Government of Canada | Gouvernement du Canada

Canada

Sentencing

SENTENCING

Government of Canada
Gouvernement du Canada

Ottawa
February 1984

PREFACE

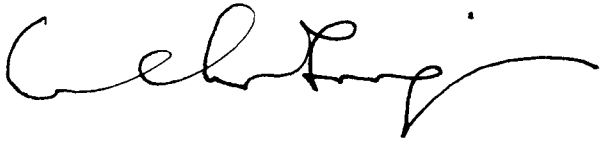
In August 1982, the Government of Canada published *The Criminal Law in Canadian Society*, a policy statement of the Government's views with respect to the purpose and principles of the criminal law. Now, just over a year later, I am pleased to publish on behalf of the Government this policy statement on sentencing, to accompany and complement the major legislative initiative I am proposing to Parliament.

Sentencing is the visible focus of the criminal law and the criminal justice system. In my view, the legislative proposals I am bringing forward in relation to sentencing constitute the most significant sentencing reform since the *Criminal Code* was enacted in 1892. The objective of the reform is to provide the basis for more effective, equitable, realistic and appropriate sentencing of criminal offenders.

The proposed legislation sets out a clear and understandable basis and rationale for sentencing, provides better tools for taking effective action to protect the public against dangerous and persistent criminals, and gives meaning to basic concepts of justice and fairness consistent with the *Charter of Rights and Freedoms* and modern social attitudes.

This policy paper sets out the context of issues and concerns within which the legislation was developed and to which it is intended to respond. It also explains the legislative proposals themselves, and indicates how the many other important sentencing-related issues not specifically addressed in the legislative proposals are to be dealt with by the Criminal Law Review.

The Preface to the Report of the Parliamentary Sub-Committee on the Penitentiary System in Canada—which I had the honour to chair—began with a quotation from Winston Churchill, who told the House of Commons in 1910 that "The mood and temper of the public with regard to the treatment of crime and criminals is one of the unfailing tests of the civilization of any country." It is my belief that the proposals I am now making with respect to the legislative foundation for sentencing in Canada both reflect that mood and temper, and meet that test of civilization.



Mark MacGuigan
Minister of Justice and Attorney General of Canada.

TABLE OF CONTENTS

I. Introduction 1

II. Sentencing Issues and Concerns 3

1. Effectiveness 6
2. Equity 13
3. Clarity 22

III. Proposals For Reform 31

1. Purposes and Principles 33
2. Evidence and Procedure 39
3. Range of Sanctions 44
   - Absolute and Conditional Discharges
   - Conditional Sentence
   - Probation
   - Restitution
   - Forfeiture
   - Fines
   - Community Service Orders
   - Intermittent Sentences
   - Variation and Enforcement
   - Imprisonment
   - Miscellaneous
4. Dangerous Offenders 57
5. Sentencing Commission 59
6. Related Issues 65

IV. Conclusion 71

I. INTRODUCTION

Sentencing is the climax of the criminal justice process. It serves as the focus of the criminal law and the criminal trial, and constitutes the point at which the criminal justice system most consciously and visibly expresses its denunciation of criminal behaviour, attempts to deter or incapacitate people from further wrongdoing, or orders reparation or redress of the harm done.

For this reason, the sentencing provisions in the *Criminal Code* are an important element of the *Code* as a whole. Unfortunately, the *Code* is silent with respect to many important sentencing issues. These issues, such as the procedure to be followed at the sentencing hearing, have often been decided on a case by case basis by judges. The *Criminal Code* itself is nine decades old, and those provisions it does contain with respect to sentencing are, for the most part, a reflection of the nineteenth century society for which it was drafted.

To be sure, there have been numerous amendments over the past ninety years, but those amendments have been introduced piecemeal in response to particular problems and concerns, and with little regard to the overall structure or philosophy underlying the *Code* or the criminal law as a whole. Consequently, little or no direction is given to courts, lawyers, accused persons, victims or to the public itself, regarding the sentencing of criminal offenders.

When the Criminal Law Review process was instituted in 1981, one of the first areas of priority to be identified was that of sentencing. The Law Reform Commission of Canada had completed the groundwork for the fundamental review of sentencing some five years before, with the publication of its report on "Dispositions and Sentences in the Criminal Process".

In August 1982, the Government of Canada published a statement of the purpose and principles of criminal law to serve as a framework for the more specific work of the Criminal Law Review. On the basis of the considerations and conclusions reached in *The Criminal Law in Canadian Society*, the Sentencing Project was launched in late 1982.

Consultations were then undertaken on the basic issues that should be considered and the approach that should be taken to the reform of sentencing laws in Canada. These consultations involved representatives of the bench, the bar, provincial governments, correctional and law enforcement officials, and groups involved and interested in criminal justice. As a result of this consultation process, and after considering many recommendations, including those of the Law Reform Commission, the Ouimet Committee, and the experience in other jurisdictions, legislative proposals have been developed for the consideration of Parliament and the Canadian public. In framing this legislation, an attempt was made to understand more fully the issues and concerns expressed about sentencing in such a way as to build upon the foundation laid over the decades in Canada, and over the centuries in the common law.

The proposed sentencing reforms are based on the the goals of the Criminal Law Review as a whole:

- to establish and maintain public confidence in an effective, equitable, credible and understandable criminal law and criminal justice system; and
- to legislate a more coherent, flexible and clear Criminal Code.

The aim of this paper is to complement the legislative proposals by setting them within the broader context of considerations and factors which led the Government to put them forward at this time. As well, this document is designed to explain the detailed sentencing proposals in the legislation in order that their meaning and intended impact may be more clearly understood.

II. SENTENCING ISSUES AND CONCERNS

The *Criminal Code* sets out a range of generally available sanctions the court may impose once guilt has been determined, but Parliament has given little explicit guidance as to the objectives that should be pursued through sentencing policy, the criteria that should be applied in arriving at a particular sentence in an individual case, or the procedures that should be followed in obtaining and assessing information relevant to the sentencing decision. In almost all cases, a wide range of discretion is conferred on the courts as to both the nature and length of sentence to impose.

One of the results of this lack of legislative guidance in respect of sentencing is that the courts themselves have developed principles, rules and guidelines to assist in the decision-making process. These judicial statements have evolved over many decades in response to specific cases, and have established important principles of liberty and justice.

The state of affairs just described—whereby the courts are given extremely wide latitude to determine individual sentences and have felt the need themselves to develop general principles and rules to assist in the exercise of that discretion—did not always exist in the system of English criminal law which forms the foundation for Canada's law. In adopting the *Code* in 1892, Canada adopted a statutory system developed in (but never directly applied to) the context of the English justice system, a system that was itself going through a period of major change. This change entailed a legislative initiative to provide the judiciary with the wide discretion it has now.

Since 1892, Parliament has acted to provide more tools and even wider discretion to the judiciary, through the development of probation, conditional and absolute discharges, intermittent imprisonment, and so on. Only rarely has it taken steps to limit or channel judicial discretion through the imposition of certain mandatory punishments (for example, murder, treason, impaired driving, and firearms-related offences), or through imposing limitations upon the use of discharges, fines or probation orders.

Generally, however, the courts have been left on their own. The basis for this has been the belief that Parliament cannot possibly foresee and make explicit statutory provision for the infinite variety of circumstances and cases that come before the courts for sentencing, and that it is precisely the need to take into account this unforeseeable variety that is one of the most important elements of the art of sentencing. Courts sentence individuals, and to do that difficult job properly, they must have wide discretion to fit the sentence to the individual case before them. This was the central tenet which determined the balance that was struck in 1892 between the respective roles of the legislature and the judiciary in matters of sentencing policy, and it continues to underpin that balance today.

One of the questions that must be considered in the fundamental review of criminal sentencing is whether the basic assumptions which led to our current law are still valid today, or whether the enormous change which has taken place in society over the past ninety years requires those assumptions to be reassessed. Even if the basic approach is found to be valid, it may well be the case that the law giving expression to that approach requires change in order better to effect the objectives society assigns to it.

Questions such as this have been asked—and answers proposed—by the Ouimet Committee, by the Law Reform Commission of Canada, and by a number of other committees, commissions, task forces, working groups, and private and public organizations. These issues have also been examined in a number of other countries in recent years. In Great Britain, the United States, Australia, France, New Zealand and West Germany, there has been considerable interest in the question of how best to deal with individuals convicted of criminal offences. These issues have often been addressed in the context of a major review of criminal law as a whole, such as that underway in Canada now.

The Sentencing Project drew heavily upon the work done by the Ouimet Committee, the Law Reform Commission of Canada, and other sources both in Canada and abroad. If it is possible to characterize in a general way the reports of those Canadian commissions, the theme of the recommendations might be described as calling for:

- restraint in the use of criminal sanctions, especially that of imprisonment;
- increased availability and use of non-carceral sentencing alternatives; and

- general support for discretion in the system, combined with a greater focus on the need for explicit mechanisms to ensure accountability in the use of that discretion.

