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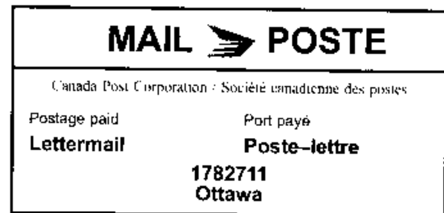

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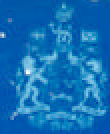

TAKING RESPONSIBILITY

Report of the Standing Committee on Justice and Solicitor General on its review of sentencing, conditional release and related aspects of corrections.

DAVID DAUBNEY, M.P.
Chairman

CANADA

TAKING RESPONSIBILITY

Report of the Standing Committee
on Justice and Solicitor General
on its Review of Sentencing,
Conditional Release and Related
Aspects of Corrections

DAVID DAUBNEY, M.P.,
Chairman

August 1988

HOUSE OF COMMONS

Issue No. 65

Tuesday, August 16, 1988
Wednesday, August 17, 1988

Chairman: David Daubney

Minutes of Proceedings and Evidence of the Standing Committee on

Justice and Solicitor General

RESPECTING:

In accordance with its mandate under Standing Order 96(2), consideration of its inquiry into sentencing, conditional release and related aspects of the correctional system

INCLUDING:

The Sixth Report to the House

Second Session of the Thirty-third Parliament, 1986-87-88

CHAMBRE DES COMMUNES

Fascicule nº 65

Le mardi 16 août 1988
Le mercredi 17 août 1988

Président: David Daubney

Procès-verbaux et témoignages du Comité permanent de la

Justice et du Solliciteur général

CONCERNANT:

Conformément à son mandat en vertu de l'article 96(2) du Règlement, étude de la détermination de la peine, de la mise en liberté sous condition et des aspects connexes du système correctionnel

Y COMPRIS:

Le Sixième Rapport à la Chambre

Deuxième session de la trente-troisième législature, 1986-1987-1988

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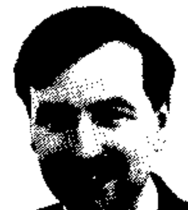

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THE STANDING COMMITTEE ON
JUSTICE AND SOLICITOR GENERAL

has the honour to present its

SIXTH REPORT

In accordance with its mandate under Standing Order 96(2) and its Terms of Reference dated November 3, 1987 concerning a review of sentencing, conditional release and related aspects of corrections, the Standing Committee on Justice and Solicitor General has adopted the following report and urges the Government to consider the advisability of implementing the recommendations contained herein.

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CHAPTER ONE

INTRODUCTION

A. Background

The House of Commons Standing Committee on Justice and Solicitor General began its review of sentencing, conditional release and related aspects of the correctional system in the spring of 1987, about the time the national debate on capital punishment was coming to an end. Many of the issues raised in the House of Commons and across the country during that debate went beyond the question of capital punishment. They demonstrated that public confidence in many aspects of our criminal justice system had seriously eroded in recent years. Many Canadians now feel that they are not being fully protected and that crime is out of control. The Committee believes that this public perception, whether well-founded or not, must be addressed and the issues raised by it must also be faced. The Committee undertook this study partly as a result of this sense of public unease.

Shortly before the Committee began its review, three events occurred which provided a focus for the study. In July 1985, Celia Ruygrok, a night supervisor at a community residential centre in Ottawa, was murdered by a resident who was on parole for an earlier non-capital murder conviction. (In the spring of 1987, a Coroner's Inquest into this murder drew a number of conclusions and made recommendations dealing with issues of sentencing, conditional release, information-sharing and co-ordination among different components of the criminal justice system. These recommendations were largely adopted by a Task Force set up to advise the Solicitor General on the policy implications of the Ruygrok Inquest.) In the spring of 1987, the Canadian Sentencing Commission released its Report, after several years of intensive study and consultation. About the same time, the Correctional Law Review released its working paper, *Conditional Release*.

The Committee's Terms of Reference[1], adopted in the fall of 1987, refer directly to these three events as a way of targeting, but not limiting, the Committee's review of sentencing, conditional release and related aspects of the correctional system.

The Committee received hundreds of briefs and expressions of opinion from many members of the public and representatives of all participants in the criminal justice system. It heard from lawyers, inmates, victims, helping professionals, parole officers, unions, correctional staff, judges, academics and many other interested Canadians.[2] It held public hearings and *in camera* meetings across the country as well as in Ottawa. It visited institutions and met with people working directly in the conditional release system. Many witnesses before the Committee not only addressed the issues raised in its Terms of Reference, but also ranged well beyond them at times with their insights and experiences.

The Committee's work has been inspired by several witnesses. For example, Gerald Ruygrok, the father of the halfway house worker murdered in Ottawa, has shown how one may come to terms with a personal tragedy with dignity and by becoming personally involved in criminal justice issues as a community volunteer. (Coincidentally, one witness, whose husband was murdered by an offender, is also a volunteer in corrections.) Andrejs Berzins, Q.C., the Crown Attorney who conducted the Ruygrok Inquest, cautioned the Committee against taking information at face value and urged it to go beyond generalities to seek out the front-line workers in the criminal justice system — people who can tell what really happens every day. Spurred on by Gerald Ruygrok's example, and by the pain of all victims who have appeared before it, the Committee has adhered as closely as possible to the urgings of the Crown Attorney.

B. Framing the Issues

The issues the Committee has set out to address are difficult, complex and interrelated. They are difficult because they deal with basic philosophical questions. Is it the purpose of sentencing to exact retribution for the breach of fundamental rules and norms? Should sentencing be attempting to rehabilitate offenders? Should it be inspired by a philosophy of just deserts? How should victims' needs and interests be addressed? Assuming agreement can be reached on the basic philosophical questions, the means must still be considered for them to be attained in practical, day-to-day terms: incarceration, community service orders, treatment, restitution and compensation to victims.

One of the major problems which must be faced directly in addressing these general philosophical questions and the specific issues that grow out of them is the level of serious public concern which sometimes amounts to

fear and panic. The high degree of public outrage expressed earlier this year indicates the degree of fear felt by many Canadians at the failings of the criminal justice system. In Toronto, Melvin Stanton, an offender nearing the end of his sentence who was permitted to serve an unescorted temporary absence at a halfway house, brutally raped and murdered Tema Conter; in Brampton, Ontario, an offender with an extensive psychiatric and violent criminal history has been charged with the murder of eleven-year-old Christopher Stephenson; in British Columbia, Alan Foster, a paroled lifer, committed suicide after murdering his wife, her daughter and the daughter's friend.

Many Canadians get much of their information about crime from American sources; yet our crime rates and the rate of violence are lower than those in the United States. Prior to the events described above, it might have been argued that public fear of crime could be discounted by contending that Canadians are reacting to spill-over from the American media, or by saying that the media do not report accurately and completely on the criminal justice system — they tend to focus on spectacular violent crimes and lenient sentences. Finally, public fear may also be challenged by saying that Canadians do not know about or understand the workings of the criminal justice system. Recent research shows that the more Canadians know about a particular criminal case, the more likely they are to propose a sentence very much like that of the sentencing judge.

Discounting fears does not dispel them, however. At present, public confidence in the criminal justice system is very fragile. Any reform of the criminal justice system — whether of sentencing, conditional release or related aspects of the correctional system — must address public perceptions directly and seek to restore public confidence in its efficacy. The challenge, then, is twofold: to address the Canadian situation as it actually is and to deal with the perceptions Canadians have of it.

The Committee is convinced that the criminal justice system must be explained to Canadians by means of public education and that the community must be given opportunities to be more involved at all levels. Reforms must address real weaknesses in the system. However, they must also recognize that public concern and the lack of confidence in the system is one of those weaknesses.

In the Committee's view, there appear to be several points of principle relating to the criminal justice system about which there is general

concurrence. First, the protection of society is a goal of criminal justice on which everyone agrees. Opinion divides on the methods of achieving this goal. Some propose more crime prevention strategies; others suggest sentencing reforms (such as reducing unwarranted disparity in sentencing, or giving longer sentences); still others recommend more effective alternatives to incarceration (both at the sentencing and release stages), etc. Although all share a belief in the principle of social protection, there are many ways to achieve it.

Agreement also exists on the concept of offender accountability — that is, if one breaks the law, one must accept responsibility for the action. Opinions differ on the methods of assuring offender accountability — by more or less punishment, by compensation and restitution to the victim, by offender reconciliation with the victim and community, and/or by opportunities for rehabilitation. Again, the principle of holding offenders accountable is shared by all, but there may be many ways to achieve it.

There is also concurrence on the principle of using alternatives to incarceration for non-violent offenders or offences. Differences of opinion occur in attempting to determine who are non-violent offenders and how best to deal with them (to minimize their likelihood of re-offending).

Dissidence occurs when specific issues are considered. For example, the issue of sentencing begs a number of questions. Are sentences too disparate? Are sentencing disparities necessarily undesirable? Are sentences adversely affected by the presence of conditional release and remission? Is this desirable? Is the so-called "truth in sentencing" approach (i.e., precluding conditional release in the early parts of the sentence) the way to go? Are there sufficient and effective alternatives to incarceration? Should sentencing guidelines be adopted? If so, should they be mandatory, presumptive or advisory? What types of aggravating and mitigating factors should be attached to such sentencing guidelines? What impact would sentencing guidelines have on the criminal justice and correctional systems? How can victims and members of the community be given opportunities to feel a greater stake in the sentencing process?

The issue of conditional release raises other questions. Should it be retained in any or all of its forms? Is it possible to assess adequately the risk of re-offending, particularly by those likely to do so in a violent way? Are offenders being effectively reintegrated into society? Should certain types of offenders not be eligible for early conditional release? Are inmates being

adequately prepared for conditional release? Are the methods used to determine eligibility for conditional release effective and fair? Does the public understand and have confidence in the way conditional release now functions? What is the role of halfway houses in the conditional release system — is there adequate community involvement? Are there certain types of offenders who should not be sent to halfway houses? If so, how should they ultimately be safely reintegrated into society?

A number of other questions underlie these issues. How can the participation of victims in sentencing and conditional release be improved? Is there adequate staff training and program evaluation in the criminal justice system? Do the various components of the criminal justice system mesh well together or are there gaps? How can Canadians become more involved in all parts of the criminal justice system?

These are just some of the scores of questions, upon which there is great divergence of opinion, that the Committee has struggled to address. While complete answers have not been found to all questions, this report attempts to set a direction for reaching positive conclusions. The Committee hopes that its report and recommendations will, if accepted and implemented by government, improve our system of sentencing and conditional release, and reassure Canadians that the operation of these components of the criminal justice system contributes to public security.

The Committee adopted the following principles as the basis of its recommendations:

(1) There must be greater community involvement and understanding at the successive stages of sentencing, corrections and conditional release.

(2) Sentencing, correctional and releasing authorities must be accountable to the community for addressing the relevant needs and interests of victims, offenders and the community.

(3) Sentencing, corrections and conditional release should have reparation and reconciliation built into them — a harm has been done and should be repaired (the victim's loss must be redressed), and most offenders will be (ultimately) reintegrated into the community.

(4) Sentencing, correctional and releasing authorities must provide opportunities for offenders to accept and demonstrate responsibility for their criminal behaviour and its consequences.

(5) Opportunities must be provided for victims to participate more meaningfully in the criminal justice system through the provision of:

(a) full access to information about all stages;

(b) opportunities to participate at appropriate stages of decision-making in the criminal justice system; and

(c) opportunities to participate in appropriate correctional processes.

(6) Educational, vocational, treatment and aftercare services must be improved and accorded greater resources at the successive stages of sentencing, corrections, and conditional release, to ensure that offenders are effectively reintegrated into the community either as an alternative to incarceration or after incarceration.

(7) Sentencing and conditional release must function with public visibility and accountability in such a way as to contribute to the protection of society.

(8) To ensure sentencing disparities are not (and are not perceived to be) unwarranted, sentencing should be structured in some manner with adequate, appropriate provisions for the consideration of aggravating and mitigating factors in specific cases, and with the requirement that reasons be given in all cases.

(9) Carceral sentences should be used with restraint; there must be a greater use of community alternatives to incarceration where appropriate, particularly in cases not involving violence or recidivism.

(10) Conditional release in some form should be retained with adequate safeguards to ensure that those who benefit from it have earned that privilege and that they do not constitute an undue risk to the community.

(11) All participants in the criminal justice system must put greater emphasis on public education.

C. Structure of the Report

As the Committee considers that all components of the criminal justice system must strive to increase public education about criminal justice processes and issues, Chapter Two discusses a Canadian study of public attitudes towards sentencing and identifies other areas of misunderstanding which contribute to lack of public confidence in the criminal justice system. Similarly, as a means of reinforcing its view that criminal justice reforms must take place in a context responsive to victims and the community, the Committee has devoted Chapter Three to a discussion of the needs and interests of victims, which for too long have been neglected by the criminal justice system.

Chapters Four to Seven review the recent history of proposed sentencing reforms in Canada and present the Committee's proposals for sentencing reform. Chapters Eight to Ten identify the present forms of conditional release, review the recent history of proposed reforms, and explain how the release process functions. Chapters Eleven to Thirteen describe the Committee's proposals for conditional release reform. Chapters Fourteen to Sixteen outline the Committee's proposals for correctional program reform with particular emphasis on Native and women offenders.

Notes

(1) See Appendix A.

(2) A list of witnesses who appeared before the Committee can be found at Appendix C. A list of submissions sent to the Committee can be found at Appendix D.

CHAPTER TWO

PUBLIC ATTITUDES

In recent years there has been a decline in public confidence in the criminal justice system in general, and the sentencing, correctional and conditional release processes in particular. Public attitudes toward the criminal justice system, as well as to other aspects of Canadian society, are influenced, and at times reinforced, by the all-pervasive presence of the mass media. People's understanding of sentencing and conditional release practices is largely based on what is contained in the media. Not everyone has regular contact with the criminal justice system.

One of the essential issues that must be assessed in any attempt at criminal justice reform is the impact of media coverage and other information on public attitudes. Where these attitudes appear to be the result of incomplete or inaccurate information, strategies for change must not be confined to legislative reform.

The Committee heard from Dr. Anthony Doob and Dr. Julian Roberts with respect to their study of public attitudes based on Gallup polls conducted in 1982, 1983, 1985 and 1986. The study concludes that Canadian views concerning sentencing are not as harsh as they might seem to be. This study was referred to by many witnesses and the Committee believes it is important to the development of Canadian public policy in the criminal justice field. A summary of the results of this study precedes a discussion of its policy implications and the Committee's recommendation.

A. Severity of Sentence

A substantial majority of Canadians polled believed that sentences were not severe enough, particularly those for violent sex crimes and for drunk driving offences. Yet, while hardly any people polled believed sentences were too severe generally, almost one-fifth and one-half of the respondents thought sentences for Native Canadians and poor people, respectively, were too harsh. In addition, most favoured spending money on developing sanctions other than imprisonment.

These apparent contradictions may be explained in a number of ways. The researchers proposed two: the desire for harsher sentences may not be strongly held; or, alternatively, people may have been thinking about quite different things when they responded to the two questions.

B. Knowledge of Crime

The views of most Canadians appear to bear little resemblance to the facts of (official) crime. Almost three-quarters of people polled substantially overestimated the amount of crime involving violence. Similarly, they overestimated the likelihood of recidivism for violent offenders. In 1982, most thought that murder had increased since the abolition of capital punishment, although this was not the case. In addition, Canadians were found to have little knowledge of statutory maximum penalties, of which offences had minimum penalties, nor of actual levels of penalties imposed by the courts. Finally, they perceived parole boards to be releasing more inmates than, in fact, was the case. Thus, it may be said, Canadians have a distorted view of crime and it is reasonable to question their calls for greater harshness in sentencing.

C. Use of Incarceration

Those who think sentences are too lenient are more likely to be thinking of violent or repeat offenders than are those who think sentences are appropriate or too harsh. It seems that punishments are not perceived to fit the crime.

For minor offences, imprisonment was not seen as a useful way to protect the public, although for serious offences a significant minority of Canadians called for greater use of incarceration. Few approved of the use of incarceration for first offenders who break and enter a dwelling (the most serious property offence). When the option of a community service order was suggested to people polled, the majority selected that choice in most cases rather than probation, fine or imprisonment. (Those initially proposing imprisonment were somewhat less likely than others to opt for a reparative sanction "in most cases", although few of them opposed its use.)

Doob and Roberts conclude that Canadians' views of appropriate penalties for at least some crimes are not strongly held. While calling for increased use of incarceration, in response to one question, those polled

selected imprisonment to a much lesser extent than other available sentencing options in response to another question. Moreover, most Canadians do not look exclusively to the sentencing process to solve the problems of crime (almost half of those polled suggested reducing unemployment). Those who viewed sentences as too lenient were more likely to see harsher sentences as the most appropriate punishment, but this was not seen as the best way of controlling crime.

D. Sources of Information About Sentencing

The vast majority of Canadians receive information about sentencing from the media, particularly television. Single case information appears to have more impact on them than statistical information. Most respondents recalled a sentence which was too lenient — often it involved homicide or sexual assault.

A Canadian Sentencing Commission study of over 800 sentencing stories in newspapers found over one half of them dealt with violence — one quarter with homicide. (These, of course, represent only a tiny portion of offences before the courts.) No reasons for the particular sentence were reported in most cases, making it difficult for the public to evaluate the judges' reasons in these important cases.

Doob and Roberts found that opinions varied as to appropriate sentences, depending on the type and extent of the account of a particular sentencing hearing. In one study, respondents felt a particular sentence was too lenient based on the newspaper account and too harsh based on court-based information made available to them. Both the offender and the offence were seen as "worse" by those whose source of information was the newspaper. It would appear, then, that people react not only to the actual sentence, but also to the context in which the sentence is placed.

E. Conclusion — Policy Implications

The Canadian public has a complex view of sentencing. Canadians seem to react with severity when asked simple questions about sentencing, especially involving violent offenders. They respond in quite a sensitive way when provided with more complete information and asked questions about sentencing in a more appropriate way.

While policymakers and politicians are wise to heed public opinion, they must be particularly cautious in the criminal justice field about acting on an inadequate or incomplete interpretation of public opinion. Ultimately, the evolution of sound government policy — one that has broad public support — is dependent on an informed public.

The laws and practices related to sentencing and conditional release are not simple — they are both complex and interrelated. News reporting, particularly on radio and television, is compressed. There is not enough time to provide sufficient detail and background about offenders and the criminal justice laws or practices which apply to them. It is not surprising, then, that the public may be confused about how the criminal justice system operates.

Recommendation 1

The Committee recommends that all federal participants in the criminal justice system (Department of Justice, the RCMP, the Correctional Service of Canada, the National Parole Board, and the Ministry Secretariat of the Solicitor General of Canada) make public education about the operation of the criminal justice system, including the myths and realities which surround it, a high priority through:

(a) the effective use of their own communication capacities (print, radio, video and TV); and

(b) their financial and other support of the voluntary sector, so that citizens in local communities may be more actively engaged in activities which increase their understanding of the criminal justice system.

CHAPTER THREE

THE NEEDS AND INTERESTS OF VICTIMS

In modern times, the role of the victim has declined to the point where some victims feel the criminal justice system has no real interest in them. Initially victimized by the offender, many have subsequently felt victimized by "the system" — the very agencies from which they expect support, compassion and action. Since the 1970s, interest in the role of the victim has increased. Many factors — often complex and interrelated — contributed to this development. Victims in Canada and elsewhere, and the groups they have organized, have brought public and political attention to the failings of our criminal justice system.

A. What Canadian Victimologists Have to Say

The Committee had the benefit of the insights of two prominent Canadian victimologists, Dr. Irvin Waller and Dr. Micheline Baril. Following is a summary of their written and oral submissions to the Committee.

1. Victims' Interests

It is victims who suffer as a result of crime. Their personal interests are affected by sentencing and related decisions; thus their views should be considered. The prevailing notion that a crime is against the state fails to recognize the victim's suffering and feelings of injustice.

The degree of trauma the victim suffers depends on the nature of the crime and the extent to which he or she can tolerate post-traumatic stress. The victim is likely to suffer "secondary victimization" in the criminal justice system, unless his or her needs are attended to.

There are five main things necessary to allow victims to restore their sense of worth and get on with their lives:

(1) *Information* about the offender and the offence can contribute to a victim's understanding and eventual acceptance of the crime.

(2) *Support* from the community as well as from family and friends is crucial to help the victim deal with feelings of isolation and vulnerability. Community support can be shown through victim assistance and compensation programs, as well as through the helpfulness and concern of criminal justice personnel whose actions can minimize the trauma of participation in the criminal process itself.

(3) *Recognition of harm.* It is important to the victim that the criminal justice system recognize the harm done through the imposition of an appropriate penalty. It is also important that the offender recognize, and acknowledge, the harm done to the victim. This is important to assist the victim in coming to terms with the fact of his or her victimization.

(4) *Reparation for the harm*, which can include financial compensation or other action by the offender designed to make redress, constitutes a concrete acknowledgement of the harm done, and may also be important to restore the victim's sense of self-worth.

(5) *Effective protection* from re-victimization or retaliation is crucial to alleviate the victim's feelings of vulnerability. This is particularly important where victims know, or have a continuing relationship with, the offender. Victims also express concerns about the protection of other members of the community.

Waller identified two generally accepted principles of natural justice which may be said to apply to victims' personal interests in criminal procedure: the duty to give persons specially affected by the decision a reasonable opportunity to present their cases; and the duty to listen fairly to both sides and to reach a decision untainted by bias.

The following are the issues that most directly affect victims of crime:

- notification of dates, time and place of significant hearings where reparation is being sought or where the release of the accused could affect their safety or depreciate the seriousness of the offence;

- access to information about the workings of the criminal justice system, particularly as it affects victims;

- an opportunity to be present at hearings and observe justice being done;

- an opportunity to tell the court directly about the harm done, to ask for restitution, and to express concerns about the release of the offender;

- explicit criteria for decisions taken by the court and reasons for the decisions; and

- recourse (e.g., appeal) where proper procedures are not followed.

2. Victim Impact Statements

Documents submitted by Waller provide an overview of developments in other jurisdictions. A summary of those most relevant to Canada appears below.

a. The United States

Grassroots victim groups have become increasingly well-organized in recent years. Recognition of the role of the victim at sentencing has been gained in many jurisdictions. Such participation influences sentencing decisions — sometimes making the sentence harsher, sometimes more lenient. More than 34 states and the U.S. federal legislative process require courts to consider victim impact statements. In some jurisdictions, judges must give reasons if restitution is not ordered. The U.S. Presidential Task Force on Victims of Crime (1983) recommended a constitutional amendment to give victims "in every criminal prosecution the right to be heard at all critical stages of judicial proceedings". Guidelines and training programs have been developed for judges, including Recommended Judicial Practices regarding the fair treatment of victims and witnesses and victim participation.

California was the first state to have systematically prepared victim impact statements (1974). Studies seem to suggest that:

- victims are generally more satisfied with the way their cases are handled when they are informed and have access to a caring listener;

- victims prefer to receive restitution rather than have the offender sentenced to prison; and

- victims related to offenders tend to seek mitigated sentences.

District Attorneys' offices in *Massachusetts* have victim assistance workers who explain the criminal justice process to the victim and prepare the written part of the victim impact statements.

In *Minnesota*, victims have been largely ignored in the sentencing guideline system which was introduced to reduce disparity of prison sentences greater than one year. Victim impact statements seem to influence judges to reduce sentences but not to increase them as the severity of the offence is considered to have been taken into account in establishing the "grid". Victims are permitted to express an opinion as to the appropriate sentence and to speak at the hearing.

The mitigating and aggravating factors recommended for departing from the proposed *New York State* sentencing guidelines permitted increasing sentences beyond the proposed "grid" where the foreseeable consequences of the crime were likely to be more painful to the victim than usual. A New York Crime Victim Board survey of other jurisdictions using victim impact statements concluded that they led to an increase in the use of restitution.

The use of victim impact statements in *South Carolina* seems to have increased sentences where the victims are surviving family members of slain victims and decreased them where the victim and offender know each other. The dramatic increase in prison population is considered to be attributable to a harsher prosecutorial policy, rather than to victim participation in sentencing.

b. France

Victims may join their civil action against the offender to the state's criminal action as the "partie civile". Victims are able to present views on prosecution, have access to the investigative file, and speak to sentence when requesting restitution. Legal aid is available to victims.

c. An Approach to Victim Impact Statements

The U.S. Model Statute on Victim Impact Statements lists the following purposes of sentencing: protection of the public, restitution to the crime victim and his or her family, and just punishment for the harm inflicted. Waller suggests the following purpose: protection of the public and the promotion of respect for the law through the imposition of sentences that are "just" for the victim, offender, and community. The principles should reflect the foreseeable consequences to the victim, and the possibility for redress and reconciliation.

Waller also identifies:

- the obligation of the court to consider victim impact statements regarding the impact of the crime, the victim's concerns for safety, and his or her opinion on reparations (substantiated by receipts);

- the offender's right of cross-examination on victim impact statements regarding reparations;

- the opportunity for the victim to be heard at sentencing regarding the victim impact statement, prior to the accused;

- the obligation of the court to give reasons for the sentence; and

- the desirability of enforcing restitution orders in the same way as fines.

Waller proposes that victim impact statements be prepared immediately after the crime and updated prior to sentencing. Police and prosecutors should consult with victims during plea negotiations and victims

should have the right to express to the judge their viewpoints about an appropriate charge when dissatisfied with the plea consultation. An aggravating factor to be considered at sentencing should be the likelihood of the offender returning to threaten the victim.

Baril points out that victim impact statements have two main objectives: one is to give the victim a role in the criminal justice process; the other, to make sure the court has complete information about the circumstances surrounding the crime and its impact on the victim. Her experience is that very few victims actually want to express an opinion about the sentence itself. The preliminary research results from an evaluation of the Montreal victim impact statement pilot project showed very little evidence of revenge-seeking. What Baril expects to result from more widespread use of victim impact statements is more orders restricting certain offenders' movements in areas frequented by their victims and more reparative sanctions.

3. Recommendations Made to the Canadian Sentencing Commission Regarding the Victim's Role in Sentencing and Related Processes

In a paper prepared for the Sentencing Commission (and recently published by the Department of Justice), Waller recommended four areas for improvement in the role of the victim in sentencing [some of which are now addressed in Bill C-89]: redress from the offender (restitution), provision of information by the police, unimpeded and expeditious access to justice, and protection from further victimization.

Judges, he says, should be required by the *Criminal Code* to order restitution unless reasons why it is inappropriate to do so are given. The prosecutor would introduce a written report on the extent of the damage done to the victim and the victim would have a right to present additional information if necessary. Complex cases could be referred to the civil courts.

He proposes that police provide victims with information and explanations about the criminal justice process, including the right to participate in the sentencing process and to have claims for restitution considered, and about victim compensation or other assistance programs.

Victims' needs should be respected when victims are witnesses. They may require separate waiting areas and consideration with respect to the

scheduling of hearings. The victim should be given an opportunity to be present and heard whenever the victim's interests will be affected by a court decision. Prosecutors could present to the court a statement of the victim's views on the issues. In some instances a separate lawyer should be provided.

In Israel and some American jurisdictions evidence procedures have been modified to permit video-taped and commissioned evidence to reduce the number of times a victim may have to give evidence or to avoid a traumatized victim having to face an accused from whom she or he fears retaliation. [Canada has recently modified evidence procedures for children who are victims of sexual abuse.]

