Department of Justice Canada
Ministère de la Justice Canada

REFORMING CRIMINAL CODE DEFENCES

Provocation, Self-Defence and Defence of Property

A Consultation Paper

Canada

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EXECUTIVE SUMMARY

The purpose of our criminal justice system is to protect and ensure the safety and security of all members of Canadian society. The *Criminal Code* sets out legal limits on behaviour by describing criminal offences such as assault and murder. No less important, the Code also sets out certain defences that may be used by accused persons to excuse or justify their behaviour.

The defences of provocation, self-defence, and defence of property are frequently invoked in the context of crimes involving the use of force. Canada's laws for these defences have remained virtually unchanged for over a hundred years. Their application and meaning have been refined by decades of judicial interpretation, but the defences are still governed by the language of the *Criminal Code*. Many individuals and groups believe that these defences reflect archaic and outmoded values and principles and that they need to be reformulated to address modern concerns and realities, particularly in the domestic sphere.

In response to calls for reform, the Department of Justice has agreed to review the law in these areas, and we are now seeking your input. This consultation paper consists of three parts, devoted respectively to the defences of provocation, self-defence and defence of property. In each part, we provide a brief description of the current law along with some of the main criticisms, and then raise various questions as to how the law might be improved.

The first part of the paper, which is arranged slightly differently from the other two, deals with the defence of provocation. It is based on the work of a Federal-Provincial-Territorial Working Group that was set up early in 1997 to review the law of provocation in response to a series of recent cases involving that defence. Criticisms of the provocation defence in many cases have been quite serious – for instance, that it promotes outdated values and is used to defeat modern egalitarian principles. In this part, then, we are seeking your views on such fundamental issues as whether the defence should be abolished outright or completely reformed.

The part of this paper on the law of self-defence has its own particular focus. While judicial interpretations of the law of self-defence have evolved considerably to reflect modern values in our society, the *Criminal Code* provisions remain complex and confusing. The Minister of Justice has taken this opportunity to seek your views on the law of self-defence, with the aim of making the defence work better for all Canadians.

The final part concerns reform of the law of defence of property, which is by nature closely linked with the law of self-defence such that any reform to one affects the other. As well, the defence remains largely as it was originally formulated, and it may be time to consider amending it to better reflect modern values.

The issues relating to these three defences have been brought together in this consultation paper because of the factual, legal and policy interrelationship between them, but each defence does represent a distinct area of law. Any part can be addressed independently of the others. You are welcome to respond to whichever questions you choose.

Please note as well that *this paper does not reflect government policy.* This paper is intended to generate discussion on the issues raised, and to provide you with an opportunity to contribute to the law reform process. Your views will be taken into account in the development of legislation, which would serve to improve the administration of criminal justice within Canada.

Finally, it must be remembered that any proposals for law reform must be consistent with the *Canadian Charter of Rights and Freedoms*. The Charter guarantees, among other protections, the right of the accused to make full answer and defence to the charges (Section 7) as well as the right of everyone to equality before and under the law (Section 15).

This paper is also available on the Department of Justice website at the following address: http://canada.justice.gc.ca/Consultations/index_en.html

We thank you in advance for your participation in this process and your contribution to the evolution of the criminal justice system.

Please send written responses by **October 1, 1998**, to the following address:

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PART ONE:

PROVOCATION

Introduction

When people kill, should it make a difference if they argue that the victim in some manner provoked them to do so? Should any provocation ever be enough to justify reducing the criminal consequences for the intentional killing of another human being? Currently, the *Criminal Code* does allow for a defence of provocation, but in recent years the nature and even the existence of the law have been the object of more and more criticism. Moreover, the successful use of the defence in a number of well-publicized cases has raised public concern, especially about whether the law is in fact condoning violence.

In response to this controversy, the Federal-Provincial-Territorial Ministers responsible for Justice, after meeting in February 1997, set up a Working Group on Provocation to review the law of provocation. Over the last year, the Working Group has built on the work of a number of bodies that had previously explored the issue, notably the report of the Law Reform Commission of Canada in 1989; the report of the Federal-Provincial Working Group on Homicide in 1991; the report of the Canadian Bar Association in 1992; the report of the House of Commons Subcommittee on the Recodification of the *Criminal Code* in 1993; and the results of the public consultations on reforming the General Part of the *Criminal Code* in 1994 conducted by the Department of Justice, as well as those conducted by Status of Women Canada that same year. The recommendations that have emerged from these initiatives range from abolishing the defence of provocation completely to retaining and even expanding the scope of the defence to offences other than murder.

More recently, the July 1997 Final Report of the Self-Defence Review conducted by Judge Lynn Ratushny discussed whether the defence of provocation should be available in certain situations to women who kill their abusive spouses in response to the slow-burning effects of prolonged and severe abuse.

Now the Department of Justice, on behalf of the Federal-Provincial-Territorial Working Group, would like to hear from you. This part of the consultation paper discusses the defence of provocation and how it is being applied in Canada today, and summarizes the main criticisms that have been directed at it. It then describes a series of options for reforming the law, pointing out some of the implications, pro or con, of each possibility and inviting your comments on them. It is important to note that neither the Department of Justice nor the Working Group is endorsing or rejecting any of the options at this time. Any decision on whether or how to reform the defence of provocation will take fully into account the response to this consultation. We thank you for taking the time to read this paper and to provide us with your views.

SECTION ONE: BACKGROUND AND CRITICISM

The Provocation Defence

The provocation defence applies only to the offence of murder. Once the court is convinced beyond a reasonable doubt that the accused has committed culpable homicide, when all the elements of murder have been established, provocation may be considered as a partial defence to reduce the conviction from murder to manslaughter. In Canada, murder carries a mandatory minimum punishment of life imprisonment with a minimum period of parole ineligibility of ten years. By contrast, there is no minimum penalty for manslaughter in the *Criminal Code*; the sentencing judge has discretion to fix an appropriate sentence in light of the circumstances of the offence and the character of the offender.

Some awareness of the historical background helps to place the current law in context. When the law of manslaughter emerged in England in the 16th century, it was in part a reaction to the severity of the law of homicide. Under that law, anyone charged with a killing was considered to have acted out of malice, and the punishment was death. The separate crime of manslaughter allowed the courts to take into account certain human frailties, rather than simply assuming malice, and thus avoid the death penalty. One such human frailty involved the claim that the accused had been provoked into committing the act.

Initially, the law focused on the accused's subjective state of mind, that is, whether he or she was sufficiently deprived of self-control to have acted without malice in responding to provocation. With time, the courts made the standard more objective by setting out categories of provocative events. By the early 19th century, provocation would reduce murder, still a capital offence, to manslaughter in three situations: "Chance Medley" (a sudden falling out or spontaneous fight between men, including coming to the assistance of a kinsman); a husband discovering his wife in the act of adultery; and a father discovering someone in the act of sodomizing his son. After an attempt to identify further categories, judges instead developed a standard of self-control and response to be attributed to the "reasonable person" in the circumstances, which would be determined by the jury.

It was in this context that the Canadian provisions were developed, adapted from provisions proposed in England later in the 19th century. They have remained substantially unaltered since 1892.

The Current Law

The current defence of provocation is governed by section 232 of the *Criminal Code*, under the heading "Murder reduced to manslaughter." It reads as follows:

> 232. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
>
> (2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purpose of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
>
> (3) For the purposes of this section, the questions
>
> (a) whether a particular wrongful act or insult amounted to provocation, and
>
> (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
>
> are questions of fact, but no one shall be deemed to have given provocation to another by doing anything he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.
>
> (4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

To summarize, in order for the defence of provocation to be applied successfully, four things must be established: that there was a "wrongful act or insult"; that such an act or insult would have deprived the "ordinary person" of self-control; that the accused did in fact act "in the heat of passion" as a result of that provocation; and that the accused acted "on the sudden" and before there was time for his or her passion to cool.

Wrongful act or insult

The Canadian courts have defined a "wrongful act or insult" as "an act, or action, of attacking or assailing; an open or sudden attack or assault without formal preparations; injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity" (*R.* v. *Taylor*, citing the *Oxford English Dictionary*).

Even lawful behaviour may be found to be "provocation" for the purposes of section 232 of the *Criminal Code*. The reason for this is that "the law does not approve of everything that it does not forbid" (*R.* v. *Haight*, 1976). Moreover, it is not even necessary that the deceased be the person who was responsible for the provocation, as long as the accused believed, even mistakenly, that the deceased had been involved (see *R.* v. *Manchuk*, 1937/38, and *R.* v. *Droste*, 1981).

The objective element

An objective test seeks to determine what a reasonable person would have believed or done and then gauges the behaviour of the accused against that objective or minimal standard. The objective element in the defence of provocation requires that there be a wrongful act or insult of such a nature that it would be sufficient to deprive an *ordinary* person of the power of self-control. The seminal

Canadian case is *R.* v. *Hill* (1986), in which the accused killed the victim in response to an uninvited homosexual advance. The Supreme Court of Canada adopted the English approach to the law of provocation, following *D.P.P.* v. *Camplin* (1978), in which the House of Lords took the accused's age into account in the objective test. In *Hill*, the majority of the Supreme Court of Canada held that while the ordinary person is not exceptionally excitable, pugnacious or in a state of drunkenness, the jury should take into account general characteristics relevant to the specific provocation.

Following *Hill*, the Canadian courts significantly widened the range of attributes to be considered. Notably, in *R.* v. *Thibert* (1996) the Supreme Court of Canada held that the past history of the relationship between the accused and the deceased could be considered in establishing whether the act or insult would provoke the "ordinary person." For instance, in an apparently tumultuous relationship, an act or insult may have a particular significance that it would not otherwise have.

Despite changes to the objective test, certain attributes are still excluded from that test, such as drunkenness at the time of the provocation. This factor, however, may be considered in the subjective test.

