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FINAL REPORT OF THE FEDERAL / PROVINCIAL WORKING GROUP ON HOMICIDE

June 1990
[Updated April 1991]

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On behalf of the Working Group on Homicide, we are honoured to present herewith our Final Report.

Reform of the law of homicide necessarily involves an assessment of our criminal law generally. This is so because much of our criminal law has evolved in response to this most heinous of moral wrongs: the blameworthy taking of a human life.

Our Working Group was initially established in response to the judgments of the Supreme Court of Canada in Vaillancourt and the ramifications potentially arising therefrom with respect to the requisite mental element for homicide crimes and related provisions. Consideration of these issues required that we address the law of homicide in a much broader fashion.

On behalf of the Working Group we would like to express our appreciation to Daniel Laurin who joined us in April, 1989. We are particularly indebted to him for his dedication to the role of secretary of the Working Group and his invaluable work in the preparation of this Report.

It is our hope that this Report will prove to be a valuable contribution to the reform of the law of homicide.

Yours respectfully,

Howard F. Morton,

Jean-François Dionne,

Co-Chairmen
Federal / Provincial
Working Group on
Homicide

Acknowledgements

Ottawa June 30, 1990
[Updated April 1991]

The Final Report on the law of homicide is the fruit of almost two years of work. This Report is not the result of the work of one or two individuals, but the accomplishment of an unusual co-operative effort to organize, write and revise in different ways and varying degrees most of the complete text. The efforts of each and every member, their constructive criticism and generous contribution in time have made this a better work.

Most of the recommendations contained in this report represent a high degree of consensus and for the most part are unanimous.

On behalf of all members, I would like to express our gratitude to François Lareau who acted as secretary from September 1988 to April 1989. The quality and volume of his work and his timely performance were far beyond normal expectations.

Thanks are due to Ed Tollefson, Q.C., who gave to François and myself all the co-operation and understanding we needed to work in a friendly atmosphere and was always there to support us in our initiatives.

Special thanks to Howard F. Morton and Jean-François Dionne who acted as co-chairmen of our Working Group. Their contributions cannot be overstated. The high quality of their commitment to this project made the task of every member much easier.

Daniel Laurin

Secretary

Federal / Provincial
Working Group on
Homicide

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INTRODUCTION

(01) Preamble

This is the Final Report to the Federal / Provincial Co-ordinating Committee of Senior Officials (CCSO) by its Working Group on the law of homicide.

On May 26-27, 1988, federal, provincial and territorial Ministers responsible for Criminal Law and Justice concluded that "Homicide" was a Category 2 priority item and that a Federal-Provincial Working Group should be formed to make recommendations concerning the existing law in this area. On August 11, 1988, CCSO formally created the Working Group at its Toronto meeting.

Pursuant to its initial mandate, the Working Group provided a First Report in January, 1989. The emphasis was on the prompt development of (1) executive and administrative advice and recommendations, and (2) legal policy and proposals arising,in particular, from the decision of the Supreme Court of Canada as to constructive murder in R. v. Vaillancourt (1987) 2 S.C.R. 673, 49 C.R. (3d) 97, 47 D.L.R. (4th) 399 (S.C.C.).

That First Report was received and considered by CCSO on schedule. It has been acted upon in part. One of the recommendation was to amend section 589 [formerly section 518] to permit joinder of indictable offences arising out of the same infraction in an indictment charging murder. On January 17, 1991, legislation to streamline trials involving persons accused of murder and other crimes (Bill C-54) received Royal Assent and became law on that date. CCSO tabled other parts, and directed the Working Group to examine the entire area of the law as to homicide and related offences in the Criminal Code with a view to making recommendations as to replace some or that entire set of Criminal Code provisions. The mandate, structure and proceedings of the Working Group are described below.

In Vaillancourt, the majority judgment of Lamer J. dealt with the constitutionalization of the principles and rules referable to *mens rea*. The ramifications of the decision therefore are not limited solely to the existing homicide and related provisions. See: R. v. Quin, 44 C.C.C. (3d) 570 (S.C.C.).

Subsequent cases have also demonstrated that Vaillancourt will be used to challenge other offences of the Criminal Code, e.g., 213(a) and (d), Favel, R. v., (1988) 43 C.C.C. (3d) 481 (Alta. C.A.); 212-213(a), * Martineau, R. v., (1988), 43 C.C.C. (3d) 417, 6 W.W.R. 385, 89 A.R. 162, 61 Alta L.R. (2d) 264 (currently under appeal to the Supreme Court of Canada); 214(5), Arkell, R. v., (1988) 43 C.C.C. (3d) 402, 64 C.R.(3d) 340, 30 B.C.L.R. (2d) 179 (B.C.C.A.) (currently under appeal to the Supreme Court of Canada).

* (see addendum page 12)

Section 245.1(1), Brooks v. R., (1988), March 10, CA 007016; 213(a), J.T.J.Jr (1988) 50 Man. R. (2d) 300-311; 213(a) Johnston v. R., (1988), Sept.14, No. 502/87, (Man. C.A.); 223, Prince, R. v., (1988) Nos. 487/87 and 504/87 (Man. C.A.); 245.2(1), Scharf v. R., (1988), No.39/88, (Man. C.A.); 212(A)(1), 212(A)(i), 213(a), Bree v. R., (1988), Ont. H.C., No. 730/86 and 338(1), Moffat v. R., (1988), Ont. C. A., No. 69/88.

(02) Mandate for Final Report

The Working Group on the law of homicide was instructed to provide a bilingual report, which was to:

(A) identify the issues arising out of the current law of homicide;

(B) consider the relevant recommendations and \ or comments made in:

(1) Law Reform Commission (LRC) Report 31, entitled Recodifying Criminal Law (Chapter 6 and the General Part);

(2) 3 reports of the Working Groups on LRC Report 30;

(3) the Canadian Sentencing Commission Report, Sentencing: A Canadian Perspective, and the Report of the Standing Committee on Justice and Solicitor General, Taking Responsibility, where they refer specifically to murder, first degree murder or second degree murder;

(C) make such recommendations as appear to be advisable.

(03) Materials

In its efforts, the Working Group found it necessary to read, analyze and consider not only the written materials referred to in the Mandate but, also, other jurisprudence and articles.

Part of the additional research concerned comparative law. A description of the comparative law materials considered is provided in the Appendix of this Report.

(04) Subjects Outside Mandate

In carrying out its Mandate, the Working Group also found it necessary to consider subjects that are related to the criminal law as to homicide and related offences. These subjects required information, research and deliberation beyond the real scope of the Mandate as given to the Working Group.

The subjects included:

(1) **Medical/Legal Issues.** Euthanasia, palliative care and similar topics which are beyond the subject of crimes relative to causing, hastening or encouraging death, which is the subject of recommendations in the Report.

(2) **Mental Disorder.** Mental disorder as a defence. It goes beyond the subject of mental disability or other forms of diminished responsibility as an extenuating circumstance in homicide crimes, which is part of the sentencing recommendations of the Report.

(3) **Police Powers.** Deadly force which is a subject of some legislative proposals in this Report.

(4) **Crimes of Endangerment.** The more general subject of crimes involving endangerment of life and safety. It particularly discusses the possibility of an overarching crime of endangerment to replace or supplement the various different offences now in the Criminal Code and other federal statutes. It also discusses the possibility of related crimes of endangerment causing death and endangerment causing bodily harm.

(05) Chairmen of the Working Group

- **Howard F. Morton**	Senior Crown Counsel, Criminal Law Policy, Ministry of the Attorney General, Province of Ontario
- **Jean-François Dionne**	Director of Crown Attorneys and Director of Criminal Affairs, Ministry of the Attorney General, Province of Quebec.

(06) Other Members of the Working Group

- **James Blacklock**	Senior Crown Counsel, Crown Law Office, Criminal Department, Ontario, Ministry of the Attorney General.
- **François Larcau**	Counsel, Criminal Law Review, Department of Justice Canada who acted as Secretary from September 1988 to April 1989. (He left the Working Group on September 6, 1989)
- **Daniel Laurin**	Counsel, Criminal Law Review, Department of Justice Canada who acted as Secretary from April 1989 to date.
- **Kenneth MacKay Q.C.**	Senior Appellate Counsel, Public Prosecutions Division, Saskatchewan Department of Justice.
- **Robert A. Mulligan**	Counsel, Criminal Justice Branch, British Columbia Ministry of the Attorney General.
- **Jack Watson**	Appellate Counsel, Criminal Justice Division, Alberta Department of the Attorney General.

(07) Meeting Dates

Regular Meetings

1988

September 20, October 12-13, November 15-16, December 19-20.

1989

January 19-20, February 21-22, April 4-6, April 25-26, May 16-18, June 21-22, July 5-7, August 20-22, September 18-21, November 8-10, November 29-December 1.

1990

January 10-12, January 31 - February 2.

Preparation of the Report

1990

February 20-22, (Laurin-Watson), March 16-18, (Laurin-Watson), April 23-24, (Laurin-Blacklock-Morton-Dionne), May 3-4, (Laurin-Morton), June 25-28, (Laurin-Morton), September 10-11, (Laurin-Dionne) October 15-16, (Laurin-Dionne-Morton-Mulligan-Blacklock), November 5-7, (Laurin-Morton).

1991

April 11-12, (Laurin-Morton).

(08) Minutes

The minutes of all of the meetings are available upon request from the Secretary of the Working Group.

(09) Opinions Expressed in this Report

The opinions expressed in this Report are those of the individual members, and are not to be taken as representing official positions of the Government of Canada or any provinces.

(10) Structure and Style of our Recommendations

None of the members of our Working Group profess expertise in the area of legal drafting. For that reason we were tempted in drafting our recommendations to simply state the principles which we believe should form the basis for any provision arising therefrom. We concluded however, that in order to attempt to articulate those principles in a meaningful way, we should adopt a drafting style which is somewhat similar to that which would be used in drafting legislation. In adopting this style we are aware that in many instances our recommendations may not perfectly express our intention. We were prepared to run that risk, however, to test the validity and appropriateness of our views as a possible basis for revised Criminal Code provisions with respect to the law of homicide. In those instances where our recommendations as drafted do not perfectly express our intention, it is our hope that the commentaries, when read in conjunction with the recommendations, will make our intention clear.

(11) Addendum to the Report (R. v. Martineau et al.)

Our Report was completed in June, 1990. Once printed it was submitted to Ministers of Justice and Attorneys General in August of that year. Subsequently numerous word processing errors were discovered and it was decided to correct these errors and reprint the Report. On September 13, 1990, the Supreme Court of Canada released its judgments in R. v. Martineau, R. v. Logan, R. v. Arkell, R. v. J(J.T.), and R. v. Luxton. Since these judgments were released prior to reprinting the Report and because they confirmed that the principles of fundamental justice require that conviction for murder be based upon proof beyond a reasonable doubt of subjective foresight of death, certain references to these cases were added as addendums to the Report.

PART 1 HIGHLIGHTS OF THE REPORT AND COMMENTARIES

1. Eliminate Constructive Murder

CURRENT SITUATION

The definition of murder includes cases where the accused did not actually intend to kill and was not even aware that death was likely to occur. One provision which was founded on the mere possession of a weapon during certain crimes, has been ruled unconstitutional by the S.C.C. in R. v. Vaillancourt (1987). Other provisions which do not require subjective foreseeability of death are now in question.

PROPOSAL

- *Eliminate constructive murder by restricting the crime of murder to cases where the offender*

  (a) intends to cause death,

  (b) does anything that he knows is likely to cause death and is reckless whether death ensues or not.

2. Reform the Law of Parties

CURRENT SITUATION

Several sections of the Code deal with the culpability of parties aside from the principal offender. *Inter alia*, there are provisions covering situations wherein the offence is not completed and for accessories after the fact. One section makes a person liable for the conduct of another where he "ought to have known that the commission of the offence would be a probable consequence" of carrying out a common unlawful purpose. As with constructive murder, this provision is subject to constitutional challenge.

PROPOSALS

- *Consolidate and update the various sections of the Code relating to parties.*
- *Change the basis of liability for the unintended conduct of others to liability for offences that are actually known to be possible consequences of pursuing a common unlawful purpose.*

3. Modernize the Law of Manslaughter

CURRENT SITUATION

Culpable homicide that is not murder or infanticide is manslaughter. The maximum penalty is life imprisonment and there is no minimum. Sentences under 5 years are common. However a greater penalty is lightly for unintentional killings in the course of other crimes that would have been constructive murder prior to R. v. Vaillancourt. The old term of "manslaughter" is not gender neutral and there is, apparently, no French word with equivalent meaning or impact. The French version of the Code uses the term "homicide involontaire coupable".

PROPOSALS

- *Rename this crime "criminal homicide".*

- *Create a sentencing classification for "first degree criminal homicide" determined by verdict in the way murder is elevated to first degree [e.g. while committing sexual assault].*

- *Define the offence to include unintentional killings arising from:*

    1. unlawful conduct involving a reasonable foreseeable risk of serious harm;

    2. conduct due to voluntary impairment in the course of any dangerous activity;

    3. conduct which shows a marked and substantial departure from the standard of care for human safety that is expected of a reasonable person.[1]

- *Set the maximum sentence at 25 years, instead of life imprisonment.*

- *Set the parole eligibility period at 1/2 the sentence.*

- *Set a range of 10-25 years for first degree criminal homicide.*

- *Allow judges to impose a sentence below the range for first degree criminal homicide where compelling circumstances, including mental disability, youth or provocation, lead to the conclusion that the ordinary minimum sentence would bring the administration of justice into disrepute.*

---

[1] In the event that objective negligence is found to be unsuitable as a basis for criminal culpability, one alternative would be to create a general offence of criminal endangerment and include within this proposal deaths which result from that offence.

e.g. Every one who, without excuse, intentionally or recklessly endangers any person is guilty of an offence.

4. Revise the Definition of First Degree Murder

CURRENT SITUATION

Murder is first degree when it is planned and deliberate, involves the death of a peace officer or prison employee, or occurs while committing or attempting to commit the offences of hijacking an aircraft, sexual assault, kidnapping, forcible confinement, or hostage-taking.

PROPOSALS

- *Add robbery, and breaking and entering into a dwelling house with intent to commit an indictable offence, to the list of underlying crimes.*
- *Expand the underlying crime of hijacking to include any means of public transportation, not just aircraft.*
- *Add cases where the murder is committed for the purpose of carrying out or concealing an underlying crime.*

5. Create More Flexibility in Sentencing

CURRENT SITUATION

There is a mandatory sentence of life imprisonment for all cases of murder. For first degree murder, that sentence includes a period of parole ineligibility of 25 years. For second degree murder, the trial judge sets the period of parole ineligibility between 10 and 25 years. Where the trial is conducted with a jury, the jury is asked to retire again immediately after rendering a guilty verdict to consider making a recommendation on the parole ineligibility period. The jury does not hear any additional evidence or submissions directed to the issue of sentence and, unless it was admitted during the trial, does not even know of any criminal record of the accused. The trial judge is not bound by any jury recommendation, and it is common for a jury not to make one. Ordinarily, a life sentence does not actually result in confinement until death, as almost all prisoners are released on parole. Where the period of parole ineligibility for either degree of murder exceeds 15 years, after serving at least that number of years a prisoner may apply to a specially constituted jury for a reduction in the period of parole ineligibility. For most other crimes, the law provides that prisoners are eligible for parole after serving 1/3 of the sentence.

PROPOSALS

- *Instead of a mandatory sentence of life imprisonment for all murders, allow judges more flexibility to tailor sentences to the nature of the case and the offender.*
- *Instead of involving judges and juries in the issue of parole eligibility, provide a standard period of 1/2 the term of imprisonment.*
- *Set a range of 20-50 years imprisonment for second degree murder and 30-50 years for first degree.*

- *Allow judges to impose a sentence below the range where compelling circumstances, including mental disability, youth or provocation, lead to the conclusion that the ordinary minimum sentence would bring the administration of justice into disrepute.*

With parole ineligibility of 1/2 the term of imprisonment, the ordinary minimum time of custody for second degree would be 10 years. That is the same as the minimum parole ineligibility term of the current life sentence for second degree murder. The result is also the same for the maximum and current sentence provisions for 1st degree. With the proposed range, 25 years of parole ineligibility would not be the norm, but the maximum. The ordinary minimum parole ineligibility period would be lowered to a more realistic and humane 15 years. That, as noted earlier, is the point when we currently give the prisoner a right to apply to the specially constituted parole jury. Because of the well established principle that the maximum sentence is to be reserved for the worst offender in the worst circumstances, maximum sentences are rare, as they should be. Therefore, it can be reasonably expected that the proposed sentencing range for first degree murder will result in a significant reduction in the number of prisoners with 25 years parole ineligibility for a murder offence.

6. Eliminate Concurrent Sentences

CURRENT SITUATION

No sentence can be made consecutive to a sentence of life imprisonment. Therefore, any other sentence must be served concurrently. Where a prisoner is serving a term less than life for a homicide offence which is not murder [e.g. criminal negligence causing death], other sentences may be concurrent or consecutive.

PROPOSALS

- *Require that the sentence for homicide offences be served consecutively to any other sentence imposed before or at the same time.*
- *Require that any sentence imposed after a sentence for a homicide crime be served consecutively.*
- *Legislate the principle of totality to permit judicial limitation of gross total sentences.*
- *Prescribe a sentence of 50 years as the maximum cumulative sentence.*

7. Refine the Authority for Peace Officers to Use Lethal Force

CURRENT SITUATION

Peace officers are permitted to use as much force "as is necessary" to prevent escape, regardless of whether or not the escape poses a risk of harm.

PROPOSAL

- *Authorize peace officers to use force likely to cause death to stop an escapee only where it is believed, on reasonable grounds, that such force is necessary to prevent serious harm to another person.*

8. Simplify the Defences of Duress, Necessity, and Protections of Persons and Property

CURRENT SITUATION

There are several sections in the Code dealing with protection of persons and property. The need to relate these multifarious provisions produces complexity that results in many appeals and new trials, especially where juries are involved. There is a limited section on duress, but no codification of the general common law defence of necessity.

PROPOSALS

- *Simplify the law by substituting for the existing statutory and common law defences excuses and justifications a single clear principle.*

- *This principle would justify reasonable conduct involving due regard for the safety of innocent persons that is believed, on reasonable grounds, to be necessary to prevent imminent serious harm to any person.*

9. Improve the Law of Attempt

CURRENT SITUATION

The general Code provision regarding attempt applies to homicide offences. Whether conduct is an attempt, "mere preparation" or "too remote" to constitute an offence is sometimes problematic issue when the offender does not complete the final act. In contrast, where there is intent to commit treason, the crime is committed when the offender "manifests that intention by an overt act".

PROPOSALS

- *Revise the definition of attempt to cover any situation wherein the offender starts to carry out the intention to commit the crime.*

- *Enhance the power to prevent serious harm by creating a new crime of preparing to commit murder.*

10. Codify a Rule of Causation

CURRENT SITUATION

The Code does not contain a provision setting out one of the basic principles of culpability. What contribution to a death constitutes causing the death ? The Supreme Court of Canada has held that it is any contribution beyond "de minimis". Causation is now frequently an issue in trials of charges of impaired driving causing death.

PROPOSAL

- *Legislate a rule of causation based on significant contribution to death.*

11. Miscellaneous

CURRENT SITUATION

"Death" is not currently provided for in the Criminal Code.

PROPOSAL

- *A definition of "death".*

PART 2 RECOMMENDATIONS

Introduction

1. The existing provisions of the Criminal Code referable to the law of homicide are contained in Part VIII, "Offences Against the Person and Reputation". In particular, sections 222-240 fall under the general heading of homicide.

