serve to exculpate accessories.

The American Law Institute's Model Penal Code § 2.03 provides that conduct is the cause of a result when it is an antecedent but for which the result in question would not have occurred and when the relationship between the conduct and the result satisfies any additional causal requirements imposed by the Code or by the law defining the offence.

ISSUES FOR CONSIDERATION

1. Should there be a general provision dealing with causation in the General Part?
2. If yes, should it include requirement as to the quantification of the accused's contribution? Should it include any limitation with respect to the foreseeability of intervening causes? Should it apply equally to those actually committing the offences and those who aid them?
3. Should any codified rule deal specifically with results caused by a commission by omission?

PHYSICAL COMPULSION

THE PRINCIPLE

People should not be punished for actions done as a result of physical compulsion imposed on them by others.

THE RATIONALE

No one can be blamed for acts beyond his or her control. Acts done under compulsion are outside the person's control.

THE PRESENT LAW

The Criminal Code has no provision regarding physical compulsion but at common law an individual is not criminally responsible for any acts which are the result of physical compulsion by another. For example, if a person has a knife and another forcibly takes her arm and makes her stab a third person, the second person commits a crime but the first commits no crime.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that the General Part include a provision to the effect that no one is liable for conduct which is beyond the person's control by reason of physical compulsion by another but this should not apply to crimes that can be committed by negligence where the lack of control is due to the defendant's negligence.

Such a provision may be redundant once the criminal law has recognized the requirement of a culpable act since cases of compulsion can then be dealt with through the general provisions on conduct and state of mind.

The Working Group on the General Part recommended that there be no general provision on compulsion in the General Part; rather that the common law should be relied upon.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 19) provides that a person is not criminally responsible for doing any act involuntarily.

The English Law Commission's Draft Code s. 33(1) has no provision concerning compulsion.

The American Law Institute's Model Penal Code § 2.01 (2) (b) provides that an act caused by physical compulsion is not a voluntary act in that it is a "bodily movement that ... is not a product of the effort or determination of the actor". Thus, as the act is not voluntary, the person cannot be guilty of the offence.

The Australian Draft Bill (s. 3H(2)(a)) provides that an act is involuntary if it was caused by the application of physical force by another person.

ISSUES FOR CONSIDERATION

1. Should there be a provision in the General Part on physical compulsion?
2. Should that provision be that no one is liable for conduct which is beyond the person's control by reason of physical compulsion by another but this would not apply to crimes of negligence where the lack of control is due to the defendant's negligence?

IMPOSSIBILITY

THE PRINCIPLE

People should not be convicted and punished for failing to do things which they could not possibly do.

THE RATIONALE

No one can be blamed or held responsible for not doing that which is physically impossible for him or her to do - no one can be required to do the impossible.

THE PRESENT LAW

The Criminal Code says nothing about impossibility, but at common law an omission to do the impossible is, because of its involuntariness, no crime unless the act required was not physically impossible but merely very inconvenient or undesirable or unless the accused was himself or herself responsible for the impossibility.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended that the General Part contain a provision to the effect that no one is liable for omitting to perform an act that is physically impossible to perform but that this shall not apply where the impossibility was due to the accused's own negligence and the crime charged can be committed by negligence.

The Working Group recommended instead that there be no general provision as to impossibility but that reliance instead be placed on the common law.

OTHER JURISDICTIONS

Both the New Zealand Crimes Bill (s. 19) and the English Law Commission's Draft Code (ss. 33(2)) provide that a person shall not be criminally responsible for an omission if his or her failure to act was a result of a physical incapacity to do so. However, this will not be the case where the accused became physically incapacitated as a result of intoxication.

The American Law Institute's Model Penal Code § 2.01(1) provides under the general rule governing liability for conduct that a person is not liable for an omission to perform an act of which he or she is physically incapable of performing.

The Australian Draft Bill (s. 3H(3)) provides that an omission is made involuntarily if the person was physically incapable of doing the required act and the incapacity was not a result of an act done or omission made by the person with the fault required for the offence or a result of voluntary intoxication.

ISSUES FOR CONSIDERATION

1. Should there be a provision in the General Part on impossibility?
2. Should that provision be that no one is liable for omitting to perform an act that it is physically impossible to perform but that this rule will not apply where the crime is one of negligence and the impossibility was due to the accused's own negligence?

AUTOMATISM

THE PRINCIPLE

People should not be convicted and punished for involuntary behaviour.

THE RATIONALE

No one can be blamed for acts or omissions that are involuntary, since these are outside his or her control, except to the extent that the person is to blame for letting himself or herself get into a condition where he or she is likely to behave involuntarily.

THE PRESENT LAW

The Criminal Code has no provisions on automatism, but according to the case law an accused who commits the elements of an offence in an "automatic" state is not criminally responsible but has a defence of automatism. This defence is made out if the accused acted while in a dissociative state caused by external factors. The courts have recognized that such external factors may include the following: a physical blow, carbon monoxide poisoning, stroke, pneumonia, hypoglycaemia, sleepwalking or involuntary intoxication.

An accused will not be absolved of criminal responsibility, however, unless the external factor was such that an ordinary person would have reacted in the same way. In other words, the dissociative state must not arise from some subjective weakness of the accused himself. Nor must it arise from voluntary consumption of alcohol or drugs or from a disease of the mind. In these cases, the accused can only rely on a defence of either intoxication or insanity respectively.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that a provision be placed in the General Part to the effect that no one is liable for conduct which is beyond his or her control by reason of factors, other than loss of temper or mental disorder, which would similarly affect an ordinary person in the circumstances but that this defence does not apply to a crime that can be committed by negligence where the lack of control is due to the defendant's negligence.

Such a provision would make the Code more comprehensive by placing in it a defence found only at common law. The defence as proposed, however, is potentially a very broad one and it is uncertain what it includes. Because it relies on

an objective standard, it departs from the principle that no one should be liable for conduct beyond his or her own control.

One possible alternative formulation would be to restrict the defence to conduct arising from external factors. One advantage of this would be to exclude from the defence cases of automatism due to the accused's own fault, e.g. voluntary intoxication. It would, however, be a further departure from the principle that lack of control exonerates an individual from liability.

The Working Group on the General Part recommended that the defence of automatism be codified. The Canadian Association of Chiefs of Police believed that the L.R.C. provision on automatism is too broad and may as a result allow an unacceptably broad extension of the defence of provocation causing the accused to act in an automatic state. The defence, it is feared, could be applicable to all offences - a situation which is considerably broader than that which exists today whereby a successful defence of provocation will, at best, reduce murder to manslaughter.

OTHER JURISDICTIONS

Both the New Zealand Crimes Bill (ss. 19 (2)) and the English Law Commission's Draft Code (ss. 33(1)) provide that a person does an act involuntarily and is therefore not criminally responsible for it if the act is the result of a reflex, spasm, or convulsion or is done while that person is asleep or unconscious.

The American Law Institute's Model Penal Code § 2.01 (2) provides for automatism under its general rule governing conduct. A person acting in an automatic state is clearly not acting voluntarily and therefore cannot be guilty of the offence with which he or she is charged.

The Australian Draft Bill (ss. 3H(2)(b),(c)) provides that an act is involuntary if it was a result of a spasm or convulsion or the act was done while the person was in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) that deprived the person of control of the act.

ISSUES FOR CONSIDERATION

1. Should there be a provision in the General Part that no one is liable for conduct which is beyond his or her control by reason of factors other than loss of temper or mental disorder which would similarly affect an ordinary person in the circumstances?
2. Should this defence apply to a crime committed by negligence where the lack of control is due to the defendant's negligence?

MISTAKE OF FACT

THE PRINCIPLE

People should not be convicted and punished for doing acts which, in the circumstances as they perceive them, are innocent.

THE RATIONALE

In fairness people can only be expected to act in the light of what they know, so that no one can be blamed for acts which are in fact wrongful but which seem innocent because of the ignorance of the accused as to the relevant facts or circumstances, unless such ignorance results from a deliberate disregard of the obvious.

THE PRESENT LAW

The Criminal Code has no provisions on mistake of fact, but according to the case law an accused may be absolved of criminal liability for an act if he or she is mistaken as to one of the constituent elements of the offence charged, since in such a case the mistake negatives the requisite mental element of the offence.

If the offence requires proof that an accused actually intended to commit the act, the mistake will exonerate so long as the accused's mistaken belief was honestly held. Mistake of fact will not always exonerate, however. If the mistake leads the accused to think he is committing some other offence, it won't always exonerate. Nor will it if it results from self-induced intoxication.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that the General Part include a provision that no one is liable for a crime committed through lack of knowledge which is due to mistake or ignorance as to the relevant circumstances. If, on the facts as he believed them, an accused would have committed an included crime or a crime different from that charged, he shall be liable for committing that included crime or attempting that different crime. If the lack of knowledge is due to recklessness or negligence and the crime charged can be committed by recklessness or negligence, the accused will still be guilty of that crime.

The advantage of including such a provision is an explicit articulation of what is at present left to case law. It provides a clear approach to the problems posed by those whose mistake makes them believe they are committing a different crime and by those whose mistake arises through their own fault. Such a provision may be

strictly speaking unnecessary since it really relates to lack of culpability and is therefore covered by the culpability provisions. The problem of the unreasonable or self-induced mistake could be addressed through new provisions on recklessness or a provision on wilful blindness. Special provision might be made for mistakes induced by intoxication.

The Working Group on the General Part recommended that any provision on mistake of fact be included in the general provision on culpability.

The Federal-Provincial Working Group on Homicide recommended that: An honest although mistaken belief, believed at the relevant time, as to a set of material facts which, if true, would not constitute the offence charged is a defence to that charge. Furthermore, where on the facts as the accused believed them to be he would have committed another homicide crime, he or she shall be liable for such crime. However, the defence does not apply to homicide crimes that are committed by recklessness or negligence where the mistake is due to the accused's recklessness or negligence.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 25) provides that a person is not criminally responsible for an offence if at the time of the act or omission, the person mistakenly believes in the existence of any fact or circumstance that, if it existed, would negate the requisite mental element. If, however, the mistake is attributable to the person's own recklessness then he or she will not be exonerated. Nor will an accused escape liability if the mistake is caused by intoxication if the person charged had already resolved before becoming intoxicated to commit the act or consumed the intoxicant to strengthen his or her resolve.

The English Law Commission's Draft Code has no express provision concerning mistake of fact. Instead, an accused may be exonerated as a result of the failure of the Crown to prove the essential elements of an offence.

The American Law Institute's Model Penal Code § 2.04 provides that ignorance or mistake as to a matter of fact is a defence if the ignorance or mistake negatives the purpose knowledge, belief, recklessness or negligence required to establish a material element of the offence or if the law provides that the state of mind established by such ignorance or mistake constitutes a defence. This defence does not apply, however, if the accused would be guilty of another offence had the situation been as he or she had supposed.

The Australian Draft Bill (s. 3M(1)) provides that where a person is charged with an offence involving a fault element and the person acted under a mistaken belief as to the existence or non-existence of facts and if the facts had been as the person believed them to be the fault element would be negated, the person is not, to be found guilty of the offence. However, if the fault in relation to the offence referred to above is recklessness or negligence, that subsection does not apply to a mistaken belief that was held recklessly or negligently.

ISSUES FOR CONSIDERATION

1. Should the General Part include a provision that no one is liable for a crime if committed through lack of knowledge which is due to a mistake or ignorance as to the relevant circumstances?
2. Should there be a provision that if on the facts as he believed them, an accused would have committed an included crime or crime different from that charged, he or she would be liable for committing that included crime or attempting that different crime?
3. Should there be a limitation that if the accused's knowledge is due to recklessness or negligence and the crime can be committed recklessly or negligently, then the accused would still be guilty of that crime?
4. Should lack of knowledge due to mistake or ignorance be a defence when it is caused by intoxication?

UNFITNESS TO PLEAD

THE PRINCIPLE

A trial for a serious offence can not be held in the absence of the accused.

THE RATIONALE

If the accused is unable, through mental disorder, to understand the proceedings against him, or to participate in his defence, he or she is effectively absent from the proceedings.

THE PRESENT LAW

The Criminal Code deals with unfitness to plead in ss. 615-617. S.615 provides that at any time before verdict, where there appears sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his or her defence, the court may direct an issue to be tried whether the accused is then unfit to stand trial. Although ss. 615-17 contain provisions regarding the procedure to be followed in such cases nowhere does the Code set out criteria for determining fitness. Nor is the case law clear on what directions should be given to the jury when they are asked to determine this issue.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended that the following provision be included in the General Part:

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.

This statement sets out the basic principle regarding unfitness to stand trial, makes it clear what the criteria for determining fitness are and extends the application of the rule to every stage of the proceedings (not just "at any time before verdict", as stated in the present S. 615(1)).

The Department of Justice has recommended the following definition:

Unfit to Stand Trial

"unfit to stand trial" means, the inability of the accused on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or the inability to instruct counsel to do so, and in particular, the inability of the accused on account of mental disorder to

- (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel.

This definition is at once broader and narrower than that offered by the Commission. It is broader in that inability to understand the nature or object of the proceedings, or the possible consequences of the proceedings, or to communicate with counsel, are only examples of ways in which the accused may be unfit to plead on account of mental disorder. It is narrower in that it restricts the issue of unfitness to "any stage of the proceedings before a verdict is rendered". The reason for this limitation is that when the verdict has been delivered there is not as much need for the accused to be fit to plead since all evidence is in and has been assessed by this time. If the time limit for raising the issue of fitness is extended beyond the verdict, it has been suggested that it may be used as a ruse to delay the proceedings in the event of an unsatisfactory verdict.

The existing rule also applies only before the verdict, and there do not appear to have been any practical problems with this limitation.

The Working Group on the General Part has indicated that it prefers the Department of Justice's provision regarding unfitness to plead.

OTHER JURISDICTIONS

Neither the New Zealand Crimes Bill nor the English Law Commission's Draft Code has a provision concerning unfitness to plead.

The American Law Institute's Model Penal Code § 4.04 provides that no person who, as a result of mental disease or defect, lacks the capacity to understand the proceedings against him or her or to assist in his or her own defence shall be tried, convicted or sentenced for the commission of an offence so long as such incapacity endures.

The Australian Draft Bill (s. 20ACA(1)) provides that a person is unfit to stand trial for an offence if it appears, for any reason, that the person is so incapable of understanding the proceedings at the trial as to be unable to make a proper defence.

ISSUES FOR CONSIDERATION

1. Should there be a general provision on unfitness in the General Part or should it be instead placed in the procedural sections of the Code?

2. If in the General Part, what should the elements of such a provision be?

IMMATURITY

THE PRINCIPLE

Persons too young to be responsible moral agents cannot be criminally liable.

THE RATIONALE

A person below the age at which one can appreciate the requirements of morality and law can't fairly be held criminally liable. While the age in question will vary from person to person, in the interests of the practicality of law enforcement some standard age must be selected. After careful consideration of the relevant research Parliament selected twelve as the most suitable age of criminal responsibility.

THE PRESENT LAW

S. 13 of the Criminal Code provides that an accused shall be excused from criminal liability for any act or omission if he or she is under the age of twelve years.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended the inclusion in the General Part of a provision that no one is liable for conduct committed when he was under twelve years of age.

The Working Group on the General Part recommended that s. 13 of the Criminal Code be retained but some members felt that it might be better located in the Application section of the General Part rather than in the Defences section.

The Canadian Association of Chiefs of Police believes that many twelve-year-old children are quite mature and that the provision exculpating anyone under the age of twelve years is unnecessarily rigid. The Association recommends that the age be reduced so as to allow greater flexibility in the disposition of young offenders.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 27) provides that a person is not criminally responsible for any act done when under the age of twelve years.