It seems fair as well to describe the reforms recommended in Great Britain, Australia, and New Zealand as consistent with this general set of themes.

In the United States, there has been a great deal of legislative activity in the past six or seven years, at both state and federal levels, with respect to sentencing. While much of that activity has been deeply influenced by the themes outlined above, a number of American jurisdictions have moved in a different direction. The changes instituted by these jurisdictions focus on creating greater uniformity and certainty in sentencing, and shift the focus away from the theory of rehabilitation to the principle of retribution or just deserts.

Many of these American initiatives were undertaken in response to concerns about high levels of systematic sentencing disparity. Consequently, a number of them adopt a radical approach to the question of discretion in sentencing—both in terms of limiting the amount of discretion available and in terms of reassigning the location of that discretion (i.e. as between the judiciary, parole boards, Crown Attorneys, the legislature, and the executive branches).

Three major issues or concerns that should serve as benchmarks for the consideration of reform proposals in the Canadian context were identified in *The Criminal Law in Canadian Society*. These concerns were described as revolving around:

- the lack of clearly stated policies or principles;
- the existence of apparent or perceived disparity; and
- the lack of knowledge about the effectiveness of sanctions, and the apparent room for greater innovation and effectiveness in both the availability and use of sentencing options.

A number of the specific principles articulated with respect to the criminal law as a whole have special application to sentencing, and Part V of *The Criminal Law in Canadian Society* set out a series of issues to be addressed in the course of the fundamental review.

Before describing the specific proposals for sentencing reform recommended by the Government, the issues and concerns which the reforms

address will be examined in greater depth. These issues—elaborated on the basis of the discussion in *The Criminal Law in Canadian Society*—are neither abstract nor legalistic. They relate directly to the concerns of the public about sentencing and criminal law, and serve to provide a framework against which the proposals for reform may be assessed.

1. Effectiveness

The public, it is often reported, fears crime and seriously questions both the ability and the willingness of the criminal justice system to take the action necessary to protect it from crime. Recent studies seem to support and underline this concern. Research indicates that criminal sanctions have only a limited effect in terms of some of their traditionally-invoked objectives, such as rehabilitation, deterrence and incapacitation.

Theories of Punishment

An initial problem in drawing meaningful conclusions about the effectiveness of sentences is that the objectives to be achieved must first be agreed upon and clearly defined. Two centuries ago, there was no question that the sentencing of criminals was aimed at punishment and, through punishment, at the elimination of the offender and deterrence of others. A century ago, the utilitarian approach identified protection of the public as the primary goal, and rehabilitation was said to have replaced punishment and retribution in offering a more effective and humane means for achieving public protection. In recent years, debate has raged over the effectiveness and appropriateness of the utilitarian philosophy, and the various means that have been promoted as answers to the problem of how to deal with criminals.

A second problem in evaluating effectiveness is that the kinds of information currently available about the workings of the criminal justice system are quite simply inadequate to the task. This is in part because no one has indicated what kinds of information are relevant and necessary, and in part because of the unavailability of comprehensive criminal justice statistics in Canada.

It must be said that no single theory, be it rehabilitation, deterrence, or incapacitation, has proven to be the simple answer in the search for an effective means to deal with crime in our society.

There is, for example, only ambiguous evidence with respect to the popular theory that punishment is the best method for dissuading the offender

from committing an offence again (specific deterrence) or for dissuading others, through example, from committing a similar offence (general deterrence). Although some evidence shows that punishment does act as a deterrent for some people and for some crimes, no simple or generally applicable cause and effect relationship has ever been established.

Indeed, the effectiveness of the criminal justice system in deterring has at least three dimensions: certainty, swiftness and severity of punishment. Simply increasing the severity of the punishment does not necessarily result in a corresponding increase in effectiveness. In fact, increasing the severity in the potential penalty attached to a certain offence may in practice reduce the certainty and the timeliness of its imposition. As actual experience in many jurisdictions has shown, the higher the price that is exacted by way of punishment, the greater the tendency for those required to pay the price to place roadblocks in the way. Consequently, what results is a slowing down of the process due to fewer guilty pleas, greater insistence on full trials and the use of every possible procedural device as a means of delay.

The theory of rehabilitation is based on humanitarian concerns and a utilitarian "common sense" theory that the most effective way to prevent crime is to transform offenders into law-abiding citizens. Although this theory has had a major impact on criminal law and correctional efforts since the turn of the century, evaluations of the programs and efforts to rehabilitate have tended to the conclusion that little effect is to be observed upon offenders from treatment programs, especially in a prison setting. There is a strong school of opposition to this view, however, which argues that: the negative evaluations are few in number and not always of the best quality; insufficient research and expertise have been put into rehabilitation to give it a fair try; and treatment programs are often changed or eliminated before being given a chance to be fairly evaluated. It is also argued that too little selectivity is used in choosing certain offenders for certain programs, and that consequently a program that might "work" with one offender seems unworkable because it is tried on all types of offenders.

Finally, the theory of incapacitation refers to the effect that imprisonment has on reducing criminal recidivism by isolating or separating the offender from the general public, from certain selected persons, or from situations which could lead to criminal behaviour. Incapacitation or "separation" was cited by the Law Reform Commission of Canada as one of the few justifiable reasons for imposing a sentence of imprisonment, but only for persons who have committed serious crimes and who represent a serious threat to the life and personal security of others.

Most who advocate incapacitation through imprisonment also argue for selectivity and restraint in its use, largely on the basis of recognition that our ability to predict future criminality, especially serious or violent criminal behaviour, is extremely limited. Because of this, it is difficult to estimate just how much serious or violent criminal behaviour will be prevented by an incapacitative sentence. Indeed, certain simulations of incapacitation policies and their costs and benefits, using assumptions about the factors involved, suggest that only minor changes in the crime rate in a given area would be achieved through major (and expensive) increases in prison populations.

As *The Criminal Law in Canadian Society* noted, some of the more apocalyptic conclusions drawn from this research—that "nothing works"—appear overstated. Although there are some indications from scattered and preliminary studies "that certain effects may result from certain sentencing practices...there is virtually nothing known about the effects on a given offender of a given sentence, or its effects on the level of commission of that crime generally in that area." It is clear that, despite the popular appeal of the basic ideas underlying each of the approaches, the theories themselves are neither simple nor one-dimensional, and that much more knowledge is needed about the way they work in practice.

It also seems fair to conclude that there is at present no systematic capacity to provide a defined set of relevant and appropriate information to assist the courts in arriving at sentencing decisions or in evaluating the effectiveness of those sentencing decisions. As will be seen, this conclusion constitutes a common thread running through the reforms proposed by the Government in respect of sentencing.

Imprisonment

The findings of research done for the Sentencing Project raise further questions related to the use of imprisonment to deal with criminal conduct. Statistics are often cited showing that Canada incarcerates, on a *per capita* basis, more people than almost any other western democracy except the United States. Indeed, Canada's incarceration rate looks relatively restrained only in comparison to that of the United States, and such other countries as the Soviet Union and the Union of South Africa.

Minor property or *Criminal Code* traffic offences account for a very high percentage of those incarcerated in provincial prisons (where sentences of under two years are served). With only two exceptions, alcohol-related driving cases accounted for the highest percentage of admissions

to provincial institutions in each jurisdiction and for each year data was available. Cases involving theft, possession of stolen goods and break and enter usually appear second most frequently among admissions. Statistics indicate that around three in ten of those admitted to provincial prisons are incarcerated for default of payment of a fine. Native Canadians make up a disproportionate percentage of the total of those imprisoned. At the federal level (where sentences of two years or more are served), the percentage of inmates admitted for violent crimes has risen in recent decades, although a significant percentage of the total number of inmates admitted have committed offences against property.

Furthermore, substantial increases in the number of admissions to prisons and penitentiaries have been experienced in nearly all Canadian jurisdictions for which data was available from 1978-1982. At the provincial level, most of the increases in admissions were accounted for by alcohol-related driving offences and theft cases. At the federal level, admissions grew by 39% between 1980 and 1982. In sum, available Canadian correctional data indicates reasonably clearly that the numbers of persons being sentenced to imprisonment have heen, in fact, increasing in recent years.

One of the effects of this increase is that, in some locations, short-term prison sentences result in quick induction processing and quick release on temporary absence—in response to the severe overcrowding of facilities. Assuming that such sentences were imposed in an effort to deter, to denounce or to incapacitate, the question arises as to the effect of such sentences in practice on the individual offender.

One response to this situation is to argue that sentences should be longer, or that a massive new prison building program should be launched. Others contend that, since most of the incarcerated population in the provincial systems has been imprisoned for non-violent property crimes, default of fine payment, impaired driving or other traffic offences, it is necessary to find other more appropriate and more effective responses for dealing with the conduct that is now resulting in the kind of imprisonment just described.

