SERVING CANADIANS

REPORT OF MINISTER'S ROUNDTABLE ON CRIMINAL LAW

November 1, 2002

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Introduction

The Minister's Roundtable on Criminal Law was held in Toronto on November 1, 2002. At the invitation of the Minister of Justice, 26 leading criminal lawyers and academics from across Canada were brought together to discuss criminal law reform. The full list of participants is attached as Appendix A to this Report.

The Minister was accompanied by Deputy Minister Morris Rosenberg and Richard Mosley, Assistant Deputy Minister, Criminal Law Policy and Community Justice. The Roundtable was facilitated by Jim Mitchell of Sussex Circle Inc.

This Report is an attempt to distill some of the main themes that were raised by participants during the Roundtable. It is not a verbatim transcription of the discussions, although it does attempt to use the participants' own words where possible. The Report does not analyze the participants' positions nor does it attempt to respond to those positions. The Report is not a statement of consensus nor a commitment to action but rather a step in the dialogue begun at the Roundtable. It will be distributed within the Department to assist in the development of policy, will be sent to all participants at the Roundtable and will be shared broadly with Canadians through the department of Justice Web site (justice.gc.ca)

In his opening remarks, the Minister of Justice said the Roundtable was part of the Department of Justice's continuing process of public consultation and will help him and the Department identify criminal justice priorities. As he noted at the annual meeting of the Canadian Bar Association in August, the Department has been very active year in and year out in the criminal law field. But every so often, the Minister noted, it is important to take stock of our work in this area and ask ourselves whether we are satisfied with the overall functioning of our criminal justice system. One particular challenge, he said, is to define a set of values that reflect "what we are as a Canadian society in this new millennium and a changing world. We need to develop a broad consensus on how these values should be reflected in our justice and criminal law system. What we need is a philosophy, a vision for the future – a declaration of principles to guide us as we consider new options."

To aid in the discussion of values and principles of the criminal law, participants were provided in advance with a paper prepared for the Roundtable by Vickie Schmolka, a lawyer and plain language consultant. This document was not a proposal of any sort but merely a compilation of existing criminal law principles that have been expressed in several forms – the *Charter of Rights and Freedoms*, preambles to recent amendments to the *Criminal Code*, and "The Criminal Law in Canadian Society" published by the Department of Justice in 1982.

The document is attached as Appendix B.

Context

To set the context for the Roundtable, Steve Mihorean of the Research and Statistics Section of the Department of Justice made a short presentation outlining the current and future trends in crime and public perceptions about crime and justice.

Mr. Mihorean noted that when thinking about crime and the criminal law, it is important to focus attention on more than victims and accused and pointed out that the demographic portrait of Canada is changing and with it the values and principles of Canadian society. He referred, for example, to an ageing population, declining fertility rate and growth in the diversity of the Canadian population. Public perceptions and attitudes toward crime, he said, change over time and vary widely depending on where you live. While national indicators of crime are used as a measure of well-being and security, in isolation, such indicators can mask the reality at the community level. All too often, crime is viewed as a national phenomenon but it is at the community level that the impact of crime is felt.

The full presentation is attached as Appendix C.

At the outset of the Roundtable, participants were asked to identify themselves and what they believed were the key criminal law issues. Some of these issues were more fully explored during the course of the day and are dealt with below in the discussion of the themes that emerged. Among the issues that were mentioned by participants in this introductory phase of the Roundtable but not discussed at great length, were the danger of mandatory minimum sentences, the inadequacy of legal aid funding, the overrepresentation of Aboriginals in the criminal justice system, the problem of wrongful convictions and the desire to increase restorative justice efforts. Other issues mentioned were the war on drugs, the dangers of the criminalization of prostitution, and the interaction between new technologies and privacy.