4. Approaches to Crime Prevention

Crime victims want to avoid further victimization of any sort; they want to live in a safer and more peaceful society. The issue is: What crime prevention strategies work best?

Waller argues that doing more of the same (more police, more prisons, etc.) has no effect on crime. The exceptions to this are saturating an area with police (a police officer on every corner reduces crime) and targeting special groups of offenders, particularly those not used to being arrested (spouse abusers, drinking and driving offenders, etc.), which have some effect on crime. Intersectoral approaches (e.g., where police and social services collaborate) seem to have the potential to affect crime.

Police-based crime prevention programs aimed at reducing opportunities for crime (Neighbourhood Watch, Stoplift, and Block Parents) may improve the public's image of the police but have not shown significant reductions in crime (at least, not beyond the short term). However, systematic responses have had very positive effects on crime. Surveillance and "eyes on the street" approaches have the potential to affect crime.

Waller suggests that primary prevention (housing, education, equal rights, etc.) which is not directed at specific social problems has unclear effects on crime. He argues that secondary social prevention which targets those groups that are at risk has enormous potential.

Longitudinal studies now show that persistent and serious offenders tend to differ from other persons in many ways, such as the care and consistency in their upbringing, housing situation and education. Caring and

consistent parenting can be promoted, particularly among single, teenage mothers through:

- increased child care;
- job creation; and
- parent skill training in the home,

all of which reduce the stresses on mothers which may lead to violence. Waller presented other examples of targeted secondary prevention to the Committee. He proposed that locally-based approaches to crime prevention emphasizing socio-economic programs focused on secondary prevention hold potential for crime reduction. He discussed the local crime prevention councils operating in 400 French cities.

B. The Present Canadian Situation — Bill C-89

Recently passed amendments to the *Criminal Code* (Bill C-89) will allow the court to consider at the time of sentencing a victim impact statement outlining the extent of the harm done to, or loss suffered by, the victim. Under the new sections 662(1.1) and 662(2), the statement will be in writing and subject to the normal rules of evidence. Until now, there has been no uniformity in the preparation or reception of victim impact statements. Nor is it known what impact they have on the sentencing process and/or on the attitudes of victims. (Recently completed evaluations of victim impact statement pilot projects in six Canadian cities are expected to be released soon by the Department of Justice.)

Other provisions of Bill C-89 facilitate the return before trial of recovered property, which might otherwise be detained by the police throughout court proceedings. This should ease a major aggravation to victims of property offences where the property has been recovered.

Clause 6, which expands and strengthens the restitution provisions of the *Code*, is the core of the amendments. It repeals the requirement that the victim apply for restitution. The new section 653 of the *Code* requires the court to consider restitution in cases involving damage, loss or destruction of property, and money lost or spent because of bodily injuries resulting from another's crime. Where these property or personal damages are readily ascertainable, the court will be required to assess the loss incurred by the victim (the new section 655 establishes a procedure for so doing) and the

offender's ability to pay — both at the time of sentencing and in the future. The offender may be required to disclose details of her or his finances for the purposes of preparing a report. An order of restitution will be given priority of enforcement over other monetary sanctions such as fines.

The court would be able to extend the order to pay restitution, vary the time of payments, or impose new conditions if the offender has a reasonable excuse for failure to pay as ordered. (There is no provision for reducing the amount of restitution to be made.) If the offender does not have a reasonable excuse, the court could impose a prison term (from which there appears to be no right of appeal) and/or facilitate civil enforcement.

Under the amendments, a court sentencing an offender convicted (or discharged under section 662.1) of an offence under the *Criminal Code*, Part III or IV of the *Food and Drug Act*, or the *Narcotic Control Act*, would generally impose a victim fine surcharge. (The amount of the surcharge would not exceed 15 percent of any fine that is imposed, or where no fine is imposed, $10,000. A court may decide not to impose the surcharge where to do so would cause "undue hardship", but the reasons for this decision must be given in writing or entered into the record of proceedings.) The proceeds from the victim fine surcharge are to be used for victim services.

Finally, the amendments provide some protection against publicity to victims. Under the previous law, a ban on the publication of the identity of the victim could only be ordered where the accused was charged with the offences of incest, gross indecency or sexual assault. The amendments extend the discretionary and mandatory bans to cases involving extortion and sexual offences and to witnesses testifying in the prosecution of these offences.

C. The Committee's Response

1. Bill C-89

Many members of the Committee also sat on the Legislative Committee on Bill C-89. **In the Committee's view, proclamation of Bill C-89 will go a long way towards making the criminal trial and sentencing process more responsive to the needs of victims. The provisions related to the submission of victim impact statements and the enhancement of restitution respond directly to the principles adopted by the Committee in Chapter One of this report.**

Bill C-89 was originally welcomed and supported in principle by all parties. Some have suggested that it does not go far enough — that it should include a statement of principles, and that it should be mandatory for police to inform victims of their rights to restitution/compensation, to prepare a victim impact statement for the court, and to be kept informed about the status of the investigation and court proceedings. The major criticism of Bill C-89 was that the proceeds of the victim fine surcharge are to be turned over to the provinces without any guarantee that these funds actually will be used to provide victims with more and better services, and that non-residents of a province will also be eligible for services. Waller recommended that Bill C-89 be amended to provide, in the proposed section 655.9(4) of the *Criminal Code*, that:

- surcharge revenues not be used to supplement money that the provinces [/territories] have already committed to victim assistance;
- provinces establish a more comprehensive network of victim services available to non-residents and residents alike; and
- surcharge revenues be used in a manner consistent with a statement of principles agreed upon by the federal and provincial [/territorial] governments.

In the Committee's view, these concerns can be addressed without legislation.

The Committee recognizes that, although there are increasing numbers of victims' compensation programs and victim services across Canada, the value of benefits available under them, as well as the scope and availability of services, varies from one province to another. However, the Minister of Justice has advised the Committee that federal-provincial discussions are contributing to the development of national standards, and that the Ministers responsible for criminal justice have now reached agreement on a policy statement of principles.

2. The Provision of Information to Victims

Almost all studies of victims highlight victims' informational concerns as their highest priority. **In the Committee's view, participants in all stages of**

the criminal justice system must respond to this need. Victims have questions about the criminal process and the offender. Not only must suitable print and audio-visual materials be readily available to victims, victims must be treated courteously and compassionately by all participants in the system.

At present there is no uniformity about the provision of information or even any agreement about which component of the system should hold that responsibility — in some cases the information is provided by police, in others by Crown attorneys; in many cases, no information is provided.

Keeping victims informed about the status of their cases at pre-trial and trial stages of the criminal justice process, and providing victims with information about particular offenders throughout their involvement with criminal justice systems (including corrections), prevent the sense of being further injured by the process and may contribute to victims' capacities to put the crime behind them. Victims may need information about the offence, the offender, and criminal justice processes in order to make sense of what has happened to them and to re-establish control over their lives. Moreover, it is believed that they will experience the administration of justice in a more personal and favourable way where suitable and timely information is provided. Such notification should help alleviate the confusion and alienation victims may feel and encourage victim cooperation in prosecution.

The Correctional Law Review Working Group, in its Working Paper *Victims and Corrections*, noted that, while there has been an improvement in the provision of information to victims concerning the trial process, early access to correctional information is still a problem. The working group also identified a number of options for improving the distribution of general correctional information to victims. **The Committee prefers the option whereby pamphlets which are already being distributed by the police, would contain a reference as to where the victim may obtain information about corrections. This could be supplemented by the availability of more detailed information at police stations, Crown attorneys' offices, and at court houses.**

In considering what access victims might be given to case-specific information concerning federally-sentenced offenders, the Correctional Law Review Working Group identified four principles to be considered:

- offenders, like other Canadians, have the right not to have personal information about them released unless there is justifiable reason to do so;

- victims (and perhaps the general public), on the other hand, have a competing right to obtain case-specific information about offenders under certain circumstances, including a reasonable apprehension of a threat to personal security, the reasonable right of the public to scrutinize the activities of government and its agencies, and the fact that the information may already be a matter of public record and obtainable elsewhere;

- in the absence of a clear and legitimate connection between the victim's "need to know" and the information sought, the privacy rights of the offender should prevail;

- where there is such a connection, the victim's "need to know" should be balanced against the possibility that release of the information would subject the offender or another person to harm or expose anyone unfairly, would disrupt the offender's program or reintegration, or would disclose information which was given with a reasonable expectation that it would be held in confidence (pp. 16-17).

In the Committee's view, the third principle would be strengthened if it were worded in such a way as to recognize the role that information about the offender, and his or her acknowledgement of the harm done, may play in contributing to the victim's emotional recovery from the effects of the crime (as described at the beginning of this Chapter). If we fail to recognize this legitimate need, it is likely that the offender's right to privacy will tip the scale against the victim in his or her pursuit of information. **In this context, the Committee believes that, in many cases, close family members of deceased or seriously injured victims may also have case-specific informational needs similar to direct victims of serious crimes.**

The Working Paper also considered how victims might be kept apprised of various correctional or release decisions concerning an offender. **The Committee favours a "form" approach whereby a form completed by the victim requesting certain types of information as it becomes available could be appended to the Crown's file and then be forwarded to the appropriate correctional authority.** As it is likely that only a few victims will want to continue to have access to information about an offender beyond the sentencing stage, it should not be difficult to respond to such requests.

The Committee believes that access to appropriate information in a supportive criminal justice environment is vital to greater victim satisfaction with sentencing and correctional processes. In many cases, information will be all that victims require. In other cases, suitable information may provide a foundation for other meaningful and responsible involvement.

Recommendation 2

The Committee recommends that all participants in the criminal justice process give high priority to the provision of general and appropriate case-specific information to victims and their families.

Recommendation 3

The Committee recommends that, at a minimum, general information include the victim's right to seek compensation and restitution, the right to submit a victim impact statement and the right to be kept informed about various pre-trial, trial, and post-trial proceedings. Basic information should identify who is responsible for providing it and where further information may be obtained.

Recommendation 4

The Committee recommends that the provision of case-specific information to victims and, in appropriate cases, to their close family members be facilitated by the use of a form on which the victim may check off the various kinds of information he or she would like to receive. Such forms should be appended to Crown attorneys' files and subsequently forwarded to correctional authorities.

3. Making Maximum Use of Victim Impact Statements

a. At Plea and Sentencing

The submission of a victim impact statement ensures that the sentencing judge has sufficient information about the impact of the crime on the victim (physical and emotional pain suffered, loss of wages or property, damage sustained, and other expenses incurred as a result of the crime) to determine a fair and proper sentence. Judges should consider all relevant information about both offenders and victims in order to reach a "just" sentence. In some cases, judges are provided with relatively extensive information about the offender (through pre-sentence reports or representations by defence counsel), but less accurate or less up-to-date information about the impact of the crime on the victim. This is particularly so where the offender pleads guilty or negotiates a guilty plea to a lesser

charge (in such cases, only a simple summary of the facts may be presented to the judge).

Some victims feel that they ought to be consulted by Crown attorneys about plea bargaining and sentencing recommendations. When the Crown accepts a guilty plea to a charge which is likely to result in a lesser sentence than that for which the offender was originally charged, chances are the victim may feel the offender got something he or she shouldn't have and the victim may feel further victimized by the criminal justice system. This appears particularly unjust when the Crown attorney is unfamiliar with some of the facts.

Some of victims' "feelings" may be addressed by attending better to the informational needs of victims. Others assert, however, that providing victims with an opportunity to be heard at plea and sentencing is helpful in the process of recovery from victimization. In such cases, mere information may not be enough; greater participation may be required.

The Canadian Sentencing Commission rejected the concept of victims becoming independent parties in plea negotiations, but suggested that there was considerable room for improving the flow of information between Crown counsel and the victim during plea negotiations. It recommended that prosecutorial authorities develop national guidelines directing Crown counsel to keep victims fully informed of plea negotiations (and sentencing proceedings) and to represent their views, and that, prior to acceptance of a plea, Crown counsel be required to receive and consider a statement of the facts of the offence and its impact upon the victim (Rec. 13.1 and 13.2).

The victim's opinion about an appropriate sentence may be particularly important where the offender and victim are known to, or closely associated with, one another and there is reason to believe the offender may pose a continuing threat to that victim, although not to anyone else. In such a case, it is important that the victim have an opportunity (on the record) to recommend conditions of probation or release which would limit the offender's access to the neighbourhoods where the victim lives and works. The Committee believes such recommendations could be incorporated in victim impact statements.

b. Use of Victim Impact Statements (and Other Sentencing Information) by Correctional Authorities

In addition to providing valuable information to sentencing judges and releasing authorities, victim impact statements are of importance also to offenders themselves and to members of correctional staff who work with them.

Victim impact statements, together with other sentencing information, should be forwarded to correctional authorities in order to assist them in making the most sensible case management decisions about offenders. They should also be used to assist case management workers and others working closely with offenders in helping the offenders come to terms with their offences and to acknowledge responsibility for them, where they have not already done so.

Paradoxically, correctional systems often have great difficulty obtaining from courts what would appear to be the most basic information about offenders and their offences. Proceedings on sentencing (which may include the gist of a victim impact statement) are not generally transcribed unless there is an appeal. Yet it is unlikely that a full and proper administration of the sentence can take place without a clear understanding of the offence which occurred and the purpose of the sentence.

As a result of several murders committed in recent years by federal offenders on conditional release, greater efforts are now made by federal correctional authorities to obtain sentencing information and reasons, where they exist. (In addition, of course, victims may always make written submissions directly to correctional and release authorities about individual offenders.) It is not clear what sentencing information, if any, probation officers and provincial institutions receive where pre-sentence reports have not been prepared. The Canadian Sentencing Commission recommended that judges provide written reasons in some circumstances and that a transcript of the sentencing judgement be made available to the authorities involved in the administration of the sentence (Rec. 11.1 and 12.3).

The Committee believes that the routine transcription of the proceedings of sentencing hearings and the transmission to correctional authorities of such transcripts and exhibits filed would assist correctional authorities in placement and program decisions, as well as pre-release

planning. (Such a recommendation is made in Chapter Eleven.) **Equally important, it would enhance the capacity of both custodial and community correctional authorities to engage offenders in meaningful discussions about the nature and consequences of their offences, steps which might be taken to acknowledge responsibility and to make amends for the behaviour, and opportunities the offender might take advantage of in order to prevent a recurrence of the criminal conduct.**

How victim impact statements might be used in the parole process is discussed in Chapter Eleven.

CHAPTER FOUR

THE RECENT HISTORY OF SENTENCING REFORM IN CANADA

No basic changes in sentencing philosophy or the structure of sentencing set out in our *Criminal Code* have been made since the late nineteenth century. In fact, Canadian criminal legislation has been criticized frequently for its lack of sentencing goals and principles. Legislative changes in Canadian criminal law have characteristically been *ad hoc* and short-term in nature.

This chapter examines some of the proposals for law reform relating to sentencing that have been made over the years. They constitute the backdrop against which the Committee makes its recommendations.

A. Ouimet Report

Established in June 1965 by Order-in-Council to study "the broad field of corrections, in its widest sense, from the initial investigation of an offence through to the discharge of a prisoner...", the Canadian Committee on Corrections, under the Chairmanship of Mr. Justice Roger Ouimet, presented its comprehensive report to the Solicitor General in March 1969. The Committee started from the basic premise that the proper function of the criminal justice system is to protect society from crime in a manner commanding public support, while at the same time avoiding needless injury to the offender. The Committee indicated that there was a need for an overall sentencing policy. It proposed to:

> ... segregate the dangerous, deter and restrain the rationally motivated professional criminal, deal as constructively as possible with every offender as the circumstances of the case permit, release the harmless, imprison the casual offender not committed to a criminal career only where no other disposition is appropriate. In every disposition, the possibility of rehabilitation should be taken into account.[1]

The Committee observed that the best long-term protection of society is secured by the ultimate rehabilitation of the sentenced individual.

The Ouimet Committee expressed the view that sentences of imprisonment should be resorted to only where the protection of society clearly requires the imposition of such a penalty. Long terms of imprisonment should be imposed only in special circumstances. The Committee recommended that the *Criminal Code* be amended to authorize the courts to deal with a person without imposing a sentence of imprisonment, unless the nature of the crime and the offender make imprisonment necessary because the offender may repeat the crime during the non-carceral sentence, because some correctional treatment of the offender in confinement is required or because a lesser sentence would depreciate the seriousness of the crime. It also recommended that dangerous offender legislation be introduced to provide for indeterminate sentences (with regular assessments and Parole Board reviews to ensure that offenders who are no longer dangerous are released).

The Ouimet Committee felt it might be difficult to eliminate entirely the disparity in sentences — at the least, however, the sentencing authority should give reasons for imposing a particular sentence. The Committee concluded that sentences should be individualized and that a range of alternatives should be made available to the sentencing judge: absolute discharge, with or without conditions; probation; fines; suspended sentence; restitution, reparation or compensation to the victim; confinement (weekend detention, night detention with programs of compulsory or voluntary work in the community, or full-time detention in reform institutions or penitentiaries or other places of segregation).

The Ouimet Committee made the following statement as a general guide for applying sentencing alternatives:

> The primary purpose of sentencing is the protection of society. Deterrence, both general and particular, through knowledge of penalties consequent upon prohibited acts; rehabilitation of the individual offender into a law-abiding citizen; confinement of the dangerous offender as long as he [or she] is dangerous, are major means of accomplishing this purpose. Use of these means should, however, be devoid of any connotation of vengeance or retribution.[2]

For there to be a rational and consistent sentencing policy, the Committee concluded that a number of deficiencies needed to be corrected. These were:

(1) the lack of readily available information about existing sentencing alternatives and services and facilities to implement sentencing dispositions;

(2) the lack of comprehensive information about the character and background of the offender; and

(3) the lack of information about the reasons for imposing certain sentences.

The report urged the federal government to prepare (in conjunction with the provinces) and issue a guide to dispositions, which would be made available to all in the correctional system and which would contain the information identified above as then lacking. The Committee recommended that fines only be imposed after a means study of the offender had been done; that, except for murder, minimum sentences of imprisonment be repealed; and that whenever there was to be a sentence of imprisonment, it be preceded by a pre-disposition report on the offender and accompanied by a statement of the reasons for such imprisonment.

B. Hugessen Report

Established in June 1972 by the Solicitor General of Canada, the Task Force on the Release of Inmates, under the Chairmanship of the Honourable Mr. Justice James K. Hugessen, released its report in November 1972. While the focus of the report was on the release of inmates, it contained an Appendix which described "A Proposal for Statutorily Fixed Sentences". The main recommendation was the abolition of fixed-term sentencing to penitentiaries and the adoption of statutorily fixed maximum sentences (for sentences of two years or more) with no discretion in the sentencing court to fix minimum terms.

Under these proposals, a judge would have three sentencing options after conviction of an offender:

- non-custodial sanctions (including semi-custodial sanctions such as probation and residency at a halfway house);

- short-term determinate custodial sentences of less than two years to be fixed by the court; or

- penitentiary sentences, the maximum length of which would be statutorily determined (three, five or ten years, or life).

In the case of penitentiary sentences, institutional authorities would make recommendations, within one to three months after sentence, in most cases, to a regional or local board about the proposed minimum length and place of incarceration based on the program, educational and other needs of the offender and the degree of custodial risk the offender poses. Each case would be reviewed at least annually at which time the board might reduce (or, exceptionally, increase) the minimum term. After serving the minimum term, offenders would be released on parole with supervision for a fixed term of approximately 18 months. Offenders would be discharged from parole about one year after discharge from supervision. (This proposal is similar to a form of indeterminate sentencing used in some American jurisdictions.)

C. Goldenberg Report

Pursuant to a motion in October 1971, the Standing Senate Committee on Legal and Constitutional Affairs, under the Chairmanship of Senator Carl Goldenberg, tabled its report on parole in 1974. In Chapter III, it reviewed the conflicts between parole and sentencing.

In contrast with the Hugessen Report, the Senate Report recommended that the present role of the courts in sentencing be maintained, although it noted the desirability of reducing the wide discretion of judges. Cautioning that redesigning parole should be accompanied by "an overhaul of sentencing", it suggested that sentencing guidelines be incorporated into the *Criminal Code.* Furthermore, it recommended that the indeterminate sentences provided for at that time in the *Prisons and Reformatories Act* be abolished except for dangerous offenders.

The Senate Committee was of the view that imprisonment should not be used unless the judge was satisfied that it was necessary for the protection of the public on at least one of three grounds. The Committee also identified 12 factors which, among others, should influence the court in the exercise of its discretion in deciding to withhold a sentence of imprisonment. In addition, it noted that the U.S. Model Sentencing Act procedure for sentencing hearings could usefully be incorporated into the *Criminal Code.*

The Senate Committee concurred with the Ouimet Committee in condemning the intrusion of sentencing courts into parole by adding probation terms to prison sentences of less than two years. It recommended the repeal of this provision in the *Criminal Code.* In addition, it

recommended that the Code be amended to provide for a limit on the cumulation of consecutive sentences.

D. Law Reform Commission of Canada Report

The Law Reform Commission of Canada published a report on dispositions and sentencing in 1976. It started from the basic premise that the coercive powers of the criminal law and its agents must be used in such a way as not to further damage the social fabric. Based on this general principle, the Commission enunciated a number of other criteria and guidelines.

Some of the other principles underlying the Commission's approach were:

(1) The criminal process should be used with restraint;

(2) Intervention via the criminal law should be proportionate to the harm done;

(3) The most effective means for restoring peace should be selected: those responsible for such decisions should be accountable for them;

(4) Sentences should encourage a sense of responsibility on the part of the offender and enable that person to understand the impact of his [or her] actions on the victim and society;

(5) Mediation and arbitration are preferable ways of arriving at a proper disposition or sentence; and

(6) Reconciliation of victim and offender, including reparation of the damage done, are desirable.

The Commission also indicated that, in its view, mechanisms other than the criminal justice system should be used wherever possible to deal with criminal acts. This could be done by mediation, arbitration or diversion. If a case proceeds to trial, and a conviction is entered, the court should order an absolute or conditional discharge wherever possible. In the Commission's view, this would especially be the case if the offender and the offence should have been dealt with at the pre-trial stage or if any more severe sanction would cause unnecessary social costs and hardships.

The Commission then set out in its report a range of sentences:

(1) Good Conduct Order: the offender would be required to keep the peace for not more than 12 months — to be imposed where an absolute or conditional discharge would not be adequate.

(2) Reporting Order: the offender would be required to report to a person, named by the court, at designated times — to be imposed where the court feels that certain limitations on liberty and some supervision of the offender may be necessary.

(3) Residence Order: the offender would be required to reside in a particular place for a determinate period of time — to be imposed where the court feels that this type of limitation needs to be imposed on the offender.

(4) Performance Order: the offender would be required to undertake educational, training or employment activities to reduce the likelihood of continued criminal activities.

(5) Community Service Order: the offender would be required to perform a fixed number of hours of community service during free time — the purposes are to take the place of a fine, to censure the criminal act and to reconcile the offender with the community.

(6) Restitution and Compensation Order: the offender would be required to reimburse the victim as far as possible for the damage.

(7) Fine: the offender would be required to pay a fine where the offence is detrimental to society as a whole or restitution is inappropriate.

(8) Imprisonment: this exceptional sanction would be used only to protect society by separating offenders who constitute serious threats to life and personal security, to denounce behaviour society considers a serious violation of basic values or to coerce offenders refusing to submit to other sanctions. Imprisonment is not justified by rehabilitation but, once

sentenced, an offender should benefit from social and health services. Courts should only resort to imprisonment if less severe sanctions are unlikely to succeed. The length of imprisonment should be determined in light of the nature of the offence, the circumstances in which it was committed and the objectives of imprisonment. A prison sentence to protect society by separation should not exceed 20 years. A prison sentence for the purpose of denunciation should not exceed three years. A prison sentence imposed because of wilful disregard of other sanctions should not exceed six months.

(9) Hospital Order: where the offender is in need of medical treatment, a court should be able to order that a term of imprisonment be served in part in a medical facility.

The Commission recommended that judges should develop sentencing criteria and should meet periodically to ensure that they are being properly applied or to change them if such is deemed to be necessary. Finally, the commission recommended that the Guidelines outlined in its report be incorporated into the *Criminal Code*.

E. The Criminal Law Review

The Criminal Law Review process was initiated by the Government of Canada in 1981 in recognition of the need for a comprehensive review of the criminal law and the development of integrated proposals for change which were consistent with a criminal justice policy. The Sentencing Project, one of 50 individual projects, was launched in 1982 and was one of the first areas of priority identified by the Review.

1. *The Criminal Law in Canadian Society*

Published in 1982 by the Department of Justice, *The Criminal Law in Canadian Society* sets out the policy of the Government of Canada with respect to the fundamental purpose and principles of the criminal law. It forms the framework for the ongoing work of the Criminal Law Review, including the Sentencing Project and Correctional Law Review Project (discussed later in this chapter).

The document presented crime trends, reviewed various explanations offered for the phenomenon of crime and policy responses to crime by

governments, and identified the factors which are likely to continue to influence the general shape of future events in Canada. It identified seven major concerns that encompass the wide range of specific criticisms, problems and complaints with respect to criminal law and the criminal justice system (including the effectiveness of alternatives and corrections, the role and the needs of victims, and sentencing and post-sentencing processes).

The document concluded that the criminal justice system must pursue both "justice" and "security" purposes, that criminal sanctions are understood by the public and offenders to be primarily punitive in nature, that criminal law should be distinguished from other forms of social control by use of the criterion, "conduct which causes or threatens *serious* harm", and that considerations of justice, necessity and economy should determine the means that the criminal justice system may employ to achieve its goals.

This policy recognized that Canada has guaranteed certain rights and freedoms and undertaken international obligations to maintain certain standards. While criminal law is necessary for the protection of the public and the maintenance of social order, it involves many of the most serious forms of interference by the state with individual rights and freedoms.

The Criminal Law in Canadian Society defined the purpose of the criminal law as:

> ...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.

It recommended that this purpose be achieved through means consonant with the Canadian Charter of Rights and Freedoms and in accordance with 12 principles, the following six of which may be said to relate directly or indirectly to sentencing and are relevant to the Committee's study:

> . . .
>
> (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 [or her] reintegration into the community;

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

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

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

. . .

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

2. Bill C-19 and Accompanying Policy Statement on Sentencing

In February 1984, the Government introduced Bill C-19, a package of *Criminal Code* amendments, some of which have now been enacted (in original or revised form) and some of which died on the Order Paper. One section of the package concerned sentencing: those matters related to the purpose of sentencing were referred to the Canadian Sentencing Commission; others related to victims and restitution recently were enacted by Parliament (in modified form) as Bill C-89.

Bill C-19 identified the fundamental purpose of sentencing as protection of the public and identified five strategies by which that might be achieved. It identified the principles by which the court's discretion might be limited: proportionality, consistency, restraint, and limitations on the use of imprisonment. Accompanying the Bill was a policy on sentencing issued by the Department of Justice to set out the context of issues and concerns within which the sentencing provisions of that Bill were developed.

The Sentencing Project drew heavily on the work of the Ouimet Committee, the Law Reform Commission of Canada and other domestic and international sources. Recommended Canadian themes included restraint in the use of criminal sanctions (especially imprisonment); increased use of non-carceral sentencing alternatives; and acceptance of judicial discretion combined with a greater focus on explicit mechanisms to ensure accountability. In contrast, a number of American jurisdictions focused on creating greater uniformity and certainty in sentencing (limiting disparity) and a shift from rehabilitation theory to retribution (or "just deserts").