Given that it costs the taxpayer up to $40,000 per year to keep an inmate incarcerated, it might well be asked, as *The Criminal Law in Canadian Society* put it, "who is punished more by a sentence of imprisonment—the prisoner, or the taxpayer—especially in cases where imprisonment does not seem to be an obviously necessary sanction to allow an adequate and appropriate response to be made to the offence or the offender in question."

In reaction to these various concerns about the inappropriate use of incarceration, a number of possibilities have been suggested in recent years, all aimed at expanding the range of sentencing options available to provide for effective, tough, non-carceral penalties designed to confront the offender with his or her responsibility for the criminal conduct and to bring home the need to take responsibility for the consequences of that conduct. Such options as community service orders, forfeiture of the instruments or proceeds of crime, increased use of restitution to victims, or fine option programs to eliminate the imprisonment of those who are unable—as opposed to unwilling—to pay fines, offer promising possibilities in this connection.

Public Perceptions

Notwithstanding all of the problems raised in connection with theories of punishment and the increased use of incarceration, it is not uncommon to find public opinion polls reporting that four out of five Canadians believe that the sentences imposed by the courts are too lenient.

Dissatisfaction with the manner in which the criminal justice system deals with crime is thought to be widespread; almost as widespread, in fact, as concern about crime itself. This is a deeply troubling state of affairs, since public belief in and support for elements of the criminal justice system is essential to their effective functioning as key social institutions. It is vital, therefore, to examine the basis for, and the real meaning of, this public concern.

In 1982, the Government published the results of public opinion research demonstrating that the information available to the public about the actual state of affairs in the criminal justice system was woefully inaccurate and inadequate. Three quarters of Canadians, for example, believed that much more than thirty percent of all crime is violent, when in fact around six to eight percent is violent. The perception of the public regarding sentencing is also at serious variance with reality. Three quarters of all Canadians apparently believe, for instance, that fewer than sixty percent of all those convicted of robbery go to prison. The fact is that eight or nine out of every ten convicted robbers go to jail.

To follow up on the research done in 1982, the Department of Justice commissioned additional research by the Centre of Criminology at the University of Toronto, focusing on the views of the Canadian public toward crime and sentencing. A series of studies was carried out to get behind the superficial, general impression that the views of the public can

be simply and accurately characterized as punitive and retributive. Included in this series of studies was a national survey of approximately 1000 Canadians, carried out in early July 1983. In general, the results support a number of interesting conclusions.

Again it was found that the Canadian public, when they think about crime, appear to be thinking mostly about violent crime, and believe there is much more violent crime than is actually the case. In fact, by far the majority of sentencing decisions are made in cases that do not involve violence to the person. The amount of attention given by the media and other groups to especially "serious" offences (eg. murder, aggravated sexual assault, kidnapping) is in sharp contrast to the frequency with which such offences are actually observed in courts. Instead, statistics gathered for this project, with the assistance of provincial and federal departments and agencies, indicate that roughly one half of *Criminal Code* sentencing decisions are related to either theft or alcohol-related driving cases.

The public opinion research also indicated that first offenders, especially those convicted of violent crimes, are seen as more likely to repeat or continue their criminal activities than research indicates they do in reality. In addition, most of those who express concern that, generally, the courts are too lenient, are thinking about what are in reality only a small percentage of more serious offenders—those who are recidivists and those who have committed acts of violence.

Far from condemning Canadians for their ignorance, the comments made above reflect back on the lack of systematic information about the operations of the criminal justice system. As a result of this lack, it is understandable that even those people who work in the system every day have inaccurate perceptions of the system. In addition, it seems obvious that most Canadians obtain their impressions of the crime situation from newspaper and other media reports, or popular literature, television shows or films related to crime which emphasize the rare but much more spectacular and therefore newsworthy and entertaining crimes or cases.

As a result of the lack of systematic information, the desire of the public for harsher sentences would, in the case of robbers, actually result in a lower percentage of robbers going to jail than is the case now, according to the University of Toronto studies. Most Canadians believe that fewer than 40% of robbers go to jail, and would like to see a majority go to jail, when, in fact 80-90% already go to jail.

The above example illustrates yet another problem in evaluating public perception of the effectiveness of sentences imposed in criminal cases. As a result of the manner in which questions are typically posed, a misleading impression is created of the public view. Very general and simplistic questions elicit very general and simplistic responses. The problem is that these general and simplistic views are then inaccurately taken to represent the genuine attitudes of the public. Further difficulties are associated with the tendency to conclude that the results of these surveys ought to be used as authoritative guidance for the policies that should be adopted in criminal law.

The general public view that sentences are too lenient is not, upon closer examination, applied to everyone. Even for a serious offence such as breaking and entering a home and stealing goods worth more than $200, most Canadians surveyed recommended a sentence not involving imprisonment, and almost all thought that a community work order would be an appropriate sentence in such a case.

Even in some very serious cases involving violence and lengthy criminal records, the public's view regarding the appropriateness of a particular sentence changed dramatically when they were provided with more elaborate details concerning the case than those put forward in the media reports.

As is made clear above, the main focus of public concern is more narrowly related to violent, dangerous crimes and criminals. The fact that the actual level of such crime is much lower than the apparent perception of the public serves to modify our understanding of that concern, but it in no way diminishes the legitimacy of that concern. The concern about violence is understandable, and it should go without saying that any amount of crime of this nature is too much.

Another related aspect of this focus of public concern has to do with the release of inmates before the expiration of their sentence. Again, a careful examination of the facts demonstrates that the apparent degree of public concern seems to be the result of an exaggerated estimate of the problems associated with early release. As well, media and public confusion about the various forms of conditional release (parole, mandatory supervision, temporary absence), the different legal bases for each form, the various objectives sought to be achieved by such releases, and the actual rate of success of such programs, serves only to exacerbate an already difficult and emotional subject area. There will be further discussion of this subject in Part III of this paper.

In short, the public has a much more complex and sophisticated view of sentencing than that represented by the findings of very general public opinion surveys. The principal focus of concern is on violent, serious criminals. The degree and specific manifestation of that concern may be exaggerated by misinformation about both the extent of the problem and the reality of sentencing practices for such offences. There, in fact, appears to be a great deal of openness on the part of the public to suggestions that community-based sentences may be appropriate in a much broader range of circumstances than is the case at present. Any effort to reform sentencing law and practice must focus not only on how the criminal justice system can effectively respond to violent offenders but must also address the equally important concerns regarding the sentencing of those non-violent property offenders who represent by far the majority of cases sentenced by Canadian criminal courts.

2. Equity

The term equity is used here in a broad or popular sense, rather than in a legal sense, to cover a number of concepts related to justice, natural rights, fairness, and consistency.

The first concern regarding equity in sentencing is "substantive" in nature. It focuses on the justice of the actual sentence handed down by the court. If sentences are perceived to be dissimilar for no apparent reason, then concerns regarding sentencing disparity arise. Sentences imposed may also be seen to be inappropriate when it is perceived that the degree or kind of punishment does not "fit the crime".

The second concern is procedural in nature. The focus of this concern is not on the sentence itself, but the manner or process by which the decision on sentencing is determined in the first place.

Substantive Concerns

The public concern about sentencing disparity refers to the perception that offenders who have committed similar offences, in similar circumstances, receive very different sentences. This apparent disparity is seen to be unjust, or inequitable, on the grounds that people should be treated in a generally similar manner. The proposition seems clear on the surface: it is only fair and just to treat people alike; to do otherwise raises questions of favoritism, bias, discrimination and unfairness.

The issue however is much more complex than that. The fact that two sentences for the same crime are different does not necessarily mean that there is disparity, or rather unwarranted disparity. The offence of robbery, for instance, can be committed by hardened, professional criminals, who carefully prepare and execute their plans with no regard for the lives or safety of others. But "robbery" can also describe the act of an unarmed, teen-aged, first time offender who is caught after having pushed a shopkeeper aside to take money from the till. As it happens, both offences currently carry the possibility of imprisonment for life. Most people, however, would not necessarily view a lengthy penitentiary term for the first case and a probation term for the second case, as constituting unwarranted disparity.

The above example serves to illustrate the importance of distinguishing between warranted and unwarranted disparity in any discussion of sentencing issues. The focus of public concern on unwarranted disparity is a concern that similar cases are given dissimilar treatment for no apparent reason. If all judges based their decisions as to sentence on the same factors and considerations, the concern about unwarranted disparity would never arise. The difficult question that follows, however, is on what factors or considerations ought judges to base their decisions as to sentence?

At one extreme, some argue that the punishment for all crimes ought to flow directly (almost automatically) from the criminal conduct: that is, the penalty for a particular offence ought to be clear, certain and directly related to the seriousness of that offence. This is often argued in the context of a "just deserts" concept of criminal justice. Accordingly, it would be quite simple to detect unwarranted sentencing disparity. All those convicted of the same offence would receive the same sentence, since a very limited number of factors would be relevant to the sentencing decision.

At the other extreme it is argued that, since each case is unique, it follows that the sentence in each case ought to be specially designed in terms of the unique characteristics of the case, especially those related to the individual offender involved. On the basis of this approach, it would be almost impossible to determine whether unwarranted disparity did in fact exist. The assumption that no two cases or offenders are exactly "similar" necessarily requires a consideration of an almost limitless range of potentially relevant factors.