The subjective element

A subjective test involves an inquiry into what the particular accused believed, intended or knew at the time in question. The subjective element of the defence of provocation requires that the accused respond to the wrongful act or insult before there is time for his or her passion to cool. Once the jury has established that the provocation in question was sufficient to deprive an "ordinary person" of the power of self-control, it must determine whether that was indeed the case for the accused. At this point, the jury is entitled to take into consideration the mental state of the accused, as well as psychological temperament, in order to determine if he or she was in fact acting in response to provocation.

The time element

Finally, the defence of provocation contains a time element. Both the provocation itself and the accused's reaction to it must be "sudden." The case law varies, however, on the length of time it takes before passions are presumed to have cooled.

In the decade from *Hill* to *Thibert*, the "suddenness" of the wrongful act or insult has become less important. The requirement that the accused must act on the sudden before passion has had time to cool has also been relaxed, and even if the alleged provocation and the violent reaction occurred days apart, it will not necessarily prevent the defence being put to the jury.

How the Law is Applied

At present, there is no comprehensive, definitive study of how the defence of provocation is being applied in Canada today, how frequently, and with what success. However, the Federal-Provincial-Territorial Working Group conducted a review of some 115 cases reported in the law reports in which provocation was raised. Of those cases, 62 involved domestic homicides: 55 in which men killed women, and seven in which women killed men. The remaining 53 cases involved men killed by men, and of these, 16 involved allegations of a homosexual advance, eight involved an altercation over intimate relations with the perpetrator's current or estranged female partner, and the remaining 29 involved men who had no special relationship. In short, even though attention tends to focus on the use of the provocation defence in domestic homicide situations, it would appear that the defence is also raised often in cases that involve altercations between males.

It should be noted that the cases surveyed by the Working Group were primarily reported appellate decisions, arising from appeals taken by the accused from verdicts of murder. Trial verdicts of manslaughter are less likely to be reported or appealed, given the restriction of the Crown's right to appeal to questions of law alone. The percentages calculated may be misleading because of the relatively small size of the sample of cases located. More important, statistical studies cannot possibly take into account either the extent or the impact on women's lives of the fear that the defence is capable of being successfully used to excuse male violence.

That being said, studies of Canadian cases reported in the law reports indicate that the defence of provocation is more often than not unsuccessful when raised in cases where men kill women. In the Working Group's study, 55 cases involved women who were killed by a man with whom they were in an intimate relationship, but in 35 (64%) of those cases, the trial court rejected the defence, and the verdict of murder was sustained on appeal. A verdict of manslaughter was sustained or unchallenged in six cases (11%); a new trial was ordered on grounds related to provocation in nine cases (16%); a verdict of manslaughter was substituted or a new trial ordered on appeal on grounds unrelated to provocation in four cases (7%); and a new trial was ordered on the grounds that the provocation was erroneously left with the jury in one case (2%).

Of the seven cases where men were killed by women with whom they were in an intimate relationship, trial verdicts of murder were delivered or sustained in three cases (43%); a new trial was ordered on grounds related to errors in the charge to the jury with respect to provocation in two cases (29%); a new trial was ordered on grounds unrelated to provocation in one case (14%); and a new trial was ordered on an acquittal of murder in one case (14%).

Similarly, statistics from England and New South Wales suggest that the defence is not being used successfully in a significant number of cases by men who kill their present or former female partners; in fact, they suggest that women are much more likely to mount a successful defence of

provocation.[1] The Working Group's study does not indicate that, in Canada, women are any more likely than men to mount a successful defence of provocation.

Important Recent Cases

Several recent cases have sparked renewed criticism of the provocation defence; they also help to shed some light on the issues involved. In two of these cases, *R.* v. *Gilroy* (1995) and *R.* v. *Stone* (1997), murder was reduced to manslaughter because of the application of the provocation defence. In *Gilroy*, the accused claimed that the victim had made a violent homosexual advance to him which set off an attack of repeated stabbing, many of the blows delivered after the death of the victim. Crown counsel accepted the lesser plea of manslaughter on the basis of the anticipated evidence and the accused was sentenced to five years imprisonment.

In *Stone*, the accused stabbed his wife 47 times after she allegedly hurled insults at him pertaining to his sexual prowess and doubts about the paternity of his children by a previous marriage. All of these insults, he claimed, were delivered during a car trip of several hours. The accused was convicted of manslaughter and sentenced to four years imprisonment, in addition to the 18 months served in custody pending trial, and a ten-year weapons prohibition.

Both of the above-mentioned cases stirred considerable public concern that the alleged provocation was inadequate to justify reducing the charge. Two other high profile cases, *R.* v. *Thibert* (1996) and *R.* v. *Klassen* (1997), also received considerable media attention. In *Thibert*, the accused killed his wife's lover after the lover allegedly prevented him from speaking to his wife, and then taunted the accused to shoot him. The majority of the Supreme Court of Canada concluded that the actions of the deceased were sufficient to put to the jury as provocation. The Court overturned the conviction of murder and ordered a new trial on the grounds that the trial judge had not properly charged the jury on the defence of provocation.

Finally, in *R.* v. *Klassen*, the accused was convicted of manslaughter and sentenced to five years imprisonment for killing his wife, in addition to the 15 months served in custody pending trial. Although the defence of provocation was not presented to the jury in the *Klassen* case, certain comments, allegedly attributed to the victim, were presented to the jury as a factor in determining whether the accused intended to kill his wife. The sentence in *Klassen* was appealed to the Supreme Court of Canada without success.

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1. See the response of Home Office Minister John Patten to Parliamentary Debates (Hansard) Issue 1586, p 190-1 October 17, 1991, and *New South Wales Law Reform Commission Discussion Paper 31: Provocation, Diminished Responsibility and Infanticide*, August 1993.

Criticisms of the Current Law of Provocation

Much of the controversy over the recent decisions, discussed above, relates to the purpose and the systemic effects of the present law of provocation, both in theory and in practical application. The defence of provocation is a particularly contentious issue for women's groups and homosexual groups. For these groups, the critical issue is whether the law of provocation reflects antiquated societal values and mores that are no longer acceptable in a time when the use of violence is disdained.

The following is a brief examination of the principal criticisms of the defence. It is worth noting, though, that in several cases, critics agree in objecting to the current law but for quite different reasons. Some would prefer to see the defence repealed or at least more precisely formulated; others would prefer to see it expanded.

Condoning violence

The rationale for the continued existence of the provocation defence stems from the law's "compassion to human infirmity" (in the words of the *Hill* judgment), since the law acknowledges that "all human beings are subject to outbursts of passion and anger which may lead them to do violent acts." However, many would argue instead that provocation is still being applied to excuse violence in a manner that is completely outdated by modern societal values. The fact that the defence of provocation is made available to excuse outbursts of violence in response to non-violent as well as violent acts is considered by many to be a fundamental shortcoming in the law of provocation. Many critics claim that this assumption is based on a model of male aggression that is no longer appropriate. They conclude that the continued existence of provocation provides an example of the law's failure to grapple with the problem of male anger and violence against women in the domestic sphere.

Research studies comparing women incarcerated as a result of killing men to men incarcerated for killing women have shown that when men kill women over "provocative" conduct, that conduct likely involves verbal taunting, infidelity or other sexual behaviour. On the other hand, when women claim to have been provoked into killing men, the provocative conduct is most likely to be physical violence.

Antiquated notions of male dominance

Many argue that the interpretations required by juries of section 232 of the *Criminal Code* allow stereotypes, misinformation, misrepresentation and ignorance to determine the verdict. For example, numerous commentators have indicated that antiquated notions of women being the property of their present or former male partners still surface in some cases where the defence of provocation is raised.

In some ethnocultural communities men may view it as a point of honour to react violently when any female member of their immediate family (not only wives) are found committing adultery. Many are concerned that the law of provocation may perpetuate this extended sphere of male dominance over women. Some critics note that, ironically, while the *Criminal Code* speaks of a

"loss of self-control", the defence appears to be raised in many cases of spousal homicides where the accused attempts to maintain control over the victim.

Failure to deter violence

In 1996, according to Statistics Canada, one out of every six homicides involved a spouse. Of 80 spousal homicides, 62 were committed by the male partner and 18 by the female partner. Sixty percent of all spousal homicides involved a history of domestic violence known to police, and where the women was the one killed, it was ninety percent. In short, in the vast majority of cases of spousal homicide where the woman is a victim, she has previously been subjected to the violent behaviour of the accused. The statistics, however, do not reveal to what extent provocation was considered a factor.

Women's groups have argued for some time that when provocation is applied to domestic killings it sends an overpowering message to women that their lives are worthless. Those who work with abused women say that these women experience heightened fears of their spouses every time they hear of cases where lenient sentences are issued on the basis of provocation. These women claim that the justice system fails to hold men responsible for their violent actions.

Blaming the victim

The law of provocation focuses on the behaviour of the victim, whose behaviour does not have to be unlawful or even deliberately insulting so long as it is characterized as wrongful in the prevailing cultural climate. Focusing on the victim's activities and the accused's rage in murder cases is seen by many as a retrograde step that diverts attention from the issue of the behaviour of the accused prior to the killing.

Some have pointed out that defence could also disproportionately affect recent immigrants, refugees or persons with disabilities in cases where an accused reacts violently to a perceived insult which may be a misunderstanding due to linguistic, cultural or other communication barriers.

The "ordinary person" test

People ought to be able to assume as a general rule that their neighbours will not react with murderous rage to the vast majority of the things that affect them each day. While it is true that some people really do lose control over their actions when they are angry, many would argue that people should be held responsible for their violent actions, whether capable of self-control when angry or not.