As identified in *The Criminal Law in Canadian Society*, three major issues have particular application to sentencing: the lack of clearly stated policies or principles in existing law; the presence of apparent or perceived disparity; and the lack of knowledge about the effectiveness of sanctions. Bill C-19 included, for the first time in Canadian legislative history, an explicit statement of the purpose and principles of sentencing and a clear set of procedural and evidentiary provisions to govern the sentencing hearing. It provided a broader and more clearly defined range of sentencing options, reserving imprisonment for cases where non-custodial sanctions are inappropriate. It increased the legitimacy of victim concerns by according wider and higher priority to the use of reparative sanctions and by consolidating and expanding the restitution provisions of the *Criminal Code*.

3. The Canadian Sentencing Commission

Concurrently with the introduction of Bill C-19 in the House of Commons, the government announced the establishment of the Canadian Sentencing Commission to consider and make recommendations upon sentencing guidelines, realigning maximum penalties within the *Criminal Code* in respect of the relative seriousness of offences, proposals to minimize unwarranted sentencing disparity, and mechanisms to provide more complete and accessible sentencing data.

The Canadian Sentencing Commission's report was tabled in Parliament at the end of March 1987. The Commission recommended that Parliament establish in legislation the purpose of sentencing and the principles which would affect the determination of sentences. To address the problem of unwarranted sentencing disparity, it recommended that a permanent sentencing commission be established to develop presumptive sentencing guidelines which would be tabled in Parliament. To provide greater clarity in sentencing, it recommended that parole be abolished and

that maximum and actual sentences be reduced: this, it said, would provide "truth in sentencing" or "real time sentencing", without increasing the prison population. It also recommended that greater use of sentencing alternatives be encouraged. Overall, it recommended that the sentencing system be equitable, clear and predictable, features which it does not have today.

The Sentencing Commission observed that sentencing itself does not resolve the major social problems that cause crime, but so long as such a system exists, the principles of justice and equity must prevail. Because the sentencing process has as its goal the accountability of the offender, rather than punishment *per se*, the least onerous sanction appropriate in the circumstances should be applied. Imprisonment should not be imposed for rehabilitation purposes but should be resorted to only in order to protect the public from violent crimes, where another sanction would not adequately reflect the gravity or repetitive nature of the offence, or where no other sanction would adequately protect the public or the administration of justice.

The Commission recommended that mandatory minimum sentences be abolished because they are inconsistent and unfair — their effect is to restrict the sentencing judge's discretion and to force a specific sentence. (See Chapter Six for further discussion of this.)

The Sentencing Commission identified two problems with maximum sentences — they often do not reasonably correspond with the seriousness of the offences to which they apply and they do not relate to what should happen to someone convicted of the offence. The Commission recommended that there be a 12-year maximum ceiling on sentences, which would apply primarily to violent offences resulting in serious harm to victims — manslaughter, aggravated sexual assault, kidnapping, etc. Nine-year, six-year, three-year, one-year or six-month sentences would apply to other offences, depending on the seriousness of the offences. The Commission ranked the seriousness of each *Criminal Code* offence and assigned each to the appropriate sentence category.

The Commission recommended that indeterminate sentences applicable to dangerous offenders be replaced by enhanced, definite sentences where special circumstances so warrant. Such an enhanced sentence would be available for offences carrying a maximum penalty of 9 or 12 years, when the offence involved serious personal injury committed in brutal circumstances.

To reduce indeterminacy in sentencing, the Commission recommended that parole be abolished and that earned remission amount to no more than 25 percent of the sentence imposed. (These recommendations are described in greater detail later in this report.) The elimination of parole and the reduction of earned remission would have the effect of ensuring that the sentence served approximates more closely the sentence imposed than is now the case.

The effect of all these proposals would be that many offenders would not be imprisoned, and those who were imprisoned would serve shorter, more definite terms and would spend a greater proportion of these sentences than is presently the case in a carceral setting. In the Commission's view all of this would lead to greater certainty in sentencing.

The Commission recommended that the sentencing judge be empowered to determine the security level of the facility in which an offender is to serve a sentence. The Commission recommended that sentencing guidelines be issued — they would be presumptive, not binding. The judge could sentence outside the guidelines if it were appropriate to do so and if reasons were given. The guidelines would also have a non-exhaustive list of aggravating and mitigating factors to be taken into account by the sentencing judge. The Commission recommended that a Permanent Sentencing Commission be established which would work in consultation with a Judicial Advisory Council to develop and monitor sentencing guidelines to be tabled in Parliament.

Community sanctions (any sanctions other than imprisonment) should be more widely used. The Commission recommended that fines be imposed only where it has been determined that the offender has the means to pay — there should be no imprisonment for inability to pay a fine. Restitution should be employed more frequently.

4. Continuing Consultations by the Department of Justice and the Ministry of the Solicitor General

The Department of Justice has been consulting with the provinces and territories, as well as other interested individuals and groups, on the recommendations of the Canadian Sentencing Commission. It is anticipated that a discussion paper on sentencing reform will be forthcoming.

The Ministry of the Solicitor General has been engaged for several years in the Correctional Law Review, a project reviewing all federal legislation related to corrections and conditional release. Its review of conditional release must, of course, take into account the recommendations of the Sentencing Commission.

The Department and the Ministry have established a joint working group for the purposes of cooperating in their consultations and reviews.

Notes

(1) Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections*, Information Canada, Ottawa, 1969, p. 185.

(2) Ibid ., p. 194.

CHAPTER FIVE

THE SEARCH FOR A SENTENCING PURPOSE AROUND WHICH CONSENSUS CAN BE BUILT

With a few specific exceptions, the Canadian sentencing process is discretionary in nature. Courts of appeal interfere with the dispositions of sentencing judges only when they feel inappropriate weight has been given to various factors. "Undue disparity" may be said to occur when no reason is available to rationalize "a marked departure" from sentences customarily imposed in the same jurisdiction for the same or similar crimes.

There is general consensus that unwarranted disparity should be eradicated. Research on sentencing disparity demonstrates that the most frequently alleged cause for unwarranted variation is confusion about the purposes of sentencing. No sentencing goals are now set out in legislation. Conflicts and inconsistencies in case law appear to arise from the fact that it is often impossible to blend the elements of public protection, punishment, denunciation and deterrence; frequently, they are contradictory and inconsistent. It is important, therefore, to achieve consensus on a sentencing rationale for the guidance of the judiciary and the enlightenment of the general public.

A number of proposals have been made as to what the goals and principles of sentencing should be. The Law Reform Commission of Canada proposed that primary emphasis be placed on the principles of denunciation, proportionality and restraint in a rational and consistent sentencing policy. (Restraint in sentencing means using the least coercive measure necessary, consistent with the principles of denunciation and proportionality. Denunciation and proportionality are defined later.)

A good many witnesses appearing before the Committee subscribed to the view of the Sentencing Commission and the Law Reform Commission that proportionality should be the major principle affecting the nature and length of sentences. Many of these witnesses favoured the development of mandatory or presumptive sentencing guidelines to control unwarranted disparity.

As a starting point, the Committee agrees with the Canadian Sentencing Commission that the purpose and principles of sentencing should be clarified and established in legislation. In its search for a sentencing rationale, the Committee looked for commonalities in the submissions it received, particularly in the underlying meaning of the positions taken as well as in the words which were actually spoken or written. This chapter sets out the various sentencing rationales upon which the Committee has drawn in developing the goals and principles it recommends be adopted in legislative form.

A. Public Protection

The most frequently articulated goal of sentencing is the protection of the public. Yet this is also said to be the overall purpose of the criminal law itself.

The Sentencing Commission was concerned that combining the purpose of the whole criminal justice system with the goal of one of its components could lead to serious misunderstandings. In particular, establishing public protection as the fundamental purpose of sentencing creates unrealistic expectations about what can be achieved by sentencing (p. 149, 153). The Sentencing Commission also argued that, while sentences may have protective effects, the sentencing courts do not have the primary responsibility for achieving this goal. However, the Commission was prepared to include public protection (albeit at a relatively low level of importance) as a principle which should affect the sentence.

The Committee agrees with the purpose of the criminal law as set out in *The Criminal Law in Canadian Society* (see page 36 above). The Committee notes that the federal government, through this policy document, recognizes that the criminal law is only one avenue for public protection: hence, it "*contribute[s]* to the maintenance of a just, peaceful and safe society." Alone, the whole criminal justice system cannot guarantee public safety. The Committee was urged by many witnesses to conclude that no criminal justice system alone could meet public expectations of safety and protection. The Church Council on Justice and Corrections stated:

> [C]ommunities must get involved in solving their moral problems. . . . Official institutions can only assist, they cannot bring about [a just, peaceful and safe society] . . . [G]iving Canadians a more realistic perception of crime, and ways of resolving conflicts more positively, would . . . diminish the helplessness which most people now experience in the face of crime . . . . (Brief, p. 2)

Nevertheless, **the Committee does not agree with the Sentencing Commission that public protection should not be established as the goal of sentencing.** In fact, many witnesses with varying perspectives on criminal justice issues urged the Committee to adopt public protection as the fundamental purpose of sentencing. While recognizing that sentencing is only one component of the criminal justice system, and therefore may be limited in what it can achieve, **the Committee believes that public confidence in the criminal justice system demands that public protection be considered as the fundamental purpose of each of its components. In this respect, sentencing is no exception.**

The mission statements of the Correctional Service of Canada (proposed in 1984) and the National Parole Board (adopted in 1986), and the tentative purpose of corrections proposed by the Correctional Law Review (Working Paper #1, 1986), quite rightly in the Committee's opinion, incorporate "to contribute to the maintenance of a just, peaceful and safe society" or "contributes to the protection of society" in their statements of purpose. The Committee believes that a statement of the purpose of sentencing should do no less.

The criminal law purpose established by the federal government in *The Criminal Law in Canadian Society* includes the strategy by which this purpose is to be achieved: "through the establishment of a system of [fair and appropriate] prohibitions, sanctions and procedures. . . ." This dual formulation of the purpose of the criminal law recognizes that the criminal law should continue to have two major aspects — security goals (related to public protection) and justice goals (equity, fairness, guarantees of rights and liberties, etc.). The Sentencing Commission seems to have focussed on the first aspect in its formulation of the purpose of the criminal law and on the second in its formulation of the purpose of sentencing:

. . .

2. Overall Purpose of the Criminal Law

> It is hereby recognized and declared that the enjoyment of peace and security are necessary values of life in society and consistent therewith, the overall purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society.

3. Fundamental Purpose of Sentencing

> It is further recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.

The proposed correctional philosophy of the Correctional Law Review Working Group followed an approach consistent with *The Criminal Law in Canadian Society*. It identified five strategies by which corrections contributes to public protection. These reflect the multi-faceted nature of corrections in modern society as well as the previously-described dual nature of criminal justice goals. In doing so, the Correctional Law Review Working Group recognized that society demands more than the pursuit of a single strategy in such complex matters and that the differences in the risks and needs presented by different offenders demand a flexible approach.

The Committee was drawn to this multi-faceted approach in developing its proposed sentencing purpose. Following is a discussion of concepts which might be formulated in strategies for inclusion in such a statement of purpose.

B. Offender Accountability/Responsibility, Rather than Punishment

A number of witnesses who appeared before the Committee argued that *a*, if not *the*, purpose of sentencing was punishment. For these witnesses, the principle of just deserts or proportionality was important. They tended to feel that present sentencing practices for some of our most serious offences (e.g., any offence where a life is taken or aggravated sexual assault takes place) do not reflect the principle of proportionality. (Proportionality means that the type and duration of the sentence shall be directly related to the gravity of the offence committed and to the degree of culpability of the offender. The maximum penalty specified in the *Criminal Code* may be said to reflect the gravity of the offence.)

The Sentencing Commission noted that while sentencing is punitive in character, it is not the same as punishment. Moreover, punishment purposefully meted out by the criminal justice system is distinguishable from the unintended harshness of its operation. The Commission also took the position that not all sentences impose such a severe measure of deprivation

as to be called punishment, although most of them are coercive. In recent years, the notion of retribution has fallen into disfavour, except where extreme violence is involved and as a means of limiting punishment.

The Committee was urged by some witnesses to conclude that punishment has little to commend it. It was argued that punishment neither encourages people to take responsibility for what they have done, nor does it provide opportunities for making reparations to the victim or the community. Much worse, it tends to encourage people to avoid accepting responsibility by lying (or self-denial) or by not getting caught. On the other hand, some witnesses clearly believed that severe punishment itself would achieve either specific or general deterrence, possibly both. (Deterrence means the sentence has the capacity to inhibit the offender from repeating the sanctioned conduct [specific deterrence] or to discourage others from doing so [general deterrence].) While there may be some evidence to support their claims with respect to some offences and some offender groups, there is a serious lack of supporting evidence about general deterrence. Yet Canadian courts seem to attribute value to it uncritically. **Nevertheless, to ignore punishment is to ignore generally accepted public attitudes about sentencing.**

However, most witnesses who talked about punishment seemed to be looking for a way of holding offenders accountable for their criminal conduct and for expressing the community's abhorrence of that behaviour (denunciation). Moreover, many witnesses identified offenders acknowledging/accepting responsibility for their criminal conduct as pivotal in turning them away from a life of crime.

The Committee was struck by the potential of this concept of offender responsibility or accountability. In addition to being a key component of diversion programs and many alternative measures, it is one that is generally supported by victims. The proponents of the concept of restorative justice have long recognized the importance to both the victim and the offender (and thereby, ultimately, to the community) of offenders accepting responsibility for their actions and taking steps to repair the harm done. **The Committee believes that it is the responsibility of the community to ensure that offenders are confronted with the consequences of their actions and challenged to accept responsibility and make reparations.**

C. Victim Reparation

In the case of minor property offences, an offender might demonstrate this acceptance of responsibility by returning stolen goods to the victim, repairing damage to the victim's property, or repaying the victim for expenses incurred in the repair or replacement of the victim's property. In some cases, in lieu of financial restitution, the offender may provide personal services to the victim[1] or do volunteer work for a community agency.

Where the status quo cannot be restored (e.g., where a life has been taken), it is likely to take offenders a considerable amount of time to come to terms fully with such offences and to truly accept and acknowledge responsibility. When this has occurred, it is important that the offender be given a way to demonstrate his or her remorse and to make some kind of symbolic restitution as a step towards the goal of healing the "brokenness" in the community and between specific people. ("Brokenness" refers to the breach in harmonious community relations which has occurred because of the criminal incident — the peace has been broken.)

D. Incapacitation and Denunciation

It is also asserted that increasing the frequency or severity of a sanction for the purposes of incapacitating offenders will reduce crime. However, prison populations and crime rates seem to rise at the same time. Moreover, prisons themselves are not crime free; expanding their use may not actually decrease crime. In addition, the Sentencing Commission concluded that incapacitation was not a suitable *overall* sentencing goal because it is achieved primarily through the use of custodial sanctions — there would be no place for community sanctions if incapacitation were the only goal of sentencing.

Denunciation is the statement of values concerning forms of behaviour that are socially unacceptable. Denunciatory sentences are currently considered to play an important part in maintaining society's values; they are generally harsher than those which are based on general deterrence. While denunciation is a consideration of great importance for sentencing, the Sentencing Commission took the position that it cannot be characterized as a goal. Denunciation uses language to express condemnation. Thus the degree to which denunciation is achieved depends upon the publicity of the condemnation.

In the most serious cases of violence, where members of the community are likely to continue to be at risk of harm by the offender, public protection will require some form of incapacitation of the offender. In many cases, the community will require a mechanism for denouncing the criminal conduct which has occurred, whether or not there continues to be a risk to others.

Nevertheless, the Committee is convinced that offenders who are simply "locked up" (or for that matter, kept under house arrest through electronic surveillance) are unlikely to accept responsibility for their behaviour. They simply "trade time for crime", and when this exchange has been completed, offenders may reoffend. Therefore, the Committee outlines elsewhere in this report the sorts of reforms which must take place in correctional institutions if they are to make any long-term contribution to public protection.

E. Alternatives to Incarceration

The Committee reached a consensus early in its deliberations about the desirability of using alternatives to incarceration as sentencing dispositions for offenders who commit non-violent offences. Using incarceration for such offenders is clearly too expensive in both financial and social terms.

Canada relies more heavily on imprisonment as punishment for crime than do many other Western nations. Among 16 European countries and the United States, only Poland and the U.S. have higher rates of incarceration than Canada. From 1982 to 1986, Canada's rate of criminal charges has declined, while its incarceration rate has increased.[2] (Penitentiary populations increased by 43 percent between 1972 and 1983 and by 20 percent between 1982/83 and 1986/87.[3] Despite this reality, the Committee senses that the Canadian public seems to think that fewer offenders are being incarcerated for shorter periods of time and that early release is easier to get. Generally speaking, the Canadian public is not as well-informed about sentencing practices as it should be and therefore sees a leniency in the system that is not borne out by reality.

Too many people are sentenced to incarceration for non-violent offences and non-payment of fines — this creates overcrowding and results in a violation of the proportionality principle in sentencing. Moreover, the

growth in prison populations does not appear to have reduced crime. **In the Committee's view, expensive prison resources should be reserved for the most serious cases. Other than in exceptional situations, the use of incarceration for non-payment of fines should be restrained. Insofar as minor offenders are concerned, all non-carceral options should be exhausted before there is recourse to incarceration.**

While few would disagree with the lengthy imprisonment of dangerous, violent criminals or some recidivists, there is a case to be made for alternative forms of sentencing for many offenders who do not pose a threat of physical harm, nor endanger the safety of individuals. Not surprisingly, then, the Sentencing Commission, following the leads of the Ouimet Committee and the Law Reform Commission of Canada, recommended that sentences of imprisonment be used with restraint and that they be reserved normally for the most serious offences, particularly those involving violence. These recommendations are consistent with the resolution on Alternatives to Imprisonment passed at the Seventh U.N. Congress on Crime Prevention and the Treatment of Offenders.

Nevertheless, the Committee is aware that some offenders incarcerated for property offences have long criminal records and in some cases do pose a risk (of violence, as well as of general recidivism) to the community. The Committee believes it is unlikely that many of these offenders have really been held accountable, other than "doing time", or have accepted responsibility for their criminal behaviour. The Committee does not wish to give the impression that it considers property offences trivial. It knows that such offences may be extremely upsetting to the victims who are affected by them. Moreover, not sanctioning such behaviour seriously can give both offenders and the public the impression that such conduct is tolerable. In the Committee's view, it is not.

In supporting the expansion and development of alternatives to incarceration, the Committee is of the view that one of the primary foci of such alternatives must be on techniques which contribute to offenders accepting responsibility for their criminal conduct and, through their subsequent behaviour, demonstrating efforts to restore the victim to the position he or she was in prior to the offence and/or providing a meaningful apology.

In the Committee's view, this notion should be uppermost in sentencing judges' minds. The issue should be addressed by both defence and

Crown counsel. The victim's views and needs should be ascertained and presented, after disclosure to the defence, to the sentencing judge. Wherever possible, victim-offender reconciliation services and, in more serious cases, alternative sentence planning services — both of which are discussed in Chapter Seven — should be engaged at the earliest opportunity to provide appropriate support to victims and to assist all parties in reaching or proposing sentencing dispositions responsive to the needs of both victims and offenders.

F. Offender Rehabilitation

The Committee is aware that some (perhaps many) offenders will not easily accept responsibility for their offences. In some cases, their "criminal thinking" will be deeply ingrained and their denial of their own responsibility will be strong. In these and other cases, offenders' own needs may be so great that they may be unable to make any meaningful restitution or efforts to repair the harm done until they have been rehabilitated. (Many witnesses used the word "habilitation" rather than "rehabilitation" to draw attention to the deficiencies in some offenders' development. These are said to be so great as to require corrections to provide basic opportunities for personal, social, educational and vocational skill development. It is not so much a matter of restoring what has been lost, but of providing what the offender has never had.)

The sentencing and correctional processes must acknowledge this and provide opportunities for offender habilitation, not simply because (as some suggest) such offenders may have themselves been victims. In the absence of so doing, it is unlikely that these offenders will be able to acknowledge their own roles in their behaviour, demonstrate to their victims and the community their efforts to restore the social balance which was disrupted by their conduct, and change their subsequent attitudes and behaviour so as to avoid criminal conduct in the future.

The rehabilitation of offenders was recommended, generally in conjunction with other goals, by a number of witnesses as the purpose of sentencing. Some witnesses suggested it as a mechanism for protecting the public from recidivistic crime; for others it had "purer" humanistic origins.

Although it is generally recognized that prisons are not suitable for rehabilitating offenders, some courts continue to sentence offenders to imprisonment for rehabilitative purposes. It has become well understood in

recent years that prisons cannot be expected to rehabilitate unwilling offenders. Hence Bill C-19 (which was never enacted) and the Sentencing Commission proposed that imprisonment not be imposed *solely* for the purpose of rehabilitation.

Unfortunately, this view has come to be associated with the view that rehabilitation should be ignored in prisons. What is intended is the following: if the primary goal of the sentence is the rehabilitation of the offender, then an appropriate community sanction should be chosen. Where a custodial sanction must be chosen (for reasons not related to rehabilitation), correctional authorities should provide opportunities for rehabilitation. This view is reflected in the strategies identified for the purpose of corrections in *Correctional Philosophy*, the first working paper of the Correctional Law Review.

Needs will vary from offender to offender and thus the range of programs and services to be provided will be large. In some cases, it will involve literacy training; in others, opportunities for vocational or post-secondary education; in many cases, addictions treatment programs will be necessary; often life skills and pre-employment counselling will be needed. These are but a few of the services and programs which have been identified for and reviewed by the Committee.

While the Sentencing Commission would permit consideration of the offender's prospects for rehabilitation as a low-level sentencing principle, it argued against rehabilitation as a sentencing goal on the ground that evaluations of various programs showed that little effect could be expected from them in lowering recidivism — particularly, in the custodial context. This view has recently been reiterated in an article by one of the commissioners and the Commission's research director.[4]

The Committee has been convinced by its hearings and institutional visits that a wide range of appropriately targeted programs and services may positively benefit offenders. The Committee believes that people can and do change; it rejects the notion that "nothing works". However, the Committee is concerned about the research which suggests that some programs may be harmful and that many appear to offer no positive benefits. Nevertheless, there appears to be no constructive way to foster positive changes in offenders beyond making the attempt. In light of the research, it is imperative that programs continue to be evaluated regularly and that new

ones build on approaches which have demonstrated success. (This will be discussed further in Chapter Fourteen.)

G. Preserving the Authority of and Promoting Respect for the Law

Ultimately the Sentencing Commission concluded that the majority of people do not need to be deterred from serious criminal behaviour, nor do they need to be rehabilitated or incapacitated. However, they do need to perceive that there is accountability for seriously blameworthy behaviour. It is the fact of holding people accountable by sanctions for behaviour which betrays core values of their community which should outline the overall purpose of sentencing. In its absence, the community will become demoralized, as individuals flout the law believing that the benefits of unlawful behaviour outweigh its costs. **The Committee agrees with the focus on accountability.**

H. Canadian Sentencing Commission Suggestions

There are genuine inconsistencies between traditional penal goals as they have been interpreted in case law to date. To avoid inconsistencies, the Sentencing Commission proposed that goals or principles which are clearly antagonistic should be excluded from the formulation of a sentencing rationale. It was of the view that principles (factors which would affect the determination of a particular sentence) should be ranked as a way of resolving dilemmas arising from the need to consider competing principles. Furthermore, it said, goals and principles which are repugnant to the nature of the sentencing process should not be assigned to it. Finally, even if a goal agrees in theory with the sentencing process, it should not be subscribed to in a fundamental way if there can be no reasonable expectation that it will be achieved to any significant degree.

The sentencing purpose proposed by the Sentencing Commission was set out earlier in this chapter. The Commission also proposed a set of principles to guide judges in the determination of specific sentences. The Committee relied on the language of these principles, to the extent they were not inconsistent with the purpose it expressed, in developing its own.

I. Summary of Committee's Views

In summary, the Committee believes that the formulation of a sentencing rationale in Canada must emphasize the contribution of

sentencing to public protection and should reflect the value of opportunities for:

- **offenders to accept and demonstrate responsibility for their criminal behaviour and its consequences;**

- **victim reparation and victim-offender-community reconciliation;**

- **offenders to become "habilitated" or rehabilitated; and**

- **denunciation and incapacitation, where necessary.**

The Committee further believes that, except where to do so would place the community at undue risk, the "correction" of the offender should take place in the community and imprisonment should be used with restraint. Finally, the Committee believes that wherever possible victims and the community should have greater involvement in sentencing and corrections.

The Committee also agrees with the President of the Law Reform Commission of Canada that sentencing must be part of an integrated, overall approach to the formulation of criminal justice policy. In the Committee's view, its proposed approach to sentencing is consistent with the purposes and principles proposed in *The Criminal Law in Canadian Society*.

Moreover, the Committee believes that criminal justice work should be grounded in the human dimension of crime (actual hurt or harm caused by offenders to victims, their families and their communities). Currently, decision-makers have little knowledge of the results of their decisions and whether or not they are achieving their desired goal. It has been suggested that the present criminal justice system is irrelevant to the human experience of crime. If this is true, it no doubt contributes to cynicism and a demoralizing lack of purpose for those who work in the field, as well as to public dissatisfaction. While there may be disagreement as to the extent that these notions are true, the Committee considers that its approach to sentencing would begin to remedy these problems.

Recommendation 5

The Committee recommends that the following be enacted in legislation as the purpose of sentencing:

The purpose of sentencing is to contribute to the maintenance of a just, peaceful and safe society by holding offenders accountable for their criminal conduct through the imposition of just sanctions which:

(a) require, or encourage when it is not possible to require, offenders to acknowledge the harm they have done to victims and the community, and to take responsibility for the consequences of their behaviour;

(b) take account of the steps offenders have taken, or propose to take, to make reparations to the victim and/or the community for the harm done or to otherwise demonstrate acceptance of responsibility;

(c) facilitate victim-offender reconciliation where victims so request, or are willing to participate in such programs;

(d) if necessary, provide offenders with opportunities which are likely to facilitate their habilitation or rehabilitation as productive and law-abiding members of society; and

(e) if necessary, denounce the behaviour and/or incapacitate the offender.

Recommendation 6

The Committee recommends that the following principles form part of a legislated sentencing policy and be considered in the determination of an appropriate sentence:

In endeavouring to achieve the sentencing purpose, the court shall exercise its discretion in accordance with the following principles:

(a) The sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender; further, it should be consistent with the sentences imposed on other offenders for similar offences committed in similar circumstances (including, but not limited to, aggravating and mitigating circumstances, relevant criminal record and impact on the victim);

(b) The maximum penalty should be imposed only in the most serious cases;

(c) The nature and duration of the sentence in combination with any other sentence imposed should not be excessive;

(d) A term of imprisonment should not be imposed without canvassing the appropriateness of alternatives to incarceration through victim-offender reconciliation programs or alternative sentence planning;

(e) A term of imprisonment should not be imposed, nor its duration determined, solely for the purpose of rehabilitation;

(f) A term of imprisonment should be imposed where it is required:

(i) to protect the public from crimes of violence, or

(ii) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice; and

(g) A term of imprisonment may be imposed to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction or enforcement mechanism appears adequate to compel compliance.

