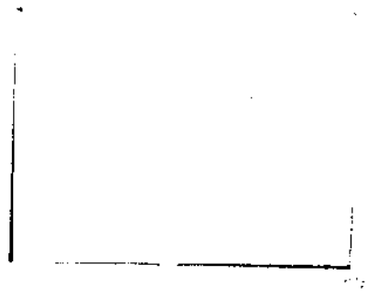
CORRECTIONAL LAW REVIEW

FIRST CONSULTATION PAPER

NOVEMBER, 1983



This Consultation Paper is intended to serve as the basis for initial consultations between members of the interested public and the Ministry of the Solicitor General and Department of Justice. It is intended for discussion purposes only, and is not in any way a statement of government policy in the area of correctional law reform.

FIRST CONSULTATION PAPER

CORRECTIONS LAW REVIEW

Table of Contents

INTRODUCTION

This Paper is intended to serve as the basis for consultations which will take place during the fall and winter of 1983/84 for the Corrections Project of the Criminal Law Review.

The Criminal Law Review was launched in 1981 as a comprehensive, fundamental review of all federal criminal legislation in Canada. There are some 50 individual projects within the review, covering all facets directly and indirectly related to the criminal justice process. The Corrections Project is concerned principally with five pieces of federal legislation: the Solicitor General Act, the Penitentiary Act, the Parole Act, the Prisons and Reformatories Act, and the Transfer of Offenders Act. Certain parts of the Criminal Code which touch on correctional matters will also be reviewed.

A comprehensive table of contents to this Paper will assist the reader to see at a glance and to locate within the Paper the various subjects to be covered in the Corrections Project. Written submissions on these subjects are welcomed from any intrested group or individual until August 1984, and in many cases, consultations in person with the Project Working Group can be arranged if there is sufficient interest.

It is important to note that, though provincial correctional systems are affected by this Project by virtue of the Parole Act and the Prisons and Reformatories Act and certain sections of the Criminal Code which will be covered, this Consultation Paper relies heavily on background and examples drawn from the federal penitentiary and parole systems. To a large extent, this reflects the historical trend away from specification, in the federal Prisons and Reformatories Act, of requirements which are applied to provincial systems. Nonetheless, various issues remain regarding the extent to which federal legislation should be permitted to establish requirements and standards for provincial corrections.

The Corrections Project has an approximate 3-year timetable which will include the publication of interim findings and conclusions, and a second round of consultations. The final product will be new draft federal legislation in corrections, accompanied by a public discussion paper.

For further information, contact:

Mr. Alan R. Needham
Director, Corrections
Policy Branch
Ministry of the Solicitor General
Ottawa
K1A 0P8

SECTION A. MAJOR ISSUES

Throughout this Paper, a number of major issues of importance to a review of correctional legislation are raised. Also raised are a large number of specific questions about what should not be contained in correctional legislation. Because the major issues are of such importance, however, and because they recur in different contexts in this Paper, they are presented below as themes to watch for throughout this exercise.

In general and specific programs, issues are raised about correctional objectives and how they can effectively be achieved. Section I asks the reader to consider what might go into a statement of objectives and principles unique to corrections. In Section III, the objectives of conditional release in particular are discussed. A key theme related to objectives is visibility. As a matter of public policy, to what extent should correctional legislation specify more precise criteria or guidelines through which specific objectives are pursued? Certain related administrative issues are also presented, such as organizational arrangements best suited to achieving objectives.

Related to objectives are issues of accountability of correctional systems. The Paper asks the reader to consider the ways in which the offender should be made accountable to correctional authorities for his behaviour, and asks also how correctional authorities should be held answerable to various "publics": to the local community, to Ministerial authority, to Parliament, to the offender, and to bodies which can provide an outside review of their decisions. Accountability can take various forms, depending on the interests and "public" involved.

Discretion is a key issue at any stage in the correctional process where judgement is involved and alternatives exist. Various questions arise as to the amount of discretion which should exist, what controls should be placed on it, and who should exercise it.

Any discussion of law which deals with individual libery must be intimately concerned with questions of human rights and remedies. A key issue for the Criminal Law Review is the extent to which the rights of individual Canadians should be spelled out in legislation. These include both substantive rights (such as a prison medical care) and procedural rights (such as the right to a hearing at certain stages). This Project does not cover issues related to the rights of correctional staff, however, since these are covered in labour statutes such as the Public Service Staff Relations Act.

A final major issue is equity in the treatment of persons under correctional authority. The nature of corrections seems to create a particularly acute need to ensure that similar offenders will be treated in similar ways, when the relevant circumstances are similar. The need to ensure equity raises a number of questions which will reflect also certain issues of accountability and discretion.

The Paper's discussion of these issues is shaped by the limitations of what can and should be contained in law, as opposed to administrative directives.

SECTION I. OBJECTIVES AND PRINCIPLES OF CORRECTIONS

INTRODUCTION

It has been extensively suggested that corrections in Canada - as in other nations - needs to come to grips with the objectives it is and should be seeking to pursue, especially in view of the findings and criticisms of the last 20 years. The 1977 Report of the Parliamentary Subcommittee on the Penitentiary System in Canada (MacGuigan Subcommittee) made it clear that it felt the root of the problems of corrections to be at the level of philosophy. It concluded that "nothing in the criminal justice system proceeds according to any clear or generally accepted principles defining the purposes of the penal system: who should be incarcerated and why, or what the Penitentiary Service is supposed to accomplish."

It has also been suggested that any new legislation in corrections should be prefaced by a statement of objectives and principles, much as the Federal Government's 1982 publication, The Criminal Law in Canadian Society, has suggested that the Criminal Code be preceded by a statement of objectives and principles. Other critics suggest that such a statement belongs not in law, but in administrative directives or program statements. Certain corrections jurisdictions in Canada have done extensive work on defining their goals, objectives, strategies and principles.

Corrections has experienced a number of major shifts in the primary or prevailing objective which it ought to pursue. Penitence was at one time a correctional objective which had major influences on the regimen and even construction of prisons. Rehabilitation has apparently lost the primacy among correctional goals enjoyed in previous decades, though some corrections experts feel it has declined too far in importance. Reintegration and life-skills orientation are perhaps the more modern version of the "rehabilitation ideal". Some critics would contend, however, that the most prominent correctional objectives are in practice, those of security and surveillance.

If a criminal law which embodied only a single goal would be a bad one (as Hart suggested), it may be equally true that not only does corrections currently embody or reflect more than one objective, it should continue to do so. At different times and with different offenders, corrections goals may be very different. Within certain cases, certain corrections goals may even be in conflict with one another.

Nonetheless, it may be important to define in law what corrections must do, what it may do, and what it must not do.

The Criminal Law in Canadian Society articulated the overall goals and principles of the criminal law, including a number which would appear to have implications for corrections. These are:

Purpose of the Criminal Law

The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.

Principles to be Applied in Achieving this Purpose

The purpose of the criminal law should be achieved through means consonant with the rights set forth in the Canadian Charter of Rights and Freedoms, and in accordance with the following principles:

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

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

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

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

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

(i) opportunities for the reconciliation of the victim, community, and offender;

(ii) redress or recompense for the harm done to the victim of the offence;

(iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community;

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

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

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

These statements of criminal law purpose and principles leave much room for - and perhaps even encourage - the articulation of a statement of objectives and principles unique to corrections.

ISSUES:

I.1 Statement in Law

Should there be a statement of the objectives and principles of corrections at the beginning of all correctional legislation?

I.2 Objectives of Corrections

If you are of the view that the objectives of corrections should be better defined (either in law or elsewhere), which of the following statements of objectives should and which should not apply to corrections? Should corrections have a primary or overall objective or objectives?

Some of these statements would apply only to certain correctional agencies, and not to others. The wording of most of them is taken directly from statements by organizations including the Canadian Association for the Prevention of Crime, the Law Reform Commission of Canada, the British Columbia Corrections Branch, the American Correctional Association, and the Ouimet Committee.

- to assist the court in its decision-making by providing information on the offender, advising on suitable sentence alternatives and resources, and developing and maintaining a wide range of correctional alternatives

- to take action calculated to return the individual offender permanently to the normal community as a contributing member of society

- to assist in the resolution of disputes where the direct intervention of the court is being considered (through techniques of mediation and conflict resolution)

- to carry out the sentence of the court, including the administration of restitution and community service orders

- to reduce the risk of harm from the offender to the public, to himself, to other offenders, and to criminal justice staff

- (remand) to provide sufficient security to ensure that the defendant will be available for trial

- to provide programs aimed at the rehabilitation and reintegration of the offender, in particular:

  - maintenance of family ties

  - development of the responsible use of freedom and choice

  - education, work, training, life skills and social development

- to preserve the rights, humanity and dignity of the offender, the public, and staff

- to co-operate with other components of the criminal justice and social system

- to reduce the reliance on imprisonment for non-dangerous offenders

- to increase public awareness and understanding of corrections and of offenders

- to increase public support for and participation in the correctional system

- to provide programs or strategies designed to keep the offender out of prison in the future

- to minimize the unintended negative effects of the sanctions

- (remand) to keep sentenced prisoners separate from those not convicted or sentenced

- to administer programs of assistance to victims and witnesses

What other suggestions would you make regarding statements of correctional objectives?

I.3 Principles of Corrections

If you are of the view that the principles which guide corrections should be better defined (in law or elsewhere), which of the following statements of principle should and which should not apply to corrections?

- the offender remains a member of society, and retains all the rights and privileges of an ordinary citizen, except those expressly removed by law or as a necessary consequence of the sentence imposed by the court

- correctional authorities may not impose further punishments or controls other than those directly implied in the sentence

- unless there are valid reasons to the contrary, the correction of the offender should take place in the community

- correctional authorities must employ the least restrictive alternative which is adequate to achieve the legitimate objectives implied in the sentence

- correctional authorities must provide stimulation and support for offenders to learn to behave responsibly

- correctional authorities must clearly and accessibly set forth the rights and privileges which accrue to offenders, the powers and responsibilities of staff, the prohibitions and obligations imposed on offenders and staff, the resources available to offenders and staff, and the criteria upon which key decisions about offenders are made (principle of notice)

- offenders should be treated in a similar fashion where the relevant circumstances and factors are similar (principle of equity)

- discretion at critical points of the correctional process should be governed by appropriate substantive and procedural controls

- any persons alleging illegal or improper treatment by an official of the correctional system should have ready access to a fair investigative and remedial procedure

- correctional policies must not deny the offender the hope of regaining status as a free citizen

- services available to the general public must be utilized in the correctional process whenever possible and practical

- correctional authorities must safeguard the rights and privileges of offenders by maintaining the duty to act fairly

- correctional authorities must engage in ongoing programs of research, self-evaluation, and review in order to keep the public and corrections better informed

- correctional services must be subject to regular independent assessment, as measured against appropriate established standards

- (remand) no person who is not as yet convicted of a crime should be required to participate in programs aimed at his rehabilitation

- correctional authorities shall design programs in such a way as to meet the legitimate needs of identifiable offender groups

- correctional authorities must participate in an active program of reform of the criminal justice system

What other proposals would you make regarding statements of correctional principles?

SECTION II. SENTENCE ADMINISTRATION AND THE RELATION BETWEEN SENTENCING AND CORRECTIONS

INTRODUCTION

Another project of the Criminal Law Review, the Sentencing Project, is responsible for the drafting of new legislation relating to sentencing. However, the close relationship between sentencing and corrections - or "sentence administration" - is obvious. Actions performed by correctional authorities and programs administered by them constitute the practical fulfillment of the pronouncement of the judge's sentence, and decisions about how an offender is handled in a correctional setting may have a direct bearing on the extent to which the aims of the sentence are fulfilled. Perhaps the most obvious example of the close connection between sentencing and corrections can be seen in the fact that various forms of conditional release are available which, in some cases, can result in an offender being placed back into the community long before the expiry of the sentence. Correctional authorities presently make virtually all major decisions about where a prison sentence will be served, under what degree of security, according to what rules and regulations, with what programmes of treatment or other services, and, within the limits set by law, for how long.