The courts have always recognized that the law establishes a standard of conduct that not all of the members of the society can meet. With respect to provocation, the law is designed to ensure that the standard of self-control to be expected from the accused is that of the "ordinary person" who has received the wrongful act or insult that fell upon a "mind unprepared for it". As a result of the provocation, the "ordinary person" would act in a voluntary manner but would not have full control of his or her actions due to rage.

However, many have argued that the expansion of the ordinary person test to include subjective elements has resulted in a significant decrease in the threshold level of self-control for the purposes of the defence of provocation. As a result, the "ordinary person" test no longer provides an appropriate or reasonable level of safety to all members of society.

On the other hand, there are those who argue in favour of the expansion of the objective element of provocation to include subjective elements, in order to accommodate women and racial minorities, whose loss of self-control should be considered in light of their personal experiences of oppression or systemic racism. Still others point out that there should be a safeguard built into the objective test to protect against the attribution of misogynist, racist, or anti-homosexual attitudes to the "ordinary person".

The time element

The provocation defence requires that the victim's particular "wrongful acts or insults" to the accused be found to have been delivered suddenly to accused persons whose minds were unprepared for those acts or insults. Many have commented that, in respect of some recent cases, this requirement has been tenuous or missing. It has been argued, therefore, that what seems to be a further limitation or "safeguard" to the application of the provocation defence does not appear to have been effective.

On the other hand, some are in favour of a further expansion of the time element in order to take into consideration the slow-burning effects of prolonged and severe abuse. This is of particular concern for advocates of the rights of battered women who kill their abusive spouses in self-defence but with excessive force.

Others, however, have pointed out that in order to respond to the situation of accused persons who have suffered prolonged abuse, the defence of provocation could be limited to situations where the accused's acts of self-defence are not legally valid because of the use of excessive force, but where such force was prompted by provocation.

Provocation and anger

Given that the theoretical basis for the defence of provocation is the consideration of "human frailties," many note that it seems incongruous that the only frailty recognized by the law of provocation is anger, specifically rage. Some have claimed that the defence should be extended to other situations in which the accused has acted out of emotion, though not anger, such as those cases where the accused has been subjected to prolonged physical and emotional abuse by the victim.

SECTION TWO: OPTIONS FOR REFORM

Considerations on Reforming the Provocation Defence

The attempt to assess criminal responsibility for violent crimes always involves tension between the demand that society makes from all its citizens for a degree of self-control and the recognition that some of those citizens will fail to comply with that demand, perhaps because they are incapable of it. Logically, a person who is incapable of controlling his or her actions should not be punished for them. This is the foundation of the insanity defence. If the loss of self-control is regarded as "complete," it amounts to a form of insanity, and punishment is therefore an illogical and ineffective response. Similarly, the defence of non-insane automatism by psychological blow is also a complete defence for murder although, in practice, juries do not generally accept this defence.

What level of self-control should be the standard in our society, the norm articulated in our laws? Our society needs to have – and to be able to enforce – a level of self-control, tolerance and respect for life that meets our aspirations as a society, notably our need to discourage violence. Moreover, persons who come from different cultures are required to obey the norm when in Canada, and those who become enraged and lose full control of their actions at an unacceptably low threshold cannot expect to avoid the consequences of the law – by having murder reduced to manslaughter, for instance – on the basis of that lack of control. Nonetheless, it is crucial that we recognize the differential effects that any reform of the law might have on disadvantaged groups within Canada, and every effort should be made to effectively communicate the standards being applied.

The purpose of the provocation defence has changed over the centuries, as society's philosophical, religious and cultural views changed. If the defence now no longer reflects the standards we expect as a society, especially if it is seen to endanger vulnerable people and groups, we need to consider whether it should be eliminated or reformed, and how best to go about it. The options that follow describe some of the solutions that have been suggested, noting some "pros" and "cons" of each approach. Please keep in mind that these options are not necessarily mutually exclusive.

OPTION 1: Abolish the Defence of Provocation

In view of the amount of criticism the provocation defence has received in recent years, suggesting that it reflects – even perpetuates – archaic social concepts and stereotypes of gender and different groups in society, the simplest course might be to abolish the defence outright.

Pros

- Abolishing the defence would acknowledge that our society does not accept extreme violence as a response to actions or insults which do not include physical threats.
- It would eliminate the historical anomaly in the law that excuses killings based on anger.
- It would alleviate the fear that the defence is being used by men to kill women.
- Abolition would remove the problems associated with complicated charges to the jury.
- It would resolve the inconsistency of applying the offence of manslaughter to killing with intent.

Cons

- The defence might be useful for women in situations of domestic violence who kill in self-defence but with excessive force in response to the provocation of physical or verbal abuse.
- There could be an increase in acquittals by juries who no longer have an alternative to a murder condemnation in cases where they view the accused as morally less worthy of blame.
- Murder might be considered an inappropriate term for killing under provocation.

OPTION 2: Reform the defence of provocation

Instead of abolishing the defence of provocation, there are various options for reforming the defence in a manner that would respond to many of the criticisms of the current law while maintaining the defence as a recognition of "human frailties" in our law of homicide. The following are some suggested options for reforming the defence. These options are not mutually exclusive, but could be combined in various ways.

2 (a) Reform the defence of provocation by removing the phrase "in the heat of passion"

Some commentators maintain that the phrase "in the heat of passion" associates violent behaviour with romantic passion. The use of the phrase in the Code gives the impression that the law somehow provides justification for killing in a rage of jealousy.

Pros

- The language is archaic and potentially misleading.
- The emotion that is consistently recognized as the basis of "heat of passion" is rage, rather than fear and terror. Consequently, people who kill in fear and terror but who use excessive force in so doing, may not as easily raise the defence.

Cons

- A suitable expression is needed to reflect the concepts of "human frailty" and "extreme emotion" which the defence is intended to accommodate.
- Rather than dropping the phrase altogether, the defence could be reworded to accommodate the emotions of "fear and terror" as well as rage and anger.

2(b) Replace "wrongful act or insult" with "unlawful act"

The exact meaning of "wrongful act" is unclear in law (while insults are considered always wrongful). It has been proposed, therefore, that this term be replaced by "unlawful act".

Pros

- A mere insult should not provide a license to kill. The idea of an insult leading to a "loss of dignity" is seen by some as "patriarchal" concept.

- By limiting the provocative acts to "unlawful acts", an accused could no longer invoke the defence in response to a partner's infidelity or to a non-violent homosexual advance.

Cons

- Verbal abuse often accompanies physical abuse, particularly in cases of spousal violence. Removing the term "insult" from the defence of provocation would render the defence inaccessible to abused persons who kill in response to an insult when the insult triggered the cumulated rage resulting from years of abuse.

2 (c) Reform the "ordinary person" test to reflect a mixed subjective-objective test

According to the case law, the current test for the defence is a mixed subjective-objective one that requires considering the accused from the perspective of an "ordinary person" of the same age, sex, or experience to take into account any special significance the act or insult might have. It has been suggested that, in order to simplify and clarify the law of provocation, the defence should be reformed to codify the incorporation of subjective elements into the "ordinary person" test.

In particular, some have proposed that individual characteristics should be taken into account when they bear on the adequacy of the provocation and ignored when they bear on the accused's level of self-control. This was the position recommended in England when the 1957 *British Homicide Act* moved the law towards subjectivity by allowing the jury to decide the adequacy of the provocation. Similarly, the United States *Model Penal Code* allows for the reasonableness of the explanation or excuse for the killing to be determined from the viewpoint of a person in the situation of the accused.

Pros

- Some claim that the "ordinary" person test has historically been interpreted from a male perspective and that the gender-neutral language in fact masks a gender-based standard.

- This option would permit the courts to consider the accused's experiences of sexism, racism or other forms of discrimination in analyzing his or her behaviour.

Cons

- In focusing on subjective factors, this option could result in courts accepting the cultural practices that define "gender roles" in a manner that justifies violent behaviour towards women and homosexuals. It could also reinforce systemic discrimination against groups on the basis of age, race, sexual orientation, etc. (See option 2(f) below.)

- The expansion of the ordinary person test to include subjective elements, could lower the threshold level of self-control for the purposes of the defence of provocation and might no longer provide a reasonable level of protection to all members of society.

2 (d) Reform the defence by expanding the "suddenness" requirement

For many commentators, the real issue is whether the accused acted while provoked, not just the suddenness of the action. The lapse of time sometimes heats, rather than cools, passions. The defence could, therefore, be reformed to retain the causal link between the provocative act or insult and the reaction, by either removing the phrase "on the sudden" or by explaining the meaning of the phrase in the context of this defence.

Pros

- Expanding the "suddenness" requirement would broaden the availability of the defence to abused people, particularly women, who kill after repeated incidents of abuse and provocative insults.
- This option reflects the fact that people have different ways of responding to provocation – some may act "on the sudden" while others take time to respond in anger.

Cons

- The greater the time between the provocation and the accused's reaction, the more likely the response to the provocation was calculated and retaliatory rather than a result of passion.
- Expanding the "suddenness" requirement could allow the accused to justify killing due to jealousy or loss of control after a period during which he or she "stewed" over the perceived affront.

2 (e) Reform the defence so that it is not available in cases of spousal homicides

Much criticism of the defence of provocation is directed at its misuse in situations of spousal or domestic homicides. A provision that would make the defence unavailable in such cases would address these concerns.

Pros

- This option would send a clear message that killings based on a sense of possession or jealousy will not be accorded any measure of justification.

Cons

- If the defence could not be used for spousal homicides, women who kill their abusive partners in self-defence but with excessive force would be unable to use the defence.

- To exclude the defence under certain circumstances suggests that some retaliatory violence resulting in death is justified while other kinds are not.