Restraint

Several principles of criminal law were discussed but one was emphasized repeatedly – restraint. Several participants noted that the criminal law is increasingly being used to attempt to solve a host of social and economic problems. It was suggested that "the criminal net is being cast too wide" and that the criminal justice system is "the pot into which we dump every social problem." By making more and more acts criminal, participants said Canadians are getting a false sense of security. The criminal law should be restricted to behavior that is truly criminal and several participants wanted restraint in the criminal law to be a key priority in any reform project. Said one: "We've spent 20 years criminalizing everything. We have to stop. We have to acknowledge we have a crisis." Politicians must resist the temptation to create a new offence every time there is a crisis. It was also noted that there is an inequality in the application of the criminal law – white-collar and economic crimes are not pursued with as much vigilance as other types of wrongs.

Clarity?

Many participants remarked that the Criminal Code has become virtually unmanageable, as more and more offences have been added over the past 20 years. In fact, one participant noted that the Code is now so complex and disorganized, it is no longer actually a coherent Code. Another said that "Martin's pocket criminal code" is so large; it no longer fits in a pocket. One described the Code as "an ugly mess". The criminal law has become so complex, it was noted, it is even difficult to explain it to participants in the system, such as police and lawyers.

Several participants suggested that if nothing else is done, at a minimum the existing Code should be restructured and reorganized, "made more sensible and understandable" by eliminating outdated offences (such as alarming the Queen) and provisions which have been struck down by the courts, and putting all related sections together.

Minorities

Several participants emphasized that any proposed reforms of the criminal law should be reviewed through an anti-racism and anti-discrimination lens. As the trends presentation indicated, participants noted the demographic makeup of the country is changing and the criminal justice system must reflect this new reality. If the justice system is going to have legitimacy, it must meet the needs of visible minorities. Several participants referred to the over-representation of Aboriginals and some racialized communities in the criminal justice system as critical issues that must be addressed. The issue of racial profiling was also commented on. As one important step, the federal government was urged to appoint more minorities as judges so the bench will better reflect the society in which it operates. Some emphasized that the key principles that must guide criminal law reform are equality, fairness and access to justice.

How?

Much of the day's discussions focused on how major reform of the criminal law could be successfully undertaken. Several of the participants had lived through – and participated in – the former Law Reform Commission's (LRC) lengthy, and ultimately unsuccessful, attempt to rewrite the Criminal Code. "We don't need another 17-year process," noted one LRC veteran.

It was recognized that any reform must take into account the capacity of Parliament – and indeed the Department of Justice – to carry out the work. Many participants agreed Parliament does not have the capacity to deal with an entire new Code. There was much discussion about whether there was political will to undertake such work. One suggested that the Code is in the shape it is today because politicians have abdicated their responsibility to take leadership and left it to the judges to decide what the criminal law should be. "Why do we have to wait until the Supreme Court tells us what the law is?" he asked.

Although crime is inherently political – "if it bleeds it leads" as one described it – participants said the process of reform should be depoliticized as much as possible. While there are likely to be a few hot-button issues, participants said there is likely to be much consensus on most reform issues.

There was consensus that comprehensive reform was unlikely to be achieved all at once but should be done in "manageable chunks." This was the way the Quebec Civil Code was eventually rewritten – in stages. "If you try to do it all at once it will surely fail," said one participant. Another compared criminal law reform to the Meech Lake Accord – it tried to do too much and different people opposed different parts and eventually it collapsed.

Differing views were expressed on what the priorities for reform should be, although many said any reform should be based on fundamental principles (such as restraint and clarity) rather than just "putting out fires." There was support from some participants for reform of the General Part and defences, even a suggestion that there should be two Codes – one on procedure and one on evidence.

Participants also suggested that any future reform should build on existing work, such as previous efforts at reforming the General Part. It was also noted that the Law Commission of Canada is already engaged in a process to determine what is a crime and that work should be integrated.

It was also recognized by participants that any reform cannot just be left to experts and exclude ordinary Canadians. Ways must be found to engage Canadians in such work. One participant said we should not assume the public can't understand or won't agree with proposals for reform – the public is remarkably sensible about these things as long as there is a process to explain in a reasonably way what is being discussed.

As well, the provinces and territories, which administer the criminal law, and the police, which enforce it, must be involved. There must be a strategy to get these interests on side otherwise reform will be very difficult to achieve.