A number of sections of this paper raise in a general or specific way, the question of how the link should be made or maintained between sentencing and corrections, or between the judiciary and the administrative authorities of corrections. For example, Section IV (Offender Rights) asks questions about the extent to which the courts (or other remedial bodies) should be involved in the protection of the rights of persons under correctional authority. Section III (Release and Remission) asks questions about the extent to which programs which release offenders from some of the obligations of sentence should be reviewable by, or even administered under the direct authority of, sentencing or other judges. This Section asks questions about the extent to which the sentencing judge should be able to direct, as part of his sentence, that the offender receive certain services aimed at "correcting" him, or that he be sent to a specific place.

Various proposals have been made in various quarters about possible models or mechanisms which might be considered in order to achieve such ends as the safeguarding of convicted offenders' rights, the fulfillment of the judge's express intentions (if any) about the sentence, and the provision of an independent authority to review the conditions of confinement and other major issues. Among the models which have been proposed or tried in other jurisdictions are the Law Reform Commission's Sentence Supervision Board, which would review conditions of confinement and release decisions made at the initial level by correctional

authorities; the juge de l'application de la peine, a special arm of the judiciary in France and Italy which is designed to make original release and treatment decisions about offenders; and the availability of general judicial appeal on substantive and procedural matters relating to corrections, as is the case in the U.S.

In Canada at present, judges are (or in theory may be) considerably more involved in matters relating to non-carceral sentences than they have been with jail sentences. They may, for example, specify the conditions of probation, the community-based programs which (if they are available) the offender will enter into if he so consents, and the manner in which a fine, fine option, or restitution or community service order shall be carried out. No such involvement by the courts with prison sentences has been seen in Canada, even though arguably the severity of an imprisonment term might suggest that sentencing judges should be at least as concerned in questions regarding the content and meaning of their sentences.

ISSUES

II.1 Objectives of Sentencing and Corrections

Issues relating to this area will be explored in Section III (Release and Remission) and Section IV (Classification). On a general level, however, the reader should bear in mind questions regarding the extent to which sentencing goals should be consistent or in harmony with correctional goals. It has frequently been observed that rehabilitation aims of a sentence, for example, may be undermined by security and surveillance objectives which are important to corrections. Perhaps some tension between sentencing and corretional goals is unavoidable. Should correctional authorities be under an obligation to consider the intent of a sentence (assuming this can be determined) in making decisions about how, why and where a sentence is to be served?

II.2 Judicial direction to corrections

Presently, Canadian sentencing judges cannot issue binding orders respecting many or even most of the correctional processes which have a major effect on the "meaning" or content of a sentence. Many judges appear to both accept and endorse this approach, perhaps out of concern for their own lack of expertise in corrections and criminology. For others, however, the arrangement is less satisfactory, and can result in sentences which in practice countervail the intended objective, or at the least fail to fulfill the intended objectives of the sentence.

To what, if any, degree should the sentencing judge be able to influence or make enforceable orders concerning the way in which a sentence should be served?

Should the judge, for example, be permitted to direct:

- the place at which a term of imprisonment will be served?

- the programmes of treatment, work, education or other services which should be offered to the offender through the prison system?

- the programmes of treatment which (perhaps with the consent of the Crown and the offender) must be undertaken by the offender?

- the level of institutional security in which the offender should be placed or the level of surveillance to be imposed by the probation officer?

II.3 Judicial Supervision of Corrections

To what degree should the sentencing authority maintain a supervisory or appellate role in the correctional process?

Judges in Canada have, up to the present, played only a very small role in reviewing decisions made by correctional authorities about the manner in which the sentence is to be served. The two most common types of such judicial involvement are probably the bringing before a judge of the offender who has defaulted on payment of a fine or the offender who has breached his probation.

The Law Reform Commission proposed that this sentence supervision function be performed by a body intermediate to the correctional and judicial authorities, called a Sentence Supervision Board, from whose decisions there would be ultimate recourse to the courts.

To what extent would some type of greater judicial involvement in correctional processes be desirable from the point of view of:

- safeguarding the interests of the offender and "watchdogging" correctional decision making?

- increasing the conformity between sentence objectives and correctional programmes?

- educating the judiciary about correctional processes?

SENTENCE CALCULATION

The courts, lawyers, prison administrators, and prisoners themselves, have frequently expressed dismay at the confusing, inadequate legislation which governs sentence calculation. While the governing principle is that ambiguity in the construction of a penal statute should be resolved in favour of the prisoner, the fact that so much ambiguity exists results in confusion and distrust, and a feeling on the part of prisoners that the length of time they must spend in confinement is determined in some arbitrary way that they cannot understand.

Sentence calculation is not complicated so long as a prisoner earns remission in the normal way, is released on parole or MS and stays out of trouble until his warrant expiry date. Then the rules of thumb - 1/3 of sentence until parole eligibility, 2/3 until release on mandatory supervision - apply. But as soon as the prisoner escapes, gets further convictions or his parole or mandatory supervision is revoked, sentence computation gets more difficult. The following are just some of the problem areas:

II.4 Remand Sentence Credit

Presently individuals who are denied bail and are therefore detained until and during their trial do not receive an automatic credit of the time spent in custody against the sentence imposed. While it seems to be an accepted principle of sentencing that a convicted person should receive some credit for pre-trial time in custody, this varies from court to court. S.649 (2.1) of the Criminal Code provides that in determining the sentence to be imposed, a judge may take into account any time spent by the convicted person in custody as a result of the offence. No further guidance is offered in the legislation. It has often been said by the courts that since no remission can be earned in pre-trial custody, the credit against sentence should be equal to twice the period of pre-trial custody. This has, however, never been clearly defined, and is not applied consistently by judges.

In many U.S. jurisdictions, pre-trial custody is an automatic credit against any sentence subsequently imposed. Should this be true in Canada? Should the credit be "straight-time" or should there be an additional allowance to compensation for the inability to earn remission?

II.5 Other Sentence Credit Ambiguities

There is no clear provision in our correctional legislation which specifies when a prisoner receives credit against his sentence. Decisions are reached by the Courts on an ad hoc

basis, leading to confusion as to what, if any, principles should apply. For example, recent cases have held:

(a) That a sentence "stops running" when a prisoner escapes from custody. This is not clearly established in any legislation, but has been so held in the case law, albeit after a number of conflicting lower court decisions.

(b) That if an institution releases a prisoner in error, and if the prisoner has not acted in bad faith, then the prisoner should be deemed to be serving his sentence, even though he was unlawfully released.

(c) That if a prisoner is released upon a successful habeas corpus application, but the Crown appeal is subsequently successful, he should not get credit for the time during which he was lawfully at large by virtue of a Court Order.

(d) Once an escaped prisoner is taken into custody, he gets credit against his sentence only if he is re-incarcerated in Canada.

Each case like this is decided by reference to its own peculiar facts. No clear principles have emerged in the case law. Do you think that clear provisions with respect to credit against a sentence should be enacted? What should be the guiding principles?

If the statement of principle includes an enumeration of the circumstances in which a prisoner either receives or does not receive credit against sentence, there is always a risk that the list will not be exhaustive, and the prisoner will either not get credit when it seems intuitively fair that he should, or get credit when it seems intuitively fair that he should not. Are there more general principles which could adequately cover the kinds of cases described above?

II.6 When a sentence is to be served in a penitentiary

Section 659(2) of the Criminal Code provides that where a person who is sentenced to imprisonment in a penitentiary is, before the expiration of that sentence, sentenced to imprisonment for less than two years, he shall be sentenced to and shall serve that term in a penitentiary.

This section was designed to ensure that someone in penitentiary would not be moved to a prison to serve the last part of his sentence, even if, prior to his release, he is sentenced to a further term of imprisonment which is less than two years, and

the total sentence to which he is subject is less than two years. Unfortunately it has also been interpreted to cover penitentiary inmates on MS who receive a short prison term, possibly even a few days for a provincial offence, and their MS is not revoked. By virtue of this section, the prisoner must return to penitentiary to serve his sentence, no matter how short, and even when it is clear that the sentencing judge intended that the sentence be served in a reformatory or even in jail.

Should this section be amended such that it does not apply to individuals on mandatory supervision from a penitentiary, so long as the MS is not revoked? Or should there be discretion given to the sentencing judge to order that the sentence, if less than two years, be served in a reformatory or jail?

II.7 Loss of remission upon parole revocation

When an offender's parole is revoked, he loses all the remission he had standing to his credit at the time he went out on parole, (with the exception of remission earned before July 1, 1978). This means that the consequence of a parole revocation is not determined by the seriousness of the behaviour which led to the revocation but rather, by the length of time the prisoner served before being released on parole. A parolee who commits an offence while on parole is of course liable to an additional sentence, as well as the penalty of lost remission. In a recent innovation which is intended to reduce some of the inequities caused by this operation of the law, NPB has expanded its administrative criteria for the recrediting of remission after revocation. These criteria now include instances where "behaviour which led to the revocation was in itself considered not serious enough to warrant a total loss of remission".

Instead of this arrangement, is there a better approach? Should, for example, the consequences of parole revocation be tied more directly to the acts which caused it? An approach tried in some U.S. jurisdictions has been, in effect, to set a "sentence" of six months for the offence of parole violation. This can be varied by the sentencing judge according to the case. A similar idea might be to create a "penalty" of up to six months' remission forfeiture for parole violation. Is this a worthwhile approach?

SECTION III. RELEASE AND REMISSION

INTRODUCTION

Early release from a sentence of imprisonment - be it on a limited temporary basis, through parole, or as a result of remission - is one of the most important correctional processes. These various forms of early release have evolved in our Canadian experience from the very first exercises of clemency by the Governor General, in the 19th century, to the current extensive conditional and unconditional release programs that are provided for in our criminal law. In spite of the well established legislative authority for these release programs, public debate as to their appropriateness has rarely abated since the first decisions were made to release offenders before the expiry of their sentence.

In the following section, issues will be raised for discussion on the objectives of early release ("why" questions), the body or mechanism which should effect it ("who" questions), and the extent to which it should affect the sentence, and the processes by which it should operate ("how" questions). Within this review, cognizance should be taken of the complex relationship between release as a correctional alternative, the philosophy and purposes of sentencing, and the overall objectives of corrections.

Although it seems that some of the controversy surrounding early release.is based on a lack of information or distorted perceptions, clearly many other concerns and criticisms have a more fundamental basis. Questions such as whether or not an offender should be relieved of a portion of his sentence of imprisonment, whether the judgement of the court should prevail over correctional administrators, whether release decisions should be based on rehabilitation or risk; are only a few examples of issues which have historical as well as current relevance.

When the Parole Act came into effect in 1959, it seemed to embody certain assumptions about purposes and principles. The purpose of the Criminal Justice System was to protect society primarily by rehabilitating the offender. The provision of conditional release from prison was based on the belief that individuals can and do change and that the community, rather than the prison, is the better environment to reinforce the commitment to change. Properly trained and experienced individuals were thought to be able to determine when an inmate is suitable for release into the community, taking into account the question of risk to society. Decisions to grant, deny or revoke parole should not be subject to political interference. Parole was to be a privilege based on the offender's proving he is deserving of

release through institutional performance, his attitude, his plan for release, and his willingness to accept supervision and to live within the law.

Undoubtedly each of these purposes and principles has been called into question during the past two decades. They are based primarily on a utilitarian philosophy of corrections which concerns itself with protecting society by preventing future wrongs - either through changing factors in the environment or the individual offender through rehabilitation, or through the deterrence or simple incapacitative effects of imposing penalties. In the ongoing debate as to the legitimacy of these objectives, several major issues concerning the early release of offenders have emerged. The first relates to the once firm belief in the rehabilitative ideal and the confidence in the trained ability of experts in the social and behavioural sciences. This confidence was such that a very broad discretion was allocated to the Parole Board to make decisions concerning the conditional release of offenders. More recently, however, the rehabilitation ideal has been out of favour, and critics have questioned the ability of experts to detect successful treatment or predict recidivism (especially violent recidivism) with accuracy.