2. The provisions falling within the general heading of homicide may be categorized as follows:

S.222	classification of homicide as culpable and non-culpable
S.223	when child becomes human being
S.224-227	miscellaneous causation rules
S.229-237	classification of culpable homicides as murder, manslaughter and infanticide

3. With the advent of the Charter of Rights, and subsequent judicial decisions which have interpreted it, the constitutionality of several homicide provisions, as well as other provisions as they apply to homicide, have been put in doubt. In Vaillancourt v. R. (1987) 60 C.R. (3d) 289 (S.C.C.) the Supreme Court of Canada in striking down section 230(d) (murder in commission of offences - use of weapon) as being of no force or effect, held that the *mens rea* of murder must reflect the "particular nature of that crime". The exact test remains unclear. At a minimum, objective foresight of death was clearly adopted as the test by four members of the court (Dickson, C.J.C., Estey, Lamer and Wilson). Those same members, in *obiter dicta*, suggested that subjective foresight may be required. One member of the court (Laforest J.) concurred with by two others (Beetz and Le Dain JJO), posited a test of a *mens rea* "referable to causing death". However, the exact limits of this latter test were not prescribed. The final member of the Court (McIntyre J.) dissented, and consequently we do not have the benefit of his view as to the constitutionally required *mens rea* for murder.

4. In light of such strong *obiter* statements, there exists a real likelihood that Courts of Appeal and ultimately the Supreme Court of Canada itself, will rule that subjective foresight of death is the minimum *mens rea* which is constitutionally required for any murder offence. Such a determination would have the effect of striking down several current provisions of the Code.

5. In addition to the concerns raised by the Vaillancourt decision and other judgments decided subsequent to it, the trend in law reform, examined in the context of comparative law, suggests an orthodox subjectivism which posits that criminal liability must, as a general rule, rest on subjective *mens rea*. Another current development which has enjoyed relatively wide acceptance provides that criminal negligence in some circumstances, can appropriately form the basis of criminal liability, e.g. the Model Penal Code.

6. Apart from the need to re-examine the current homicide provisions arising out of the above mentioned developments, the existing framework of homicide provisions has been criticized for some time in several respects. Specific observations concerning the present provisions include the following:

a) Many of the current provisions located presently under the heading "Homicide" should be located in a "General Part", in that they are applicable to the Code as a whole.

b) The classification of homicides as culpable and non-culpable is unnecessary. Rather, it is argued the Code should simply define the different types of offences referable to causing death.

c) Negative definitions, as in the case of manslaughter, are not consistent with the codification of criminal law in that they do not offer a positive definition which is both comprehensive and understandable.

d) There is unnecessary overlap and piggy backing in many of the provisions.

e) Several provisions, particularly in the area of causation, could be replaced by a general principle defining causation in its entirety.

f) Some sections, e.g. 205(6) (causing death by perjury), are no longer necessary (since the abolition of capital punishment).

g) Provisions such as 205(c) and (d) (death by frightening is culpable homicide, killing by influence on the mind is not) demonstrate the need for a definitional approach to homicide, as opposed to the existing culpable, non-culpable framework.

h) The Criminal Code should, to the greatest extent possible, codify in a comprehensive and precise manner, the actual principles which Parliament desires to constitute the law of homicide as opposed to leaving these matters to the courts to be determined on an *ad hoc* basis. In addition the terminology used in the Criminal Code should be modernized and utilize plain language.

7. In 1986 the Law Reform Commission of Canada released Volume 1 of its proposed new Criminal Code for Canada. Volume 1, *inter alia*, provides for an expanded General Part and new provisions concerning the law of homicide. Although our recommendations differ in many respects from the proposals of the Law Reform Commission, we benefitted greatly from their work. Indeed from our perspective their Report provided an excellent reference point from which to view the difficulties and inadequacies of the existing provisions.

8. Although the Homicide Working Group was created in response to the constitutional problems arising out of the Vaillancourt decision, our mandate was to examine the law of homicide in a much broader sense and to make recommendations referable to the homicide provisions generally.

Addendum - March 1991 - R. v. Martineau et al.

Since the release of our draft Report in June 1990, the Supreme Court of Canada in R. v. Martineau (september 13, 1990) has conclusively determined that the principles of fundamental justice guaranteed by section 7 of the Charter of Rights require that a conviction for murder be based upon proof beyond a reasonable doubt of subjective foreseeability of death.

In Martineau the majority (L'Heureux-Dubé J. dissenting) held that existing section 230 of the Criminal Code was unconstitutional because it did not require proof beyond a reasonable doubt that the accused had subjective foreseeability of death.

At pp. 8-9 of the majority judgment Lamer CJ (Dickson CJ, Wilson, Gonthier, and Cory JJ concurring) stated:

> " In my view, in a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attaching to the most serious of crimes, murder, should be reserved for those who choose to intentionnaly cause death or who choose to inflict bodily harm that they know is likely to cause death. The essential role of requiring subjective foresight of death in the context of murder is to maintain a proportionality between the *stigma* and punishment attached to a murder conviction and the moral blameworthiness of the offender. Murder has long been recognized as the "worst" and most heinous of peace time crimes. It is, therefore, essential that to satisfy the principles of fundamental justice, the *stigma* and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death."

Lamer J. for the majority went on to conclude that since it is the opening paragraph of section 230 which permits a conviction for murder on less that subjective *mens rea*, all of section 230, i.e., 230 (a)(b)(c)(d) is unconstitutional similarly Lamer CJ specifically dealt with section 229 (c) and stated that there was:

> " Fatal doubt on the constitutionality of Part of section 212 (c) (now section 229 (c) of the Code, specifically the words "ought to know is likely to cause death "

Similarly in R. v. Logan (september 13, 1990), the Supreme Court held that the offence of attempt murder requires subjective foresight. Further the Court held that since subjective foresight was required to convict a principal of murder or attempt murder that same minimum degree of *mens rea* is constitutionally required to convict a party to the offence pursuant to section 21(2) of the Code.

Thus, although the objective component of section 21(2), i.e., "Ought to have known" contravenes section 7 of the Charter and is therefore inoperative in conjonction with any offence which requires subjective *mens rea*.

The majority judgments in the above-mentioned cases therefore decided that in all cases of murder or attempt murder whether involving a principal or a party, the minimum standard required for conviction is proof beyond a reasonable doubt of a subjective intention to cause death or a subjective intention to cause bodily harm that they know will likely cause death.

Although it might be argued that at least in the case of section 230(c) (wilful stopping of breath) that the decision by the majority was *obiter dicta* since 230 (c) was not before the court; such argument seems unlikely to succeed (however see judgment of Sopinka J. on this issue).

Thus the uncertainty which flowed from Vaillancourt with respect to the minimum intent required to support a conviction for murder has in all likelihood been resolved. The Homicide Working Group is of the view that its' recommendations would not conflict with theses subsequent decisions of the Supreme Court of canada.

Recommendation 1 Rule of Causation

Everyone causes death, when their conduct significantly contributes to death, notwithstanding that there may be other significant contributory factors and that such conduct may not alone have caused death.

STRUCTURAL CHANGES

This provision would replace the miscellaneous, non-comprehensive rules currently found in sections 224-227 of the Code.

COMMENTARY

The current Criminal Code does not contain a general rule of causation. Rather, the Code sets out several miscellaneous rules relating to causation which may be summarized as follows:

> Section 222(6) provides that a person does not commit homicide by reason only of committing perjury which results in the conviction and death of a human being by sentence of law.
>
> Section 224 provides that an act or omission which results in the death of a human being is a sufficient causal link to the death even though the death may have been prevented by resorting to proper means.
>
> Section 225 provides that where death results from conduct the causal link is established notwithstanding the immediate cause of death is proper or improper treatment that is applied in good faith.
>
> Section 226 provides a causal link where bodily injury results in death, even though the only effect of the bodily injury was to accelerate inevitable death from another cause.
>
> Section 227 provides that the necessary causal link will not be established unless the death occurs within one year and one day from the date of the conduct which caused or contributed to the cause of death.
>
> Section 228 provides that causation cannot be established where the death is caused by influence on the mind alone, unless the death is in relation to a child or a sick person and is a result of wilful frightening.

We are of the view that the absence of a general principle of causation, coupled with the existence of several miscellaneous rules, some of which have no application to the present law, (e.g. causing death by perjury which results in capital punishment) is confusing and undesirable. In our recommendation we have attempted to codify a comprehensive principle of causation. We are also of the view that societal values are best reflected in our criminal law when that law is expressed in clear and precise language. If legal principles, such as causation, can be codified in plain language, the public should have a better understanding of them. If so, the stigmatization, denunciation and punishment associated with being convicted of a crime such as homicide will be viewed as being justified.

Our proposal, which would replace all of the current causation provisions, with the possible exception of section 227 (death within a year and a day), is intended to codify both the approach and the test enunciated in R. v. Smithers (1978) 1 S.C.R. 506, (1977) 34 C.C.C. (2d) 427, which was restated more recently in the 1989 Supreme Court of Canada judgement delivered in R. v. Pinske (1989) 2 S.C.R. 979.

The test set out in Smithers provides that in order to establish causation, the Crown need only establish that the cause was at least a contributing cause of death, outside the *deminimis* range. We are of the view that Smithers strikes the appropriate measure of a just causal link. However, on its facts, Smithers did not deal with a situation wherein a subsequent intervening act could cloud the determination of causation.[1]

Much of the working's group time was spent in attempting to find a French and English equivalent of the term *deminimis*. In the end we adopted the term "significantly contributes" as the essential causal link. While we were not totally confident in our forecast of the manner in which in future the term "significantly contributes" will be judicially interpreted, we were of the view that this term best captured the meaning of the principle enunciated in Smithers.

In addition to adopting the phrase "significantly contributes", we were of the view that any statutory provision ought to also contain two modifying clauses for purposes of clarity, each of which serves a different purpose. The first of these two modifying clauses refers to the fact that the existence of "other significant contributory factors" will not negate the causal link. In our view this reflects the judgment in Smithers which discourages a measurement of the relative weight or effect between competing significant causes. Such an exercise by the trier of fact confuses a significant causal link with preponderance. Further, we wished to make it clear that no person should knowingly make a significant contribution to death or to the existence of a danger thereof. —

The second qualification in the recommended principle adopts another feature of the Smithers test which provides that it is not necessary that such conduct alone would have caused the death. We view this as an important aspect of the Smithers test in that causation should not be distinguished on a forensic lottery basis. Criminal liability for causing death should not turn on whether the victims was thin-skulled or whether the victim had adequate access to timely medical assistance. Rather, the culpability of the offender should arise from the presence of the requisite *mens rea* and *actus reus* of the crime.

While we agree with the Law Reform Commission of Canada that there should be a comprehensive principle of causation we differ with them as to the definition of that principle. The LRC proposal (Report 31, section 2(6)) speaks in terms of a substantial contribution whereas we view this as too narrow and prefer the term significent contribution for the reasons we have stated. Further, the LRC would break the claim of causation should there be a superseding unforeseen and unforeseeable cause. We are unsure as to the meaning of the term and are concerned that it would unduly narrow the causal link.

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[1] The Smithers case has not escaped criticism, see for example, three decisions of the Alberta Court of Appeal: R. v. D.L.F., R. v. Ewart, and R. v. Colby (1989).

Recommendation 2 Definitions

For the purposes of this Part:

(1) "conduct" includes any act of a person, and any omission to do anything that is a legal duty of the person;

(2) "legal duty" means a duty imposed by an Act of Parliament or by an Act of a legislature of a province or territory;

(3) "death" means the irreversible cessation of life having regard to the current state of medical science;

(4) references to "knowingly", "known" or "knows" means that the person in question

(a) actually knew the facts or,

(b) knew sufficient facts to know that other facts were relevant, and wilfully declined to make reasonable inquiries to ascertain those other relevant facts.

STRUCTURAL CHANGES

The recommended definitions would be included in the Homicide Part. While it would be preferable to include such definitions within a General Part, we felt that since our mandate related only to the law of homicide, such definitions should only be recommended as applying to the Homicide Part. Section 219(2), which currently defines "duty" as a duty imposed by law, would be repealed and replaced by the recommended definition of "legal duty".

COMMENTARY

At present, the recommended definitions are not found in the Criminal Code (with the exception of a rather ambiguous definition of duty found in section 219(2)). It is our view that including such definitions in the Part relating to homicide will create greater certainty and clarification as to what the terms mean. Further, Parliament should adhere to one of the major objectives of codification by being as comprehensive as possible in defining elements of the *actus reus* and *mens rea*, and to the greatest extent possible, should not leave such words and phrases to be defined by the Courts. Triers of fact will be assisted in their deliberations by having definitions which are as precise as is possible, and which are written in plain language.

Death

There is no definition of death in the Criminal Code. We are of the view that the term ought to be define, as we have recommended for the following reasons:

1. In order to keep the Criminal Code current with medical science, it is necessary to provide for a definition which is capable of evolving with the current state of scientific and medical knowledge.

2. The proposed definition recognizes the importance of the medical and scientific community in the preservation of life. By so defining death, the Criminal Code will express confidence in the authenticity of decisions made by medical practitioners within the limits of current medical science.

3. In defining death as we have recommended, there would be a degree of certainty as to the moment of death. We are of the view that such a definition is in accord with both social and medical realities, while at the same time recognizing that the criminal law reflects the value which society places on human life.

Knowingly - Known - Knows

Various recommendations in our report incorporate these terms. In our deliberations we found that these terms are not universally defined. We therefore found it desirable to define these terms albeit in a partially circular manner. Given that such terms specifically relate to *mens rea*, they should be defined as comprehensively as is possible. At present, the Code does not provide a general definition of intent. Words such as "knows" or "knowing" are currently found in the definition of certain offences, e.g, possession offences, the crime of incest, and driving while disqualified. While these words are not defined in the current Code, knowledge is generally taken to mean actual knowledge, for example, in possession cases, knowledge of the nature of what is possessed.

The current definition of murder found in section 229(a)(ii) of the Code defines murder to include a situation where the person who causes the death, means to cause bodily harm that he knows is likely to cause death and is reckless whether death ensues or not. Similarly the definition set out in sections 229(b) and (c) incorporate this element of knowledge as part of the essential *mens rea* of the crime. Knowledge of both the risk and the likelihood of result is in our view the most appropriate expression of *mens rea* in that it assures a subjective approach.

We have defined these terms 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. We view the wilful blindness aspect to be essential to our *mens rea* requirement. The common law has rejected the notion of constructive knowledge whereby an awareness of relevant facts is deemed to an offender simply on the basis that he must have known the facts because he ought to have known those facts. (see R. v. Pappajohn [1980] 2 S.C.R. 120 and R. v. Sansregret (1985) 45 C.R. (3d) 193 (S.C.C.)) This rejection of the notion of constructive knowledge is in our view an important part of the rationale which underlies the Vaillancourt decision.

On the other hand we view retention of the doctrine of wilful blindness to be essential. In Sansregret , the Supreme Court of Canada unanimously reaffirmed the principle upon which requisite *mens rea* can be satisfied on the basis of wilful blindness. Wilful blindness arises where a person who has become aware of the need for some inquiry declines to make that inquiry because he does not wish to know the truth and prefers to remain ignorant.[2]

The culpability for wilful blindness is justified by the accused's fault in deliberately failing to make inquiries when he knows that there is cause for same.

We have therefore retained the doctrine of wilful blindness where it is proven:

(1) that an offender has a subjective awareness of facts which to his own subjective state of mind made further facts relevant; and

(2) the offender wilfully decided to blind himself to such facts or wilfully declined to make reasonable inquiries about those facts.

In our view, it is completely justified to draw the inference that an offender in such circumstances subjectively believes the additional facts to be inculpatory, and that they do not wish to fix themselves with actual knowledge of their inculpatory nature.

Legal Duty

Current section 219 (criminal negligence) provides for the following definition of duty:

> " For the purposes of this section duty means a duty imposed by law".

We recommend repeal of this provision, which is circular, ambiguous and vague. In its place we recommend a definition which confines the concept of a legal duty to one which is imposed by statute.

The present definition of duty has been interpreted to include any duty which arises by virtue of either the common law or statute: see R. v. Coyne (1958) 31 C.R. 335 (N.B.C.A.), R. v. Popen (1981) 60 C.C.C. (2d) (Ont. C.A.). In Popen the Ontario Court of Appeal held that the common law imposed a legal duty upon parents to take reasonable steps to protect their children from illegal violence used by either the other parent or a third person towards the child, which the parent foresaw or ought to have foreseen. That parent was therefore held to be liable for criminal negligence for failing to discharge the duty in circumstances which showed a wanton or reckless disregard for the child's safety, where the failure to discharge the legal duty had contributed to the death or bodily harm to the child.

While we have restricted our recommended definition of legal duty to one that is imposed by statute, we are of the view that Parliament ought to codify in the Criminal Code all common law duties which it wishes

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[2] In adopting this description of wilful blindness, we are not unmindful that the judgment of Wilson J. in R. v. Tutton, R. v. Waite would appear to expand the generally accepted definition of wilful blindness. We do not feel that it is necessary or desirable to expand the notion of wilful blindness in cases of negligence since in our view criminal negligence should be determined on an objective basis.

to retain. While we felt that it was beyond our mandate to either determine all of the common law duties that might arise, and to recommend a closed list of those duties, we are of the view that it is incumbent on Parliament to prescribe by statute any duty which is to be imposed on members of the public. In our view this is necessary not merely for completeness but more importantly in order that members of the public have an opportunity to be aware of the duties which the law imposes upon them.

Current section 215 (duty of persons to provide necessaries), section 216 (duty of persons undertaking acts dangerous to life), section 217 (duty of persons undertaking acts), and section 218 (abandoning child) would be retained as would the definitions relating to these duties as set out in section 214.

In this Report we have set out a discussion of the notion of a generalized crime of endangerment and the related offence of endangerment causing bodily harm. A minority of the Working Group would urge that further consideration be given to such an offence, the adoption of which might lead to the repeal of various current provisions in the Criminal Code, such as section 255.

Recommendation 3 A Need to Re-examine Section 216 of the Code (Duty of Persons Undertaking Acts Dangerous to Life)

STRUCTURAL CHANGES

None

COMMENTARY

Current section 216 of the Criminal Code provides as follows:

> Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.

The section imposes a legal duty upon persons who undertake to administer surgical or medical treatment to another person. The duty is also imposed upon anyone who undertakes to do any other lawful act that may endanger the life of another person. The standard imposed by the legal duty, except in cases of necessity, is to have and to use reasonable knowledge, skill and care in carrying out the treatment or other lawful act that may endanger life.

We spent considerable time on the various medical/legal issues arising out of, or relating to, the law of homicide. We examined such subjects as euthanasia, palliative care, and aiding or counselling suicide. At the end of our deliberations we concluded that all of these subjects, including current section 216, could not adequately be dealt with by our Working Group. These issues require a multi-disciplined approach in order to fully appreciate the ramifications of both the existing provisions and any improvements which may be made to them.

We examined for example, the question of providing palliative care in conjunction with section 216. We concluded that there are at least six different situations that should be considered in addressing palliative care and euthanasia:

(1) Palliative care not causing harm or accelerating death with consent of person involved,

(2) Palliative care not causing harm or accelerating death with consent of family but not of person involved,

(3) Palliative care not causing harm or accelerating death without express consent, but based on medical opinion and under medical supervision,

(4) Palliative care causing harm or accelerating death with consent of person involved,

(5) Palliative care causing harm or accelerating death with consent of family but not of person involved, and

(6) Palliative care causing harm or accelerating death without express consent but based on medical opinion and under medical supervision.

The obvious legal implications and issues which must be addressed in the above - mentioned situations are immediately apparent, for example:

(1) what is "consent",
(2) who are "family",
(3) what rules, if any, should apply to the formation and application of "medical opinion" ?

Further issues, some of which are far more difficult and controversial, will be recognized in addition to those listed above.

Abortion

Although the Criminal Code contains provisions relative to abortion, they have been declared by the Supreme Court of Canada to be inconsistent with the rights guaranteed to women under section 7 of the Canadian Charter of Rights and Freedoms, and, since the inconsistency is not in accord with the principles of fundamental justice, and is not a reasonable limit within the meaning of section 1 of the Charter, they are of no force or effect: see R. v. Morgentaler et al. (1988, S.C.C.). We are not oblivious to the legislation which is currently before Parliament in relation to this subject. However, absent study of such legislation, which was not part of our mandate, we concluded that we should not comment either on the subject of abortion generally, no comment thereon should be offered.