It is generally accepted that the Canadian philosophy of sentencing falls in between the two models outlined just above. That is, the courts neither adhere to a rigid, mechanistic concept of sentencing by automatically imposing a certain penalty if a certain offence is proven, nor do they adopt a wide-open, totally individualized approach, treating each case as wholly unique and unrelated to other comparable cases. The determination of the sentence in a particular case is based on an assessment of the particular facts before the court against past practice in cases involving similar facts and situations. If, in the court's view, there are no particularly compelling individual circumstances that merit attention, then the sentence will be determined in accordance with sentencing practice in similar cases.

Some term this comparison of cases within a range a "tariff" approach to sentencing. The "tariff" is seen to guide the sentence for a particular offence, unless there are aggravating or mitigating circumstances related to the offence or the offender which lead the court to conclude that imposition of the normal or "tariff" sentence would be inappropriate.

It must be said that there is some scholarly disagreement on the accuracy of this characterization of Canadian sentencing practice. The disagreement results from the lack of data available, and, more importantly, from the lack of any explicit, agreed-upon policy respecting what factors are relevant and not relevant, what weight ought to be assigned to particular factors, and what priority should be attached to the various objectives assigned to sentencing. In this sense, the degree to which sentencing is approached on a "tariff" basis cannot be established in a definitive manner, by reference to generally accepted criteria.

It should be noted that the Canadian criminal justice system has a number of features which have helped to diminish the possibility that widespread and systematic unwarranted sentencing disparity could exist. One such feature is that sentences can be appealed on the grounds of "fitness". By way of contrast, in many American jurisdictions, the trial judge is the sole and final authority on sentence, with no appeal possible. Through these appeals in Canada, a body of case law has developed over the decades which sets out certain important principles and criteria to be applied to sentencing decisions by the lower courts. Some courts of appeal, as was noted earlier, have set out a range of appropriate sentences for certain offences and certain circumstances.

In addition, the judiciary itself has launched commendable efforts to avoid problems that might result in inequity or disparity. The develop-

ment of a number of judicial professional organizations in the past decade has resulted in initiatives to bring judges together to discuss common problems and concerns. The result of these initiatives has been a better shared understanding of objectives and principles and a consequent reduction in the possibility of unwarranted disparity. Publication of the *Canadian Sentencing Handbook* in 1982 by the Canadian Association of Provincial Court Judges was another step in widening the common understanding among the judiciary of sentencing principles.

These features and developments are valuable and useful. They cannot, however, provide a complete answer to the problem of potential unwarranted disparity or even to the problem of perceived inequity in sentencing on the part of the public. Even if the available statistics are inadequate to provide a definitive empirical answer to the question of whether unwarranted sentencing disparity exists in Canada, a number of the points made above demonstrate the need to address the question at a philosophical and policy level. If the public perceives inequity in sentencing, and conceives of that inequity as resulting in part from unwarranted disparity, the response to that perception cannot simply be a general statement that different factors must be weighed in different cases and that, because of this, no definitive conclusion can be drawn about the accuracy of the public perception. It is incumbent upon the system to spell out to the greatest extent possible the basis for its approach to the problem involved: anything less would be to fail to recognize the fundamental challenge to its legitimacy.

Thus, if there is a case to be made in Canada for variations in sentencing practice on the basis of broadly accepted principles or criteria, or on the basis of valid differences in regional concerns, that case has not been made in a consistent or explicit manner. Discussions of such a consistent and explicit set of principles or criteria for distinguishing between cases requires consideration to be given to general issues relating to the amount and location of discretion in the system, and the manner and degree to which the exercise of that discretion is to be made accountable.

The existence of principles and tariffs in the case law goes some way toward this point, but the principles are not well known to the public, and the tariffs are inconsistent and incomplete. The point about public understanding is an important one since it is public concern, and public understanding that must be at the core of efforts to reform criminal law. This also applies to the welcome developments among the judiciary to engage in more elaborate and conscious efforts to share experiences and widen understanding of the system and its operation. These efforts are to

be encouraged, but they cannot in and of themselves address the public concern about the operation of the system. This is a task that must be approached in a number of ways, not least among them through an effort on the part of the elected representatives of the public to explain and make explicit their expectations, understanding and conception of the public interest in respect of sentencing policy generally.

Having made these points, and bearing in mind the lack of overall criminal justice data in Canada, there does exist some empirical evidence concerning sentencing practices and trends in Canada—evidence which sheds some light on the subject of differences in sentencing patterns. Whether these differences constitute unwarranted disparity is another question.

Hogarth, in his 1971 study of the sentencing practices of provincial court judges in Ontario, found that the sentences handed down by these judges varied according to differences in their individual attitudes and perceptions regarding the purposes of sentencing, the nature of the crime, and the particular facts of the case at hand.

A recent study involving "simulated" cases revealed considerable variation among sentences when some 200 judges were asked to assign sentences in the same set of cases. As the study was a simulation, it is of course only suggestive of actual practice. However, the study did show that the differences in sentences were related to the difference of opinion among the judges regarding the appropriate aim of sentencing in each case, the weight to be attached to particular objectives, and the relative importance to be attached to the particular facts.

Another recent study of actual sentencing decisions in two Canadian cities found evidence of a substantial amount of unexplainable variation among sentences. In addition, it revealed consistent differences among the sentencing patterns of some individual judges.

An analysis of seven court jurisdictions and ten correctional jurisdictions was undertaken specifically for the Sentencing Project. On the basis of that analysis, a number of interesting observations can be made. For the offences of theft, fraud, and break and enter, the percentage of convictions resulting in imprisonment varies little across the country. For theft offences (over $200 and under $200 combined), for example, the percentage of convictions resulting in a sentence of imprisonment varies from 17% to 21%. For fraud offences, the percentage of convictions leading to imprisonment varies within a range of 43% to 46%. For breaking and

entering offences proceeded with by way of indictment, the range of convictions resulting in imprisonment runs from 51% to 61%.

For other offence types, however, there are very considerable differences, and the chances a convicted offender has of going to prison depend, in part, on where he or she is convicted. For all those convicted of drinking and driving offences, the incarceration rate varies from 4-10% in one location, to 18-23% in another. For wilful damage cases, the rate of incarceration varies from 2% to 16%. For assault causing bodily harm cases proceeded with by way of indictment, the percentage of those convicted who are imprisoned varies from 39% to 63%. For uttering offences (i.e. use of forged documents) proceeded with by way of indictment, the rate of incarceration ranges from 33% to 60%. For mischief cases, both summary and indictable, the rate varies from 7% to 22%. For offences involving possession of stolen goods, the incarceration rate varies from 25% to 39%.

Such signs or hints of the existence of disparity are not surprising, given the large number of courts involved in sentencing, the high volume of cases, differences in cases within a general offence type, and the lack of explicit guidance as to what factors are to be viewed as relevant and appropriate to the determination of sentence. This disparity results from such factors as: differing perceptions of sentence severity (for some, a $2000 fine may be seen as severe, others may not see three months in prison as tough); variability in the information available about the individual case, or about sentencing practices and effectiveness in other similar cases; differences in the objectives sought to be achieved by various judges and in various types of cases; and differences in the criteria applied, and the weight assigned to those criteria on the part of different judges or different courts.

On the basis of the general approach to sentencing which has traditionally been in effect in Canada, it seems implicit that some variation in sentencing is to be expected. Without it, sentencing practices could not reflect differences in individual cases, in community standards, or regional priorities and concerns. Nor could those practices evolve to reflect changes in community standards, social conditions, or be refined in the light of new knowledge. There are, however, negative aspects to widespread differences in sentencing practices across Canada. If principles of fairness and equity are seen to be legitimate and appropriate principles of sentencing, then the violation of these principles as evidenced by unwarranted disparity, potentially promotes disrespect for the law. This is a matter of serious concern.

On a related point, the *Canadian Charter of Rights and Freedoms* demands that dispositions be demonstrably fair. Even if widespread differences did not in fact amount to serious unwarranted disparity, such differences would be difficult to defend and explain in terms of fairness or equity, given the lack of explicit agreement or direction regarding the principles, goals, and criteria that are to be applied to the determination of sentence.

The discussion of unwarranted disparity leads to the second major aspect of what was earlier referred to as the substantive justice of sentencing. This second aspect concerns the perceived inadequacy of punishments meted out for various offences (i.e. sentences seen as too lenient or, more rarely, too harsh in relation to the seriousness of the crime); and the relative ranking of offences in terms of seriousness (i.e. the perception that criminal law pays more attention to property crimes than it does to violent crimes against people).