Recommendation 7

The Committee recommends that judges be required to state reasons for the sentence imposed in terms of the proposed sentencing goal and with reference to the proposed sentencing principles, and salient facts relied upon, so that victims, offenders, the community, correctional officials and releasing authorities will understand the purpose of the sentence and appreciate how it was determined.

Notes

(1) In British Columbia, an effort was made to expand community service to provide direct service to the victim. Investigation revealed, however, that the large majority of citizens did not want victim assistance through direct service by offenders: Darryl Plecas and John Winterdyk, "Community Service: Some Questions and Answers", *Provincial Judges Journal*, March 1982, p. 11-12 and 19.

(2) Law Reform Commission of Canada brief, pp. 16-18.

(3) Correctional Service of Canada, *Third Report of the Strategic Planning Committee*, Solicitor General Canada, 1983; Solicitor General Canada, *Solicitor General, Annual Report, 1986-87*, Ministry of Supply and Services, Ottawa, 1988, p. 60.

(4) J.P. Brodeur and A.N. Doob, "Rehabilitating the debate on rehabilitation", forthcoming.

CHAPTER SIX

SENTENCING REFORM: SENTENCING GUIDELINES AND MINIMUM AND MAXIMUM SENTENCES

A. Background to Reform

1. Violence: Perception and Reality

Earlier in this report, there was a discussion of the overestimation of violent crime by the public and the likelihood of recidivism for violent offenders. The fear of criminal violence has become heightened in recent years. **While the Committee considers that the perception of the *prevalence* of violent crime is not reflected in reality, it does believe that the *fear* is real and must be addressed by all levels of the criminal justice system.**

The Committee attributes much of the public misperception of crime to media reports which sensationalize violent cases and which often deal with complex situations in a limited time or space. Moreover, the Committee recognizes that in recent years there has been increased reporting to police of certain offences (e.g., sexual assault), as well as changes in criminal justice record-keeping practices, both of which have also contributed to the perception of increasing violence.

Nevertheless, there has been a number of serious cases in recent years where offenders on conditional release who had been previously convicted of homicidal offences subsequently took another life. While these incidents are few in number, they are dramatic and it is not surprising that they have contributed to public fear and a lack of confidence in the correctional, releasing and supervision systems.

2. Public Mistrust of the Criminal Justice System

The John Howard Society of Canada suggested that the problem of the lack of public trust in our criminal justice system results from both internal and external sources. In their view, each component of the criminal justice system (e.g., police, judiciary, corrections, etc.), operating within its own

particular mandate and with its own resources, has publicly expressed its inability to do its job effectively in terms of the failure of another component of the system. According to the Society, the overall impression left with the public is that the system as a whole is totally ineffective. External factors which affect public distrust, they say, are the influences of mass communications (both in the news — we get it quickly and in colour — and in entertainment), the proliferation of security system companies (which, by implication, casts doubt upon the trust we can place in the criminal justice system), and the development of crime prevention initiatives (which imply we need protection).

While the Committee agrees with the general tenor of these remarks, it is concerned that areas of the criminal justice system genuinely in need of reform be identified and proposals for reform be considered. This chapter of the report sets out a consideration of sentencing reforms.

B. Sentencing Guidelines

The perception of the prevalence of violence and the growing public mistrust of the criminal justice system have led some witnesses appearing before the Committee and some other segments of the community to call for, among other things, an increase in the availability and the quantum of mandatory minimum sentences or mandatory sentencing guidelines. The Committee was provided with evidence with respect to sentences in various parts of the country for certain offences (child abuse in Ottawa, and sexual assault in Toronto and Newfoundland, for example) which gave the Committee the impression that some judges at times do not seem to rank these offences as seriously as the Committee would have expected. Alternatively, the principle of proportionality did not seem to be the overriding factor affecting the sentences given in these cases. Impressionistic evidence with respect to spousal assault seemed to lead to the same conclusion. **The Committee believes that these particular offences should be reviewed carefully by the judiciary, Crown attorneys and, in the event a permanent sentencing commission is established, by that body.**

Not all witnesses agreed with the Sentencing Commission's view that proportionality should be *the* primary consideration at sentencing. Many took the position that sentencing is and should remain a human process. While acknowledging the importance of proportionality, these witnesses were more inclined than those who espouse the "just deserts" philosophy to place a higher value on other factors which might affect the sentencing decision.

Such witnesses tended to oppose the introduction of sentencing guidelines, except perhaps those which would be advisory only.

Other witnesses tried to take a middle course. While supporting the importance of reducing unwarranted disparity, the Canadian Psychological Association, for example, asserted the necessity of some measure of judicial discretion which would allow the individualization of the sentence. It supported in principle the development of sentencing guidelines designed to reduce *unwarranted* disparity but underlined the requirement of further consideration regarding structure. It suggested the need for a clear articulation of the social purposes of sentencing, the systematic collection and dissemination of normative sentencing data, evaluation of proposed sentencing guidelines, and further research on sentencing disparity. It also proposed that education of those judges whose decisions are erratic be a priority.

The Committee believes that sentencing guidelines have much to commend them. (In particular, it would expect to see different sentencing patterns for sexual assault, child abuse, and spousal assault under sentencing guidelines.) **However, the Committee is concerned that such guidelines are unlikely to respond adequately to the sentencing goal and principles proposed earlier in this report by the Committee and does not support their introduction at this time.**

The Committee has been persuaded of the value of offenders acknowledging responsibility for their criminal conduct and coming to terms with what has happened through positive steps designed to make reparations to the victim and/or community and to habilitate themselves. This strategy requires a more individualized approach to sentencing than that offered by sentencing guidelines, which are likely to be a more useful tool where the underlying goals are retributive and punitive, or perhaps where denunciation needs to be the primary consideration.

Where restoration of community harmony is paramount, sentencing guidelines, in other than an advisory form, are unlikely to be very helpful. By their very nature, they can only classify cases according to the in/out (custodial or community) nature of the sanction and the quantum of the sanction (generally, time or amount of fine or restitution). It is unlikely that they could be designed to deal with the complex variables which may determine the components of a sentencing package designed to address the sentencing philosophy proposed in the preceding chapter of this report. Such

a philosophy may actually be incompatible with the in/out and quantum issues of sentencing guidelines.

Moreover, there is some evidence that guidelines have had the undesirable effect of contributing to rapidly increasing prison populations in the United States. (The U.S. Sentencing Commission anticipates that its guidelines will lead to a doubling of the federal prison populations.) Minnesota and Washington State have calibrated their guidelines so as to prevent an increase in prison populations. In addition, guidelines which are only advisory do not seem to accomplish the desired results and some presumptive guidelines are being challenged in American courts.[1]

Canadian appellate courts have greater powers to review sentencing decisions than do their American counterparts, thereby negating to some extent, in the Committee's opinion, the need to adopt guidelines in order to eradicate unwarranted sentencing disparity. The Committee also believes that current technology permits the development of sentencing data banks which could be accessed by sentencing judges.

Dr. John Hogarth appeared before the Committee to explain the Sentencing Data Base, a computerized information-storage system he designed at the University of British Columbia with support from I.B.M. Canada, the B.C. and federal governments, private foundations and the legal profession. Used by judges in a number of court buildings in British Columbia, it provides (as of March 1988) sentencing information about B.C. *appellate* cases decided over 15 years (a summary of each judgment can be called up on the screen) and about the frequency of use of various sentences (suspended sentences, with and without probation, fines and prison) and the range and frequency of custodial sentences or fines, given at *trial* over four years for various offences, categorized by gender, age, marital status and criminal record, if requested. The system also includes information about general sentencing principles, procedures and evidence, and aggravating and mitigating factors recognized in the B.C. Court of Appeal from 1982 to 1986 (full text of cases available), as well as regionally identified resources for assisting offenders. The system is continually being expanded.

While each case must obviously be decided on its own facts, the Data Base is a useful tool for trial judges; it provides quick access to basic sentencing information. Hogarth suggests that widespread use of the system will reduce unwarranted sentencing disparity without imposing guidelines. (He feels that if research does not prove this assumption correct, one will be

able to conclude that the provision of reasonably complete and simple-to-use information cannot itself promote more consistent sentencing decisions.)

One limitation on the data base is that, at present, it includes only British Columbia cases. Given the absence of sentencing appeals at the Supreme Court of Canada, sentencing policy is essentially set by provincial courts of appeal. Depending on how easy it is to retrieve existing data from provincial courts and other trial court registries, the system could be expanded to include all Canadian sentencing jurisdictions. Implementation of the Committee's previous recommendation requiring judges to state reasons for sentences could facilitate compilation of relevant sentencing information for the evolution of a more sophisticated national sentencing data base.

Moreover, the system is currently able to sort cases in relation only to a few standardized offender characteristics — gender, age range, marital status, and presence or absence of a criminal record. Determining an appropriate sentence by comparing it with other similar cases may require more sophisticated data entry, sorting and retrieval mechanisms. To reduce unwarranted disparity effectively, judges may need to know more about the nature of the criminal record, circumstances related to the offence and offender characteristics, other than gender, age, and marital status, as well as what community sanctions have been used in various circumstances. The existing system does not permit retrieval of such information. In fact, in many trial decisions, because of the absence of reasons, such information is not readily available.

A different approach has been developed by Dr. Doob and Norman Park, president of Norpark Computer Design, Inc., who submitted information to the Committee. They contend that, even with sentencing guidelines, judges need information about the use of the ranges of sentences that fall within the guidelines and about the kinds of cases that fall outside the ranges, along with the reasons for departures.

Doob and Park, in conjunction with sentencing judges, developed a data collection sheet on which sentencing judges check off the relevant attribute of sex offender and offence characteristics (all but one of which are related to the Committee's proposed principles to be considered in the determination of an appropriate sentence):

- criminal record (i.e., none, inconsequential or unrelated; some but not serious; substantial);

- relative severity of this particular offence as compared to other instances of the same offence (i.e. less severe than most; about the same as most; more severe than most);
- involvement of the offender;
- aggravating or mitigating circumstances;
- impact on victim; and
- prevalence of the offence in the community.

Judges may also record additional comments on the sheet. These sheets provide a sentencing data base with respect to offences proceeded with by indictment. Court of appeal summaries have been added to the system.

The computer program gives feedback on thirty-four of the most common *Criminal Code* and *Narcotic Control Act* offences dealt with in provincial courts. The distribution of sentences given to a judge using the system is divided into up to ten categories and presented in four columns — the distribution of sentences ordered at trial in each of the judge's own province and the participating provinces collectively (initally, B.C., Saskatchewan, Manitoba, P.E.I. and Newfoundland), as well as those made in the courts of appeal in each judge's own province and the participating provinces collectively. The frequency of distribution is given for various forms of sentences: discharge, probation, restitution, compensation; community service order; fine; six lengths of imprisonment less than two years and imprisonment for two years or more; and composite sentences (one sentence for more than one offence). Judges may review individual cases or subsets of cases on the screen or have them printed. They may also print sample distributions or the full information recorded by the sentencing judge on any case.

Seventy-nine percent of 414 trial judges surveyed by the Canadian Sentencing Commission indicated that it would help them to have better information about current sentencing practices. Seventy percent felt a computerized system providing information about individual cases would be helpful. Currently judges have too little information in an easily usable form and too much in a form that cannot be used effectively.

Nevertheless, the Committee believes that useful work on the collection of sentencing data can begin and that much work can be done

towards developing sentencing guidelines. Such information would assist the judiciary whether or not formal guidelines are ever implemented. Moreover, the Committee also takes the position, contrary to that of the Sentencing Commission, that the use of sentencing guidelines for the purpose of reducing unwarranted sentencing disparity which occurs because of judicial practices is not inconsistent with maintaining a well-structured conditional release system. (However, the Committee acknowledges that some disparity occurs at present because offenders with longer sentences who obtain parole seem to do so at an earlier stage in their sentences than those with shorter sentences.)

While opposing the introduction of presumptive or mandatory sentencing guidelines at this time, the Committee favours the development of *offence rankings*, as described on p. 39. It is in general agreement with the groupings of offences proposed by the Sentencing Commission on pages 494 to 515 of its report (but does not agree with the proposed maximums). Furthermore, the Committee believes that the Department of Justice should consult widely on the specific proposals before adopting them, particularly with respect to offences which constitute sexual assault, child abuse and spousal abuse. Similarly, the proposed aggravating and mitigating factors ought to have more community input.

These tasks should be carried out by a permanent sentencing commission. There is a need for an independent body to collect and disseminate sentencing information. It should also fulfill an important role with respect to public education about sentencing. It has also been suggested that it study increasing community involvement in sentencing, that it gather sentencing data with respect to race and gender, and that women and Natives be included in the membership of the commission.

Recommendation 8

> **The Committee recommends that only advisory guidelines be developed at this time and that priority be given to developing first those which would be applied to the most serious offences.**

Recommendation 9

> **The Committee recommends implementation of the following recommendations of the Sentencing Commission as to the**

development of such guidelines and the operation of a permanent sentencing commission:

(a) that four presumptions be used to provide guidance for the impostion of custodial and non-custodial sentences:

(i) unqualified presumptive disposition of custody;

(ii) unqualified presumptive disposition of non-custody;

(iii) qualified presumptive disposition of custody; or

(iv) qualified presumptive disposition of non-custody. (Rec. 11.5)

(b) that the following list of aggravating and mitigating factors be adopted as the primary grounds to justify departures from the guidelines:

Aggravating Factors

1. Presence of actual or threatened violence or the actual use or possession of a weapon, or imitation thereof.

2. Existence of previous convictions.

3. Manifestation of excessive cruelty towards [the] victim.

4. Vulnerability of the victim due, for example, to age or infirmity.

5. Evidence that a victim's access to the judicial process was impeded.

6. Existence of multiple victims or multiple incidents.

7. Existence of substantial economic loss.

8. Evidence of breach of trust (e.g., embezzlement by [a] bank officer).

9. Evidence of planned or organized criminal activity.

Mitigating Factors

1. Absence of previous convictions.

2. **Evidence of physical or mental impairment of offender.**

3. **The offender was young or elderly.**

4. **Evidence that the offender was under duress.**

5. **Evidence of provocation by the victim.**

6. **Evidence that restitution or compensation was made by [the] offender.**

7. **Evidence that the offender played a relatively minor role in the offence.** (Rec. 11.8)

(c) ... that the following principles respecting the use of aggravating and mitigating factors be incorporated to the sentencing guidelines:

***Identification*: when invoking aggravating and mitigating factors, the sentencing judge should identify which factors are considered to be mitigating and which factors are considered to be aggravating.**

***Consistency*: when invoking a particular factor, the judge should identify which aspect of the factor has led to its application in aggravation or mitigation of sentence. (For example, rather than merely referring to the age of the offender, the judge should indicate that it was the offender's *youth* which was considered to be a mitigating factor or the offender's *maturity* which was considered to be an aggravating factor. This would prevent the inconsistent use of age as an aggravating factor in one situation and as a mitigating factor in a comparable situation.)**

***Specificity*: the personal circumstances or characteristics of an offender should be considered as an aggravating factor only when they relate directly to the commission of the offence. (For example, a judge might consider an offender's expertise in computers as an aggravating factor in a computer fraud case but the above principles would preclude the court from considering the lack of education of a convicted robber as an aggravating circumstance.)**

Legal rights: **the offender's exercise of his [or her] legal rights should never be considered as an aggravating factor.** (Rec. 11.9)

(d) **the establishment of a Judicial Advisory Committee which would act in an advisory capacity to the permanent sentencing commission, in the formulation of amendments to the original sentencing guidelines... [A majority of] the membership of the Judicial Advisory Committee should be composed of trial court judges from all levels of courts in Canada.** (Rec. 11.11)

C. Minimum Sentences

Were presumptive or mandatory sentencing guidelines to be adopted, much of the public demand for mandatory minimum sentences would be satisfied by appropriate guidelines for specific offences. Also, some members of the Committee feel strongly that either presumptive guidelines or minimum sentences are required to achieve the denunciatory requirements of the community posed by certain violent criminal conduct. A review of the limited statistical sentencing information available, as well as some sentencing data provided to the Committee by witnesses, reveals that not only is there a wide range of sentences given for certain serious offences (attempted murder, manslaughter, criminal negligence causing death, serious sexual assaults, etc.), but also that a good number of sentences for these offences do not appear to reflect the gravity of the offence to the extent that the Committee members feel is appropriate.

Other witnesses have strongly opposed the expansion of minimum sentences and supported the recommendations of the Law Reform Commission of Canada and the Canadian Sentencing Commission that mandatory minimum sentences be abolished for all offences except murder and high treason. Likewise, some Committee members doubt the effectiveness, and deplore the social and financial costs, of mandatory minimum sentences, which in their view are an overreaction to present excessive judicial discretion in sentencing. Such sentences increase court time (defendants fight hard to avoid conviction) and cause distortions in charging practices and plea negotiations. Moreover, they preclude the possibility of responding to cases in an individualized manner.

The Committee is aware that mandatory minimum sentences are now constantly subject to Charter challenge. While some, relatively short minimum sentences have been upheld, the Supreme Court of Canada in *R. v. Smith*, held in 1987 that section 5(2) of the *Narcotic Control Act*, providing for a mandatory minimum sentence of seven years for importing a narcotic, constituted cruel and unusual punishment, thereby breaching section 12 (and not justified under section 1 of the Canadian Charter of Rights and Freedoms. In assessing whether penalties are grossly disproportionate (as opposed to merely excessive), so as to constitute cruel and unusual punishment, Chief Justice Dickson and Mr. Justice Lamer suggested considering the gravity of the offence, the personal characteristics of the offender, and the particular circumstances of the case, as well as the effect of the sentence (including nature, length and conditions under which it is served), whether it is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles and whether valid alternative punishments exist.

The Court found that section 5(2) of the *Narcotic Control Act* failed the proportionality test, for it led to the imposing of a totally disproportionate term of imprisonment in that it covered many narcotic substances of varying degrees of danger, totally disregarded the quantity imported and treated as irrelevant the reason for importing and the existence of any previous convictions. In the Court's opinion, it is not necessary to sentence the minor offender to seven years in prison to deter the serious offender. The means employed to achieve the legitimate government objective of controlling the importation of drugs impairs the right protected by section 12 of the Charter to a greater degree than necessary. The seven-year minimum sentence becomes cruel and unusual because it must be imposed regardless of the circumstances of the offence or the offender; its arbitrary imposition results in some cases receiving a legislatively ordained grossly disproportionate sentence (e.g. for importation of a small quantity of cannabis for personal use).

Mr. Justice LeDain did suggest, however, that section 5(2) of the *Act* might be restructured in such a manner, with distinctions as to the nature of the narcotic, quantities, purpose, and possibly prior conviction, as to survive further challenge. He supported the test set out by the dissenting Mr. Justice McIntyre:

> A punishment will be cruel and unusual and violate section 12 of the Charter if it has any one or more of the following characteristics:

(1) The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;

(2) The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or

(3) The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.

At present, the Committee does not recommend the abolition of minimum sentences. Specifically, it believes that minimum life sentences should be retained for murder and high treason and it does not agree with the Sentencing Commission's recommendations that parole ineligibility periods for first and second degree murder be reduced from 25 years to 15-25 years and from 10-25 years to 10-15 years, respectively. Nevertheless, the Committee does not generally support the introduction of further minimum sentences. For the most part, it prefers the use of advisory sentencing guidelines to address concerns related to specific offences. However, **the Committee believes that the public interest requires that repeat violent sexual offenders be sentenced to severe minimum periods of imprisonment. The Committee wishes to ensure that sentences for repeat violent sexual offenders result in such offenders serving at least ten years in prison.**

Although the majority of the Committee believes that the number of minimum sentences *per se* should not be increased, there is consensus that both public protection and the expression of public revulsion for such conduct (denunciation) require that the minimum time to be served in prison by offenders who have more than once sexually assaulted others with violence be subject to legislative rather than judicial and administrative control. While recognizing that all sexual assaults constitute serious violations of the person and are likely to have long-lasting consequences, for this purpose, the Committee intends not to include in its meaning of violence those offences which are committed through enticement or advantage, but to focus on the more brutal offences.

The Committee is of the view that properly structured amendments to the *Criminal Code* could meet the tests described in *R. v. Smith*. Given the nature and circumstances of the offence, particularly its repetition, the Committee believes that the public conscience would not be outraged, nor would human dignity be degraded, especially when considered in light of other sentences currently provided for in Canadian law and the seriousness of the offence. In the Committe's opinion the proposed amendment does not

exceed what is necessary for the achievement of the valid social aims of protecting the community, at least temporarily, by incapacitating the offender, demonstrating society's abhorence of the offence, and communicating to the victim and the community that such conduct will be dealt with severely. (To the extent that it is possible to achieve deterrence in such circumstances, the sentence would also support the traditional sentencing aim of deterrence.) Public confidence in present sentencing practices in this area, particularly among women who as a class are invariably the victims of such attacks, has been eroded. Existing alternatives appear to be insufficient to ensure public protection from these repeat violent sexual offenders for reasonably long periods of time and demonstrating the community's disapproval of such offences. No other alternative appears to be appropriate to achieve the desired results. The proposed punishment is not arbitrary — it would apply to a narrowly defined class of offenders in narrowly defined circumstances for a very grave offence. The sentencing judge would retain control of determining the total sentence, so that more serious offences may be distinguished from those which appear less brutal, although still violent, and to take account of various offender characteristics. The proposed penalty is consistent with the sentencing purpose and principles proposed by the Committee in Chapter Five. In the Committee's opinion, the rationale for the present penalty for second degree murder should suffice in supporting the proposed penalty for repeat violent sexual offenders.

Recommendation 10

The Committee recommends that the minimum sentence for all offenders convicted of the second or subsequent offence for sexual assault involving violence be ten years and that the parole ineligibility period be established legislatively as ten years, regardless of sentence length.

Recommendation 11

To reach a public consensus on which offences or offenders should be subject to the aforementioned minimum parole eligibility period, the Committee recommends that the Department of Justice consult widely on this issue.

D. Maximum Sentences

Maximum sentences are required to limit the maximum deprivation of liberty that the state may impose on an offender. This concept is fundamental to democratic societies.

Most, but not all, witnesses agreed that the present maximum sentences need to be reviewed and, for the most part, reduced. The Committee agrees with the Sentencing Commission that the present maximums, with unstructured judicial discretion, contribute to wide sentencing variation, judge shopping and lack of certainty. Moreover, in the context of the Sentencing Commission's recommendations for the abolition of parole and the reductions of the duration of day release and the remitted portion of the sentence, the Sentencing Commission's proposed maximums make sense.

However, unlike the Sentencing Commission, the majority of the Committee feels that parole has considerable value for both the public and offenders, even though the Committee holds that the availability of day parole and full parole early in the sentence seems to undermine the meaning of a sentence of imprisonment and to contribute to public confusion, and ultimately public distrust, about sentencing and release. For this reason, the Committee has been concerned about the suitability of the present legislative parole ineligibility periods. (Its comments with respect to this are to be found in Chapter Twelve.)

Therefore, it is the opinion of the Committee that public confidence in the criminal justice system would not be enhanced by a reduction of maximum sentences.

Recommendation 12

> **The Committee recommends that the Department of Justice continue to consult with the public (not just those with a particular interest in criminal justice issues) with respect to the Sentencing Commission's recommendations in this area and that interested individuals and organizations be encouraged to comment on the specific rankings proposed by the Sentencing Commission.**

Notes

(1) Andrew von Hirsch, "Structuring Sentencing Discretion: A Comparison of Techniques", a paper presented to the Conference on the Reform of Sentencing, Parole and Early Release, Ottawa, August 1-4, 1988.

CHAPTER SEVEN

SENTENCING REFORM: SENTENCING ALTERNATIVES AND INTERMEDIATE SANCTIONS

A. The Goals and Failure of Incarceration

It is now generally recognized that imprisonment has not been effective in rehabilitating or reforming offenders,[1] has not been shown to be a strong deterrent,[2] and has achieved only temporary public protection and uneven retribution, as the lengths of prison sentences handed down vary for the same type of crime.

Since imprisonment generally offers the public protection from criminal behaviour for only a limited time, rehabilitation of the offender is of great importance. However, prisons have not generally been effective in reforming their inmates, as the high incidence of recidivism among prison populations shows.

The use of imprisonment as a main response to a wide variety of offences against the law is not a tenable approach in practical terms. Most offenders are neither violent nor dangerous. Their behaviour is not likely to be improved by the prison experience. In addition, their growing numbers in jails and penitentiaries entail serious problems of expense and administration, and possibly increased future risks to society. Moreover, modern technology may now permit the monitoring in the community of some offenders who previously might have been incarcerated for incapacitation or denunciation purposes. **Alternatives to imprisonment and intermediate sanctions, therefore, are increasingly viewed as necessary developments. The Committee supports this view and reflects it in its proposed sentencing principles.**

B. Alternatives and Intermediate Sanctions

A number of such alternatives are now in use. Some, such as parole and probation, date back to the 19th century, while others are of relatively recent origin. (Fines, of course, originated even earlier.) Sentencing alternatives being used in Canada include diversion, fines, absolute and

conditional discharges, suspended sentences, supervision of offenders in the community by means of probation, community service orders, fine option programs, restitution, temporary absence passes and victim-offender reconciliation programs. Community dispute mediation centres, community resource centres, halfway houses and therapeutic communities, such as facilities for alcoholics, are also in operation. These programs, developed more extensively in some parts of the country than in others, have met with varying degrees of success.

Over the last 15 years, the use of restitution and community service orders for non-violent offenders has met with considerable approval. These forms of sentences recognize the involvement and grievance of the victim and provide some measure of redress, at the very least in a symbolic way. Moreover, they appear to offer more hope than does imprisonment of achieving the eventual rehabilitation of the offender. More recently, intensive probation supervision, home confinement and alternative sentence planning and management have offered opportunities in the form of intermediate sanctions which permit the diversion from incarceration, or the release back to the community earlier, of offenders who might otherwise be, or who have been, incarcerated. Processes which bring victims and offenders together seem to offer both the greatest hope of sensitizing offenders to the impact of their criminal conduct on their victims and the best opportunities for them to take responsibility for their behaviour. As such, they are consistent with the Committee's proposed purpose of sentencing.

Nevertheless, our knowledge about how to select the most appropriate community sanctions for individual offenders remains at a relatively rudimentary state. The Canadian Sentencing Commission identified the need for further research to be conducted with respect to the use and evaluation of community sanctions. In particular, it was concerned about the "widening of the net effect" whereby the introduction of a new sanction (for example, home confinement) might not act as an alternative to incarceration if it were to be applied to offenders who would have been subject otherwise only to probation, rather than to imprisonment. When net widening occurs (as it appears to have done with respect to the use of community service orders), costs of community sanctions are increased, prison populations (and, therefore, costs) do not decrease, and the liberty of offenders who remain in the community may be more severely constrained than previously.

The Canadian Sentencing Commission recommended that guidelines be developed for the use of community sanctions in their own right as

alternatives to incarceration. Such guidelines would assist the judiciary in the selection of a particular community sanction in two aspects of decision-making: choosing a community sanction, as opposed to incarceration (Rec. 12.10); and choosing one community sanction instead of another (Rec. 12.11). These recommendations are rooted in the notions that:

- broad discretion, not guided by explicit standards, is a bad thing;
- punishment should be graduated to reflect the degree of reprehensibility of the conduct being sanctioned; and
- maintaining proportionality requires the ability to compare the severity of sanctions.

