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UNIFORM LAW CONFERENCE OF CANADA

REVIEW OF THE SCOPE OF THE CRIMINAL SECTION'S MANDATE

FINAL REPORT

**Presented by
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**By videoconference
August 2021**

Presented to the Criminal Section

This document is a publication of the Uniform Law Conference of
Canada.

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1. Background

[1] At the 2019 Annual Meeting of the Criminal Section of the Uniform Law Conference of Canada (ULCC), a few resolutions were the subject of lively debate to determine whether they were within the mandate of the Criminal Section.

[2] In order to determine if those resolutions ought to be debated, the Criminal Section reviewed the *ULCC Constitution* (as amended and adopted in 2018), and raised other considerations, including the ULCC’s general purpose, the relationship between the breadth of the mandate and the membership of the Criminal Section, as well as the expertise of the ULCC and its delegates. After the discussion, the resolutions in question were withdrawn.

[3] This discussion highlighted the need for greater clarity regarding the mandate of the Criminal Section, and how best to handle situations where there is a debate as to whether a resolution properly falls within the scope of that mandate.

[4] During the 2019 Annual Meeting, the incoming Chair of the Criminal Section indicated that the Steering Committee of the Criminal Section would consider the question of mandate going forward, and may strike a working group to study the issue.

[5] In December 2019, the Steering Committee of the Criminal Section created a working group responsible mainly for clarifying the general understanding of the mandate and establishing a procedure for determining whether an issue is within its purview.

[6] The working group is composed of Lee Kirkpatrick (Justice Yukon), Samantha Hulme (British Columbia Prosecution Service), Kevin Westell (Trial Lawyers Association of British Columbia), Tony Paisana (Canadian Bar Association), Matthew Hinshaw (Alberta Prosecution Service), Craig Savage (Manitoba Prosecution Service), Catherine Cooper (Ontario Ministry of the Attorney General – Criminal Law Division), Laura Pitcairn (Public Prosecution Service of Canada), Lucie Angers, Stéphanie O’Connor, Caroline Quesnel, Normand Wong, Chloé Rousselle (Justice Canada) and Anne-Marie Boisvert (Full Professor, Université de Montréal). For various reasons including retirement, some of them were not able to participate for part of 2020 and in 2021.

2. Overview of the Work

[7] The working group met four times, by teleconference, between its creation and the 2020 Annual Meeting. After discussing the tasks expected of the working group, members reviewed the range of resolutions previously debated by the Criminal Section, looked at the mandate of the Criminal Section as set out in the *ULCC Constitution*, and discussed options for procedure (hereinafter the “mandate procedure”) that could be followed in the future.

[8] The working group quickly reached the conclusion that the Criminal Section's mandate could not, and perhaps should not, be narrowly defined. In fact, members expressed various, and sometimes opposing, views while attempting to describe the Criminal Section's mandate. The overview of previous resolutions illustrated the variety of factors that must be taken into consideration in determining whether it is appropriate for a resolution to be debated by the Criminal Section, such as the topics addressed or the desired outcome.

[9] In this context, a mandate procedure focused on a case-by-case analysis of the potentially problematic or controversial resolutions was unavoidable. It was also decided that a decision-making grid would be developed to provide guidance to those who would be called upon, in accordance with the mandate procedure, to determine whether a resolution is within the mandate of the Criminal Section.

2.1 Presentation of the Status Report

[10] At the 2020 Annual Meeting, the Status Report of the working group was presented to the Criminal Section. As noted in the minutes prepared by Caroline Quesnel, then Secretary of the Criminal Section, the presentation mainly focused on explaining the options the working group had developed for a mandate procedure, as well as its proposed decision-making grid.

[11] Two similar options for the mandate procedure were presented. They differed in the following way: under Option A, a majority of the Jurisdictional Representatives (JRs) would determine whether a resolution can be debated, if the Criminal Section's Steering Committee had previously found that the resolution is not within the mandate, while, under Option B, the decision would be made solely by a majority of the Steering Committee.

[12] Since the Steering Committee would play a role in either option, the importance of ensuring a diverse membership in the Steering Committee was mentioned, as was the possibility of making a recommendation in the final report on that topic.