One suggestion that received support from a number of the participants was to set up several working groups of experts to bring forward proposals for reform in specified areas of criminal law. These working groups would need to be funded, work within tight deadlines and include broad public consultations. This type of process would require the Minister to provide guiding principles for the work.

Reasonable expectations

Some participants agreed with the suggestion that there is a now a "crisis of confidence and legitimacy" in the criminal law, while others said Canada still has one of the best justice systems in the world, despite its problems.

Although it may be an "overwhelming" job to revise the Code, many participants said it is doable and in fact must be done. "The status quo is not on," said one. Another suggested using the language of revising the criminal law, rather than reforming it. The key, suggested another, is political leadership by the Minister of Justice and reasonable expectations. The government should be "modest and honest" about what it is attempting to accomplish and not suggest that it will somehow reduce crime.

Conclusion

In their brief concluding remarks, the Minister, Deputy Minister and the Assistant Deputy Minister thanked the participants for taking time out of their busy schedules to participate in the Roundtable. The ADM stressed the importance of having the provinces and territories on side for reforms or revisions to the Criminal Code.

The Deputy Minister noted much of the day's discussion focused on "governance" or how to actually succeed in undertaking criminal law reform and said there is probably no more contentious issue than what the criminal law should look like. He suggested there may be lessons to be learned from other jurisdictions that have already undertaken major reforms and said while legislation is important, there must also be links to other policy instruments and other government departments and initiatives. The Deputy also cautioned that police and provincial attorneys general, who did not take part in the Roundtable, might have a very different perspective on the issues discussed.

The Minister thanked every person for his or her participation and for sharing his or her insights with the Department. He encouraged everyone to refer to the speech he made to the Canadian Bar Association (CBA) in August 2002, where he indicated his strong commitment to reform of the criminal justice system. He noted that given the number of topics referred to the House of Commons Justice Committee, the number of private members' bills that are introduced and the daily questions during question period, there is no doubt that Parliament is interested in justice issues. He noted the many challenges of reforming the criminal law and emphasized the need to take on small manageable areas. He agreed that whatever is undertaken must have tangible results, be credible and be delivered in a reasonable, responsible and timely way. Reform of the Code must also be accompanied by appropriate social and economic intervention and community capacity building. He stressed the importance of talking to a broad range of stakeholders but also the need to have public education, as reform also presents communication challenges. He supported the need to set out values to guide reform. He too emphasized that only part of the justice community was represented at the roundtable and said discussions must also

take place with law enforcement and the judiciary, as well as provinces and territories given their important roles in the criminal law.

The Minister stated his commitment to following up on his speech to the CBA and exploring options for reform.

APPENDIX A

Minister's Roundtable on Criminal Law
November1, 2002 - 0930-1630 - Toronto Metropolitan Hotel – Ballroom

LIST OF PARTICIPANTS

Sanjeev Anand	University of Alberta
Bruce Archibald	Dalhousie Law School
Marvin Bloos	Beresh Depoe Cunningham – Edmonton
Anne-Marie Boisvert	Université de Montréal
Karen Busby	University of Manitoba
Marc David	(CBA) Shadley Battista - Montréal
Anthony Doob	University of Toronto, Centre of Criminology
Todd Ducharme	Toronto
Avvy Go	Metro Toronto Chinese & Southeast Asian Legal Clinic
Leigh Gower	Miller Thomson LLP - Whitehorse
Patrick Healy	McGill University
Jean-Claude Hébert	Hébert, Bourque & Downs – Montréal
Michelle LeClair-Harding	Roe & Company - Saskatoon
Maureen Maloney, Q.C.	University of Victoria
Morris Manning, Q.C.	Toronto
Allan Manson	Queen's University
Dianne L. Martin	Osgoode Hall Law School, York University
Gilles Ouimet	(Barreau du Québec) Shadley Battista – Montréal
David Paciocco	University of Ottawa
Margaret Parsons	African Canadian Legal Clinic - Toronto
Richard Peck, Q.C.	Peck & Company - Vancouver
Naeem Rauf	Edmonton
Kent Roach	University of Toronto, Faculty of Law
Murray Segal	ADAG Criminal Law - Toronto
Michael Tulloch	Michael Tulloch & Associates – Toronto
Louise Viau	Université de Montréal
Martin Cauchon	Minister of Justice and Attorney General of Canada
Morris Rosenberg	Deputy Minister of Justice and Deputy Attorney General
Richard G. Mosley	Assistant Deputy Minister, Criminal Law Policy & CJB
Jim Mitchell	Sussex Circle Inc. - Ottawa