III.1 Objectives of Conditional Release

Given that the objectives and principles embodied in the Parole Act may be open to serious question, what purposes should conditional release serve in new legislation? Which of the possible purposes given below should conditional release not serve? (Some of those listed are not, in fact, stated objectives of conditional release.)

Re-integration into the Community

Although support for the ideal and the practicability of rehabilitation in institutions or the community has been seriously questioned, most correctional authorities acknowledge responsibility to provide assistance towards the eventual reintegration of offenders into the community. This assistance may take the form of various programs to assist the offender in the preparation for release, decompression from a prison environment, encouragement to develop meaningful release plans, opportunities to participate in gradual release programs, and community supervision with elements of support and encouragement. The Criminal Law in Canadian Society (1982) recognizes the role of such programs in Principle (g), which states in part that "wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for .... opportunities aimed at personal reformation of the offender and his re-integration into the community".

The debate over rehabilitation and its primacy in corrections is still very much of relevance. Many correctional experts are of the view that rehabilitation was never seriously tried in Canada (nor in most other jurisdictions) inasmuch as insufficient resources and commitment were applied to its implementation. To conclude, therefore, that "nothing works" is premature at best, and based on inadequate information. On the other hand, further criticisms of the rehabilitative ideal have alleged that it would permit excessive intrusion into the lives of individuals, and excessive amounts of unreviewable discretion. Perhaps in part as a result of the ongoing debate over rehabilitation, correctional administrators have turned more towards an "opportunities" model, wherein the offender is presented with program choices having certain practical consequences. The term "reintegration" has also come into use, and perhaps reflects an emphasis away from psycholgical treatment or cognitive approaches, and towards programs aimed at assisting the offender to interact in more functional ways with social institutions, family and others.

(Although programs of re-integration into the community have, traditionally in Canada, been linked to the release of the offender from prison before the end of his sentence, it is worth noting that community-based supervision following imprisonment could in fact be ordered at the time of initial sentencing, much like sentences or jail followed by probation. Mandatory community supervision could even be a statutory requirement which formed part of every sentence of imprisonment, and was designed to occur at the conclusion of the imprisonment period.)

Protection of the Public through the Assessment of Risk Over Time

The great majority of offenders sentenced to imprisonment eventually return to the community, after serving various lengths of time. The original Parole Act contemplated that if an offender had derived the "maximum benefit from imprisonment" and was not an undue risk, he could be granted parole if it were considered likely to assist in his rehabilitation. In more recent years, the "benefits" to the individual from imprisonment have been questioned even by top correctional administrators. Imprisonment does, however, have the unquestioned effect of separating the offender from the community, of incapacitating him. If the offender is or will be an undue risk to the community when released, incapacitation goals may demand that he serve as long a period as his sentence allows. For others who are not a risk - however defined -

some would argue that society is better protected in the long term by an earlier release from the prison environment. The selection of offenders for conditional release based on risk assessment is thus another utilitarian goal which some have advocated.

Humanitarian Purposes

Some would argue that early release can and should still pursue aims which are rooted in its early beginning in clemency for deserving offenders. Since any grant of conditional release will reduce the time which an offender spends in prison, there is some mitigation of full sentence in any early release. Mitigation of sentence for humanitarian purposes has been defended in cases such as:

- the offender who has demonstrated a positive change in behaviour while incarcerated;

- the offender who has spent such a long time in prison that mercy demands his release;

- the offender who has experienced remorse and demonstrated a change in attitude;

- the offender whose family circumstances have changed, and necessitate the return of the offender;

- the offender for whom it is necessary to halt, offset or try to reverse the unintended negative or debilitating effects of incarceration.

Hope

It seems axiomatic that when an individual's feedom is taken away, freedom becomes his greatest hope. Hope may not be able to stand on its own as an objective, since presumably one would not parole some offenders for no other reason than to give hope to those who are left behind. However, providing hope, especially to long-term prisoners, may be a defensible goal. Some argue it infuses a humanitarian aspect into a system which is often highly punitive. Others argue that the uncertainty about one's possible release date causes more anxiety and negative consequences than the hope provides positive consequences.

In the past several years an increasingly sizable group of inmates in federal penitentiaries are facing long-term sentences, with early release a very remote prospect for some. In these cases, the existence of release opportunities may be more likely to be a source of bitterness with the uncertainty of not knowing when release will come.

To mitigate sentence disparity

The mitigating effect conditional release programs have on sentences has long been a point of contention with some members of the public, the judiciary and the police. Although paroling authorities have stated that they are not in the business of correcting disparities in court sentences, some observers claim that early release does have this effect. Some have even advocated systems which would facilitate such an evening out of sentence disparity, as in an appended view from the Hugessen Task Force which proposed that the releasing authority fix the time to serve until parole eligibility, rather than being bound by the present system of release eligibilty dates which are fixed by law as a portion of the sentence. Some observers claim a central authority like a parole board is in a good position to identify sentence disparities and correct them. In this view, release can serve also as a forum for sober second thoughts after the emotion and controversy of the offence and trial.

However, it is important to note that the issue of disparity in sentences is being addressed directly in the Sentencing Project of the Criminal Law Review with the relationship of sentencing to post-sentence practices being addressed in a related policy document.

To reduce prison populations and cost

Most would agree that conditional release represents a less expensive and more humane way to deal with offenders than prisons. There is little question that if early release were abolished and sentences remained unchanged, prison populations would increase. The financial costs of this increase could be expected to be considerable. In spite of the obvious fiscal benefits, the proposal that conditional release practices can be adjusted to reduce prison populations is extremely controversial.

Incentive for prison discipline

Remission particularly, but parole as well, has been cited as a prison discipline mechanism, but its appropriateness in this role is controversial. Some members of the public feel that good behaviour in prison should not be grounds for early release from sentence, though many prison administrators claim that the possibility of early release is essential as a tool for controlling penal institutions. In part because of concern over certain violent acts committed by offenders released before the end

of sentence through credits of good behaviour, remission has been criticized as a program which may be appropriate for some, but not for all. For those who may be violent, in this view, creating good behaviour incentives is not a defensible objective if it mandates early release.

Which of these objectives do you consider as valid purposes of early release? Are there other objectives which should be included in a statement of objectives for conditional release?

III.2 Eligibility for Various Forms of Conditional Release

Above, we have explored questions of the "why" of conditional release - the objectives it should pursue. Beginning in this section, we will explore questions of how conditional release should operate.

Under the current arrangement, there is a balance between the part of the sentence fixed by the court, the part under parole discretion, and the part governed by remission. To some extent, the objectives which one chooses for conditional release may determine one's view of the extensiveness of its role. If one supports a limited clemency-like view of parole, for example, then perhaps one would also support a system of longer fixed periods prior to eligibility, and a smaller range of discretion. If on the other hand, one feels that parole should be aimed primarily at individualized treatment and reintegration of the offender, one might support the elimination of all fixed eligiblity rules, and an extended range of discretion.

Below, then, are listed the various forms of conditional release and some of the eligibility rules which, for most offenders, govern the amount of discretion available within the sentence.

- Temporary Absence

Unescorted temporary absences are granted from provincial prisons (that is, prisons for persons serving less than two years) by provincial prison authorities, and from federal penitentiaries (which hold persons serving two years or more) by the National Parole Board, which in certain circumstances delegates the absence-granting athority to penitentiary officials. Eligiblity rules vary from province to province, but for federal sentences, inmates do not become eligible for unescorted temporary absences (UTA's) until they have served one-sixth of their sentence, or six months, whichever is longer. Life-sentenced inmates do not become eligible for UTA's until three years before eligibility for full parole. In some provicnes, the UTA

program is extensively used in order to release prisoners within weeks from jail terms of some length, in many cases on the recommendation of the sentencing judge.

- Day Parole

This is typically seen as a limited form of release in between temporary absence and full parole. Though in the federal system day parole is usually granted to a halfway facility, all that the law requires is that a day parolee return to the institution "from time to time" or "after a specified period". Day parole is typically available after the service of one-half the period to full parole eligibility, or six months, whichever is longer.

- Full Parole

Full Parole is a term which refers to more extended forms of release from prison. In British Columbia, Ontario and Quebec, provincial parole boards exist to make decisions regarding who should and should not be granted day parole or full parole from provincial prisons. In the other provinces and in the federal penitentiary system, the National Parole Board is the decision-making authority. Most prisoners become eligible for parole after serving one-third of their sentence. Through s.8 of the Parole Regulations, certain inmates who have committed "violent conduct" may at the discretion of the parole board, be required to serve half their sentence before parole eligibility. Special rules exist for persons serving life sentences for homicide and other offences. For example, first-degree murder carries a mandatory 25-year period to parole eligibility, which may be reduced after 15 years through judicial review. Second-degree murder may carry from 10 to 25 years' minimum until parole eligibility. Life sentences imposed other than as a minimum sentnece are subject to a seven-year period prior to parole eligibility. Sentences of indeterminate detention must be reviewed after three years, then every two years thereafter.

Parole by exception is a very limited release form which may be available in rare cases prior to the usual full parole eligibility date. It is infrequently used, and applies only in cases of inmates who are terminally ill, who are subject to a deportation order, or whose continued incarceration would likely result in serious physical or mental harm. The parole by exception power used to be considerably broader, available in "special circumstances" prior to 1978. It is now applied almost exclusively in deportation cases.

- Earned Remission

  In both the provincial and the federal system, mandatory release occurs at the end of the sentence, less time off for good behaviour which may be earned in the institutions for good conduct and program participation. This "remission" of sentence, which has existed for over 100 years, currently allows a sentence to be reduced by up to one-third. (Remission has no effect however, on life sentences. Though lifers may participate in programs which affect the earning of remission, the only means for full release from a life sentence is parole).

- Mandatory Supervision

  In the provincial systems, prisoners are released free and clear at the end of their sentence, less earned remission. In the federal system, since 1970, inmates have been required to serve the remitted portion of their sentence in the community under the supervision of a parole officer. They may be returned to penitentiary at any time before the end of their sentence for either criminal activity or a breach of one of the conditions of release, which in their "standard" form are the same as the conditions of parole. (See Section V for a discussion of the conditions imposed on supervised persons.) Under the current law, early release from imprisonment as a result of remission is a universal feature available to all prisoners who earn remission while institutionalized.

  In 1982, in a controversial action designed to test the universality of remission-based release, the NPB "gated" a number of federal inmates - attempted to detain them until the end of their sentenced in cases thought to be dangerous. "Gating" may eventually become a permanent feature of federal corrections, thus affecting the balance of fixed and discretionary parts of the sentence for offenders considered dangerous.

In your view are the current arrangements concerning when release becomes available appropriate? Do you support the same or differently constituted conditional release programs? Would you favour longer or shorter fixed periods prior to eligibility, or the elimination of fixed periods in favour of case-by-case determination of the first review date for release?

In particular,are the eligiblity rules for lifers and murderers appropriate? Should remission continue to have no practical impact on life sentences? Do you support the notion of creating special eligibility rules for certain cases, as in "gating" or the "violent conduct category" (Section 8 of the Parole Act)?

III.3 Release Policies and Criteria

Above we have considered the objectives which conditional release should pursue, and the extent of the impact which it should have on the sentence of the court. A related question concerns the policies and criteria which flow from those general objectives, and give specificity to them.

Concerns about accountability, visibility, fairness and equity have led some critics to suggest that releasing authorities should be required to give more specific notice of the policies and criteria which govern releasing and revocation decisions. This concern has become perhaps more acute as skepticism has increased about traditonal dimensions of release, such as prediction of recidivism and rehabilitation. There is some speculation that in the post-Charter of Rights and Freedoms era, administrative authorities may eventually be forced to specify the basis for their decisions. On the other hand, many defenders of the present system are convinced that each case must be analysed entirely on its own merits, or at the least they feel that requiring highly specific criteria or guidelines for decisions will unduly reduce the amount of necessary discretion available, or will create a "paper equality" which masks very real inequities.