Important as these notions are, they, like sentencing guidelines, do not adequately fit the Committee's concept of a sentencing purpose.

Some witnesses encouraged the Committee to consider whether a particular alternative:

- constitutes a true alternative to imprisonment or whether it is more likely to be used as an "add-on" to existing community sanctions, thereby "widening the net" rather than reducing reliance on incarceration;
- is a viable alternative for special groups, such as mentally disordered offenders and persistent, petty offenders;
- is likely to be more effective than incarceration in terms of cost, risk of re-offending before and after sentence expiry, public and victim perception of justice, and humane treatment of the offender; and
- requires the threat of imprisonment as a backup to the community sanction and, if so, what the implications of that are.

In considering alternatives to incarceration, generally, the Committee is aware that the following issues must also be considered:

- whether judges will use the full range of alternatives;

- whether all alternatives are uniformly available; and

- whether a proliferation of options provides opportunities to "tailor" appropriate sanctions for particular offenders or leads to confusion as to which sanction a judge should choose in particular circumstances.

It has been suggested that a proliferation of sentencing alternatives leads to creative individualized sentencing, which is good insofar as it decreases the reliance on incarceration but harmful in the sense that the broad discretion to choose punishment, in the absence of explicit standards, leads to sentencing disparity. Those who hold this view maintain that punishment must be graduated to reflect the degree of reprehensibility of the offender's conduct. Proportionality requires an ability to compare the severity of penalties, and highly individualized sentences are difficult, if not impossible, to compare. They recommend concentrating on a few kinds of standardized non-custodial sentences, such as the use of "day fines" (scaled to offenders' incomes) and community service (where the number of hours ordered can be scaled according to offence severity).[3] Others argue, however, that all we can really achieve in sentencing is a sense of "rough justice". They ask whether the pain of one year's imprisonment for a 30-year old is equivalent to that for a 70-year old; or, how different is one year in a minimum security camp compared to one year in a maximum security prison.[4]

A number of sentencing alternatives are discussed in this chapter, some in more detail than others. Community service orders are discussed extensively because of the prevalence of their use, the availability of literature on the subject, and because a number of witnesses before the Committee raised particular issues concerning their use and proposed recommendations. Alternative sentence (or client specific) planning and victim-offender reconciliation programs are also treated in depth because the Committee is convinced that they present opportunities to hold offenders accountable for their behaviour consistent with the principles the Committee has adopted, although their present use is far from widespread. Similarly, intensive probation supervision and home confinement offer promise as mid-range sanctions. Other sentencing alternatives the Committee feels are particularly valuable are discussed in a more concise manner. (In doing so, the Committee does not intend to imply that other alternatives not mentioned here are without merit.)

The Committee feels it is important to describe sentencing alternatives and intermediate sanctions in this report because it anticipates the readership will be relatively broad and few previous national reports have highlighted these options. Moreover, the approaches described in this chapter are not limited to being used as sentencing options. They have much to commend them in the release context as well.

1. Community Service Orders

a. Historical Perspective

Community service as a punishment for crime may be said to have originated in a British slavery statute which provided that able-bodied vagrants who would not work would be enslaved to their former masters (or, in their absence, to the municipality) for a period of two years.[5] Other forms of "community service" used instead of imprisonment included impressment for service in the navy or army, or transportation to a penal colony for settlement, such as Australia. In modern times, the substitution of work for penal sanctions has taken the form of public or community work. Today the use of community service is widespread, although there is still considerable discussion about its usefulness and desirability.

b. What is Community Service?

As an alternative to jail terms, sentences involving community service require offenders to perform without pay prescribed work in the community for specific periods of time. Offenders may be required, for example, to help the underprivileged or disadvantaged, to shovel snow, clean parks, work in children's centres or deliver meals on wheels to the elderly. The essential characteristic of the work required is that it be of benefit to the community.

Opportunities for community service now exist in all Canadian provinces and territories except New Brunswick. Generally funded by provincial correctional authorities, these services may be coordinated by probation agencies themselves or contracted through them to private agencies or individuals.

c. Advantages of Community Service Orders

There are many advantages for the offender in the community service program. They include the possibilities for new relationships, new learning and job training, and the chance to develop good work habits and to make constructive use of time. There is also an important economic advantage for the taxpayer when community service is used as a true alternative to incarceration, rather than as an "add on" to some other community sanction which would have been selected by the judge instead of imprisonment. Community service punishes offenders, in that their free time is restricted, as well as offering them a chance to reform themselves.

From the beginning, this sentence has enjoyed a wide measure of support both from the public and people involved in the criminal justice system. Over the years, it has attracted little controversy. Experience in British Columbia and in Ontario bears out reports that community service appears to be reasonably successful wherever it is carried on.[6]

Research in British Columbia in 1981 indicated that the large majority of offenders sentenced to community service (CS) felt that they were getting something out of the program, that their work was appreciated, "that CS will help them stay out of trouble, and that they are paying back the community for having committed an offence". It was found that the attitudes of offenders were changed through participation in community service and that, regardless of type of offence, the offenders with the most positive attitudes were those who had completed the greatest number of hours of service.

In Ontario, increasing use has been made in recent years of community service orders for people convicted of a wide range of offences. The Correctional Services Minister of Ontario stated in November 1984 that 20 percent of offenders sentenced to do community work actually had done more than ordered, staying on either to finish a job or becoming personally involved in volunteer efforts. In addition, it has been found that this work experience has led to subsequent job opportunities for some individuals.

d. Relationship of Community Service to Sentencing Goals

Community service does not incapacitate the offender to any serious degree. Although it is to an extent punitive, it is not designed as a form of retribution or intended to cause suffering. Rehabilitation of the person

sentenced is only part of the intent of this program. Offenders are required to be responsible not merely for themselves but also for the effect of their behaviour on others. This form of sentence, therefore, represents not only a change in method of punishment but also a change of goals:

> [Community service fosters] an *awareness of the needs of others*, an awareness "*that the members of society are interdependent*" ... in short, ... [the object is] to change the offender's basic moral attitudes toward his [or her] society.[7] (our emphasis)

This goal represents a desire not merely to repair damage done but to express the principle of justice in social relations.

> The Community Service Order is *a means of providing restitution to society* for the harm caused by the offender. ...
>
> This form of penalty, a very useful alternative to the traditional methods of sentencing, *emphasizes the offender's responsibility* to society in a direct way.[8] (our emphasis)

These goals are entirely consistent with the sentencing goal proposed by the Committee.

e. Issues of Concern

i. Legislative Authority for Community Service Orders in Various Jurisdictions

The sentence of community service was adopted in Canada during the late 1970s after its legislated introduction in England, although no specific legislative provision for it exists here. It has been regarded as an appropriate disposition for offenders convicted of a wide range of less serious offences, and is ordered, generally on consent (as in other Commonwealth countries), pursuant to section 663(2)(h) of the *Criminal Code* as a condition of probation. The use of the condition must, of necessity, be based on practical considerations relative to the ability of the offender to perform the work and the community to provide the avenues of enterprise.

Community service was introduced by legislation in Georgia in 1982. It was intended to "pointedly impress upon the probationer the collective concern of society over his [or her] criminal activity," and to promote a "work-ethic approach to punishment".[9] The responsibilities of the community agency, the community service officer, the offender and the

judiciary are all clearly specified. Those of the latter include setting out the number of hours of community service, approving agencies for whose benefit the work may be done, and determining the appropriate action to be taken in the event that either the offender or community agency violates the court order or work agreement.

Some community service advocates have suggested that provision be made for a community service order to be a separate sanction, instead of a condition of a probation order. Bill C-19 (which died on the Order Paper in 1984) endeavoured to make a community service order an independent sentencing option, consistent with the recommendations of the Law Reform Commission of Canada and the Sentencing Commission. If this were to take place now, it would focus on the reparative function, in contrast to the control and rehabilitative functions of probation. The argument may also be supported on the basis that, in the existing practice, some administrative inconsistencies about eligibility, duration and type of service have created a potential threat to the equality of justice.

ii. Maximum Number of Hours of Community Service

In Canada, there is no ceiling on the number of hours which may be ordered by the sentencing judge; nor are there any guidelines with respect to specific offences. Consequently, sentences vary considerably for similar offences (sentencing disparity) and some sentences are, in the opinion of the Community Service Order Coordinators' Association of Ontario (hereafter, "the CSO Association"), onerous on the offender and a burden to the community.

Most American states do not limit the number of hours which may be ordered. The CSO Association advised the Committee that excessive hours (in the thousands) have been ordered there and cautioned that this trend could be followed in Ontario. (Adult offenders in Ontario have received orders as high as 800, 1,000 and 3,000 hours.) It feels that performance of more than 200 hours of community service per year is unrealistic.

The CSO Association fears that community agencies which accept offender-volunteers will be less inclined to do so where a large number of hours has been ordered. Furthermore, excessive hours may decrease the offender's motivation and ultimately contribute to a poor attitude towards placement or a decrease in reliability.

In Quebec, as in Britain and a number of other countries, a limit has been placed on the term of duration.[10] Most of the American states that have adopted community service do not specify such a limit. The latter arrangement is said to permit flexibility to relate the severity of the order to the seriousness or extent of harmfulness of the offence to the community.

iii. Disparity

The Kingston chapter of the John Howard Society submitted a brief to the Committee in which it identified the great disparity in the number of hours of community service required of different offenders. Judges have full discretion to impose any number of hours they wish. They receive no guidelines in this regard. The result, therefore, is a wide disparity of orders from judge to judge and even great inconsistency by the same judge. Research tends to suggest that the number of hours ordered is unrelated to age, socio-economic status, etc. The only variable found by Dr. Ken Pease, a British researcher who appeared before the Committee, that did have some effect on the length of community service orders issued was employment: unemployed offenders tended to receive longer orders than employed offenders.

There may also be regional or other disparities in how frequently community service orders are used and in their enforcement.

iv. Assessing/Excluding Some Offenders

The CSO Coordinators' Association of Ontario indicated to the Committee that some sexual offenders have received community service orders, although it is a rare occurrence for *serious* sexual offenders to be so referred. Nevertheless, the community is not receptive to receiving such offenders to perform community service, even though the offender may be suitable in terms of attitude and other criteria.

The CSO Association fears that inappropriate referrals to community service placements will affect the credibility of the whole program. It suggests that offenders found guilty of sexual assault, or other sexual or violent offences, should be assessed by CSO programs for their suitability *prior* to sentencing. (In fact, it would prefer that *all* possible CSO candidates be assessed prior to sentencing.)

Currently, inappropriately sentenced offenders are either not given a placement or they may be placed. In the former case, the sentence may be neither completed nor enforced. In the latter, the community is placed at risk.

The John Howard Society of Kingston had similar concerns. Its brief noted that judges rarely request an assessment to determine whether it would be appropriate to sentence a particular offender to a community service order. The Society has had experiences with people who have long-term, severe drinking problems and who show up at their placements while intoxicated.

Another example of difficulties with such orders is their impact on mothers with limited incomes. The need for childcare arrangements in these cases may seriously limit a person's ability to participate in the program. Similarly, a person who works long hours at his or her job and has family responsibilities can also find such an order stressful and may resent it. Many people in this situation prefer to pay a fine. The Society argues that, in many cases, a fine is more appropriate than probation or imprisonment.

v. Prison Alternative or Net Widening?

In theory (and, in some cases, in law), community service orders are to be regarded as alternatives only to imprisonable offences. Therefore, no one is supposed to be sentenced to a community service order who otherwise would not have received a comparable prison sentence, had such orders not been available. However, sometimes community service appears to be used as an "add-on" to probation, thereby "widening the net".

Although in the past the John Howard Society of Kingston has supported community service orders as alternatives to incarceration, it now feels the original purpose of the programs has not been achieved:

> It is our belief that judges have, for the most part, used Community Service Orders to expand the intensity of community sanctions. Generally, they do not use Community Service Orders as an alternative to incarceration. (Brief, p. 2)

In fact, it states, between 1977 and 1983 while the number of community service order hours has increased, prison populations have not declined.

Pease also pointed out that there is a considerable gulf between the rhetoric and the reality of community service orders. He cited numerous studies that examined this question from different perspectives, in various legal systems, and he found:

> There is ... remarkable consensus, wherever the proposition has been put to the test, that community service orders do not replace custody in a clear majority [45%-55%] of cases in which they are imposed, even where it is clearly stated that the order was introduced for such a purpose.[11]

In some jurisdictions, community service orders are explicitly stated to be an alternative to incarceration. Georgia considers community service, which is to be completed in addition to regular employment, to represent a middle-ground punishment between probation and incarceration. To ensure that such an order is used as a true alternative, it has been suggested that offenders should be selected using a "prison risk-assessment model", as they are in North Carolina. It has also been suggested that community service orders of more than a certain amount (e.g., 100 hours) should clearly be an alternative to custody, while those of a lesser amount need not be.[12]

In some jurisdictions, community service orders have been developed as an alternative to fines (particularly in the form of fine option programs).[13] Pease suggested that there would be no need for community service orders if a fair fining system, which affected both rich and poor equitably, could be devised. (He suggested that the Swedish system of day-fines, which calculates the penalty based on the offender's income and severity of offence, might be one such system.) Until such a system is devised, however, community service orders should exist alongside inefficient fining systems. **The Committee believes that community service orders have a different kind of value than fines and should be used on their own or in combination with other community sanctions, even where they are not true alternatives to incarceration, provided that the judge is satisfied that a discharge, restitution, fine, or simple probation order alone would not achieve the purpose of sentencing proposed by the Committee.**

vi. Evaluation

Pease attempted to assess the success of community service orders by looking at public attitudes towards such orders (discussed previously) and the rate of reconviction of offenders receiving such sentences. In one of the few studies which looked at the reconviction rates of offenders sentenced to

community service orders, Pease noted that offenders sentenced to such orders tended to have a lower rate of recidivism than those receiving other sentences. Nevertheless, he considered the results to be inconclusive.

Recommendation 13

The Committee recommends that legislation be enacted to permit the imposition of a community service order as a sole sanction or in combination with others, provided that the judge is satisfied that a discharge, restitution, fine or simple probation order alone would not achieve the purpose of sentencing proposed by the Committee.

Recommendation 14

The Committee recommends that guidelines for the number of hours of community service which should be imposed in various circumstances be developed to decrease sentencing disparity.

Recommendation 15

The Committee recommends that a legislated ceiling of between 300 and 600 hours (over three years) be established for community service sentences for adult offenders, provided that judges be permitted to exceed the ceiling where a greater number of hours is agreed to by the offender as a result of victim-offender reconciliation or an "alternative sentence plan" proposal and reasons are provided by the judge.

Recommendation 16

The Committee recommends that legislation be adopted to exclude sexual and violent offenders from eligibility for community service orders unless they have been assessed and found suitable by a community service program coordinator.

2. Alternative Sentence Planning

a. The Canadian Experience

Alternative Sentence Planning is a unique Canadian project of the Children's Home of Winnipeg, an agency built upon "a commitment to community-based alternatives to prevent institutionalization, to assist the institutionalized to re-enter society and to work together with individuals to help them develop their potential". The project receives demonstration project funding from federal, provincial and municipal sources. Andrew Smith, the Executive Director of the Project, appeared before the Committee.

The goal of Alternative Service Planning is to reduce imprisonment by providing a detailed alternative acceptable to the court and the offender. The Service is based on the belief that many people are imprisoned simply because of a lack of realistic alternatives being presented to the court. Alternative sentence plans are based on six principles:

- sentencing should promote *responsibility* by the offender (for his or her actions by encouraging him or her to be accountable for the harm resulting from the offence) and by the community (for the management of the criminal behaviour);

- sentencing should be *restorative* — it should correct the imbalance, hurt or damage caused by the offence;

- the sentence should be *reparative*, attempting to repair the physical, emotional or financial harm caused by the offence;

- the sentence should, wherever possible, attempt to bring *reconciliation* between the victim and the offender;

- sentencing should be *rehabilitative* by providing the offender with opportunities to deal with the issues that have contributed to the offence; and

- there should be a *democratization* of the criminal justice system to return justice to the community and place it in the immediate context of both the victim and the offender.

The agency's program is to present alternative sentence plans to sentencing judges for adult and young offenders. It accepts cases on the basis of three criteria:

- the offender can reasonably expect to receive a prison sentence of three months or more (so the plan serves as a true alternative to prison, not an "add-on");
- the offender has pleaded guilty or intends to do so (the offender must accept responsibility for the offence); and
- the offender has demonstrated a willingness to participate in an alternative sentence plan.

The staff prepares a detailed social and criminal history of the offender and advocates on his or her behalf for such social and treatment services, if any, that may be required and obtained on a voluntary basis. A specific course of action is then prepared (including a statement of what actions have already been taken) and proposed to the sentencing judge:

> Typically, such proposals try to provide appropriate reparation or restitution to the victim of the offence or the community, and present to the sentencing judge, options, consistent with recognized sentencing practices, that would satisfactorily resolve the offence and satisfy the Court as being an appropriate sentence for the specific offence. (Brief, p. 6)

Alternative Sentence Planning suggests that victims will be best served:

- by an approach which does not protect the accused from the suffering of the victim;
- when a sentence contains a consequence for the offender that attempts to restore either the physical or emotional damage suffered by that victim; and
- when the sentence enables the offender to deal with the issues that led to the offence.

b. The American Experience

Alternative Sentence Planning is somewhat more widespread in the U.S. where it is known as Client Specific Planning. Herb Hoelter, Director of

the Client Specific Planning Program of the National Center of Institutions and Alternatives, based in Washington, also appeared before the Committee to explain its approach.

Client Specific Planning requires the offender to be held accountable for the crime. Controls and "paybacks" are two aspects of each plan. Each plan *must* demonstrate the means by which the offender's actions will be monitored (e.g., urinalysis, supervision, etc.), so that any deviations from the court's order will be immediately detected. "Paybacks" may be restitution directly to the victim or indirectly to the community. In no case is the public safety to be compromised. When necessary, the Center may recommend some form of incarceration. (This occurs in about 15 percent to 20 percent of cases.)

The sentencing goal of retribution is achieved through long-term, unpaid labour (community service), financial restitution to the victim or substitute victim, and/or payments to victim compensation funds.

Rehabilitative goals are also established in the plan. Although this goal is given a secondary emphasis (compared to accountability and retribution), it is addressed comprehensively. It may involve in-patient or out-patient treatment (for addictions or other serious problems) and/or counselling for financial, marital, employment or other difficulties. These rehabilitative components are coordinated with other elements of the plan.

The Center claims that its clients have a lower re-arrest rate than offenders whose cases are disposed of otherwise. Compliance with the plans is high.

c. The Committee's Opinion and Recommendations

The Committee was impressed with these approaches to sentencing alternatives. Their goals are consistent with the purpose of sentencing the Committee has proposed. The Committee has considered the balance which must be struck in utilizing alternatives to incarceration wherever appropriate and ensuring that sentencing dispositions communicate to all offenders and the community the seriousness of breaches of the criminal law. **The Committee would like to see further application and evaluation of these approaches in Canada.**

Recommendation 17

> **The Committee recommends that the federal government, preferably in conjunction with provincial/territorial governments, provide funding to community organizations for alternative sentence planning projects in a number of jurisdictions in Canada on a pilot project basis.**

Recommendation 18

> **The Committee recommends that the federal government, preferably in conjunction with provincial/territorial governments, provide funding and technical exchange to community organizations to promote sound evaluation of such pilot projects.**

3. Victim-Offender Reconciliation Programs[14]

a. In General

i. What is Victim-Offender Reconciliation?

Victim-offender reconciliation is a process whereby offenders and victims are brought together by a trained (often volunteer) mediator to achieve a resolution to the criminal event which is satisfactory to both parties. Victim-offender reconciliation seeks to:

- effect reconciliation and understanding between victims and offenders;
- facilitate the reaching of agreements between victims and offenders regarding restitution;
- assist offenders in directing payment of their "debt to society" to their victims;
- involve community people in work with problems that normally lead into the criminal justice process; and
- identify crime that can be successfully dealt with in the community.

Reconciliation has been used effectively in many North American communities since the birth of the concept in Kitchener/Waterloo, Ontario in 1974. The Committee heard from representatives of programs operating in Ontario, Manitoba, Saskatchewan and British Columbia. Generally, such programs deal with minor offences (e.g., property offences, assault and causing a disturbance, etc.), particularly where the parties know one another; but victim-offender reconciliation can be used in more serious cases. (This is further discussed later in this chapter.) Many victim-offender reconciliation programs also handle dispute resolutions where no criminal charges have arisen or are likely to arise.

ii. How it Works

Reconciliation helps break down the stereotyped images victims and offenders have of one another by bringing them together. When they meet face-to-face, there can be a mutual understanding and agreement as to what can be done about the offence. The assistance of an objective third party is useful in facilitating interaction at such meetings. These mediators do not impose settlements, but rather assist the victim and offender in arriving at their own settlement — a settlement which is agreeable to both.

Victim-offender reconciliation techniques:

- help victims face painful emotions and to feel personally empowered by gaining control of their lives again;
- help offenders feel empowered by taking responsibility for their actions; and
- help victims, offenders and others learn effective conflict resolution strategies which can be used in other situations.

iii. Benefits of Victim-Offender Reconciliation

First, and most important, *victims* benefit through reconciliation by: participating throughout the process; receiving restitution and reparation (losses may be restored through cash or service); receiving information about the crime itself (motive/method/background), about the offender (stereotypes dissolve) and about the criminal justice system and its processes; and peacemaking. Access to information allays fears, anxiety, frustration and a sense of alienation, and positively affects attitudes toward the system. Because

victims and offenders are often neighbours or members of the same community, mediation facilitates the finding of common-sense solutions today which enable living together peacefully tomorrow.

Equally important, *offenders* benefit by: gaining an awareness of the harm suffered by victims (the human cost and its consequences); participating in a process that allows for "making it right"; receiving information (especially about the victim, thereby breaking down stereotypes); receiving a sentence which is an alternative to incarceration (victim-offender reconciliation can provide an escape from the damaging effects of incarceration without providing an escape from responsibility); and participation (which yields ownership in, and commitment to, the agreement, resulting in high contract-fulfillment rates).

In addition, reconciliation provides the following benefits to the *criminal justice system* and the *community*:

- appropriate alternative sanctions are available to judges;
- low cost;
- provision of a mechanism for the establishment of losses;
- effective means of intervention in cases that resist or defy solution in the traditional criminal justice process;
- increased understanding about the criminal justice system (community education);
- assistance to victims, thereby reducing the hostility many project upon the system itself;
- empowerment: Community members are provided with an opportunity to develop skills which they can apply to the resolution of the conflicts which arise in the community;
- reduction of levels of conflict within a community; and
- deterrence from further irresponsibility: While more research will be required to demonstrate this conclusively, offenders who meet their victims face-to-face in this manner are believed to be less likely to re-offend.

iv. Evaluation of Mediation Services and Other Reconciliation Programs

The Mediation Services program in Winnipeg was recently evaluated by the Attorney-General of Manitoba. Highlights of this evaluation were included in its brief to the Committee: 90 percent of 500 cases resulted in agreements; 90 percent of participants rated the service as either good or excellent; and 80 percent would mediate again if the need arose (Brief, p. 2).

Four Indiana reconciliation sites were evaluated in 1984. Following are highlights from their evaluation report:[15]

- 83 percent of the offenders and 59 percent of the victims expressed satisfaction with the process (another 30 percent of victims were "somewhat satisfied");
- 97 percent of the victims reported that they would choose to participate if they had to do it over again and that they would recommend it to other victims;
- both victims and offenders saw "being responded to as persons" as the greatest strength of the program;
- most of the offenders interviewed by the evaluators seemed to have a better sense, than did a matched sample of offenders who had not been referred, that what they did hurt people and required a response;
- for those who participated in face-to-face meetings, completion of restitution was quite high;
- offenders experienced reconciliation as punishment and many victims viewed it as a form of legitimate punishment in which they had an opportunity to participate; and
- victim-offender reconciliation may be used along with incarceration as a means of reducing reliance on incarceration.

b. Oklahoma Post-Conviction Mediation Program[16]

Mediation hearings held in Oklahoma prisons may be conducted to reach an agreement between the victim and offender which may then form the basis of recommended sentence modifications which are taken back to the judge. (The mediation service may also be used as part of case pre-sentence investigation to propose an appropriate punishment prior to sentencing.) Both violent and non-violent cases are handled, although larceny-related crimes are the most common.

Mediation facilitators inform the parties of the limits and the parameters of the hearing (which are established by the judge, prosecuting attorney and Department of Corrections, with a view to maintaining overall consistency). The sentencing judge and prosecutors are contacted prior to the mediation meeting so that their concerns, as well as the victim's, can be addressed. Mediation agreements generally address: length of incarceration/supervision, community service, rehabilitative programs for either the victim or offender, and restitution.

The process encourages and facilitates the sharing of the victim's feelings and emotions about the criminal incident and its impact. Offender accountability and responsibility is emphasized; it results in a structured plan going beyond incarceration.

In the first 18 months of the program, 1,400 victims provided direct input into sentencing plans. Seventy-two percent of those victims wished to meet the offender(s) to mediate; 97 percent of the mediation meetings resulted in agreements which were satisfactory to the victims. These agreements generated $20,000 for the state Crime Victims' Compensation Fund, 50,000 hours of community service (valued at $165,000), and $650,000 for restitution. Mediated offenders are reportedly "model" probationers while under supervision — less than eight percent failed to carry out their mediated agreements or were involved in new crimes.

c. Genesee Justice — Dealing with Violence[17]

Almost all witnesses before the Committee who talked of victim-offender reconciliation referred to the Genesee County, New York model when queried about the applicability of reconciliation in situations where offenders had committed crimes involving violence. Initially, the

Committee was sceptical about the possibility of applying reconciliation techniques in such cases. (In fact, a few witnesses themselves agreed.)

The Committee heard from Doug Call who, when Sheriff of Genesee County, in 1983 introduced victim-offender reconciliation for violent offences as part of his program of victim assistance services, and from Dennis Whitman, Coordinator of the Genesee County Community Service and Victim Assistance Programs. They described examples of various "violent" cases in which their victim assistance program contributed to community-based sanctions.

The first 13 offenders referred into their reconciliation program were convicted of the following offences:

3 criminally negligent homicide

2 armed robbery

1 criminal possession of a deadly weapon

1 rape

1 assault and battery

1 sodomy

1 reckless endangerment

1 attempted manslaughter

1 grand larceny

1 unspecified misdemeanour.

Genesee County claims to have matched justice with fairness for victims, offenders and their communities. Its services consist of adult and juvenile community service, intensive victim assistance, victim-directed sentencing, victim-offender reconciliation conferences, victim-oriented pre-sentence conferences, affirmative agreements, intensive felony and second felony offender diversion, felony reparations, and uniform cemetery and school vandalism sentencing guidelines.

The Sheriff's Department urges victims to "fight back" by reporting crime and demanding their rights and privileges under the law. By supporting victims in a comprehensive and ongoing way, the Sheriff's Department encourages victims to use their pain as motivation to go through the court process. The Department has dramatically increased services and

support to victims, decreased the jail population (both regular and weekend sentenced days), obligated offenders to help themselves and others, and increased the involvement of victims and the community in the criminal justice system.