APPENDIX B

Background material

Principles to guide criminal law reform

The Minister of Justice of Canada's Roundtable on Criminal Law November 1, 2002 Toronto, Ontario

Prepared by:

Vicki Schmolka
Lawyer & Plain Language Consultant
Kingston, Ontario

Principles, security and justice

From the time Parliament passed Canada's first *Criminal Code* in 1892, certain principles have been the cornerstone of our criminal justice system. Canadian law recognizes, for example, that a person accused of a crime is innocent until proven guilty in a court of law and that proof of the crime must be made beyond a reasonable doubt. These principles protect all citizens from the arbitrary use of the state's powers of arrest, detention and punishment.

Society uses the criminal law to shield its members from destructive, hurtful and socially unacceptable behaviours that undermine everyone's right to live in a just, peaceful and safe society. As such, the criminal law is a deterrent and primarily punitive. A person found guilty of a criminal offence may lose his or her liberty and face consequences that have a profound affect on personal freedoms and choices. The federal government's criminal law power is therefore our society's most extreme tool to use to control behaviour that society, through Parliament, has determined to be undesirable.

What, then, is a reasonable and acceptable use of the state's criminal law power? What principles should guide Parliament when it makes decisions about criminalizing or decriminalizing actions and behaviours and when it sets out the punishments for people found guilty of criminal offences?

The Department of Justice Canada's policy document, "The Criminal Law in Canadian Society", published in 1982, identified two major purposes of the criminal law:

1. security goals – the preservation of the peace, prevention of crime, protection of the public

   and

2. justice goals – equity, fairness, guarantees for the rights and liberties of the individual against the powers of the state and the provision of a fitting response by society to wrongdoing.

There is an inevitable tension between these two co-existing goals which creates the underlying dynamic of our criminal justice system.

An articulation of principles provides guidance in society's on-going search for the best and most appropriate way to balance these goals.

Cornerstone principles: The *Canadian Charter of Rights and Freedoms*

The coming into force of the *Charter* in the 1980s clarified the principles that must guide the criminal justice system and criminal law reform. The rights in the *Charter* spell out the basic legal protection that safeguards citizens in their "dealings with the state and its machinery of justice".

By and large, these rights already existed by precedent, by practice and through statutes but their inclusion in the *Charter* was a public acknowledgement of their unassailable status. The *Charter* rights include:

- the right to life, liberty and security of the person and the right not to be denied life, liberty and security of the person except in accordance with the principles of fundamental justice (section 7)
- the right to be secure against unreasonable search and seizure (section 8)
- the right not to be arbitrarily detained or imprisoned (section 9)
- rights on arrest or detention to be informed of the reasons, to retain and instruct counsel without delay, and to be released if the detention is determined to be unlawful (section 10)
- the rights of an accused charged with an offence
    - to be informed without unreasonable delay of the charges
    - to be tried within a reasonable time
    - to remain silent at his or her trial
    - to be presumed innocent until proven guilty in a fair and public hearing by an independent and impartial tribunal
    - to be granted bail unless there is just cause not to
    - to have a trial by jury for a more serious offence

  - not to be found guilty of an offence that was created after the act or omission took place
  - not to be tried for the same offence twice, and
- to receive the lesser punishment if the punishment for an offence was changed between the time the offence was committed and the time of sentencing (section 11)
- the right not to be subjected to cruel and unusual treatment or punishment (section 12)
- the right of a witness to give evidence and not to have that evidence used as incriminating evidence in another proceeding, except for perjury proceedings or other proceedings concerning the giving of contradictory evidence (section 13)
- the right to the assistance of an interpreter as a party or witness in a proceeding who cannot understand or speak the language in which the proceedings are taking place (section 14)
- the right to equality before and under the law and to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (section 15).