On what basis should decisions for the granting of release be made? Should more specific release criteria (and criteria for the earning of remission) be established which might have the effect of focusing the decision-maker's attention in certain directions and thus reducing the decision-maker's absolute discretion? Should such criteria or guidelines be placed in law, or merely referred to in law and placed in administrative directives?

III.4 Procedural Rights and Safeguards

The above parts of this Section have dealt with issues of the substance of release decisions. Procedural protections given to individuals at various stages in the release process are also of interest. Initiatives by paroling authorities have created a number of procedural safeguards in recent years not originally specified in the Parole Act: these include the right to a hearing, to notice of hearings, to disclosure of case file material pertinent to the decision, to the provision of written reasons for decisions, and to the assistance of other persons (who may be legal counsel) at hearings. In the remission process, innovations have affected the inmate disciplinary system such that at the federal level, independent chairpersons determine guilt or innocence of institutional charges, and set the disposition, which may include loss of remission. In the

federal system, however, most remission which is lost by inmates is "failed to be earned" because of poor program participation or poor conduct generally, and the process of assessing the earning of remission is much more informal.

In your view, are there any areas in release where increased procedural safeguards are needed? What should they be?

III.5 Review and Evaluation

The courts have, in recent years, increasingly adopted the view that certain administrative processes are governed by the "duty to act fairly", which requires certain basic procedural protections. The Parole Act however precludes any involvement by the courts in reviewing the substance of release decisions.

Though virtually all decisions which affect release are subject to some form or other of internal review by the correctional authority, some critics argue that only independent, outside review can be expected to bring the rigour of close analysis to correctional decisions. Some would argue that the courts or some other body or different bodies should be empowered to provide a full review of certain release decisions. Others contend that only the procedures followed in the decision-making, and not the decisions themselves, should be subject to external review. Certain proposed models for release, such as the Sentence Supervision Board contemplated by the Law Reform Commission in 1973, would have local institutional authorities make certain initial release decisions, while the Board itself would serve in the role of independent reviewer of these decisions (see later in this Section).

In your view, should independent review of the procedures of release and/or the release decisions (or decisions which affect release, such as loss or remission) be available? What type of body should conduct reviews? Are your answers about review different for different decisions or programs?

A related concern is ongoing evaluation of release programs as a whole, not in respect of individual decisions. Issues connected to evaluation and various other types of accountability are addressed in Section VII.

III.6 Suspension and Revocation

Section V of this Paper (Offender Programs) deals with questions of the supervision which should be given to released offenders and the conditions which should be imposed on them. Section 16(1) of the Parole Act provides for the suspension of parole by a member of the Board or by persons designated by the

Chairman when a breach of any term or condition of parole has occurred, in order to prevent a breach of any term or condition, or to protect society. These powers have been questioned by some and it has been suggested that more precise statutory criteria for suspension and revocation should be established.

Are the current provisions for the suspension of parole by the Board or by persons designated by the Chairman appropriate or should more precise criteria be established? Are any changes necessary with respect to suspension and revocation procedures? If so, what additional procedural safeguards should be considered?

III.7 Provincial Parole Boards

Although provincial parole boards are bound by the terms of the Parole Act, the Lieutenant Governor in Council of each province which has a provincial parole board may make regulations in a like manner to the Governor in Council for the federal board. However, the Parole Act specifies that provincial regulations should not be inconsistent with the Parole Act or with federal Regulations.

With the establishment of provincial boards and legislation, experience has already demonstrated a number of differences between the policies and practices of the various boards, e.g., calculation of sentences, procedural safeguards including hearings and assistance at hearings, voting procedures, etc. Should there be limits established in the differences between the policies and practices of the various boards? If so, what mechanisms should be established to ensure a consistent application of the law? (See also Section IV.)

III.8 Releasing Authority

The above discussion has dealt with the major "why" and "how" questions in release. This paper turns now to questions of who should release offenders from imprisonment.

Currently, releasing authority is shared among institutional authorities (who administer remission and, on a delegated or non-delegated basis, grant some temporary absences) and parole boards (who grant day and full parole, and in some cases temporary absences). Mandatory supervision is not granted as such, but established by law in the federal system.

Various criticisms have been made of the current arrangements. On the one hand, some feel that institutional authorities are too close to the pressures of running a prison to make sound and equitable decisions which affect the liberty of individuals. The Hugessen Task Force (1972) recommended that all

release decisions, and even transfer decisions, be made by an authority independent of the prison authority. On the other hand, it has been argued (mostly by institutional authorities) that they are in the best position to observe and understand the offender, and are thus best suited to make all release decisions, possibly subject to review.

Critics have also argued that there are difficulties with bodies like parole boards which render them unsuitable.

Though organizationally independent of prison authorities, they may be close to them in training and experience, and rely very heavily on the case planning, preparation and recommendations of personnel of the prison and parole service. Thus, they may not be as "independent" in an operational sense as is desirable. Other observers may feel that bodies like parole boards are "too" independent in the sense that they may be unfamiliar with corrections or law enforcement generally, and may not be sufficiently integrated into processes of offender program planning or requirements of accountability imposed on other government bodies.

Some critics advocate closer judicial involvement in release decision-making, both in order to ensure substantive and procedural due process, and in order to encourage the judiciary to come to grips with key questions about the "meaning of prison sentences", such as the purpose of the sentence awarded, sentence disparity, what imprisonment is like, what programs it involves, and how much time should be served, on average, by certain types of offenders.

What is your view of <u>who</u> should make initial releasing decisions? The major options appear to be as follows. Are your answers different for different release programs?

- decisions by an independent administrative tribunal constituted in a manner similar to a parole board
- decisions by institutional authorities
- decisions by sentencing judges generally
- decisions by special judges appointed for that purpose, perhaps within a special arm of the judiciary.

III.9 Major Models

Over the years since remission and release were first created, a number of holistic "models" for release have been suggested by various observers. Though many of the issues which these models are intended to address (such an objectives, procedures and who should decide) have been raised above, it may be useful to describe some of these models below, in order to

highlight these issues again and assist the project to respond to the proposals which have been made. One obvious model, the status quo, is not described below, since it has already been reviewed in some detail.

Law Reform Commission Model

Since the work of the LRC is "Phase One" of the Criminal Law Review, the Commission's model for release is dealt with first.

In a 1975 working paper entitled Imprisonment and Release, the LRC reviewed a number of important issues in the conditional release area and proposed the following model based on the concept of a sentence supervision board. This board would be constituted much like the current parole board, but would be established to review all major decisions of imprisonment and release (which would be initially made by prison personnel) and to make the initial decision in serious cases affecting a breach of prison regulations. Essential elements of this sentence supervision board were independence, full due process, and supervision over the entire sentence, with ultimate recourse to the courts. Generally the Board would intervene only in more serious cases, with the review being either automatic or optional depending on the gravity of the situation.

Offenders sentenced to imprisonment for the purpose of separation from the rest of society would be subject to graduated release from complete custody through various stages, established in advance on a presumptive basis, leading to ultimate release. The prescribed staging would be developed through the sentence supervision board, which would act independently of prison and other correctional administration. The transition from one stage to another would be automatic unless the offender shows criminal conduct or breaches the conditions of that stage; the decision would not be based on a prediction of risk in the abstract, but on conduct. If a sentence is imposed solely for the purpose of denunciation, a graduated program of release would not be necessary; however a temporary absence program should be utilized to offset the damaging effects of incarceration and the offender would normally be expected to serve the final one-third of his sentence under supervision in the community, though some could be detained until sentence expiry. This final third would not be established through remission, but would normally lead to release prior to the end of the sentence. Provision would be available to reduce conditions of supervision after two successful years in the community, or, to terminate a sentence after a period of offence-free conduct by application to a court.

The LRC model appears to have the advantages of placing initial decision-making with the prison staff closest to the inmate, while providing a review function by a specialized board which would presumably reduce the workload which eventually would

land in the courts, on appeal. Highly specific policies governing each stage of incarceration are required. Remission is abolished, and dangerous offenders could be held until sentence expiry, but most offenders would normally serve the last third of their sentence in a "decompression" period of community supervision.

Possible disadvantages of this model are that it relies so heavily on appeal by the offender to the reviewing authorities, in order to ensure accountability. It also assumes that decompression and programs of graduated release through forms of increased liberty are a sound practice, which may not be the case for all offenders or even for most. Only misconduct on the offender's part can interrupt this decompression process, and this too may be impractical. Finally, the entire LRC concept of imprisonment and release is premised on the ability to distinguish dangerous persons from the non-dangerous - a rather tenvons premise.

Hugessen-Goldenberg models

The 1972 Hugessen Report and the 1974 Goldenberg (Senate Committee) Report took very similar views of parole, and many of their common recommendations have already been implemented. In those respects which have not been implemented the Reports are somewhat similar. Hugessen would suggest a two-tier, multi-disciplinary board, with the local board (attached to the local penitentiary) making final decisions about non-violent offenders serving under five years. Regional boards would decide on other offenders. The centralized Parole Commissioner and Parole Institute would provide the data feedback and other administrative support needed by the local and regional boards. Legislation would set "explicit criteria" for decisions. Remission would be abolished, but the last one-third of the sentence would still be served in the community, under supervision. Judicial review would be available on procedural matters only. No involvement by elected officials in parole decisions would be permitted.

The Goldenberg report also endorsed release as an integral part of the correctional process. A main difference with the Hugessen report was Goldenberg's view that release should in no way be concerned with sentence disparities which are a matter for the courts to address. Goldenberg too would eliminate remission, but instead would create a form of "minimum parole" granted automatically to all federal and provincial offenders for the final one-third of their sentence. The first third of the sentence would be fixed as the institutional part of the sentence, and the middle third subject to discretionary parole.

Juge de l'application de la peine

A model in use in France and other European countries for some years is the juge de l'application de la peine. He is a specially created "sentence administration judge". In France, the judge (JAP) was also originally created as a means for protecting offenders' rights, overseeing prison conditions and disciplinary processes, and implementing individual programs of treatment and gradual release. Refinement of the JAP model have included the creation of screening and advisory bodies which may be composed of local correctional officials.

The JAP model is intended to provide a vigorous judicial review of conditions and decisions affecting the lives of offenders, and the tension which has developed in some countries between the JAP and penal authorities may be a sign of a healthy balance of power being exercised. On the other hand, this model could have disadvantages linked to the enormous workload of the JAP, the physical and professional distance of the JAP from prison authorities, and difficulties in integrating his decisions effectively into overall correctional objectives and principles.

Minimalist model

This model is based on the view that less intervention is better with offenders than more, unless there are compelling reasons, i.e., protection of the public, to intervene. This approach may be justified on a number of grounds. First, some criminologists believe there is evidence to suggest that "doing nothing" may be at least as effective as more intrusive correctional measures. In the absence of specific evidence as to "what works", it is best to do so as little as possible, consonant with important criminal justice aims such as protection of the public from violent behaviour. Minimal intervention is less destructive to the offender's links to the community, thus aiding re-integration. Minimal intevention is considered in the long run cheaper and more humane than traditional correcional intervention.

This approach was at least partially endorsed in CLICS in the principle that (i) "in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances". At the level of release from incarceration, a minimal model would likely involve presumptive release of all offenders at the earliest possible date, supervision for as short a period as possible under minimal, if any, restrictions, and return to penitentiary only for new criminal charges. In effect, release on parole would effectively mean termination of sentence, but a further criminal offence would be treated more severely, in light of the violation of parole.

This model has several advantages: It meets the criticism that parolees should not be expected to live up to a higher standard of behaviour than others, but provides for increased penalties for further criminal behaviour. Punishment for parole violation (further criminal offence) would be determined by the courts and would be proportionate to the harm caused. Costs of parole system would be reduced, use of resources maximized, i.e., assistance available only to those who want it. Sentence administration would be substantially simplified - prisoners would not be able to serve one sentence "off and on" for a period of years.

Major objections to this model include the difficulty in identifying those offenders in respect of whom the presumption of release should not apply. It is also contrary to the "common sense" view that you get more protection by doing more: incarcerating more people for longer periods of time, and may therefore be politically unacceptable. It may also be expected to encounter considerable difficulties in obtaining public understanding and support.