Public concern over sentencing is often seen to focus on the alleged leniency of the courts. As was noted earlier, it is difficult to frame a response to such a generalized and undifferentiated view because, upon closer examination, it only superficially reflects the views or concerns of the public. Again, this is not to be taken to mean that the public is or would be wholly satisfied with current sentencing practices if it were only to be given the precise information available to the courts in individual cases. But it does lead to the conclusion that considerably more effort should be made to discern the true view of the public on sentencing, and to ensure that the public is provided with better information concerning the basis on which sentencing is actually carried out.

Another source of the perceived inadequacy of punishments relates to the role of the victim of crime. There is a growing concern among the public that the courts are so concerned with the rights of the offender that they ignore the harm inflicted on the victim. In most cases, victims must resort to their own devices to receive satisfaction from the offender for the property lost or injury suffered.

Since 1892, the *Criminal Code* has provided various forms of compensation or restitution orders to be made in favour of victims of crime. And yet relatively few such orders are given as a matter of practice. In the words of the report of the Federal-Provincial Task Force on Justice for Victims of Crime, published in August 1983, "the criminal justice system has relegated the victim to a very minor role and left victims with the conviction that they are being used only as a means by which to punish the

offender". On the basis of this analysis the Task Force recommended that, among other things, greater emphasis be placed upon reparative sanctions in the *Code*. The report considered what the likely public reaction would be to the increased use of restitution, noting that "there seems to be an increasing level of public support for initiatives designed to assist victims of crime but that support takes different forms". The report continued:

> On one hand are those who believe that much heavier punishments should be meted out to offenders and that such a step would satisfy victims. On the other hand, their detractors say that they are probably wrong on both counts. They point to the fact that punitive countries such as Iran do not benefit from less crime, while moderate countries such as the Netherlands do not suffer from more crime. Moreover, they do not believe victims want harsh punishment so much as they want reparation for their loss. They see all punishment as destructive, and are convinced that the length of a prison term is directly related to the anger and bitterness of the offender at the point of release.

It should be stressed that increased attention to the needs and concerns of victims of crime need not come at the expense of the rights of the offender in the process. To address these two separate issues in terms of a trade-off or "zero-sum game" would neither further the purpose of this exercise, nor would it serve the principle of equity.

Procedural Consistency

At present, there are no clear guidelines in the law to indicate to the courts how the difficult task of sentencing should be approached—what information should be made available to the court, what powers should be made available to obtain that information, or how that information should be assessed in determining the appropriate sentence. The case law may be referred to, but it offers limited guidance, and may differ significantly from province to province. Except for limited case law reports, there are no indicators available for the courts to make them aware of the practice followed by other courts confronted by similar situations, much less to give "feedback" on the effects that previous sentences had on the offenders in question.

Apart from the codified right of the accused to speak to sentence, the *Criminal Code* is virtually silent on procedures to be followed at the stage of sentencing. A judge is under no statutory obligation to order a presentence report in any case, and practice varies widely across the country as to the contents of any reports that may be ordered. There has been litigation on some particular points regarding the burden of proof that must be discharged with respect to evidence presented at the sentencing stage.

There is no guidance in the legislation as to when judges should set out their explicit reasons for determining a particular sentence in a particular case, and in many cases no such reasons are given. This lack may hamper public understanding of the basis for a sentence, understanding on the part of the offender himself or herself as to the reasons in the court's mind, understanding on the part of correctional officials who have to administer the sentence imposed, and understanding on the part of any appeal court which has to review the case.

The *Code* is silent on the issue of the relative weight and priority to be assigned to various factors relevant to the sentencing decision. Many questions are left unanswered. How much weight should be attached to a prior criminal record which involves fairly minor offences committed some years ago? How much weight should be assigned to that record in relation to other potentially relevant factors, such as the family situation of offenders, their employment record or prospects, their potential for rehabilitation, or public concern about the growing incidence of the particular type of offence for which they were convicted? Does the high standing of the offender in the community act as a mitigating or an aggravating factor? Some courts have held that a person holding a position of trust and status in the community should be dealt with harshly, because a greater degree of responsibility attaches to that position. Others have held that the very fact of arrest, charge and conviction—which usually entails loss of status and position—punishes such an offender sufficiently, and that no harsh penalty in addition is required for any criminal law purpose, especially in view of the (typically) many years of valuable service given by the offender to the community in the past.

Courts themselves have managed—must manage—to make decisions despite these shortcomings. The public, though, is in an even more difficult position in attempting to understand the basis on which sentences are determined in Canada. Not only is there no explicit guidance or information of the type referred to just above, the courts in many cases give no reasons for the decisions they hand down. Consequently, public reporting and understanding of those decisions suffers.

In the United States, a number of jurisdictions have instituted mandatory sentencing statutes, the effect of which is radically to restrict the number of factors seen as decisive or even relevant to the sentencing decision. These laws shift authority from the courts to the legislature and, in practice, to the lawyers and police who may reach negotiated agreements on charges, pleas and therefore sentences. Other jurisdictions, wary of

such a shift in discretion, seek to preserve the authority and responsibility of the courts for sentencing, but also seek to make the exercise of sentencing discretion more visible, explicit and thereby understandable, by encouraging the development of advisory guidelines, often by the courts themselves. Such guidelines set out a benchmark or reference point by identifying the normal or typical case for a particular offence—defined in terms of a limited set of relevant factors to be taken into account with respect to the offence and the offender in question. This typical case acts as a starting point, from which the court may move if it finds particular aggravating or mitigating factors to be relevant in the individual case before it. Reasons for choosing the particular sentence are often required in such cases.

The objective of this last approach to guidelines is not to bring about a lock-step uniformity in sentencing decisions, but rather to set out a consistent approach to be followed in arriving at such decisions. In this sense, it is a procedural as much as a substantive issue that is addressed. The benefit in explicitly identifying the procedure to be followed and factors to be examined and weighed in reaching the sentencing decision is that it provides a consistency of approach which serves to minimize any disparity that may result from a lack of shared understanding of the fundamental principles, objectives and factors seen to be most important. At the same time, making this approach explicit renders it more visible and understandable to the public at large, and thereby renders the sentencing process more accountable.

3. Clarity

The concern over clarity in the law and practice of sentencing is closely related to the issues of effectiveness and equity. Confusion over the proper approach to questions of effectiveness and equity in large measure results from lack of clarity and certainty in the *Criminal Code* provisions (or lack of provisions) regarding overall sentencing principles and objectives, and its failure to articulate clearly the relationships between the various sentencing options that have been introduced in piecemeal fashion over the past ninety years. It must also be said that this lack of clarity exacerbates the problems of public misunderstanding and mistrust of the criminal law and its application in Canada.

An understanding of the features of current Canadian statutory provisions related to sentencing may help to illuminate some of these problems more clearly.

Organization of Current Provisions

The current sentencing provisions are scattered throughout the *Criminal Code*, from Part I through Part XXIV. The *Code* contains no general statement of the purposes and principles of sentencing, nor does it provide clear guidance as to the procedural and evidentiary rules governing the sentencing hearing.

The bulk of the sentencing provisions are contained in Part XX, entitled "Punishments, Fines, Forfeitures, Costs and Restitution of Property". Part XX in turn is broken down into the following headings, in the following order:

- Punishments Generally (including fines, compensation and costs)
- Imprisonment
- Delivery of Accused to Keeper of Prison
- Absolute and Conditional Discharges
- Suspended Sentences
- Intermittent Sentences and Probation
- Imprisonment for Life
- Disabilities
- Pardon

As the ordering of this Part illustrates, there has been little legislative consideration given to the organization of these provisions—in large part because of the addition to the *Code* in the past several decades of new provisions related to discharges, probation, and parole eligibility for certain offences (others are dealt with through the *Parole Act*) and so on. The sentencing options available to the court do not seem to be arrayed according to any notion of their relative severity, or the priority in which they should be considered.

The current legislative scheme divides offences into categories, by providing for a limited number of maximum penalties attached to each individual offence. The penalties for particular indictable offences are expressed only in terms of a maximum number of years of imprisonment, with categories of two, five, ten, fourteen years, or life imprisonment available for convictions in cases proceeded with by way of indictment. Conviction for a summary conviction offence usually carries a maximum of six months in prison, a fine of $500, or both. Some offences

can be proceeded with either in a summary fashion or by way of indictment, at the option of the Crown prosecutor. In almost all such "hybrid" offences, the maximum penalty differs depending on the manner in which the Crown elects to proceed. While a general section sets out the power of the court to exercise its discretion in sentencing by imposing the non-custodial sanctions in those cases not governed by a specific exception to this rule, application of those alternatives to incarceration are hedged around by other rules limiting the extent to which, for example, a fine may be ordered "in lieu of" as opposed to "in addition to" incarceration.

The structure and language of the codified criminal law also contribute to potential misunderstanding of sentencing. The tradition of expressing the sanction attached to a particular offence in terms of a maximum number of years of imprisonment is derived from English law. The case law has established that this structure was aimed at providing for the penalty for the worst imaginable case of the offence in question, rather than the typical or average case. For this reason, and because the maximum is usually so much higher than the average sentence, the maxima in the *Code* offer virtually no guidance to the courts—or to the public—as to the appropriate or expected sentence in the average set of circumstances.