Euthanasia and Palliative Care

In the course of our consideration of this subject, we considered a film presentation of The Nature of Things in which Dr. David Suzuki raised questions relating to this subject. In addition, we received a presentation from Mr. Bernard Starkman, a recognized expert in this field. Further, we studied a number of articles, and, in particular, Working Paper 28, of the Law Reform Commission of Canada, entitled Euthanasia, Aiding Suicide and Cessation of Treatment, and the Commission's Report 20 on the same subjects. This subject was also an area of some of the most vigourous discussion. As noted by one member, the essential concepts have been debated by the public and by experts for years without final resolution.

These subjects have been explored in writings by the medical and legal communities, and, at present, the medical community has been left to shoulder the question pretty much on its own. There is discussion in the written material as to the descriptive features of the phenomena but seldom are universally acceptable, or even moderate compromises, offered.

In relation to euthanasia in particular, there has apparently not been, in Canada, any exhaustive research on the subjects of

(1) what types of fact situations are encountered in cases of aiding suicide, euthanasia, or cessation of treatment,

(2) how one could reasonably assess the true wishes or the motives of the person involved,

(3) whether aiding suicide should continue to be an offence, regardless of the circumstances,

circumstances,

(4) whether there is any public support for euthanasia under conditions specified by legislation,

(5) whether there is any medical consensus that euthanasia is currently being practised in Canada, whether described as such or not.

These are not the only questions, but they are questions worthy of consideration and assessment. The questions of how medical practicioners can ethically deal with the terminally ill, quite apart from euthanasia, raises a variety of other issues as well. No one questions the validity of palliative care where it eases the life of the terminally ill, but there may be medical-ethical questions associated with palliative care that actually accelerates death. Further, the distinction between euthanasia, palliative care and the current Criminal Code prohibition against aiding suicide is currently dependent not upon a logical or predictable set of legal principles, but upon the day-to-day judgment of Crown Attorneys throughout Canada. Indeed, the same can be said for the distinctions found between euthanasia, murder, and aiding suicide.

It follows that there is a need to address the legal and ethical issues within the Criminal Code. The alternative, of doing nothing, is to leave some aspects of these issues to the discretion of medical practitioners and the sagacious silence that may attend the sincere grant of release from painful terminal illness. The alternative of doing nothing is also to leave other aspects of these issues to Crown Attorneys, who must decide whether to prosecute. The Crown Attorneys have very little to guide them, except the moral values protected in the Criminal Code, including respect for the dignity and worth of human life. But even these values are not clear, because the Code protects the right of self -determination, and there is no longer any offence of suicide or attempted suicide.

We reached a consensus on a number of points:

(1) The value which we place on human life does not warrant any dilution of the Criminal Code provisions as to aiding suicide. There must be a strong deterrent to those who might seek to hurry others to their deaths for improper reasons.

(2) The autonomy of persons is a societal value in itself. This necessarily involved a recognition by us, reflected in the repeal of the Code provision which prohibited attempted suicide, that it is impractical and inappropriate to prohibit such conduct, and that competent and thoughtful persons, on careful reflection and undergoing terminal illness and pain, may choose the time of their inevitable deaths, to avoid continuing in such a state.

(3) The efforts of medical science to combat suffering as well as disease and death should not be devalued by legal interference with the scientific processes developed by an ethical and knowledgeable profession.

Conclusion

With some regret, we were unable to devise a set of specific proposals for changes in the Criminal Code to reflect our degree of consensus. Indeed, Mr. Starkman, in particular, recommended that we do not so, in light of the relative ignorance of all those keenly interested in these issues about the various factual, scientific, and ethical elements of those issues. However, we agreed that the above subjects should be examined by an appropriate group with the necessary expertise, with a view to describing and explaining

the issues and the contexts in which they arise, and making specific proposals for changes in the law where necessary.
We concluded that as presently constituted, our Working Group simply did not have the expertise to consider all of the medical, scientific, legal and moral issues arising out of this provision. There does not exist in this country reliable information as to the extent of "the public need" in these areas and that significant research with respect to both current practices and the public desire to expand those practices would have to be undertaken.

We therefore recommend that a multi-disciplined working group commence work on these extremely difficult issues as soon as possible. These issues are of direct importance to a large portion of the population and are of uppermost concern to the public at large. Government has a responsibility to address these difficult issues, and to provide solutions which will satisfy to the greatest extent possible the concern of the public in this area.

We would refer the reader to recommendations 4-9 and 10 which deals somewhat in more depth with respect to various medical / legal issues.

Recommendation 4 Retention of Section 217 of the Criminal Code (Duty of Persons Undertaking Acts)

STRUCTURAL CHANGES

None

COMMENTARY

Section 217 of the Criminal Code provides as follows:

> Every person 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.

In recommending that this provision be retained, we recognize that, as presently worded, section 217 would continue to be an important provision in conjunction with our definition of conduct. The section provides that in undertaking an act, one imposes upon himself or herself a legal duty to complete the act where the failure to complete the act is or may be dangerous to life. It follows that there is no legal duty to complete the act where the omission to do so would not be dangerous to life. The provision does not create an offence for the breach of such a duty. However, an omission to act in carrying out the duty would amount to conduct and could thereby constitute the *actus reus* for criminal homicide or murder pursuant to our recommended definition of these crimes. Breach of the provision would also continue to form the basis of criminal negligence if accompanied by a wanton and reckless disregard for the lives or safety of others. Finally we would add that section 217 uses plain language and is clear in its meaning and serves as a useful model for any legislative language which might be used in other provisions of the Code.

We would note that this provision touches on the medical-legal issues discussed under the previous recommendation and would also refer the reader to recommendations 9 and 10.

Introduction

The proper categorization of homicide offences has long bedeviled the criminal law. All homicides involve the killing of a human being. The difficulty is that the killing of a human being can occur in an incredible variety of circumstances, and can involve markedly different mental states in the killer. (See: History of the Criminal Law, (1883) Vol. III Sir James Fitzjames Stephen pp. 17-18). Some killings can only be viewed as atrocities. Other killings, however, can produce almost a sense of pity for the offender. It is thus natural to desire some form of gradation of seriousness within the overarching offence of homicide.

This report, like the current Criminal Code which provides for murder and manslaughter, divides homicide into two basic offences: murder and the lesser offence of criminal homicide. It further recognizes that each of these two offences can be committed in highly aggravating circumstances. Consequently certain situations have been isolated and described as either first degree murder or first degree criminal homicide. The penalties attached to the basic offences of murder and criminal homicide have been augmented when these offences are made out in the first degree.

Sentencing Scheme

It could be argued that the desired degree of gradation could be accomplished by simply enacting one overarching offence of homicide and leaving the question of aggravation or mitigation to the sentencing discretion of the trial court. This has never been the approach taken to date in Canadian legal history nor, indeed, in any country in the common law world. (New Zealand is currently considering a new Criminal Code which takes this approach although it distinguishes infanticide from other homicide by creating a different maximum punishment. New Zealand Crimes Bill, 1989, 122-124). The sentencing approach would leave too much to the discretion of the individual judge, would deprive the accused of the protection of the strict rules of evidence, and would strip too much of the content of the trial away from the jury. Other considerations entered the overall design of the proposed homicide structure.

First, the structuring of homicide offences must be just. It should, as much as possible, avoid the use of technical rules which operate to attach to those offenders a social stigma which they do not deserve.

Second, a homicide scheme must be kept as simple as possible. This is vital if the structure is to be understood by judges and juries, and if a large number of retrials are to be avoided.

Third, to the greatest extent possible, the most serious offences in our Criminal Code must be drafted in such a manner that they are comprehensible to members of the public at large and accord with their values.

We were strongly of the view that it is Parliament's obligation, at least to some degree, to legislatively address, the question of gradation through the definition of offences.

The offence definition approach requires the Crown to prove to a jury on the basis of strictly admissible evidence the central factors aggravate a homicide to the level of murder. (In Gardiner v. The Queen (1982) 30 CR (3d) 289, the Supreme Court of Canada held that hearsay evidence was admissible on the question of sentence.).

We concluded that in order to reflect the sanctity of human life all intentional killing and killings involving subjective recklessness toward the lives of others should be carved out from homicide generally and stamped with the label "murder". We were of the view that such killings had to be punished by means of a significant minimum sentence in all but a very narrow range of cases. It was also felt that some degree of categorization by way of offence definition was desirable from the perspective of an accused person.

We found ourselves in agreement with what appears to be the modern trend of placing greater emphasis on the offender's mental element when drawing the line between the basic offences of murder and the lesser form of homicide. In fact, in Canada, this trend in criminal law policy may be constitutionally compelled. However, we continue to recognize the aggravating value of other important factors when drawing the line between first degree versions of those offences and their foundation definitions. While no other jurisdiction has a murder provision as broad as the former 213(d) which was struck down in Vaillancourt, the fact of the matter remains that a subjective intention to kill has never been the exclusive touchstone for classifying homicides in any common law jurisdiction.

To date, some form of felony-murder, which is not dependent on an intent to kill or subjective foresight of death, continues to exist in all Australian States, in New Zealand and in 47 of the American States. (See Colin Howard, Criminal Law (4th ed.) 1982, pp 52-65, Queensland Criminal Code, 1899, section 302, Western Australian Criminal Code, 1913, sections 278-279, Tasmanian Criminal Code, section 157, New Zealand Crimes Act, 1961, sections 167-168, M.L. Gilbert, Degrees of Felony Murder, (1983) 40 Wash, and Lee L. Rev. 1601.)

In addition, in Scotland, a person who kills need not have had an intent to kill, and need not be aware of the risk of death inherent in his or her conduct to be guilty of murder. (See Lord Goff, The Mental Element in the Crime of Murder (1988) 104 L.Q.R. 30 at pp. 52-57.) Finally, in England, if an offender intentionally inflicts grievous bodily harm, and in doing so causes death, he is guilty of murder whether or not he intended to kill or was even subjectively aware of the risk of death inherent in his action. (See R. v. Cunningham (1981) 3 W.L.R. 223 (H.L.)). We note the view of Stephen who stated that it is "a mistake" to rely exclusively on the offender's intention in dividing the overarching offence of homicide. (See History of the Criminal Law (1983) vol. III, pp 91-3.) When one considers our homicide structure as a whole, including the definitions of murder, criminal homicide, and the first degree version of those offences it continues to recognize that, as Stephen stated at p. 91:

> "The two elements to be considered in distinguishing between the more and less heinous forms of an offence are public danger and moral guilt, and to these must be added a third which is especially important in cases of homicide, namely the shock which the offence gives to the public feeling and imagination".

In fact we note that certain American research suggests that the public views certain unintentional killings as being more grave than some intentional killings. (See Crump and Crump, In Defence of the Felony Murder Doctrine (1981), 8 Harv. J of L. and P. P. 359 at 363-365, e.g., unintentional killing during rapes or robberies appears to be ranked as being more serious by those surveyed than intentional killings of a domestic nature.) Under our proposed scheme the first degree version of criminal homicide will carry the same minimum punishment as the basic offence of murder.

This, too, reflects our acceptance of the fact that the offender's intent cannot be the exclusive consideration when assessing the gravity of any particular killing. Which offence is more heinous, considering the factors referred to by Stephen: the wife who intentionally kills her husband by stabbing him once in the chest after a significant period of abuse; or the hijacker who unintentionally kills the pilot while beating him in an effort to force him to take passengers and the assailant's armed colleagues to a hostile country ?

Law Reform Commission of Canada

We concluded that some unintentional killings should be punished as harshly as murder and that Parliament should so state. We thus found ourselves in disagreement with the general approach of Report 31 of the Law Reform Commission of Canada which classifies homicides other than first gegree murder exclusively on the basis of the mental element possessed by the offender at the time he or she causes death. We did, however, find ourselves in agreement with the Law Reform Commission on another matter in that we would abolish the culpable/non-culpable homicide structure currently found in our Code.

Section 222 creates a structure which begins with a definition of homicide. It then declares some homicides to be culpable and some not to be. It goes on to exhaustively define culpable homicides as being murder manslaughter or infanticide and states that culpable homicide must involve causing the death of a human being by:

222. (a) an unlawful act,
(b) by criminal negligence,
(c) by causing an individual by threats to do something which causes his death, and
(d) by wilfully frightening a child or sick person.

The Code next defines culpable homicide that is murder and infanticide in positive terms in section 229 and section 233. It also defines manslaughter partially in positive terms in section 232 but largely in negative terms in section 234 where it declares simply that culpable homicide that is not murder or infanticide is manslaughter.

The Law Reform Commission of Canada points out that generally we do not define crimes in such a circuitous manner. Professor Stuart makes a similar point in his text Canadian Criminal Law 2nd ed. p. 209. Both authorities suggest this structure is unnecessary and state that our homicide crimes could be independently defined in a more positive fashion. We find ourselves in agreement with this proposition.

Recommendation 5 Murder

(1) Everyone commits murder who causes death when:

(a) the person means to cause death, or

(b) the person knows death is likely to be caused by his or her conduct and is reckless whether death ensues or not.

(2) For the purpose of subsection (1), it is not material that the deceased, through mistake or accident, is not a person contemplated by the person who caused the death.

STRUCTURAL CHANGES

This recommendation would replace the current sections 229 and 230 of the Criminal Code as being the only definition of murder.

COMMENTARY

By virtue of this provision murder would be confined to killings wherein the offender intended to kill or was reckless as to whether or not death could ensue from his or her conduct. The concept of "conduct" is explained earlier in this report. All other killings would fall under our second definition of "criminal homicide" unless they did not involve unlawful conduct from which serious bodily harm was reasonably foreseeable or did not involve some other measure of gross negligence.

Persons who kill while engaged in unlawful conduct not involving objective foresight of serious bodily harm could be convicted and punished for their unlawful conduct and the death involved in those cases could continue to be taken into account as an aggravating feature in relation to the sentence imposed. Killings that were caused without unlawful conduct or gross negligence would not be criminal although civil liability could undoubtedly attach to negligently causing death.

A major advantage of restricting murder in accordance with this proposal is that the offence would thus be defined in a fashion which complies with the *obiter* comments of Lamer J. (concurred in by Dickson C.J.C., Wilson J. and Estey J.) in R. v. Vaillancourt. Lamer J. suggested therein that the principles of fundamental justice contained in section 7 of the Charter may require murder to be confined to cases involving subjective foresight of death.

Our definition, because it is so confined, should thus insulate the offence of murder from constitutional attack and avoid the costs associated with retrials being ordered due to constitutional deficiencies in the definition of that offence. We also observe that the recommendations embodied in the draft code currently being studied in England narrow the definition of murder as it now exists in that country. The definition proposed in England is along the general lines of that proposed herein, i.e.:

Proposed Criminal Code of England

54. (1) A person is guilty of murder if he causes the death of another;

(a) intending to cause death; or

(b) intending to cause serious personal harm and being aware that he may cause death, unless section 56, 59, 62 or 64 applies.

(2) A person convicted of murder shall be sentenced to life imprisonment, except that, where he appears to the court to have been under the age of eighteen years at the time the offence was committed, he shall be sentenced to detention in such place and for such period and subject to such conditions as to release as the Secretary of State may determine.

Law Reform Commission of Canada

We believe that our definition of murder is preferable to the approach of the Law Reform Commission of Canada for a number of reasons. The Law Reform Commission's draft code defines murder as "purposely causing the death of another person". Despite its brevity, on closer examination, the Commission's definition would appear to be rather complex. If resort is had to the Commission's definitions of "culpability" and "purposely" this becomes apparent.

The Law Reform Commission's Code (Report 31, recodifying criminal law, p.21-23, p.143) provides as follows:

2(4) Requirements for Culpability.

(A) General requirements as to Level of Culpability. Unless otherwise provided:

(i) where the definition of a crime requires purpose, no one is liable unless as concerns its elements he acts

(a) purposely as to the conduct specified by that definition,

(b) purposely as to the consequences, if any, so specified, and

c) knowingly or recklessly as to the circumstances, if any, so specified;

(B) Definitions.

"Purposely."

(i) A person acts purposely as to conduct if he means to engage in such conduct, and, in the case of an omission, if he also knows the circumstances giving rise to the duty to act or is reckless as to their existence.

(ii) A person acts purposely as to a consequence if he acts in order to effect:

a) that consequence; or

(b) another consequence which he knows involves that consequence.

" Recklessly."

A person is reckless as to consequences or circumstances if, in acting as he does, he is conscious that such consequences will probably result or that such circumstances probably obtain.

Under the Law Reform Commission's scheme, the Court must determine which matters are conduct, circumstances, and consequences, as different mental standards must be found in relation to these various elements. In our respectful view this will result in overly complicated and confusing jury charges referable to the requisite mental state necessary to incur liability. This was also the view of the Federal/Provincial Group which considered the General Part of the Law Reform Commission's new Code as a whole.

Even for a crime defined as simply as murder, the demarcation between conduct, circumstances and consequences in any particular case is not readily apparent. Presumably the death of a human being in the context of murder is a consequence of the offence. Another view however might be that the death of a human being is a circumstance of the commission of the offence of murder. A further view might be that, while the fact of death itself is a consequence, the fact that it is the death of a human being may be a circumstance. Even if it could be said to be clear as to which matters fit into each category a jury would still have to grapple with the different mental states applicable to each of those categories. This in our view is not an easy task for a jury of laypersons. In addition, we wanted to make it clear that a subjectively reckless killer ought to be treated as a "murderer". In our view the reckless killer is morally as culpable as the intentional killer. In fact, as stated by Stephen, a case can be made that some reckless killings are more serious than intentional ones. Stephen argued:

> Is there anything to choose morally between the man who violently stabs another in the chest with the definite intention of killing him, and the man who stabs another in the chest with no definite intention at all as to his victim's life or death, but with a feeling of indifference whether he lives or dies? It seems to me that there is nothing to choose between the two men, and that cases may be put in which reckless indifference to the fate of a person intentionally subjected to deadly injury is, if possible, morally worse than an actual intent to kill. For instance, the master of a ship, by a long series of brutal cruelties intended not to kill but to inflict prolonged and exquisite torture which may or may not end in death, does actually kill his victim. This shows more cold blooded, disgusting cruelty than if he had killed by a single blow intended to kill. Or, again, a man wishing to cheat an insurance office, and so to obtain a small sum of money, sets fire to his own dwelling-house well knowing that six people all of whom are burnt to death are sleeping above the room which he sets on fire.

It should be noted that under the current Code section 229(a)(ii) and the proposed definition of murder in the English Code at least some reckless killers are identified as murderers.

Sections 229 (c) and 230 (a) (b) (c)

Our definition of murder does away with what is now defined as murder under section 229(c) ("unlawful act - objective foresight of death" murder) and murder as defined under sections 230(a), (b) and (c) ("felony" murder). None of these provisions require an intent to kill or even subjective foresight of death.

* The constitutionality of these provisions, although not yet decided by the Supreme Court of Canada, has been suspect since the decision in Vaillancourt. (Note the Ontario Court of Appeal, the Alberta Court of Appeal, and the Manitoba Court of Appeal have all declared 213(a) unconstitutional.) (See R. v. Giff (1988) 42 C.C.C. (3d) 524, R. v. Martineau (1988) 43 C.C.C. (3d) 417, R. v. J.T.J. Jr. (1988) 50 Man. R. (2d) 300. The constitutionality of section 213(a) has now been argued before the Supreme Court of Canada in the context of a Crown appeal in R. v. Martineau and a number of other related cases. The decisions are currently under reserve.)

* (See Addendum Page 12)

Eliminating these provisions should do much to simplify the charge to a jury in many murder trials. Currently, it is not unusual to see a jury charged, not only on murder as defined in section 229(a)(i) and (ii), but also on murder as defined by sections 229(c), 230(a) as well as 230(d). This can easily result in a complex and confusing jury charge which in turn can lead to either wrongful convictions, or new trials in cases wherein convictions under 229(a)(i) or (ii) were fully warranted.

In addition, the so-called "constructive murder" provisions were said by some to have had a measure of technicality about them as well as an accompanying measure of unfairness. If an offender was engaged in certain unlawful activity and utilized certain techniques to achieve his unlawful purposes, he was branded a murderer if he caused death. If, however, he caused death during the course of other crimes or by other means, no conviction for murder would follow.

Our proposed basic definition of murder would do away with these allegations and would confine the label "murderer" to those offenders who killed while being subjectively aware of the risk of death involved in their conduct.