SECTION IV. OFFENDER RIGHTS

INTRODUCTION

It has been suggested that a prisoner should retain all rights except those which are necessarily taken away by the fact of incarceration. Some rights are taken away by legislation, such as the right to vote, the right to hold public office, the right to certain future employment and licences, the right to remain in Canada in certain circumstances. Other rights have been held to be implicitly removed or restricted by virtue of incarceration:freedom of movement or association, use of the mails and telephone, or the right to marry. In addition, an inmate is given some few rights because of the fact of his incarceration.

However, the rights afforded to inmates in our correctional systems are typically found in subordinate or delegated legislation. Prior to 1961, the Penitentiary Act contained a requirement that convicts be provided with sufficient clothing, food and bedding. This was the only mandatory provision concerning inmate rights in Canadian legislation, and had been in existence in some form since 1938. In 1960 it was dropped from the Act, and in 1962, included in the Regulations pursuant to the Penitenitary Act, in addition to the requirement that adequate medical and dental care and toilet articles be provided.

Pursuant to the Act, the Commissioner of Corrections has the power to make.rules, known as Commissioner's Directives, with respect to the running of penitentiaries and the conduct of inmates which bind the inmates but impose no legally binding duty upon the institutional administration. In addition, the Regulations permit further rules to be issued by the Directors of Divisions and by institutional heads concerning matters within their responsibility.

The rights conferred by the Regulations often have to be read in light of the Directives which may dilute the force of the rights. The increased reliance on delegated legislation removes inmate rights from Parliamentary scrutiny and leaves them in the hands of penitentiary administrators. A key issue in this area has therefore been whether correctional law should specify more extensively the rights which will accrue to convicted persons.

Until very recently, our judicial system has not been particularly concerned with correctional decision-making. Once sentenced to imprisonment, the court's duty was discharged and correctional authorities had virtually absolute authority to determine how a sentence was to be served. This was due, at least in part to the old notion of civil death or disability consequent upon a criminal conviction. Although the concept of

civil death was abolished in Canada in 1892, the traditional view of Courts that review of prison administration was something beyond their jurisdiction has lingered.

That change that has occurred is, arguably, a result of our changing views of the absolute authority of administrative bodies in general, and only secondarily because of an interest in reviewing the actions of correctional authorities. In Canada, the 1978 decisions of the Supreme Court of Canada in Re Nicholson and Haldimand-Norfold Regional Board of Commissioners of Police was the first to recognize a legally enforceable "duty to act fairly" on administrative bodies. This duty has now been held by the Courts to exist in relation to many of the more serious decisions made by correctional authorities about prisoners.

Part IV of the Canadian Human Rights Act, now repealed, extended to all citizens the opportunity to see information about themselves held by the government. Although used little by ordinary citizens, it has been used extensively by prisoners.

With the enactment of the new Access to Information and Privacy Acts, and more importantly the Canadian Charter of Rights and Freedoms, prisoners are finding themselves able to attest legal claims for better, and fairer treatment.

Finally, principle (j) in CLICS attests that "in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls". If given effect in legislation this principle could have a substantial impact on the lives of prisoners.

ISSUES

IV.1 Prison Disciplinary System

Disciplinary Offences for federal inmates are listed in s.39 of the Penitentiary Service Regulations, and are:

a) disobeys or fails to obey a lawful order of a penitentiary officer,

b) assaults or threatens to assault another person

c) refuses to work or fails to work to the best of his ability

d) leaves his work without permission of a penitentiary officer,

e) damages government property or the property of another person,

f) wilfully wastes food,

g) is indecent, disrespectful or threatening in his actions, language or writing toward any other person,

h) wilfully disobeys or fails to obey any regulation or rule governing the conduct of inmates,

i) has contraband in his possession

j) deals in contraband with any other person,

k) does any act that is calculated to prejudice the discipline or good order of the institution,

l) does any act with intent to escape or to assist another inmate to escape,

m) gives or offers a bribe or reward to any person for any purpose,

n) contravenes any rule, regulation or directive made under the Act, or

o) attempts to do anything mentioned in paragraphs (a) to (n).

It has been suggested that disciplinary offences should be more clearly defined in order that the inmate knows what constitutes an offence. Is this appropriate, or does the penitentiary administration need more discretion to control an institution?

At present, an inmate charged with a disciplinary offence is not entitled to counsel, and cannot appeal the decision of the Independent Chairperson, since these are not provided for in legislation or in regulation, and are not required in all cases by virtue of the "duty to act fairly". However, an inmate may be sentenced to dissociation (where he will fail to earn a number of days of remission, or forfeit any amount of the remission), standing to his credit (although forfeiture of more than 30 days must be approved by the Deputy Commissioner for the region, while forfeiture of more than 90 days must be approved by the Minister), thus extending the period of time during which he is not entitled to be released from incarceration.

Are the safeguards which surround the disciplinary process sufficient, or is it reasonable to impose a higher standard on prison administrators in respect of prison disciplinary hearings?

A number of changes could be made to the hearing procedure, for example:

(a) right to counsel or to assistance by other representatives;

(b) requirement that the decision to convict be on the basis of "beyond reasonable doubt" be moved from its present (unenforceable) location in the Directive to the Regulations;

(c) internal review mechanism, similar to that for parole review;

(d) right of review by Federal Court of Appeal, pursuant to s.28 of the Federal Court Act, which would provide a limited review on the basis of "natural justice";

(e) right to full appeal to a court as to the merits of the decision.

Do you think any of these, or any other, requirements should be attached to the disciplinary process?

IV.2 Visiting and Correspondence

Visiting and correspondence are addressed in Section 27 of the Penitentiary Service Regulations as follows:

> "The visiting and correspondence privileges that may, in accordance with directives, be permitted to inmates shall be such as are, in all the circumstances, calculated to assist in the reformation and rehabilitation of the inmate."

The U.N. Standard Minimum Rules for the Treatment of Prisoners included the following on the subject of contact with the outside world:

37 Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

Should the Canadian legislation stipulate that inmates shall be allowed visits and correspondence, and if so, should there be any restrictive conditions (e.g., no visits while in punitive dissociation)?

If visiting and correspondence are maintained as privileges rather than rights, should they be restricted only to circumstances where they are calculated to assist in the reformation and rehabilitation of the inmate?

IV.3 Censorship

Section 28 of the Penitentiary Service Regulations addresses the matter of censorship as follows:

> "In so far as practicable, the censorship of correspondence shall be avoided and the privacy of visits shall be maintained, but nothing herein shall be deemed to limit the authority of the Commissioner to direct or the institutional head to order censorship of correspondence or supervision of visiting to the extent considered necessary or desirable for the reformation and rehabilitation of inmates or the security of the institution."

While a case can be made for censorship of correspondence on the grounds of institutional security, can we defend censorship on the grounds that it is "considered necessary or desirable for the reformation and rehabilitation of inmates"?

Should this legislation be modified? If so, how?

IV.4 Library Services

Although section 31 of the Penitentiary Service Regulations prohibits certain reading material, there is no section of the Regulations which directs the provision of library services to inmates.

In this regard, the U.N. Standard Minimum Rules for the Treatment of Prisoners state the following:

> 40 Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.

Should Canadian legislation include a statement requiring the provision of libraries for inmates? Should there be a specific requirement that adequate legal materials be provided in the library?

IV.5 Employment of Inmates

Subsection 35(1) of the Regulations stipulates that "every inmate is required to work at an occupation or activity that is calculated to assist in his reformation and rehabilitation." On the subject of inmate employment (and the related subject of vocational training), the State Department of Corrections Act (Advisory Commission on Intergovernmental Relations) includes the following section:

> "The department shall provide employment opportunities, work experiences, and vocational training for all inmates. To the extent possible, equipment, management practices, and general procedures shall approximate normal conditions of employment."

Comparing these two sections on the subject of inmate employment raises two issues. The first concerns the difference in approach - the first placing the requirement on the inmate to work, the second placing the requirement on the department to provide work (and vocational training) for inmates. Should the Canadian legislation reflect the current approach, the alternative, or both?

The second issue concerns the enunciation in the model code of the principle that prison employment shall, to the extent possible, approximate normal conditions of employment. Should the Canadian legislation be amended to incorporate this principle? Should an inmate have an entitlement to work (and thus to the benefit such as savings, better parole opportunities, etc.)?

IV.6 Inmate Pay

Section 36 of the Penitentiary Service Regulations stipulates that "the Commissioner may, with the approval of Treasury Board, authorize rates of pay for inmates", while the details on how inmates are actually paid are to be described in the Commissioner's Directives. Inmates have thus no entitlement in law to pay, even if they perform the work they have been assigned to do. Should this be remedied?

Some model legislation requires the inmate to contribute to the support of his dependents who may be receiving public assistance during the period of commitment, if funds available to him are adequate for that purpose. Similarly, some legislation calls for the deduction of money from an inmate's pay to defray all or part of the cost of maintaining him in prison.

Also, in keeping with the princple of individual responsibility, and easing the offender's post-release adjustment to the community, it may be advantageous to stipulate, where practicable, standard employee deductions (i.e. U.I.C., C.P.P. and provincial health insurance contributions at the appropriate time). Should provisions for the deductions from inmate pay be specified in the Canadian legislation? If so, which deductions should be included, and how should the section be worded?

IV.7 Transfers

Prior to an inmate being transferred for administrative reasons, he is given forty-eight hours to present reasons as to why the decision should be reconsidered. This procedure need not be followed in instances where "security" considerations must be met. Do you think that an inmate should be allowed some basic safeguards to cover these situations?

IV.8 Legal Aid

Since legal aid plans are provincially operated, the criteria for, as well as the availability of, assistance varies from province to province. What responsibility does the federal government have to ensure that all federal prisoners have access to legal assistance? Should there be some sort of agreement between the provinces with respect to eligibility for legal aid for federal inmates?

There has been debate with respect to the most appropriate way of providing adequate legal services to prisoners. Do you think service delivery could best be achieved by:

- legal aid certificates provided in the normal way?
- specialized clinics located close to penitentiaries?
- other means?

IV.9 Special Offender Groups

A variety of "special offender" groups (e.g., dangerous offenders, offenders from minority cultural groups, female offenders, sexual offenders, drug/alcohol abusers) are

considered to have special correctional needs. Current legislation does not specifically address the circumstances and needs of these groups.

Is it feasible and appropriate to frame legislation that would be directed to any of these special offender groups? If so, how should such legislation be worded?

IV.10 Female Offenders

Section 24 of the Penitentiary Service Regulations states:

> "No female inmate shall be kept in a form of custody in which, without the constant supervision of an officer, she can associate with male inmates."

This section does not stipulate whether the officer shall be male or female. Should legislation stipulate that only female officers shall guard female inmates, except on perimeter posts?

On the subject of female inmates, the Standard Act for State Correctional Services (National Council on Crime and Deliquency) provides that "women committed to the department shall be housed in institutions separate from institutions for men." Should Canadian legislation include a regulation of this sort?

IV.11 Charter of Rights and Freedoms

The enactment of the Canadian Charter of Rights and Freedoms has raised a number of issues concerning correctional legislation and practices related to offender rights.

Section 1 guarantees rights and freedoms subject to reasonable limits prescribed by law. Should there be a general statement of guiding principles contained in correctional legislation to identify these reasonable limits? If yes, what should the principles be?

Section 3 states that every citizen has the right to vote. Should this apply to prisoners? What about offenders on bail, parole or mandatory supervision?

Given that special offender groups such as Native and females, because of their small numbers, may not receive, in every instance, treatment or programs which result in equal benefit to that provided to other offender groups, does this

contravene Section 15 which provides for equality before and under the law and equal protection and benefit of the law? If you believe so, how can this reasonably be alleviated?