[13] The proposed decision-making grid was also presented, which sets out key elements to be weighed and considered when examining whether a resolution is within the scope of the Criminal Section's mandate.

[14] During discussions that followed the presentation of the report, delegates noted that the mandate of the Criminal Section evolved through the years: while the Criminal Section's work was originally mostly concerned with criminal procedure, reforms of a substantive nature later became part of it.

[15] In relation to the mandate procedure, delegates identified advantages for each option: the process would be more streamlined and faster if the Steering Committee were the only decision maker (Option B), while involving the JRs gives a "second chance" to a resolution that would be deemed out of scope by the Steering Committee (Option A). Criminal Section delegates underscored the importance of adopting a mandate procedure

that ensures that the various points of view present at ULCC can be taken into account in the decision-making process. Some noted concerns with an option that would allow JRs to have the final vote (Option A), as JRs are all governmental representatives. Another delegate indicated that trust in the Steering Committee could be compromised if JRs were able to reverse its decision that a resolution is out of scope. Some suggested that the mandate procedure could explicitly provide for the deciding body - whether the Steering Committee or the JRs – to consult others as appropriate before making a determination on a resolution.

[16] It was also noted that the ULCC *By-laws* provide discretion in relation to the composition of the Steering Committee, and that the work of a new committee on Diversity and Inclusion (chaired by Matthew Hinshaw) may influence it.

[17] In relation to the decision-making grid, delegates noted that one of its components (i.e., item *vii*: whether there is another more appropriate forum) should not be interpreted in such a way that relevant questions would be dismissed solely because another forum, such as a federal-provincial-territorial forum, is available. It was suggested that this component of the decision-making grid be nuanced.

[18] Delegates also discussed the name of the working group, which did not study the mandate of the Criminal Section with a view to changing it, but instead with a view to finding a way to help in determining whether resolutions fit within it. It was agreed that the new name would be “The Working Group Examining *the Scope* of the Mandate of the Criminal Section.” (emphasis added)

[19] The status report was accepted by unanimous vote (30-0-0).

2.2 Work after the presentation of the Status Report

[20] The working group met by teleconference or videoconference six times after the 2020 Annual Meeting and also completed some work via email.

[21] The first two meetings focused on finalizing the procedure and the decision-making grid. Similar to the discussions during the Annual Meeting, it emerged from the discussions that option A allows for more participation of all jurisdictions and is more inclusive. However, this option presents administrative challenges, particularly because it may be difficult to bring all JRs together at an already demanding time of year at the ULCC level. It was also pointed out that option B offers a simpler procedure, while still containing many safeguards and opportunities to allow a resolution to be debated at the annual meeting. In general, the majority of members indicated that they did not have a strong preference for either option. The decision was made to proceed with option B, but on the understanding that the Steering Committee would be entitled to consult with others prior to making a decision and that JRs would be informed of the Steering Committee’s decision. Other technical changes were made to the mandate procedure to enhance its general clarity.

[22] The working group reviewed the decision-making grid as it was presented in August 2020. A decision was made to add an introduction:

The Decision-Making Grid sets out the key criteria related to the core elements of the mandate of the Criminal Section. However, using this tool, and the List of Characteristics or Conditions that accompanies it, should not be a mathematical exercise. While certain criteria may carry more weight than others, a combination of factors may as well mitigate certain aspects that were initially perceived as concerning. A resolution that at first may seem outside the mandate could in fact turn out to be appropriate for consideration in light of, for example, the context or the desired outcome.

[23] A specification was also added (in order to address the concern raised at the 2020 Annual meeting) that a resolution should not be discarded because it relates to a matter that could be or is debated in another FPT forum.

[24] A number of other topics were canvassed at the various meetings, including the importance of diversity in the composition of the Steering Committee.

[25] There was also a discussion about the relationship between, on the one hand, the mandate procedure and the decision-making grid and, on the other hand, ULCC's *Constitution, By-laws, Criminal Section Rules of Procedure* and policies.

[26] It was decided that the mandate procedure and the decision-making grid should not be incorporated into the *By-laws*, nor merely referenced in the Criminal Section's *Rules of Procedure*. Instead, it was agreed that they should be added as an appendix to the Criminal Section's *Rules of Procedure*. Without knowing how long it might take before the procedure is used, and bearing in mind that the *Rules of Procedure* can be relatively easily amended if necessary (see section 9), it was determined that a trial period was not required.