Intent to Cause a Particular Level of Injury or the Use of a Particular Type of Assault

The majority also believed that the Code currently places too much emphasis on the need for an intent to cause a particular level of injury or the use of a particular type of assault. (See, for example, 229(a)(ii) or 230(a), (b) and (c). The definition of murder proposed by the Working Group is broader than the one currently contained in section 229(a)(ii) or proposed in England in that it is not dependent on the intentional infliction of bodily harm. Under the Working Group's definition, if a person kills another through any conduct and at the time he was aware of the "likelihood" of death and could be said to be "reckless" as to whether or not death ensued, that person is guilty of murder.

The appropriate notion of subjective recklessness is however a difficult one to capture. One important issue is the degree of probability that a risk must reach to be sufficient. The problem is in some contexts we naturally feel that subjective foresight of almost any degree of risk of death should qualify as recklessness and amount to a sufficient intent for murder. In other contexts we might desire foresight of a higher lever of risk before including that a *mens rea* sufficient for murder was present. [See discussion in Boughey v. The Queen (1986) 65 A.L.R. 609, and Regina v. Gush (1980) 2 N.Z.L.R. 92].

For example, in most cases where an offender intentionally inflicts bodily harm during the course of an unprovoked assault, one might think that subjective foresight as to the mere possibility of death should be enough to qualify as a sufficient intent for murder. I this was the meaning one put on the notion of likelihood in the definition contained in Recommendation 5(1)b, however, there would be a danger that some impaired drivers who killed would be convicted of murder as the intentional infliction of bodily harm is no longer a pre-requisite to a finding of the intent for murder under that provision.

One could adopt different standards for "reckless murders" depending on whether or not the intentional

infliction of bodily harm was a part of their definition but this seems to be an overly complex approach. [See Victoria Law Reform Commission Report on Homicide (1988) page 45-50].

One member of the Working Group would as a result, have confined the definitionof reckless murder to those killings which involved the intentional infliction bodily harm and an awareness that death was a real possibility. The majority however favoured dropping the requirement of the intentional infliction of bodily harm and the adoption of a standard of true likelihood (i.e. more likely than not). This was thought by them to be required if we were to confine the label murderer to those truly deserving it.

In addition, the majority felt confining reckless murder to case involving the intentional infliction of bodily harm was overly narrow and omitted cases which should fall within our notion of murder (i.e. the malicious person who throws someone into the water knowing that it was more likely that not the person could not swim to shore).

It should also be observed that by defining murder so as to require subjective foresight of death fo: all offenders, we believes that the law with respect to parties to murder can also be simplified. The current party provisions contained in sections 21(1) and 21(2) attach liability to a party on the basis of both subjective and objective foresight. When an offence such as murder, which is currently based on mental elements that include subjective foresight (229(a)(i) and (ii)), objective foresight section (229(c)), and intentional commission of certain crimes by certain means (230(a), (b), (b) and (c)), is combined with the Code's current party provisions, complex jury charges result. The changes which we propose to the murder definition coupled with the changes to the parties provisions discussed operate to uniformly place liability for all offenders on the footing of subjective foresight. This is recommended not only from the point of view of simplicity, but also because it obviates certain constitutional concerns which have begun to emerge in connection with the party sections of the Criminal Code in the context of murder charges.

(See R. v. Logan (1988) 46 C.C.C. (3d) 354 (Ont. C.A.) (currently reserved by the Supreme Court of Canada on appeal by the Crown) and Regina v. Harris (1989) 48 C.C.C. (3d) 521 (Ont. C.A.).) Section 1(2) is intended to carry forward the policy considerations currently reflected in section 229(b).

(See addendum at page 33)

Addendum: R. v. Logan

* Since the release of our draft Report, the Supreme Court of Canada released its judgment in R. v. Logan *supra* in Logan the court held that since subjective foresight was required to convict a principal of murder or attempt murder that same minimum degree of *mens rea* is constutionally required to convict a part to the offence pursuant to section 21 (2) of the Code. Therefore the objective foresight portion of section 21 (2), i.e., "Or ought to have known" were declared to be inoperative.

Recommendation 6 First Degree Murder

(1) Murder is first degree murder when it is committed by a person:

(a) while a person is committing or attempting to commit an offence set forth in subsection 2, or

(b) when the person has the purpose of committing or attempting to commit an offence set forth in subsection 2, or

(c) when the person has the purpose of concealing the commission of an offence set forth in subsection 2.

(2) The offences hereinafter listed are the offences referred to in subsection 1:

(a) sexual assault,

(b) kidnapping, abduction and forcible confinement,

(c) robbery,

(d) hijacking of any means of transportation,

(e) hostage-taking, or

(f) breaking and entering into a dwelling house with the intent to commit an indictable offence.

(3) Notwithstanding subsection 1, murder is also first degree murder when murder is committed:

(a) in the execution of a carefully considered scheme to commit murder,

(b) for the purpose of financial gain,

(c) for the purposes of obstructing or influencing the course of justice,

(d) for the purpose of obstructing or influencing any electoral process,

(e) when the person whose death is caused was known to be a peace officer then acting in the lawful execution of his or her duty.

STRUCTURAL CHANGES

These provisions would replace current section 231 of the Criminal Code.

COMMENTARY

As mentioned earlier, Stephen saw three factors as being of relevance in the classification of homicide: moral guilt, public danger, and community shock.

We felt that by drawing the basic line between murder and criminal homicide, new emphasis should be placed on the mental element of the offender. The Group also felt, however, that once this basic line had been drawn, it was completely appropriate to continue to recognize other features as significant aggravating factors when it came to delineating the boundaries between the degrees of each of the basic offences. Such demarcation is made primarily for sentencing purposes.

In creating the offence of first degree murder, Parliament makes it clear to the judiciary, and to the public as a whole, how seriously it views this type of murder. For murder, this does not represent a radical departure from our current classification system. Section 231 of the Code presently defines first degree murder in generally similar terms. Nor do we believe that a constitutional problem under section 7 of the Charter is raised by this approach, as the cases to date suggest that the current section 231 does not change the basic nature of the offence of murder. Rather, this section is seen as different sentencing or penalty structure attached to an aggravated version of the basic offence. (See R. v. Farrant (1983) 4 C.C.C. (3d) 354 (S.C.C.) R. v. Paré (1988) 39 C.C.C. (3d) 97 (S.C.C.) and R. v. Arkel (1989) 43 C.C.C. (3d) 402 (B.C.C.A.)).

The list of primary crimes which elevate murder to first degree murder under section 231(5) of the current Code are carried forward with some degree of expansion.

1. Hijacking an aircraft under section 231(5)(a) of the current Code is expanded to hijacking any means of transportation.

2. The reference to "sexual assault" replaces sections 231(5)(b) to (d).

3. Kidnapping and forcible confinement under section 231(5)(e) is expanded to kidnapping, "abduction" and forcible confinement.

4. Hostage-taking is carried over from section 231(5)(f).

5. Robbery and break and enter into a dwelling house with intent to commit an indictable offence have been added.

The expansion of the list of primary crimes is intended to embrace situations in which victims are frequently exposed to violent attack and a measure of domination by the offender.

Since this list only applies to elevate what would be defined as murder (a crime by definition involving a minimum subjective foresight of death) the *mens rea* of the offender is already at a high level of moral culpability, and the application of an increase in the minimum punishment when such a killing occurs during the course of another serious crime cannot be considered to be grossly disproportionate so as to amount to cruel and unusual punishment. (See Smith v. The Queen (1988) 34 C.C.C (3d) 97.)

The fact that a killing or a murder occurs during the course of another serious crime has invoked the highest level of punishment in other jurisdictions.

Such is the case in the United States. (See M.L. Gilbert Degrees of Felony Murder, *supra*, Tison v. Arizona 107 S.Ct. 1676 (1987).) Indeed, in England, at one point, the fact that a murder occurred during the course of certain offences was viewed as being sufficiently aggravating to raise murder to capital murder.

Moreover, the Law Reform Commission of Canada has recognized that the fact that a murder that occurs during the course of certain crimes is sufficient to aggravate the offence to first degree murder. (See Report 31, "Recodifying the Criminal Law", pp. 58-60.)

Section 231(5) of the Code is changed in other features.

That section currently applies only to the person who actually caused the death personally. This feature is not carried forward into our recommendation. As mentioned earlier, however, our party structure is different from the current Code and is confined to those possessing subjective foresight of the offence to which they are joined as parties.

Further, section 231(5) of the Code restricts the death in terms of time to "while committing" or "while attempting to commit". (See Homicide Act, 1957, 5 & 6 Eliz. II, c. ll section 5.) When England abolished felony murder in 1957, they continued to treat as a capital offence a murder occurring during the course of a theft, resistance to arrest, or escape custody).

Where the murder is committed for the purposes of the primary crime or to conceal the primary crime, the elevation to first degree murder also applies.

Subsection 3 of the recommendation treats purposes other than the commission of one of the enumerated offences in subsection 2 as being sufficiently aggravating to elevate murder to first degree murder. These purposes would have to be tested subjectively and would have to be proven to the traditional criminal standard. The Working Group felt that the purposes outlined in 3(c) and (d) reflect fundamental Canadian institutions and values. An intentional or reckless killing for these purposes should, in our view, be first degree murder.

The complexities of contract killing under section 231(3) of the current Code as well as the test of "planned and deliberate" under section 231(2) of the current provisions are proposed to be replaced in our recommendation by the phrases "for the purposes of financial gain" and "a carefully considered scheme".

The current contract killing paragraph is encumbered with requirements concerning "value passing". The Working Group concluded that the few cases where contract killers would be involved would be caught by the phrase "carefully considered scheme". Whether value was to pass should be of little importance when it is the cold-bloodedness of the crime which seems to be the true focus of the current 231(3). On the other hand, if the value reflected in the current to 231(3) is the evil inherent in the fact that a killing can be financially motivated we believe this policy is better expressed as we have done in section 3(a).

We felt that the phrase "planned and deliberate" should be replaced by the term "carefully considered scheme" for a number of reasons. We concluded that the term "planned and deliberate" was, to a large extent, redundant. The courts have told us that a deliberate killing is one that is "considered" not impulsive. (See More v. The Queen [1963] 3 C.C.C. 289.) It is difficult to envisage a truly "considered" killing which is not "planned" to some degree. We felt the evil aimed at in making planned and deliberate murders first degree was reflecting the seriousness of a cold, calculated killing. The Group believes the phrase killing pursuant to "a carefully considered scheme" captures this notion in simpler language than does "planned and deliberate". We would point out however that replacing the phrase "planned and deliberate"

could lead to further litigation aimed at resolving the exact meaning of the new phrase.

Current section of 231(4) of the Code recognizes the special need to protect police officers on duty. This protection is enhanced by our recommendation in section 3(e). This section uses the inclusive definition of peace officer, rather than the list of officers and persons set forth in the current section 231(4) of the Criminal Code.

We concluded that the need to protect those officers engaged in the performance of the kinds of public duties with which peace officers are charged demands that the knowing killing of such an officer be strongly denounced by an appropriate minimum penalty.

Another adjustment in the language of 3(e) above brings this provision into line with the Charter, in that it plainly states that in order for this enhancement of punishment to occur, the trier of fact must be satisfied beyond a reasonable doubt that the identity of the victim, as a peace officer on duty, was known to the offender. The language in the present Code does not precisely state this but the decision of the Ontario Court of Appeal in R. v. Collins (1989) 48 C.C.C. (3d) 343, suggests this is required currently as in a matter of statutory interpretation. We have adopted the reasoning set forth in the Collins decision in our recommendation.

Recommendation 7 Criminal Homicide

(1) Everyone commits the offence of criminal homicide who causes death:

(a) by unlawful conduct involving a reasonably foreseeable risk of serious harm to any person, or

(b) by conduct which shows a marked and substantial departure from the standard of care towards human life or human safety that is expected of a reasonable and prudent person in the circumstances, or

(c) by conduct resulting from being in an impaired condition in the course of any activity which was dangerous to life or safety.

(2) Being in an impaired condition is not a defence to any offence of criminal homicide.

(3) For the purposes of this section, being in an impaired condition means that the person is in a voluntary state of:

(a) impaired awareness of reality, or

(b) impaired physical ability, or

(c) impaired self-control.

(4) For greater certainty but not so as to restrict the generality of subsection 1, "activity which was dangerous to life" includes the operation of any motorized vehicle, aircraft or vessel.

(5) For the purposes of this definition the term "unlawful conduct" means conduct which is an offence under a federal or provincial statute.

(6) The fact that the person charged with an offence under this section had an honest but mistaken belief about any factor related to that offence, or to the circumstances, is not relevant unless that fact was based on reasonable grounds.

STRUCTURAL CHANGES

Sections 220 and 222 of the Criminal Code, R.S.C. 1985, c. C-46, which create the offence of criminal negligence causing death, would be repealed in favour of this section. In addition, the offence of manslaughter would be abolished. Provocation would no longer reduce murder to this order of homicide. Provocation would, however, be taken into account as possibly mitigating the sentence.

Although strictly speaking the offence of criminal negligence is not a homicide crime we concluded that for reasons discussed in the commentary, *supra*, it was both logical and appropriate to subsume this offence into the new offence of criminal homicide.

Many of the factual situations which would have been formerly addressed by the constructive murder provisions of the Criminal Code will be caught under this provision or under the further recommendation made below as to first degree criminal homicide.

COMMENTARY

We have dropped the term "manslaughter". This term is not gender neutral. Further there is apparently no French word which has an equivalent meaning. The French version of the Code currently employs the term "homicide involuntaire culpable".

As indicated earlier, this provision would capture all killings which are not murder, other than those in which gross negligence was not present if the conduct was lawful, or no reasonable foreseeability of serious bodily harm existed if the conduct was unlawful. Other killings if caused during the course of unlawful activity would be taken into account as aggravating sentencing factors for the offence causing the death. If no gross negligence was involved in a killing during the course of lawful activity, civil sanctions may be available, but such an occurrence would not be a crime.

Section 1(c) was intended to be a particularization of section 1(b). We felt that anyone who while impaired engaged in an activity which itself was dangerous to the lives or safety of others had demonstrated a marked and substantial departure as defined in section 1(b). For the purposes of clarity and uniformity, it was felt this should be expressly stated in the statute. If a person kills in such circumstances it is appropriate to criminalize such conduct and recognize it as a criminal homicide. As will be seen by reference to section 3, *infra*, there is no minimum punishment for the basic offence of criminal homicide. Thus a suspended sentence would be available as a disposition in an appropriate case.

Section 1(a) builds liability in part on the basis of "unlawful conduct" as does the current law of manslaughter. Stephen was of the view that the term "unlawful act" in some contexts was a very broad notion that could include all crimes, all torts, all acts contrary to public policy or morality and all acts injurious to the public. (See History of the Criminal Law, *supra*, vol. III, p. 16.) This approach, in theory, leaves a great deal of scope to the judiciary to in effect declare certain conduct criminal. This is not consistent with current trends. Just as Parliament has abolished "common law" conspiracy, the general thrust of our current Code is to define crimes so as not to leave that question to the judiciary and the common law as we have done with the defences and contempt. (See G. Williams, Criminal Law the General Part (1961) p. 27.)

We recommend that, to be considered "unlawful conduct" within the meaning of 1(a), the conduct ought to be limited to that which is prohibited by federal or provincial statute. Some might argue that municipal by-laws should be included on the basis that once someone acts unlawfully and kills in circumstances wherein serious harm to others is objectively foreseeable, that should attract liability for homicide. We, however, felt that it was going too far to build a homicide crime on something as diverse as the various sets of municipal by-laws in force across the country. All members agreed that an act should not become "unlawful" because it is viewed as "morally repugnant". The Court of Appeal for Ontario in R. v. Cole (1981) 64 C.C.C. (2d) 118 at 133, reached the same conclusion. Our conclusion thus supports the narrowing of Stephen's broadest notion of the term "unlawful act".

Section l(a) is a narrowing of the law is another respect. The law would appear to be that there is no requirement for subjective or objective foreseeability of death in the offence of manslaughter (see Smithers v. The Queen (1978) 40 C.R.N.S. 79 at 90). The English law requires, however, objective foreseeability of some harm. (See R. v. Church [1966] 1 Q.B. 59 at 69.) This test appears to have been adopted by the Ontario Court of Appeal in Regina v. Tennant and Nacarrato (1975) 23 CCC 2d 80 at 96 and Regina v. Cole.

Our definition requires objective foresight of serious harm. We recognize that this could well result in accused persons in the position of Smithers, *supra*, being convicted of assault or assault causing bodily harm as opposed to being convicted of manslaughter. Presumably such persons would be sentenced harshly for the assault in such circumstances. Simple assault and assault causing bodily harm now carry a maximum

of five and ten years imprisonment respectively. These maximums may have to be re-examined if the Working Group's recommendations are acted on. (The definition of assault may also have to be revised.) The majority felt, however, that the narrowing of the scope of unlawful act/manslaughter made this offence as well as the offence of first degree criminal homicide constitutionally more resilient.

As will be seen under our discussion of first degree criminal homicide, this offence in one of its forms involves a significant minimum punishment. It was felt by the majority that it was therefore appropriate for Parliament to elevate the fault element present in this offence.

One member was of the view that the constitutional cases have not developed to a point which drive us to abandon our traditional approach to unlawful act manslaughter. The Ontario Court of Appeal in R. v. Jobidon (1988) 45 C.C.C. (3d) 176, held that, in spite of the current definition of assault, which requires proof of a lack of consent to the application of force, some consents would not be recognized by the law on grounds of public policy. Thus it was no defence to a manslaughter to argue that both participants to a street fight had consented to the exchange of blows which led to the victim's death. We agrees with the result, however, that it would be appropriate for Parliament to draft the definition of the offence so that this was clearly recognized. This member felt that if someone engages in an unlawful act involving objective foresight of some harm and in fact someone dies, that should as a matter of policy be a homicide.

Section 1(b) is an attempt to resolve a debate that has been ongoing in Canadian courts since 1960 when the Supreme Court of Canada decided O'Grady v. Sparling [1960] S.C.R. 804, which held that the current criminal negligence provisions of our Code require proof of "advertent" negligence. This decision was not consistent with the cases decided up to that point in our legal history and was subsequently ignored by provincial appellant courts. (See discussion by Don Stuart, Canadian Criminal Law, 2nd. ed. pp. 183-198, and R. v. Waite (1986) 28 C.C.C. (3d) 326 (Ont. C.A.)). Recently the Ontario Court of Appeal and the Supreme Court of Canada have re-examined this area in R. v. Waite (1989) 48 C.C.C. (3d), and R. v. Tutton (1989) 48 C.C.C. (3d) 129. Ultimately, the Supreme Court split evenly on the question of whether or not criminal negligence, as it is currently defined, is to be subjectively or objectively tested. The recommended proyision accepts the need for an objectively tested concept of negligence in the area of criminal homicide.

In making this recommendation our position is consistent with the American Model Penal Code (see sections 202 pp. 225 to 226, 240 to 244). This position is consistent with the recommendations of the Canadian Law Reform Commission in its Working Paper on "Omissions, Negligence and Endangerment" (1985) and in Report 31, "Re-Codifying the Criminal Law". The modern academic trend also seems to support negligence as a justifiable tool in delineating criminal liability (see Don Stuart, Canadian Criminal Law, 1987, 2nd. ed., pp. 183-198, H.L.A. Hart, Negligence, *Mens Rea* and Criminal Responsibility in Oxford Essays in Jurisprudence, 1961, A.G. Guest (ed. pp. 29-49, G.P. Fletcher, Theory of Criminal Negligence, A Comparative Analysis (1977) 119 U. of Penn. L. Rev. 401, C. Wells, Swatting the Subjective Bug (1982) Crim. L. Rev. 209.

We concluded that given the increased hazards to life posed by modern technology it is appropriate to use the concept of a high degree of negligence as a basis for criminal liability on a selective basis. Homicide is one of the areas within which we found this tool to be appropriate. Section 1(2) is intended to make it clear that while drunkenness or voluntary intoxication might negate the intent necessary for murder it would not result in the outright acquittal of an accused.