IV.12 International Obligations

In 1976, Canada endorsed the U.N. Standard Minimum Rules for the Treatment of Prisoners. In 1976, Canada adhered to international covenants containing sections on inmates' rights and signed the Optional Protocol to the Covenant on Civil and Political Rights. To date, not all these standards have been adopted or implemented, for example, Article XV of the International Covenant on Civil and Political Rights, to which Canada is a signatory, provides that if, "subsequent to the commission of an offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."

Since international law has no enforceable application in Canada unless incorporated into domestic law, should these treaties be given effect through legislation?

IV.13 Internal Remedies

Currently, prisoners have a number of remedies internal to the correctional system available to them to rectify perceived inadequacies or injustices in the way they are treated by the system. Which of the following remedies should and which should not be available to offenders? How could any of them be made more effective?

(1) Ombudsmen

At the federal level, and in some provinces, inmates have access to an independent ombudsman who has the authority to enter institutions at will and obtain access to inmates and their files, but whose role in resolving disputes is limited to making recommendations.

(2) Grievance Process

In most correctional systems, the inmate can file a complaint through a formal grievance system. In the federal correctional system, there is a tiered grievance procedure under which an attempt is made to respond to the problem first at the level of the parties concerned; after which, if the dispute is not resolved, the parties can seek an

advisory opinion from the institution's Citizens' Advisory Committee. Then, if the answer is not satisfactory to the inmate, the matter will be reviewed by the Warden of the Institution, the Deputy Commissioner of the region, and finally by the Deputy Commissioner of Offender Programs.

(3) Citizens' Committees

An inmate can bring any concern to the Citizens' Advisory Committee, which is a body of community members appointed by the Warden of each federal institution. This Committee makes itself available to listen to concerns or complaints raised by inmates, staff or management, and may make recommendations as to appropriate resolutions.

(4) Arbitration

In some American jurisdictions, a tiered grievance procedure is established which relies on mediation among the parties in the first instance, followed by review levels which reflect the organizational structure of the correctional authority, and ending in binding arbitration. The arbitration process avoids the costs and delays of litigation, and arbitration orders must be followed unless they would be contrary to law, would endanger any individual, or could not be accommodated within the correctional budget for the current fiscal year.

Are there other internal remedies which should be explored for safeguarding offenders' interests?

IV.14 Codification of Further Offender Rights

The previous sections have raised questions about a number of specific areas where offenders presently have, or perhaps should have, rights in law. In general, should new legislation in corrections be more comprehensive about the rights which offenders do and ought to have? Should a "code of offender rights" be legislated? If so, in what detail should these rights be described?

IV.15 Scope of Legal Requirements on Corrections

The Courts have held that penitentiary administrators have a duty to act fairly towards the prisoners in their charge, but the Courts will only intervene to overturn an unfair act on the part of the administration when the act had serious consequences for the prisoner. Thus disciplinary hearings have been held to be subject to the duty to act fairly, but transfer decisions, in almost every case, have not. The content of the duty to act fairly varies according to the circumstances, but is generally thought to include the right of the prisoner to be advised of the case against him, and to be given an opportunity to respond.

Is the duty to act fairly, (a procedural safeguard), a sufficient standard to impose on correctional administrators? What kind of decisions should this, or some other standard, attach to?

e.g., disciplinary hearings
transfers
educational and vocational opportunities
parole hearings (see also Section III)
placement in administrative segregation or S.H.U.'s
classification into maximum, medium or minimum security

SECTION V. OFFENDER PROGRAMS

INTRODUCTION

The subject of offender programs is not elaborated in the Penitentiary Act. There are sections of the Act which establish authority in respect to commitment, reception and transfer of inmates, as well as a provision for federal-provincial agreements that would provide for the Custody of mentally ill inmates in provincial mental hospitals. There is also a section which directs that an Advisory Committee on Penitentiary Industry be appointed by the Minister to advise the Commissioner on penitentiary industrial operations. However, the major force of the Act in regards to offender programs is section 29 which stipulates that the Governor in Council may make Regulations for the custody, treatment, training, employment and discipline of inmates; and subject to the Act and to these Regulations, the Commissioner may make directives in all these areas.

The Penitentiary Service Regulations elaborate the provisions set down in the Act. Part II concerns the custody and training of inmates, and contains 31 sections on a variety of subjects ranging from reception, classification, food and clothing, medical and dental care, exercise, visting and correspondence, hobbies, employment, and inmate pay, to the custody of inmates, inmate offences, and dissociation. Part III establishes regulations for the operation of penitentiary industries, and for the disposal of articles produced by inmate labor.

The Prisons and Reformatories Act is similar to the Penitentiary Act in that it states that the Lieutenant Governor of a province may make regulations respecting the "custody, treatment, discipline, training and employment of prisoners".

Offender programs, for the purposes of this section, refer to all programs relating to the custody, treatment and training of inmates, except those in the areas of release and remission (which are covered in section III), and those that relate more strongly to offender rights, e.g., grievance procedures (which are covered in section IV). The following section identifies topics in the area of offender programs where current legislation may be inadequate; highlights alternative legislation from various model codes; and asks the reader to comment on the merits of alternative legislation. In this regard, the reader may do well to address the following set of fundamental questions in each instance:

a) What is the impact of the current legislation?
b) What are its limitations?
c) What is the purpose in proposing changes (i.e., what impact are we hoping that a revised formulation will have on actual practice?)

ISSUES

V.1 Commitment/Transfer

Subsection 13(3) of the Penitentiary Act states:

> "Where a person has been sentenced or committed to penitentiary the Commissioner or any officer directed by the Commissioner may, by warrant under his hand, direct that the person shall be committed or transferred to any penitenitary in Canada..."

In a similar vein, subsection 13(4) of the Act states:

> "Where a person has been sentenced or committed to penitentiary, the officer in charge of the regional headquarters for the region in which the person is confined may, by warrant under his hand, direct the transfer of that person to any other penitentiary within the region."

This legislation does not impose any criteria on the transfer or decision process.

The Standard Act for State Correctional Services (National Council of Crime and Delinquency) proposes a clause in the statement of authority for transfer that ties the transfer decision to the mandate of the corrections agency, i.e. "consistent with commitment, and in accordance with treatment, training and security needs." Should such a clause be included in Canadian legislation?

V.2 Reception/Reception Procedure

Current legislation concerning reception stipulates:

> "Every inmate who is sentenced or committed to penitentiary shall, in so far as facilities permit, be kept in custody in a reception area until the reception procedure, as set out in directives, has been completed."
> (P.S.R., section 11)

The American Law Institute Model Penal Code calls for "reception centres" that are (preferably) separate institutions with (definitely) independent administration and personnel. There has been experience in C.S.C., and a history of debate, on the subject of reception centres. Only the Québec region currently operates a reception centre.

Would it be desirable to establish reception centres in Canadian legislation?

Section 12 of the Penitentiary Service Regulations states:

"The reception procedure shall include an investigation into the medical, psychological, social, education and vocational condition and history of the inmate and the motivation for his offence"

Some model legislation emphasizes that the corrections agency shall undertake an assessment of the inmate at the point of reception and, to the maximum extent feasible, at later points, including in community-based institutions. Commissioner's directives currently provide for a needs analysis profile and individual program plan for each inmate.

Would it be desirable to elaborate the legislation on the subject of assessment and program planning? If so, what should be included in this section, and how should it be worded?

Further on the subject of reception procedure, some model legislation proposes that a copy of the reception report be forwarded to the clerk of the court which sentenced the prisoner. Presumably, the intent of this clause is to insure some feedback from corrections to the courts.

Should a clause of this sort be inserted in Canadian legislation?

V.3 Treatment of Mentally Ill/Retarded Inmates

Subsection 19(1) of the Penitentiary Act states that:

"The Minister may, with the approval of the Governor in Council, enter into an agreement with the government of any province to provide for the custody, in a mental hospital or other appropriate institution operated by the province, of persons who, having been sentenced or committed to penitentiary, are found to be mentally ill or mentally defective at any time during confinement."

The circumstance in which there is no agreement with the provincial government is addressed in subsection 19(2), wherein the Commissioner may authorize the return of the inmate to the place of confinement from which he was received.

The diagnosis, management and treatment of mentally ill and mentally retarded offenders is an extremely complex subject that is rife with medical, psychological, custodial and jurisdictional issues. Many of these issues are being covered in the Mental Disorder Project of the Criminal Law Review. Although subsection 19 (2) has not been used for many years, this provision places provincial governments in an uncomfortable position. In any event, the legislation does not go very far in addressing the issue of the treatment of these individuals.

How might this section of legislation be improved? Is it feasible to frame legislation that would direct those inmates who are diagnosed mentally ill or mentally retarded to be transferred to an appropriate mental health facility? Should there be a "right to treatment" for mentally ill offenders?

V.4 Classification

The Penitentiary Service Regulations contain the following section on the subject of classification.

> "The file of an inmate shall be carefully reviewed before any decision is made concerning the classification, reclassification or transfer of the inmate."

The American Law Institute Model Penal Code provides considerable detail regarding classification, including a statement on the composition of a Reception Classification Board, the procedure for this Board, and the Director's authority for designating the institution to which the prisoner shall be transferred (based on the report prepared by the Reception Classification Board).

Is it a good idea to elaborate Canadian legislation along these lines? If so, what should the legislation on classification contain?

V.5 Correctional Training Program

The general statement regarding the actual correctional program in Canadian penitentaries is contained in subsection 20 (1) and 20 (2),which are as follows:

> 20(1) "There shall be, at each institution, an appropriate program of inmate activities designed, as far as practicable, to prepare inmates, upon discharge, to assume their responsibilities as citizens and to conform to the requirements of the law."
>
> (2) "For the purpose of giving effect to subsection (1), the Commissioner shall, so far as practicable make available to each inmate who is capable of benefiting therefrom, academic or vocational training, instructive and productive work, religious and recreational activities and psychiatric, psychological and social counselling."

It is interesting to compare this statement with a corresponding section of the Standard Act for State Correctional Services (National Council on Crime and Delinquency) which is worded as follows:

"Persons committed to the institutional care of the department shall be dealt with humanely, with efforts directed to their rehabilitation, to effect their return to the community as promptly as practicable. For these purposes the director shall establish programs of classification and diagnosis, education, casework, counselling and psychotherapy, vocational training and guidance work, and library and religious services; he may establish other rehabilitation programs".

The latter statement presses for the inmate's "return to the community as promptly as practicable." Should this concept be reflected in Canadian legislation on correctional programs?

The latter statement simply requires the director to establish a variety of rehabilitative programs, whereas the Penitentiary Service Regulation requires the Commissioner to make available a variety of programs, as far as practicable, to those inmates capable of benefitting from them.

What elements of one or both would it be best to include in legislation on this subject? Should legislation specify the types and range of educational, vocational and other programs which must be made available?

V.6 Medical and Dental Care

The Penitentiary Service Regulations include the following section on medical and dental care:

"Every inmate shall be provided, in accordance with directives, with the essential medical and dental care that he requires."

The American Law Institute Model Penal Code proposes a clause that would permit an inmate, at his request, to provide such care for himself at his own expense. Is such a clause desirable for Canadian legislation? The federal system currently allows an inmate to seek an outside medical diagnosis, at his own expense. Should the penal institution be obliged to provide the medical care prescribed by an inmate's outside doctor or dentist, provided it is non-elective in nature (e.g., plastic surgery)?

V.7 Disposal of Industrial Products

Section 43 of the Penitentiary Service Regulations stipulates that the articles produced by inmate labor "shall not be disposed to purchasers in the ordinary course of trade under competitive conditions" unless so authorized by the Treasury Board. The U.S. National Advisory Commission on Criminal Justice Standards and Goals adopted the position (Standard 16-13) that any legislation which prohibits the sale of products of prison industries on the open market should be repealed.

Is it feasible (and/or desirable) to open the market for penitentiary industrial products?

Section 43 further stipulates that the articles "may be disposed of to any department, branch or agency of the government of Canada, the government of a province or a municipal government, or to any charitable, religious or non-profit-making organization".

The State Department of Correction Act (Advisory Commission on Intergovernmental Relations) proposes a provision that "tax-supported departments, agencies shall give preference to the purchase of products of inmate labor and inmate services".