The English Law Commission's Draft Code (s. 32) provides that an individual is protected from criminal responsibility for any offence committed while under the

age of ten years. The Code also provides the same defence for a person under fourteen years of age unless he or she is aware that what he or she does is wrong.

The American Law Institute's Model Penal Code § 4.10 provides that a person shall not be tried for or convicted of an offence if at the time of the conduct charged to constitute the offence, he or she was less than sixteen years of age, in which case the Juvenile Court shall have exclusive jurisdiction. The Code does not, however have a provision similar to that of the LRCC's which absolutely excuses on the basis of immaturity.

The Australian Draft Bill (s. 3P) provides that a person under the age of 10 years cannot be found guilty of an offence. Furthermore, a person who is at least 10 years old but under the age of 14 years cannot be found guilty of an offence unless the person was aware that his or her act constituted an offence or was seriously wrong.

ISSUES FOR CONSIDERATION

1. Should there be a provision regarding immaturity in the General Part? Should it make explicit that a person is excused from criminal liability?
2. Given the fact that Parliament recently enacted the Young Offenders Act is there any reason to reconsider 12 as the age of criminal responsibility ?

CHOICE OF LESSER EVIL

THE PRINCIPLE

No one should be punished for choosing the lesser of two evils in an emergency.

THE RATIONALE

Those who break the law to avert significantly greater harm than that involved in breaking it are not to blame but rather deserve commendation. For example, a person who breaks a window of another's house to save an unconscious child from a fire should not be convicted of mischief.

THE PRESENT LAW

The Criminal Code has no provision on choice of lesser evil.

CANADIAN RECOMMENDATIONS

The Law Reform Commission has recommended that the General Part contain a provision that justifies disobeying the law to avoid immediate harm to persons or immediate and serious damage to property which could not be prevented in any other way and which would outweigh the harm resulting from obeying the law, provided that the harm caused by the disobedience does not cause death or serious bodily harm.

The Working Group did not discuss the issue of the choice of a lesser evil and consequently has no recommendation.

The Canadian Association of Chiefs of Police recommended that any defence of necessity should more closely mirror the common law provision as outlined in a Supreme Court decision in Perka. In particular, the LRC's proposal should be changed so as not to allow the defence to become too lenient. Furthermore, the provision should, according to the Association, place the onus of proof on the person who wishes to rely upon the defence.

OTHER JURISDICTIONS

Neither the New Zealand Crimes Bill nor the English Law Commission's Draft Code have a provision concerning the choice of a lesser evil.

The American Law Institute's Model Penal Code § 3.02 provides that for the justification of choice of a lesser evil to be made out, three criteria must be met. First, the harm sought to be avoided by such conduct must be greater than that sought to be prevented by the law defining the offence charged; secondly, neither the Code nor other law defining the offence may provide exceptions or defences dealing with the specific situation involved; and thirdly, a legislative purpose to exclude the justification claimed cannot otherwise plainly appear.

ISSUES FOR CONSIDERATION

1. Should the General Part contain a provision on choosing between lesser evils?
2. Should the section provide that a person would be justified in disobeying the law to avoid immediate and serious harm to persons or immediate and serious damage to property which outweighs the harm from obeying the law and which could not be prevented in any other way?
3. Should the justification be limited to offences of damage to property?

DEFENCE OF THE PERSON

THE PRINCIPLE

Everyone is justified and therefore does not act unlawfully when using necessary and proportionate force to defend himself or herself against unlawful aggression.

THE RATIONALE

Everyone is entitled to use reasonable force to repel unlawful attacks.

THE PRESENT LAW

An accused's act is justified as self-defence if it is to repel an unlawful assault. Criminal Code ss. 34-37 provide three general categories of self-defence: self-defence against an unprovoked assault, self-defence in case of aggression, and self-defence preventing assault. For the accused's act to be justified, he or she must in all cases use no more force than is reasonable in the circumstances. He or she must also not purposely cause death or grievous bodily harm unless under a reasonable apprehension of his or her own death or grievous bodily harm and in the belief on reasonable and probable grounds that he or she could not otherwise preserve himself or herself from death or grievous bodily harm.

If, however, the situation results from the defender's own unjustifiable assault on the assailant or by his or her own provocation, the requirements for the justification are more stringent. The initial assault must not have been started with intent to cause death or grievous bodily harm. The accused must have tried as far as possible to quit or retract before getting to the stage of being threatened with death or grievous bodily harm. Before this stage he or she must not have tried to kill or inflict grievous bodily harm upon the assailant, and must have acted under a reasonable apprehension of death or grievous bodily harm and in the belief on reasonable grounds that the force used was necessary to preserve himself or herself from death or grievous bodily harm.

A person is justified by s. 37 in using force to defend himself or herself or anyone under his or her protection from assault if that person uses no more force than is necessary to prevent the assault or its repetition and refrains from wilfully inflicting harm which is excessive given the nature of the assault which he or she intended to prevent.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that a provision be put in the General Part that no one is liable for protecting himself or herself or another against unlawful force by using such force as is reasonably necessary to avoid the harm apprehended, but this defence should not be available to anyone using force against a person reasonably identifiable as a peace officer executing a warrant of arrest or anyone present acting under his or her authority.

The advantage of adopting such a provision is the simplification of the present sections of the Code into just one rule and one exception, and adding to it an exception giving special validity to court orders of process and diminishing the risk of violence arising from their enforcement.

The Working Group on the General Part recommended that the provision on defence of the person be expanded so as to include acts or omissions which would otherwise be criminal, for example theft, unlawful confinement, damage to property, possession of a weapon, and omitting to perform a lawful duty but which constitute a reasonable means of defence.

The Canadian Association of Chiefs of Police submits that the suggested provision on self-defence may be problematic as regards the treatment of persons resisting arrest. The Association is concerned that the provision which justifies an accused's use of force to resist an arrest which he or she honestly but unreasonably believes to be unlawful is unreasonably lenient. The Association instead recommends that the provision be amended so as to adopt the proposition that all arrests by the police be presumed to be lawful. This change will have the effect of deterring resistance to arrest regardless of whether or not the individual thinks the arrest is lawful.

The Association is also concerned that the defence will only avail a person who is the victim of force which is actually unlawful. Instead, the Association feels that the provision should include a reasonable apprehension of unlawful force.

The Federal-Provincial Working Group on Homicide recommended that the following provision be included in the Criminal Code regarding homicide:

No one commits an offence of homicide by reason of reasonable conduct including due regard for the safety of innocent persons, that results in death or serious bodily harm, if he or she honestly believed, on reasonable grounds, that the conduct was necessary to prevent imminent serious harm to himself or herself or to any other person.

This provision would take the place of several existing justificatory defences such as compulsion by threats, defence of personal property, defence with claim of right and self-defence in case of aggression. The provision is more general and should therefore clear up the inconsistencies which exist in the present law. A possible disadvantage of such a proposal is that it would eliminate a separate provision concerning the defence of property. This might mean that a person could no longer use force to protect property but only to protect oneself or another.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 41) provides that an individual is justified in using, in self-defence or the defence of another, such force as, in the circumstances that that person believes them to be, it is reasonable to use.

The English Law Commission's Draft Code (s. 44 (1) (c)) provides that a person does not commit an offence by using such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable to protect himself or another from unlawful force or unlawful personal harm.

The American Law Institute's Model Penal Code § 3.04 provides that the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself or herself against the use of unlawful force by such other person on the present occasion. However, the use of force is not justifiable to resist arrest by a police officer, nor is it justifiable to use deadly force in repelling an aggressor unless the actor believes that such force is necessary to protect himself or herself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat.

The Australian Draft Bill (s. 3Y(1)(b)) provides that it is a defence to a prosecution for an offence if the defendant proves that, in the circumstances that existed at the time or that the defendant believed to exist at the time, the relevant act was done using such force as in those circumstances was immediately necessary and reasonable to protect himself or herself or another from unlawful force or unlawful physical injury. However, this defence will not be available to the person in relation to a resulting use of force by the person if the person knew that the force was used against a constable or a person assisting a constable and the constable was acting in the course of his or her duty unless the person believed the force to be immediately necessary to prevent personal harm to himself or herself or to another.

ISSUES FOR CONSIDERATION

1. Should the new provision on defence of the person in the General Part be that no one is liable for protecting himself, herself, or another against force by using such force as is reasonably necessary to avoid the harm apprehended?
2. Should this rule be subject to a limitation that this defence would not be available to someone using force against someone identifiable as a peace officer executing a warrant of arrest or anyone acting under his or her authority?
3. Should the provision be expanded so as to include acts or omissions other than the use of force which are reasonable in defence of the person but which would otherwise be criminal?

PROTECTION OF MOVABLE PROPERTY

THE PRINCIPLE

No one should be punished for protecting his or her belongings from a thief.

THE RATIONALE

Everyone is entitled to use reasonable force against anyone trying unlawfully to take his or her property.

THE PRESENT LAW

The Criminal Code in ss. 38-39 provides how far a person is justified in defending his or her personal property provided the person uses no more force than is reasonable. Everyone in possession of personal property and everyone lawfully assisting that person is justified in preventing a trespasser from taking it or in taking it back from a trespasser who has taken it so long as he or she does not strike the person or cause that person bodily harm. Any trespasser who persists in attempting to keep or take it from the owner or anyone lawfully assisting the owner shall be deemed to commit an assault. But unless the possessor claims to be entitled to assert ownership of the property or is acting under the authority of such a person, the possessor is not justified in defending the property against someone entitled by law to take possession of it.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that a provision be placed in the General Part that no one in peaceable possession of movable property is liable for using such force, provided it does not amount to purposefully killing or seriously harming, as is reasonably necessary to prevent another person from unlawfully taking it or to recover it from another who has just unlawfully taken it. This would clarify and simplify the present provisions.

The provision prohibits the use of deadly or wounding force but it does not extend the defence to provide for situations other than a taking, eg. destruction etc.

The Working Group recommended that any new provision not absolutely exclude the use of deadly force. The group recommended further that the defence be available against damage to or destruction of property as well as taking it. Finally, the group felt that there should be allowance made for defensive acts or omissions other than the use of force.

The Federal-Provincial Working Group on Homicide recommended that neither mistake nor ignorance of the law be an excuse for a person who commits a homicide offence. The group felt that for a crime as serious as homicide, the defence should not be available under any circumstances.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 48) provides that every person who is in lawful possession of any movable property, and every person lawfully assisting that person, is protected from criminal responsibility for using reasonable force to resist an attempt by a trespasser to take possession of that property, or to retake possession of that property from a trespasser. However, the defence is not available to an accused who uses force intended to cause injury.

The English Law Commission's Draft Code (s. 44(1)(e)) does not distinguish between movable and immovable property and provides simply that a person does not commit an offence by using such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable to protect property (whether belonging to himself or another) from unlawful appropriation, destruction or damage.

The American Law Institute's Model Penal Code § 3.06 does not distinguish between movable and immovable property. It provides that the use of force in the protection of property is justifiable if the actor believes that such force is immediately necessary to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property, provided that such land or movable property is, or is believed by the actor to be, in his or her possession or in the possession of another person for whose protection he or she acts.

Force will also be justified to effect an entry or re-entry upon land or to retake tangible movable property, provided that the actor believes that he or the person by whose authority he or she acts or a person from whom he or she or such other person derives title was unlawfully dispossessed of such land or movable property and is entitled to possession. However, in this latter situation, the use of force is justified only if the force is used immediately or on fresh pursuit after such dispossession or the actor believes that the person against whom he or she uses force has no claim of right to the possession of the property and, in the case of land, the circumstances are of such urgency that it would be an exceptional hardship to postpone the entry or re-entry until a court order is obtained.

The Australian Draft Bill (s. 3Y(1)(d)) provides that it is a defence if the defendant proves that, in the circumstances that existed at the time or that the defendant believed to exist at the time, the relevant act was done using such force as in those circumstances was immediately necessary and reasonable to protect any property from unlawful removal, destruction or damage.

ISSUES FOR CONSIDERATION

1. Should the new justification regarding protection of moveable property in the General Part provide that a person in peaceable possession of property may use so much force as is necessary to prevent another from taking it unlawfully or to recover it from another who has just unlawfully taken it?
2. Should there be a limitation on the use of force that its use must not result in death or serious bodily harm?
3. Should such a provision be also available against another who intended to damage or destroy the property and not take it?
4. Should any provision also allow for acts other than the use of force?

PROTECTION OF IMMOVABLE PROPERTY

THE PRINCIPLE

No one is liable for defending his or her house and land.

THE RATIONALE

No one can be faulted for using reasonable force to eject trespassers and repel those trying to seize his or her house and land from him or her.

THE PRESENT LAW

The Criminal Code in ss. 40-42 provides justifications for the defence of immovable property. Anyone in possession of a dwelling-house or other real property and every one lawfully assisting that person or acting under that person's authority is justified in using reasonable force to prevent anyone from trespassing on the property or to remove a trespasser. If the trespasser resists with force, the trespasser shall be deemed to commit an assault without provocation or justification. But everyone lawfully entitled to the possession of a dwelling-house or other real property or anyone acting under his or her authority is justified in entering the property by day and in a peaceable manner to recover it. If the person in possession who has no claim of right assaults that person, the person shall be deemed to commit assault without provocation or justification.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that the General Part include a new provision that those in peaceable possession of immovable property are not liable for using such force less than killing or wounding as is reasonably necessary to prevent another person from entering or to remove trespassers.

As with the provision concerning the protection of movable property, the Working Group on the General Part recommended that the provision not absolutely exclude the use of deadly force. The group recommended further that the defence be available against damage to or destruction of property as well as the taking of it. Finally, the Group felt that there should be allowance made for defensive acts or omissions other than the use of force.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 49) provides that every person who is in lawful possession of a dwellinghouse, and every person lawfully assisting that person, is justified in using such force as may be reasonable, in the circumstances as the person believes them to be, to prevent the forcible breaking and entering of the dwellinghouse. The person(s) is also justified in using as much force as may be reasonable to prevent any person from trespassing on the land or premises or to remove any trespasser. However, the defence will not extend to those persons using force intended to cause injury.

The English Law Commission's Draft Code provides the same defence to persons defending immovable property as to persons defending movable property (see Protection of Movable Property).

The American Law Institute's Model Penal Code provision on immovable property is the same as that for movable property (see Protection of Movable Property).

The Australian Draft Bill (ss. 3Y(1)b), (c)) provides that it is a defence if the defendant proves that, in the circumstances that existed at the time or that the defendant believed to exist at the time, the relevant act was done using such force as was immediately necessary and reasonable to protect any property from unlawful removal, destruction or damage or to prevent or terminate an unlawful trespass to the person or his or her property.

ISSUES FOR CONSIDERATION

1. Should the General Part contain a justification dealing with the defence of property regardless of whether it is movable or immovable?

PROTECTION OF PERSONS ACTING UNDER LEGAL AUTHORITY

THE PRINCIPLE

No one can be punished for doing what he or she is required to do by law.

THE RATIONALE

A person would be in an impossible position if one law required him or her to do something and another forbade the action.

THE PRESENT LAW

The Criminal Code affords no general protection to those acting under legal authority. It does, however, contain one general provision and several specific ones on the lawful use of force in this context. Reasonable use of force is allowed in order to carry out duties required or authorized by law (s.25(1)), to prevent the escape of an accused from arrest (s.25(4)), to prevent the commission of an offence which is likely to cause immediate and serious injury to persons or property and for which there can be arrest without warrant (s.27), to prevent a breach of the peace (s.30) and to suppress a riot (s.33). Force intended to cause death or grievous bodily harm, however, will not be justified except by reasonable belief that it is necessary for the preservation of oneself or another from death or grievous bodily harm. And anyone using excess force in any of these circumstances will be liable for the excess.