This may prove more confusing for the public than for the courts, who at least have the case law principle that the maximum is to be reserved for the worst imaginable case for that particular offence. If the public were to read the *Criminal Code*, or even press reports of sentencing decisions, they could easily be puzzled by the fact that the penalty for a given offence is set out only as a particular length of time in prison. In the words of the *Code*, every one who breaks and enters a dwelling house "is liable to imprisonment for life", "every one who commits theft involving a sum or property worth over $200 is liable to imprisonment for ten years" and so on.

The fact that most offences other than those calling for a mandatory minimum also allow for a fine or order of probation is not mentioned in the *Code*. Nor is the principle that the maximum is for the worst case. Thus, someone reading that a particular offender convicted of break and enter received a short prison sentence plus probation, or that another offender convicted of theft over $200 received a straight sentence of probation, might believe that an injustice had been committed in that the directive of the law had not been followed.

Nor is there any apparent consistency within or between the categories of maximum sentences, in that various offences calling for a high maximum do not always seem comparable to others within that category, and may even appear less serious than other offences which have lower maximum sentences attached to them. The penalty for murder, for instance, is a mandatory term of life imprisonment. But life sentences are also available for almost two dozen other offences, such as breaking and entering a dwelling house and stopping a mail conveyance with intent to rob or search it. A fourteen year sentence is possible for a conviction for the offences of mischief to public property, counselling or aiding suicide, or signing a document in the name or on the account of another person with intent to defraud. Assaulting a peace officer, committing an assault causing bodily harm, or assaulting a person with intent to commit an indictable offence, on the other hand, subjects a person to the possibility of imprisonment for five years.

In fact, an examination of the offence structure in the *Code* reveals no clear pattern in terms of the relative seriousness with which crimes have been defined. This, perhaps, should not be surprising in light of the fact that the *Code* has not been subject to comprehensive review in over nine decades, and that Canadian society has changed in important ways over the course of those nine decades.

As *The Criminal Law in Canadian Society* stated, one of the fundamental principles of criminal law is that it "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." One consequence of this principle is that an effort should be made to "examine the relative seriousness of the various offences contained in the *Criminal Code*, and where appropriate, rationalize the sanctions presently assigned to each, in view of the overall penalty structure and the manner in which the present offences are arrayed within that structure. This may require some alteration to the relative and the absolute degrees of severity in the sanctions attached to various offences".

Although judicial discretion within the statutory maximum limits is clearly established as the general rule, there are exceptions. Mandatory minimum penalties are provided in the *Criminal Code* for drinking and driving offences, certain betting and gaming offences, murder, treason, and use of firearms in the commission of an indictable offence. Outside

the *Criminal Code*, a large number of offences carry mandatory penalties, most, but by no means all, of a monetary nature. Perhaps the best known of these offences is the seven year mandatory minimum for importation of narcotics, under the *Narcotic Control Act*.

Sentencing Provisions

Absolute and conditional discharges, introduced in the law in 1972, represent the most lenient disposition available to the court. Upon the granting of a discharge, the accused is deemed not to have been convicted of a criminal offence. Although this would suggest that the accused has not been burdened with a criminal record, such is not the case, since the *Criminal Records Act* requires the discharged accused to apply for a pardon in order to have his or her record sealed.

Probation was first introduced in Canadian criminal law in 1889 as a conditional release for first offenders who had committed relatively minor offences. Supervised probation did not officially come into operation until a 1921 amendment introduced the concept of supervision of persons whose sentence had been suspended. While the availability of probation has been widened over the years, the *Criminal Code* still provides that a probation order cannot be imposed as a sentence in its own right, but only in conjunction with a conditional discharge, a suspended sentence, a fine, an intermittent jail term, or a sentence of imprisonment not exceeding two years. Where a conditional discharge, a suspended sentence, or an intermittent sentence of imprisonment is ordered, in fact, a probation order is mandatory. The court may impose a wide variety of conditions in conjunction with a probation order, but there exists uncertainty in some jurisdictions as to whether it is possible to require a probationer to perform community service under such an order. In other jurisdictions, such community work orders are widely used. Some contend that conditions attached to probation orders are unrealistic and unenforceable if imposed without careful attention to the need for ancillary programs or support facilities—such as requiring an alcoholic to abstain from alcohol without ensuring that an appropriate program is available and that the probationer has at least some recognition of the need for such treatment. The consequence of such conditions can be serious, in that an offender on probation who is charged with breach of probation is subject to further penalties by virtue of the fact that breach of probation is itself a criminal offence, and because someone on probation as a consequence of a discharge or suspended sentence can be called back and sentenced for the original offence as well as for the breach of the probation order itself.

Fines are—and have been for ninety years—the most prevalent sentence imposed by the courts. They account for around half the sentences imposed for all *Criminal Code* offences combined. Unless the provisions imposing punishment for an offence state otherwise (as they do in the case of drinking and driving offences), summary conviction offences are punishable by fine alone or by imprisonment not exceeding six months, or both. Indictable offences punishable by five years or less imprisonment may be punished by fine alone. Where the offence is punishable by a maximum of more than five years imprisonment, however, the fine must be combined with "other punishment", notwithstanding the fact that the court may determine that a fine alone is the appropriate sentence in the circumstances. This leads to situations where the court, to satisfy the condition in the *Code*, imposes a hefty fine plus "one day" in prison—a sentence many judges feel to be ridiculous. In most instances, the maximum fine that can be imposed upon conviction for a summary offence is $500—a figure that has remain unchanged for thirty years, notwithstanding inflation. For indictable offences, there is no maximum limit to the fine that can be imposed. To coerce payment, a term of imprisonment may be set by the court at the time it imposes the fine. There is no requirement in the *Code* to assess the amount of the fine in terms of the ability of the accused to pay. It is only when imprisonment is ordered in default of fine payment for a person between sixteen and twenty-one years old, that such a means inquiry must be held. As was noted earlier, imprisonment in default of payment of fines accounts for fully 29% of the admissions to provincial prisons. In some provinces, the figure approaches 50%, despite the fact that there is no way of ensuring that default occurs as a result of unwillingness as opposed to inability to pay such fines. One consequence of this phenomenon is that, far from adding to the provincial treasury through fine revenue, imprisonment in default costs provincial taxpayers enormous sums of money, since incarceration is such a costly sanction.

There are currently five sections in the *Criminal Code* providing for restitution or compensation to be paid by the offender to the victim of the crime. These provisions, which do not relate clearly to each other, are found in different parts of the *Code*, apply to different offences, and are backed or enforced by different means. For a compensation order under section 653, for example, the "aggrieved person" (i.e. the victim) must apply, and enforcement is left to the victim through the civil process. Compensation for damaged property under section 388, on the other hand, is in the discretion of the court, requires no application to be made by the victim, and may be enforced by the court by the imposition of a prison term of up to two months. Compensation orders under this sec-

tion are limited to a maximum of $50. Nowhere in the *Code* is it stated that restitution should be considered as a sentence in its own right, as opposed to an "add-on" to the "real" sentence, and nothing relates restitution to any overall principles or philosophy of sentencing.

Part XXI of the *Criminal Code* sets out special provisions with respect to dangerous offenders. This Part, enacted in 1977, replaced former provisions introduced after World War II dealing with habitual offenders and dangerous sexual offenders. Part XXI defines a dangerous offender as someone who has committed a "serious personal injury offence" and who meets several other criteria primarily focused on the prediction of future dangerous behaviour. An application for a dangerous offender finding requires the consent of the Attorney General of the province in which the offender is tried, either before or after making of the application by the prosecutor. In addition, the law requires evidence from at least two psychiatrists, one representing the Crown, the other the accused. Where the court finds that the statutory criteria have been met, the individual may be identified as a dangerous offender. In such a case, the court may sentence that person to indeterminate imprisonment in place of the normal penalty for the offence giving rise to the conviction. The Parole Board is required to conduct a review three years after this finding, and every two years thereafter, to determine whether parole should be granted.

Many criticisms have been levelled at the Part XXI provisions, from two opposing perspectives. Some argue that the whole philosophy underlying the provisions is wrong in principle, because it is at variance with the basic approach of criminal law. Criminal law generally punishes people for what they actually did in the past. The dangerous offender provisions, on the other hand, incarcerate people for what they might do in the future. Many of these same critics object to the requirement for psychiatric evidence, stating that the human sciences are simply unable to predict future behaviour at the level of the individual with any degree of confidence. In fact, the evidence indicates a large degree of overprediction of future violence.

On the other side, some object to the provisions on the grounds that they do not accomplish the objective for which they were intended: the protection of the public against especially dangerous individuals. They argue that the particular approach underlying the legislation, and the detailed procedural safeguards set out in the legislation for the individuals involved, present obstacles to its use in some cases where it may be appropriate. Since the legislation was brought into force in 1977, these

critics point out, it has been used in only around forty cases—most of them in Ontario.