Should legislation that would accord preferential status to penitentiary industrial products be adopted in Canada?

V.8 Penitentiary Industry

Section 27 of the Penitentiary Act directs that an Advisory Committee on Penitentiary Industry be appointed by the Minister to advise the Commissioner on penitentiary industrial operations. Since the Act does not direct the establishment of any other committees to oversee offender programs (e.g., Citizens Advisory Committee, a Volunteer Agencies Advisory Committee, etc.) is this section an anomaly that should be repealed? Or, is the matter of penitentiary industry of such importance that it merits a section in the Act that establishes an Advisory Committee in this area? Should similar legislation be devised to establish advisory committees in other areas of offender programs?

V.9 Community Supervision of Offenders

The nature of the supervision, surveillance and assistance provided to an offender who is under correctional authority in the community may vary greatly. The conditions imposed as part of an order of probation or a grant of conditional release may be as broad as the law and general standards of resonableness permit under the Charter.

What provision, if any, should be made in the law to specify the conditions of community supervision which may be imposed? Which of the following should and should not be permitted as imposed conditions? Which should be available as standard conditions and which should be available as special conditions which can be imposed only on certain offenders?

- keep the peace and be of good behaviour;

- fulfill all legal and social responsibilities;
- provide for the support of his/her spouse or any other dependants whom he/she is liable to support;
- abstain from the consumption of alcohol either absolutely or on such terms as may be specified;
- abstain from owning, possessing or carrying a weapon;
- make compensation to any other persons for any loss, damage or injury suffered by that person;
- perform any unpaid work, not exceeding one hundred hours, as may be specified as community service;
- submit to treatment for alcohol or drug addiction if the decision-maker is satisfied that the offender is in need of treatment, the offender consents to undergo such treatment and a treatment facility consents to receive him;
- refrain from residing in a designated place or frequenting a designated place;
- remain within a designated area and notify the person designated of any change in his/her address or his/her employment or occupation;
- make reasonable efforts to find and maintain suitable employment, and report any change in employment;
- obtain permission before purchasing a motor vehicle, incurring debt or assuming additional responsibilities such as marriage;
- report regularly to the police;
- report any arrest by the police or questioning by police concerning any offence.

V.10 Public Participation and Non-Government/Volunteer Programs

The present legislation does not contain a section on the subject of mechanisms for public participation in penitentiaries and for the operation of non-government/volunteer programs. In view of the current emphasis on the role of society in all areas of Criminal justice, (e.g., Principle (1) in The Criminal Law in Canadian Society) it may be important to enunciate in law the role of the public, and/or agencies that operate non-government/volunteer programs in penitentiaries and in the community.

Should mechanisms for the participation of the public, and for relevant agencies, be established through legislation?

What should be included in legislation in this area, and how should it be worded?

V.11 Community Services/Programs/Resources

The establishment of community services, and the resources to fund these services, is not provided in the present legislation. One issue that frequently arises in discussions regarding the return of inmates to the community centres around the problems that these individuals encounter in making the adjustment due to inadequate funds. The Standard Act for State Correctional Services (National Council on Crime and Delinquency) directs the department to "establish a revolving fund from funds available to the department, to be used for loans to prisoners discharged, released on parole, or released on mandatory conditional release, to assist them to readjust in the community".

Should such a fund be established in Canadian legislation?

Apart from such a fund, should legislation direct that certain services shall be provided to inmates upon their return to the community? If so, how should such legislation be worded?

V.12 Reconciliation

The notion of reconciliation of victim, community and offender is increasingly being recognized as a goal of the criminal justice system (e.g., Principle (g) in The Criminal Law in Canadian Society). The current legislation does not specifically address the concept of reconciliation, or the subject of offender programs that would contribute to the realization of this goal.

Should the legislation contain a section on reconciliation and the establishment of offender programs in support of reconciliation? What should be included in such legislation?

SECTION VI: FEDERAL-PROVINCIAL ISSUES

INTRODUCTION

In recent years there has been a steady increase in the interaction between federal and provincial operations in the field of corrections, and this interaction has generated strong demands for better federal-provincial coordination. The separate powers and roles of the two levels of government are recognized in law: federal authority over penitentiaries in section 91 (28) of the British North America Act (the Constitution Act, 1867) and provincial authority over prisons in section 92; the "two-year rule" is established in section 659 of the Criminal Code. By contrast, neither constitutional nor statute law adequately recognizes the areas of necessary federal-provincial interaction.

This increased cooperation is exemplified by the expanded use of community programs in both jurisdictions, use of Exchange of Service Agreements, expansion of provincial paroling authority and extensive consultations between governments. There has been insufficient linkage between these innovations and the legislation that has authorized their negotiation. The shortcomings of the legislative expression of the appropriate federal and provincial roles and the imprecise division of constitutional authority have constantly been criticized by those working in the system. They were cited as early as the Archambault Report (1938), as well as the Fauteux Report (1956), and the Ouimet Report (1969). The 1977 Subcommittee Report to Parliament (the MacGuigan Report) stated: "one of the major problems facing criminal corrections in Canada is the jurisdictional split between the provincial and federal penitentiary systems." The split in jurisdiction and a number of other areas of conflict and confusion between federal and provincial correctional systems were identified in a major study of Duplication and Overlaps in the late 1970's. Various other studies such as the Report of the Federal-Provincial Task Force on Long Term Objectives in Corrections, 1976, have recommended that the system be rationalized and the legislation be amended to express clearly the appropriate role in each level of government.

It has sometimes been suggested that "two-year rule" is the principal source of conflict and confusion in the Canadian correctional system. It may be too ambitious for this review to attempt to resolve what has been a fundamental issue for decades. Nevertheless, it is the mandate of this review to restructure federal correcional legislation to achieve the following goals:

- expression of the philosophy and objectives that will dictate, to some extent, the Federal Government's approach to provincial correctional systems.

- clarification of the scope of federal jurisdiction stemming from sections 91 (27) and (28) of the B.N.A. Act.

- clear statements of the powers and role of various officials and structures in the federal system.

- possibly the identification of mechanisms for resolving federal-provincial differences; provision for delegation; federal-provincial agreements, etc.

This review thus represents an opportunity to at least clarify and make legislative provision for appropriate federal and provincial roles in the correctional field, even though the problem of the two-year rule itself may not be resolved.

The Report of the Federal-Provincial Task Force on Long Term Objectives in Corrections (1976) is of interest for its list of criteria against which various options for redesigning federal and provincial roles in corrections should be evaluated. While the Report deals with the broadest spectrum of such options, including exclusive federal jurisdiction over corrections on the one hand and exclusive provincial jurisdiction on the other, the criteria against which all possible options should be measured would include:

1. Philosophy, values, goals and objectives,

2. The impact of the administration on services, programs and clients (service delivery),

3. Implications for minimum standards and equal access to service across the country (balancing this is more flexibility on a regional basis to deal with problems and needs),

4. Effect on administrative structure,

5. Financial impact including both capital and operating expenditures,

6. The impact on the relationships of corrections to other parts of the criminal justice system primarily police and courts,

7. The effect on the interface of corrections with other social services, including health, welfare and education,

8. The impact of the alternatives on the interface of corrections and private agencies, particularly aftercare.

Any change in the respective roles of federal and provincial governments can be assessed in light of these criteria.

ISSUES

VI.1 Federal-Provincial Split in Jurisdiction

Should the present split in jurisdiction between the federal and provicial responsibility in corrections be maintained? If not, what is the preferable arrangement? E.g.

- total provincial responsibility for corrections
- total federal responsibility for corrections
- options for interested provinces (but not necessarily all) to assume responsibility for all correctional operations within their borders
- split at a different sentence length (e.g. 30 days, 6 months, 1 year, 5 years?)
- split according to a different criterion, such as the type of correctional service or function (e.g., community-based services versus institutional-based)
- some other arrangement?

VI.2 Continuing Role of Federal Legislation in Corrections

It has been suggested that, under the current or even a different split in federal-provincial jurisdictions, there should still be minimum standards for certain correctional matters, enforceable on all jurisdictions through the criminal law power of the federal government.

Should there be legally enforceable standards, placed in federal legislation, and binding on all correctional jurisdictions in Canada? Or should any national standards (if such are desirable) be through non-legislated agreements among the governments?

If you are of the view that legislation should establish minimum standards for all corrections operations, in what areas should these apply, e.g.,

- offender rights and responsibilities
- offender programs which must or may be provided
- parole procedures and policies
- the earning of remission: criteria and procedures?

VI.3 Federal-Provincial Consultation Mechanisms

Should legislation provide for permanent mechanisms for regular federal-provincial coordination and consultation on key issues, and if so, which issues in particular?

VI.4 Federal-Provincial Sharing of Resources

Are the general Exchange of Service agreements adequate to achieve proper coordination and effective use of resources, or should greater joint planning and sharing of resources be encouraged? How could these processes be impoved, if at all?

SECTION VII. ORGANIZATIONAL, STRUCTURAL AND RELEVANT ADMINISTRATIVE ISSUES

INTRODUCTION

In the federal system, the Correctional Service of Canada (CSC) and the National Parole Board (NPB) both come under the same Minister, the Solicitor General, although they are administered under separate acts, the Penitentiary Act and the Parole Act respectively.

CSC is responsible for the welfare of the offender from his admission to the penitentiary to his warrant expiry date. This includes his stay in the institution and his supervision period, if any, in the community. The NPB is the decision-making body which decides when, if at all, under what conditions and in what form the offender will be released or revoked on some form of conditional release. Its release decisions are based on a number of factors including criminal history, previous institutional behaviour, nature of the offence and the reports and recommendations of correctional staff. It is under no obligation to support CSC's recommendation.

In 1979 an administrative document was signed by the Chairman of the Board and the Commissioner of Corrections. This document sets out the terms and conditions for information and services that each agency will provide to the other relating to, for example, case preparation, panel hearings and case supervision.. It also stipulates the consultative mechanism to be followed when examining matters of mutual concern.

ISSUES

VII.1 Organizational Structure

No matter what the legislative requirements in substantive areas of corrections, the effectiveness of correctional authorities will always be influenced, at least partially, by how they are structured, organized, and managed. For this reason some model correctional legislation provides suggestions regarding issues of this nature.

In Section VI, questions regarding the division and organization of correctional authorities along federal-provincial lines were discussed. The following section deals with the internal organization of corrections authorities in a given jurisdiction. For obvious reasons, the discussion below centres on the federal correctional authorities.

Some model codes, such as the Model Penal Code, the ACIR State Department of Correction Act, and the National Council on Crime and Delinquency's Standard Act for State Correctional Services, place legislation governing all aspects of corrections, including parole, in a single act. (The parole board is constituted as an independent body within the correctional department). This is intended to encourage coordination among correctional agencies.

Some model acts, such as the Model Penal Code, go so far as to specify the divisions into which the correctional authority should be separated, each corresponding to a type of correctional service or function, such as a Division of Community Supervision and a Division of Research and Training.

- Do you think federal correctional services should be administered under a single act, or under separate acts, as now?

- Should Correctional legislation go so far as to structure the divisional structure of correctional authorities?

Since 1977 the preparation of cases for NPB review and the supervision of inmates on conditional release have been the responsibility of CSC. Prior to that date these activities had been carried out under the authority of the Parole Board by the National Parole Service (NPS).

There are positive and negative arguments for the retention of the present arrangement. For example, some argue that it is essential that institutional programming, release preparation and supervision be performed by a single agency to ensure consistency and continuity to the offender's individualized planning and activity process; conversely, others argue that it is difficult for NPB to be held responsible for its decisions when it has direct control over neither the case preparation nor the quality of supervision. On the other hand, one of the apparent rationales behind the shift of NPS from under NPB control was to preserve the independence of decision-makers from those making case recommendations. Whether the shift has in fact had this effect is still a matter for debate.

What is the most appropriate organizational structure for provision of these services? Should one of the following arrangements be tried:

- return of the National Parole Service to NPB control?
- the creation of NPS as a separate branch within CSC, a separate agency within the Solicitor General, or part of another federal department?