[27] The *Constitution* was reviewed. Members agreed that the purpose of the discussion was not so much to try to identify the original intent of the *Constitution*, but rather to determine whether it allows for debates on resolutions in a way that is generally consistent with the working group's understanding of the scope of the Criminal Section's mandate. A distinction between the English and French versions was noted: the French version indicates that the Criminal Section deals with legal and operational issues "that might benefit from reform," whereas the English version is more precise in indicating that such reform is legislative in nature.

3. The Recommendations

3.1 The mandate procedure and the decision-making grid

[28] The mandate procedure is intended as a solution that would balance the following objectives:

- Avoid potential debates about the issue of the Criminal Section's mandate during annual meetings, where the time for discussions and votes on resolutions is already limited;

- Build on an existing structure within the ULCC Criminal Section, so as to avoid a procedure that would require the creation of a new committee;
- Allow for a flexible approach based on discussion and fairness;
- Ensure consistency in decision-making;
- Grant decision-making powers to a body sufficiently representative of the ULCC Criminal Section's composition.

[29] The mandate procedure articulates a sequence of steps beginning with the receipt of all proposed resolutions and ending, if needed, with a final decision as to whether a resolution is within the scope of the Criminal Section's mandate. The Chair and the Secretary of the Criminal Section would play an important role, as they would be the first to review the resolutions. If a resolution raises any concerns, they would discuss it with the JR, the delegate or both. The Steering Committee would only be asked to schedule a meeting if it was not possible to resolve the issue at this early informal stage.

[30] If a meeting is required, the Steering Committee would welcome the JR, the delegate, or both to speak about the resolution, and would be able to consult anyone whose opinion or views may be helpful in the discussion or decision. The Steering Committee could suggest ways to address the concerns, and therefore increase the possibility that the resolution would be debated. For example, the resolution could be amended, or be supported by a background paper produced for the benefit of the delegates.

[31] In general, the mandate procedure should be applied in a spirit of collaboration, as is the usual practice of the Criminal Section. It is meant to be a flexible procedure, which leaves room for adaptation to the situation at hand. The aim is to encourage dialogue and, where appropriate, allow resolutions that are submitted to the annual meeting to be properly and credibly debated.

[32] The decision-making grid sets out the key criteria related to the core elements of the mandate, as identified by the working group. It was built with the understanding that using this tool should be done on a case-by-case analysis and should not be a mathematical exercise. There are no criteria that automatically lead to rejection or inclusion. It seems clear from the decision-making grid that a resolution seeking legislative reform by amending a specific provision of the *Criminal Code* on a question of criminal procedure will almost certainly fall within the Criminal Section's mandate. However, it may be that a resolution addressing a matter for which the delegates are less likely to have an in-depth expertise might be better suited for ULCC if its recommendation specifically targets the criminal law issue it is trying to address or seeks to submit the issue to a working group. Also, it seems clear that a resolution which does not seek any legislative reform, but is aimed exclusively at the adoption of a directive to regulate the exercise of prosecutorial discretion is unlikely to be debated, as is, at the annual meeting.

[33] It should be kept in mind that a resolution that may appear to be outside the mandate could in fact turn out to be appropriate in light of, for example, the context or

the desired outcome. Also, while certain criteria may carry more weight than others, a combination of factors may mitigate certain aspects that were initially perceived as concerning. In addition, a number of characteristics or conditions are identified that would serve to either assist in recognizing that the resolution is within scope or provide a mechanism to bring it within scope (e.g., hearing from a subject matter expert, modifying the resolution).

[34] The decision-making grid was developed to support those who will be called upon to discuss or make a decision on whether or not a resolution falls within the mandate of the Criminal Section. That being said, it may also have a broader informative or guidance role for all of those who may submit resolutions. In fact, the existence of the decision-making grid may be of assistance, upstream, to avoid potential debates. The inclusion of the decision-making grid in the *Rules of Procedure* would ensure that all delegates have easy access to it.