These provisions also have implications for the driving offences now contained in the Code to the extent that those offences create crimes which involve the causing of death. It may be that offences such as dangerous driving causing death or criminal negligence causing death should be repealed if our recommendations find favour. Notwithstanding this we do not, at this point, recommend the repeal of those provisions. It was felt that a close examination of those sections was beyond the scope of the

Working Group's mandate. A minority believed that sections 1(b) and 1(c) were inappropriate. They believed the crime of criminal homicide should be confined to 1(a) (unlawful conduct and foreseeable serious harm) supplemented by the definition of a new substantive crime of "endangerment". This notion is discussed in the Report and appears in essence to be analogous to the approach taken in the proposed New Zealand Code.

Some may argue that mistake of fact should not be codified, as the subsection 5 provision would do. The mistake of fact defence can be said to be somewhat complicated and evolving. Its form now appears to depend on whether the defence is being advanced in relation to a crime based on subjective fault or negligence-based fault. For example, mistakes which relate to subjective mental elements need only be honest to give rise to a defence. They need not be reasonable. (See R. v. Pappajohn (1980) 52 C.C.C. (2d) 481.) On the other hand, when fault is based on some form of negligence, mistakes must not only be honest but must also be reasonable. (See R. v. Tutton, *supra*, per McIntyre J.). The difficulty with the offence of criminal homicide is that some of the mental elements which are a prerequisite to liability may involve a subjective intention. (For example, the intent necessary to render the act unlawful within the meaning of the definition set out in section 1(a).) On the other hand, other parts of the definition of criminal homicide are based on the mental state of negligence. The definition proposed above would require all mistakes to be reasonable. The Working Group however was unable, in the context of criminal homicide to think of any examples where these legal niceties made any practical difference and consequently recommended the adoption of this simplified version of the defence.

We are of the view that the basic offence of criminal homicide will survive Charter scrutiny under section 7. There is a fault element present. Section 1(a) of the definition requires the accused to intentionally engage in unlawful conduct in a manner that manifests negligence toward the lives and safety of others. Sections 1(b) and 1(c) do not require any intentional unlawful conduct as does section 1(a) but they both depend on a high degree of negligence. The majority of the Working Group believe these elements satisfy the basic fault requirement as enunciated by the Supreme Court of Canada in Re B.C. Motor Vehicle Reference (1986) 23 C.C.C. (3d) 289, which was again adverted to by Mr. Justice Lamer in Vaillancourt, *supra*.

In our view neither subjective or objective foresight of death is a constitutionally required element in relation to the lesser degree of homicide offences. Manslaughter, for example, has never historically required subjective or objective foresight of death. (See J.L. Davis, The Development of Negligence as a Basis for Liability in Criminal Homicide Cases (1933) 26 Kentucky L. J. 209 at 209, 215, History of the Criminal Law by Sir James Stephen (1883) vol. 3, p. 2, p 76, Smithers v. The Queen *supra*, R. v. Tennant and Nacarrato *supra*, R. v. Cole *supra*.

In light of the fact that criminal homicide is our substitute for manslaughter the fact that we have structured the fault element present in the offence at a level which is elevated from the current level for manslaughter should suffice to meet any constitutional standard inherent in section 7 of the Charter vis-à-vis the lesser order of homicide offences. In addition, it should be noted that the Ontario Court of Appeal in R. v. Nelson and R. v. Cabral (unreported decisions 1990) has held that basing criminal liability on objectively tested negligence does not per se give rise to a violation of section 7 of the Charter. These cases involved charges of criminal negligence in the operation of a motor vehicle and criminal negligence causing bodily harm. The Court noted that since a minimum punishment was not attached to these offences, the sentencing court could reflect an offender's culpability in the sentence imposed. The same comments are applicable to our basic offence of criminal homicide.

It should be observed that our offence of first degree criminal homicide does contain a serious minimum punishment. We note, however, that by virtue of that definition only "unlawful conduct" killings will ever be first degree criminal homicide. Further, as we have noted earlier, this recommendation, augments the fault element traditionally found in that form of homicide currently. Moreover, the unlawful acts are

confined to a very serious order of crime. It is also pointed out that there are a range of cases to which this minimum punishment will not apply. Further comment is made under our definition of first degree criminal homicide.

We close our commentary on the offence of criminal homicide by noting that provocation is no longer a basis for reducing murder to criminal homicide. This latter offence is largely based on concepts of negligence. The act of intentionally killing, even when provoked, does not fit easily into such a notion. Provocation will now provide an exceptional circumstance which operates to relieve the offender from the minimum punishment attached to murder and will permit the Court to sentence the offender on a discretionary basis. (provocation has ceased to exist under New Zealand's proposed Code as well as all homicides are merged into one offence of culpable homicide. New Zealand commentators noted, however, that it continues to be relevant to sentencing).

Recommendation 8 First Degree Criminal Homicide

(1) Criminal homicide is first degree criminal homicide when death is caused by the person:

(a) while a person is committing or attempting to commit an offence set forth in subsection 2, or

(b) when the person has the purpose of committing or attempting to commit an offence set forth in subsection 2, or

(c) when the person has the purpose of concealing the commission of an offence set forth in subsection 2.

(2) For the purposes of subsection (1), the following offences, howsoever they are set out in the relevant provisions of this or any other Act, apply:

(a) sexual assault,

(b) kidnapping, abduction and forcible confinement,

(c) robbery,

(d) hijacking of any means of transportation,

(e) hostage-taking, or

(f) breaking and entering into a dwelling house with the intent to commit an indictable offence.

STRUCTURAL CHANGES

This section would replace current section 230 of the Criminal Code.

COMMENTARY

We have considered a number of options in this area. While it might be argued that there is no need for such a category in that such offences could be left to the sentencing discretion of the trial court, we did not adopt this approach. The group felt that even unintentional and non-subjectively reckless killings during the course of the very serious "triggering offences" set out above were exceptionally grave. These offences involve greater moral culpability or wickedness arising out of the offence committed, i.e. circumstances. We concluded that Parliament should make it clear that such killings called for severe sentences both for the purposes of deterrence and of denunciation regardless of the precise circumstances of the offender other than in the narrow range of cases. (see part 3 of the Report, re. sentencing). If an offender chooses to pursue the serious unlawful purposes set out above in a fashion from which it could be concluded that

either death or other serious harm was objectively foreseeable and if such an offender did in fact kill, it is our view that such behavior is serious enough to demand, as a minimum, the equivalent of the lower end of sentences imposed for intentional murder.

We note in support of our recommendation that something similar to the conduct described as first degree criminal homicide would today be described and punished as murder in many American and Australian jurisdictions. (See M.L. Gilbert, Degrees of Felony Murder and Australian Statutes (*supra*). In addition, something akin to this has, for most of our country's history, been described and punished as murder under sections 229(c), 230(a), (b) and (c) of our Code. A number of the policy arguments can be made in favour of the proposed provision. This is a list of such considerations:

(1) Sociological research suggest that members of the public see unintentional killing during the course of some serious crimes as being equally heinous as some intentional killings (see Crump and Crump, pp. 363-365).

(2) Studies of American juries suggest that they seem to be in accord with the policy of treating such killings harshly as they have no difficulty convicting in felony murde cases although they do have difficulty convicting some intentional killers as murderer (see Crump and Crump, *supra*, at pp. 365-367).

(3) The Law Reform Commission of Canada in their Report to Parliament no.3 of March 25, 1976 entitled " Our Criminal Law " has recognized that it is important that the criminal law reflect and be in accord with our social values. Items (a) and (b) above thus would appear to call for something along the line of what we have proposed in this recommendation.

(4) The fact that a killing occurs during a serious crime has been recognized as being a legitimate aggravating feature for murder. (See proposals on first degree murder herein, Law Reform Commission, Re-Codifying the Criminal Law, *supra*. The provision set out in this section of our report is consistent with this pol icy in relation to murder. (Note the triggering offences are the same in our proposal for first degree murder and first degree criminal homicide).

(5) This is consistent with Stephen's policy that homicides were aggravated by factors other than the offender's intention, i.e., moral guilt, public danger and community shock.

(6) Statistics suggest killing during the course of serious crime is a social problem requiring attention. Someone is killed during the course of a serious crime in Canada approximately every three days. In 1988 19% of all homicides were killings during the course of other crimes. This is up from an average of 16.1% between 1976-1985. Of this 19%, over 70% occurred during the course of robbery, break and enter or theft. A further 23% occurred during a sexual assault (see Statistics Canada, Homicide in Canada-A Statistical Perspective, 1988 pp. 85, pp. 93-99).

(7) The creation of such an offence has a deterrent value in that it deters unintentional killings. Those who are prepared to rob or sexually assault, for example, are given an emphatic and uncompromising message. If they choose to use means which objectively pose a danger of serious harm to others, their decision to use that means and the fact of a death will result in their underlying offence taking on a completely different character involving penalties of a completely different order (see Crump and Crump, *supra*, pp. 370-371).

We considered adding a section analogous to subsection 3 of our definition of first degree murder. We decided, however, that the notion of "purposes" did not fit easily with a notion of unintentional, non-reckless death. This, and a desire for simplicity, in the final analysis, led us to drop the idea of any such provision.

We recognize that this provision has the potential to be found to violate section 7 of the Charter. It is a homicide offence, it has a severe minimum penalty in most cases and there is no requirement that the section be confined to situations involving subjective or objective foresight of death.

However, we note that this offence is no longer called "murder". The stigma attaching to conviction for this offence is thus not the same as the former 213(d), which was under consideration in Vaillancourt, *supra*. Secondly, provision is made for relief against the minimum punishment in some cases. Thirdly, there is a high level of fault present in the elements of first degree criminal homicide. It always involves causing the death of another human being by unlawful conduct. Its operation is strictly confined to a very serious order of underlying offences which are intentionally engaged in. In addition, the offender must have chosen to pursue his unlawful purpose by means which objectively involve foreseeable danger of serious harm to others.

It is our view that the above-mentioned criteria constitute a sufficient "fault content" to avoid a breach of section 7 of the Charter when one is dealing with a homicide other than a murder. The Working Group does not consider that the sentence suggested is so grossly disproportionate that it would give rise to a violation of the Charter's guarantees against cruel and unusual punishment.

Moreover, it could be argued that this provision is not subject to a "Vaillancourt" analysis as it is no more than a sentencing provision akin to section 231(5) of the Code. (See R. v. Arkell (1988) 43 C.C.C (3d) 403 (B.C.C.A.) R. v. Farrant, *supra*.

Finally, we felt that this provision was appropriate from a policy point of view and should be enacted notwithstanding that it was arguably open to constitutional attack. We further note that even if first degree criminal homicide proves to be unconstitutional no new trials will be required. The Court of Appeal could in all cases simply substitute a conviction for criminal homicide and impose a proper sentence.

Given the fact that the provision is desirable from a policy point of view, given the fact that it is arguably constitutionally valid, and there being no risk of retrials even if the provision is held to be unconstitutional, we concluded that Parliament should enact this provision or one akin to it.

Charge to a Jury

It is our view that although there are two base crimes and two first degree versions of those offences in our homicide structure, we do not believe this is overly complex. A charge to the jury in most cases can be constructed fairly simply to explain to a jury the different bases for liability in a homicide case under our structure. Let's take a killing allegedly occurring in the course of a robbery, perhaps one of the more complicated killings to charge a jury on currently.

The basic steps in such a charge could be outlined as follows: The jury would be told that before the accused could be convicted of any homicide offence that they must be satisfied beyond a reasonable doubt that the accused by his conduct had caused the deceased's death. If they found that the accused's conduct was of significance in causing death (i.e. contributed to the death in more than a trifling fashion) they could conclude that this requirement was satisfied.

The next question to address once the causation requirement is illustrated is the accused's intent. If the jury found the accused intentionally caused the death or caused death by conduct that he knew was likely to cause death and was reckless as to whether death would or not would occur then that person would be guilty of murder.

If the jury was satisfied that the killing was accompanied by one of the requisite mental elements for murder they would go on to consider if the Crown had proved any of the circumstances set out in Recommendation 6 that would aggravate the offence of murder to one of murder in the first degree.

If the jury concluded the accused was guilty of first degree murder that would end their deliberation. If, on the other hand, they had a doubt about that matter their verdict would remain one of murder assuming they found the accused had caused death with one of the requisite intents.

If the jury had a doubt on the issue of the requisite intent for murder they would then turn their minds to a consideration of the criminal homicide offences.

If they found that the accused's conduct in causing the death was unlawful (e.g. was an assault) and if, the circumstances, it could be said to have been reasonably foreseeable that serious harm would occur they would convict of criminal homicide. If not, they would acquit of all homicide offences (a conviction could be recorded for the unlawful act causing the death if the accused was charged with this offence the death would aggravate the sentence for that offence).

If the jury concluded that the accused had caused death by an unlawful act in circumstances in which serious harm was reasonably foreseeable, the jury would go on to consider whether or not the unlawful act was one of those listed in 8(2). If it was they could convict of first degree criminal homicide. If not the verdict would remain one of criminal homicide.

Commentary on a General Crime of Endangerment

Multifarious Endangerment Offences

Much of the Criminal Code is designed to reduce the risk of harm from the conduct of others. Sanctions are provided for unjustified endangerment, as well as for actual injury. Some examples of the many provisions formulated to apply to multifarious types of endangerment are:

Section 49	acts intended or likely to cause bodily harm to the Queen.
Section 77	endangering the safety of an aircraft.
Section 80	dangerous handling of explosives.
Section 86	without lawful excuse, pointing a firearm and careless handling of a firearm or ammunition.
Section 87	possession of a weapon for a purpose dangerous to the public peace.
Section 216	duty to use reasonable knowledge, skill and care in medical treatment or other lawful acts that may endanger life.
Section 217	duty to fulfil an undertaking if omission may be dangerous to life.
Section 218	endangerment of a child under age 10 by abandonment or exposure.
Section 220	causing death by criminal negligence.
Section 221	causing bodily harm by criminal negligence.
Section 244	discharge of a firearm with intent to endanger life.
Section 245	administering poison or other noxious substance.
Section 246	choking or drugging to overcome resistance to a crime.
Section 247	traps likely to cause death or bodily harm.
Section 248	interference with transportation facilities with intent to endanger safety.
Section 249	dangerous, operation of a motor vehicle, vessel or aircraft.
Section 250	dangerous waterskiing.
Section 251	unsafe vessel, aircraft or railway equipment.
Section 253	impairment by alcohol or a drug in the operation of a motor vehicle, vessel, aircraft or railway equipment.
Section 262	preventing or impeding attempt to save life.
Section 263	failure to safeguard an opening in ice or excavation on land.

A General Crime

The criminal law is made unnecessarily complex by the proliferation of particular offences. It is worthwhile returning to the essence of the conduct to be proscribed - in this case, unjustified endangerment of others. A general endangerment offence could satisfactorily cover many of the current provisions and would avoid the risk of failure to specify some uncontemplated form of dangerous conduct. Regardless of the means, it should be a crime to", without excuse, intentionally or recklessly endanger any person".

The law of manslaughter [or "criminal homicide", as we suggest] could simply be founded on deaths arising from this type of general offence of criminal endangerment.

Other Illustrations

One of the great strengths of the Law Reform Commission of Canada reports on reform of the criminal law is illustrating how to reduce statutory complexity. For example, in a chapter on crimes causing danger in Report 31 (1987), the following offence is proposed:

> 10(1) Endangering. Everyone commits a crime who causes a risk of death or serious harm to another person:
>
> (a) purposely;
>
> (b) recklessly; or
>
> (c) through negligence

The following endangerment offences were proposed in the 1989 New Zealand Crimes Bill.

Endangering

130. Endangering with intent to cause serious bodily harm.

(1) Every person is liable to imprisonment for 14 years who:

(a) Does any, or omits without lawful excuse to perform or observe any legal duty, with intent to cause serious bodily harm to any other person; or

(b) With reckless disregard for the safety of others, does any act or omits without lawful excuse to perform or observe any legal duty, knowing that the act or omission is likely to cause serious bodily harm to any other person.

(2) This section applies whether or not the act or omission results in death or bodily harm to any other person. CF. 1961, No. 43 section 188

131. Endangering with intent to facilitate crime.

(1) Every person is liable to imprisonment for 14 years who, with intent:

(a) To commit, or to help in the commission of, any crime; or

(b) To avoid detection, or the detection of any other person, in the commission of any crime; or

(c) To avoid arrest or to escape, or to avoid the arrest to help in the escape of any other person, after the commission of any crime, wounds any other person, or administers to any other person any substance for the purpose of causing unconsciousness or serious incapacity, or stops the breath of any other person.

(2) Every person i.e. liable to imprisonment for 7 years who, with any intent specified in subsection (1) of this section, incapacitates or injures any other person in any manner not described in that subsection.

CF. 1961, No. 43, section 191

132. Endangering with intent to injure, ect.

(1) Every person is liable to imprisonment of 5 years who:

(a) Does any act, or omits without lawful excuse to perform or observe any legal duty, with intent to injure any other person; or

(b) With reckless disregard for the safety of others, or needlessly, does any act or omits without lawful excuse to perform or observe any legal duty, the act or omission being likely to cause injury to any other person or to endanger the safety or health of any other person.

(2) Every person is liable to imprisonment for 2 years who negligently does any act or omits without lawful excuse to perform or observe any legal duty, the act or omission being likely to cause injury to any other person or to endanger the safety or health of any other person.

(3) This section applies whether or not the act or omission results in death or injury to any other person.

Both of these illustrations include liability based on negligence. If it is concluded that negligence should not be a basis for criminal sanctions, a general endangerment crime could be restricted to the traditional elements of intention and recklessness.

Recommendation 9 Retention of Existing Provisions

Section 223 (When child becomes human being)
Section 233 (Infanticide)
Section 238 (Killing unborn child in act of birth)
Section 242 (Neglect to obtain assistance in child birth)
Section 243 (Concealing dead body of child)

COMMENTARY

Although we devoted considerable time to these provisions, we concluded that a purely legal approach could not be taken to them. We therefore do not as part of this Report recommend that any of these provisions be repealed or amended. Rather, we would recommend that a multi-disciplined approach be taken toward reform of these provisions and that any working group involved in this endeavour be composed of experts in the various medical, psychiatric and other related fields in addition to legal experts.

We would like to point out, however, that these provisions raise issues concerning the state of mind and the state of physical health of the mother whose child is killed, whether born or unborn. These provisions have been part of our criminal law for a considerable period of time, and reflect a long-standing recognition of the medical, social and other factors which operate to diminish the level of criminal responsibility attributed to the mother or another person whose conduct causes the death of a child. The social policy issues which are reflected, for example, in sections 233, 238(1), and 242, require examination to determine if they remain valid in the sense of being in accord with contemporary medical science. These provisions create a special offence in place of what would otherwise be murder. The policy considerations underlying such provisions are not primarily legal. Rather, they turn on policy determinations of a social or medical nature. It is difficult to reconcile these special offences with the offence of homicide and excuses or defences thereto, without addressing the much broader concept of diminished responsibility.

While we do not provide any in-depth analysis of these provisions which would permit us to seriously question the validity of the social policies underlying them, we would like to point out that they contain several anomalies. For example, section 238 which carries a maximum penalty of life imprisonment for the act of causing the death of a child that has not become a human being could be applied to the mother who is in the act of birth but the child has not reached a stage wherein section 223 would declare it to be a human being. However if the child has reached the stage whereby section 223 would provide it with the status of a human being and the mother is in a mental state which would fit within section 233 (infanticide) the maximum penalty for her actions would be imprisonment for a term not exceeding five years. We also had considerable difficulty with the maximum penalty of five years provided for in section 242 (neglect to obtain assistance in child birth). We fail to see the basis of such a radical distinction between this penalty and the penalty of life imprisonment provided for in section 238 (killing unborn child in act of birth). Finally the title to section 242 refers to neglect to obtain assistance in childbirth. This title implies that negligence is an element of this offence whereas the section itself makes it clear that it is an intentional offence and we would therefore recommend a re-examination of the heading to this provision.

We had similar difficulty with the section 243 maximum penalty of two years for concealing the dead body of a child. In our view this offence is tantamount to being an accessory after the fact and should fit within the umbrella of the accessory provision rather than being a separate provision having a maximum penalty of only two years' imprisonment.