2 (f) Reform the defence so that it is not available in cases where the victim asserts his or her Charter-protected rights

This approach would allow the courts to incorporate an equality analysis into the "ordinary person" test. Behaviour motivated by stereotypes of sex, race, sexual orientation, age or disabilities, etc., would therefore not be considered "reasonable" for the purposes of this defence. It might also be possible to redefine the definition of "wrongful act or insult" to exclude acts or insults which undermine the accused's sense of the control or possession of another person and to exclude non-violent sexual advances by either gender.

Pros

- By providing a means of ensuring that the principles of equality and individual responsibility are taken into consideration in the analysis, the idea of moral responsibility is reinforced.
- Provocation due to real or perceived infidelity or to the break up of a relationship could no longer be the basis for the defence.
- This option also addresses the concerns raised by the misuse of provocation in cases involving non-violent homosexual advances.

Cons

- Since the Charter does not apply to individuals but only to the State, section 15 of the Charter does not impose an obligation on individuals to accord equal treatment to others. A *Criminal Code* provision that refers to Charter-protected values could be overly complex and difficult to apply.
- To exclude the defence under certain circumstances suggests that some retaliatory violence resulting in death is justified while other kinds are not.

2 (g) Reform the defence to limit it to situations where excessive force was used in self-defence

Some commentators maintain that it is more acceptable in our modern society to consider provocation within the context of self-defence than to accept that a simple act or comment by an individual could reduce an intentional homicide to manslaughter. As a result, it is proposed that provocation be limited to situations where the accused acted in self-defence but did so with excessive force. Self-defence is a complete defence to murder, resulting in an acquittal, whereas, provocation acts as a statutory mitigation of responsibility lowering the crime from murder to manslaughter. The option, which proposes limiting the defence of provocation to situations where self-defence is not legally valid due to excessive force, would necessarily provide for a verdict of manslaughter rather than an acquittal.

Pros

- By tying provocation to self-defence, the defence of provocation could no longer be used by a person to justify killing a present or former partner in a fit of rage due to jealousy or the loss of control over the victim.
- This option would permit the use of the defence by women in situations of domestic violence who kill in self-defence but with excessive force in response to the provocation of physical or verbal abuse.

Cons

- This option does not address situations where the behavior of the accused is motivated by a negative stereotype of the victim. An example might be where the accused alleges to have killed in self-defence and under provocation in response to a homosexual advance.
- Self-defence involves rationally assessing the need for a fatal response whereas, provocation involves extreme emotional disturbance. Tying the law of provocation to the law of self-defence would create a complicated defence.

SECTION THREE: CONSULTATION QUESTIONS

The question of whether – and how – to reform the provocation defence in Canada is clearly contentious, but one that must be addressed. Your responses to the following questions will help us to assess the issues fairly and comprehensively so that any reforms that are made are in the best interests of Canadians.

Question 1. Should the *Criminal Code* provisions be abolished?

Question 2. Is there a need to reform the current *Criminal Code* provisions on the provocation defence, or should they simply be left as they are?

Question 3. If you believe the Code provisions need to be reformed, which of the following options or combination of options would you support? Please feel free to elaborate on your reasons or to suggest ways in which options might be combined.

a. Reform the defence of provocation by removing the phrase "in the heat of passion."

   If you believe it should be reworded, please suggest what you would consider appropriate wording.

b. Replace "wrongful act or insult" with "unlawful act."

c. Reform the "ordinary person" test to reflect a mixed subjective-objective test.

d. Reform the defence by expanding the "suddenness" requirement.

e. Reform the defence so that it is not available in cases of spousal homicide.

f. Reform the defence so that it is not available in cases where the victim asserts his or her Charter-protected rights.

g. Reform the defence to limit it to situations where excessive force was used in self-defence.

Question 4. Are there other options for reforming the law governing the provocation defence that you would like to see considered?

PART TWO:

SELF-DEFENCE

Introduction

The principle of self-defence is an essential part of Canadian law. In recent years, though, the *Criminal Code* provisions that set out the law have been widely criticized by numerous commentators. The current law has been described as needlessly complex, internally inconsistent and partly redundant, and many commentators insist that the time has come for reform.

There is no denying that, in spite of a century of development in the courts, self-defence continues to confuse and trouble counsel, judges and juries, not to mention the people who find themselves having to justify their own responses in dangerous situations. In particular, the problem of instructing juries on the subtleties of the law remains a problem. As recently as February 1998, the Supreme Court of Canada (in the *Mallott* case) had to deal with questions about the sufficiency of jury instructions and the application of evidence of prior abuse suffered by the accused in self-defence cases.

Accordingly, the Department of Justice has agreed to conduct a review of the issue, and we are now asking for your assistance. This part of the consultation paper provides an analysis of the current law and a summary of the main criticisms that have been directed at it. It then discusses various options for reforming the law, noting some potential implications, and raising specific questions for your consideration.

SECTION ONE: THE CURRENT LAW OF SELF-DEFENCE

The Existing Provisions

Canada's law of self-defence is governed by sections 34 to 37 of the *Criminal Code*. The basic principle which underlies self-defence is that a person who is attacked or assaulted is not criminally responsible for using a reasonable or proportionate amount of force against the person assaulting them. An attempt or threat to apply force also constitutes an assault. A person can therefore use defensive force in response to an apprehension of immediate or impending danger. The law also allows a person to use force to defend someone under their protection. The law does not permit excessive or unreasonable force.[2]

The provisions distinguish various factual circumstances in which self-defence can arise, and provide specific defences tailored to those circumstances. The provisions read as follows:

> 34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
>
> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
> (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.
>
> 35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if
>
> (a) he uses the force
>
> (i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and
> (ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;
>
> (b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and
> (c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.
>
> 36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.
>
> 37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.
>
> (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

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2. In an effort to address certain cases of excessive (i.e. unreasonable) force, it might be possible to blend the law of self-defence with the law of provocation. Such a measure could account for cases where the resort to force was justified, but excessive force was used by the accused in response to provocation by the victim. For a more detailed discussion of this option, please see the part of this paper entitled Provocation.

Calls for Reform

Over the past 10 years, calls for reform of the law of self-defence have come from a variety of sources active within the justice system, including legal academics and commentators who study or work closely with the law. Judges, who are required to instruct juries on how to apply the law in specific cases, have as well on occasion been vocal in their dissatisfaction with the current law. In a 1987 report , *Recodifying Criminal Law*, the Law Reform Commission of Canada commented on the complexity of the statutory provisions on self-defence and recommended they be repealed and replaced with a single, comprehensive provision. The Canadian Bar Association made similar criticisms and suggested amendments in its report, *Principles of Criminal Liability - Proposals for a New General Part of the Criminal Code of Canada.*

Also in 1992, the Subcommittee on the Recodification of the General Part of the *Criminal Code*, a subcommittee of the House of Commons Standing Committee on Justice and the Solicitor General, agreed that the law of self-defence should be simplified and clarified through legislative action. In response to that report, the Government of Canada released a White Paper in 1993, entitled "Proposals to amend the *Criminal Code* (General Principles)", which took the form of a draft bill. It included a clause repealing the current self-defence scheme and enacting a simplified comprehensive provision on self-defence.

Most recently, reform of the self-defence provisions was recommended by Judge Ratushny in the Self-Defence Review. The Review was established in October of 1995, in response to the landmark Supreme Court of Canada decision in *R.* v. *Lavallee* (1990). In *Lavallee*, the Supreme Court accepted that the reasonableness of the accused's fear of death or serious bodily harm could not be an entirely objective inquiry, but instead had to be assessed together with a wide variety of subjective factors, such as the length of time the accused and the victim knew each other and the nature of their relationship.

In its final report, issued July 11, 1997, the Self-Defence Review concluded that the current scheme was overly complex and internally contradictory. The Review recommended repealing the current self-defence scheme and replacing it with a comprehensive, simple and clear provision, which would provide guidance to judges and juries in determining what beliefs and acts are reasonable and what factors should be taken into account in making that determination. To this end, the Review proposed a model self-defence provision.

Particular Criticisms of the Law

Commentators have identified various weaknesses with the current scheme. For instance, they say the provisions are overly complex and confusing, and both overlapping and inconsistent. It is also argued that the scheme provides inadequate protection to those who use force to protect other people, and that it is not sufficiently responsive to the accused's individual state of mind.

Complexity, inconsistency and overlap

A plain reading of the provisions on self-defence reveals the potential for confusion and difficulty. For instance, the scheme places great emphasis on the precise circumstances of the incident by making distinctions that determine which section is triggered. There are different provisions for provoked and unprovoked attacks, for intentional and unintentional use of deadly force, and for defence of oneself and defence of another person. Also, the required elements of the defence differ from one section to another. Under subsection 34(1), for example, force is justified as long as it was no more force than was necessary, while under subsection 34(2), the accused must have been under a reasonable apprehension of death or grievous bodily harm and must have believed that there were no means of self-preservation available other than causing death or grievous bodily harm. Similarly, section 35, which applies where the accused initially provoked the attack, contains a duty to retreat that is not present in any other section.

There is also a certain amount of overlap between the provisions. For example, subsection 34(2) has been interpreted to apply to provoked attacks, since it does not include the words of subsection 34(1), "without having provoked the assault" (*R.* v. *McIntyre*, 1995). It therefore covers most of the same factual circumstances as those caught by section 35, which specifically applies to attacks which the accused has provoked. In addition, there is overlap between subsection 34(1), which provides a defence to an accused who uses force to repel an unlawful assault, and section 37, which allows an accused to use force to defend someone under his or her protection, but also him or herself.

The complexity, overlap and inconsistencies of the current scheme make it difficult for judges and juries to apply the law. Where the evidence could support the application of several provisions, the trial judge must instruct the jury on each one, explaining the different elements that must be met for each and the interrelationship between them. The jury must sort through the evidence and come to conclusions about the facts before applying the appropriate law.