RECOMMENDATION 1: The working group recommends that the procedure and decision-making grid, as proposed in Annex A to this Report, be incorporated as an appendix to the Criminal Section *Rules of Procedure*, with consequential amendments, if any, as required.

3.2 The composition of the Steering Committee

[35] In the Status Report, the working group mentioned its intention of making a recommendation, in its final report, to recognize the importance of a diverse composition for the Steering Committee, as well as the role a representative of a group which includes defence counsel could fill.

[36] The working group noted section 11 of the ULCC *By-laws* and, more specifically, paragraph 11(1)(d) and subsection 11(3), which specify that at least two members at large shall be selected to join the Criminal Section's Steering Committee, taking into account regional and other interests represented in the Criminal Section. Other interests include, but are not limited to, interests of criminal defence counsel. Consequently, a recommendation respecting diversity does not require a change to the ULCC *By-laws*.

[37] A recommendation that at least one member of the Steering Committee be a representative of a group which includes defence counsel is not restrictive - it recognizes there may be times where two or more such representatives are selected, as it recognizes that it might not always be possible to have even one member of such a group. It could be the case, for example, if the representatives of a group which includes defence counsel decline the invitation to join the Steering Committee due to time constraints because of other professional commitments.

[38] The working group wants to encourage diversity within the Steering Committee, but it recognizes the discretion for selecting members at large rests solely with the Chair of the Criminal Section.

RECOMMENDATION 2: While noting that the selection of members at large of the Steering Committee is left to the discretion of the Chair, the working group recognizes the importance of an inclusive and diverse composition of the Criminal Section’s Steering Committee. To that end, the working group recommends that, as permitted by the *By-laws*, representation of the various interests remain a consideration in the establishment of the Steering Committee, and, as such, that at least one representative of a group which includes defence counsel be a member of the Steering Committee, where practicable.

3.3 The Constitution

[39] Arguably, delegates of the Criminal Section are entitled to discuss all subjects of interest to it, in accordance with the text of the *Constitution*.

[40] The ULCC *Constitution* includes a *Statement of Purpose* as well as a *Mandate*. In relation to criminal law, the *Statement of Purpose* mentions the following:

<p>As the criminal justice system in Canada is a matter of shared constitutional responsibility between the federal, provincial and territorial governments, the Uniform Law Conference of Canada provides an opportunity for delegates to identify legal and operational issues that might benefit from legislative reform.</p>	<p>Le système de justice pénale étant une responsabilité partagée entre le gouvernement fédéral et les gouvernements provinciaux et territoriaux, les délégués bénéficient de la tribune que leur offre la Conférence pour l’harmonisation des lois au Canada pour déterminer les questions d’ordre juridique et opérationnel qui gagneraient à faire l’objet de réformes.</p>
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Its *Mandate* pertaining to criminal law and implemented by the Criminal Section reads as follows:

<p>The mandate of the Uniform Law Conference of Canada is [...] to recommend changes to the Criminal Code of Canada and other related criminal law statutes and to provide a forum to study and consult on evolving criminal law issues.</p>	<p>La Conférence pour l’harmonisation des lois au Canada a pour mission [...] de recommander des changements au Code criminel du Canada et autres lois pénales, en plus de servir de forum d’étude et de concertation sur des questions émergentes relevant du droit criminel.</p>
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[41] During the course of its work, the working group noticed that there was a discrepancy between the English and French versions of the *Statement of Purpose*. The English version qualifies the reforms as being legislative ones whereas the French version does not include the same qualification.

[42] While both the *Constitution* (in its English version of the *Statement of Purpose*) and the decision-making grid reflect how the Criminal Section has mainly and traditionally focused on legislative reform, they also illustrate how the work of the Criminal Section can go beyond that. The *Mandate of the Constitution*, in particular, clearly states that the Criminal Section also provides a forum to study and consult on evolving criminal law issues. This occurs currently through the Earl Fruchtmann Memorial Seminar or the federal consultations that are scheduled during many meetings, and there has been the occasional resolution over the years that has not directly recommended legislative reform. Overall, the *Constitution* adequately captures the general purpose and mandate of the Criminal Section, making it easy for anyone to understand, while also allowing it considerable flexibility to undertake its varied activities and to address a myriad of criminal law issues.