This innovative criminal justice initiative has been developed for several reasons. Primarily, there is a need for significant and serious change in our criminal justice system to provide a human and personal dimension for the victim as well as the offender. Humanizing the system brings a far more direct accountability between the offender and the victim.

Victims are included at every stage of the process and offenders are made accountable to them, as well as to society. With the cooperation of chiefs of police and judges, this central focus serves to "integrate" the criminal justice system. The Genesee County Community Service/Victim Assistance Program has shown that reconciliation between victims and offenders can take place even in cases of the most serious crimes and is especially important in these cases.

Preparation of both victims and offenders must be done carefully and systematically; it can involve many different kinds of third parties. The victim is the key person as to whether or not victim-offender reconciliation takes place. It is not an easy decision for a victim or surviving family member to make. The victim is visited immediately, or at least within two to three days, after the offence occurs and is kept fully informed of the situation and the process with at least a monthly report. After charges have been laid, the victim meets with the prosecutor and a victim impact statement is prepared. The victim is visited by members of a victims' group as well as by victim assistance officers of the police force who are specially trained in mediation, with a view to reducing trauma and anxiety. Program staff meet separately with the victim and the offender prior to the reconciliation meeting to build a bond of trust between the mediator and each party. (It is not uncommon for the program staff to hold up to 90 meetings with the victim.) The offender is prepared for a meeting with the victim between conviction and sentence.

The meeting between victim and offender can be a cause of great relief to the victim: an emotional burden is lifted, victims gain confidence in the system, and they begin to see the offender as a human being rather than as an evil monster. In Genesee County, judges increasingly order victim-offender meetings and they consider the effect of the crime on the

victim in determining the sentence. Victims' suggestions, when constructive, may be incorporated in the sentence.

d. The Committee's Opinion and Recommendation

The Committee found the evidence it heard across the country about the principles of restorative justice compelling and is particularly attracted to the notion that offenders should be obligated to "do something" for their victims and for society. The Committee believes it is essential that offenders be held accountable for their behaviour. The Committee was also impressed by the evidence of some of the victims who appeared before it of their capacity to come to terms with some of the most serious offences which could be perpetrated against them (murder of a loved one, incest, etc.) through reconciliative meetings with offenders or other avenues opened up through victim services which operate on the principles of restorative justice.

At the same time, the Committee was profoundly moved by the pain of other victims who had been further victimized and essentially left out of the criminal justice process. While it can never be known whether another approach could have made more bearable the pain these victims experience, it appears that the humanizing of the criminal justice process which restorative justice necessarily entails at least offers that hope. **The Committee was particularly impressed by the Genesee County Victim Assistance Program which is clearly and unequivocally focussed on the needs of victims** — a victim service which is prepared to meet 60, 90 or 100 times with a victim cannot be accused of trying to manipulate victims for the benefit of offenders.

The Committee believes that the sentencing purpose it has proposed puts the onus on offenders to do something for victims and society. It maximizes the opportunity to humanize the sentencing and, ultimately, the correctional processes. It respects the interests and needs of victims and increases community involvement in criminal justice. In the Committee's view, achievement of the sentencing purpose proposed by the Committee is likely to be enhanced where victims, offenders and the courts have access to services which employ the techniques of victim-offender reconciliation.

Recommendation 19

The Committee recommends that the federal government, preferably in conjunction with provincial/territorial governments,

support the expansion and evaluation throughout Canada of victim-offender reconciliation programs at all stages of the criminal justice process which:

(a) provide substantial support to victims through effective victim services; and

(b) encourage a high degree of community participation.

4. Restitution

Restitution is often a central feature of alternative sentence planning and victim-offender reconciliation. An old concept, going back to biblical times, it is based on the principle that the offender should restore stolen property to its owner or repay the victim and his or her "community" for the harm or damage done. Restitution may take many forms — an apology, monetary payment, or victim or community service. In many jurisdictions, restitution involves the community (police, prosecutor, or judge and/or diversion or reconciliation project volunteers), as well as the victim and offender, particularly where criminal prosecutions are avoided by prompt payment of restitution.

In recent history, the traditional right of the victim (or the victim's family) to receive reparations from the offender (or the offender's family) was almost entirely replaced by the payment of compensation by the offender to the state in the form of fines. In recent years, victims have focussed considerable public attention on their interests and sought changes to restitution laws to ensure recompense for their losses.

Another important aspect of restitution is its correctional potential for the person who commits a crime. In many cases, the constructive accomplishment of making restitution improves the offender's self-esteem and behaviour. It "gives the offender a chance to earn and repay honestly what he [or she] stole or destroyed... . The lack of a connection between a small theft and months in prison deprives most offenders of an understanding of justice and leaves them feeling a sense of having been wronged. Restitution relates what they did to what they must do."[18] Moreover, in its absence, offenders take little or no responsibility for their behaviour.

a. Canadian Law

Until recently modern criminal law in Canada has not paid a great deal of attention to the victim or to restitution in sentencing practices. Recently-enacted amendments to the *Criminal Code* (in Bill C-89) endeavour to address this problem by, among other things:

- requiring judges to impose an additional penalty of restitution in appropriate cases; and

- expanding the scope of restitution to include reasonably ascertainable pecuniary losses for bodily injury, as well as property damages.

These innovations respond to the Law Reform Commission of Canada's suggestion that restitution be made central to sentencing theory and practice, and the recommendations of the Canadian Sentencing Commission that:

(1) a restitution order be imposed as a first community alternative when the offence involves loss or damage to an individual victim (Rec. 12.16 and 12.17); and

(2) priority among pecuniary sanctions be given to restitution where the offender has limited means (Rec. 12.21).

However, they fail to address the latter's recommendation that restitution be available as a sole sanction, as well as in combination with others (Rec. 12.31). Nor do they require judges to give reasons for failing to order restitution, although victim groups have requested this.

Moreover, the provisions, as drafted at present, with respect to pecuniary damages for the victim's lost wages, etc. (section 653(b) of the *Code*), would seem to be limited to an all-or-nothing proposition. That is, where a victim has incurred pecuniary damages as a result of bodily injury, it appears that the restitution order has to be "an amount *equal to* all pecuniary damages...". Where a judge ascertains, pursuant to section 655 that an offender would not be able to pay full restitution, it would seem that the judge might have to decline making an order of restitution related to personal injury, when determining whether restitution "is ... appropriate in the circumstances." (In cases of property damage, it would appear that judges

have discretion to order restitution in "an amount *not exceeding* the replacement value of the property...".) This flaw seems unfortunate, given that victims have lobbied for years for a provision which might permit partial or full restitution for such losses.

b. Restitution in Conjunction with Victim-Offender Reconciliation Programs

In addition to the sentencing judge ascertaining the amount of restitution to be made, reference has already been made to the role victim-offender reconciliation programs might play in this regard. Where offenders have been referred to such programs prior to sentencing, the judge may include the restitution terms of the agreement in the sentence. In addition to the value of a freely and fairly-negotiated settlement, reconciliation programs offer the opportunity of supervision of completion of the agreement. (Such a role may also be played by probation officers or other officers of the court, as described below.)

c. Enforcement

Saskatchewan has a province-wide restitution program. Restitution coordinators provide pre-sentence reports (when requested by the court) and monitor the payment performance of offenders. Where necessary, they enforce restitution orders. To aid offenders in the successful completion of their orders, restitution coordinators may provide personal or financial counselling and assistance in obtaining employment or retraining. Some restitution centres in the U.S. also help offenders who lack the means to make restitution to find jobs and budget their earnings.[19]

Aside from the support for enforcement of restitution provided by the program in Saskatchewan and through victim-offender reconciliation projects, mechanisms for enforcing restitution in Canada have been weak. Bill C-89 provides little new in the way of enforcement other than incarceration for default in certain circumstances (section 655.6), although, as recommended by the Canadian Sentencing Commission (Rec. 12.31), it does provide that the enforcement of restitution have priority over the enforcement of other monetary sanctions (section 655.8(5)). However, it does not go as far as the Sentencing Commission recommendation that, in appropriate cases, after a show cause hearing in the criminal court, the court be able to order wage attachments or property seizure (Rec. 12.30 and 12.25).

d. Committee Recommendations

The Committee has previously indicated its support for Bill C-89 which it believes makes a significant improvement in the present situation regarding restitution. The Committee received few representations with respect to the enforcement of restitution, but **it feels that civil enforcement mechanisms which might be initiated by the state on behalf of victims should be explored further.**

Recommendation 20

The Committee recommends that section 653(b) of the *Criminal Code* (contained in Bill C-89) be clarified to ensure that restitution for bodily injuries may be ordered in an amount *up to* the value of all pecuniary damages.

Recommendation 21

The Committee recommends that the federal government enact legislation, and/or contribute support to provincial/territorial governments, to enhance civil enforcement of restitution orders with a view to relieving individual victims of this burden.

Recommendation 22

The Committee recommends that the following recommendations of the Sentencing Commission be implemented:

(a) that a restitution order be imposed when the offence involves loss or damage to an individual victim. A fine should be imposed where a public institution incurs loss as a result of the offence or damage caused to public property (Rec. 12.17); and

(b) that where the limited means of an offender permits the imposition of only one pecuniary order, priority be given to an order of restitution, where appropriate (Rec. 12.21).

5. Enhanced Probation Services

Probation, one of the older and now the most common form of correctional placement, consists mainly of supervising offenders in the community through social work methods. Ideally, probation involves an element of consent — that the offender wishes to work constructively with the probation officer. In practice this may not always be the case. Moreover, probation may now give the appearance of doing something with offenders when, in reality, very little is being done.

a. What is Probation?

Probation traditionally combines both control (supervision) and care (opportunity to overcome personal and social problems associated with their criminal behaviour). In Canada, supervision is usually carried out either by professional social workers employed by government correctional agencies or by volunteer probation officers. (Ontario, Nova Scotia and Alberta have programs which utilize volunteer probation officers.) In Canada, the maximum period of probation is three years; no minimum is established in law, although few orders are for less than six months. Excessively short periods of supervision are generally considered to be insufficient to rehabilitate offenders.

Jack Aasen and Stephen Howell, two probation officers from B.C. who appeared before the Committee, proposed that probation, which has proven itself to be a versatile sanction, could, with some improvements, link the Sentencing Commission's objectives of making greater use of community sanctions with adoption of a "justice model" of sentencing:

> If "justice" is really about restoring broken relationships it is doubtful if any other sanction has a better chance of success than probation. (Brief, p. 1)

The witnesses suggested that for community sanctions to be accepted by the public as appropriate dispositions, three things are required: the support and advocacy of innovative leaders, adequate funding, and a legislative structure which ensures enforceability.

There is a need for greater political support for the use of probation, they argued. At present, perceived public fears about and frustration with crime are exploited to promote harsher penalties. The witnesses felt the public's misperceptions arise out of a lack of knowledge about sentencing:

This suggests that leaders who are prepared to educate the public and engage them in a process of developing alternatives could help build a consensus for humane, cost-effective community sanctions. (Brief, p. 2)

More funding is needed for an adequate probation service: present probation caseloads in B.C. exceed 100. Aasen and Howell also proposed that additional funding should support new and innovative programs, such as supervision of victim restitution or service, and of community service; specialized supervision for mentally ill and sexual offenders; probation hostels; and intensive supervision for serious offenders (see section **e.** below). The federal government might fund demonstration projects.

The Canadian Sentencing Commission reported the following concerns with probation (p. 363):

- a feeling among probation officers that the size of their caseloads (averaging 80-100 cases in Atlantic Canada) precluded effective supervision;

- a majority of judges indicating that their impressions of the quality of supervision of particular community sanctions affected their willingness to assign particular community dispositions; and

- a feeling among probation officers that some judges grant probation to inappropriate clients (some offenders didn't require probation; others, had abused it in the past).

It is generally recognized that probation is more overcrowded than imprisonment and that probation caseloads are too large to permit probation officers to do any serious work with most offenders.

The concerns of the Sentencing Commission could be alleviated by two of its recommendations:

- greater federal and provincial commitment to the development and financing of community dispositions (Rec. 12.1) — to reduce workloads; and

- the development of principles respecting the imposition of individual community sanctions (Rec. 12.10) — the greater use of community sanctions is inherent in the Commission's

proposed sentencing guidelines (which identify those offences that should carry a presumption of community sanctions).

The Committee is in general agreement with these recommendations.

b. Probation in Conjunction with Conditional Discharges and Suspended Sentences

As to whether or not probation should constitute an independent sanction or be used in conjunction with other sentences, there is considerable debate. In Canada, it may be used only in conjunction with other sanctions, such as a conditional discharge, a suspended sentence, a fine, or in addition to a period of incarceration.

The *Criminal Code* now requires that certain conditions be, and permits a range of others to be, included in a probation order. To emphasize that some conditions may serve a distinct, separate purpose, the Law Reform Commission of Canada recommended in 1976 that probation be replaced by six separate sentences (good conduct order, reporting order, residence order, performance order, community service order, restitution and compensation order), which might be ordered separately or in conjunction with one or more others or with some other type of order, such as a fine. These distinct sentences would reduce the scope and content of orders to clearly stated performance criteria. Although recommending that community sanctions be developed as independent sanctions (Rec. 12.8), the Sentencing Commission made no specific recommendations with respect to probation.

Aasen and Howell also recommend that probation orders be made in conjunction with "true suspended sentences" by which the sentencing judge would make an order of imprisonment for a specific period of time, suspend the enforcement of the order and substitute in lieu thereof a period of probation. Should the conditions of probation be breached, a simple revocation hearing, with due process safeguards, could be held and the original sentence enforced.

c. Enforcement of Probation Orders

Aasen and Howell identified for the Committee the inadequacy of the present provisions for enforcing probation orders. They recommended that section 666 of the *Criminal Code* be amended to provide for a simple hearing to revoke probation, as exists in most English-speaking countries of

the world, when probation has been breached. As it stands, a charge of breach of probation now requires a trial and proof "beyond a reasonable doubt": this situation gives the probationer "... a panoply of legal protections and a range of defences which make a mockery of the system" (Brief, p. 3). For example, identity may be in doubt because the accused never reported to the probation officer, and the officer cannot identify him or her; the probationer is, therefore, not convicted of breach of probation. Similarly the defence of forgetfulness is often used to escape conviction on the "willful" aspect of the charge. The result, therefore, is not only that the rate of conviction is low (only 15.3 percent of not guilty pleas in B.C. are convicted), but, also, many reports of breaches of probation are never forwarded to prosecutors by probation officers because of the impossibly high standard of proof required (in Vancouver, 42 percent of charges requested were not laid).

The Committee is sympathetic to the arguments made by these witnesses on the basis that remedying the enforcement problem would create greater public confidence in the sanction of probation.

d. Special Conditions/Services Associated with Probation

Probationary conditions are generally designed to fulfill either control or rehabilitative functions. Some which the Committee feels warrant further encouragement are described on the following pages.

i. Alcohol or Drug Treatment or Abstention

Probation conditions related to abstaining from alcohol may be made pursuant to section 663(2)(c) or (h) of the *Criminal Code*. Such an order usually arises where the offender was under the influence at the time of the offence and is likely to recidivate while using alcohol.

Alcohol and drug treatment orders (residential or otherwise), or those requiring the attendance of offenders at self-help addictions programs, are usually made when the offender has acknowledged addiction and proposes to seek treatment as a means of conquering the addiction and avoiding recidivism. Such orders may be made to "encourage" the offender to commence or maintain treatment. Orders to specific treatment programs generally require the consent of the offender and the program. They usually arise from recommendations in a pre-sentence report.

ii. Employment Orders

Where an offender is unemployed, the judge may order that he or she seek employment pursuant to section 663(2)(g) of the *Criminal Code*. Such offenders often require the assistance of probation officers in identifying suitable employment leads or community-based programs designed to assist them in job searches, acquiring basic job training readiness skills, or retraining; such programs may also provide vocational assessment and counselling.

A number of employment assistance programs throughout Canada, most funded by the Canada Employment and Immigration Commission, often operated by private agencies, assist special target groups (youth, low-income women, immigrants, probationers and parolees, etc.) in seeking employment. Some programs include academic upgrading, but usually the focus is on attitudes, skills and opportunities. Some programs offer a protected work environment, to permit either work adjustment or employment experience. Clientele in such programs are not limited to offenders.

iii. Personal Counselling and Life Skills

Personal counselling is available through probation services directly or by referral from probation authorities to private criminal justice or mental health agencies (e.g., Family Service Associations, John Howard and Elizabeth Fry Societies, Salvation Army, etc.), or hospitals. Such services have historically been available to individuals, couples, or families. In recent years, more specialized counselling has become available to address specific experiences (incest, sexual assault, addictions, etc.). Increasingly, such services are available not only to individuals, but also to groups.

Group work has gained increasingly positive recognition in recent years as a mechanism for changing attitudes, empowering victims and the disadvantaged, and facilitating learning — both knowledge and skill development. Life skills programs are perhaps the best known form of group work. They have been used successfully with disadvantaged women, youth, students on the verge of dropping out of school or re-entering educational institutions, prisoners and people re-entering the community from closed settings.

Life skills programs are commonly operated by private agencies or individuals on contract to various governmental or quasi-governmental agencies. Programs vary greatly, but often teach clients how to access resources they may require (e.g., subsidized housing, food banks, social assistance, government benefits, education and training programs, etc.). They may teach clients how to manage money wisely, and how to eat nutritiously. In addition, and most important, they help clients build self-esteem and develop assertiveness.

iv. Shoplifting Counselling

Counselling programs for shoplifters have been established in several communities in Canada. They are specifically directed at offenders with a history of shoplifting, but may also be of benefit to some offenders with a fraud or theft history. The best-known programs are operated by Elizabeth Fry Societies in Vancouver, Calgary and Brampton, although some are offered through probation offices in Ontario and Manitoba.

These programs are a specialized form of group work with integrated educational, therapeutic, self-help and life skills approaches. Group work is usually supplemented by individual counselling. The programs aim to get at what is presumed to be the underlying social and psychological problems which contribute to the shoplifting behaviour. While clients are predominantly adult women, some men attend, and one program has a special group for adolescents.

Elizabeth Fry Societies from which the Committee heard identified shoplifting programs as important sentencing options for female offenders.

v. Treatment for Assaultive Males

From 1981 to 1984, treatment programs for assaultive males increased from four to over 30 across Canada. Today there are well over one hundred.[20] These programs reflect a trend towards preventive, rather than reactive, measures to combat the problem of domestic violence.

The emphasis in most programs is on the assaultive behaviour as a learned response to a man's anger problems and not necessarily on the relation to marital difficulties. The programs aim to teach their clients to accept responsibility for their violent behaviour, to recognize and confront it,

and to replace it with appropriate non-violent and interactive responses. (One Alberta treatment program is also directed towards the family as well as the offender.)

Dr. Anthony Davis, a Board member of the Tearman Society of Nova Scotia, a transition hostel for battered women, encouraged the Committee to recommend court-ordered counselling for assaultive spouses in addition to their maintaining employment and supporting their families, who would be adversely affected by the sanction of incarceration. It is not known to what extent such programs are used at present as sentencing options.

vi. Evening/Weekend Attendance Centres

Reference has been made above to a range of Canadian counselling and employment preparation services which may be used voluntarily by probationers. Aside from these and an out-patient alcohol treatment program in Toronto for impaired drivers, the Committee did not receive specific evidence with respect to attendance centres.

In the state of Victoria in *Australia*, four Attendance Centres may be used as conditions of probation, as an alternative to incarceration for one to twelve months. Offenders must usually attend the Centre two evenings per week and Saturdays, for about 18 hours per week. The evening sessions may involve job skills training, and group and individual counselling; Saturdays are generally devoted to community service. Such Centres can accommodate 40 to 50 offenders. Abstention and tardiness are considered breaches and may result in return to court where the offender may be subject to incarceration of up to 12 months.[21]

An experiment in New South Wales in 1976 permitted some offenders who might otherwise have been imprisoned to remain in the community, but required them to work in the prison, or some other designated location, from 3:30 p.m. to midnight, the time when most crimes are committed.[22]

New Zealand recently introduced the innovative sentence of "community care" as a partial replacement for the probation order. Its purpose is to put the offender into a community environment where he or she will be "subject to influences and example expected to have a beneficial and supportive effect." It requires an offender to take part in a residential or non-residential program which is offered by an individual or agency in the community. The sentence may not exceed 12 months and the residential

component must not exceed six months. A report on the nature and conditions of the program (in practice, a fairly specific written contract negotiated by the offender and the sponsor) must be presented to the court through a probation officer.

While retaining an emphasis on an individualized (rehabilitative) approach designed to identify and deal with an offender's specific problems, the sentence recognizes that such problems can only be successfully solved in a community environment. The sentence actually leaves the direct responsibility for the implementation and satisfactory completion of the sentence in the hands of the community.

Warren Young, Director of Criminology at the Victoria University of Wellington, in a paper presented to the Conference for the Reform of Sentencing, Parole and Early Release in Ottawa in August 1988, identified four problematic features in the concept of community care:

- the concept of "community" in the rhetoric of "community participation" has been left largely undefined — the number of available and suitable programs for offenders may be relatively few;
- most people in the community may feel that the state should retain responsibility for offenders;
- few additional resources have been made available to voluntary agencies to offer programs to offenders; and
- community care may widen the net of social control.

Nevertheless, the Committee is of the view that such a sentence offers a wide range of possibilities consistent with the principles it has adopted. Sentences of community care resulting from alternative sentence planning or victim-offender reconciliation might provide useful enhancements to probation.

vii. Probation Hostels and Community Residential Centres

Probation hostels were developed in *England* to address the contribution of homelessness and "bad homes" to delinquency. Hostel

residency requirements attached to a probation order were usually for 12 months. These probation hostels are somewhat similar in concept to Canadian community residential centres or halfway houses and young offender "open custody" facilities — residents work or study in the community during the day and may be given passes on evenings or weekends.[23]

Probation hostels are also found in *New Zealand*. Many are operated by churches; ideally, they are small establishments. They are generally used when home conditions are considered to be inadequate or likely to contribute to an offender's criminal behaviour, or when the offender is homeless. Staff generally help offenders find work or improve their education.[24]

Denmark's attitude towards imprisonment has led to a range of "custodial" options. Many people sentenced for seven days to six months are housed in "open institutions": they participate in work and social activities in the community, purchase food outside the institution and furnish their own rooms. The Prison and Probation Administration also runs some short-term "institutions" for probationers and parolees who stay there voluntarily or by way of probation order.[25]

Japan has over 200 halfway houses for adult and juvenile offenders, operated by voluntary agencies. Financial support for them was strengthened by the 1950 Law for Aftercare. Although a person cannot be ordered to a halfway house by a court, probationers may be referred there by their supervising officers. Each hostel accommodates between nine and 100 people (the average being 23). Offenders generally work in the community, but some halfway houses have their own workshops. One halfway house is attached to a psychiatric hospital.[26]

Georgia has established "diversion" or restitution centres to confine non-violent offenders who need more supervision than regular probation, but do not require secure custody. Offenders work full time and pay room and board, restitution, fines and taxes. Thus, the cost is shifted from the taxpayer to the offender. Since 1973, the number of centres has expanded to 14 (two of which are for female offenders); others are planned. Each centre houses 44 residents.

The program permits offenders to stabilize their lives and to remain productive members of society throughout their sentences. Moreover, family and community interaction is maintained, although visits at the centres are

quite restrictive. The centres provide individual and group counselling, work ethics, consumer education, educational upgrading and recreation. The minimum stay is four months (average, four to five months). Offenders remain on regular probation after leaving the centre.

A security officer does hourly rounds. Those absent without leave may be held in jail, pending return to court. Judges may re-sentence to prison those offenders who breach the terms of their probation.

The cost of the centres is about $21.75 per day of which offenders contribute $6.50. (Offenders also pay a probation fee and contribute to daily transportation costs.) The grounds and buildings are maintained by residents, each of whom is expected to do 30 to 50 hours of community service. Of 1,569 residents in 1985, 1,059 were terminated successfully.[27]

A number of voluntary agencies and churches (Elizabeth Fry Society, John Howard Society, St. Leonard's Society, Salvation Army, Seventh Step, etc.) operate community residential centres in *Canada*. While primarily funded to house offenders released from provincial prisons and federal penitentiaries, a few beds may be used to strengthen probation orders where prison is inappropriate and the agency and offender consent. Unfortunately, the availability of such facilities varies dramatically across the country. (For example, there is only one for women west of Sudbury, Ontario — in Vancouver!)

Most community residential centres are designed for residents who will either be working or attending school or a training program. A few "special interest" ones have developed in recent years: some for Natives, some operated by ex-offenders, some specializing in alcohol/drug treatment programs, and one in Montreal for "dangerous offenders". Local Elizabeth Fry Societies urged the Committee to encourage the use of halfway houses as sentencing alternatives for female offenders to avoid them being incarcerated far from families and children and to permit them to benefit from suitable community programs.

In 1976 the Law Reform Commission of Canada recommended that one of the dispositions which should be available to judges be a requirement that an offender reside for a specific period of time in a given residence. The Canadian Sentencing Commission recommended that judges be permitted to sentence offenders to "open custody" (Rec. 10.14 and 10.15). **The Committee agrees with these recommendations.**

e. Intensive Probation Supervision

About 30 American states have adopted some form of intensive probation supervision[28], either as a means of providing early release from prison or as a means of maintaining safely in the community offenders who might otherwise be incarcerated. Intensive probation supervision programs usually include community service, restitution and more frequent surveillance by probation officers than normal (including random visits). Supervision conditions may also include strict curfews, mandatory attendance at a training centre or drug/alcohol treatment program, or residence in a halfway house.[29]

i. The Georgia Program

One of the strictest programs has been operating in Georgia since 1982.[30] Its twin goals are to provide rehabilitative services to the offender and to monitor closely his or her activities. Eligible probationers are those who normally would have been sentenced to prison, but do not pose an unacceptable risk to society. (It has been suggested that offenders who would have been incarcerated in Georgia would not have been incarcerated in many other jurisdictions.)

Probationers are subject to curfews, unannounced visits from their probation officers, spot urinalysis or breathalyzer tests, and at least 132 hours of community service to be done on weekends. (This aspect of the Georgia program is said to be resented most by offenders.) Offenders may enter the program directly by order of the sentencing judge or may request the judge to amend the prison sentence and substitute intensive probation (post-sentence diversion). The latter mechanism, in particular, permits expeditious return of an offender to prison if necessary.

Each probationer is assigned to two probation officers: one performs primarily surveillance functions; the other, more traditional probation services. (The maximum caseload of each team is 25 probationers.) Additional surveillance is provided by:

- notifying law enforcement agencies that the offender is subject to intensive supervision, and by placing his or her name on the state-wide computer, so that the probation officer may be notified quickly if the probationer is arrested;

- checking arrest records weekly; and

- supplementing spot checks by using community monitors.

Curfews (10 p.m. to 6 a.m. unless restricted by the court, or varied to permit shift work) are checked at least twice per month.

The Georgia program claims a 78 percent success rate, defined as completing the term of intensive probation supervision and being returned to regular probation or discharged. While those who complete the program commit new crimes after completion at a rate slightly higher than those who were on regular probation, they do so at a much lower rate than ex-prisoners.

The costs of the program, about $1,080 per offender for eight months (about one-fifth the cost of state prison), are borne entirely by a fee of between $10 and $50 per month levied against all probationers by the sentencing judges. The program can accommodate about 1,400 offenders for 6-12 months.