Use of force to protect third persons

The current section 37 provides a defence to the accused who uses force to defend a person "under his protection". This approach has been criticized by some who suggest that the use of force should be permissible to protect any other person, even one who is not under the care or custody of the accused. Such an expansion of the defence would recognize that there are circumstances in which a person may be justified in resorting to force to protect the safety of friends, family members other than those under the accused's protection, acquaintances or even strangers, who may need help from another person.

Approach to mental state

The provisions have been criticized as well for their approach to the state of mind of the accused; objective, subjective or a combination of both. A subjective approach involves an inquiry into what the particular accused believed, intended or knew at the time in question. An objective approach seeks to determine what a reasonable person would have intended, believed or done, and then gauges the behaviour of the accused against that objective or minimum standard. A mixed subjective-objective approach reflects a middle ground between the objective and subjective analysis, by defining the ordinary reasonable person to include the same general characteristics as the accused, in order to assess the reasonableness of the accused's conduct or state of mind from a more appropriate context, rather than in complete abstraction.

Under subsection 34(1) and section 37, the circumstances giving rise to the defence may be assessed subjectively, according to whether the accused actually believed that force was necessary. However, under subsection 34(2) and section 35, the accused's perceptions about the circumstances must be objectively reasonable. Where the scheme adopts an objective approach to the beliefs and perceptions of the accused, the courts have provided a measure of flexibility by recognizing that the subjective personal characteristics of the accused, such as age, gender and relationship to the victim, are relevant to determining what is a reasonable appreciation of the situation and must, therefore, be taken into account. For example, a battered woman's fear for her life, based on her interpretation of the familiar threats and behaviour of her batterer, might be considered reasonable given the history and context of the relationship. On the other hand, in the same circumstances a person who is a stranger to the batterer might not be considered to reasonably fear for his or her life.

Despite this allowance for personal characteristics, certain sections of the current law still require that the beliefs of the accused be reasonable in an objective sense. If the accused honestly believes that his or her life is in danger and that resort to deadly force is necessary, but those beliefs are not considered reasonable to the ordinary person, the defence is barred. Some commentators have argued that this unfairly denies protection to those accused who honestly but unreasonably believe that they must resort to force to protect their own life. Furthermore, critics also maintain that there is no useful purpose in having a different approach among the various provisions.

SECTION TWO: REFORMING THE LAW

Possible Models for Reform

Some of the groups and bodies that have studied the law of self-defence have suggested draft or model provisions to address some of the main criticisms. Two of these models are provided below. These are not the only options available for reforming the law, nor should it be presumed that they are the preferred options of the government. They are included here as specific examples of alternatives to the current law that illustrate some of the questions that arise in discussing the law of self-defence. They will be referred to in the following section of this discussion paper to highlight various issues on which we are seeking your opinions.

The White Paper Model

37. (1) A person is not guilty of an offence to the extent that the person acts in self-defence or in defence of another person.

(2) A person acts in self-defence or in defence of another person if, in the circumstances as the person believes them to be,

(a) the person's acts are necessary for the defence of that person or the other person, as the case may be, against force or threatened force;
(b) the force is or would be unlawful; and
(c) the person's acts are reasonable and are proportionate to the harm that the person seeks to avoid.

The Self-Defence Review Model

(1) In this section, a "defender" is a person who uses force against another person.

(2) A defender is not liable for using force against another person if

(a) the defender actually believes
  (i) the other person is committing or is going to commit an assault, and
  (ii) the use of force is necessary for self-protection or the protection of a third person from the assault;
(b) those beliefs are reasonable; and
(c) the degree of force used is reasonable.

(3) The defender's actual beliefs and the degree of force used are reasonable if they do not constitute a marked departure from what an ordinary sober person would have believed or used, as the case may be, if placed in the circumstances as the defender believed them to be.

(4) The circumstances that shall be considered in determining reasonableness are those that may have influenced the beliefs and the degree of force used by the defender and may include:

(a) the defender's background, including any past abuse suffered by the defender;
(b) the nature, duration and history of relationship between the defender and the other person, including prior acts of violence or threats, whether directed to the defender or to others;
(c) the age, race, sex and physical characteristics of the defender and the other person;
(d) the nature and imminence of the assault: and
(e) the means available to the defender to respond to the assault, including the defender's mental and physical abilities and the existence of options other than the use of force.

Questions for Discussion

Issue 1: Simplifying the law

The current self-defence scheme contains four separate sections, which provide multiple defences. The defences are highly dependent on the circumstances of the incident in question, and the test for a successful claim of self-defence varies according to these circumstances.

Both reform models simplify and consolidate the current approach by providing a single test for self-defence, applicable in all circumstances. They set out a general principle of justifiable use of force, which would eliminate the existing distinctions based on the particulars of the assault and replace specific fact-based rules with a general standard.

> **Question**: Should a new law of self-defence be based on a general principle of justifiable use of force, applicable in all situations? Or should the law be fact-based, with distinct rules based on specific circumstances?

Currently, section 34 provides a defence in cases of unprovoked attack. Section 35 applies where the accused has initially provoked the victim, and then must resort to force in self-defence. Even a person who provokes a fight is entitled to use force in self-defence if the victim overreacts in his or her retaliation. The test for self-defence in these circumstances is more stringent, though. For example, the initial aggressor is under a duty to retreat before he or she may lawfully use force against the person responding.

The distinction based on initial provocation by the accused has been argued to be unnecessary and complicated. Imagine a scenario where a person, in response to verbal threats, starts a fight by pushing and shoving, the victim escalates the level of violence by drawing a knife, and the initial aggressor then acts to preserve himself from that threat. Both parties may be entitled to claim self-defence, but the appropriate defence, whether it be section 34 or section 35, will depend on which party was in fact the initial aggressor or which act constituted the initial assault, questions that may be difficult to answer depending on the circumstances.

Commentators argue for the removal of the distinction and the enactment of a single test for self-defence based on general principles which provide a measure of flexibility capable of accommodating all situations, such as necessity, reasonableness and proportionality. Having a single standard would also eliminate the rigid rule of the initial aggressor's duty to retreat. This could be particularly important with respect to battered women. An abusive relationship may lead a person to feel that retreat or escape is impossible and that she or he is trapped in the relationship and the same physical space as their abuser. If that person responds with violence, however, it might be argued that she or he could have retreated, simply by walking out of the house. Without the duty to retreat as a required element of the defence, the question of retreat would be treated as one among several factors relevant to the issue of necessity, reasonableness or proportionality, rather than being determinative of a specific rule of self-defence.

Question: Should the self-defence provisions eliminate the distinction between provoked and unprovoked attacks? Or should the new law maintain this distinction as a ground for a different rule?

Another distinction in the present scheme is that of the intent of the accused to cause death or grievous bodily harm. Where the force used by the accused is not intended to cause death or grievous bodily harm, subsection 34(1) allows an accused to use as much force as necessary to repel an attack, which may include deadly force. Conversely, subsection 34(2), which applies where the accused *intentionally* causes death or grievous bodily harm, requires that he or she be under a reasonable apprehension of his or her own death or grievous bodily harm, and believe on reasonable grounds that he or she can not otherwise preserve him or herself. The presence or absence of the accused's intent to cause death or grievous bodily harm thus determines which subsection applies, and consequently, which is the test for justifiable force.

The reform models eliminate the distinction between intentional and unintentional deadly force. They propose a single test applicable in both types of situations, regardless of the accused's intent. The general rule of justification under these options, determined according to standards such as reasonableness, proportionality and necessity, is argued to be flexible enough to respond to the particulars of each case. Such a formulation would still prohibit intentional deadly force where it was excessive, because if the circumstances do not merit deadly force, it would not be found to be reasonable, proportionate or necessary.

Question: Should a new law of self-defence eliminate the distinction between intentional and unintentional causing of death or grievous bodily harm in self-defence? Or should the new law maintain this distinction and provide a specific rule for each situation?

Issue 2: Use of force to protect other people

A new law could recognize that defensive force may be justifiable in situations other than a protective care relationship. A person might be called upon to use force to protect the physical well-being of a friend, a parent or even a stranger who was being attacked. This might be particularly beneficial to members of traditionally disadvantaged groups. For example, an elderly person or a person with a disability may be unable to defend him or herself in a violent situation and may need someone to help.

This would expand the availability of the defence as it currently stands, since section 37 only justifies the use of force to prevent an assault on a person under the accused's protection. It would further eliminate any potential difficulty in interpreting exactly what is covered by "under his protection" in a given case.

> **Question:** Should a new law expand the scope of protection to cover a person who uses force to defend any other person and not just someone under his or her protection?

Issue 3: Judging the circumstances

Under certain sections of the current law, the beliefs and perceptions of the accused about the circumstances and the need for force must be found to be reasonable. For example, under subsection 34(2) and section 35, the accused is justified in using force if he or she is under a reasonable apprehension of death or grievous bodily harm. The courts have tempered the inquiry into reasonableness by holding that the circumstances should be judged according to the perceptions of an ordinary person with the same general characteristics and background as the accused. However, if the jury finds that the accused's perception of the circumstances was not reasonable, even taking those factors into account, the defence will fail. This is the case despite the fact that the accused honestly perceived that his or her life was in jeopardy and that the use of force was necessary.

The White Paper model provision suggests a different approach. The circumstances giving rise to the defence are judged purely subjectively, that is to say, according to the beliefs and perceptions of the accused, without a further inquiry into their reasonableness. As long as the beliefs are honestly held, the jury will not inquire into whether an ordinary person in the same position would have had the same appreciation of the circumstances.