There is also a provision (s.25(2)) justifying anyone authorized to execute process in executing in good faith a process which is in some way defective.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommends that a provision be included in the General Part that no one is liable for performing an act authorized by or under federal or provincial statute or for using reasonable force not meant to cause death or serious harm to another. No peace officer is liable for using reasonably necessary force to arrest, recapture or prevent the escape of a suspect or offender.

This provision provides a general rule justifying the performance of legal duties, a general rule subject to one restriction justifying reasonable use of force for such purposes, and a special rule for peace officers. It also removes from the General Part the detailed provisions concerning powers and duties required or authorized by law, which properly belong in the procedural sections of the Code.

The disadvantage of the provision is that by referring to provincial statutes it allows provincial law to act as a defence to a criminal charge under the federal Code.

The Canadian Association of Chiefs of Police is concerned with the LRC's provision regarding persons acting under legal authority because of the absence of a preface which justifies an individual who uses force in good faith and on reasonable and probable grounds but who is innocently mistaken. Thus, an officer may be subject to criminal sanctions even though he or she is behaving in a manner which is, though not statutorily recognized, nonetheless generally accepted as reasonably necessary to the performance of his or her duties. The Association therefore recommended that the present law be preserved insofar as police are more protected than would be the case under the L.R.C. proposal.

The Federal-Provincial Working Group on Homicide recommended that the following provision be placed in the Code:

No peace officer, or other person authorized to assist a peace officer, commits a homicide offence by reason only of reasonable conduct involving due regard for the safety of innocent persons, that results in death or serious bodily harm, if he or she honestly believed, on reasonable grounds, that the conduct was necessary to prevent the commission of the offence, or the escape of any offender, and that such offence or escape subjected any person to the risk of serious harm. However, the peace officer will not be excused if he or she uses force which is intended to cause death or intended to make death likely.

The 1989 Uniform Law Conference passed a resolution that subsection 25(4) be repealed and be replaced by a new provision which would restrict the use of deadly force by a peace officer proceeding lawfully to arrest, with or without warrant, to only as much force as is necessary to prevent an individual from fleeing from a lawful arrest (including force that is likely or intended to cause death) where the use of such force is necessary for the protection of the public from serious bodily harm if the fleeing individual escaped arrest. This resolution followed on the recommendation of the The 1989 Lewis Task Force on Policing and Race Relations (Ontario).

OTHER JURISDICTIONS

The New Zealand Crimes Bill has several provisions concerning behaviour justified by legal authority (ss. 32 - 40). Anyone duly authorized to execute an arrest warrant and anyone assisting him or her is justified in arresting the wrong person provided the arrest was made in good faith and under a reasonable belief. Furthermore, an individual is justified in arresting or aiding in the arrest without warrant anyone seen committing a crime or an act for which there is express provision for arrest without warrant.

A member of the police is justified in arresting any person whom the member believes on reasonable grounds to have committed an offence even though no offence has been committed or the person arrested did not commit the offence. Furthermore, any force used in carrying out the arrests mentioned above must be such force as is reasonably necessary in the circumstances to effect the result.

However, no one other than a member of the police or a person assisting a member of the police may use force that is intended or is likely to cause death or serious bodily harm.

The English Law Commission's Draft Code (ss. 44 (1) (a)) provides that a person does not commit an offence by using such force as, in the circumstances which exist or which he or she believes to exist, is immediately necessary and reasonable to prevent or terminate crime, or to effect or assist in the lawful arrest of an offender or suspected offender or of a person unlawfully at large.

The American Law Institute's Model Penal Code § 3.07 has several provisions protecting those acting under lawful authority. As these provisions are not especially different from the other Codes, a general outline should suffice. The provision essentially states that the use of force will be justifiable provided that the actor is acting under legally-recognized authority and that the force used is reasonably believed by the actor to be immediately necessary to effect the desired outcome.

The Australian Draft Bill (s. 3X) provides that a person is not guilty if the relevant act is required or authorized by a law of the Commonwealth.

ISSUES FOR CONSIDERATION

1. Should the General Part contain a justification that no one is liable for performing an act authorized by or under federal or provincial statute and for using reasonable force for doing so?
2. Should there be a limitation on the use of force specifically that it not cause death or serious harm to another?
3. Should there also be a provision that no peace officer is liable for using reasonable necessary force to arrest, recapture, or prevent the escape of a suspect or offender?

AUTHORITY OVER CHILDREN

THE PRINCIPLE

Parents are entitled to correct their children.

THE RATIONALE

Since society entrusts the rearing of children to the parents, it should leave them free to use reasonable force in doing so and should not intrude into the privacy of family upbringing.

THE PRESENT LAW

S. 43 of the Criminal Code provides that a schoolteacher, parent, or person standing in place of a parent, such as a guardian, is justified in using force by way of correction only, toward a pupil or a child, as the case may be, who is under his or her care. That person shall not be justified if such force exceeds what is reasonable under the circumstances. The Supreme Court of Canada in its decision in Ogg-Moss v. R. has held that the words "by way of correction" in the case of school-teachers means "for the benefit of the education of the child".

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that the provision in the General Part be that parents and those they expressly permit can use reasonable force and/or confinement against their children under eighteen in the exercise of parental authority.

The provision would prevent the intrusion of law enforcement into the privacy of the home for every trivial slap or spanking. The provision may be taken as blunting the law's general message on violence and singles out children as not meriting full personal security and equal legal protection.

The federal-provincial working group recommended that no use of force against children be allowed by teachers. The group also felt that the question of allowing the use of force by parents is a policy question. The issue involves a balancing of the advantages of discipline with the disadvantages of the use and effectiveness of force.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 46) provides that every parent of a child, and every person acting as a parent of a child, is justified in using force by way of correction towards the child if the force used is reasonable and is not intended to cause actual bodily harm.

The English Law Commission's Draft Code makes no specific provision on the matter of authority over children.

The American Law Institute's Model Penal Code § 3.08 (1) provides that a parent or guardian of a minor or a person acting at the request of such a person is justified in using force for the purpose of safeguarding or promoting the welfare of the minor including the prevention or punishment of his or her misconduct, if the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation.

A teacher or person otherwise entrusted with the care or supervision for a special purpose of a minor is justified in using such force as the actor believes is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor. However, the teacher is only justified if the degree of force, had it been used by a parent or guardian, would also have been justified.

ISSUES FOR CONSIDERATION

1. Should the new justification in the General Part be that parents and those that they expressly permit to do so can use reasonable force and confinement by way of correction of their children under 18?
2. Should teachers be permitted to use force for the lawful correction of students?

SUPERIOR ORDERS

THE PRINCIPLE

A person obliged to obey military orders should not be criminally liable for carrying out those orders.

THE RATIONALE

Those subject to military discipline commit military offences by refusing to obey their superiors' orders but may commit crimes by obeying them when they are unlawful. This will clearly put them in an impossible position unless obedience to superior orders can amount to some extent to a defence to a criminal charge.

THE PRESENT LAW

S. 73 of the National Defence Act makes it an offence punishable by life imprisonment for those bound by military law to refuse to obey the orders of their superiors. If those orders involve the commission of crimes, however, those carrying them out will be criminally liable unless there is some recognized defence of obedience to superior orders. The Criminal Code has no general provision on the matter but s. 32(2) justifies obedience to superior orders for suppression of a riot unless the orders are manifestly unlawful. Apart from this, the Criminal Code leaves the matter to common law in which there are few precedents.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that a provision be put in the General Part that 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.

In addition, or alternatively, one might wish to include a provision that no one is liable for anything done out of obedience to his superior officer's orders for the suppression of a riot unless those orders are manifestly unlawful. The Working Group on the General Part said that the statutory defence should continue to be limited to riot situations as in s. 32(2) of the present Code.

OTHER JURISDICTIONS

Neither the New Zealand Crimes Bill nor the English Law Commission's Draft Code make a provision concerning the obedience of persons bound by military law to superior orders.

The American Law Institute's Model Penal Code § 2.10 provides that it is an affirmative defence that the actor, in engaging in the conduct charged to constitute an offence, does no more than execute an order of his superior in the armed services which he does not know to be unlawful.

ISSUES FOR CONSIDERATION

1. Should there be a justification in the General Part that no one bound by military law is liable for anything done out of obedience to his or her superior's officers orders unless those orders are manifestly unlawful?
2. Should the provision also add the words " or that person knows the unlawfulness of these orders"?

LAWFUL ASSISTANCE

THE PRINCIPLE

A person helping another to perform a lawful act should not be criminally liable for doing so.

THE RATIONALE

If one may lawfully do an act, one ought to be legally free to get assistance in doing it, otherwise the law would be both illogical and unjust.

THE PRESENT LAW

Under present law, separate provisions for lawful assistance are to be found in sections dealing with self-defence, defence of property and protection of persons in authority. They provide that anyone lawfully assisting a person acting under the section in question shall also enjoy the benefit of the section.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended a provision that no one is liable who helps, advises, encourages, urges, incites or acts under the authority of another if that other has a defence due to lack of control, duress, necessity, defence of the person, protection of property (movable and immovable), protection of persons acting under authority, authority over children, or superior orders.

This provision avoids needless repetition in the Code. The alternative is to provide for lawful assistance under the particular defences to which it is appropriate.

OTHER JURISDICTIONS

The New Zealand Crimes Bill has no explicit provision concerning lawful assistance. However, the Bill (s. 34, 41) does provide that a person is justified in assisting an officer in the execution of an arrest or assisting a person in the lawful protection of himself or herself or another or his or her property.

The English Law Commission's Draft Code does not make any provision for lawful assistance.

The American Law Institute's Model Penal Code has no provision concerning lawful assistance.

ISSUES FOR CONSIDERATION

1. Should a provision be included in the General Part that no one is liable who helps, advises, encourages, urges, incites, or acts under the authority of another if that other has a defence due to lack of control, duress, necessity, defence of the person, protection of property (movable and immovable), protection of persons acting under authority, authority over children, or superior orders?

EXCUSE - NECESSITY

THE PRINCIPLE

People should be excused from punishment for breaking the law in desperate emergencies even though their conduct cannot be justified in terms of choice of lesser evil.

THE RATIONALE

No one in an instant overwhelming emergency can in fairness be required to resist pressures which no ordinary person would resist, to refrain from acts from which no ordinary person similarly placed would refrain from, or in short to be a hero. To save one's own life at the expense of another's may not be justifiable but it remains understandable and should be excusable.

THE PRESENT LAW

The Criminal Code contains no provision on necessity. Case law has worked out a limited defence by way of excuse. For this to be made out three conditions must be met: (1) there must be circumstances of imminent risk where the action is taken to avoid a direct and immediate peril; (2) the action must be unavoidable in that there is no reasonable alternative course of action which would not be a breach of the law; and (3) the harm inflicted must be less than the harm sought to be avoided.

CANADIAN RECOMMENDATIONS

The Law Reform Commission did not recommend that a provision be put in the General Part on necessity as an excuse for acting under overwhelming pressure.

The Working Group on the General Part recommended that necessity should be addressed in the Criminal Code.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 30) provides that a person is not criminally responsible for any act done or omitted to be done under such circumstances of sudden or extraordinary emergency that a person of ordinary common sense and prudence could not reasonably be expected to act otherwise.

The English Law Commission's Draft Code has deliberately left the determination of a defence of necessity as an excuse to judicial discretion. This is made possible by a blanket provision in the Draft Code (s. 45) which allows for the preservation of any justification or excuse which is developing at common law. However, the Code has a provision concerning duress of circumstances (s. 43) which closely resembles necessity, stating that a person does an act under duress of circumstances and is therefore not guilty of an offence when he or she does it because he or she knows or believes that it is immediately necessary to avoid death or bodily harm to himself or herself or another and the danger is such that in all the circumstances he or she cannot reasonably be expected to act otherwise.

The American Law Institute's Model Penal Code has no special provision concerning necessity as an excuse. However, if the necessitous circumstances in which the accused was acting rendered his or her conduct essentially involuntary, he or she may escape criminal liability. (see § 2.01)

The Australian Draft Bill (s. 3V) provides that a person is not guilty if the person did the relevant act because he or she believed that circumstances existed that would, if the act was not done, have resulted in the death of, serious physical injury being caused to, or a serious sexual assault being made upon any person and there was no way, other than doing the act, of preventing that. The defence will not apply if the person acted with intent to kill another person or the person knowingly, and without any reasonable excuse, exposed himself or herself to the risk of those circumstances existing.

ISSUES FOR CONSIDERATION

1. Should there be a provision in the General Part as to necessity as an excuse?

INTOXICATION

THE PRINCIPLE

People so intoxicated as not to know what they are doing cannot be held responsible for their actions, especially if the intoxication was not their fault, but otherwise intoxication is no excuse.

THE RATIONALE

No one can be blamed for doing wrong when so intoxicated as not to know what he or she is doing though he or she can be blamed, if it was his or her own fault, for becoming intoxicated.

THE PRESENT LAW

The Criminal Code contains no explicit provision on intoxication. At present, the case law on the matter is unsettled. Generally, involuntary intoxication, i.e. intoxication which is not self-induced, will excuse insofar as it makes the acts committed while intoxicated involuntary. Voluntary, i.e. self-induced, intoxication will not excuse unless the crime charged is one of specific intent (e.g. robbery and theft), not general intent (e.g. manslaughter and assault), and the intoxication prevents formation of the requisite intent. Nor will it excuse where an accused forms the intention to commit an offence and subsequently gets drunk so as to get the courage to do so.

Voluntary intoxication, however, may also ground a defence of insanity. This will be so where the intoxication is such as to render an accused legally insane. Not surprisingly, for policy reasons the courts have made it almost impossible for this defence to succeed.

CANADIAN RECOMMENDATIONS

The majority of the Law Reform Commission recommends that no one should be liable if intoxication makes the person lack the requisite culpability for the crime charged but that where the intoxication is self-induced the person should be liable in general for committing the crime while intoxicated and in case of unlawful homicide for manslaughter while intoxicated which offence would be subject to the same penalty as for manslaughter.

The advantages of the provision are that it codifies the rules on intoxication and so makes the Code comprehensive; it removes the problematic distinction

between general and specific intent; and it allows for a special system of conviction in cases of voluntary intoxication.

The disadvantages are that the provision is complex and difficult to relate to the general sections on culpability; it is self-contradictory to convict of committing a crime while intoxicated people who lack the requisite culpability for that crime; and it is unfair to raise negligent homicide while intoxicated to the status of manslaughter.

The minority of the Law Reform Commission recommends that a person should be liable if a person's intoxication was self-induced and the crime is one of negligence.

The advantage of the minority position is that it would allow conviction where the intoxication was the accused's own fault without falling into illogicality regarding culpability requirements. The disadvantage would be the ruling-out of liability even in cases of self-induced intoxication for purpose and recklessness crimes.

An alternative would be to create an offence of becoming intoxicated in circumstances where one is likely to become a danger to the person or property of another. The advantage of such a provision is that it would punish the person for what he actually did, i.e. become intoxicated so as to be a social danger. The disadvantage is that the likelihood of dangerousness may be difficult to determine.

A second alternative would be to create an offence of becoming intoxicated and in consequence committing the conduct required in the definition of a crime. The advantage would be to punish a person for what he actually did, i.e. become intoxicated so as to be a social danger, but only in circumstances where it has become clear from his commission of a crime that he has become such a danger. The disadvantage is that such a provision would not penalize those culpable who although dangerously intoxicated are fortunate enough not to engage in otherwise criminal conduct.

The Working Group on the General Part recommended that intoxication not be a defence to any crime unless there was a total loss of control or consciousness. The Group also called for a provision regarding becoming intoxicated in circumstances where one is likely to become a danger to the person or property of another.