[43] The working group felt that the *Statement of Purpose* should be consistent in both its English and French versions and that, as an overall statement of the Criminal Section’s purpose, it should refer to *legislative* reform specifically.

[44] Because the ULCC is bilingual in its work, as stated in the *Constitution*, and operates in both English and French, as reiterated in the *Statement of Policy on Diversity and Inclusion* (adopted in 2020), it is important to ensure that both versions of the *Constitution* deliver the same message. Although other discrepancies may exist between the English and the French version of the *Constitution*, the one mentioned above must be corrected in order to avoid possible difficulties or uncertainties in relation to the purpose or scope of the Criminal Section’s mandate.

RECOMMENDATION 3: The working group recognizes that any discrepancies between the French and English versions of the *Constitution* that may give rise to an ambiguity as to the scope of the mandate of the Criminal Section should be resolved. To that end, the working group recommends that the French version of the fifth paragraph be amended by adding the word “*législatives*” to qualify the reforms (“ [...] déterminer les questions d’ordre juridique et opérationnel qui gagneraient à faire l’objet de réformes *législatives*”).

4. Conclusion

[45] The working group conducted its work over a period of approximately one and a half years. As with the resolutions debated at the ULCC Criminal Section, the issues surrounding the scope of the mandate raised a variety of views, but always in a spirit of sincere collaboration.

[46] The recommendations aim at flexible solutions, based on a desire to facilitate proper discussions and reliable outcomes at the ULCC on important criminal law issues.

[47] This report, and its three recommendations, are submitted to the Criminal Section at the 2021 Annual Meeting for its approval.

ANNEX A

PROCEDURE BY WHICH THE CRIMINAL SECTION COULD DETERMINE WHETHER A RESOLUTION SHOULD BE DEBATED DURING THE ANNUAL MEETING

There is a general presumption that all submitted resolutions are within the Criminal Section's mandate and can be debated at the annual meeting.

1. **The Chair and the Secretary** of the Criminal Section consider all resolutions received to verify whether they raise any concerns in light of the *Decision-Making Grid*.
2. If **the Chair and the Secretary** are of the opinion that a resolution might be outside the mandate, they contact the Jurisdictional Representative and the delegate who submitted the resolution, where applicable, to that effect. Following an informal discussion with the Chair and the Secretary, the Jurisdictional Representative and the delegate can decide to keep the resolution as is, amend it or withdraw it.
3. If the Jurisdictional Representative and the delegate decide to maintain the resolution (as is or amended), and **the Chair and the Secretary** are still concerned about the resolution falling outside the Criminal Section's mandate, they bring it to the attention of the Criminal Section's **Steering Committee**.
4. **The Steering Committee** schedules a meeting, which must be held at least ten weeks before the ULCC annual meeting (subject to the information below regarding the applicable timeframe).
5. **The Steering Committee** considers and discusses the resolution in light of the *Decision-Making Grid*. At this stage :
 - a. The Steering Committee can consult anyone whose opinion or views may be helpful in the discussion or decision;
 - b. The Jurisdictional Representative and the delegate who submitted the resolution have the opportunity, if they choose to do so, to make a case for why the resolution should not be rejected;
 - c. The Steering Committee may suggest to the Jurisdictional Representative and the delegate that they modify the resolution or adopt other measures to address the concerns, including by taking into account the *List of Characteristics or Conditions* that accompanies the *Decision-Making Grid*.
6. If, following these discussions, a majority of **the Steering Committee** members are of the opinion that the resolution is outside the mandate of the Criminal Section, the resolution is rejected. The result of the vote is the final decision.

7. **The Chair and the Secretary** of the Criminal Section notify the Jurisdictional Representatives, as well as the delegate who submitted the resolution, of the Steering Committee's decision.

If it is not possible to follow the procedure within the established **timeframe**, for example with floor resolutions, resolutions submitted after the deadline or if a valid concern is raised at a later date, **the Chair and the Secretary** can decide to set aside the resolution for the upcoming or current meeting, for the purpose of submitting it to **the Steering Committee** before the next annual meeting.