The more general procedural and evidentiary aspects of the law relating to sentencing are subject to criticism more on the basis of their absence than with respect to particular faults with existing provisions.

Conclusion

Overall, the vast multiplication of offences in Canadian law, and the development of new forms of sentences such as probation and discharges, has taken place unaccompanied by any legislative indication as to how the courts are to assess their relative importance or appropriateness in the individual cases with which they must deal, or as to how the various provisions are to be related one to the other in terms of the priority in which they are to be considered.

One response to this lack of explicit guidance is that the courts have done the job Parliament has left undone. And, as was mentioned earlier, the courts have developed an elaborate and commendable set of principles and rules through case law. As well, the function of the appeal courts within each province has been to even out some examples of apparent disparity, so as to diminish some of the potential deleterious effects of lack of Parliamentary guidance regarding the purpose, principles, and criteria of prime importance in the determination of sentence.

The case law, however, is necessarily limited in how far it can go in this regard, since it must be reactive to the particular facts and cases that come before the courts. In addition, the fact that the Supreme Court of Canada does not normally hear sentencing appeals means that there are ten separate provincial arbiters in sentencing matters relating to the question of "fitness" of sentence. This situation—while potentially advantageous from the point of view of reflecting regional distinctions—means that there is no forum for articulating a set of nationally-applicable standards or principles in this regard. At a certain level, it is important that basic principles and approaches be set out on such a national level, for the same reason that the Fathers of Confederation argued that the "criminal law" power should be given to the national Parliament, rather than left to the individual local jurisdictions, as was the case in the United States. Determination of the basis for criminal liability is a matter of national, rather than local, importance. The definition of crime, and the principles and procedures to be followed in determining whether a particular individual has committed a crime, and what punishment

should result, should have national application, rather than differing from province to province or region to region.

Questions bearing on these general points have been raised in the earlier discussions of effectiveness and equity. What is the chief objective to be pursued in sentencing? Is it deterrence, protection of the public, rehabilitation of the offender, or incapacitation? All have been suggested as primary, some as the only legitimate objective to be sought. When is the use of imprisonment appropriate, when not? Are reparative sanctions such as restitution an integral part of the criminal sentencing regime, or are they ancillary "add-ons", or afterthoughts to be considered separately? Is probation a real sentence in its own right, or is it somehow to be seen as an alternative to the "real" sentence of imprisonment?

On none of these points is there clear guidance from the body which has the fundamental responsibility for giving such guidance—the Parliament of Canada. It is especially important, in an era when the consensus which formerly seemed to exist in matters of criminal law policy has eroded, to articulate in legislation a conception of the purpose, objectives and principles of sentencing. This erosion of consensus has partly resulted from, and partly contributed to, the concerns about effectiveness and equity of sentencing, concerns which seriously affect the credibility and legitimacy without which the law and its administration cannot function.

III. PROPOSALS FOR REFORM

In response to the issues and concerns related to sentencing, the Government is now proposing to Parliament a comprehensive set of provisions for inclusion in the *Criminal Code*, to bring together previously dispersed and unorganized provisions, and to expand them significantly to form a complete and self-contained part of the criminal law governing sentencing.

Highlights

This consolidation and expansion of sentencing provisions is designed to respond to the principle, set out in *The Criminal Law in Canadian Society*, that "the criminal law should...clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process."

Included, for the first time, would be an explicit statement of the purpose and principles of sentencing. The statement would offer an indication to the courts and to the public of the fundamental approach to be adopted in the determination of sentences. In so doing, it would preserve and endorse the clear benefits of judicial discretion while providing a framework or set of reference points for the exercise of that discretion.

A clear set of procedural and evidentiary provisions would be set out to govern the sentencing hearing. These provisions would fill an almost total vacuum in the *Criminal Code*, and would clarify a number of important issues relating to the kinds of information considered relevant and appropriate to the sentencing decision, while preserving the degree of flexibility and discretion essential to permit the court to individualize sentences in the light of relevant and appropriate mitigating or aggravating circumstances.

A broader and more clearly defined range of sentencing options would be provided for the court by bringing together and rationalizing current provisions. Within this range of sentencing options, emphasis would be

given to non-custodial sanctions, with imprisonment reserved for cases where such non-custodial sanctions are inappropriate. The provisions would also expand or create sanctions to allow for tough and effective penalties to be imposed without having to resort to imprisonment. In addition, increased emphasis and legitimacy would be given to victims' concerns through wider and higher priority use of reparative sanctions such as restitution and community service orders. The clarification, consolidation and expansion of the restitution provisions would constitute a major change in emphasis in criminal sentencing.

The *Criminal Code* provisions related to dangerous offenders would be fundamentally changed by the repeal of those aspects of the current legislation which require the court to make a prediction of future behaviour, based upon mandatory psychiatric evidence. The changes would provide for a mandatory sentence of life imprisonment, with parole eligibility only after ten years, for those found under the newly-framed dangerous offender provisions to have committed a serious personal injury offence normally subject to at least ten years' imprisonment. The offence must have been committed in such a brutal manner as to compel the conclusion that the offender constitutes a threat to the life, safety or physical well-being of others, or it must be shown that the offence is part of a pattern of repetitive behaviour showing a failure on the part of the accused to restrain his or her behaviour and a wanton and reckless disregard for the lives, safety or physical well-being of others.

In addition to these legislative proposals, an independent and high level Sentencing Commission is to be established by the federal government, under Part I of the *Inquiries Act*. The Commission is to be composed of nine members—five judges and four experts from other fields. Over a two year period, this Commission, assisted by full-time research staff and other existing resources, will address and make recommendations upon the question of sentencing guidelines, and also upon the question of realigning maximum penalties within the *Criminal Code* in respect of the relative seriousness of offences. As well, the Commission is to be asked to examine mandatory minimum penalties in the *Code*. Finally, in considering these issues, the Commission is to be asked to advise on the relationships which would and should exist between any guidelines that are established and other important aspects of criminal law and its application, including prosecutorial discretion, plea and charge negotiation, and the parole and remission provisions of the *Parole Act* and the *Penitentiary Act*.

Details of these proposed sentencing reforms are described more fully in the next sections of this paper. In addition, the approach to be taken by the Criminal Law Review to important issues closely affected by, and affecting, sentencing, will be discussed.

1. Purposes and Principles

A striking omission from the *Criminal Code*, one which dates from its inception in 1892, is the lack of any statement of the purposes and principles which underlie the criminal law in general, and sentencing in particular. This lack of formal Parliamentary guidance has resulted in a situation whereby it cannot be said that there is a clear, nationally-applicable set of standards or principles, despite the admirable efforts of trial and appeal courts to fill the vacuum. Since these standards or principles are issues of public policy which are of fundamental importance, Parliament is the most appropriate forum for their articulation. For these reasons, and to make the sentencing provisions of the *Criminal Code* as self-contained and comprehensive as possible, an explicit statement of the purposes and principles underlying the determination of a fair and appropriate sentence has been proposed.

In framing this statement, a wide variety of sources was considered. A sizeable body of case law developed by the courts over the past decades was analysed, exploring the principles, rules, and reference points in sentencing. In addition, reference was made to numerous articles and publications on sentencing, including the *Canadian Sentencing Handbook* published in 1982 by the Canadian Association of Provincial Court Judges. The work of the Ouimet Commission and the Law Reform Commission of Canada, as reflected in the general statement of purpose and principles of the criminal law articulated in *The Criminal Law In Canadian Society*, was invaluable. A number of those principles which focused primarily on sentencing have been incorporated into this proposed legislative statement. In addition, reference was made to recent American proposals such as those found in the *Model Penal Code* and the comprehensive criminal law codification bills recently before the United States Congress (H.R.6915 and S.1630).

One of the major objectives of proposing an explicit legislative statement, rather than leaving the issues to the case law, is to provide a ready point of reference for judges, lawyers, academics and laypersons alike, through articulation of a formal Parliamentary statement of the goals of the sentencing process. While case law will continue to add detail and

meaning to the legislated purposes and principles, the framework, being statutory, will be more substantial than in the past.

The purposes and principles of sentencing have been conceived in two parts. The first part contains a statement of the paramount purpose of sentencing, accompanied by an enumeration of means by which this purpose may be achieved. The second part contains a number of principles and factors to guide the court in its determination of the appropriate sentence.

Purposes

Protection of the public has been identified as the overriding purpose of sentencing. This goal is to be understood in its broadest sense, as being in harmony with the overall statement of the purpose and principles of the criminal law articulated in *The Criminal Law in Canadian Society*.

The notion of public protection goes beyond the narrow definition sometimes ascribed to it in case law and other legal publications. Some have tended to identify "protection of the public" exclusively with prison sentences, or even more narrowly, with the kind of indeterminate sentence provided for habitual offenders in the past, and dangerous offenders at present. While it is undeniable that the physical security of the public is protected from inmates while they are incarcerated, it does not follow that non-carceral or community-based sanctions cannot equally serve the purpose of protection of society. In fact, the thrust of these sentencing reforms is that there are a number of methods of achieving public protection other than through imprisonment, and that the use of these non-carceral sanctions should be both strengthened and encouraged. This thrust is aimed at bringing public perceptions more into line with the reality of the situation, and at reversing the widespread, but inaccurate and harmful presumption that imprisonment is the "normal" or expected sanction, with all other sentences being seen as merely "alternatives to incarceration".