The minimum supervision standards which have been developed for the three phases of the program are outlined below. In exceptional circumstances, deviation from them may be approved by the chief probation officer and/or the sentencing judge.

Phase I (minimum 3 months)

The probation officer meets with the probationer's family members to explain the program and elicit their cooperation. In a face-to-face meeting with the offender, the probation officer conducts a risk assessment which determines whether the offender will be seen at least three or five times per week; these visits may be at the offender's home, place of work, or at the probation office, and occur during daytime, evenings, and on weekends. The probationer's employment or education is verified once each week; the employer is contacted once each month to verify that the probationer's work is satisfactory. Unemployed probationers have their job searches verified; the first contact is expected to be at 8 a.m. each day. At least 50 hours of community service is to be performed in this phase. Unemployed probationers are expected to participate in community service daily.

Phase II (3-12 months)

A probationer who has responded positively to supervision in the first phase, completed the specified community service, remained arrest- and alcohol/drug-free, and established or maintained stable employment may move to Phase II. Face-to-face contacts may be reduced to two per week (one day, one evening). The curfew may be extended from 10 p.m. to 11 p.m. At least 30 additional hours of community service is to be completed.

Phase III

Unless it is recommended to the judge that the probationer be transferred to regular probation, the third phase permits reduction of face-to-face meetings to one per week (including once a month in the evening), relaxation of the curfew in the discretion of the probation officer, and completion of the balance of the 132 hours of community service.

Transfer to Regular Probation

Upon completion of the requirements of intensive probation supervision and application to the sentencing judge, the probationer may be transferred to regular probation. He or she will be supervised according to maximum or high standards of regular probation supervision and reassessed after six months.

ii. The Swedish Model

The Swedish approach to intensive supervision in the 1970s was considerably different. The Sundsvall and Stockholm Experiments demonstrated that close contact between supervisor and client was associated with lower recidivism. The Swedish model increased this contact by providing accommodation (halfway houses and temporary residences), lay (volunteer) supervisors, chosen whenever possible by the client, and professional mental health care.[31]

iii. Canadian Proposals

Almost a combination of the Swedish model and Alternative Sentence Planning (described earlier in this chapter) is the intensive supervision program developed by Gateway Correctional Services in British Columbia in

the early part of this decade. Its Executive Director, Bob Kissner, provided the Committee with information about this comprehensive, individualized program for young adult offenders, generally on probation. Programs are a combination of one-to-one supervision, structuring, counselling and special casework services. Individual programs may include referral to and coordination with other agencies, depending on client needs.

Program combinations may include:

- one-to-one counselling;
- employment assistance;
- accommodation assistance;
- addictions counselling;
- financial counselling;
- family counselling;
- educational upgrading;
- psychological counselling;
- medical assistance; and
- recreational services.

Several probation officers in B.C. have developed other proposals to provide intensive supervision for high-risk offenders, more along the lines of the Georgia model. In one, the offender's suitability for the program would be assessed as part of the pre-sentence report. The offender would be sentenced to prison and within 48 hours released into the community; this process would permit swift enforcement.[32]

Aasen and Howell urged the Committee to support the introduction of intensive probation supervision in Canada. In a discussion paper which Howell prepared for the Adult Probation and Community Service Advisory Group, and subsequently submitted to the Committee, he proposed seven minimum criteria for an intensive supervision program:

- a rigid set of admission criteria based on some sort of scoring system;
- specific judicial authorization;

- offender consent, so that the offender may choose incarceration;
- a maximum caseload of 50 offenders for two officers;
- a minimum of two face-to-face contacts with each client per week, including at least one random non-office contact;
- weekly contact with at least two collateral sources; and
- an enhanced enforcement mechanism.

Intensive probation supervision offers an intermediate sanction, between the extremes of imprisonment (which is both harsh and expensive) and the relatively lenient sanction of simple probation, for offenders whose criminal behaviour may be controlled through intensive supervision. When combined with alcohol and drug treatment programs and testing, it may reduce the incidence of street crime. **The Committee would like to see Canada explore the use of this sanction further.**

Recommendation 23

The Committee recommends that probation be replaced by seven separate orders (good conduct, reporting, residence, performance, community service, restitution and intensive supervision), which might be ordered separately or in conjunction with one or more others or with some other type of order.

Recommendation 24

The Committee recommends that the *Criminal Code* be amended to provide a more efficient mechanism than is now the case for dealing with breaches of probation or other orders in a way which respects the offender's due process rights.

Recommendation 25

The Committee recommends that more extensive use be made of group work in community correctional programs and that adequate resources be provided so that these might be made available to offenders on a voluntary basis or pursuant to a performance order.

Recommendation 26

In particular, the Committee recommends that greater use be made of probation conditions or performance orders which require assaultive spouses to participate in specialized treatment or counselling programs.

Recommendation 27

The Committee recommends that consideration be given to the New Zealand sentence of community care and the Gateway Correctional Services model of intensive supervision.

Recommendation 28

The Committee recommends that funding be made available to voluntary and charitable agencies to establish or expand community residential and related programs.

6. Home Confinement, House Arrest and Electronic Surveillance

The idea of confining certain offenders to their homes is appealing because it has the potential to accomplish some aspects of the incapacitation which prison offers (primarily monitoring movement) without major disruption to employment and family life, and without the dehumanizing outcomes and costs associated with imprisonment. Technology now makes such dispositions viable: an electronic transmitter may be strapped to an offender's wrist or ankle, alerting a central computer if he or she moves more than a specified distance from the receiver in the house. (Some technology requires the person monitoring the computer to call offenders randomly. Other, more expensive technology sends an automatic signal to the computer whenever the offender moves more than a certain distance from the transmitter.) Home confinement, of course, need not be accompanied by electronic surveillance (it is not in Australia, for example), but it appears likely that it will be in North America.

Electronic bracelets are being used experimentally in 20 American states (Virginia, Michigan, New Mexico, Oregon, Delaware and Florida, among them) and in B.C. to assist in the supervision of parolees, probationers and those on remand or serving intermittent sentences. Ontario

and Alberta have also considered use of the device. Saskatchewan has decided not to use it.[33] The B.C. experiment is a voluntary program permitting the offender to serve an intermittent sentence for impaired driving (either as a court-ordered condition of probation or by way of temporary absence after an order of imprisonment).

Critics say, at a minimum, the use of electronic monitoring in response to impaired driving should be accompanied by family and substance abuse education and counselling. They also caution that the use of electronic bracelets is likely to widen the net and not serve simply as an alternative to incarceration, and that it may lead ultimately to more intrusive surveillance, such as the use of implants to monitor alcohol and drug levels.[34] In addition, some devices in the U.S. have demonstrated that they do not work consistently: some have set off false alarms and others have failed to detect unapproved absences.[35] Moreover, the use of electronic bracelets is costly. (The centralized equipment may cost $100,000 in addition to the $10 a day per offender cost.) It has been suggested that offenders could be required to contribute to the cost of the equipment.[36]

Also, consideration needs to be given to the length of sentence of home confinement. As an alternative to incarceration (intermittent or otherwise), should the term of home confinement be the same, less or longer than that of incarceration? (In one Australian state, and some American jurisdictions, it appears, the judge makes an order of imprisonment for a fixed period of time, execution of which is suspended and home confinement of a lesser period substituted.) Presumably where home confinement is used as a condition of probation in support of intermittent sentences to be served in prison (discussed further in the next section of this Chapter), the term of home confinement could expire when the prison portions of the sentence have been completed.

With respect to the B.C. experiment, the Canadian Bar Association Committee on Imprisonment and Release recommended (Brief, p. 20) that:

- the Association supports in principle the use of electronic monitoring as an alternative to imprisonment where imprisonment is not considered necessary in the public interest;

- other Canadian jurisdictions be encouraged to initiate similar programs;

- the bail and probation provisions of the *Criminal Code* be amended to enable courts of law to impose such orders only as an alternative to incarceration (not for the purposes of "widening the net") in appropriate circumstances; and

- provincial/territorial correctional legislation [with respect to temporary absences] be amended to expressly authorize electronic monitoring and that the content of such legislation expressly clarify

  - the eligibility criteria;

  - the application process and procedure;

  - the suspension, termination and revocation process and procedure; and

  - the penalties for violation

  so as to comply with section 7 of the Canadian Charter of Rights and Freedoms.

The Committee supports the use of home confinement, with or without electronic monitoring, as an intermediate sanction and agrees with the recommendations of the Canadian Bar Association set out above. In the Committee's view, home confinement may be a suitable alternative to incarceration in situations where the goals of denunciation or deterrence are considered to be necessary and achievable, and where public protection does not seem to require the financial and social costs associated with incarceration. In the Committee's view, however, it would be inappropriate to "widen the net" of social control through this mechanism. Moreover, it must be recognized that the sanction offers monitoring, not prevention; it should not be used with offenders who are dangerous and require incarceration. Nor should it be used as a substitute for appropriate rehabilitative services which may be provided in accordance with other forms of probation (or related orders). Finally, as a sole sanction, it does not further the sentencing goal proposed by the Committee.[37]

Recommendation 29

The Committee recommends that home confinement, with or without electronic monitoring, be made available as an intermediate sanction, probably in conjunction with other

sanctions, for carefully selected offences in appropriate circumstances.

Recommendation 30

The Committee recommends that legislative changes required to permit the use of home confinement as a sentencing option provide reasonably efficient enforcement mechanisms which do not infringe basic due process rights of offenders.

Recommendation 31

The Committee recommends that consideration be given to requiring the consent of the offender and his or her co-residing family members to an order of home confinement.

Recommendation 32

The Committee recommends that in making an order of home confinement, the court consider appropriate collateral conditions (e.g., addictions counselling where appropriate).

7. Sentencing Alternatives That Shorten or Re-arrange the Period of Imprisonment — Periodic, Intermittent or Weekend Detention

Attempts have been made to reduce reliance on incarceration by providing sentencing options that permit judges to use short periods of incarceration in combination with longer periods of probation supervision. Such options usually provide mechanisms for returning the offender to detention expeditiously should that be required. Unlike traditional conditional release schemes, which are discussed later in the report, these "split sentences" are judicially controlled. Some occur directly as a result of sentencing; others, by re-sentencing upon application by the offender.

Intermittent sentences appear to be used most commonly in relation to impaired driving sentences but, in Canada, they are available for any prison sentence not exceeding 90 days. Generally, such sentences are served on weekends (hence the name "weekend detention" in some jurisdictions); the offender remains on probation until all the periods of incarceration have been served. They are useful sanctions where the purposes of denunciation or

deterrence need to be addressed, but where little is to be gained by interrupting an offender's employment.

Intermittent sentences enable offenders to maintain their jobs or education, and family and social relationships. They may be used in some jurisdictions to ensure an offender's attendance for certain rehabilitative activities. As previously noted with respect to attendance centres, offenders may be required to attend at a facility several evenings per week as well as on weekends. It is believed that such sentences serve as an incentive for offenders not to breach the terms of their probation, as well as to deter them from further criminal activity. The Tearman Society of Nova Scotia recommended this form of sentence for assaultive males so that they may continue to support their families.

In *New Zealand*, where the concept originated in the 1960s, no single continuous period of intermittent custody may exceed 60 hours. The sentence must specify the number of periods to be served each week, the length of sentence, and the date and time the offender is to report for the first time. The offender must consent to this form of sentence. Each detention centre has developed a unique approach. Each has an advisory committee, with representatives from the courts, business, labour and the community at large, who advise on staff appointments, work programs and general policy matters. It is claimed that between 64 percent and 67 percent of probationers subject to intermittent sentences remain successfully in the community after two years.[38]

In *Canada*, the judge's order must specify when the detention periods are to be served. The period of probation expires when the periods of detention have been served. It is unclear whether a subsequent period of probation may be ordered (as it could be in relation to a continuous period of imprisonment of two years or less). Recently, there have been problems with offenders showing up intoxicated at jails or prisons to serve their intermittent sentences; probation orders may specify that offenders must be sober when they arrive at detention facilities. Another problem is that there is currently insufficient space at jails and provincial prisons to accommodate the number of offenders serving intermittent sentences. In such circumstances, the prospect of home confinement becomes attractive to correctional authorities. (Some European jurisdictions deal with the overcrowding problem by delaying service of the sentence until there is space.) Finally, it should be noted that occasionally such sentences have been

used for sexual offenders; the Committee recognizes that the public has been outraged by this.

In the Committee's view, intermittent sentences are useful to achieve the purposes of denunciation and deterrence, particularly in cases of impaired driving and spousal abuse where the assaulted victim may not wish to be deprived of spousal support. However, the Committee is concerned about the financial costs and the disruption to prison/jail routines associated with such sentences in many other sorts of cases. Moreover, the Committee is of the view that such sentences are generally inappropriate in cases of sexual assault.

Recommendation 33

> **The Committee recommends that intermittent sentences not generally be used with respect to sexual offences, where public protection, when necessary, should be secured through incarceration or where denunciation might be secured through home confinement, community residential orders, or short periods of continuous incarceration.**

Recommendation 34

> **The Committee recommends that community residential settings be used for intermittent sentences.**

Recommendation 35

> **The Committee recommends that consideration be given to combining intermittent sentences with performance orders or probationary conditions which are restorative or rehabilitative in nature.**

8. Fines

Except for the fact that too many people, particularly Natives, are incarcerated in Canada for default of fine payments, few representations were made to the Committee concerning fines. The Committee received recommendations that a day fine system be implemented or that fine options programs be utilized to avoid this problem. **The Committee basically favours avoiding incarceration in lieu of fine payment.**

Recommendation 36

The Committee recommends that the following recommendations of the Sentencing Commission be implemented:

(a) that once it has been decided that a fine may be the appropriate sanction, consideration be given to whether it is appropriate to impose a fine on the individual before the court. The amount of the fine and time for payment must be determined in accordance not only with the gravity of the offence, but also with the financial ability of the offender. Further to the above principle, prior to the imposition of a fine, the court should inquire into the means of the offender to determine his or her ability to pay and the appropriate mode and conditions of payment. (Rec. 12.20)

(b) that where the limited means of an offender permits the imposition of only one pecuniary order, priority be given to an order of restitution, where appropriate. (Rec. 12.21)

(c) that the use of imprisonment for fine default be reduced. (Rec. 12.22)

(d) that a quasi-automatic prison term not be imposed for fine default and that offenders only be incarcerated for wilful breach of a community sanction. (Rec. 12.23)

C. General Recommendations of the Committee

Recommendation 37

The Committee recommends that the following recommendations of the Canadian Sentencing Commission be implemented:

(a) that the federal and provincial governments provide the necessary resources and financial support to ensure that community programs are made available and to encourage their greater use (Rec. 12.1);

(b) that mechanisms to provide better information about sentencing objectives to sentence administrators be developed (Rec. 12.2);

(c) that a transcript of the sentencing judgment be made available to the authorities involved in the administration of the sentence (Rec. 12.3);

(d) that mechanisms to provide better information about alternative sentencing resources to the judiciary be developed (Rec. 12.5);

(e) that feedback to the courts regarding the effectiveness of sanctions be provided on a systematic basis (Rec. 12.6);

(f) that prior to imposing a particular community sanction, the sentencing judge be advised to consult or obtain a report respecting the suitability of the offender for the sanction and the availability of programs to support such a disposition (Rec. 12.7);

(g) that [existing] community sanctions be developed as independent sanctions,... [and] that additional proposals be examined by the permanent sentencing commission and by the federal and/or provincial governments for further review, development and implementation (Rec. 12.8);

(h) that the permanent sentencing commission *consider* the feasibility of developing criteria and principles which permit the comparison of individual community sanctions and which attempt to standardize their use (e.g., X dollars is the equivalent of Y hours of community service) (Rec. 12.10 and 12.11); and

(i) that the judiciary retain primary control over the nature and conditions attached to community sanctions (Rec. 12.12).

Recommendation 38

The Committee also recommends:

(a) that federal and provincial authorities develop, support and evaluate alternatives to incarceration and intermediate sanctions;

(b) that greater recognition and financial support be given to non-governmental agencies to develop alternative programs; and

(c) that greater linkages be developed between the criminal justice system and other social and mental health services in the society.

Notes

(1) Some studies have indicated that "custodial sentences tend to increase the likelihood of recidivism rather than reduce it": C. Van der Werff, "Recidivism and Special Deterrence", *British Journal of Criminology*, Vol. 21, No. 2, April 1981, p. 136-146, at p. 146.

(2) Studies on deterrence have led to the conclusion that, generally speaking, there may be little difference in the deterrent effect of various penal measures. Some research has suggested that "longer expected sentences do not significantly deter prospective offenders from committing property crimes": Kenneth L. Avio and C. Scott Clark, "The supply of property offences in Ontario: Evidence on the deterrent effect of punishment", *Canadian Journal of Economics*, February 1978, p. 1-19, at p. 14.

(3) A. Von Hirsch, "Creative Sentencing: Punishment to Fit the Criminal", *The Nation*, June 25, 1988, p. 901-2.

(4) N. Morris, addressing the Conference for the Reform of Sentencing, Parole and Early Release in Ottawa, August 1988.

(5) Ken Pease, "Community Service Orders", in Michael Tonry and Norval Morris (eds.), *Crime and Justice: An Annual Review of Research — Volume 6*, University of Chicago Press, 1985, p. 56.

(6) D. Plecas and J. Winterdyk, "Community Service: Some Questions and Answers", *Provincial Judges Journal*, March 1982, p. 11; April Lindgren, "Community work helps turn young offender's life around", *The Citizen*, Ottawa, 20 November 1984, p. A5.

(7) S.A. Thorvaldson, "Justifying Community Service", *Provincial Judges Journal*, March 1982, p. 9.

(8) Judge J.B. Varcoe, "The Misuse of Community Service Orders", *Provincial Judges Journal*, March 1982, p. 13.

(9) Georgia Department of Corrections, "Sentencing Options: State of Georgia", mimeographed, undated.

(10) Canada's *Young Offender's Act* limits community service sentences to 240 hours to be completed within one year. In Quebec, community service orders for adult offenders range from 20-120 hours, pursuant to provincial guidelines; in New Zealand, the legislated (?) range is 8-200 hours; in Georgia, the limit is 250 hours to be completed within one year for misdemeanors and 500 hours within three years for felonies; in the U.K. and Australia, the limit is 208 hours: S. Divorski and J. Holland *et al.*, *Directory of Adult Alternative Programs in Canada* [User Report No. 1986-7], Research Division, Programs Branch, Ministry of the Solicitor General, Ottawa, 1986, p. 14; J. Leibrich, "Use of Community Service in New Zealand", *Australia and New Zealand Journal of Criminology*, Vol. 18, June 1985, p. 85; Georgia Department of Corrections (Probation Division), "Community Service", mimeographed, undated; Australia Law Reform Commission, *Sentencing of Federal Offenders* [Report No. 15, Interim], Australian Government Publishing Service, Canberra, 1980, p. 241.

(11) Pease, *op. cit.*, Note 5, p. 69. In 1975, only 45 percent of English probation orders were a direct alternative to incarceration: C.R. Dodge, *A World Without Prisons: Alternatives to Incarceration Throughout the World*, Lexington Books, Lexington, Mass., 1979, p. 119-123.

(12) G. Danziger, "Prison Crowding", *Editorial Research Reports*, 7 August 1987, 394-407 at p. 404; Pease, *op. cit.*, Note 5, p. 71.

(13) The Law Reform Commission of Canada (LRCC) appeared to consider community service as a fine alternative: LRCC, *A Report on Dispositions and Sentences in the Criminal Process: Guidelines*, LRCC, Ottawa, 1976, p. 24. The province of P.E.I. permits offenders to pay off the CSO at the rate of $5 per CSO hour: J.W. Ekstedt and M.A. Jackson *et al.*, *A Profile of Canadian Alternative Sentencing Programmes: A National Review of Policy Issues*, Communications and Public Affairs, Department of Justice Canada, Ottawa, 1988, p. 50.

(14) The Committee relied on material submitted by the Mennonite Central Committee and the Victim-Offender Reconciliation Program in Langley, B.C., in preparing this section of the report.

(15) Extracted from *Peace Section Newsletter*, Vol. 16, No. 1, January-February 1986, a publication of the Mennonite Central Committee Peace Section, Akron, Penn., p. 7 and 12.

(16) Holly Darwin, In Service Training Coordinator, Oklahoma Department of Corrections, "Oklahoma Department of Corrections Post-Conviction Mediation Program: Highlights", Appendix 2 in National Associations Active in Criminal

Justice, *Criminal Justice and Victim-Offender-Community Reconciliation*, Seminar Proceedings, Ottawa, September 1985.

(17) Print and audio-visual materials concerning the wide range of services incorporated in "Genesee Justice" are available from the Community Service/Victim Assistance Program, Genesee County Sheriff's Department, County Building # 1, Batavia, N.Y., U.S.A. 14020-3199.

(18) Ruth Morris, "Creative Alternatives to Prisons", paper presented to Conference on Prison Overcrowding, Toronto, 1985, p. 6.

(19) Divorski and Holland, *op. cit.*, Note 10, p. 63; G. Danziger, *op. cit.*, Note 12, 394-407 at 397.

(20) See *Canadian Treatment Programs for Men Who Batter*, National Clearinghouse on Family Violence, Health and Welfare Canada, Ottawa, 1988; and Ekstedt and Jackson, *op. cit.*, Note 13, p. 33, 51, 63, 74, 90, 101, 124 and 138.

(21) Australia Law Reform Commission, *op. cit.*, Note 10, p. 241; Dodge, *op. cit.*, Note 11, p. 50.

(22) Dodge, *op. cit.*, Note 11, p. 50.

(23) J. Sinclair, *Hostels for Probationers*, Her Majesty's Stationery Office, London, 1971, p. 1; Dodge, *op. cit.*, Note 11, p. 124-6.

(24) Dodge, *op. cit.*, Note 11, p. 55.

(25) *Ibid.*, p. 103, 109 and 110-112.

(26) *Ibid.*, p. 188.

(27) K. Sawyer, "The Alternative to Prison", *The Washington Post*, National Weekly Edition, 2 September 1985; D.C. Evans and V. Fallins, "Georgia Diversion Centers", Georgia Department of Corrections, July 1985; Georgia Department of Corrections, "Sentencing Options: ...", *op. cit.*, Note 9.

(28) R. Lacayo, "Considering the Alternatives: Crowded prisons spark less confining punishments", *Time*, 2 February 1987, p. 60.

(29) Danziger, *op. cit.*, Note 12, p. 395 and 405.

(30) Sawyer, *op. cit.*, Note 27; "Intensive Probation Supervision" and "Sentencing Options: ...", both mimeographed and undated publications of the Georgia Department of Corrections.

(31) Dodge, *op. cit.*, Note 11, p. 203-6.

(32) Ekstedt and Jackson *et al.*, *op. cit.*, Note 13, p. 148.

(33) *Ibid.*, p. 96 and 128.

(34) "Electronic Surveillance: Turning Homes into Jails", in *Liaison*, November 1987, p. 4-8.

(35) Danziger, *op. cit.*, Note 12, p. 405.

(36) Lacayo, *op. cit.*, Note 28, p. 60; Danziger, *op. cit.*, Note 29, p. 402.

(37) For a consideration of how home confinement might facilitate reintegration into the community, see R.A. Ball and J.R. Lilly, "Home Incarceration: An International Alternative to Institutional Incarceration", Vol. 9, No. 2 (1985) *International Journal of Comparative and Applied Criminal Justice*, p. 85-97.

(38) Dodge, *op. cit.*, Note 11, p. 55-6.

CHAPTER EIGHT

CURRENT FORMS OF CONDITIONAL RELEASE [1]

A. Introduction

This chapter provides a description of the different current forms of conditional release: temporary absence, day parole, full parole and earned remission/mandatory supervision. It also sets out the mandatory terms and conditions of release deemed to have been imposed by the National Parole Board on any inmate released into the community under supervision.

These various forms of conditional release permit federal and provincial adult inmates to be in the community during part of a sentence of imprisonment. Such inmates are subject to supervision as well as to mandatory and special release conditions.

Conditional release is believed by many both to promote the reintegration of the offender into the community and to protect the community from *undue* risk. These ends are achieved both by supervising the offender and providing assistance. To ensure that an inmate under supervision is properly controlled and receives appropriate assistance, he or she must report periodically to a parole officer, to the police, or to both. The parole officer has the dual responsibility to assist the offender to reintegrate into the community and protect the safety of the community. All forms of conditional release may be terminated if the offender exhibits behaviour that poses an undue risk to the community by breaching a condition of release or by committing a new crime, or if there is suspicion that he or she may do so.

B. Forms of Conditional Release

Offenders become eligible for different forms of release after serving various prescribed periods of incarceration, depending on the length of sentence and the nature of the offence. Eligibility for release generally means the offender is eligible to *apply* for the privilege of release. Only release on mandatory supervision may be automatic and, since 1986, its availability to the most serious offenders has been restricted.

1. Temporary Absence

A temporary absence from custody is usually the first release an inmate will be granted. It is a brief period of release for a specific purpose and usually has very strict conditions. A temporary absence may be given at any time for medical and humanitarian or, after a certain point in time, for rehabilitative reasons. It may be with or without escort. Successfully completed escorted temporary absences are often required before unescorted temporary absences are granted.

a. From Federal Penitentiaries

Escorted temporary absences mean that the inmate, either alone or as a member of a group, is accompanied by an escorting officer. The escort may be a correctional officer (from either the security or resocialization staff) or, where appropriate, a community volunteer specially selected by the Correctional Service of Canada for the purpose.

The decision to grant a temporary absence with escort is generally made by the institutional authorities, except for offenders sentenced for murder, whose absence with or without escort for humanitarian or rehabilitative reasons may not be granted without the approval of the National Parole Board and then not until the expiry of all but three years of the period of ineligibility for parole (10 to 25 years). Although there are otherwise no legislated minimum periods of imprisonment that must be served before a grant of temporary absence with escort may be authorized, they are not usually granted for rehabilitative purposes until a specified portion of the sentence has been served.

Unescorted temporary absences for rehabilitative or humanitarian purposes have been the responsibility of the National Parole Board since 1978. They are used for occasional intermittent release (e.g., to apply for a job, attend family functions, or to visit relatives or friends). The Board may delegate its authority regarding medical or humanitarian reasons, as it considers appropriate (subject to any conditions it deems advisable and for such periods as it sees fit), with respect to an inmate or a class of inmates, to the Commissioner of Corrections or to the Warden or Superintendent of a penitentiary. The latter is done in most cases of inmates serving sentences of less than five years.

Except for medical emergencies, penitentiary inmates are generally ineligible for temporary absences prior to serving at least six months or one-sixth of sentence (longer in some cases).

The *frequency and duration* of unescorted temporary absences vary. Usually, inmates from maximum- and medium-security institutions may be granted temporary absences that together do not exceed 48 hours per month; inmates from minimum-security institutions may be granted up to 72 hours per month. Other forms of temporary absence may be granted in the same month if the Board or institutional authorities consider they are necessary.

Temporary absences, with or without escort, for humanitarian reasons or to assist in the rehabilitation of the inmate may be granted by the Board for a period not exceeding 15 days. Temporary absence for medical reasons may be granted by the Board or Commissioner (when delegated) for an unlimited period, and by an institutional director (when delegated) for up to 15 days.