Such a provision would clearly limit the availability of the defence. Parliament may not wish to excuse criminal activity merely because the accused was drunk. This is true both because a large number of crimes are committed while the accused is drunk so a lenient defence could have the effect of excusing many criminal acts and because as a matter of policy, it would seem paradoxical to excuse an accused if he or she gets drunk before committing a crime so as to absolve himself or herself of any responsibility.

The Canadian Association of Chiefs of Police recommended that the minority view of the LRC was preferable to that of the majority owing to its greater clarity and logic. However, the Association was nonetheless concerned that, depending on the interpretation by the courts of the exculpatory terms of fraud, duress, compulsion or reasonable mistake, the defence may be too broad. For example, if the term "compulsion" were to be interpreted to include alcoholic compulsion (a fairly

unlikely possibility) then the scope of the defence, the Association submitted, would be wholly inappropriate.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 29) provides that the determination of whether an accused had the requisite state of mind at the time of the commission of the offence, may take into account evidence that the person was intoxicated at the time of the act or omission. However, this provision will not apply where intoxication is an essential element of the offence charged or the person charged had already resolved before becoming intoxicated to do or omit to do the act or he or she consumed any intoxicant to strengthen his or her resolve to do or omit to do the act.

The provision in the English Law Commission's Draft Code is somewhat more complicated. It (s. 22) states that where an offence requires a fault element of recklessness, a person who was voluntarily intoxicated shall be treated as not having believed in the existence of an exempting circumstance (where the existence of such a belief is in issue) if a reasonable sober person would not have so believed. Furthermore, where an offence requires a fault element of failure to comply with a standard of care, or requires no fault, a person who was voluntarily intoxicated shall be treated as not having believed in the existence of an exempting circumstance (where the existence of such a belief is in issue) if a reasonable, sober person would not have so believed.

The American Law Institute's Model Penal Code § 2.08 provides that intoxication is in general not a defence unless it negatives an element of the offence. However, if the intoxication is not self-induced or if it is pathological then an accused will have a defence if, as a result of intoxication at the time of the conduct, the actor lacks the substantial capacity either to appreciate its criminality or to conform his or her conduct to the requirements of law.

The Australian Draft Bill (s. 3Y) provides that where intention to cause a specific result is an element of an offence, evidence that the person was intoxicated, whether voluntarily or involuntarily, at the time of the relevant act may be taken into account in determining whether the person had the necessary intention. The defence will not apply where the person charged had resolved before becoming intoxicated to do the relevant act or became intoxicated in order to strengthen his or her resolve to do the relevant act.

Where intention to cause a specific result is not an element of an offence, evidence that the person was intoxicated at the time may be taken into account in determining whether the person had any requisite fault only if the intoxication was involuntary.

Finally, where, for the purposes of determining whether a person is guilty, it is necessary to compare the conduct or state of mind of the person with that of a reasonable person, the comparison is to be made between the conduct or state of mind of the person and a reasonable person who is not intoxicated.

ISSUES FOR CONSIDERATION

1. Should there be an excuse in the General Part that no one is criminally liable if that person lacks the requisite culpability for the crime due to intoxication unless the intoxication is self-induced in which case the person would be liable for committing the crime while intoxicated?
2. Should there instead be a general offence of becoming intoxicated in circumstances where one is likely to become a danger to the person or property of another?
3. Alternatively, should there be an offence of becoming intoxicated and in consequence committing the conduct required in the definition of a crime?

MENTAL DISORDER

THE PRINCIPLE

Mentally disordered people have no criminal liability.

THE RATIONALE

People so mentally disordered as not to be responsible for their actions cannot in fairness be blamed or punished for them.

THE PRESENT LAW

Mental disorder is dealt with by the Criminal Code in s.16. Section 16(1) provides that no one shall be convicted for any act or omission done while insane. "Insane" is defined by s.16(2) as being in a state of natural imbecility or having a disease of the mind to an extent that renders one incapable of appreciating the nature and quality of an act or omission or of knowing that it is wrong. The courts have held "disease of the mind" to include any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding self-induced states caused by alcohol or drugs or transitory mental states such as hysteria or concussion. "Appreciating" has been held to involve not only knowledge but also the capacity to foresee and measure the consequences of an act or omission. They have held "wrong" to mean legally wrong.

S.16(3) provides that a person with specific delusions but in other respects sane shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.

S.16(4) provides that everyone is presumed sane until the contrary is proved. Case law to date has held that the onus is on the person asserting that the accused was insane at the time of the offence to prove it on the balance of probabilities. Usually the onus is on the accused, but sometimes the prosecution may wish to establish the insanity of the accused and therefore the onus shifts.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended that S. 16 of the Criminal Code be replaced by the following:

Mental Disorder.

No one is liable for his conduct if, through disease or defect of the mind, he or she was incapable of appreciating the nature, consequences or legal wrongfulness of such conduct [or believed what he or she was doing was morally wrong]."

The proposed provision modernizes the language of the defence, eliminates the redundant insane delusion provision and removes the presumption of sanity to be dealt with later in the Commission's proposed Code of Criminal Procedure. A majority of Commissioners wished to add the words in brackets because in their view a person committed a wrongful act or omission because, due to mental disorder, that person believed the act or omission to be morally right, merits treatment rather than punishment. The words in brackets would, however, not exempt the psychopath from criminal liability merely because he is indifferent as to whether his acts or omissions are right or wrong.

The Canadian Association of Chiefs of Police submitted that the LRC's minority alternative ("or believed what he was doing was morally right") should be rejected because such a subjective defence could easily preclude the discretion as to how harmful conduct is sanctioned after a finding of guilt. Moreover, the Association is concerned that the defence may become available to accused suffering from a wider range of maladies than is now the case because of the more general wording. This would result in fewer convictions than before and a greater number of dispositions by way of mental disorder. Finally, the Association is concerned that the proposed provision creates an absolute defence to a charge, rather than a qualified one as is the case now. That is, a disposition of "not guilty by reason of insanity", it would appear, would be replaced by simply "not guilty".

The Department of Justice has recommended the following replacement for S. 16:

Defence of Mental Disorder

16.(1) No person is criminally responsible for an act or omission committed while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Presumption

(2) Every person shall be presumed not to have been suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

Raising Defence of Mental Disorder

(3) Subject to subsection (5), an accused or the prosecutor may adduce evidence for the purpose of establishing that the accused was suffering from a mental disorder so as to be exempt from criminal responsibility.

Burden of Proof

(4) The burden of proof with respect to the issue of whether an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party raising the issue.

Limitation on Prosecutor Raising Defence

(5) Where an accused does not raise the issue of whether the accused was suffering from a mental disorder so as to be exempt from criminal responsibility, the court before whom the trial is held may permit the prosecutor to adduce evidence for the purpose of establishing that the accused was suffering from such mental disorder where the court is satisfied that

- (a) apart from the issue of whether the accused was suffering from such a mental disorder, the evidence previously adduced at the trial would warrant the jury, or the court where there is no jury, being satisfied beyond reasonable doubt that the accused committed the act or omission charged against the accused with the requisite criminal intent;
- (b) the admission of the evidence of mental disorder to be adduced by the prosecutor would not prejudice the accused in respect of a defence that is reasonably available; and
- (c) the interests of justice require the evidence of mental disorder to be adduced by the prosecutor, given
 - (i) the nature and seriousness of the alleged offence,
 - (ii) the extent to which the accused may be a danger to the public, and
 - (iii) the substantial nature of the evidence to be adduced by the prosecutor indicating that the accused was suffering from a mental disorder so as to be exempt from criminal responsibility.

Motion of Court

(6) Where the court has reasonable grounds to believe that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility, the court may, on its own motion, raise that issue.

Definition of "Accused"

(7) In this section, "accused" includes a defendant in summary conviction proceedings.

Like the provision recommended by the Law Reform Commission, this proposal maintains the basic content of the existing law, but modernizes its language so as to be more consistent with current medical usage and eliminates the redundant insane delusion provision. Unlike the Commission's proposal, however, the Department's proposal sets out the presumption of sanity and the rules of procedure relating to who can raise the issue and who has the burden of proof. It also makes it clear that these rules also apply to summary conviction procedure. The reason for setting out the rules of procedure as part of the

substantive provision is that in the structure of the existing Criminal Code it is more convenient for the user to have the rules together.

The Working Group on the General Part prefers the Department of Justice's version.

The Federal-Provincial Working Group on Homicide recommended that no special provision concerning mental disorder be included in the homicide provisions.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 28) provides that a person shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved. It provides further that a person is not criminally responsible for any act done or omitted to be done when suffering from a mental defect or mental disorder that renders the person incapable of knowing what he or she is doing or omitting to do or of attributing to the act or omission the character that the community would commonly attribute to the act or omission.

The English Law Commission's Draft Code (ss. 35, 36) provides that a verdict of mental disorder shall be returned if the accused is proved to have committed an offence, but it is proved on a balance of probabilities that he or she was at the time suffering from severe mental illness or severe mental handicap and that the offence with which he or she was charged is attributable to this disorder. Moreover, the evidence must show that the accused acted or may have acted in a state of automatism, or without the fault required for the offence, or believing that an exempting circumstance existed, and it is proved on the balance of probabilities that he or she was suffering from mental disorder at the time of the act. However, this provision does not apply to an offence concerning sexual relations with the mentally handicapped.

The American Law Institute's Model Penal Code § 4.01 provides that a person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he or she lacks substantial capacity either to appreciate the criminality [wrongfulness] of his or her conduct or to conform his or her conduct to the requirements of law. The term mental disease does not, however, include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

The Australian Draft Bill (s. 3Q) provides that a person who is charged with an offence is entitled to be acquitted because of mental illness if, at the time of the relevant act, the person was, as a result of a mental disease or mental defect incapable of knowing what he or she was doing or incapable of understanding that what he or she was doing was wrong according to the ordinary standards of a reasonable person.

ISSUES FOR CONSIDERATION

1. What should the provision for excusing the mentally disordered from criminal liability be?
2. Should procedural provisions with respect to mental disorder be placed in the General Part?
3. Should the accused be obliged to prove on a balance of probabilities that he or she was suffering from mental disorder if the accused is the one raising the issue?

MISTAKE OR IGNORANCE OF LAW

THE PRINCIPLE

Ignorance of the law is in general no excuse.

THE RATIONALE

Criminal law underlines moral principles so well known that either people know them or be taken to know them.

THE PRESENT LAW

The Criminal Code under s. 19 provides that ignorance of the law of a person who commits the elements of an offence is not an excuse for committing that offence. This rule applies to both federal and provincial enactments. The rule has been quite rigidly applied in most cases and is only subject to three exceptions: non-publication, colour of right and officially-induced error.

Non-publication relates to subordinate legislation such as federal or provincial regulations or orders which are not published in a gazette. If such publication is required by law, contravention is excused by the defence of ignorance of the law if the accused had no actual notice of the legislation in question. If the legislation is a federal regulation, contravention is excused unless the regulation specifically provides that it is to be in force before publication and reasonable steps have been taken to notify persons who are affected by the regulation of its purport.

Colour of right is a statutory exception to the s. 19 rule. The exception is limited to Criminal Code provisions which explicitly mention it, e.g. forcible detainer of property (s. 72 (2)), theft (s. 322) and all Part XI offences of wilful acts against property such as mischief (s.430) and arson (s. 433). Under these provisions an accused with an honest belief in a state of facts which would, if it actually existed, legally justify or excuse his or her conduct will be excused.

The third exception concerns that of officially-induced error. Though the law does not excuse an accused simply because he or she has taken reasonable steps to ascertain whether his or her acts are legal, it may excuse the accused for contravening a regulation if he or she relied on official advice, if such reliance was reasonable and the official was responsible for the administration or enforcement of the law in question.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended that a provision be placed in the General Part to the effect that there is a defence of mistake or ignorance of law only as regards the following conditions: (a) mistake or ignorance concerning private rights relevant to the crime; or (b) mistake or ignorance of law 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.

The advantage of such a provision would be to modify the present provision of the Code that ignorance of law is no defence - nothing is a defence unless it is explicitly recognized as such - and to make the Code more comprehensive by including the common-law defences as to mistake or ignorance of law, and more explicit by outlining the conditions of the defence.

The disadvantages are that the exception regarding courts of appeal would make the criminal law vary in application from province to province which might conflict with s. 15 of the Charter regarding equality and that it may be hard to draw the line between administrative authorities that are competent and those that are not.

The Working Group on the General Part did not agree with the Law Reform Commission recommendation.

The Canadian Association of Chiefs of Police is concerned that the provision on mistake or ignorance of law does not require the mistake of an accused as to his or her private rights to be a reasonable one. A second concern of the Association is that the provision allowing for a mistake induced by reliance on a decision of a Provincial Court of Appeal may create situations which offend the equality rights of individuals protected by s. 15 of the Charter.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 26) provides that ignorance of the law is in general no excuse. However, a person is not criminally responsible for any act or omission that the person believes to be justified if that belief is based on ignorance of or mistake as to any matter of law other than the appropriate enactment. Furthermore, a person is not criminally responsible for any offence against any instrument made under the authority of an Act if, at the time of the act or omission, the instrument had not been published or otherwise reasonably made known to the public or persons likely to be affected by it and the person did not know of the instrument.

The English Law Commission's Draft Code (s. 21) also provides for a general rule that ignorance of the law is in most cases no excuse. The only exception to this rule (see s. 46) is the situation whereby a person contravenes a statutory instrument which at the time of his or her act had not been issued by Her Majesty's Stationery Office and by that time, reasonable steps had not been taken to bring the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of that person.

The American Law Institute's Model Penal Code § 2.04 (1) provides that ignorance or mistake of law is in general no excuse. However, if the mistake negatives the fault requirement of an offence or if the offence itself contemplates such ignorance or mistake, then an accused may have a defence. Furthermore, an accused will be excused § 2.04 (3) if the enactment defining the offence is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged or if the accused acts in reasonable reliance upon an erroneous official statement of the law, contained in a statute or other enactment, a judicial decision, an administrative order, or an official interpretation of the public officer charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offence.

The Australian Draft Bill (ss. 3J, 3K(1)) provides that in general ignorance of, or a mistake as to a law of the Commonwealth does not relieve a person from criminal liability for an act that contravenes that law unless the law provides that ignorance or mistake is an excuse or that ignorance or mistake would negate any requisite fault. However, it is a defence to an act done in contravention of a provision of a statutory instrument if the person proves that, at the time of the act, the person did not know that the act constituted an offence and copies of the instrument had not been published or otherwise reasonably made available to the public or to those persons likely to be affected by it and the effect of the provision had not otherwise been reasonably made known to the public or to those persons likely to be affected by it.

ISSUES FOR CONSIDERATION

1. Should there be a provision regarding mistake or ignorance of the law in the General Part?
2. If so, should it provide that ignorance of the law is no excuse except where a) the mistake or ignorance was as to private rights relevant to the crime or b) the mistake or ignorance reasonable resulted from i) non-publication of the law in question, ii) reliance on a decision of a court of appeal in the province have jurisdiction over the crime charged, or iii) reliance on competent administrative authority.?

DURESS

THE PRINCIPLE

People under extreme threats from others should not in all cases be held criminally liable for acts or omissions they have committed.

THE RATIONALE

To punish those who act under immediate and overwhelming threats from others is both unfair and pointless where the harm resulting from the act is minor and that threatened to the agent is great. It is unfair because it unfairly treats the agent as freely choosing to act as he did, and pointless because distant legal sanctions will never deter in the face of immediate danger to the agent.