Some commentators suggest that an entirely subjective approach may not adequately protect the public, because it fails to require the accused to live up to a minimum standard of reasonable or prudent perception or observation. For example, suppose a homeowner has recently seen a news story about a group of teenagers who broke into a house and assaulted its inhabitants. When a group of teenagers approaches his house at night, he might honestly feel that force is necessary, although unbeknownst to him, they are high school students selling chocolate bars. A subjective approach fails to require this person to exercise a measure of reasonableness in assessing the situation. It might also allow for the perpetuation of stereotypes, in that a person might honestly believe that he or she has reason to fear all members of a particular ethnic group, for example, even though such beliefs are not reasonable. It is important to note that the White Paper model provision does attempt to balance the subjective approach to the circumstances by providing additional requirements for justifying the amount of force used. While the perceptions of the accused do not have to be reasonable, the *acts* of the accused within that perceived context do have to be reasonable, as well as necessary and proportionate to the harm sought to be avoided. (See Issue 4 below for a fuller discussion of this matter.)

The Self-Defence Review model is closer to the current law. It provides that the beliefs and perceptions of the accused must not only be determined subjectively, but they must also be judged to be reasonable from an objective standpoint. The jury must determine what the accused honestly believed and that those beliefs were reasonable. This dual subjective-objective approach essentially requires the accused to satisfy a minimum standard of reasonable behaviour in his or her appreciation of circumstances. While this approach may appear less responsive to the individual state of awareness of the accused, the objectivity is tempered by the fact that the degree of force used must be found only to be reasonable. (See Issue 4.)

Question: Should the circumstances giving rise to the defence be judged according to:

(a) a reasonable perception of the circumstances by an ordinary person with the same characteristics and background as the accused; or

(b) the accused's honest perception of the circumstances, whether or not it is mistaken and whether or not it is reasonable?

Issue 4: Judging the degree of force

Under the current law, the degree of force used by the accused is measured against varying standards, depending on which section is triggered. For example, under subsection 34(1) and section 37, the amount of force used must be "no more than is necessary"; in other words, the amount of force must be proportionate to the threat to the accused. In contrast, under sub-section 34(2) and section 35, the use of force is justified if the accused reasonably believes that there is no other means of preserving himself or herself from death or grievous bodily harm, otherwise stated as necessity.

Both reform models attempt to identify more clearly the elements required with respect to the degree of force used, and to standardize their application in all circumstances. Under the White Paper model, the force used must meet the triple requirements of necessity, reasonableness and proportionality. This represents a departure from the current law, which requires only that the amount of force be necessary or proportionate, depending on which section is triggered. Although this model appears to make the defence more difficult to invoke, it is essential to note that the three elements are judged from the accused's perspective of the circumstances (as discussed under Issue 3, above). Essentially, the subjective approach to the circumstances is balanced against the additional requirements as to the amount of force used.

The Self-Defence Review model requires that the force used be necessary and reasonable, judged from the accused's subjective appreciation of the circumstances, an appreciation that must also be objectively reasonable. This test is less stringent than the White Paper model in that it does not include the additional requirement of proportionality. However, the less stringent test for justifying the degree of force used must be balanced against the more rigorous dual subjective and objective tests for assessing the circumstances that give rise to the defence (as discussed under Issue 3 above).

Question: How should the amount of force used in self-defence be measured? Should a new law of self-defence require that the degree of force used be necessary? proportionate to the harm sought to be avoided? or reasonable? Should the amount of force have to satisfy more than one of these criteria?

* * *

Question: If you think that the law of self-defence should require that the amount of force used be proportionate to the harm sought to be avoided, should proportionality be judged according to:

(a) what a reasonable person with the same general characteristics and background as the accused would have believed was an appropriate amount of force, in the circumstances as believed by the accused; or

(b) what the accused honestly believed was an appropriate amount of force?

Issue 5: Defining "reasonable"

The concept of reasonableness occurs in various contexts throughout the criminal law. However, the current law of self-defence does not contain a statutory definition of "reasonable", nor is the term defined elsewhere in the *Criminal Code*. A body of jurisprudence has developed which interprets the concept of reasonable within varying contexts. Based on this understanding of the concept, the question of whether an act or a belief is reasonable is determined by the jury according to its common sense and experience.

The Self-Defence Review model contains a definition of reasonable, as well as a list of factors to take into account in determining reasonableness. The objective of these measures is to give greater guidance to the courts and to juries. The definition and the list of factors were inspired by the *Lavallee* case and by the need to pay special attention to the cases of battered women. However, to include a definition of "reasonable" within a new law of self-defence would represent a substantial change to the existing criminal law, since the term "reasonable" is currently not defined anywhere.

> **Question:** Should the law of self-defence give greater guidance to courts and juries by defining "reasonable"? Or should the question of reasonableness be determined by the jury according to its common sense and experience?

The definition of reasonable provided by the Self-Defence Review model states that an act or belief is reasonable if it does not depart markedly from what an ordinary sober person would have done or believed. Self-defence situations are often complicated by the presence of alcohol or drugs, which can impair perceptions and behaviours. By deeming the reasonable person to be sober, this definition is designed to ensure that an accused cannot take advantage of intoxication to justify violence. Intoxication is excluded from the assessment of objective reasonableness of the accused's beliefs and actions.

One possible consequence of this formulation is that an accused who was intoxicated may effectively be denied the use of the defence. If the accused is intoxicated, he or she may perceive the circumstances quite differently than a sober person would, and therefore unreasonably. As well, the degree of force used must be reasonable, but an intoxicated individual might overreact or apply excessive force without intending to. Even though the accused might honestly believe that force is necessary and that he or she is responding with a reasonable amount of force, the defence will fail if, on account of intoxication, the accused's perception is unreasonable or the response to the threat is excessive.

> **Question:** If you think that a law of self-defence should provide a definition of "reasonable", should the definition use a "sober person" as the standard? Or should intoxication be permitted to be taken into account as one of the factors relevant to the accused's perception of the circumstances or the reasonableness of the force used?

As explained above, the concept of reasonableness occurs throughout the criminal law, but is not defined anywhere in the *Criminal Code*. It has been judicially interpreted to mean any conduct or belief which accords with that of a reasonable person, according to a standard of due diligence. The law requires people to exercise a certain level of care in their actions – that of a reasonable person. Failure to live up to the standard of a reasonably prudent person constitutes negligence. As such, beliefs and acts which depart from those of a reasonable person are unreasonable.

The Self-Defence Review model defines reasonable as that which does not constitute a marked departure from what an ordinary sober person would do or believe. The concept of "marked departure" derives from jurisprudence on criminal fault in penal negligence offences (as opposed to jurisprudence on defences). Penal negligence is not a subjective state of mind, but rather an objective standard of fault. Criminal fault in penal negligence cases is established not by the accused's actual awareness of the risk of consequences, as is the case with most criminal offences, but rather by the accused's failure to perceive the situation or to behave in a reasonable manner. Although difficult to pinpoint, a distinction must be made between two levels of negligence. On the one hand, simple or mere negligence, i.e. a lack of due diligence, is conduct that differs from that of a reasonably prudent person. On the other hand, gross negligence or "marked departure" is conduct which is so far removed from that of a reasonable person, because of a high degree of risk of the consequences happening or a high degree of harm if they did happen, that it is sufficiently blameworthy to constitute criminal fault. Because penal negligence offences punish the accused for his or her failure to see the risk, rather than for intentional or deliberate wrongdoing, a criminal sanction will only be appropriate where the behaviour falls so far below that of a reasonable person as to reach the level of gross negligence.

The Self-Defence Review found it appropriate to draw a parallel between the standard of fault that applies for offences, and the standard that should apply to defences. The model provision therefore borrows the concept of "marked departure" and uses it to define "reasonable" with respect to the defence of self-defence. A belief or act is deemed to be reasonable as long as it is not a "marked departure" from that of an ordinary person. In other words, if the amount of force used by an accused was greater than that which would have been used by a reasonably prudent person, but not so much more as to be considered gross negligence or wanton misconduct, it would still be deemed to be reasonable under the proposed definition. Put another way, a claim of self-defence would be denied only if the amount of force used was grossly unreasonable, as opposed to unreasonable.

This definition of "reasonableness", as being anything less than penal or gross negligence, constitutes a significant deviation from the current law. Under this definition, all conduct up to the point of gross negligence is deemed to be reasonable. The result is that negligent conduct is deemed to be reasonable. It has been argued that because "reasonable" will continue to be applied in all other contexts according to its current understanding, i.e. that which is not negligent, adoption of this definition within a law of self-defence would create an inconsistency with other parts of the criminal law.

Question: If you think that a law of self-defence should provide a definition of "reasonable", should the definition measure reasonableness against a standard of gross negligence? Or should it provide a standard of simple negligence?

Currently, the question of reasonableness is decided by the jury based on their common sense and experience. The jury is entitled to consider whatever factors it finds to be relevant to the reasonableness of an accused's belief or action.

In addition to providing a definition of "reasonable", the Self-Defence Review model would provide further guidance to judges and juries by enumerating factors to be considered in assessing what is reasonable. The list is not exhaustive, nor is it mandatory. It would serve to identify particular circumstances which may influence a person's beliefs and actions. The list includes the accused's background, including any past abuse, the relationship between the accused and the victim, the physical characteristics of the accused and the victim, the nature and imminence of the assault, and the existence of options other than the use of force.

A list of factors might be a useful tool in guiding judges and juries in their understanding of the circumstances. However, it should be noted that even in the absence of a statutory list, many if not all of these factors would likely be considered by the jury in assessing reasonableness if these facts came out in the evidence and were relevant to the particular circumstances.

Although the Self-Defence model does not expressly address the issue of self-defence by a battered woman, the list of factors is largely inspired by the need to address the circumstances of battered women, and was directed primarily toward helping the jury understand those circumstances. In particular, factors (a) and (b) draw the jury's attention to any past abuse suffered by the accused, and to the specific nature of the relationship between the accused and the victim. Factors (c), (d) and (e) are more general considerations that would likely be relevant in most self-defence situations.