If the resolution is rejected, withdrawn or amended during the above-described procedure (steps 2 or 5):

- before the resolutions are shared with the Jurisdictional Representatives: the resolution is considered as never submitted (if rejected or withdrawn) or as the original (if amended);
- after the resolutions are shared with the Jurisdictional Representatives: the resolution is referred to as rejected, withdrawn or amended as a result of the mandate procedure, including for the purpose of the record of resolutions.

DECISION-MAKING GRID

The *Decision-Making Grid* sets out the key criteria related to the core elements of the mandate of the Criminal Section. However, using this tool, and the *List of Characteristics or Conditions* that accompanies it, should not be a mathematical exercise. While certain criteria may carry more weight than others, a combination of factors may as well mitigate certain aspects that were initially perceived as concerning. A resolution that at first may seem outside the mandate could in fact turn out to be appropriate for consideration in light of, for example, the context or the desired outcome.

Criteria	Weighs in favour	Weighs against
(i) The resolution seeks legislative reform.	X	
(ii) The resolution is related to one of the following: <ul style="list-style-type: none"> • <i>Criminal Code, Youth Criminal Justice Act;</i> • <i>Controlled Drugs and Substances Act, Cannabis Act, Canada Evidence Act;</i> • <i>Sex Offender Registration Act, Firearms Act, Corrections and Conditional Release Act, Criminal Records Act.</i> 	X	
(iii) The resolution is related to legislation entirely or partially made under the federal jurisdiction over criminal law, including criminal procedure.	X	
(iv) The resolution seeks to amend legislation adopted by a province or territory.		X
(v) The resolution concerns provincial rules of court.		X
(vi) The Criminal Section has direct expertise in the topic of the resolution. (NB: direct expertise means the personal expertise of the delegate, the expertise of the organization for which the delegate works or the expertise of people the delegate can easily consult.)	X	
(vii) There is another forum or avenue (outside the ULCC) that would be more appropriate for dealing with the issue identified by the resolution. (NB: The fact that other fora, such as the Coordinating Committee of Senior Officials – Criminal Justice or the Steering Committee on Criminal Justice Efficiencies and Access to the Criminal Justice System, might be tasked to deal with issues identified in a resolution should not weigh against that resolution being debated at the ULCC, given the broad membership of the delegations and their expertise in criminal law matters.)		X
(viii) The resolution addresses prosecutorial discretion or suggests that the prosecution services or courts adopt directives or instructions.		X

(ix) The resolution concerns the executive branch of a government (e.g.: implementing a program, spending funds in a particular field or for a specific initiative).		X
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List of Characteristics or Conditions

In addition to the criteria of the decision-making grid, consideration must also be given to the presence of certain characteristics or the possibility of imposing conditions that could help to overcome certain difficulties regarding the Criminal Section's mandate. For example:

- The resolution will be amended so that the anticipated outcome is that the issue be submitted to a working group (joint or of the Criminal Section) or to the Civil Section, or be addressed through the Earl Fruchtman Memorial Seminar.
- A backgrounder will be produced and distributed before the annual meeting.
- An expert will be available for a presentation at the annual meeting.
- The resolution will be modified with more appropriate wording in regard to the mandate.

ANNEX B

RECOMMENDATIONS

The Working Group Examining the Scope of the Mandate of the Criminal Section:

1. Recommends that the procedure and decision-making grid, as proposed in Annex A to this Report, be incorporated as an appendix to the Criminal Section *Rules of Procedure*, with consequential amendments, if any, as required.
2. While noting that the selection of members-at-large of the Steering Committee is left to the discretion of the Chair, recognizes the importance of an inclusive and diverse composition of the Criminal Section’s Steering Committee. To that end, the working group recommends that, as permitted by the *By-laws*, representation of the various interests remain a consideration in the establishment of the Steering Committee, and, as such, that at least one representative of a group which includes defence counsel be a member of the Steering Committee, where practicable.
3. Recognizes that any discrepancies between the French and English versions of the *Constitution* that may give rise to an ambiguity as to the scope of the mandate of the Criminal Section should be resolved. To that end, the working group recommends that the French version of the fifth paragraph be amended by adding the word “*législatives*” to qualify the reforms (“ [...] déterminer les questions d’ordre juridique et opérationnel qui gagneraient à faire l’objet de réformes *législatives*”).