THE PRESENT LAW

S. 17 of the Criminal Code provides that a person is excused from criminal liability if he committed elements of the offence under "compulsion" by threats from a person who is present of immediate death or bodily harm which he believes will be carried out. The excuse will not avail a party to a conspiracy, nor will it apply to certain listed offences, e.g. murder, attempted murder, sexual assault, robbery, etc. Parties to offences, however, may avail themselves of the common-law defence of duress in all cases which is to the same effect as the defence in the Code.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended that a provision be put in the General Part that 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 causes the death of, or seriously harms, another person.

The advantage of such a provision is that it simplifies the Code by having a general requirement of a reasonable response to threats of immediate serious harm. It makes it more comprehensive and consistent by having the same defence of duress for all parties. Finally, it makes it more principled by replacing the present Code's ad hoc list of excluded offences with a general disallowance of purposely causing death or serious harm.

The disadvantage of such a provision is that it does not exclude the defence in cases of conduct which is seriously harmful to society rather than to specific victims, e.g. treason.

An alternative would be to include such a provision but exclude certain offences such as murder, sexual assault, robbery etc.

The Working Group on the General Part agreed that s. 17 is unsatisfactory and should be amended or replaced. The Group did not agree with the Law Reform Commission recommendation. The Group believed that the defence should be available to a credible threat made against a third person. The Group also felt, however, that the defence should not be available to a person who joins an organization or conspiracy who knows that by his or her membership, he or she may be subject to duress.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 31) provides that a person is not criminally responsible for any act done or omitted to be done because of any threat of immediate death or serious bodily harm to that person or any other person from a person who is immediately able to carry out that threat. This provision does not apply, however, where the person who does or omits the act is a party to any association or conspiracy and knew at the time of joining that he or she could thereby become subject to such threats.

The English Law Commission's Draft Code (s. 42) provides that a person is not guilty of an offence when he or she does an act under duress by threats whereby he or she knows or believes that a threat has been made to cause death or serious personal harm to himself or herself or another if the act is not done and that the threat will be carried out immediately if he does not do the act or, if not immediately, before he or that other can obtain official protection and that there is no other way of preventing the threat being carried out. This provision does not apply, however to a person who has knowingly and without reasonable excuse exposed himself or herself to the risk of such a threat. Finally, the defence is not available to a person accused of murder or attempted murder.

The American Law Institute's Model Penal Code § 2.09 provides that an accused will be excused from criminal liability if he or she engaged in the conduct charged to constitute an offence because he or she was coerced to do so by the use of, or a threat to use, unlawful force against his or her person or the person of another, which a person of reasonable firmness in his or her situation would have been unable to resist. The defence will not be available to one who recklessly placed himself or herself in a situation in which it was probable that he or she should be subjected to duress.

The Australian Draft Bill (s. 3U) provides that (1) a person is not guilty of an offence if the person does the act because he or she believed that a threat had been made that, if carried out, would have resulted in the death of serious physical injury being caused to or a serious sexual assault being made upon any person and (2) the person knew or believed that if the act was not done the threat would have been carried out before protection against it could be obtained from police or other authorities and (3) the person believed that there was no way, other than doing the act, of preventing the threat from being carried out and (4) a person of reasonable

firmness would not, in the same circumstances, have resisted such a threat. The defence does not apply if the person acted with intent to kill another person or the person knowingly, and without any reasonable excuse, exposed himself or herself to the risk of such a threat. Furthermore, a woman is not to be excused from criminal liability only because of the coercion of her spouse.

ISSUES FOR CONSIDERATION

1. Should the General Part contain an excuse that no one is liable for committing a crime in reasonable response to threats of immediate serious harm to himself or another unless he or she purposely causes the death of, or seriously harms, another?
2. Should offences such as murder, sexual assault, and robbery be specifically excluded from the provision?
3. Should the excuse be available if the threat is credible and made against a third party, for example, a complete stranger?
4. Should the excuse not be available if the person was party to an association or conspiracy and knew at the time of joining that he or she could become subject to such threats?

MISTAKEN BELIEF AS TO DEFENCE

THE PRINCIPLE

People should be judged on the facts as they perceive them and exonerated where they would have been so exonerated had those facts existed.

THE RATIONALE

No one should be criminally liable without being morally to blame, and someone who mistakenly believes, through no fault of his or her own, that the facts are such as to excuse or justify his or her conduct is not morally to blame and therefore should not be held criminally liable.

THE PRESENT LAW

There is currently no specific or general provision in the Criminal Code excusing an accused on account of mistaken belief as to a defence. At common law, however, an accused must in general be judged on the facts as he or she perceived them.

The present s. 34(2) dealing with self-defence, a justification, does expressly allow for reasonable mistakes, but only with respect to the danger of an assault or the degree of force needed to repel it, not with respect to the initial existence of an assault.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended that a provision be included in the General Part that no one be criminally liable who mistakenly believes in the existence of a circumstance that would provide a defence other than mistake of fact, intoxication, immaturity, mental disorder and mistake of law, but that this shall not apply to crimes of negligence if the mistaken belief results from negligence.

The advantage of such a provision would be to make the Code more consistent by reflecting the principle of responsibility as regards defences, and more comprehensive and less repetitious by having a single provision. The disadvantage of such a provision is that it is not clear that such a provision is necessary since it may well be subsumed under the general culpability provisions.

The Working Group on the General Part recommended that it may be useful to include this provision in a general provision regarding mental states. Their reasoning is that the mistake tends simply to negate the mental element for an

offence and therefore mistaken belief as to defence is no more than an extension of the general principle that there can be no guilt without moral blameworthiness.

The Canadian Association of Chiefs of Police recommended that the defence of mistaken belief only be available if the belief is a reasonable one.

OTHER JURISDICTIONS

The New Zealand Crimes Bill does not have a provision concerning mistaken belief as to defence.

The English Law Commission's Draft Code (s. 41) provides that a person who acts in the belief that a circumstance exists has any defence that he or she would have if the circumstance existed.

The American Law Institute's Model Penal Code does not have a provision concerning a mistaken belief as to a defence.

The Australian Draft Bill (s. 3M(2)) provides that where a person is charged with an offence involving a fault element and the person acted under a mistaken belief as to the existence or non-existence of facts and had the facts been as the person believed them to be the person would have constituted a defence to the charge, the defence is, unless otherwise specified, available to the person.

ISSUES FOR CONSIDERATION

1. Should there be a provision in the General Part that a person is excused from criminal liability if the person mistakenly believes in the existence of a circumstance that would provide a defence other than mistake of fact, intoxication, immaturity, mental disorder and mistake of law, but such an excuse will not apply to crimes of negligence if the mistaken belief resulted from negligence?

EXCESSIVE FORCE IN SELF-DEFENCE AND LAW ENFORCEMENT

THE PRINCIPLE

Force is an evil to be used only to the extent that it is reasonably necessary.

THE RATIONALE

The use of force in self-defence is limited to that reasonably necessary for carrying out the lawful purpose for which it is used - you can only use fists against fists.

THE PRESENT LAW

S. 26 of the Criminal Code provides that anyone authorized by law to use force is criminally responsible for any excess thereof. Hence if the excess force results in the death of another, there is no "partial" defence reducing the crime from murder to manslaughter. The requisite intent to kill, however, would still have to be proved beyond a reasonable doubt in order to secure a murder conviction.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended in its suggested provisions regarding self-defence and acting under legal authority that the force must be reasonably necessary; that, except in the case of peace officers arresting etc. and persons acting under legal authority, there must be no intention to cause death or grievous bodily harm, and that force may not be used against a peace officer executing a process.

The advantage of such a provision is uniformity of approach. Other than the exception, it makes no difference why excessive force was used or who used it. The disadvantages, which arises from that uniformity, are that there may be situations where deadly force is justifiable and that the lack of a "partial" defence for use of excessive force means that one who kills by going too far in otherwise lawful conduct is treated the same as one who simply kills unlawfully.

An alternative would be to include a special "partial" defence of excess force. The advantage would be to make allowance for the fact that in fairness a person acting for a lawful purpose but using excess force is not as culpable as one who simply uses force for an unlawful purpose. The disadvantage is that such a provision might act as a general encouragement to use force.

The Working Group on the General Part agreed generally with the LRC's proposal regarding the reasonableness criterion for legitimate force. There were

however a number of specific policy concerns that should be considered specifically. The Group felt as elsewhere that the absolute exclusion of the use of deadly force is problematic.

The Federal-Provincial Working Group on Homicide recommended that any proposed excuse based on excessive force be eliminated.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 52) provides that every person who is authorized by law to use force is criminally responsible for any excessive force, according to the nature and quality of the act that constitutes the excess.

The English Law Commission's Draft Code (s. 59) provides that a person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his or her act, he or she believes the use of the force which causes death to be necessary and reasonable to defend himself or herself or another or their property, but the force exceeds that which is necessary and reasonable in the circumstances which he or she believes to exist.

The American Law Institute's Model Penal Code provides § 3.04 - 3.08 that an accused will not be justified in using force in the protection of person or property if the force used is excessive with regard to the circumstances. The Code does not make any provision for the possible reduction of murder to manslaughter in a self-defence situation where the death is caused by a person acting legitimately in self-defence but using more force than is reasonably necessary to effect the defence.

ISSUES FOR CONSIDERATION

1. Should there be a provision included in the General Part that would allow a partial excuse if a person justified in using reasonable force instead used an excessive (unreasonable) amount?
2. Under what circumstances should this partial defence apply?

DIMINISHED RESPONSIBILITY

THE PRINCIPLE

An individual whose mental condition impairs his or her moral responsibility should not be held fully liable for such wrongdoing perpetrated while in that condition.

THE RATIONALE

A person whose ability to conform to the law's requirements is impaired by mental disorder cannot be fully blamed for lack of such conformity even though his or her impairment falls short of complete legal insanity.

THE PRESENT LAW

The Criminal Code has no provision on diminished responsibility short of insanity under s.16. Case law, however, reveals a conflict on the matter. One side considers that whether an accused has the requisite intent depends on all the circumstances including that of mental disorder. The other considers that to allow a defence of diminished responsibility would circumvent s.16, which makes it clear that the onus of proof of insanity rests on the accused.

There is a second and related conflict. Some take the view that if culpability may be negated by mental disorder of a lesser degree than legal insanity, the defence of diminished responsibility should apply to all crimes requiring a mental element. Others reject this theory and hold that diminished responsibility should only apply to murder.

CANADIAN RECOMMENDATIONS

Neither the Law Reform Commission nor the Working Group on the General Part made a recommendation regarding diminished responsibility.

Alternatives should be considered. One would be to retain the status quo as set out in the common law. The advantage of this would be to allow for flexibility of application and the possibility of diminished responsibility applying to offences other than murder. The disadvantage is that it would leave the law in its current uncertainty.

A second alternative would be to include a provision which contemplates the possibility of diminished responsibility negating intent for offences other than murder. The advantage of this would be that such a provision would increase

certainty since it explicitly recognizes the relevance of mental disorder not constituting legal insanity. The disadvantage may be redundancy in light of the basic requirement of an accused's culpability in the commission of any prohibited act.

The Federal-Provincial Working Group on Homicide recommended that any mental disability falling short of exculpatory mental disorder be relevant only with regard to sentencing.

OTHER JURISDICTIONS

The New Zealand Crimes Bill has no provision concerning diminished responsibility.

The English Law Commission's Draft Code (s. 56) provides that a person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of the act, he or she is suffering from such mental abnormality as is a substantial enough reason to reduce the offence to manslaughter. This section does not apply, however, if the mental abnormality is a result of intoxication.

The American Law Institute's Model Penal Code § 210.3 (1) (b) in its definition of manslaughter provides that a homicide which would otherwise be murder is manslaughter when committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he or she believes them to be.

ISSUES FOR CONSIDERATION

1. Should a provision be placed in the General Part as found in the English Draft Code of a partial excuse of diminished responsibility for murder based on mental disorder which did not amount to insanity?
2. Should there be a provision in the General Part on diminished responsibility applicable to all crimes?

ABANDONMENT

THE PRINCIPLE

Someone who attempts to commit a crime but then abandons the attempt should not incur the same liability as one who continues the attempt.

THE RATIONALE

Abandoning an attempt make the attempter less morally culpable than one who continues with the attempt.

THE PRESENT LAW

The present Criminal Code has no provision on abandonment, nor in the case law is abandonment recognized generally as a defence to a charge of attempt but is seen rather as a mitigating factor. A limited defence of abandonment has been recognized, however, in the context of aiding and abetting the commission of a crime: timely communication of an intention to abandon the common criminal purpose will excuse an accused from liability for the subsequent commission of the offence. Furthermore, in certain contexts such as where consent is involved, e.g. those involving possible attempted sexual assault, abandonment may negate the requisite intent to commit the offence without consent.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that no special provision in the General Part be made for a defence of abandonment. The advantage of including such a provision in the General Part is to provide an incentive to desist from criminal attempt. The disadvantage is to equate reduced culpability with complete innocence and to overlook the fact that abandonment may result less from genuine change of heart than from awareness that police are watching.

The Working Group on the General Part recommends that there be no defence of abandonment as it did not believe that abandonment can negate the offender's culpability. The Group believed that abandonment should only be considered a factor in mitigating sentence.

The Federal-Provincial Working Group on Homicide has fairly extensive recommendations concerning the abandonment of a common purpose by one of the participants. The group recommended that every one who is a party to a homicide offence is guilty of that offence whether or not that person withdrew from or

abandoned his or her involvement in that offence before that offence was completed. This rule is subject to an exception: the accused will escape liability if the court is satisfied that he or she took all reasonable and timely steps to prevent the completion of the offence. However, that accused will nonetheless be liable for any offences committed previous to the abandonment.

OTHER JURISDICTIONS

Neither the New Zealand Crimes Bill nor the English Law Commission's Draft Code has a provision concerning abandonment.

The American Law Institute's Model Penal Code § s. 5.01 (4) provides that when an actor's conduct would otherwise constitute an attempt; § 5.02 (3), solicitation; or § 5.03 (6), conspiracy, it is an affirmative defence that he or she abandoned his or her effort to commit the crime or otherwise prevented its commission under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose. The defence will not, however, be available if the renunciation is motivated by circumstances not apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make it more difficult to accomplish the criminal purpose.

ISSUES FOR CONSIDERATION

1. Should the General Part contain a partial or complete excuse where an accused abandons the commission of a crime?
2. Should it only be an excuse if the crime charged is an attempt?
3. Should it also be an excuse if the crime charged is counselling?

DE MINIMIS NON CURAT LEX

THE PRINCIPLE

The law does not concern itself with trifles.

THE RATIONALE

This principle recognizes that although there has been a breach of the criminal law, there should be no prosecution and conviction for the breach. There are two reasons for this. First, a criminal justice system that prosecutes for every trivial violation of the criminal law would be oppressive. Secondly, prosecution for every trivial breach would render the criminal justice system inefficient by swamping it with trivial matters.

THE PRESENT LAW

The maxim "de minimis non curat lex" (the law does not concern itself with trifles) is not found in the Criminal Code but has its origins in the common law. Its purpose is to relieve against the harshness of convicting an accused for a merely technical breach of a statute. The law is very unsettled in its application of the maxim although it has often been discussed in the context of possession of illegal substances under the Food and Drug Act and the Narcotic Control Act.

The defence has succeeded on occasion in drug possession cases where the drug possessed is a trivial amount. However, there have also been decisions which make it an offence no matter how small the amount possessed. A middle ground of sorts also exists which will excuse an accused if the amount possessed is less than is either personally or commercially usable. It appears that the defence will also apply to an assault charge. The law is settled, however, that the defence does not apply to a theft charge.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada made no recommendation that the General Part should include a defence of "de minimis non curat lex". Not enacting a "de minimis" defence allows the defence to be applied more flexibly on an ad hoc basis depending on the crime in question. The disadvantage may be a resulting confusion as to the application of the principle.