It is certainly important that the cases of battered women be treated appropriately and fairly by the courts. But it must be noted that any special considerations designed to respond to a particular category of cases would become part of a general law of self-defence. Even in cases where there is no abusive relationship between the accused and the victim, the entire list of factors would apply to the determination of reasonableness. Those factors concerned with abuse would obviously have less relevance in self-defence situations where there was no prior abuse.

Since any list of factors included within a general law of self-defence would be applicable in all cases where the defence is raised, it is worth considering what sorts of factors should be included in a list.

Question: Should a new law of self-defence include a list of factors to take into account in determining reasonableness? Or should the matter of reasonableness and the factors to be considered be left to the common sense and experience of the jury?

* * *

Question: If you think there should be a list, what factors would you include? Should the list specifically address the circumstances of battered women? Or should the list contain more general factors capable of responding to all types of situations?

* * *

Question: If you think that there should be a list of factors, should such a list be provided in addition to a definition of "reasonable"? Or should a list be provided as an alternative to a definition of "reasonable"?

PART THREE:

DEFENCE OF PROPERTY

Introduction

If a thief or trespasser attempts to take property that is in your possession, you are not required just to retreat and give it up, and then go to court to get it back. Canadian law recognizes that property ownership and possession are fundamental to society, and the *Criminal Code* therefore allows you to take action at the time, physically if necessary, to reassert your control over the property.

However, the current law is set out as a scheme of defences that apply according to various circumstances. Although they are not invoked frequently, the provisions on defence of property have long been criticized as needlessly complicated and internally inconsistent and as not being based on clear underlying principles. Furthermore, those situations where force is used to defend property often involve a threat to a person as well, and the defence of property therefore frequently overlaps with self-defence, which can create additional confusion.

Accordingly, the Department of Justice has devoted a part of this consultation paper to law of defence of property. This part begins by describing the current law of defence of property and the controversy surrounding it. It then goes on to discuss possible reforms to the law, and raises some specific questions for your consideration. Your comments and opinions will be helpful to us as we attempt to address these issues.

SECTION ONE: THE CURRENT LAW OF DEFENCE OF PROPERTY

The Existing Provisions

Sections 38 to 42 of the *Criminal Code* allow for the use of force in defence of property in various circumstances. It should be noted that the provisions are designed to protect *possession* of property, not ownership. Any person who is in peaceable possession of personal property (i.e. movable property), can use a minimal amount of force to prevent someone from taking that property or to recover it if it has just been taken. Peaceable possession is possession which is not seriously challenged by anyone or likely to lead to violence. If the person also has a claim of right to the property (generally defined as a belief that he or she is entitled to possession of it), then more force can be used, even against another person with a claim of right. The provisions also allow for force in defence of real property (i.e. land and buildings), including special rules for dwelling-houses. If a trespasser resists the possessor's attempts to protect the property, whether real or personal property, the trespasser is considered to be committing an assault without justification or provocation. The self-defence provisions in the *Code* would then apply, allowing the possessor to use whatever force is necessary in defence of his or her person. The provisions read as follows:

> 38. (1) Every one who is in peaceable possession of personal property, and every one lawfully assisting him, is justified
>
> (a) in preventing a trespasser from taking it, or
>
> (b) in taking it from a trespasser who has taken it,
>
> if he does not strike or cause bodily harm to the trespasser.
>
> (2) Where a person who is in peaceable possession of personal property lays hands on it, a trespasser who persists in attempting to keep it or take it from him or from any one lawfully assisting him shall be deemed to commit an assault without justification or provocation.
>
> 39. (1) Every one who is in peaceable possession of personal property under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.
>
> (2) Every one who is in peaceable possession of personal property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it.
>
> 40. Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority.
>
> 41. (1) Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.
>
> (2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property, or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation.
>
> 42. (1) Every one is justified in peaceably entering a dwelling-house or real property by day to take

possession of it if he, or a person under whose authority he acts, is lawfully entitled to possession of it.

(2) Where a person

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

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

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

(3) Where a person

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

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

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

Calls for Reform

Calls for reform of the defence of property scheme have come from a variety of sources. Academics and legal commentators have long expressed concern about the complexity of the current provisions, as well as with some of the principles on which it is based. Various other groups have also urged law reform. For example, in its *Report 31, Recodifying the Criminal Law*, the Law Reform Commission of Canada was critical of the complexity of the existing provisions, while the Canadian Bar Association and the Parliamentary Subcommittee on the Recodification of the General Part of the *Criminal Code* have made recommendations for reform. In response to the Parliamentary Subcommittee report, the Government of Canada released a White Paper in 1993. The White Paper, entitled "Proposals to amend the *Criminal Code* (General Principles)," took the form of a draft bill which proposed repealing the current defence of property scheme and replacing it with a single comprehensive provision.

Particular Criticisms of the Current Law

The main criticisms of the current law are that it is needlessly complex and internally inconsistent and that the provisions overlap. As well, some disapprove of the fact that the law allows for the use of deadly force for the protection of property. A brief discussion of these criticisms follows.

Complexity, inconsistency and overlap

The current provisions on defence of property have been severely criticized as being needlessly complex, and there is little doubt that there are indeed grounds for confusion. The scheme contains five separate provisions, each seemingly applicable in different situations. The available defence will vary depending on whether the property is real or personal property, and, if real property, whether it is a "dwelling-house" or some other type of property. It will also vary according to the claim of possessory entitlement of both the possessor and the trespasser or taker.

Many have argued that it might be more effective to base the scheme on broad principles of justifiable use of force, rather than on specific rules which apply in predetermined circumstances. As well, some commentators question whether there is a legitimate justification for the distinction between real and personal property and between "dwelling-houses" and other real property.

The law has been criticized as well for inconsistent language. For instance, subsection 38(2) speaks of a trespasser who "persists in attempting" to keep the personal property that has been taken, whereas subsection 41(2) refers to a trespasser who "resists an attempt" by the peaceful possessor to prevent the entry of the trespasser. Similarly, section 40 allows the peaceable possessor to use "as much force as is necessary" to prevent a break-in of a dwelling-house, while subsection 39(1) and section 41 allow the use of "no more force than is necessary".

Furthermore, sections 40 and 41 overlap substantially. Section 40 allows a peaceable possessor of a dwelling-house to use force to prevent a forcible break-in, while section 41 allows the peaceable possessor of real property to use force to prevent a trespass on the property, or to expel a trespasser. But any person who is "forcibly breaking into or forcibly entering a dwelling-house without lawful authority" would, for the purposes of section 41, typically also be a person attempting to trespass.

The scheme has also been criticized for containing internal references to the law of self-defence, since certain behaviour is deemed to constitute an assault without justification or provocation. The two sets of defences, however, justify the use of force on quite distinct grounds, and a self-defence situation should be assessed according to the law of self-defence, even if it begins as a dispute over property. The analysis is entirely independent of a defence of property claim, and critics argue that setting out a predetermined relationship between two distinct defences is unnecessary and confusing.

Use of deadly force

Any struggle between a possessor and a potential taker of property can lead to violence, and a threat to property may turn into a threat to human life or safety. Where the possessor's physical safety is threatened, the law of self-defence may be invoked to justify the use of force against the taker or trespasser's attack, even intentional deadly force in appropriate circumstances. Where there is a threat to property but no clear threat to a person's safety, though, it may be more difficult to assess when, if ever, deadly force should be justified.

The current law places no upper limit on the extent of force that may be used. Most sections of the current scheme implicitly allow the use of deadly force (except section 38, which prohibits causing injury) by authorizing as much force as is *necessary* to defend possession. Nonetheless, several courts have stated as a general principle that intentional deadly force can never be justified in defence of property alone, and that human life and safety should always take priority over property interests. Some commentators maintain that this principle should be stated clearly in the *Criminal Code*.

SECTION TWO: REFORMING THE LAW

A Model for Reform

Various groups that have commented on the law of defence of property have suggested model provisions as possible amendments to the existing law. The model law included in the government's 1993 White Paper is provided below as a useful illustration of a simplified and reformed version of the law. *It is not meant to represent the government's position, nor is it proposed as the only model for law reform.* It is used in this section as a reference point and a foundation for a series of questions designed to elicit your views on key issues.

The White Paper proposal

38. (1) A person in peaceable possession of property under a claim of right is not guilty of an offence to the extent that, in the circumstances as the person believes them to be,

(a) the person acts in order to defend that possession against interference;
(b) the interference is
    (i) lawful interference, other than lawful interference that is protected by section 25, or
    (ii) unlawful interference; and
(c) the person's acts are reasonable and proportionate to the interference that the person seeks to avoid or terminate.

(2) A person in peaceable possession of property, whether or not under a claim of right, is not guilty of an offence to the extent that, in the circumstances as the person believes them to be,

(a) the person acts in order to defend that possession against interference;
(b) the interference is unlawful; and
(c) the person's acts are reasonable and are proportionate to the interference that the person seeks to avoid or terminate.

(3) The defences provided by subsections (1) and (2) are also available to a person acting under the authority of a person referred to in those subsections or lawfully assisting such a person.

(4) In this section,

"defend that possession" means to protect the property from interference, to retake possession of the property from a person who has removed it or taken possession of it, or to remove from the property a person who has entered or remains on the property;

"interference" includes destruction of or damage to property, removal of property, taking possession of property, or entering or remaining on property, whether occurring or imminent.

Questions for Discussion

Issue 1: Simplifying the law

The model provision would simplify the current scheme by reducing the number and length of the existing provisions, and by eliminating distinctions between real and personal property and between dwelling-houses and other real property. With fewer rules, but based on more general principles, a reformed law could be comprehensive and consistent in its application. Further, it could be flexible enough to respond to all types of situations – whether a trespasser, for instance, was entering a private home or place of business, or a motor vehicle.

However, it does not follow that the specific circumstances of the incident would cease to be relevant. Specific details would still need to be taken into account in each case in assessing whether the general standards of reasonableness and proportionality were met, rather than as rigid conditions which determine which rule applies.