Infanticide

The offence of infanticide was added to the Criminal Code in 1948 as a reduced offence to what otherwise would have been murder. We question whether the medical and scientifice views as the effects of giving birth and lactation which led to the creation of this reduced offence remain valid. We wonder also whether these effects can lead to a state of mind in the mother which could form the basis of any homicide crime (see Women Who Kill Their Children, Silverman R.A., Victims and Violence, Vol. 3, No. 2, pp 113-127). In the absence of an exhaustive study of these and a host of other questions concerning this offence recommendations simply cannot be made in this area.

Accordingly we recommend that before disturbing the current provisions of the Criminal Code in relation to infanticide, there ought to be a careful and exhaustive study to ascertain the need for any such changes, as well as the medical and legal implications of any such changes, and whether or not they would have public support. Amongst other questions that relate to this area, is the thorny issue of when life actually begins. The Criminal Code currently deals with the matter on issuance from the mother, and thus does not directly deal with whether or not life begins at some earlier stage.

However, it should be noted that we concluded that the language of these provisions is not clear and is not a model of coherence. As one of the members Group has noted:

> "Section 238, (killing unborn child in act of birth) in particular presents difficulties as regards the proposed modifications of the law on homicide and the proposed legislation on abortion. Moreover, discordance is to be noted, when the mother is involved, between this offence and infanticide. The motives that restrict interdiction to the sole eventuality of childbirth is also questionable."

Recommendation 11 Attempt Murder

Everyone who, having the intention to commit murder, engages in conduct, which is beyond preparation to carry out that intention is guilty of attempt murder.

STRUCTURAL CHANGES

Although attempt murder is prescribed as a specific offence in section 239 of the Criminal Code, there is no specific definition of this offence. Current section 24 of the Code defines attempts generally and indirectly provides that mere preparation is not sufficient to constitute an attempt.

Current section 239 of the Code provides for a punishment for attempt murder but does not define the offence itself, leaving it to the general provision.

Our recommended offence would specifically provide for a definition of attempt murder.

COMMENTARY

With respect to as the *mens rea* currently required for attempt murder, the leading case of R. v. Ancio (1984) 39 C.R. 3d 1 (S.C.C.) requires a specific intention to kill, and thereby restricts the offence to what would be intentional killings. The working group is of the view that the decision in Ancio is overly restrictive as to the *mens rea* requirement. In recommendation 5 we define the *mens rea* for murder so as to include recklessness. Since a reckless killing coming within the definition of murder is as morally blameworthy as an intentional killing, we would not distinguish between these two forms of *mens rea* in the area of attempt murder. See R. v. Nygaard and Schimmens (1989, S.C.C.). Further, given that we should restrict the definition of murder to intentional or reckless killing, we believe that Parliament should now return to the principle that the offence of attempt murder is an attempt to commit the offence of murder however defined (see R. v. Lajoie, (1971) 10 C.C.C. (2d) 313).

The most difficult area in the law of attempt is the current test of the requisite *actus reus*. Current section 24(2) codifies the common law requirement that the act which constitutes an attempt must be more than a mere act of preparation and must not be too remote from the completion of the crime.

Comparative law discloses that prescribing the *actus reus* of attempt is not an easy task.

The Model Penal Code provides for a rather lengthy definition of attempt. This definition which includes the commencement of the offence by an act or omission which constitutes a "substantial step". And further goes on to statutorily provide for specific instances of what would amount to a "substantial step".

For example, reconnoitering the place contemplated for the commission of the crime. There seems to be universal acceptance that the current law as to *actus reus* for attempt is in an unsatisfactory state. In our review of comparative law we were unable to defend any particular definition as being obviously superior to others. Several critics of the existing law such as Glanville Williams have advocated that mere preparation ought to be a sufficient *actus reus* for the offence of contempt (see, Williams G., the General

Part page 662). We are of the view, however, that this would unduly extend the net of liability. In the final analysis we decided to exclude preparation as the basis for attempted murder and rather would create a separate offence of preparing to commit murder (see recommendation 12). While we appreciate that courts will have to distinguish and perhaps therefore define preparation as opposed to attempt, we are of the view that such delineation will not be difficult given the relatively plain meaning of the term "prepare".

Recommendation 12 Preparing to Commit Murder

Everyone who, having the intention to commit murder, prepares to carry out that intention is guilty of preparing to commit murder.

STRUCTURAL CHANGES

This proposed provision is new and would be an offence separate from that of attempt murder. A consequential provision however would provide that preparing to commit murder is an included offence of attempt murder.

COMMENTARY

Currently under section 24(2) of the Criminal Code, mere preparation to commit the offence of murder, even where one has an intention to carry out the crime, is not an offence. In our view the need to protect life and deter prospective killings justifies the creation of the offence of preparing to commit murder. Such a provision would also permit earlier intervention directed at planned murders. In our view, this recommendation, coupled with our definition of attempt murder will avoid the present situation wherein juries seek to determine if there is preparation and if so whether or not it is "mere". Rather the trier of fact would only have to decide if the accused actually started to commit the offence, which would be attempt murder, or if he merely prepared to do so in which case he would be preparing to commit murder, or if he did neither. In our view all of these questions are questions of fact and not questions of law as is currently the situation under section 24(2) of the Code. In our view, section 24(2), which is obviously intended to enhance the reviewability of findings by the trier of fact in this area, would be unnecessary. This is so because triers of fact would not have to compromise logic or reality to avoid a verdict which they considered undesirable in a moral sense.

We appreciate that under our proposal, judicial interpretation will still be required to definitively distinguish an attempt from preparation. While we considered an exhaustive definition of each of these terms, in the end we concluded that judicial construction of these terms based on concrete facts was the preferable route.

Recommendation 13 Parties to Offences

Introduction

Provisions referable to parties to offences ought to be contained in the General Part of the Criminal Code as they are currently. However, in the recommendations which follow, the working group confined itself to the law of parties as it applies to homicide offences only. We did not consider it to be our mandate, nor did we have sufficient time, to consider all of the ramifications of our proposed recommendations with respect to the law of parties generally.

As a result of the decisions in Vaillancourt, R. v. Logan and R. v. Harris, there is concern that section 21(2) as it is presently worded would not survive a Charter challenge in relation to murder given that the requisite *mens rea* currently set out in the provision is at least in part objective, i.e., "ought to have known". While this concern is valid and has led us to recommend a subjective *mens rea* approach to section 21(2) as it relates to murder, the same concern, in our view, may not arise with respect to the application of section 21(2) in relation to other offences.

The net effect of our recommendations with respect to this area of the law is to enlarge the scope of liability for parties insofar as the *actus reus* of homicide crimes is concerned. At the same time we have limited the scope of liability as a party, insofar as the mental state is concerned. We have therefore recommended enlargement of *actus reus* liability by expanding the type of conduct which would bring a person within the scope of a party while at the same time recognizing on the *mens rea* side that the mental element attributable to a party must be referable to subjective foreseeability of death or the risk of death.

Recommendation 13a Parties to an Offence

(1) Everyone is a party to an offence in this Part and is liable to the penalty for that offence, who

(a) commits it,
(b) assists another person to commit it,
(c) procures another person to commit it,
(d) uses another person to commit it, or
(e) counsels, advises, urges, encourages or incites another person to commit it.

(2) Sections 21 and 22 do not apply to this Part.

STRUCTURAL CHANGES

This provision would replace section 21(1) of the Code for the purposes of the homicide part.

COMMENTARY

This recommendation aims to accomplish two distinct purposes. First, it attempts to capture existing section 21(1) in plain language. Second, it expands somewhat the range of activity which would be covered by the provision by including procuring or using another person to commit the offence. The recommendation makes it clear that any person who is actively involved in the bringing about of a completed homicide offence is as liable as the person who physically commits the offence. This basis of criminal liability has a long history in our common law and does not offend the principles of fundamental justice, see for example R. v. Thatcher (1987) 57 C.R. (3d) 97 (S.C.C.).

(1) Where two or more persons form an intention in common to

(a) carry out an unlawful purpose and

(b) to assist each other therein and

anyone of them, in carrying out the common purpose, commits an offence in this Part, 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.

(2) Everyone who counsels another person to be a party to an offence in this Part 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.

(3) Everyone who is a party to an offence under this Section is guilty of that offence whether or not that person withdrew from or abandoned his involvement in that offence before that offence was completed, unless the court is satisfied that the person took all reasonable and timely steps to prevent the completion of the offence.

(4) Where a person is, by virtue of subsection (3), not guilty of an offence arising from having withdrawn from or abandoned his involvement in that offence before that offence was completed, that person is guilty of any offences to which he or she was a party that were completed before the withdrawal or abandonment.

(5) The law as to withdrawal from, or abandonment of, involvement in an offence is abrogated for the purpose of this Part.

STRUCTURAL CHANGES

This provision would replace current sections 21(2) and 22(1) and (3) of the Criminal Code for the purposes of the homicide part.

COMMENTARY

13b (1) Intention in Common

This recommendation would require subjective foreseeability as the basis of the specified *mens rea* as opposed to constructive knowledge of likelihood as is currently the case under section 21(2). The current phrase "knew or ought to have known that the commission of the offence would be a probable consequence" is replaced by "knew that the other offence could be a consequence". Thus the degree of likelihood has been altered from knowing or ought to have known that the other offence was probable to actual knowledge

that the other offence could occur or was possible. In our view the recommended provision offers a reasonable balance in that the offender's liability is key to his knowingly setting into motion events which could lead to the commission of the secondary crime. This degree of knowledge, ie, knowing of the possibility of the second crime occurring, is as morally repugnant as the intentional commission of the secondary crime: see by way of analogy R. v. Thatcher (1987) 57 C.R. (3d) 97 (S.C.C.). In our view this basis of liability based on subjective *mens rea*, is justifiable in furtherance of one of the major objectives of the criminal law which is to discourage the plotting of criminal schemes by holding offenders who have a subjective intention in common responsible for what they knew could occur. It must be remembered that as a prerequisite to the application of the section, two or more persons must form an intention in common to both carry out an unlawful purpose and to assist each other therein.

13b (2) Counselling

As with the previous subsection, the liability of a party for the commission of the secondary offence is based on subjective *mens rea*, i.e. knowledge, that such secondary offence could be committed in consequence of the carrying out of the primary offence. Our recommendation therefore has removed the objective test currently found in section 22(2) of the Code.

In our view, such liability being based on subjective *mens rea* is justifiable and appropriate in furtherance of deterring the knowing inducement or counselling of criminal schemes by providing that such persons are responsible for any offence which they knew could occur.

13b (3) Abandonment and Withdrawal

This provision deals with the question of abandonment and withdrawal prior to completion of the offence. The common law has recognized a rare but operative form of defence whereby an offender who has embarked on a criminal enterprise with others can avoid liability for the completed offence if he abandons the common unlawful purpose with a timely communication of such to his associates which amounts, where practicable and reasonable, to unequivocal notice prior to the commission of the crime (see Miller v. R. (1976) 38 C.R.N.S. 139 (S.C.C). The purpose of the requirement of notice of withdrawal was developed to achieve at least some measure of active discouragement by the offender to the others with the ultimate objective of discouraging the completion of the crime completely.

However, with respect to homicides, we are of the view that mere abandonment with notice is inadequate to allow exemption for the withdrawing offender. It is not sufficient to permit a person who effectively contributes to events leading to murder or similar crimes to avoid liability for the completed crime unless he or she has taken all reasonable steps to prevent the homicide from occurring. We see considerable social value in the area of homicide in creating an inducement to offenders who have embarked on joint enterprises to take reasonable and timely steps to prevent the completion of the crime. This proposal also recognizes the legitimacy of a diminished level of guilt for offenders whose moral wrongfulness is thus reduced by an effort to set things right. We view our recommendation as seeking to balance these appropriate social objectives by recognizing within strict limits, a defence of abandonment and withdrawal for cases where liability is based on being a party to the commission of foreseeable crimes. We would therefore limit the defence of abandonment or withdrawal to the circumstances stated above and consequentially would recommend that the common law with respect to this defence be abrogated.

13b (4) Limits to Abandonment and Withdrawal

This provision specifically is aimed at ensuring that there is no doubt that a person who has already been a party to a completed offence cannot escape liability by withdrawal from a secondary offence. While this may seem to be a statement of the obvious, it is our view that the principle ought to be codified in the interest of certainty.

13b (5) Abrogation of Common Law

This provision is consequential to subsection 3 which limits the defence of abandonment and withdrawal to that provision. In our view such a subsection is necessary to make it clear that the common law concept of abandonment or withdrawal is abrogated.

Recommendation 13c Parties After the Fact

(1) Everyone who, knowing, believing or suspecting that any other person has committed an offence in this Part which has in fact been committed, receives, aids, comforts or assists that other person,

(a) whether or not that other person is his or her spouse, and

(b) whether or not that other person can be or is charged or convicted of that offence with intent to enable that other person to

(i) escape

(ii) avoid apprehension or discovery, or

(iii) conceal or dispose of evidence, in relation to that offence, is guilty of an offence.

(2) Section 23 and 23.1 do not apply to this Part.

STRUCTURAL CHANGES

This provision would replace current sections 23 and 23.1 as they apply to offences set out in the homicide part of the Criminal Code.

COMMENTARY

This recommendation would broaden the present *actus reus* basis of liability found in section 23 of the Criminal Code, while retaining the subjective *mens rea* requirement. Existing section 23 of the Code is triggered by subjective knowledge that a person has been a party to an offence. We would broaden the range of subjective knowledge to knowing, believing or suspecting. In our view, in light of the subjective *mens rea* requirement, it is sufficient to attract liability if one suspects that a person has committed an offence which in fact has occurred. In terms of the *actus reus* required for liability, the primary crime must in fact have been committed but the proposed provision makes it clear that it is not necessary that the person aided be capable of being charged or convicted or be in fact charged or convicted before the party after the fact could be tried and convicted. Section 23 of the Code restricts liability to direct involvement in receiving, comforting and assisting an offender for the purpose of enabling their escape. This language has led to judicial interpretation which has resulted in a fairly wide meaning being attributed to the concept of "escape" in order to ensure that the offence, at least for major crimes, is sufficiently broad to include persons who intend to assist an offender to escape justice as opposed to merely restricting it to escaping custody. In our view, rather than leave this issue to one of judicial interpretation, Parliament should define the crime in its entirety in the interest of codification and the advantages arising therefrom. Although judicial interpretation in this area has served a public purpose which the strict terms of section 23 failed to serve, the precise ambit of activity which is to be covered by a crime should be prescribed by Parliament. Rather than speak in broad generalities such as "escaping justice", the precise means by which justice can be defeated ought to be prescribed in the section itself.

It should be noted that we have also eliminated, for the purposes of this part only, the spousal defence set forth in current section 23(2) of the Code. While it may be acceptable in the case of lesser offences to provide for an exemption for spouses for the various reasons advanced in support thereof, in cases of homicide the balance of policy consideration does not justify exempting spouses who otherwise fall within the definition of the crime. In our view marital accord and stability is not likely to be enhanced in cases where the spouse offender has committed a homicide crime.

(1) Everyone who counsels, advises, urges, procures, uses, encourages, or incites another person to commit any offence in this part, where that offence is not completed, is guilty of an offence under this section.

(2) Everyone who conspires with another person to commit any offence in this part is guilty of an offence under this section whether or not the offence in this part is completed and whether or not the person with whom the person conspires is capable of being convicted or of being prosecuted for that offence or for the conspiracy offence.

STRUCTURAL CHANGES

This provision would replace, for the purposes of this part, sections 22(2), 463, 464, and 465 of the Criminal Code.

COMMENTARY

This provision would replace the above-mentioned sections by using terminology which is in harmony with the other recommended party provisions found in this part. Although we have expanded the means by which this offence may be committed, we have only done so to the extent which the other party provisions have been expanded and have done so for the same policy considerations. In our view the nature of the crime in question justifies the minor expansions recommended.

Introduction

Any proposed reform to the law of homicide crimes would be incomplete if it failed to concurrently address excuses, justifications and defences to those crimes. We appreciate that the codification of such provisions should be in the General Part of a Criminal Code. However, in accordance with our mandate, we have confined our proposals with respect to defences etc. to their application to homicide crimes.

Much of our current criminal law is concerned with a multitude of justifications, excuses and defences. While many of theses are codified in the Criminal Code, others exist, either by virtue of section 8(3) of the Code which preserves common law justifications, excuses and defences, or by virtue of judge made law.

We concluded that there exists a great deal of confusion and overlap in this area. Much of this confusion arises from the manner in which many of the defences etc. have been interpreted and applied by courts. This has led to an inconsistency in both the principles underlying the defences etc. and their application. We view certainty of principle and consistency of application in this area to be an essential part of a just legal system.

We are somewhat reluctant to do away with the existent structure which consists of both statutory provisions and the common law thereby permitting flexibility and evolution in this area. We concluded that Parliament, as opposed to the courts, should determine, to the greatest extent possible, the principles of our criminal law including defences. For this reason and for the purposes of certainty and comprehensiveness we have recommended a new regime in the area of defences, justifications and excuses.

Recommendation 13 proposes a single defence of protection of oneself or other persons. It would replace a number of current provisions dealing with, inter alia, the defence of the persons, including self defence, and the defence of property which would no longer apply to homicide crimes. It would also replace common law defences such as necessity, duress, superior orders and provocation as they apply to homicide crimes.

Recommendation 14 provides for a defence of execution of legal duty or authority which would replace sections 25, 26 and 27. Consequent to recommendation 13, recommendation 15 would repeal section 8(3) of the Code and thereby abrogate common law defences, both present and future.

Recommendations 16 and 17 deal with mistake of fact and mistake of law respectively.

Our recommendations would replace virtually all of the current Code provisions and the common law in this area with a minimum number of defences which, at least insofar as homicide is concerned, would completely encompass the defences, justifications and excuses available.

Our report does not address the "defences" of insanity or automatism (involuntary *actus reus*) as they are being fully considered by the Mental Disorder Project conducted by the Federal Department of Justice.

Commentary as to Mental Disorder

Introduction

Our report touches upon, in a certain respect, the subject of mental disability, an expression used to distinguish the subject from mental disorder as referred to in the jurisprudence dealing with insanity, and as referred to in literature concerning mental illness, in the context of special extenuating circumstances in mitigation of the minimum terms of imprisonment provided for the offences of murder, attempt murder, and first degree criminal homicide.

It was not considered appropriate to recognize such a special extenuating circumstance as mental disability in relation to first degree murder, as the factors of *mens rea* that elevated murder to first degree murder were such that they could not exist in the face of mental disability within the scope of our recommendations. However, apart from that necessary feature of the package of recommendations, we concluded that it was not appropriate to go further and trespass upon the considerable effort done by earlier groups and by current groups in relation to the subject of mental disorder.

We noted further, that the Supreme Court of Canada is soon to entertain a number of companion appeals to consider the subject of the defence of insanity, and, in particular, the subject of the presumption of sanity and the reverse onus in relation to proof to displace that presumption. These cases including R.v. Chaulk and Morrisette, R.v. Ratti, and R.v. Romeo, will address significant subjects in the context of mental disorder as an excuse defence.

The Current Criminal Code Provisions

The subject of mental disorder, as a defence, is, of course, addressed by sections 16 and 614 of the Criminal Code. The subject of fitness to stand trial, and mental illness as it relates to the proceedings before the courts, is dealt with, to some extent, by the following sections:

(1) section 537, dealing with preliminary inquiries and the judicial powers associated therewith,

(2) sections 615 to 617 and 619, dealing with trials and the judicial powers associated therewith, and with the Boards of Review, and with the disposition of persons unfit to stand trial generally,

(3) section 618, dealing with mentally ill inmates in institutions,

(4) section 803, dealing with the trial of summary conviction offences,

(5) section 681, dealing with the powers of appeal courts in relation to indictable offence proceedings,

(6) section 823, dealing with appeals in summary conviction offences by summary conviction appeal courts,

(7) section 839, dealing with second level appeals in summary conviction offences,

(8) section 756, dealing with Dangerous Offenders,

(9) section 775, dealing with applications for orders in the nature of certiorari and habeas corpus, and section 784, dealing with appeals in relation to such orders.

Needless to say, there are other provisions of other statutes, such as the Penitentiaries Act, the Canada Health Act, the Supreme Court Act, and other federal and provincial legislation which impact directly on mentally disordered offenders, not to mention the proposals of the mental disorder legislation which is currently under federal-provincial discussion.