An alternative would be to enact a "de minimis non curat lex" provision. The advantage is to address distinctly the principle, as does Model Penal Code, and

to make the Code comprehensive, leaving it to the courts to interpret the provision in the context of particular crimes. It would however send a clear message that notwithstanding a crime has been committed, an accused should be acquitted merely because the crime is trivial, rather than leaving the triviality to be taken into account at a sentencing hearing.

The Working Group on the General Part was split on this issue.

OTHER JURISDICTIONS

Neither the New Zealand Crimes Bill nor the English Law Commission's Draft Code have a recommendation concerning the "De Minimis" principle.

The American Law Institute's Model Penal Code § 2.12 provides that an accused will escape criminal liability if his or her conduct did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offence or did so only to an extent too trivial to warrant the condemnation of conviction.

ISSUES FOR CONSIDERATION

1. Should the General Part explicitly provide for a defence of "de minimis" as does the Model Penal Code?

PRANK

THE PRINCIPLE

A person should not be held to act with criminal intent if he or she is only carrying out a prank.

THE RATIONALE

Acting with criminal intent means aiming at the harm prohibited by the criminal law, whereas a person carrying out a prank is not seriously aiming at that harm and should not be treated as if he or she were.

THE PRESENT LAW

The defence of prank may exempt from criminal liability if the court finds that the elements of the offence were committed in the furtherance of the practical joke. This defence is subject to much judicial discretion and is largely dependent on the court's view of socially-acceptable conduct. While the state of the law in Canada concerning a defence of prank is unsettled, the courts are now leaning towards considering prank as a factor mitigating penalty that results in discharges rather than as an exculpatory defence. Also, to date, this defence has only arisen in conjunction with offences that use the word "fraudulently" in their statutory enactment.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada did not recommend that a defence of prank be put in the General Part. The advantage of not doing so is the avoidance of confusing motive with intent, for even if the act was done for a joke, the accused still intended to do it, though in crimes of dishonesty the motive may serve to negative dishonesty. The alternative would be to create a defence of prank. The advantage of this is that the code would directly address this policy issue by affirming its existence.

Another alternative is to leave prank to be addressed by future sentencing procedures, with the issue to be whether prank should be specified as a factor going to mitigate sentence. The advantage of this approach is that it places the issue of prank arguably in its proper context as a factor going to the mitigation of sentence. The disadvantage is that it delays addressing this issue until later in the codification process.

The Working Group on the General Part made no recommendation on this issue.

OTHER JURISDICTIONS

Neither the New Zealand Crimes Bill nor the English Law Commission's Draft Code have a provision concerning prank.

The American Law Institute's Model Penal Code has no specific provision concerning prank. However, insofar as the intent to play a practical joke negatives the requisite intent for an offence, an accused may escape criminal liability.

ISSUES FOR CONSIDERATION

1. Should the General Part include a provision providing a specific defence of prank or should it be left to be addressed by future sentencing procedures?

DOUBLE JEOPARDY

THE PRINCIPLE

No person should be subjected to multiple prosecutions, convictions or penalties for the same crime or the same transaction.

THE RATIONALE

The state, with all its power, should not be enabled to harass the citizen by repeated prosecutions in order to ensure conviction after a previous acquittal or to obtain a further conviction after a prior conviction, otherwise no one charged with a crime could ever be sure that the case against him or her had concluded.

THE PRESENT LAW

It is one of the fundamental rules of criminal law that no person shall be placed in jeopardy twice for the same matter. At common law, some procedural defences have long existed to ensure that this rule is followed. For example, "autrefois convict" prevents future prosecutions of an accused for a crime of which he or she has already been convicted and "autrefois acquit" prevents future prosecutions of an accused for a crime of which he or she has already been acquitted. These defences, often specially pleaded, are provided for under ss. 606 -609 of the Criminal Code.

Furthermore, these defences are now enshrined in the constitution by s. 11(h) of the Charter of Rights and Freedoms which provides that any one charged with an offence has the right if finally acquitted of the offence not to be tried for it again and, if found guilty and punished for the offence, not to be tried and punished for it again. Also, there are other defences relating to double jeopardy which have been developed more recently by our courts. An accused may raise the rule against multiple convictions, which, in certain circumstances, prevents an accused from being convicted of different crimes that arise out of the same act or transaction. An accused may also raise the defence of "issue estoppel" which prevents the re-litigation of a particular issue which has already been conclusively determined in previous criminal proceedings.

CANADIAN RECOMMENDATIONS

One alternative is to put all substantive and procedural matters concerning protection against double jeopardy in a forthcoming Code of Criminal Procedure. In this regard, the Law Reform Commission of Canada will soon publish a Working Paper on Double Jeopardy, Pleas and Verdicts that codifies, in plain language: (a)

what is now the plea of "autrefois acquit" or "autrefois convict"; (b) the rule against multiple convictions; and (c) "issue estoppel". In addition, the Working Paper proposes a number of important procedural provisions addressing to what extent crimes arising out of the same transaction should be tried together, the effect of foreign judgments on trials to be held in Canada, the application of the proposed double jeopardy rules to federal offences, and when and how these issues should be raised. The advantage of this alternative is that all double jeopardy issues would be found in one place, would be addressed there comprehensively, and would avoid possible confusion about the application of rules or procedures ancillary to substantive issues.

A second alternative is to place the above-mentioned substantive aspects of double jeopardy in the General Part of the proposed criminal code, with the additional procedural matters to be dealt with in a later Code of Criminal Procedure. The disadvantage of this approach is that it would split up the substantive aspects from important procedural aspects, making it impossible to obtain a complete overview of the subject.

The final alternative is to omit codification of double jeopardy issues, leaving it to interpretations of s. 11 (h) of the Charter to develop rules to protect against double jeopardy. The advantage of this alternative is that s. 11 (h), on its face, applies only to "autrefois acquit" or "autrefois convict" situations. Case law alone would develop the scope of other aspects of double jeopardy such as the rule against multiple convictions. This would produce no more than the present situation - an incomplete Code.

OTHER JURISDICTIONS

The New Zealand Crimes Bill has no provision concerning double jeopardy.

The English Law Commission's Draft Code (s. 11) provides that a person shall not be tried for an offence of which he or she has been convicted or acquitted or of which he or she might have been convicted on an indictment or information charging him or her with another offence of which he or she has been convicted or acquitted.

The American Law Institute's Model Penal Code § 1.08 & 1.09 provides that when a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution if it resulted in an acquittal or a conviction, if it was terminated by a final order or judgment for the defendant which has not been set aside, reversed or vacated, or if it was improperly terminated.

ISSUES FOR CONSIDERATION

1. Should the General Part contain a provision that no person shall be placed in jeopardy twice for the same matter? Should the Code instead rely solely on s. 11(h) of the Charter? Should it instead be left to the procedural sections of the Code?

ENTRAPMENT

THE PRINCIPLE

An accused's act must be culpable in order for criminal responsibility to apply. Therefore it must have been deliberate and wholly voluntary.

THE RATIONALE

If an accused is induced by a law enforcement officer to commit an offence which he or she would not otherwise have committed, his or her behaviour may not have been truly voluntary. Moreover, law enforcement officials must be discouraged from inducing the commission of offences merely for the purpose of their prosecution.

THE PRESENT LAW

Generally, the issue of entrapment involves the instigation of offences by government officials for the purpose of prosecuting them. The defence of entrapment will neither justify nor excuse an accused's act but if the defence is made out, the court may enter a stay in the proceedings. This halts the proceedings at that point and is effectively an acquittal of the accused in that he or she cannot subsequently be convicted. A stay may be appealed in the same way as a verdict of acquittal.

Entrapment may arise in one of two types of situations. First, where an official provides someone an opportunity to commit an offence in circumstances where the official does not have a reasonable suspicion that the accused is behaving unlawfully, or where he or she is acting improperly for dubious motives unrelated to the investigation and repression of crime. Second, where the official has a reasonable suspicion or is acting in the course of a valid enquiry, but goes beyond merely providing an opportunity and actually induces the commission of an offence.

As far as is possible the test will be objective both as to the legitimacy of police behaviour and as to whether an average person would have been induced to behave as the accused did.

The issue of entrapment may be raised after the Crown has proved the elements of the offence beyond a reasonable doubt. The defence must be established on a balance of probabilities by the accused and will only be made out in the clearest of cases.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada has recommended that defences of a procedural nature, however, such as entrapment, are left to be dealt with in a new Code of Criminal Procedure.

A number of alternatives should be considered. One possibility is to retain the status quo. The advantage of this is that the present law provides safeguards against unreasonable behaviour on the part of law enforcers. This is in keeping with the principle that individuals should be free from undue intrusion by the state into their lives. The disadvantage is that the usual remedy of a stay in the proceedings may be unduly lenient to an accused because he or she has, after all, committed a crime with requisite intent. Official behaviour can be controlled in a more direct manner without acquitting an accused of a crime which he or she committed.

A second alternative would be to omit an entrapment provision altogether and look to the accused's state of mind to determine whether State pressure has induced the commission of the crime by a reluctant accused. Inducement by a law enforcer may be considered regarding mitigation of punishment. The advantage of this provision is that it places proper emphasis on the intent of the accused in an entrapment-like situation. The remedy is more in keeping with the harm caused by official inducement. If an accused would not have committed the offence had the official not induced him or her to commit it, the accused may be acquitted altogether, whereas if the accused was merely provided an opportunity to commit the crime to which he or she was predisposed, then the punishment may be reduced. The disadvantage is that this rule does not deal adequately with unreasonable behaviour of law enforcement officers. The right of the accused not to be unduly harassed by the state is not reflected by this provision.

A third alternative would be to rely on s. 24(2) of the Charter which provides that evidence obtained in a manner which infringes any rights guaranteed under the Charter may be excluded if the admission of it in court proceedings would bring the administration of justice into disrepute. The advantage of this is that this rule protects an accused against unreasonable behaviour by a law enforcement official while not granting too much leniency to an accused. The disadvantage is that there is no certainty that entrapment-like behaviour offends any right guaranteed under the Charter. While this may appear on the face of it to militate against a provision protecting individuals from entrapment, there may nonetheless be overriding policy reasons for such a provision.

The Working Group made no recommendation as such concerning entrapment. However, the Group felt that there may be good reason to consider this in the context of the General Part rather than to relegate it to the Procedural Section.

OTHER JURISDICTIONS

Neither the New Zealand Crimes Bill nor the English Law Commission's Draft Code have a provision concerning entrapment.

The American Law Institute's Model Penal Code § 2.19 provides that a public law enforcement official or a person acting in co-operation with such an official perpetrates an entrapment if to obtain evidence of the commission of an offence, he or she induces or encourages another person to engage in conduct constituting such offence by either making knowingly false representations designed to induce the belief that such conduct is not prohibited or employing methods which create a substantial risk that such an offence will be committed by persons other than those who are ready to commit it. This defence is not available when causing or threatening bodily injury is an element of the offence charged.

ISSUES FOR CONSIDERATION

1. Should there be a provision dealing with entrapment in the General Part?
2. If yes, what should the definition of the defence be?

ATTEMPTS

THE PRINCIPLE

People are responsible not only for committing crimes but also for trying to commit them.

THE RATIONALE

An individual who tries to commit a crime but fails to do so is at least to some extent to blame and often as much so as one who succeeds in its commission.

THE PRESENT LAW

The Criminal Code provides in s. 24 that an accused may be charged with attempting to commit an offence if, while having an intent to commit that crime he or she does or omits to do anything for the purpose of carrying out this intention, whether or not it was possible under the circumstances to commit the crime, provided that what he or she does goes beyond mere preparation and is not too remote to constitute an attempt to commit the crime. On the question of what constitutes a sufficient act or omission for this purpose the law is unsettled. And as to distinguishing between preparation and attempt it provides no satisfactory criterion.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended that the following provision be placed in the General Part: Everyone is liable for attempt who, going beyond mere preparation, attempts to commit a crime, and is subject to half the penalty for it.

The advantage of such a provision is that it is sufficiently general to allow adequate flexibility of interpretation regarding what constitutes an act going beyond mere preparation. It also provides a general rule as to sentence so as to increase the certainty of penal consequences. The rule accords with the intuition that an attempter is less morally culpable than an actual perpetrator and should therefore be subject to a lesser sentence.

The disadvantage is that it may not be sensible to limit the reach of the law of attempts to acts beyond mere preparation if the preparatory acts may be interpreted as clear steps in the commission of a crime. The sentencing provision is unnecessarily rigid in its dogmatic application of a 50% reduction in sentence for an

attempt, since half of the maximum sentence may, in some circumstances, be insufficient.

An alternative provision would be a compromise between the current state of the law and the Law Reform Commission's recommendation. Such a provision would make a person liable for attempting an offence if he or she commits a substantial or significant act or omission in furtherance of the offence. That person could, if convicted, be subject to a more rational sentencing scheme which would reflect the differing severity of particular offences. For instance, for serious offences punishable by 14 or more years of imprisonment, the accused would be subject to the same maximum sentence as would an accused convicted of committing the offence itself; for lesser offences, the accused would only be subject to one-half of the maximum.

The advantage of this alternative is that it provides criminal sanctions for an accused whose conduct clearly demonstrates that he or she is embarking on a crime, even though the discovery occurs in the preparation stage of the enterprise. The sentencing structure provides some guidance for the courts while allowing more flexibility in application. The disadvantage is that it doesn't provide much guidance as to the requisite mental element for an attempted offence.

The Working Group recommended that the act required for an attempt be a "significant act in the furtherance of a crime." The group feels also that the strict one-half penalty should be removed so as to add the necessary flexibility of sentencing power.

The Canadian Association of Chiefs of Police recommended that the rigid restriction on sentencing a person convicted of attempting an offence to one half the full sentence for the completed offence be abolished. It also urged that more legislative direction be given concerning the threshold separating mere preparation from commission.

The Federal-Provincial Working Group on Homicide recommended that everyone who, having the intention to commit murder, engages in conduct which is beyond preparation to carry out that intention is guilty of attempted murder.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 45) provides that a person attempts to commit an offence who, with intent to commit the offence, does or omits to do any act to carry it out that is immediately or proximately connected with the offence, and not so remote as to be mere preparation. No one may be convicted of an attempt to commit an offence if it was, owing to a mistake of law, impossible to commit the offence. The Bill (s. 67) also makes a provision for attempted furthering in much the same form as the Law Reform Commission of Canada's provision. That is, anyone who would have been guilty as a party to an offence had that offence been committed, is nonetheless liable to the same punishment as he or she would have been if he or she were guilty of an attempt to commit the offence.

The English Law Commission's Draft Code (s. 49) provides that a person who, intending to commit an indictable offence, does an act that is more than merely

preparatory to the commission of the offence is guilty of attempt to commit the offence. A person may be guilty as an accessory to an attempt by another to commit an offence but it is never an offence to attempt to procure, assist or encourage as an accessory the commission of an offence by another.

The American Law Institute's Model Penal Code § 5.01 provides that a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he or she does one of three things. First, the accused purposely engages in conduct which would constitute the crime if the attendant circumstances were as he or she believed them to be. Second, when causing a result is an element of the crime, he or she does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his or her part. Finally, if the accused purposely does or omits to do anything which, under the circumstances as he or she believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his or her commission of the crime.

The Australian Draft Bill (s. 7C) provides that where a person, with intent to commit an offence, does an act (including an omission) that goes so far towards the commission of the offence as to be more than mere preparation, the person is taken to have committed that offence and is punishable accordingly for attempting to commit an offence. The person may be found guilty of attempting to commit an offence even though the commission of the offence intended was impossible.