The *Charter* also guarantees that all the rights and freedoms set out in it apply equally to men and women (section 28).

In addition to these *Charter* rights, what other principles should be the backdrop for future reforms to the *Criminal Code*?

Principles to guide future criminal law reform

Bills that propose amendments to the *Criminal Code* may include a Preamble which states the reasons for the proposed reform and the principles that guide it. For example, the Preamble to Bill 79, setting out changes to the *Criminal Code* concerning victims of crime, includes this clause:

> "Whereas the Parliament of Canada supports the principle that victims of and witnesses to offences should be treated with courtesy, compassion and respect by the criminal justice system, and should suffer the least amount of inconvenience necessary as a result of their involvement in the criminal justice system".

This clause declares that the criminal justice system should be sensitive to the needs of victims and witnesses of crimes and provides a context for the law reforms in the legislation.

What principles can be identified to similarly guide the future reform of the *Criminal Code*? What principles beyond those in the *Charter* should be recognized as cornerstones of our criminal justice system in the 21st century?

Here is a list of principles developed after a review of the principles in "Criminal Law in Canadian Society" and in Preambles to recent criminal law Bills. It has been compiled to provide a starting point for discussions at the Minister's Roundtable.

Should these principles be the foundation for criminal law reform? Are there other principles to add?

- The fundamental purpose of the criminal law is security -- to preserve the peace, prevent crime and protect the public.

- The criminal law should only interfere with individual rights and freedoms to the extent necessary to achieve its purpose.

- The criminal law must provide a fitting response to wrongdoing while respecting the principles of justice and fairness and the rights and liberties of the individual.

- The criminal law should not be used in such a way that it disproportionately punishes people who are protected from discrimination under section 15 of the *Charter*.

- An accused should not be found guilty of a criminal offence and subject to punishment for it if he or she was unable to form the

intent required to commit the criminal offence by reason of a recognized mental disability. The appropriate response is treatment in a health care facility.

- The sentencing of an offender must seek to rehabilitate the offender and to repair the harm the offender has done to individuals and to society, to the extent possible.

- The punishment for an offence must reflect the gravity of the offence as well as the degree of responsibility of the offender. There must be discretion in the criminal justice system to ensure that the goal of rehabilitation is not lost and that the least restrictive yet still adequate punishment is given.

- Similar offences committed in similar circumstances should result in similar punishments.

- Offenders may be separated from society when necessary but, except in the most extreme cases, reintegration of the offender into society should be the goal.

- The criminal justice system must recognize the reduced level of maturity of young people and must keep young people separate from adult accused and offenders, except when allowed by law.

- The criminal justice system must treat victims of offences and witnesses to offences with courtesy, compassion and respect. Victims and witnesses should not suffer harm as a result of their involvement in the criminal justice system.

- The criminal law must describe in clear and accessible language the actions that society has determined are criminal and the penalties for those offences.

Appendix

For your information, here is a list of the principles set out in "Criminal Law in Canadian Society":

(a) The criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose;

(b) The criminal law should clearly and accessibly set forth:
(i) the nature of conduct declared criminal;
(ii) the responsibility required to be proven for a finding of criminal liability;

(c) The criminal law should also clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process;

(d) Unless otherwise provided by Parliament, the burden of proving every material element of a crime should be on the prosecution, which burden should not be discharged by anything less than proof beyond a reasonable doubt;

(e) The criminal law should provide and clearly define powers necessary to facilitate the conduct of criminal investigations and the arrest and detention of offenders, without unreasonably or arbitrarily interfering with individual rights and freedoms;

(f) The criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others;

(g) Whenever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for:

(i) opportunities for the reconciliation of the victim, community, and offender;
(ii) redress or recompense for the harm done to the victim of the offence;
(iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community;

(h) persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar;

(i) In awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances;

(j) In order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;

(k) Any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair and investigative and remedial procedure;

Wherever possible and appropriate, opportunities should be provided for lay participation in the criminal justice process and the determination of community interests.