> **Question:** Should a new law of defence of property be based on a general principle of justifiable use of force? Or should the law be fact-based, providing distinct rules based on specific circumstances?
>
> * * *
>
> **Question:** Should a new law of defence of property maintain or eliminate the distinctions between real and personal property or between dwelling-houses and other real property?

In the reform model, "interference" is broadly defined, and includes actual or threatened destruction, damage, taking, entry or possession of property. The effect of adding such a definition while eliminating the distinction between real and personal property is that force would be permitted in a wider variety of circumstances than it is now. The provision would justify the use of force to prevent unlawful entry of personal property, such as a car or a boat, rather than just to prevent its being taken. Similarly, it would permit force to protect real property from damage or destruction, even in the absence of a trespass or an entry. For example, it might even justify the use of force to prevent damage to one's property caused by a neighbour who is felling trees while remaining on his or her own property.

This broad principle of justifiable force to prevent interference is quite different from the existing scheme of allowing force to respond to particular acts (for example, a taking or an entry) in relation to particular types of property.

> **Question:** Should a new law of defence of property expand protection and allow the use of force against a broad range of interference? Or should force be permitted only to prevent movable property from being taken away and immovable property from being trespassed upon?

Issue 2: Priority for possession or claim of right

The proposed model retains the current scheme's emphasis on whether the peaceable possessor and the trespasser or taker have a claim of right to the property. It continues to place higher priority on protecting the interests of persons who have an actual or perceived legal entitlement to possession of the property than the interests of persons who have possession of the property but with no such claim.

If the person who possesses the property does not have a claim of right to it, he or she will not be permitted to use force to defend it against a person who does have a claim of right to the property. So, for example, a person who finds lost property would not be justified in using force against the owner of that property if the owner is trying to take it back.

However, if neither has a claim of right, then the law will uphold the status quo, and allow the possessor to use force to defend the possession. The person who finds lost property, in this case, may use force to defend the property from a thief.

With respect to personal property, the law again favours the status quo if both parties have a claim of right to possession of the property, say as joint owners of the same property. The peaceable possessor is entitled to use force against any interference, even against another person with a claim of right. For example, if a married couple separates, the spouse who remains in possession of the house could use force to prevent the other from removing its contents. In such circumstances, the person seeking possession of the property would be required to resort to civil procedures in order to get it.

Because of the complexity of the sections on protection of real property and the lack of jurisprudence in this area, it is not clear whether a possessor of real property with a claim of right is justified in using force – and if so, how much – against another person with a claim of right. A new law could clarify this issue.

The other key feature basic to this defence is the idea of *peaceable possession.* The law protects peaceable possession of property, as opposed to possession that is not peaceable. Although "peaceable possession" is not defined, it is generally understood to mean possession in circumstances that are unlikely to lead to violence. Even if a person has a valid legal claim to the property, if the possession is not peaceable he or she cannot make use of the defence to prevent interference by someone else. For example, if a person is seen recklessly waving around a baseball bat, the police or others are lawfully entitled to take it away, even if only temporarily.

On the other hand, even a person with a legal claim to property is not allowed simply to take it if it is being possessed peaceably by another person who also has a claim of right to possession. The peaceable possessor has priority and is entitled to resist such interference with force.

Question: Should a new law of defence of property give priority to the peaceable possessor where both parties have a claim of right to the property? In other words, should the law entitle a person in peaceable possession of property and with a claim of right to use force against a person who also has a legal claim to possession of the property?

Issue 3: Judging the circumstances

The current provisions do not specify whether the circumstances surrounding the incident are to be judged subjectively or objectively. They have generally been interpreted to comprise an objective test: that is, the accused's belief that force was required must be reasonable. The determination of reasonableness, though, tends to be tempered by taking into account subjective characteristics of the accused, such as background and personal characteristics, as is the case under the law of self-defence. The accused is entitled to be mistaken about the nature of the threat, but any mistakes must be based on reasonable grounds. A reformed law could adopt the current judicial interpretation, but provide clarity and certainty as to how the subjective-objective test is to be applied.

The reform model offers instead a purely subjective approach, with the need to resort to force assessed "in the circumstances as the person believes them to be". This test would expand the scope of protection available to an accused. The court would have to determine whether the accused honestly believed that someone was interfering with his or her property and whether that interference was lawful or not. Not only would the accused be entitled to be mistaken in his or her beliefs, but the court would not inquire into whether those beliefs were reasonable, only whether they were honestly held.

The danger is that a purely subjective test might give too much weight to the accused's perceptions, by allowing the accused to assess his or her circumstances "unreasonably". The subjective test is balanced in the reform model, though, by a more stringent approach to justifying the degree of force used. (See Issue 4.)

> **Question:** Should the circumstances giving rise to the defence be judged according to:
>
> (a) a reasonable perception of the circumstances by an ordinary person with the same general characteristics and background as the accused: or
>
> (b) the accused's honest perception of the circumstances, whether or not it is mistaken and whether or not it is reasonable?

Issue 4: Judging the degree of force

To the extent that the existing provisions justify the use of force, they require only that the amount of force used be *necessary* for the purpose of defending the possession. If more force than necessary is used, the defence will fail. Although not supported by the language of the provision, some courts have inferred either a proportionality test or a reasonableness test into the defence. They have taken the view that the use of extreme force for the protection of property, even if necessary for that purpose, is not justifiable unless there is a direct risk to human life or safety. Unfortunately, at present there is a lack of authoritative jurisprudence in this area, but the trend in the courts seems to be to infer further requirements in addition to necessity.

One option for a reformed law would be to adopt one of the judicially formulated approaches. A new law could provide expressly that the amount of force used must be necessary and either reasonable or proportionate. Alternatively, it could simply retain the element of necessity as the standard for measuring the level of force used. Under either of these formulations, though, the degree of force used would be assessed from an objectively reasonable view of the circumstances (as discussed above in Issue 3).

Another option is that reflected in the White Paper model, which modifies the current test for acceptable use of force by replacing the element of necessity with the dual requirements of reasonableness and proportionality. The inquiry would consider whether the degree of force used was reasonable and proportionate to the harm sought to be avoided, namely some kind of interference with property. These elements would be evaluated from the perspective of the circumstances as believed by the accused, even if that perception were mistaken and/or unreasonable. Although the accused's perception of the circumstances need not be reasonable, the degree of force used would have to be reasonable within the context as he or she perceived it.

Question: How should the level of force used be measured? Should the force used in defence of property be "reasonable" or "proportionate"? Or should the standard be that of "necessity"? Does the concept of reasonableness include proportionality in any event?

* * *

Question: If you think that a new law of defence of property should require the degree of force used to be "proportionate," should proportionality be judged according to:

(a) what an ordinary person with the same general characteristics and background as the accused would have thought was proportionate, based on the accused's perception of the circumstances; or

(b) what the accused honestly thought was proportionate in the circumstances?

Issue 5: Deadly force

The existing provisions do not set a limit on the permissible degree of force that can be used in defence of property, only that it be *necessary* to protect the property from being taken or trespassed upon. But necessary force theoretically includes deadly force. An inquiry into what amount of force was necessary to prevent a trespass or to recover property does not expressly require the court to consider whether that amount of force was proportionate to the harm sought to be avoided. So, even where there is no threat to the safety of a person, deadly force might be justified where it is the only means of recovering or defending a property. However, the issue is far from simple.

As an example, consider the situation of a person returning to his or her car to find a man inside attempting to steal it. The owner demands that he get out, but the thief refuses, locks the car door, and tries to start the engine. The thief is unarmed, and it cannot be said that the safety of the owner is being threatened at this stage, but there appears to be no way for the owner to get the thief out of the car and thus to defend his or her possession – other than extreme force. Should he or she be entitled to use deadly force as a means to prevent the theft?

Some critics of the current scheme argue that the taking of a human life is always disproportionate to the harm, loss or destruction of property and that therefore no one is ever justified in killing another intentionally to defend property interests. This is the position taken by such bodies as the Canadian Bar Association Task Force and the Law Reform Commission of Canada, who have recommended including an express prohibition on the use of intentional deadly force in the law of defence of property. A reformed law of defence of property could adopt this approach and codify the principle that human life is always more important than property interests.

The reform model offers another approach to assessing justifiable force, though, like the current law it places no upper limit on the use of force and thereby implicitly allows for the use of deadly force in appropriate circumstances. However, it places limits on permissible force by requiring that the force used be *reasonable* and *proportionate* to the harm sought to be avoided, instead of *necessary* to defend the possession, which is currently the only limitation. Proponents of this approach, such as the Parliamentary Subcommittee on the Recodification of the General Part of the *Criminal Code*, contend that prohibiting the use of deadly force will arbitrarily restrict the availability of the defence. As a result, it may be unavailable in cases where deadly force is appropriate. Concepts such as reasonableness and proportionality, they argue, require a careful balancing of interests in property and human life, and would be sufficient to guarantee that the defence would not be abused.

For example, should a person have the right to use deadly force to prevent someone from stealing a deadly weapon, such as a bomb or contagious materials?

It should be noted that section 27 of the *Criminal Code* already provides a defence for the use of force to prevent a person from committing an offence that would be likely to cause immediate and serious injury to any person or any person's property.[3] This defence permits the use of as much force as is reasonably necessary to prevent the commission of the offence – which force could include deadly force. As a result, even if deadly force were to be prohibited in defence of property alone, it may still be permitted in appropriate circumstances under section 27.

> **Question:** Should a new law of defence of property permit the use of deadly force in some circumstances? Or is taking a human life never justified solely for the preservation of property?

Thank you for taking the time to read this consultation paper. We look forward to receiving your comments on these important issues.

3. Section 27 of the *Criminal Code* reads as follows:

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

(a) to prevent the commission of an offence

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

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

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

APPENDIX

References

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