VII.2 Independence of correctional authorities

What degree of independence from political authority should be maintained in corrections? At present, existing correctional legislation is often far from clear on the respective mandates, roles of and relations between the Minister responsible for corrections and the agencies of corrections. The Law Reform Commmission, in its 1980 Working Paper, Independent Administrative Agencies, recommends that the enabling Act for each administrative agency should make explicit the nature of the relationship between the agency on the one hand and the Minister and "the rest of government" on the other. This would include issues of direction and control regarding individual decisions, policy, and the operation and management of the agency.

The Penitentiary Act states that the Commissioner of Corrections is "under the direction" of the Solicitor General. The Minister therefore can apparently involve himself in any part of the operation of CSC. However, the Solicitor General is not referred to in the Parole Act. Parole decisions appear in fact to have a special status at least at the federal level since the Parole Act gives the Board "exclusive jurisdiction and absolute discretion" to grant or refuse conditional releases of various kinds. This seems to preclude Ministerial involvement in individual case decisions, but to leave open questions of policy-making, operational processes, and management.

It is generally felt that some insulation is needed by individual Canadian citizens from political influence over decisions affecting their liberties and freedoms. Yet in some areas, the Minister responsible may have a role directly provided in legislation (as where the federal Solicitor General must approve a forfeiture of remission of over 90 days). In other areas where an individual has been treated unfairly through inadvertence or deliberate action, perhaps the principle of responsibility of elected officials would suggest that the Minister responsible should be entitled to intervene with correctional authorities on behalf of an aggrieved individual.

Where should the line be drawn between political responsibility, and correctional independence? Should individual case decisions be completely independent - that is, not subject to decision, review or reversal by a Minister or Ministers? Can a clear line be drawn between individual case decisions and the policies which may guide them? Do some types of decisions or policy areas require different types of accountability structures?

Another separate issue revolves around the question of whether or not CSC and NPB should be under the same Minister. Is it beneficial or even possible for the same Minister to

adjudicate occasional disputes between the two agencies? Should the agencies remain under the same Minister? If so, how could one reduce or eliminate dysfunctional competition/conflict? If not, should one agency be moved to another department, such as Justice? Or should one or both be outside departmental confines - an option which the Law Reform Commission suggested should only be selected for "very good reasons"?

VII.3 Policy-making Function

Some model acts call for the vesting of correctional policy-making with a Commissioner of Corrections; others would create a board of policy-makers which reports to the political authority responsible for corrections. The National Council on Crime and Delinquency would create a seven-member "Board of Corrections" which would formulate policy, but would not be composed of persons with any administrative or executive duties in corrections. The Model Penal Code would create a "Commission of Corrections" composed of correctional managers, the chairman of the parole board, judges, and members of the public. The 1977 MacGuigan Parliamentary SubCommittee on the Penitentiary System recommended that policy-making in the penitentiary system be done by a five-member board appointed for staggered five-year terms by the Solicitor General, and reporting annually "to Parliament through the Solicitor General". The Law Reform Commission suggested in 1980 that for some administrative agencies, it would not be appropriate for the body making individual case decisions to be the same as the body formulating overall policies.

- How should policy be made in corrections? Should the Minister responsible be ultimately in charge of this function?

- Should the chief executive officer or body of each correctional agency be given the authority in legislation to make policy? Or should this authority rest with the chief executive body "under the direction of the Minister"? Should some policy issues require reference to full Cabinet? Or should a board of correctional and parole managers, in a coordinated correctional department, set policy together? Or, in another model, should policy be set by a separate body, composed at least partially of members of the public?

- should a distinction be made between parole, for example, and other policy areas?

VII.4 Appointment and Qualifications of Chief Executive Officers

Related to the above questions of independence and correctional policy and decision-making are questions of the method and tenure of appointment.

The Commissioner of Corrections and the National Parole Board members are appointed by the Governor in Council (The Federal Cabinet), on the recommendation of the Solicitor General. The Commissioner has an indefinite Governor-in-Council appointment, while Parole Board members serve fixed renewable terms, presumably to insulate the Board from undue political influence. The MacGuigan Committee recommended that the Commissioner of Corrections be appointed by the five-member policy Board described above. The Solicitor General's Study of Conditional Release recommended that consideration be given to "screening or nomination" bodies which would compile a list of possible candidates for appointment to the National Parole Board.

Some model acts propose that it be a legal requirement that key correctional functionaries have certain qualifications, such as "appropriate training and experience in corrections". Such legal provisions could in turn reduce the appearance or reality of inappropriate "policital" appointments.

What recommendations would you make regarding:

- Who should appoint key functionaries?
- How should they be appointed or hired? What qualifications if any should be mandatory?
- Should there be a time limit for certain appointments?
- Should the answers to the above questions be different for different officials (e.g. parole versus penitentiary heads)? Why? On what criteria should distinctions be made?

VII.5 Appointment and Qualifications of other Staff

Both the Penitentiary Act and Parole Act are silent on the appropriate qualifications, training and experience of staff hired or appointed to these agencies. Some model acts, on the other hand have requirements such as that certain staff, especially those who work directly with offenders, must have certain education and/or related experience. The MacGuigan Committee also recommended "appropriate personality testing".

- Should federal correctional legislation require certain qualifications of custodial staff, casework staff, parole officers, or indeed all professional staff?

- If so, what qualifications should legislation contain for various types of staff, as regards:

  - education or its equivalent
  - experience in corrections or related fields
  - other qualifications

VII.6 Inspection and Audit Functions

At present there are auditing and inspection functions carried out, within the CSC and NPB, in addition to the general auditing function of government. The powers contained in the Solicitor General Act have also been interpreted to mean that the Minister may order investigations of various correctional matters, reporting to him. Some model correctional codes have also placed an "inspection" function with the independent and semi-independent policy boards referred to above.

- Should there be provision for an independent or semi-independent "inspection" authority in corrections?

- Can and should legislation specify the types of inspection functions, or supervisory functions, which should be carried out at the level of Minister, chief executive officer, their delegates, or an independent or semi-independent body?

VII.7 Staff Training

Some model correctional code mandate programs of staff training. Should correctional legislation do so in Canada, and if so, what areas if any should be specifically mentioned?

VII.8 Peace Officer Powers

Currently, all federal corrections staff, including parole officers and clerical personnel, are, by law, peace officers. Is this an appropriate arrangement? Should there be limits on the numbers and types of staff who are given peace officer powers? Where should these limits appear? Should there be limits on the types of powers which can be exercised by certain types of staff

(search and seizure, electronic surveillance, mail opening, the use of dealy force)? (Note: Questions relating to peace officer powers will also be addressed by the Police Powers Project of the Criminal Law Review.)

VII.9 Miscellaneous Powers and Duties

To what extent should correctional legislation mandate the agency head or his delegates to perform various miscellaneous functions, such as:

- research and development
- evaluation and program effectiveness
- production and promulgation of policy and procedure quidelines
- public education, including of the professional public (judges, etc.)
- community resource development
- volunteer services coordination
- support for non-governmental organizations active in corrections or criminal justice.

SECTION VIII INTERNATIONAL TRANSFER OF OFFENDERS

INTRODUCTION

In 1978, the Transfer of Offenders Act was proclaimed, in order to permit Canadian citizens who are convicted and serving sentences abroad to return to Canada to serve their terms here. The Act also provides for the return of foreign nationals sentenced in Canada. Since the proclamation of the Act, individual treaties giving effect to it have been signed with the United States, Mexico, and Peru, and agreements are expected to be in effect shortly with Bolivia, Thailand and France. The provisions of the Act seek to respect the judicial process of the country where the conviction occurred, while adapting the service of the sentence to the receiving country's practices.

ISSUES

VIII.1 Criteria for Approval of Transfer

The Transfer of Offenders Act provides for international transfer where the offender requests it, and where the sending and receiving nations consent to it. No particular direction is given in the Act, however, regarding the criteria which the decision-maker in Canada (the federal Solicitor General) should consider in deciding whether or not to approve the return of a Canadian convicted abroad, except that the agreement of the province is needed if the offender would be sent to a provincial prison.

The Charter of Rights and Freedoms states that "every citizen of Canada has the right to enter, remain in and leave Canada". This could be interpreted to mean that requested transfers back to Canada must be granted, but certain limiting criteria may meet the test of being "reasonable limits prescribed by law (which) can be demonstrably justified in a free and democratic society".

What criteria, if any, should be provided in the Act or elsewhere in order to guide decisions to approve or not approve the return of Canadians convicted abroad? Which of the following, for example should and should not be permitted as considerations:

- proof of Canadian citizenship?
- long-standing and/or strong ties to Canada or persons living in Canada?

- intention to reside in Canada after completion of sentence?
- that the transfer would assist in the offender's reform or reintegration?
- that the transfer would be in the interests of humaneness?
- the length and seriousness of the previous criminal record?
- the risk to the public from the offender, once released from sentence?

Would any other criteria be acceptable as considerations regarding the return of Canadians convicted abroad?

VIII.2 Ineligibility to appeal conviction or sentence or to apply for pardon

The Transfer of Offenders Act specifically provides that the finding of guilt and the sentence imposed on a Canadian citizen by a foreign authority may not be appealed or subject to any form of review in Canada. This respects the soverign authority of foreign courts, and encourages (but does not compel) the offender to complete all appeals prior to returning to Canada. Though an argument can perhaps be made for the power to pardon transferred offenders, there is some uncertainty whether pardons and the Royal Prerogative of Mercy will be available in all cases, since a foreign-imposed sentence is not specifically deemed to have been imposed in Canada for "all purposes, including clemency".

These factors could lead to an offender's serving a lengthier period in prison, or suffering other consequences for a greater time, than he might otherwise experience. Is this appropriate? Should some other arrangement be used, or "deeming" provisions made clearer in the Act?

VIII.3 Parole eligibility

The Transfer of Offenders Act provides that a Canadian offender returned to Canada becomes eligible for parole on "the date, so far as can be ascertained by the Board, at which he would have been eligible for parole had he been convicted and his sentence imposed by a court in Canada".

This provision can create problems in cases where the sentence imposed of a type or has an effect which would not have been imposed in Canada. One example was of an offender given a sentence in an American state of "5 to 45 years", not a permis-

sible sentence in Canada. While he would have been eligible for parole after 5 years had he remained in the U.S., he was given a 7-year parole eligibility date in Canada, because of his maximum 45-year sentence. Another example might be an offender sentenced in a jurisdiction where the sentencing court is required to impose the sentence range provided in law for the offence, and the parole board "re-fixes". Another example would be a jurisdiction where remission credits have the effect of advancing the parole eligibility date.

Up until now, the solution to this dilemma has been to notify prospective transferees when they will be eligible for parole, and let them weigh the advantages and disadvantages of returning.

Another suggestion for remedying these possible inequities might be to change the Act to reflect the date at which the offender would normally have been eligible for extended early release in the jurisdiction which sentenced him. This could, however, cause problems related to perceived inequities relative to other inmates not transferred from foreign jurisdictions. It might also be difficult to determine with precision when some persons would have become eligible for parole. What is the best way to approach this problem?

VIII.4 Notice to offender

As noted above, prospective transferees are informed prior to agreeing to eventual transfer, of the date on which they will be eligible for parole, temporary absence, and day parole. Are there other matters of which they should be informed, e.g.:

- the standard conditions of probation or other "supervision" to which they will be subject?
- the nature and extent of remission credits which they are eligible to earn?
- the obligation to be subject to mandatory supervision on the remitted portion of a penitentiary sentence imposed after the introduction of MS in Canada?
- the other sentence credits which will be counted against their sentence in Canada (e.g. street time, remand time)?
- the likely security level in which they will be held on a jail sentence?

VIII.5 Time left on sentence

Some treaties signed under the authority of the Transfer of Offenders Act provide that no transfer will be considered if the offender has only a certain amount of time left to serve on his sentence (e.g. 6 months, one year). Is this an appropriate provision? Should it be provided for in the Act, since it is a limitation placed on a constitutionally based right?