ISSUES FOR CONSIDERATION

1. Should there be a provision in the General Part that everyone is liable for attempt who going beyond mere preparation, attempts to commit a crime?
2. Should the provision in the General Part require instead that a person commit a substantial or significant act or omission in furtherance of the offence?
3. What should the penalty for attempts be - always one-half the maximum sentence for the completed offence or should it vary with the overall seriousness of the crime?
4. Should there be a provision concerning impossible attempts; that is, acts which even if successfully carried out, would not constitute a crime?

CONSPIRACY

THE PRINCIPLE

Criminal liability attaches not only to commission of crimes but also to agreements to commit crimes.

THE RATIONALE

When people conspire to commit offences, the law need not wait until they commit them before it intervenes but can intervene at a preliminary stage against the conspirators to prevent the actual commission.

THE PRESENT LAW

An accused will be criminally liable for conspiring to commit an offence if he or she agrees with one or more people to commit that offence. While general liability for conspiracy is established under s. 465 of the Criminal Code, which makes it a crime to conspire to commit murder, to prosecute another falsely or to commit an indictable or summary offence, the definition of "conspiring" is only found in the case law.

The requisite elements of conspiracy are an intention to commit an offence combined with the act of agreement to commit the elements of that offence. Actions merely coincidental with those of another in the absence of actual agreement do not amount to conspiracy. However, an accused is still liable for conspiracy even though the other parties are not brought to trial.

CANADIAN RECOMMENDATIONS

The Law Reform Commission recommended that a provision be placed in the General Part that everyone is liable for conspiracy who agrees with another person to commit a crime and is subject to half the penalty for it. Such a provision consolidates the law on conspiracy into one section. The disadvantage of this is that the failure to carry out the agreement may result not from ethical considerations but simply from practical difficulties, so that the conspiring may not always be less reprehensible than the committing.

The Working Group on the General Part disagreed with the LRC's proposal. The group rejected the strict one-half maximum penalty as being too inflexible.

The Canadian Association of Chiefs of Police recommended that the provision concerning conspiracy be broadened to create potential criminal liability for conspiring to commit an offence which is not a crime.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 61) provides that a person conspires to commit an offence where that person agrees with any other person that an act will be done or omitted to be done, which act or omission, if it occurs, constitutes that offence. A conspiracy continues until the agreement is carried out, or until all of the parties, or all of the parties except one, have abandoned the intention that it be carried out.

English Law Commission's Draft Code (s. 48) provides that a person is guilty of conspiracy to commit an offence if he or she agrees with another or others that an act or acts shall be done which, if done, will involve the commission of the offence or offences by one or more of the parties to the agreement. As with the New Zealand provision, the English Code provides that a conspiracy continues until the agreed act or acts is or are done, or until all or all save one of the parties to the agreement have abandoned the intention that such act or acts shall be done.

The American Law Institute's Model Penal Code § 5.03 provides that a person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he or she either agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime, or agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

The Australian Draft Bill (s. 7D) provides that where a person agrees with another (including his or her spouse) that an act be done or omitted to be done and this involves committing an offence by any one or more of them if any intends that the act be done or the omission be made, the person is guilty of conspiracy to commit the offence. A conspiracy continues until the agreed act or omission is done or made or alternatively all, or all except one of the parties to the agreement have abandoned the intention to continue with the agreement.

ISSUES FOR CONSIDERATION

1. Should the General Part contain a provision that everyone is liable for the offence of conspiracy who agrees with another to commit a crime ?
2. Should the penalty for conspiracy always be one-half the maximum penalty for the completed offence or should it vary with the seriousness of the offence?
3. Should the General Part contain a definition of conspiracy?

AIDING AND ABETTING

THE PRINCIPLE

Everyone who actively helps or encourages another to commit a crime is himself or herself criminally liable.

THE RATIONALE

A person who positively helps or encourages another to engage in wrongdoing is responsible for that wrongdoing.

THE PRESENT LAW

Subsections 21(1)(b) and (c) of the Criminal Code provide that an accused who aids or encourages the commission of a crime is liable as a party to that crime if it is committed and is guilty of the same offence as one who actually commits it. Liability requires more than mere presence at the scene of the crime; it requires active encouragement or some positive act of assistance, e.g. keeping watch, enticing the victim away, or preventing others from stopping the commission of the crime.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended that the following provision be put in the General Part: Everyone is liable for furthering a crime and is subject to the penalty for it if he or she helps, advises, encourages, urges, incites or uses another person to commit that crime and that person completely performs the conduct specified by its definition.

The advantage of such a provision is that a separate offence of furthering means that an accused will more accurately know with what he or she has been charged. Similarly, criminal records will distinguish between a conviction for actual perpetration of an offence and aiding or abetting the commission of it.

The Working Group recommended that the Code definition of "commit" be extended to include helping and encouraging. The group would also like to see the rules of criminal procedure modified so as to take care of any resulting ambiguity. The Working Group in effect wished to continue the present law found in s. 21.

The Federal-Provincial Working Group on Homicide recommended that everyone who commits an offence, or assists, procures, uses, counsels, advises, urges, encourages or incites another person to commit it be a party to that offence and be liable for the penalty for it.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 57(1)) provides that a person is a party to an offence and therefore guilty of that offence who helps any person to commit the offence or does or says anything to bring about the commission or continuance of the offence. Furthermore, a person may be a party to an offence by merely being present at the scene of the offence if that person knows that his or her presence will encourage any other person to commit or to continue the offence or that person fails to exercise any authority that he or she has in the circumstances to prevent the commission or continuance of the offence. The person may be convicted of the offence even if the principal is not or cannot be convicted.

The English Law Commission's Draft Code (s. 27) provides that a person is guilty of an offence as an accessory if he or she intentionally assists or encourages the act which constitutes or results in the commission of the offence by the principal. This includes behaviour arising from the failure by a person to take reasonable steps to exercise any authority or to discharge any duty he or she has to control the relevant acts of the principal in order to prevent the commission of the offence.

The American Law Institute's Model Penal Code § 2.06 provides that a person is an accomplice of another person in the commission of an offence and therefore guilty of that offence if, with the purpose of promoting or facilitating the commission of the offence, he or she solicits such other person to commit it, or aids or agrees or attempts to aid such other person in planning or committing it, or, having a legal duty to prevent the commission of the offence, fails to make proper effort so to do.

The Australian Draft Bill (s. 5(4)) provides a person may be charged with knowingly being involved in the commission of an offence and therefore taken to have committed that offence if he or she assisted, encouraged or procured the commission of the offence by another and the offence was committed.

ISSUES FOR CONSIDERATION

1. Should the General Part provision on parties be changed to provide that everyone is liable for furthering a crime and would be subject to penalty for it if he or she helps, advises, encourages, incites or uses another person to commit that crime and that person completely performs the conduct specified by its definition?
2. Should the provision be extended to include liability for a person who is present at the scene of a crime if that person knows that his or her presence will encourage any other person to commit or continue the offence or that person fails to exercise any authority that he or she has in the circumstances to prevent the commission or continuation of the offence?

3. Should liability for failing to prevent the commission or continuation of the offence only attach if the accused had an explicit legal duty to prevent the commission or continuation of the offence?

4. What should the mental element be for aiding and abetting? Is recklessness enough?

COMMON INTENTION

THE PRINCIPLE

If two or more persons decide together to pursue an unlawful purpose, each of them is criminally responsible for any other unlawful acts committed by a member of the group if that act was incidental to the furtherance of the unlawful purpose.

THE RATIONALE

This helps to deter unlawful enterprise and to punish all persons involved in a crime for consequences which were reasonably foreseeable in the circumstances.

THE PRESENT LAW

S. 21(2) of the Criminal Code provides that an accused will be a party to an offence if he forms a common intention with another person to pursue an unlawful purpose and the other, in fulfilment of that purpose, commits the offence. The accused will only be liable as a party if he or she knew or ought to have known that the offence was a probable consequence of carrying out the unlawful purpose. The common intention must be not only to carry out the unlawful purpose but also to assist each other therein.

An unlawful act includes a breach of any federal or provincial statute as well as a criminal act under the Criminal Code. The unlawful act which the parties originally formed the common intention to commit must be different from the offence for which the accused are ultimately charged.

In the context of murder and attempted murder, the words "ought to have known" have been held by the courts to be of no force and effect because the objective test offends ss. 7 and 11(d) of the Charter. Thus, the standard is that of subjective knowledge on the part of the accused that the offence was a probable consequence of carrying out the unlawful purpose.

For other offences, an accused will be liable as a party to the offence if a reasonable person in the position of the accused would have foreseen that the commission of the offence was a probable consequence of pursuing the unlawful purpose. Under either test, the probability of the offence being committed is to be determined objectively.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended that the existing rule be modified in a new General Part so that an accused will not be liable for furthering or attempting to further any crime different from the crime intended to be furthered. A person will nonetheless be criminally liable for a crime when the crime committed differs only as to the victim's identity or to the degree of harm involved. Moreover, according to the proposed rule, a person who agrees with another person to commit a crime and who also otherwise furthers it is liable not only for the crime which he agrees to commit and intends to further, but also for any crime which he knows is a probable consequence of such agreement or furthering.

The advantage of such a provision is that it reduces the severity of the present law by allowing an accused to escape liability as a general rule if the crime committed is different from that intended to be furthered. Moreover, the objective test of the foreseeability of the second crime has been changed to a subjective one. This is not only more in keeping with the deterrent value of the legislation, but it also avoids the possibility that an objective test will offend ss. 7 and 11(d) of the Charter.

The disadvantage is that it creates an overlap between common intention and conspiracy. This could lead to confusion as to which provision applies in circumstances where there is express agreement between individuals to commit a crime. There is no provision with respect to abandonment and therefore no legislative direction as to appropriate measures to be taken with someone who, having formed a common intention with another, decides to participate no longer in the criminal activity.

An alternative is to retain the status quo. The advantage of this is that it sends out a clear signal that joint criminal activity will not be tolerated by making an individual responsible for any crimes committed by his or her partner(s) in the criminal activity. The disadvantage is that the objective test of foreseeability has limited deterrent effect since if a person is not aware of the likelihood of the commission of a secondary crime, he or she is not going to be deterred from carrying out the criminal activity. Furthermore, it is very likely that this objective test of foreseeability will offend ss. 7 and 11(d) of the Charter.

The Working Group on the General Part disagreed with the Law Reform Commission's recommendation.

The Canadian Association of Chiefs of Police recommended that the test be objective; that is, criminal liability will exist where the person "knew or ought to have known" that the offence was a probable consequence of the agreement.

The Federal-Provincial Working Group on Homicide recommends that the following provision be codified regarding common intention:

Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and anyone of them, in carrying out the common purpose, commits a homicide-related offence, each of them who knew that the commission of such offence could be a consequence of the carrying out of the common purpose is a party to that offence.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 58) provides that where two or more persons form a common intention to help each other to commit an offence, each of them is a party to every offence committed by any of them in carrying out that common intention if he or she knows that the commission of that offence is a probable consequence of the carrying out of that common intention.

The English Law Commission's Draft Code (s. 27) makes no express provision regarding common intention. However, the section regarding accessories contemplates a common intention-type situation, the provisions of which are the same as those for aiding and abetting. There is not, however, provision made concerning liability for the commission of an offence by another which is different from that for which the parties originally formed the common intention.

The American Law Institute's Model Penal Code does not have a provision as such regarding common intention.

The Australian Draft Bill (s. 7) provides that where two or more persons form a common intention to bring about the doing of an act or an omission and the doing of that act or omission constitutes an offence and in implementing that common intention, an act is done or an omission is made that constitutes a different offence and each of them contemplated the doing of the second act or omission as a possible incident of the implementation of that common intention, each is to be taken to have committed the different offence.

ISSUES FOR CONSIDERATION

1. Should the General Part contain a provision that, subject to exceptions, an accused will not be liable for furthering or attempting to further any crime different from the crime intended to be furthered? The person would however be liable if the crime committed differs only as to the victim's identity or the degree of harm involved.
2. Should a person who agrees with another to commit a crime and who also otherwise furthers it be liable not only for the crime he or she agrees to commit and intends to further, but also for any crime which he or she knows is a probable consequence of such agreement or furthering?
3. Should instead the provision in the General Part be consistent with the present law that a person is liable for a crime committed by another with whom he or she has formed a common purpose to commit any crime?

COUNSELLING

THE PRINCIPLE

Everyone who incites another to commit a crime is himself or herself responsible for the commission of that crime.

THE RATIONALE

People who incite others to wrongdoing must share the blame with the perpetrator for that wrongdoing.

THE PRESENT LAW

The Criminal Code deals with counselling under two sections. S.22, which defines "counselling" to include procuring, soliciting and inciting, provides that everyone who counsels another to commit a crime is criminally liable as a party to the crime and therefore guilty of that crime if it is committed notwithstanding that it might be committed in a different way than that counselled or if a different crime, one that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

S. 464 provides that everyone who counsels another to commit a crime is still criminally liable even if that crime is not committed. If the crime counselled is an indictable offence, an accused is guilty of an indictable offence and liable to the same punishment as a person attempting to commit it. If it is a summary offence, he or she is guilty of a summary offence.

CANADIAN RECOMMENDATIONS

The Law Reform Commission of Canada recommended that the following provisions be added to the General Part:

- (a) Everyone is liable for furthering a crime and is subject to the penalty for it if he helps, advises, encourages, urges, incites or uses another person to commit that crime and that person completely performs the conduct specified by its definition.
- (b) Everyone is liable for attempted furthering of a crime and is subject to half the penalty for that crime if he helps, advises, encourages, urges, incites or uses another person to commit that crime and that other person does not completely perform the conduct specified by its definition.

The advantage of adding such a provision is that the distinction between counselling a complete and incomplete offence is a useful one and reflects the Criminal Code and the common law. The suggested provision removes the possible gap left in the current law regarding a person who aids in the commission of an incomplete offence. It does so by creating liability as an attempted furtherer for a person who aids another to commit a crime which that other does not commit.

The recommended offence provides that an accused, if punished, would be subject to one-half of the maximum penalty of the offence incited. Surely in some if not all circumstances, there is no difference regarding culpability between one who incites the commission of a complete offence and one who counsels another to commit an offence but that other person for reasons unconnected with the acts of the "counsellor" decides not to do so.

The Working Group on the General Part recommended that the Code definition of "commit" be extended to include helping and encouraging. The group would also like to see the rules of criminal procedure modified so as to take care of any resulting ambiguity.

The Federal-Provincial Working Group on Homicide recommended that the following provision be codified concerning counselling homicide:

Every one who counsels another person to be a party to a homicide offence is a party to and is guilty of every other offence that the other person commits in consequence of the counselling, if the person who counselled knew that the other offence could be committed in consequence of the counselling.

OTHER JURISDICTIONS

The New Zealand Crimes Bill (s. 57 (4)) provides that a person is a party to an offence and therefore guilty of committing that offence if he or she says or does anything to bring about the commission by another person of an offence. The person will be liable for every offence the other person commits in consequence of what is said or done and that is known by the first-mentioned person to be a likely consequence of what is said or done. Further, (s. 67 (1)) this person will be liable to the same penalty to which that person would be liable if he or she were guilty of an attempt to commit the offence.

The provision in the English Law Commission's Draft Code (s. 27) concerning counselling a crime is the same as that of aiding and abetting a crime. However, the Code further provides that a person who has encouraged the commission of an offence is not guilty as an accessory if before its commission he or she countermanded the encouragement with a view to preventing its commission or he or she took all reasonable steps to prevent its commission. Finally, the Code also provides that an accused will nonetheless be liable as an accessory to an offence although he or she does not foresee, or is not aware of, a circumstance of the offence which is not an element of it.