Generally, no consecutive unescorted temporary absences are allowed. Releases of an ongoing nature are more appropriately considered in the context of day parole.

b. From Provincial Prisons

Inmates confined in provincial institutions are not within the jurisdiction of the National Parole Board in the case of temporary absences, with or without escort. They are subject to the authority of provincially designated correctional officials, who may grant absences of an unlimited period for medical reasons and up to 15 days for humanitarian or rehabilitative purposes. The practice of 15-day back-to-back unescorted temporary absences has evolved to provide for extended periods of work release, particularly in provinces which do not have a provincial parole board or prior to day parole eligibility. No minimum period of incarceration is prescribed prior to eligibility.

2. Parole

The term "parole" includes "day parole" and "full parole". Parole is an authority for an inmate to be under supervision outside of prison during his or her sentence.

The National Parole Board may grant parole to an inmate, subject to any terms or conditions it considers reasonable, if the Board considers that:

- in the case of full parole, the inmate has derived the maximum benefit from imprisonment;
- the reform and rehabilitation of the inmate will be aided by the grant of parole; and
- the release of the inmate would not constitute an undue risk to society.

The Board is deemed to have imposed such mandatory terms and conditions as may be prescribed by the regulations unless it has relieved the inmate of compliance with (or has varied) any of them. In addition, it may also impose special conditions.

British Columbia, Ontario and Quebec have provincial parole boards which deal with almost all applications for parole from inmates of provincial institutions.

a. Day Parole

Day parole is a form of conditional release usually granted for four to six months (although it may be granted for up to 12 months) to penitentiary inmates who are considered by the National Parole Board to be good candidates for full parole. Most inmates are eligible to apply for this type of release after serving one-sixth of the sentence. (Where actual violence or the threat of violence was involved in the crime, it is unlikely to be granted until later.) The inmate must return, usually every night, to a minimum-security institution, to a community correctional centre, operated by the Correctional Service of Canada, or to a community residential centre, a halfway house, operated by a voluntary organization.

Day parole is usually granted for one of the following reasons:

- to allow an inmate to seek further education or training when the facilities are not available in the institution;
- to provide the opportunity to participate in community service or employment projects such as forestry or harvesting;

- to help an inmate re-adjust to life outside prison; and

- to re-establish or strengthen family relationships.

For inmates who are not successful in obtaining parole, day parole may be granted later in the sentence, just prior to release on mandatory supervision, to provide greater control and support than that available during mandatory supervision.

b. Full Parole

i. Generally

Full parole is the full-time conditional release of an inmate for the remainder of his or her sentence. Those who have served at least one-third of their sentence (more for special categories such as lifers) are eligible to apply; those who have persuaded a parole board that they are determined to lead law-abiding lives may be granted full parole.

Unless the parolee fails to adhere to the conditions of parole or returns to criminal activities and is thereby re-imprisoned, he or she will remain in the community under parole until the expiry date of the sentence (or discharge of parole).

Only about 32 percent of federal releases are on full parole. Of these, the majority has served from 46 percent to 49 percent of their sentences before being granted full parole, although many will have been released somewhat earlier on day parole.

ii. Special Categories of Offences and Offenders

° Violent Conduct Offences

A "violent conduct offence" for parole purposes is one carrying a maximum penalty of 10 years or more, for which a sentence of five years or more was actually imposed, and which involved conduct that seriously endangered the life or safety of any person or resulted in serious bodily harm or severe psychological damage to any person. An inmate convicted of a violent conduct offence within 10 years of the expiration of a sentence for a previous violent conduct offence is not eligible for full parole until one-half of the sentence has been served, or seven years, whichever is the lesser. This

provision is seldom used because of a technical interpretation of the legislation that the previous sentence must have *expired* prior to the commission of the subsequent offence. (In some cases, the subsequent offence will have been committed while the inmate was still serving the previous sentence in the community under conditional release.)

° Murderers

Since July 1976, there have been two categories of murder: first and second degree. First degree murder covers all planned and deliberate murders and certain others such as contracted murders, murder of a police officer, a prison employee or any other person authorized to work in a prison, when he or she is on duty. The mandatory minimum period to be served before being considered for full parole is 25 years. Persons who have committed second degree murder (i.e., any murder that is not first degree murder) can be considered for parole after serving between 10 to 25 years of their sentences, as determined by the court. Anyone convicted of murder who must serve more than 15 years before parole eligibility may apply after 15 years for a judicial review by a Superior Court judge and a jury to either reduce the remaining period before eligibility, or to be declared eligible for parole immediately.

° Dangerous Offenders

Since October 1977, the courts, *upon application by the Crown*, have been able to impose indeterminate sentences on certain individuals they consider to be dangerous offenders: those who have been convicted of serious personal injury offences and have backgrounds of persistent aggressive or violent behaviour.

A dangerous offender becomes eligible for full parole three years after being taken into custody and must have a case review at that time and every two years thereafter. The Board is required to review, once a year, the cases of inmates sentenced, *before* October 1977, to an indeterminate term as habitual or dangerous sexual offenders.

iii. Parole by Exception

Provided the inmate otherwise meets the statutory criteria for parole, with some exceptions, parole boards may grant full parole or day parole "by

exception'' to an inmate before he or she has served the portion of the prescribed term of imprisonment in circumstances such as those where:

- the inmate is terminally ill;

- the inmate's physical or mental health is likely to suffer serious damage if he or she continues to be held in confinement;

- there is a deportation order made against the inmate under the *Immigration Act, 1976* and the inmate is to be detained under that Act until deported; or

- in the case of provincial inmates, the inmate has completed a program recommended by the sentencing court or satisfied specific, expressly stated objectives of the sentence.

Inmates ineligible for parole by exception are those serving sentences of life imprisonment, of detention for an indeterminate period, or in respect of a "violent conduct offence''.

3. Mandatory Supervision

a. Generally

Most penitentiary inmates who have not been released on parole (or whose parole has been revoked) are eligible to serve in the community, under supervision, the portion of the sentence for which they have accumulated earned remission. (Inmates whose penitentiary terms began before July 1970 and provincial inmates are released at that time without supervision.) Most releases (57.5 percent in 1986/87) from penitentiary are those on mandatory supervision.

The terms "remission'' and "mandatory supervision'' are often confused. *Remission*, which has been in effect for over 100 years, allows the majority of inmates to earn eligibility to serve a portion of their sentences in the community. Commonly known as "time off for good behaviour'', remission can be as much as one-third of an inmate's sentence. Mandatory supervision, which has been in place since 1970, is compulsory supervision which federal inmates must accept if they accept release on their remission date. An inmate is not required to accept release under mandatory

supervision and may choose to remain in the institution until the sentence expiry date.

The purpose of mandatory supervision is:

- to provide the same degree of control and assistance to federal inmates released as a result of remission as to those released on parole; and

- to assist the offender in making the transition to law-abiding behaviour upon return to the community and to allow relatively quick and easy return to penitentiary of those who violate conditions of release or who commit new crimes.

The National Parole Board has the authority to set conditions and to revoke mandatory supervision. It can thus send individuals back to prison to serve the remaining portion of their sentences if the conditions of the release are violated or if the inmates commit new crimes.

b. Detention Orders, Residency and One-Chance Mandatory Supervision (Bill C-67)

While parole has always been a discretionary decision by the National Parole Board, release under mandatory supervision prior to the passage of Bill C-67 in 1986 was an unqualified entitlement. Bill C-67 now authorizes the National Parole Board, in accordance with criteria (including a schedule of offences) and procedures established by the legislation to detain in custody until sentence expiry date those inmates otherwise eligible for mandatory supervision who are considered likely to commit an offence causing death or serious harm to another person before the end of their sentence. These inmates forfeit their remission.

Cases must be referred to the National Parole Board six months prior to eligibility for mandatory supervision if the Correctional Service of Canada finds that:

- the inmate's current term is for a *Criminal Code* offence that had been prosecuted by indictment and is mentioned in the schedule;

- the commission of the offence caused the death of or serious harm to another person; and

- there are reasonable grounds to believe that the inmate is likely to commit a similar offence prior to sentence expiry.

Those offences mentioned in the schedule for which there must have been a prosecution by indictment and a conviction are:

Current *Criminal Code* Offences:

- causing injury with intent (paragraph 79(2)(a))
- use of a firearm during commission of an offence (section 83)
- pointing a firearm (subsection 84(1))
- prison breach (section 132)
- manslaughter (section 219)
- attempt to commit murder (section 222)
- causing bodily harm with intent (section 228)
- overcoming resistance to commission of offence (section 230)
- assault (section 245)
- assault with a weapon or causing bodily harm (section 245.1)
- aggravated assault (section 245.2)
- unlawfully causing bodily harm (section 245.3)
- assaulting a peace officer (section 246)
- sexual assault (section 246.1)
- sexual assault with a weapon, threats to a third party or causing bodily harm (section 246.2)
- aggravated sexual assault (section 246.3)
- kidnapping (section 247)
- robbery (section 303)
- arson (section 389)
- setting fire to other substance (section 390)
- setting fire by negligence (section 392)

- conspiracy to commit murder (paragraph 423(1)(a))

Criminal Code Offences Committed Prior to 4 January 1983:

- rape (section 144)
- attempt to commit rape (section 145)
- indecent assault on female (section 149)
- indecent assault on male (section 156)
- common assault (section 245)
- assault with intent (section 246)

In addition, the Commissioner of Corrections may refer to the Board any inmate where there is reason to believe that, prior to sentence expiry, the inmate will commit an offence causing death or serious bodily harm.

The National Parole Board has the option of ordering that certain inmates may be detained until warrant expiry, or that they may be placed under strict residential conditions if they are released under mandatory supervision. Detained inmates are entitled to an annual review. Inmates subject to strict residential conditions will have only one chance in the community, and, if their releases are revoked, will be detained until warrant expiry.

4. Mandatory Terms and Conditions of Release

The mandatory terms and conditions that the National Parole Board is deemed to have imposed in respect of any inmate released on parole or subject to mandatory supervision are that the inmate:

(1) on release, travel directly to the inmate's place of residence, as noted on the parole or mandatory supervision certificate;

(2) report to the parole supervisor immediately on release and thereafter as instructed by the parole supervisor;

(3) remain at all times in Canada, within territorial boundaries prescribed by the parole supervisor;

(4) obey the law and keep the peace;

(5) inform the parole supervisor immediately on arrest or being questioned by the police;

(6) report to the police as instructed by the parole supervisor;

(7) advise the parole supervisor of the inmate's address of residence on release and thereafter report immediately

(a) any change in the address of residence,

(b) any change in the normal occupation, including employment, vocational or educational training and volunteer work,

(c) any change in the family, domestic or financial situation, and

(d) any change which may reasonably be expected to affect the inmate's ability to comply with the terms of conditions of parole or mandatory supervision; and

(8) not own, possess or have the control of any weapon, as defined in the *Criminal Code*, except as authorized by the parole supervisor.

In addition, the National Parole Board may impose special conditions such as to abstain from intoxicants and to participate in programs such as drug or alcohol rehabilitation.

Breach of conditions can lead to suspension and revocation (discussed in Chapter Ten).

C. Unconditional Release

About 7.3 percent of releases from penitentiaries in 1986/87 occurred at the end of inmates' sentences. These offenders either had no earned remission, were detained until warrant expiry date pursuant to Bill C-67, or they refused to accept release on mandatory supervision.

Notes

(1) This chapter is based in large part on the relevant provisions of the *Parole Act*, Parole Regulations, *Penitentiary Act*, *Criminal Code*, the National Parole Board's *Policy and Procedures Manual*, and the 3-volume *Briefing Book* prepared for the Committee by the National Parole Board.

CHAPTER NINE

THE RECENT HISTORY OF CONDITIONAL RELEASE REFORM IN CANADA

A. Early Days

Conditional release began to develop in the United Kingdom in the mid-nineteenth century. Ticket of leave programs were established whereby offenders would be released from prison before the end of a term of imprisonment if they applied themselves industriously while incarcerated. Community supervision did not exist but offenders not respecting agreed-upon terms of release were returned to prison. Similar developments were taking place in Germany in the 1860s. In the 1870s, the ticket of leave approach was imported to the United States with the opening of the parole system at Elmira Reformatory in New York State.

Prior to 1899, the Royal Prerogative of Mercy was used as a releasing mechanism in Canada. In 1899, Parliament enacted the *Ticket of Leave Act* which, for the first time, established the system of conditional release in Canada. In 1901, the Dominion Parole Office was created as part of the Remission Service within the Department of Justice. By the late 1950s, the Remission Service had developed a number of regional offices to provide supervision to offenders.

In 1956, the Committee appointed to Inquire into the Principles and Procedures followed by the Remission Service of the Department of Justice (the Fauteux Committee) released its Report. The Fauteux Committee saw parole as a transition for offenders from institutions to the community. In its view, parole had a dual role — integrative and supervisory: both would benefit the offender and society. In part as a response to the Fauteux Report, Parliament in 1959 enacted the *Parole Act* and established the independent National Parole Board. The Board, initially made up of five members, was given authority to grant conditional release to offenders.

The next part of this chapter will deal with developments since 1969. This period has been characterized by a number of proposals for reform and their implementation, in whole or in part.

B. Proposals for Reform and Other Developments Since 1969

1. Ouimet Report

As will become apparent from the following outline of the 1969 recommendations of the Report of the Canadian Committee on Corrections (Ouimet Committee), many of its proposals have been implemented since they were first made public.

The Ouimet Committee saw parole as a treatment-oriented correctional measure — a method of surveillance coupled with assistance to the offender to reintegrate into society. It considered the primary objective of parole to be social re-education of the offender: society is protected by the degree of surveillance to which the offender is subjected. Parole was seen as a less burdensome and less expensive form of correction than incarceration. The Ouimet Committee suggested that the burden of showing that more costly and more burdensome correctional alternatives are more effective rests on those making such propositions. The Ouimet Committee named two measurement criteria to determine the success of parole — whether the offender successfully completed the parole period and whether the offender's total correctional experience led to his or her not committing further offences.

The Ouimet Committee recommended that federal/provincial parole jurisdiction be clarified, with each level of government being responsible for the parole needs of those in its correctional institutions. At the time its report was released, the National Parole Board and the National Parole Service operated as a unit, with the latter providing parole investigatory and advisory services to the former quasi-judicial body. Consequently, the Ouimet Committee recommended that these two institutions be separated to preserve the quasi-judicial independence of the National Parole Board. Most of the parole investigatory and supervisory functions formerly performed by the National Parole Service are now performed by the Correctional Service of Canada.

The Ouimet Committee also recommended that the National Parole Board have more members (it had five at the time) and that they be representative of many disciplines and sectors of the community. It recommended that offenders be able to appear at Parole Board hearings, that such Boards be comprised of three-member panels and that decisions be rendered expeditiously with reasons being given.

The Ouimet Committee did not recommend that the eligibility for parole after one-third of sentence has been served be changed. The Ouimet Committee urged that the automatic forfeiture of the balance of an offender's parole upon conviction for an indictable offence committed while on parole be subject to over-ruling by the National Parole Board in extraordinary circumstances.

In certain circumstances, the Ouimet Committee urged that the National Parole Board should be empowered to recommend to a court that it terminate a sentence before expiry where an offender has been on parole successfully for a long period of time. This would apply in cases of sentences to preventive detention or to imprisonment for life.

At the time the report was released, there was provision for inmates to have 25 percent of their sentences remitted statutorily — this could only be lost for misbehaviour. In addition, inmates accumulated earned remission at a rate of three days per month if they applied themselves industriously — this could not be lost. In 1969, such offenders were released into the community without supervision of any kind. The Ouimet Committee recommended that all offenders released under statutory or earned remission be subject to what it called "statutory conditional release" — such an inmate would be subject to the same type of supervision as those on parole in the community. A variant of this proposal was subsequently enacted by Parliament in the form of mandatory supervision. (In 1976, the concept of statutory remission was repealed by Parliament.)

Some of the other changes adopted partly as a result of the Ouimet Report were the increase in the number of National Parole Board members from five to nine and the authorization of the establishment of regional divisions of two or more members.

2. Hugessen Report

The 1972 Hugessen Task Force report started from the premise that the National Parole Board was too centralized and should establish five Regional Boards across the country. Each of these Regional Boards would consist of a Chairperson, an independent person not involved in the correctional system, a judge, a senior police officer, a psychiatrist or psychologist, a criminologist or sociologist, a person with responsibility for programs in a correctional institution and a person with responsibility for

supervision of offenders in the community. Where the workload required, it was recommended that part-time members or short-term full-time members should be appointed to Regional Boards.

The Task Force also recommended that there be Local Boards set up for institutions within each region. These Local Boards would be made up of senior institutional personnel, senior parole personnel and an independent citizen from a local community. Local Boards would have jurisdiction over offenders with less than five-year sentences; Regional Boards would be empowered to review decisions of these Local Boards and would deal with all other parole matters.

The Task Force recommended that there be a National Commissioner for Parole who would coordinate the work of the Regional Boards and make recommendations for appointments to Regional and Local Boards. The Task Force urged that a National Parole Institute be established to collect and analyze statistics and other forms of data.

The Task Force suggested that the confusion between temporary absences for rehabilitation purposes and day parole was undesirable. At that time, temporary absence decisions were made by the correctional institution and day parole decisions were made by the National Parole Board. In the past, the different authorities, taking into account the same factors, had made inconsistent decisions about the same inmate. The Task Force recommended that temporary absences be abolished, and that they and day parole be combined into what it would call "temporary parole". Such "temporary parole" would be granted by the National Parole Board. Under this proposal, the correctional authority would only be able to authorize essential temporary absences for medical or humanitarian purposes.

It was recommended that the offender should be able to apply for temporary parole six months after a sentence begins. The eligibility date to apply for parole would not change — offenders would be eligible after one-third of the sentence had been served or four years, whichever was less.

The Task Force recommended that clear criteria for granting parole should exist in legislation. The legislation should also, under these proposals, indicate specific conditions and limitations applicable to those on parole — these should be designed to prevent the parolee from committing a new offence or repeating a previous offence.

The Task Force indicated that, due to parole, temporary absences and remission, virtually no offender spends the entire length of a sentence in prison. It expressed the view that remission had lost much of its value as a device to control offenders — parole was seen as a much more effective device to control inmates because it involved months and years of time rather than days or weeks as remission did. It thus recommended that both earned and statutory remission be abolished and that the last third of a sentence be served on what it called "mandatory parole".

The Task Force proposed that all forms of parole should be reviewable after 18 months by a Regional Board, and if that time had been successfully completed in the community, the balance of the offender's sentence should be forgiven.

The recommendations made by the Task Force were, in the main, not adopted but its concerns relating to due process were largely addressed in subsequent legislative amendments and changes to policy.

3. Goldenberg Report

The 1974 Goldenberg Committee report started from the basic premise that parole must be a procedure for the benefit of society and the offender, in which inmates would be released from incarceration in a systematic manner, under regulated conditions. It was observed that parole supervision needed to be intensified — brief and infrequent contact with the parolee was seen as insufficient to protect society adequately or to assist the parolee effectively. The Goldenberg Committee asserted that parole must be seen as a positive step in the correctional system — not as a reward, a right or as a prison management function.

The Goldenberg Committee recommended that the provisions related to statutory remission, earned remission and mandatory supervision be repealed and replaced by an entitlement to "minimum parole" for the last third of a sentence. It proposed that "discretionary parole" be available after an inmate had served one-third of the sentence or seven years, whichever is the lesser. Any recommendation on parole eligibility made by a court would, under these proposals, have to be taken into account in making the parole decision. It also recommended that the criteria under which parole is granted be set out in legislation.

Under the Goldenberg Committee recommendations, the parole authority would be authorized to grant "temporary parole" to an inmate if one-half of the time prior to the eligibility date for "discretionary parole" (that is, one-sixth of the sentence or three and one-half years, whichever is lesser) had been served, if the release was not an undue risk to the community, and if the reason for the release was part of the inmate's plan for social reintegration.

Many of the recommendations contained in the Goldenberg Report with respect to organization and procedure have been put into effect by means of legislation or as National Parole Board policy.

4. Law Reform Commission Report

The Law Reform Commission, in its 1976 report, *Dispositions and Sentences in the Criminal Process - Guidelines*, recommended that a "Sentence Supervision Board" replace the National Parole Board. This Board would have the following duties:

- consult with prison officials, courts and police, and formulate and publish policies and criteria affecting conditions of imprisonment and release;
- automatically, or upon request, review important decisions relating to conditions of imprisonment and release; and
- hear serious charges and determine the process for such charges against prisoners arising under prison regulations.

Under this proposal, the Sentence Supervision Board would be empowered to:

- refuse a first temporary absence at the prescribed time or any other temporary absence provided by regulations;
- refuse to permit a prisoner to begin the next stage at the prescribed time;
- grant additional temporary absences to prisoners who request them or to shorten or disregard a stage, in compliance with the criteria stated in the regulations;

- impose special conditions of personal restraint at any stage where the offender does not accept them voluntarily;

- return prisoners to a former stage through revocation of day release, community supervision, or through transfer to maximum security conditions; and

- serve as a disciplinary court for serious violations of regulations, or for offences that entail severe punishment such as solitary confinement for a period exceeding one week, or fines or compensation involving large sums of money. In the case of serious offences violating the criminal law, the prisoner should be prosecuted in court.

The Commission also recommended that statutory remission be abolished.

The great bulk of the Law Reform Commission's report dealt with disposition and sentencing guidelines as described earlier in this report. The major thrust of the Law Reform Commission's recommendations in relation to conditional release, as set out above, has not been accepted or implemented by government.

5. Peace and Security Legislation

In July 1976, Parliament enacted Bill C-84. This legislation abolished capital punishment as the penalty for murder. It established parole eligibility dates at 25 years for first degree murder and at between 10 and 25 years for second degree murder.

Parliament enacted Bill C-51 in October 1977. Legislation dealing with habitual criminals and dangerous sexual offenders was replaced by dangerous offender legislation allowing for the judicial imposition of indeterminate sentences. Statutory remission of sentence was abolished and replaced by an equivalent amount of earned remission. The National Parole Board was relieved of its responsibility for the National Parole Service. The Parole Service became a responsibility of the Commissioner of Corrections because it was believed that such a reorganization would lead to better systemic coordination and service or program delivery. The National Parole Board was increased in size from 19 to 26 members — provision was made for the appointment of temporary board members to help with the case

workload and for the appointment of community board members to vote on cases where life sentences or sentences of preventive detention are involved.

In 1978, legislation was enacted to allow for the establishment of provincial Parole Boards, as recommended in the 1974 Goldenberg Report.

6. Nielsen Task Force

In November 1985, the Study Team on Justice Issues submitted its report to the Task Force on Program Review. Among other issues, this report dealt with membership of the National Parole Board, parole guidelines, "provincialization" of the parole system and mandatory supervision.

Insofar as membership of the Board is concerned, the report expressed some concern about the qualifications and calibre of its members. It urged consideration of a system whereby the Chairman and members would be nominated by a screening committee of seven federal, provincial and private sector officials whose recommendations would be based on objective criteria.

The Study Team expressed some concern about the unfettered decision-making discretion of the National Parole Board, leading to possible disparity and inequity in decision-making. It noted the existence of parole decision-making guidelines in other jurisdictions and that the adoption of a similar approach might lead to more equitable decisions.

The Study Team carried out an extensive analysis of the possible benefits that might result from a transfer of the responsibility for parole to the provinces. The report reviewed the advantages and disadvantages of total provincialization, total federalization, federalization based on a local staff presence and administration of parole by prison staff. It anticipated that results would be most positive from "provincialization" and put forth its view that parole supervision carried out by provincial officers under agreement with the federal government would be more efficient and cheaper than the current arrangement. It felt that privatization of parole supervision was premature.

Mandatory supervision was described by the Study Team as a program that had failed and should either be abolished or significantly amended. On the related issue of remission, the Study Team presented five options, possibly favouring the *status quo*, saying that its abolition would lead to

increased prison population and added costs, and that its abolition would also result in the loss of a tool for encouraging positive behaviour.

7. Bills C-67 and C-68

Parliament amended the *Parole Act* in July 1986 by adopting Bills C-67 and C-68. The legislation enables the National Parole Board to detain beyond the mandatory supervision date those offenders who have committed certain serious offences and who there are reasonable grounds to believe will commit a similar offence before sentence expiry. Such an application for detention is made by the Correctional Service of Canada and the Board can either order detention until warrant expiry date or one-chance release on mandatory supervision.

These amendments also provide offenders with a mandatory panel review of their cases at the one-sixth day parole eligibility date with the intention of releasing those who are not dangerous as early as possible.

8. Canadian Sentencing Commission

The Canadian Sentencing Commission recommended in its 1987 report that parole be abolished. It concluded that conditional release adds uncertainty to the sentencing system — two offenders sentenced to the same term for the same offence may be returned to the community at different times, depending on their institutional performance while incarcerated. This uncertainty as to when an offender may be released, stated the Commission, may have an effect on the practices of sentencing judges. The Commission also observed that parole has the (unintended) effect of "equalizing sentences" — those serving long sentences on average serve a smaller portion of them in prison than those serving shorter sentences.

The Commission recommended that earned remission be retained as a relatively non-coercive method of administrative control that offers an incentive to inmates to engage in constructive behaviour and activity. Because the Commission believed that Canada should move closer to "real time" sentencing (that the prison sentence served should more closely approximate the sentence imposed), it recommended that no more than 25 percent of a sentence should be subject to earned remission.

9. Correctional Law Review

In March 1987, at about the same time as the Canadian Sentencing Commission released its report, the Ministry of the Solicitor General Correctional Law Review released Working Paper No. 3 on conditional release. The Working Paper set out the broad issues raised by conditional release and examined the implications of conditional release, without drawing any conclusions. Since the publication of this Working Paper, a series of consultations on its contents and that of other Working Papers has been held.

10. Solicitor General's June 1988 Proposals

The Solicitor General of Canada made a number of proposals for changes in the system of conditional release when he appeared before the Committee on June 15, 1988. He proposed that the *Parole Act* be amended so that it would be clear that the assessment of public risk is the sole criterion in all decisions relating to the conditional release of offenders. Under these proposals, public protection, he said, would be promoted by facilitating the timely integration of the offender into the community as a law-abiding member.

It was proposed by the Solicitor General that parole eligibility not be available until one-half of a sentence or 10 years had been served, whichever of the two is the lesser. He proposed that earned remission be abolished and that offenders be eligible for presumptive release when the lesser of one-third or 12 months remains to be served in a sentence, constituting essentially a shorter period of mandatory supervision. The detention provisions of Bill C-67 would still apply to the proposed presumptive release scheme.

Under these changes offenders would not be eligible for day parole until six months before their parole eligibility date. The purpose of day parole would be to prepare offenders for reintegration into the community. The first parole hearing would, under these proposals, take place not prior to the six months preceding the date an offender is eligible for parole. There would be an annual parole review hearing.

Temporary absences would, under the Solicitor General's proposals, only be allowed if they relate directly to correctional programs, rather than preparation for release. They would still be allowed for limited humanitarian

reasons. The eligibility dates and procedures would remain approximately as they are now.

After consultations, the Solicitor General of Canada indicated, in an August 3, 1988 address to an international conference held in Ottawa on the reform of sentencing, parole and early release, that he would be refining his June 15, 1988 proposals. He said, in particular, that he would be exploring ways to target only those inmates who show a propensity to commit violent offences for longer periods of incarceration before becoming eligible for parole.