The Mental Disorder Project

There are a number of different issues that were addressed, to a greater or lesser extent, by the proposals arising out of the mental disorder project, including:

(1) judicial interim release of mentally disordered persons and the administration of the cases of inmates awaiting pending criminal proceedings,

(2) sentencing of mentally disordered persons, including hospital orders,

(3) administration of sentences of mentally disordered persons, including reviews and capping provisions,

(4) mental disorder as a complete excuse defence,

(5) mental disorder as a partial excuse defence in relation to crimes requiring special forms of *mens rea*,

(6) disclosure by the Crown in the course of criminal proceedings as to evidence of mental disorder,

(7) the role of the Crown during criminal proceedings with respect to evidence of mental disorder,

(8) admissibility of statements given to persons in authority or agents of the state by mentally disordered persons,

(9) the weight of statements made by mentally disordered persons, and

(10) the character and purpose of remands to medical institutions of persons for mental assessment, and the implications of such remands upon the gathering of evidence relevant to criminal proceedings.

This broad range of questions and issues was, of course, beyond the capacity as to time and resources of our group to address even though some of its members had familiarity with or involvement in the consultation process regarding this project.

The Primary Concerns of the Working Group

Should our recommendations with respect to homicide and related offences include within it a separate and distinct formulation as to a defence of mental disorder, and, if so, what form should that take.

Should the proposed Part of the Criminal Code dealing with homicide and related offences take cognizance of mental disorder, howsoever defined, in any respect in relation to the offences and defences set out in the Part.

Should the subject of mental disorder be reflected in any fashion in connection with the sentencing scheme to be included in the Working Group's proposals as to a Part of the Criminal Code dealing with homicide offences. As can be seen, this question was answered in a qualified affirmative in the ultimate recommendations of the Report.

However, the answer to questions (1) and (2) was ultimately in the negative. It was the consensus that although the fundamental nature and importance of homicide and related offences was such that it was appropriate to address those subjects by a special Part of the Criminal Code -- an approach seen in other civilized western jurisdictions -- the subject of how to best address mental disorder could not be dealt with solely in the context of such offences.

In concluding as we did we relied on the useful discussion by Professor Stuart in Canadian Criminal Law, 2d Edition, (1987), at pages 350 to 363. In that part of his text, Stuart pointed out the various controversies that raged amongst academics and others concerning the effect that mental disorder should have in the implementation of the criminal law and in the criminal justice system.

Stuart pointed out that there was, for example, a tension between those who

> (1) preferred to regard mental disorder as no basis for an excuse from criminal conduct, since that approach had potential for endangering the public, and since an enlightened system of sentencing could appropriately deal with the person whose conduct was of criminal attention,
>
> (2) preferred to think that while mental disorder was not really an excuse for crime, it was for the offender, and that accordingly the conduct should be branded as criminal but in some way the offender should not, and he should be dealt with as a medical case, and
>
> (3) preferred the view that mental disorder went, or potentially went, depending on the view of the trier of fact, to the proof of the essential ingredients of crime allegations, and, in particular, the *mens rea*, in which case there was no legal justification for branding either the conduct or the offender as criminal, but there was justification, depending on the case, to associate a form of civil commitment of the subject actor with the criminal system in order to serve the public protection and give some attention to the medical needs of the subject.

This is, of course, not the only area of dispute in relation to the mentally disordered offender, but it is a centrally important one, and it is a persistent source of disagreement in criminal and medical jurisprudence. We determined not to propose an answer to this fundamental question. As with all forms of criminal offences, the doctrinal considerations, which occasion the development and recognition of the required *mens rea* for any offence, depend directly upon the words used and purposes of the framers of any provisions of the Criminal Code.

Our proposals as to the design and content of the various forms of homicide and related offences if adopted into legislation, necessarily must be attended by jurisprudential analysis leading to the ultimate formulation of the basic *mens rea* and *actus reus* which are definitive for the offences. Consequent upon that would be a consideration of the sorts of mental states that will fall short of meeting the requirements of such *mens rea*. We, for instance, did not purport to eliminate a defence based on mental disorder from such proposed crimes as criminal homicide, though specifically proposing to do away with any notion of "impaired condition" arising from voluntary action, as a defence to such crimes.

In other words, in the end result, we elected not to depart from the existing law insofar as mental disorder and the handling of mentally disordered persons was concerned.

In that regard, therefore, our report should be taken as recognizing and applying the existing law as to the defence of insanity, and as to matters raising a reasonable doubt as to the existence of the requisite *mens rea* for crimes, to the extent that the proposed new offences and defence provisions are and would be affected thereby.

(1) No one commits an offence under this part by reason of reasonable conduct including due regard for the safety of innocent persons, that results in death or serious bodily harm, if they honestly believed, on reasonable grounds, that the conduct was necessary to prevent imminent serious harm to themselves or to any other person.

(2) The following sections do not apply to this part:

Section 17 (compulsion by threats)
Section 34 (self defence against unprovoked assault)
Section 35 (self defence in case of aggression)
Section 37 (preventing assault)
Section 38 (defence of personal property)
Section 39 (defence with claim of right)
Section 40 (defence of dwelling)
Section 41 (defence of house or real property)
Section 43 (correction of child by force)
Section 44 (master of ship maintaining discipline)

STRUCTURAL CHANGES

This provision would replace all of the above-mentioned defences, justifications and excuses currently found in the Criminal Code insofar as they apply to the law of homicide.

Recommendation 15 *infra* would repeal section 8(3) of the Code and abrogate any common law justifications, excuses or defences.

COMMENTARY

The current multitude of defences, justifications and excuses which may be found in the Criminal Code or in the common law is extremely confusing and often results in great difficulty for triers of facts attempting to sort out the various defences etc. which may be applicable to any given case.

Take for example a case where the accused raises a defence generally based on the suggestion that he was responding to violence instigated by the victim. In such a case, the following Criminal Code provisions would likely have to be considered by the trier of fact:

(1) Section 34(1), which essentially provides that where a person has been unlawfully assaulted without having provoked the assault, that person is justified in repelling force by force provided that the force used is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself. Should death or grievous bodily harm be the result, the accused is still justified provided that he did not intend to cause death or grievous bodily harm.

(2) Section 34(2), which provides that where the responsive force applied by the person who has been unlawfully assaulted by another causes death or grievous bodily harm, he is justified if the death or grievous bodily harm was caused under a reasonable apprehension of death or grievous bodily harm from the initial assault, or its pursuit, and if the responsive force is inflicted in the belief, on reasonable grounds, that the person assaulted cannot otherwise preserve himself from death or grievous bodily harm. It should be noted that the reference to "reasonable apprehension of death" and "reasonable grounds" import objective criteria into this provision as is the case with several of the following provisions.

(3) Section 35 defines in cumbersome language the scope of lawful self-defence of a person who has assaulted or provoked an assault on himself by another. This provision has several elements each of which must be explained to a jury. First, the selection only applies where the accused without justification either assaulted the victim without an intent to cause death or grievous bodily harm, or has provoked an assault upon himself by the victim in the absence of justification. The use of force by the accused must be under a reasonable apprehension of death or grievous bodily harm from the violence of the victim who was initially assaulted or provoked. Second, the force must be used in the reasonably grounded belief that it is necessary to preserve the accused from death or grievous bodily harm. The phrases "reasonable apprehension" and "unreasonable grounds" import objective considerations into the accused's knowledge and apprehension. Third, the accused must not have at any time, before the necessity of preventing himself from death or grievous bodily harm arose, endeavoured to cause death or grievous bodily harm to the victim. Fourth, the accused must also have declined further conflict and retreated from it, as far as it was feasible to do so, before the necessity of preserving himself from death or grievous bodily harm arose.

(4) Section 37 defines the extent to which the use of force may be justified in the defence of oneself or of anyone under his or her protection. Under this section the force used to defend oneself must be no more then is necessary to prevent the assault or its repetition and there is a further limitation which provides that the wilful infliction of excessive hurt falls outside the protection afforded by the justification. In addition to being instructed with respect to the above-mentioned provisions, the trier of fact would, in order to attempt to understand and apply them correctly, have to be instructed with respect to such common law notions as there being no requirement to weigh force to a nicety and no requirement of detached reflection in the face of a sudden assault and no absolute requirement of having one's back to the wall in retreat cases etc.

In addition, depending on the particular facts of any given case, the trier of fact would have to address the following further considerations.

(5) Section 17 which deals with duress and the common law gloss thereto.

(6) Sections 38, 39, 40 and 41 which deal, in a multifaceted way, with the defence of property.

(7) The common law concept of necessity as set out in R. v. Perka et al. (1984) S.C.C.

(8) Section 27 which deals with protection of other persons.

(9) Section 26 dealing with excessive force and liability for crimes in accordance with the degree of force applied.

(10) Section 25 which would specifically apply to peace officers or other persons engaged in the administration or enforcement of the law.

Not only are each of the above-mentioned provisions complex and in some cases unclear, the cumulative effect of all or several of these provisions as they apply to any particular case leads to a great deal of confusion for triers of fact. These complexities have been magnified by the inordinant amount of jurisprudence interpreting these provisions, some of which is not consistent throughout Canada.

We also believe that the public is equally confused and are more often wrong than right in their understanding of under what circumstances, and to what degree, they are justified in using force to protect themselves, other persons, or property. Such confusion is not merely undesirable, but could lead to very dangerous situations with serious consequences.

Such a state of affairs is extremely unsatisfactory. Given that it is often ordinary citizens who are faced with the prospect of having to use force to protect themselves, others or property, the law should state as clearly as is possible and in plain language, the extent to which they are permitted to use force in such circumstances.

In recommending that the use of force to protect property no longer be a defence or justification, we are not unmindful that we may well be criticized for taking this position. We recommend as we do for the following reasons:

(1) Cases currently permitting the protection of dwellings and other real property will often involve the presence of imminent serious harm to an occupant thereof, such as in a break and enter. In such cases recommendation 14 would apply. Where there is no danger of imminent serious harm, e.g. mere trespass, we believe it is better to leave the matter to law enforcement agencies rather than to escalate the situation to one involving violence to either the occupant or the intruder.

(2) The use of some degree of force to protect chattels arguably could be justified. However the degree of force which should be permitted is difficult to define. Existing section 38 indirectly permits an uncertain degree of force provided that there is no striking or the infliction of bodily harm. Subsection 2 however would permit the use of force by way of self-defence if the trespasser persists in taking the chattel. This provision is generally in need of clarification and simplification. In the context of homicide crimes however, we concluded that this defence should not apply to homicide cases for the reasons stated above.

"Reasonable Conduct"

The term "reasonable conduct" would require an objective examination of the totality of the conduct including such matters as the use of excessive force.

We chose this term as the threshold test for the defence primarily for two reasons. First, it is a term of ordinary usage which should not require undue legal interpretation. Second, although the term will not require undue legal interpretation, it is a term of flexible application on a case-to-case basis. Finally, we believe that the term is the appropriate threshold test which should permit the availability of the defence.

"Due Regard for the Safety of Innocent Persons"

This term also is not complex. Both triers of fact and the public at large using common sense should appreciate the meaning of this term. The term encompasses what we view to be one of the most important elements of "reasonable conduct". Although many other elements will enter into a determination of whether conduct is reasonable on a case-by-case basis, we are of the view that in allowing for this defence, due regard for the safety of innocent persons must always be present. The term "innocent persons" describes people who are either not involved in the occurrence taking place, or whose involvement is not the result of misconduct of their own making.

The test of "reasonable conduct including due regard for the safety of innocent persons" will be objectively assessed having regard to all of the circumstances of the case. This objective assessment however will be based on the state of knowledge of the person at the time.

"Honestly Believed on Reasonable Grounds"

This term would require that the accused subjectively held an honest actual belief that his action which resulted in death was necessary to avoid imminent serious harm. However, as in the current provisions of the Code, the subjective belief must be held on objectively measured reasonable grounds if the defence is to succeed.

"Imminent Serious Harm"

This expression connotes the sort of immediacy which is currently recognized in sections 34, 35 and 37 of the Code.

The requirement of "imminent serious harm" was chosen to make it clear that the defence must not be considered as a licence to kill, or as permitting an intention to kill in any situation falling short of the presence of an imminent danger or serious harm. While killing in circumstances which may fall short of this test may be relevant to the sentence, it ought not to be accepted as either morally or legally appropriate and the Code should so clearly state.

One aspect of the threshold test of imminent serious harm gave us considerable difficulty. We are familiar with so called "pre-emptive strike homicides" wherein, for example, spouses or children who have been subjected for a long period of time to the degradation and/or violence of a overbearing family member have killed that person to avoid the continuation of such intolerable abuse. In such cases the question of whether such abuse amounted to imminent serious harm would have to be determined on the particular facts involved.

"To Any Person"

This phrase significantly expands the defence to permit the protection of any other person from imminent serious harm. Section 37 of the Code restricts the use of force to defend against an assault either to oneself or to any person under one's protection. We expanded the defence to include protecting any other person because we felt strongly that such a position is morally desirable. Further, unlike the existing provision which gives rise to uncertainty as to who might included as being under one's protection, our expanded defence is unambiguous. It therefore will permit the public to know exactly where they stand should they come to the aid of a member of the public who is not "under their protection". We would note that this approach is consistent with that of the Law Reform Commission (see Report 31, section 3(10)).

(1) No peace officer, or other person authorized to assist a peace officer, commits an offence under this Part 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:

(a) the conduct was necessary to prevent

(i) the commission or continuation of any offence, or

(ii) the escape of any offender, and

(b) that such offence or escape subjected any person to the risk of serious bodily harm.

(2) Nothing in this Section authorizes a peace officer, or person authorized to assist a peace officer, to use force which

(a) he intends to cause death, or,

(b) he knows is likely to cause death unless the peace officer or person believed, on reasonable grounds, that the use of such force was necessary for the purpose of preserving himself or herself or anyone else from death or serious bodily harm.

(3) Sections 25, 26 and 27 do not apply to this Part.

STRUCTURAL CHANGES

This provision would repeal and replace existing sections 25, 26 and 27 of the Code.

COMMENTARY

Current section 25 and in particular subsection (4) thereof has been the subject of considerable controversy in recent years. The debate concerning the use of deadly force by peace officers is understandable. It arises out of the requirement to balance the need to provide peace officers with sufficient authority to permit them to effectively enforce the law and the need to ensure that such powers are not excessive. In recommending as we have, we are of the view that existing section 25(4) is not sufficiently restrictive with respect to the use of deadly force. Our proposal would replace existing section 25.

Our recommendation would permit a peace officer to act to protect any member of the public rather than merely those "under his protection" as is the case in existing section 25(3). This would remove the requirement of immediate or direct responsibility to a person potentially at risk because we believe it is unreasonable to expect a peace officer to address himself or herself with respect to such niceties in the heat of many situations.

Our proposal uses the term "serious bodily harm" as opposed to the current term "grievous bodily harm" which we believe to be antiquated.

Recommendation 15 mirrors recommendation 14 with one major exception: the defence will apply if the officer acts to prevent a risk of serious harm which need not be imminent, provided that the officer is acting to prevent the commission or continuation of any crime or the escape of the offender. We believe this distinction to be justified on the basis that peace officers, unlike ordinary citizens, are under a duty to protect the public and that they cannot be expected to measure the imminency of the risk of serious harm in the wide variety of situations arising out of this duty.

Our recommendation would repeal existing subsection 25(4) which confers the power to use as much force as is necessary to prevent an escape from arrest. We view the authorization of the use of deadly force on the mere fact of escape as opposed to the risk of serious bodily harm as unnecessarily excessive. Absent a risk of serious bodily harm to anyone, we feel that it is more appropriate to simply permit the escape and leave it to modern law enforcement to recapture the offender at a later time. Similarly the use of the term "unless the escape can be prevented by reasonable means in a less violent manner" in current section 25(4) is of the same effect focusing as it does on the escape as opposed to public safety. In summary, we believe that protection of the public from a risk of serious bodily harm is the appropriate threshold for the use of deadly force by a peace officer.

We would also note that in our view the current definition of "peace officer" is far too broad in relation to the use of deadly force even under our recommendation.

Commentary as to Police Powers "Use of Deadly Force"

In December 1989, as a result of increasing concern with respect to the use of deadly force by peace officers permitted by section 25 (3)(4) of the Code, Deputy Ministers responsible for the administration of justice mandated our Working Group to examine this subject and to formulate appropriate recommendations on an urgent basis.

We immediately turned our attention to study of this topic and concluded that existing section 25(4) is not sufficiently restrictive with respect to the use of deadly force. After much deliberation we recommended that current subsections (3) and (4) be repealed and replaced with the following:

> 25(3) A person acting pursuant to subsection (1) is not justified in using force that is intended or is likely to cause death or serious bodily harm unless he or she believes on reasonable grounds that it is necessary to prevent serious bodily harm to any person.

We believe that this recommendation could be legislated independently of our other recommendations including recommendation 15.

The Current Provisions of the Criminal Code

The Criminal Code sets out, in section 25, as part of the provisions dealing with justification defences, the protections which apply to peace officers and other persons engaged in the administration or enforcement of the law. Section 25(1) of the Code authorizes such persons, while in the lawful execution of their duty, to do what they are "required or authorized to do" and to use "as much force as is necessary for that purpose". Section 25(2), dealing with defective process, is not directly pertinent to our mandate.

Subsection (3), however, provides that:

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

Subsection (4) goes on to provide as follows:

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

This combination of subsections, therefore, goes beyond the meaning of "necessary" in subsection (1), and, in a sense, deems certain conduct to be necessary for the purposes of subsection (1), while deeming other conduct to be unnecessary. However, resort to deadly force, is authorized and justified by the section read as a whole.

Proposals for Change

Section 25(4) has been the subject of criticism in many reports and submissions to government. Various proposals have therefore emerged for the amendment of that section, notably:

> (1) The April 1989 Lewis Task Force on Policing and Race Relations (Ontario).
>
> (2) The August 1989 Uniform Law Conference Resolution, presented by Ontario.
>
> (3) A December 4, 1989, letter from Ian Scott, Attorney General of Ontario, to Minister of Justice, Doug Lewis.
>
> (4) Report 30 (1986) of the Law Reform Commission, proposing as part of section 3(13), a General Rule and an Exception in relation to persons acting under legal authority.

(5) Report 31 (1987) of the Law Reform Commission, proposing as part of section 3(13), a General Rule and a Rule relative to force by peace officers.

The subject of the use of deadly force by peace officers has also been considered, discussed or has appeared in the following:

(1) Uniform Law Conference of Canada Report, Winnipeg, August 1986, Powers and Procedures with Respect to the Investigation of Criminal Offences and the Apprehension of Criminal Offenders.

(2) Police Powers Project of the Criminal Law Review, September 1986, following upon the Report mentioned above.

(3) Law Reform Commission Report 31, June 1987, mentioned above.

(4) United Nations, General Assembly, 8th Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, Austria, June 27 - July 1, 1988 Draft Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

(5) The Lewis Task Force, Ontario, April 1989, "Police Use of Force" mentioned above.

(6) Uniform Law Conference of Canada Proposals, August 1989, specific proposal to amend section 25(4), carried.

(7) First Report of the Working Group on the Law of Homicide, January 1989, part of various recommendations.

(8) Solicitor General of Ontario, Briefing Notes, November 1989, Banff, Alberta Fleeing Felons and a Proposed Amendment to the Criminal Code.

(9) United Nations, Secretariat, December 1989, Draft Resolution on Use of Force and Firearms by Law Enforcement Officials, draft based on discussions under subsection (4) above.

(10) Law Reform Commission of Canada Report, Expected June 1990, Code of Criminal Procedure.

(11) United Kingdom, Police and Criminal Evidence Act, 1984, Section 117.

(12) United States, United States Code, 1982, Title 18.

(13) United States, American Law Institute Model Penal Code and Commentaries, Part 2, Volume II, Section 242.2, including descriptions of state and federal enactments and reform surveys.

(14) United Kingdom, The Law Commission, 1989, A Criminal Code for England and Wales, April 1989, Draft Criminal Code Bill, containing in Part I, Defences, sections 44 and 45, and in Part II, Homicide, section 59.