S. 47 provides that a person is guilty of incitement if he or she incites another to do or cause to be done an act or acts which, if done, will involve the commission

of the offence by the other and intends or believes that the other, if he or she acts as incited, shall or will do so with the fault required for the offence.

The American Law Institute's Model Penal Code § 2.06 (3) provides that a person is an accomplice of another person in the commission of an offence if with the purpose of promoting or facilitating the commission of the offence, he solicits such other person to commit it. § 5.02 provides that a person is guilty of solicitation to commit a crime if, with the purpose of promoting or facilitating its commission he or she commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his or her complicity in its commission or attempted commission.

The Australian Draft Bill (s. 6) provides that where a person procures another person to do or omit to do an act and if the procurer had done or omitted to do the act, the procurer would be guilty of an offence, the procurer is to be taken to be knowingly involved in the commission of the offence and therefore has committed the offence in question. This is true whether or not the other person can be held criminally responsible for the offence.

ISSUES FOR CONSIDERATION

1. Should the General Part contain a provision such as that recommended by the Law Reform Commission of Canada that if a person furthers a crime he is liable for the penalty for it and if she or he merely attempts to further it, he or she is liable for half the penalty for the crime?

EXTRA - TERRITORIAL JURISDICTION

THE PRINCIPLE

Except as specifically provided by law, no person shall be convicted in Canada for a crime committed wholly outside Canada. All of the exceptions (or, at least those currently within the Criminal Code) that provide for extraterritorial jurisdiction should be set out together in the General Part of the Code.

THE RATIONALE

In conformity with common law tradition and international law, Canadian courts generally assume criminal jurisdiction only over crimes committed wholly in Canada. This general rule is subject to a number of exceptions that give Canadian courts jurisdiction, in some instances, over crimes committed wholly or partly outside Canada. These exceptions are usually based upon generally accepted principles of international law and subject to various diplomatic and other legal immunities.

In order to provide clarity to the law, these exceptions should be set out together in the General Part.

THE PRESENT LAW

In considering the extraterritoriality of Canadian criminal law, it is important to bear in mind the difference between the applicability of Canadian law to acts occurring outside Canada, on the one hand, and the jurisdiction of Canadian courts to try those acts as being contrary to Canadian law. While often inter-related, the former usually concerns the definition or scope of the substantive offence, while the latter concerns the empowerment of the courts to adjudicate. Applicability of law is usually achieved by declaring that the offence may be committed whether or not it occurs in Canada. Canadian jurisdiction is usually achieved by deeming the acts in question to be committed in Canada and empowering the courts in a territorial jurisdiction of Canada with the ability to try that offence.

Subsection 6(2) of the Criminal Code provides that, subject to that Act or any other Act of Parliament, no person shall be convicted (or discharged) of an offence committed outside Canada. A number of provisions of the Criminal Code and other Acts provide exceptions; however, not all of these are located nor cross-referenced in one Part of the Code. In respect of some provisions, while the issue of applicability is clear, the issue of jurisdiction is not.

The major group of exceptions can be found in section 7 of the Code which carefully (and in a complex manner) provides that a number of specified offences

may have extraterritorial application and that Canadian courts may have jurisdiction in relation to these offences. All of these exceptions are based on recognized principles of international law which permit countries to apply their laws and the jurisdiction of their courts to acts committed wholly or partially outside their territorial jurisdiction. In particular, extraterritorial jurisdiction has been granted, pursuant to international conventions to which Canada is a party, in respect of offences concerning aviation, internationally protected persons, hostage taking, protection of nuclear materials and torture. Pursuant to various recognized principles of international law, application and jurisdiction is also extended to war crimes, crimes against humanity and acts committed by employees of the government of Canada. The scope of application of these provisions is not really an issue for the current review since, in accord with Canada's international obligations, their scope must not exceed that which Canada is entitled to do by international law. However, the Law Reform Commission has questioned whether the drafting of some provisions (e.g., concerning aviation) are strictly in accord with international conventions.

Section 477 concerns offences committed on the territorial sea and other waters off the coast of Canada. In addition, the Canada Shipping Act and the Territorial Sea and Fishing Zones Act also contain relevant provisions. All of these provisions are being amended and rationalized in the proposed Canadian Laws Offshore Application Act which has been passed by the House of Commons and is currently before the Senate.

Section 465 provides a number of circumstances where the offence of conspiracy may have extraterritorial application and Canadian courts may have related jurisdiction. In particular, subsection 465(3) provides that any person who conspires in Canada for the purpose of doing anything, which is an offence in Canada, in a place outside Canada shall be deemed to have committed that offence in Canada, if that act would also be an offence under the laws of that foreign place. Subsection (4) provides that a person who conspires outside Canada to do anything in Canada, which is an offence in Canada, shall be deemed to have conspired in Canada to do that thing. It should be noted that this latter provision, unlike subsection (3), does not contain a requirement that the acts must be considered to be an offence under the laws of both countries (i.e., double criminality).

A number of other provisions throughout the Criminal Code also proscribe as offences various types of conduct as being criminal, even if committed outside Canada (e.g., forging currency, forging passports and certificates of citizenship, bigamy and piracy), but the basis for the jurisdiction of Canadian courts to try such offences is not clearly provided in the Code, and resort must be had to the common law.

A number of other Acts of Parliament also create offences with extraterritorial impact, but which are not specifically mentioned in the Criminal Code (e.g., National Defence Act, Official Secrets Act, Foreign Enlistment Act, etc.).

With respect to situations where some elements of an offence may be committed inside Canada and others may be committed outside Canada, the Criminal Code does not contain any governing provision. However, the Supreme Court of Canada in Libman v. The Queen (1985) held that Canadian courts may,

under the common law, exercise jurisdiction if a significant portion of the activities constituting the offence are committed in Canada such that there is a "real and substantial link" between the offence and Canada.

CANADIAN RECOMMENDATIONS

In section 5 of its Draft Code, the Law Reform Commission of Canada has proposed that a consolidation of many of the jurisdictional provisions in Canadian statutes be located in the General Part of a new Criminal Code. The Commission, however, did not examine all federal laws in order to determine their extraterritorial applicability, and recommends that this be done. In addition, it also recommends that a number of changes be made to the law in order to extend its application or to clarify its expression. However, in some cases, this attempt has resulted in a proposed application of Canadian law that goes beyond the obligations of the international conventions to which Canada is a party or recognized principles of international law.

In particular, section 5 would:

1. Codify the principle in Libman v. The Queen.
2. Require the presence of double criminality with respect to both conspiracies made inside Canada to be effected outside Canada and conspiracies made outside Canada to be effected within Canada.
3. In a manner similar to conspiracy, provide for extraterritorial application and jurisdiction in respect of attempts to commit offences and furthering or attempting to further a crime. (This is a new extension and is broader than that proposed by other model penal codes, discussed below.)
4. Excludes locally engaged staff at Canadian embassies, for example, from the jurisdiction of Canadian law. Extends Canadian jurisdiction to members of the R.C.M.P. serving abroad and their families.
5. Provides a statutory grant of jurisdiction for currency and passport offences.
6. Attempts to combine a definition of piracy (which may be too broad) with a statutory grant of jurisdiction.
7. Attempts to re-express in simpler language various provisions of section 7 of the Criminal Code that are based on international conventions to which Canada is a party. (In some situations this is generally successful; but in other situations the resulting scope of application is either too broad or too narrow.)

OTHER JURISDICTIONS

The American Law Institute's Model Penal Code § 1.03 provides a number of general rules concerning territorial applicability. The Model Penal Code, however, does not address specific extensions of extraterritorial jurisdiction pursuant to international conventions as does the Canadian Criminal Code. Nor does the Model

Penal Code contain a general rule similar to subs. 5(1) of the Canadian Criminal Code, but rather states the general rules where the jurisdiction of the State will apply.

With respect to transnational crimes, the Model Penal Code applies if either the conduct or the result thereof occurs within the State. In order for the presence of one of the elements of an offence to found jurisdiction, there is no requirement (unlike the LRC's proposal) that the element must establish a real and substantial link with the domestic State. However, if the result of the domestic conduct occurs in another jurisdiction where similar conduct would not constitute an offence, jurisdiction will only apply if a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result. Where a result that is an element of a domestic offence is caused by conduct that both occurs outside the State and is not an offence there, jurisdiction will not apply unless the actor purposely or knowingly caused the result within the State.

Like the LRC recommendations, the Model Penal Code applies to conspiracies, attempts or other forms of complicity committed in the domestic State that are undertaken for the purpose of committing an offence in another jurisdiction, if the conduct is considered to be an offence in both jurisdictions. However, unlike the LRC recommendation, double criminality is not required in order to found jurisdiction where a conspiracy or attempt is committed outside of the State for the purpose of committing an offence within that State. Instead, an overt act in furtherance of the conspiracy must occur within the State; however, no such requirement exists in respect of the commission of an attempt. Other forms of complicity occurring outside of the State in relation to an offence to be committed within the State are not covered by the Model Penal Code's jurisdictional rules.

The Model Penal Code also provides jurisdiction where the offence consists of the omission to perform a legal duty imposed by the law of the State with respect to domicile, residence or a relationship to a person, thing or transaction in the State, or where the offence is based on a statute of the State which expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of the State and the actor knows or should know that his/her conduct is likely to affect that interest.

The New Zealand Crimes Bill (s. 8) provides that New Zealand courts have jurisdiction where: any act or omission that constitutes an offence occurs in New Zealand; and, in the case of acts or omissions occurring outside New Zealand, any New Zealand statute expressly states that such act or omission constitutes an offence whether or not it occurs in New Zealand. (For example, ss 81 and 82 , which set out the offences of piracy and piratical acts, specifically provides that these acts are offences whether done within or outside New Zealand. By s. 8, New Zealand courts would have jurisdiction.)

With respect to transnational crimes, s. 13 of the New Zealand Crimes Bill provides that the offence shall be deemed to be committed in New Zealand if any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission or event.

The New Zealand Crimes Bill (s. 14) also contains a provision specifically dealing with offences on ships or aircraft and jurisdiction in respect of certain persons with diplomatic or consular immunity.

The English Law Commission's Draft Criminal Code does not contain any general provisions concerning the jurisdiction of the criminal courts. The Commission believed that these should be located in the procedural Part of the Code rather than the General Part. In any event, since consultations were still being undertaken within the government on this issue, such as to require further changes to the Commission's initial proposals, there was little advantage to be gained by including provisions which would inevitably require reconsideration.

Nevertheless, the Draft Code does contain some provisions, which while not granting English courts with jurisdiction, do provide that certain offences also apply outside of the normal limits of jurisdiction. For example, in respect of the offences of murder, manslaughter, kidnapping, causing intentional personal harm, and causing an explosion likely to endanger life, s. 52 provides that a person may be guilty of conspiracy, attempt and incitement to commit that act outside England, provided that that act, if done within England, would constitute such an offence.

Likewise, a person may be guilty of a conspiracy, attempt or incitement (in relation to the same list of offences) occurring outside England provided that the ultimate offence is intended to be done in England and, if so done, would constitute such an offence. With respect to any offence, a person may be guilty of a conspiracy made outside England if: the ultimate offence is to be committed in England; and, an overt act occurs in England and a person enters within the ordinary limits of English jurisdiction for any purpose in pursuance of the agreement. Section 60 of the Draft Code also provides special provisions for the offences of murder and manslaughter. Essentially, a person may be guilty if either the act or death occurs in England (or within English jurisdiction) or the accused is a British citizen. Extraterritorial application of law as part of the definition of an offence also occurs in respect of other offences as well, such as hostage-taking and torture. None of these provisions is, however, strictly a jurisdictional provision since they appear to define the scope of the offence rather than the jurisdiction of the English courts to try such offences.

ISSUES FOR CONSIDERATION

1. Should all of the jurisdictional provisions of a) the Criminal Code or b) all federal statutes be located in the General Part of a new Criminal Code?
2. Should a new Code attempt to codify the principles enunciated in the case of Libman v. The Queen?
3. Should double criminality be required with respect to conspiracies made outside Canada to commit an offence in Canada. Alternatively, should some other requirement be required instead, such as the doing of an overt act in Canada in furtherance of the conspiracy. Should the status quo remain?

4. Should extraterritorial jurisdiction be extended to a) attempts, b) counselling, or c) other forms of complicity in crime (e.g., aiding) committed in Canada in respect of subsequent offences to be committed outside Canada?
5. Should extraterritorial jurisdiction be extended to a) attempts, b) counselling, or c) other forms of complicity in crime (e.g., aiding) committed outside Canada in respect of offences to be committed inside Canada?
6. Should a review be undertaken by the Government of Canada to ensure that the provisions of section 7 of the Criminal Code, and the proposals of the Law Reform Commission, are consistent with Canada's international obligations?

SENTENCING

The issue of what aspects of sentencing should be dealt with in the General Part could be the subject of a general discussion or could be revisited at some future date. For the moment, the entire question of sentencing is being dealt with through a separate consultation process.

On July 6, 1990, the Hon. Kim Campbell, Minister of Justice and Attorney General of Canada and the Hon. Pierre Cadieux, Solicitor General of Canada, announced the introduction of wide-ranging proposals for the reform of sentencing, corrections and conditional release.

These proposals are presented in a Consultation Package called Directions for Reform: Sentencing, corrections and Conditional Release. The Consultation Package was formulated in part by drawing upon recommendations from the general public and from recent reports, in particular Taking Responsibility, the report of the Standing Committee on Justice and Solicitor General, and Sentencing Reform: A Canadian Approach, the report of the Canadian Sentencing Commission. For the most part, the proposals for sentencing reform are discussed in the document entitled, Directions for Reform in Sentencing. Following the announcement of these proposed reforms a process of consultations has been launched to obtain feedback on the proposals.

These proposed reforms on sentencing are designed to establish a consistent and coherent framework of policy and process in sentencing matters; to implement a system of policy and process approved by Parliament; and to increase public accessibility to the law on sentencing.

The Consultation Package proposes that a more rational and just range of sanctions be created. In particular, the package calls for a substantially diminished emphasis on incarceration and substitution wherever possible of intermediate sanctions such as probation, community service orders and fine option programs.

Given the piecemeal reforms in the past, there is at present neither a clarity of organization nor general legislative direction to the courts as to the priority within the range of sanctions. As a result, the Consultation Package proposes that Part XXIII of the Criminal Code, which outlines the current sentencing provisions, be restructured in a more clear and logical format, which will make it more understandable and therefore more accessible to both criminal justice professionals and to the public.

It is also proposed that a legislated statement of purpose and principles of sentencing be incorporated within Part XXIII as a means to clarify sentencing objectives, contribute to coherent policies and provide guidance to judges on what they should consider in determining the most appropriate sentence.

As well, it is proposed that a Code of Evidence and Procedure for Sentencing hearings be included within new Part XXIII, which would govern the conduct of the sentencing hearing in order to protect the rights of the offender, to ensure that the sentence imposed by the court is the most appropriate one in the circumstances and to reduce unwarranted disparity in sentencing. It would also include reforms in the imposition and collection of fines and would include the forfeiture provisions from

other parts of the Criminal Code where these forfeiture provisions are applied once a finding of guilt has been made by the court.

These revisions to Part XXIII are designed to consolidate sentencing matters in an effort to make the Criminal Code more coherent and accessible.

In addition, the Consultation Package proposes the establishment of a Permanent Sentencing and Parole commission as vehicle by which both sentencing and Parole could be consider within a consistent policy framework and would, among other things, develop sentencing guide-lines.

CLASSIFICATION OF OFFENCES

A General Part sometimes sets out a scheme for the classification of offences from which classification from which numerous procedural incidences follow. The Law Reform Commission has published a working paper on Classification of Offences which will form part of the backbone of its Code of Criminal Procedure.