(15) Australia, Australian Criminal Law, 1981, Federal Offfences, by Watson and Watson, describing complaints about police conduct.

(16) Australia, Report of the Muirhead Commission, 1989.

(17) Australia, Queensland and Western Australia, An introduction to Criminal Law in Queensland and Western Australia, Chapter 13, Offences against the Person, pp. 193-218.

(18) New Zealand, Criminal Law in New Zealand, Garrow and Caldwell, 1981, Crimes Against the Person, and Arrest and Search, pp. 141-148, and 463-468.

(19) New Zealand, New Zealand Crimes Bill, May 1989, specific provisions.

(20) Canada, Donald Stuart, Canadian Criminal Law , (Carswell, 1987), pp. 419-424.

(21) Canada, Report of the Commission into Policing and the Blood Band of Southern Alberta, Expected in late, 1990.

(22) Canada, Report of the Canadian Committee on Corrections, called the Ouimet Report, March 31, 1969, pp. 59-61.

(23) Canada, J.D. Abraham et al., 'Police Use of Lethal Force, A Toronto Perspective', (1981) 19 Osgoode Hall L. J. 199.

The matter of police authority has, of course, also been the subject of a large amount of jurisprudence, notably:

(1) cases such as Eccles v. Bourque (1974, S.C.C.), R. v. Landry (1982, S.C.C.), Priestman v. Colangelo and Smythson (1959, S.C.C.), and R. v. Roberge (1984, S.C.C.) in Canada, and

(2) R. v. Waterfield (1964, H.L.) and cases following it in England, and

(3) Brower v. Inyo (1989, U.S.S.C.), and Pennsylvania v. Bruder (1989, U.S.S.C.), and Berkemer v. McCarty (1985, U.S.S.C.)

just to scratch the surface of the jurisprudence dealing with police powers.

The type of analysis which would be required to do justice to that topic was beyond the capacity in terms of time and resources, not to mention being beyond our mandate. However, members did familiarize themselves with the foregoing material in order to form what is hoped to be a useful set of specific proposals.

Proposal for Consideration

After study of this subject, we concluded that section 25(4) of the Criminal Code was not appropriately focused, in that it authorized the use of deadly force in the context of escape, rather than in the context of avoiding death or serious harm to innocent persons. We were in agreement, albeit not to the same extent, that it was inevitable in Canadian society that peace officers and others currently covered by Section 25 of the Criminal Code be permitted to use deadly force in some circumstances. Equally, the members, were of the view that the general language used in subsection (1) of section 25 of the Code were insufficient to provide the police with adequate guidance in relation to the limits of their authority. Further, we however, were also of the view that section 25(4) of the Code, quite apart from being inappropriately focused was not sufficiently restrictive with respect to the use of deadly force.

Although we believe that there exists throughout Canada, a sincere desire on the part of police forces to themselves restrain resort to deadly force, through administrative and internal policies, some of which may or may not be unduly restrictive in some instances, the declaration of such policy on a national basis is a proper subject of the criminal law, and thus a proper matter for the Justification and Excuse provisions of the Criminal Code. In consequence, we addressed ourselves to a number of formulations of Sections 25(3) and 25(4) of the Criminal Code with a view to determining whether or not any of them commended themselves to a proper balance of social policy objectives. In this respect, we noted that deadly force was not simply a matter of use of firearms or other weapons, but could well involve the manner in which police roadblocks were set up or high speed chases were handled and regulated, that subject being within the deadly force rules applicable in American jurisprudence as well as Canadian jurisprudence (see e.g. R.v. Roberge (1984, S.C.C.)).

In the end result, the following formulation was arrived at:

> 25 (3) A person acting pursuant to subsection (1) is not justified in using force that is intended or is likely to cause death or serious bodily harm unless he believes on reasonable grounds that it is necessary to prevent serious bodily harm to any person.

This proposal alters the language of the current section 25(3) of the Criminal Code in certain respects:

> (1) First, it replaces "grievous", which is an archaic word, with "serious", which is more comprehensible and current.
>
> (2) Second, it deletes the phrase "under his protection" so as to remove the requirement of immediate or direct responsibility over the person potentially at risk, since it is unreasonable to expect a police officer to address himself to such niceties in the agony of many situations.

With those adjustments, it is further proposed that section 25(4) of the Criminal Code be repealed. That section adds nothing but confusion to the legal situation, except insofar, as has been noted above, it grants a power to use deadly force in situations based not on risk to others, but on the mere fact of escape. Where a police officer is proceeding lawfully to arrest, he already has the protection of subsection

(1) of section 25 of the Code in that regard whether or not he has a warrant. Where the subject of the arrest takes flight, the peace officer already has the power of arrest and thus is in the course of his duty to proceed to carry it out, also under subsection (1). Accordingly, what is added by subsection (4) is the power to use "as much force as is necessary to prevent the escape". There is little gained by this phrase and too much is authorized in service of prevention of escape only. Protection of persons from death or serious harm is a valid purpose to associate with deadly force, and the language of section 25(3) as proposed above, provides for such force when "necessary", so that no logical conflict arises from removal of the authority to use such force to prevent the escape.

The further qualifying clause in subsection (4) of "unless the escape can be prevented by reasonable means in a less violent manner" has the same defect, focusing on escape instead of safety, so it adds no realistic limit or guidance to what is determined to be "necessary" in relation to the use of deadly force. It follows from the foregoing that on amendment to subsection (3), to expand its application to the protection of "anyone", nothing of value remains to be kept by means of subsection (4). Before leaving this proposal, it should be noted that various sources have recommended adding to this provision a definition of "serious harm" which corresponds with the definition of "bodily harm" as set out in section 267(2) of the Criminal Code.

Recommendation 16 Abrogation of Common Law Defences

(1) Section 8(3) of the Criminal Code is repealed.

(2) Any common law defence and the common law relating to any of the defences previously provided for, as it relates to the law of homicide is abrogated.

(3) For greater certainty, but not so as to restrict the generality of the foregoing, the common law as to

- *defence of the persons*
- *defence of property, moveable or immovable*
- *execution of any form of legal duty*
- *obedience to authority*
- *duress*
- *necessity*
- *provocation*

is abrogated for the purposes of this Part.

STRUCTURAL CHANGES

This provision would abrogate not only any common law defence to a crime of homicide, but would also abrogate the common law which may have developed with respect to any of the defences currently available to a charge of homicide which are abrogated and replaced by the defences provided for in recommendations 14 and 15. Section 8(3) of the Code would be repealed pursuant to this recommendation. The common law development of future defences to homicide crimes pursuant to this provision would no longer be possible.

COMMENTARY

Section 8(3) of the Code preserves common law defences, justifications and excuses (as long as same are not altered or inconsistent with other provisions of the Criminal Code). Section 8(3) has arguably been a valuable component of the Criminal Code in that it has permitted courts to recognize such new defences as might be appropriate, thus enlarging the common law (see R. v. Kirzner (1977) 1 C.R. (3d) 138). In our view, for the reasons previously stated, any new homicide part ought to include a complete codification of defences available to the offences prescribed therein. It is for this reason that we have recommended the repeal of section 8(3) as it applies to the law of homicide. In providing for the defences which we have recommended, we are of the view that to permit common law defences to coexist and perhaps conflict with these provisions could lead to confusion and a lack of certainty in this area. If Parliament determines the defences which are to be available to a homicide crime, further defences should not be created by courts. If our recommendations with respect to the defences which we have provided for is viewed to be inadequate, then we are of the view that Parliament should specifically provide for any supplementary defences to the crime of homicide in the Criminal Code itself, rather than permit further unknown or at least uncodified defences to emerge. While there would no doubt be a great deal of flexibility in the application of our defence provisions as they apply to particular facts, the defences themselves should be codified.

(1) For purposes of this part, an honest but mistaken belief, in facts which, if true, would not constitute the offence charged, is a defence to that charge.

(2) In determining whether or not a mistaken belief referred to subsection(1), was honest, the trier of fact may take into account the presence or absence of reasonable grounds for such a belief.

(3) In determining whether or not a mistaken belief referred to in subsection (1) was honest, the trier of fact may take into account the failure of the person charged to make prudent inquiries as to relevant facts where, under the circumstances, the person charged had reason to suspect that his belief about such fact was mistaken.

(4) Subsection (1) does not apply as a defence to homicide crimes that are committed by recklessness or negligence where the mistake is due to the accused's recklessness as negligence as the case may be.

(5) The common law with respect to mistake of fact is abrogated.

STRUCTURAL CHANGES

The principles governing mistake of fact are not currently part of our Criminal Code. Our recommendation would replace and abrogate the common law with respect to this defence.

COMMENTARY

The exact parameters of the defence or excuse of mistake of fact as it exists in Canada are difficult to ascertain. Further, there has been considerable debate in the jurisprudence with respect to whether or not such mistake need be both honest and reasonable. In Papajohn (1980) 14 C.R. (3d) 243, six out of seven judges of the Supreme Court of Canada dealing with a case of rape held that an honest but unreasonable mistake as to non-consent would absolve the accused. Moreover the judgments in the case seem to clearly indicate that this principle applies to all offences which require a subjective *mens rea*. (See also R. v. Sansregret (1985) 45 C.R. (3d) 193 (S.C.C.))

Although we concluded that the state of mind of the offender should be viewed subjectively as opposed to constructively, we were strongly of the view that in determining the subjective belief of the accused, triers of fact should be instructed that they may take in to account both the reasonableness of the belief and the inquiries or lack thereof as to relevant facts by the offender.

Subsection (6) of recommendation 7 provides that in order to be a defence to criminal homicide, a mistake of fact must be both honest and reasonable. Similarly in subsections (2) and (3) of that recommendation we excluded impairment as a defence. Our intention therefore is to exclude mistakes based on impairment as a defence to criminal homicide. Insofar as intentional murder is concerned, however, a mistake of fact based on impairment could be a defence as it would negate the essential *mens rea* of that offence. In subsection 5 of the recommendation we have attempted to ensure that mistake of fact is limited to these

parameters as well as ensuring that negligent or reckless mistakes cannot form the basis for a defence to any offence except intentional murder. We would note that in this respect our recommendation is intended to be consistent with recommendation 3(2(b)) of Report 31 of the Law Reform Commission of Canada.

Recommendation 18 Mistake of Law

Mistake or ignorance of the law by a person who commits a homicide offence is not an excuse or defence.

STRUCTURAL CHANGES

This provision would replace existing section 19 of the Criminal Code.

COMMENTARY

Section 19 has been part of our Criminal Code since 1892. The section speaks of ignorance of the law and does not expressly refer to mistake of law. In R. v. Molis (1980) 55 C.C.C. (2d) 5587, the Supreme Court of Canada held that ignorance of the law includes not only true ignorance of the existence of the law but also mistake as to the meaning, scope, or application of any law. We agree with the approach taken in Molis and would codify the principle enunciated therein.

The Law Reform Commission of Canada in report #31 Recodifying Criminal Law, recommends two exceptions to their general rule that mistake of law is no defence: (1) ignorance of the law owing to non-publication of laws, and (2) mistake of law resulting from either reliance on a decision on a Court of Appeal or reliance on competent administrative authority.

Insofar as the law of homicide is concerned we are of the view that the L.R.C. recommendation is inappropriate. While we make no comment with respect to their proposal insofar as it relates to lesser crimes, we are of the view that such a defence should not apply to crimes of homicide.

We would also add that we are unable to imagine many situations where the L.R.C. recommendation would be applicable to a homicide offence. We concluded that, in realistic terms, it could only possibly apply to persons relying on "competent administrative authority". While we were uncertain as to precisely what would be encompassed by the term "competent administrative authority", we concluded that irrespective of its meaning it would not be appropriate to provide for such a defence for a homicide crime.

PART 3 SENTENCING

Recommendations 19-23 Sentencing

Introduction

Sentencing is often the most important part of a criminal case. One of the axioms of the practice of criminal law is that the sentence is to the trial what the bullet is to the powder. In fact, it is the prospective sentence that commonly makes it necessary to even have a trial. Faced with a long sentence, an accused is naturally inclined to require the Crown to meet the stringent evidentiary rules and the high burden of proof in criminal procedure. This is especially so in homicide cases where a conviction for murder brings a mandatory life sentence. Of course, the seriousness of the crime of murder means that there must be a serious penalty. It is the one crime that still evokes calls for capital punishment. No one can credibly argue against the alternative of lengthy incarceration. However, we must become more sophisticated in our application of that heavy sanction.

Homicides are committed in an infinite variety of circumstances. A mercy killing is not the same as a contract killing; emotional killings are not the same as slayings in the course of predatory crimes; and there are widely disparate personal characteristics of offenders. It is time to reconsider the standard penalty of life imprisonment and provide more flexibility to fit the punishment to the case.

Recommendation 19 Life Imprisonment and Parole

Instead of a mandatory sentence of life imprisonment for all murders, allow judges more room to tailor sentences to the nature of the case and the offender.

COMMENTARY

There is a mandatory sentence of life imprisonment for all cases of murder. For first degree murder, that sentence includes a period of parole ineligibility of 25 years. In cases of second degree murder, the Court again has no choice but to order life imprisonment, although there is a judicial determination of the period of parole ineligibility between 10 and 25 years. Where a verdict of second degree murder is returned by a jury, the jury is asked to retire again immediately to consider making a recommendation on the parole ineligibility period (s.743, Crim. Code). This is not a satisfactory procedure. The jury does not hear any additional evidence or submissions directed at the issue of sentence and, unless it was admitted during the trial, does not even know of any criminal record of the accused. Not surprisingly, it is common for juries to deliberate a short time and not make any recommendation. In any event, the trial judge, who does hear pertinent evidence and submissions, is not bound by any jury recommendation. The express focus on parole at this stage of a criminal case is inappropriate. The courts should not appear to be preoccupied with the release of the offender, at the very moment when the morality play that is a trial has reached the part where the moral is expected. This is the act where the focus should be on the community values underlying the crime and the sanction.

When the period of parole ineligibility exceeds 15 years, after serving at least that number of years a prisoner may apply to a specially constituted jury for a reduction in the period of parole ineligibility (s.745, Crim. Code). This idea was apparently conceived as one way of relieving the harshness of long terms of parole ineligibility that were established at the time of the abolition of capital punishment. Unlike the trial jury, this jury can decide on a 2/3 majority and is not restricted to a recommendation. It has the power to order a reduction in the term of parole ineligibility and, where it rejects the application, to set the time when another application can be made. Because of the mandatory 25 years parole ineligibility, every first degree murder case qualifies for these proceedings. We are just now seeing the first cases of this kind coming on for hearing. This hybrid second jury concept is not satisfactory, especially in its capacity to properly deal with the nature of a crime committed more than 15 years before. Even production of the record of the case can be a difficulty. It is particularly unfortunate when these proceedings revive old issues about the degree of culpability of the offender which were not conclusively resolved by the formal verdict of the trial jury that, naturally, was not accompanied by reasons for judgment.

Recommendation 20 A Standard Period of Parole Ineligibility

A standard period of parole ineligibility at 1/2 the term of imprisonment.

COMMENTARY

It would be simpler and better to have a standard statutory parole ineligibility period as an inherent part of every sentence. That is now the case with the standard 1/3 parole ineligibility period for most crimes aside from murder. The problem is that low threshold tends to engender public cynicism about criminal sentences. There is too much discrepancy between the formal sentence and the actual prospect of release. A more suitable point of parole ineligibility would be the 1/2 point of a term of imprisonment. This would, also, probably have the desirable effect of causing judges to proportionately reduce the overall length of many prison terms. Of course, it is not possible to apply this concept of parole ineligibility of 1/2 the term of imprisonment in relation to the current mandatory life sentence for murder. For other reasons outlined below, that type of sentence should be eliminated in favour of a suitable range of years and it would then be possible to apply the proposed standard parole ineligibility term.

Ordinarily, life sentences do not actually result in confinement until death, as almost all prisoners are eventually released on parole. It would be much better to realistically set a certain number of years of imprisonment based on the particular circumstances of the crime and the offender. As noted in the introduction, not all murders are the same. We should get rid of the obliquity of formally assigning the same penalty of life imprisonment to all of them and then making all the meaningful adjustments with parole.

Recommendation 21 A Range of Sentences

A range of 20-50 years imprisonment for second degree murder and 30-50 years for first degree.

COMMENTARY

For the crime of murder a range of 20-50 years' imprisonment would be suitable. With parole ineligibility of 1/2 the term of imprisonment, the ordinary minimum time of custody would be 10 years (.5 x 20). That is the same as the minimum parole ineligibility term of the current life sentence for second degree murder. The result is also the same at the maximum end of the proposed and current sentence provisions (.5 x 50 = the present maximum parole ineligibility term of 25 years). It is in first degree murder where the most significant change would occur. A suitable sentencing range for that crime would be 30-50 years' imprisonment. Under the current law, there is a mandatory life sentence with parole ineligibility for 25 years. With the proposed range, 25 years of parole ineligibility would not be the norm, but the maximum (.5 x 50). The ordinary minimum parole ineligibility period would be lowered to a more realistic and humane 15 years (.5 x 30). That, as noted earlier, is the point when we currently give the prisoner a right to apply to the specially constituted parole jury.

Because of the well established principle that the maximum sentence is to be reserved for the worst offender in the worst circumstances, maximum sentences are rare, as they should be. Therefore, it can be reasonably expected that the proposed sentencing range for first degree murder will result in significant reduction in the number of prisoners with 25 years parole ineligibility for a murder offence. With respect to the proposed new crime of criminal homicide which would take the place of manslaughter, 25 years is a more realistic maximum than life imprisonment. It is also an appropriate maximum for other homicide related offences, such as the proposed new crime of preparing to commit murder. The proposed first degree criminal homicide would capture many of the cases which have been treated as constructive murder prior to R. v. Vaillancourt, and for those cases a range of 10-25 years is appropriate. The greatest advantage of a range of sentences is the ability to tailor the sentence to the particulars of the case to justly reflect relative culpability. At the same time, the parameters of the range serve the important purpose of proclaiming the general seriousness of the crime.

Recommendation 22 Exceptional Cases

Allow judges to impose a sentence below the statutory range where compelling circumstances, including mental disability, youth or provocation, lead to the conclusion that the ordinary minimum sentence would bring the administration of justice into desrepute.

COMMENTARY

There will always be a few exceptional cases for which even the low end of the range of sentence would be unfair. This is the problem with any minimum sentence. There should be a clearly defined judicial discretion to set a sentence below the statutory range where compelling circumstances, such as mental disability, youth or provocation, lead to the conclusion that the ordinary minimum sentence would bring the administration of justice into desrepute.

Recommendation 23 Consecutive Sentences and the Principle of Totality

Require that a sentence for a homicide crime be served consecutively to any other sentence imposed before or at the same time, and that any other sentence imposed after a sentence for a homicide crime be served consecutively, and legislate the principle of sentencing totality and an ultimate cumulative sentence of 50 years imprisonment.

COMMENTARY

Concurrent sentences are an affront to logic and undermine public confidence in the justice system. In practice, they are often just a convenient sentencing mechanism used instead of designing suitable cumulative sentences to reach the same total punishment. That should be generally avoided, and especially for homicide crimes. The seriousness of homicide crimes requires that the punishment be clearly seen and not discounted by artificial parallel sanctions. Subject to the following, all sentences for homicide crimes should be served consecutively to any other sentence imposed before or at the same time. Also, any other sentence imposed after a sentence for a homicide crime should be served consecutively. While, in principle, offenders should receive a suitable penalty for each discrete crime, sometimes the cumulative total of the usual sentences would result in a hopeless gross total. The principle of totality, already known in the case law of sentencing, should be adopted as public policy in statute. This would proclaim an overriding judicial obligation to limit the total time of imprisonment for multiple offences to a reasonable, humane level. As with all sentencing decisions, such an adjustment should be done expressly with reasons. There should also be an ultimate maximum 50-year total to sentences of imprisonment. If maximum sentences are to be reserved for the worst offender in the worst circumstances, and murder is the most serious crime, the greatest possible sentence for that crime is a suitable general ceiling. A 50-year term would, of course, also expend most of the remaining expected life span of those very rare offenders who must be held in close confinement for such a distressingly long time.