A number of means of protecting the public through sentencing are identified in the statement, including: the imposition of just punishment; incapacitation; deterrence; restitution; and rehabilitation.

Imposing just punishment for criminal acts encompasses the notion that sanctions for criminal conduct should reflect the gravity of the offence and the responsibility of the offender. In other words, the punishment must "fit the crime". This notion reflects the "justice" or "just deserts"

purpose of a sentence. Imposition of just punishment reinforces and promotes respect for the law and, in so doing, reinforces and promotes security. The notion of "just deserts" does not imply a movement away from individualized sentencing. It is "just" to punish only when deserved and only to the degree deserved, and this requires careful attention to be paid to the individual factors of each case.

For those offences which are of such a serious nature that protection of the public requires that the offender be physically separated from society, incapacitation through imprisonment remains a necessary means. Further specification of the circumstances under which incarceration is appropriate is provided in the second part of the proposed statement, dealing with principles of application.

Although there is only ambiguous or inconclusive evidence at present to support the conclusion that deterrence in itself is an effective means of achieving the objectives of sentencing, it is still considered to be one of the means through which protection of the public, in the limited context of sentencing, may be achieved. Deterrence as a means of public protection operates in two ways. At the level of the individual, a sentence warns offenders that their criminal conduct in the future will be punished in the same or a stronger fashion in the hope that the threat of such a sanction will change their behaviour. At a more symbolic level, the punishment of a guilty individual gives notice to the community that such conduct will not be tolerated.

Another means of protecting the public is to promote and provide for redress or restitution for the harm done to individual victims or to the community. The notion that our legal system should take substantial account of the needs of victims is an old one, however, until recently, it has generally been underemphasized in the context of the criminal, as opposed to the civil law. The criminal law view is that an offence against a victim is an offence against all of society, which is redressed by society acting to apprehend and deal appropriately with the offender. Direct redress to the victim was seen as outside this sphere, although, of course, the victim could always proceed by civil action. In recent years, however, there has been increasing concern for victims and a growing awareness that more attention should be paid to their needs. This view recognizes that the victim of a crime stands in a more direct relationship to the state than do citizens at large, and that the state has a special obligation to him or her. While individual victims will benefit from the recognition of restitution and recompense as a valid purpose of sentencing, it must be stressed that the tools mentioned above remain *sentencing* provisions

whose primary thrust is in relation to offenders. As such, they function partly as punishment and partly as rehabilitative tools to impress upon the offender the social harm caused and to reinforce the concept that responsibility and accountability must be accepted by the offender.

Rehabilitation encompasses both promoting and providing for opportunities for the offender to become a law-abiding member of the community. The word "opportunities" is intended to suggest that goals of individual reform and rehabilitation must be tempered with the recognition that the ability of the criminal justice system to markedly affect the behaviour of individuals may be limited and that the success of rehabilitation depends on the personal commitment of those it is designed to help. For the same reason, the focus of rehabilitation in this context is on community reintegration through law-abiding behaviour, rather than through "correction" of the offender. There are a number of ways that the criminal justice system provides these opportunities for reintegration. Absolute and conditional discharges, which do not carry the stigma of conviction, give offenders, in effect, a second chance. Conditional sentences (now known as suspended sentences) serve the same purpose, although a conviction is registered. Intermittent sentences allow offenders to continue to work and fulfill their social responsibilities at the same time as they serve their sentences. A number of conditions of probation may be imposed by a judge which are aimed directly at changing certain behaviour. Although a term of imprisonment should not be imposed in the name of rehabilitation, the provision of opportunities for self-improvement through prison programs for those incarcerated for other reasons remains a valid goal. Even though some research has cast doubt on the effectiveness of prison programs, other research suggests that better matching of offenders with programs may produce better results. It has also been shown that raising the general educational levels of inmates has positive results.

The various elements of the proposed statement of purpose address concerns that on the one hand too many people are being sent to prison unnecessarily, and on the other hand that the criminal justice system does not always respond adequately to those offenders who present a real danger to society. The statement of purpose thus sets out a number of possible approaches that may be considered as legitimate in the pursuit of the overall objective of public protection. In so doing, it accords with the conclusion reached in *The Criminal Law in Canadian Society* with respect to debate in recent years over the relative merits of the retributive and utilitarian schools of philosophy, and over the implications of recent research on effectiveness:

By recognizing the legitimacy of both the utilitarian and the retributive approaches, and by refusing to equate them with security and justice respectively, we may more productively debate the specific point of balance that is to be struck between the two major purposes of the law and the criminal justice system: justice and security. Thus, if the goal is to pursue "justice", utilitarian concerns about security, protection, prevention, treatment and rehabilitation need not be abandoned. Or, if the emphasis is to be on crime control and public protection, arguments appealing to a retributive justification for punishment in the name of "justice" or "just deserts" need not be dismissed as illegitimate. This is an important consideration to bear in mind, since most recent debates on the issue of the major purpose of criminal law are posed in such a way as to suggest there can be only one such legitimate purpose. Acceptance of this assumption of the necessity for a unique purpose may appear more logically or philosophically appealing, but it does not seem to be realistic in terms of the actual uses to which criminal law is put, and the actual effects it has in society.

Principles

In addition to the foregoing purposes of sentencing, the statement proposes a number of other principles and factors to be considered before imposing sentence. Proportionality, equity, and totality are all principles that have been developed in our case law and stand as guideposts to fair and appropriate sentences.

To do justice, a sentence must be proportionate to the seriousness of the offence, the harm threatened or sustained, and the degree of culpability or responsibility of the offender. This requires consideration to be given to any mitigating or aggravating circumstances serving to distinguish the case from other similar cases. The proportionality principle also limits the amount of punishment that may be imposed ("an eye for an eye" ensures that *not more* than an eye may be exacted) to avoid unjustly sacrificing the individual offender to the common good. It is also a necessary companion to section 12 of the *Charter of Rights and Freedoms* which states that: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment".

The principle of equity directs that a sentence should be similar to sentences imposed on other offenders for similar offences in similar circumstances. It recognizes the importance of "justice being seen to be done" and functions, as does the proportionality principle, as a check on the discretion of the court in imposing individual sentences. It is therefore one method of minimizing potential disparity.

The principle of totality addresses the concern that, where a combination of sentences is imposed, or where consecutive sentences are imposed, the total effect of the sentence should be taken into account. Even though a

sentence for each offence in isolation may be appropriate, where there are multiple charges or counts, the total amount or length of a sentence must not be so long as to be disproportionate or excessive. Similarly, when a number of sanctions are imposed for a single offence (e.g. imprisonment and probation), the total effect must be assessed in light of this principle.

Another significant principle in imposing sentence is related to the preceding discussion of the appropriate use of imprisonment as a sanction. As discussed in *The Criminal Law in Canadian Society*, this involves the minimum necessary intervention adequate in the particular circumstances (also called the principle of parsimony or economy in punishment). There are two implications to this concept: first, in all but the most serious or obvious cases, a judge should consider non-carceral or community-based sanctions before imposing imprisonment; and, second, the court should consider a sentence as part of a hierarchy of sentencing options, from the least serious to the most serious. The more serious alternatives would be imposed only on grounds of necessity. It should be stressed that the choice of non-carceral sanctions in preference to prison terms for many offenders does not imply that a court is dealing leniently with an offender. A number of non-carceral alternatives can be very onerous indeed, as will be explained in the section of the paper describing the range of sanctions.

Two further principles address the question of when it is appropriate to impose the sanction of incarceration. The first, in line with the philosophy of the Law Reform Commission, identifies three main sets of circumstances as justifying a sentence of imprisonment: separation of offenders posing a threat to life and personal security; denunciation of conduct so reprehensible that lesser punishment would be inappropriate; and last resort coercion of offenders who wilfully refuse to comply with other sanctions. As can be seen, these circumstances relate back to the elements of the statement of purpose.

Another principle calls attention to the practical problems and inherent injustice of sentencing a person to imprisonment, or to a longer term of imprisonment, on the basis of its alleged rehabilitative effect. As was noted above, this is not to say that rehabilitation can never take place in prison or that opportunities should not be provided for offenders to rehabilitate themselves once imprisoned. It only states that the decision to incarcerate in the first place should not be taken with a view to rehabilitation. If rehabilitation is the primary purpose of the sentence, other sanctions are more appropriate and hold out more hope of being effective.

Complementing these last three principles is a principle derived from case law, which states that the maximum punishment prescribed in the *Code* for each offence indicates the sentence that should be given for the most serious type of case for that offence. Its inclusion is intended to assist the general public in understanding how sentences are decided. It may also help judges in communicating with the public when explaining the reasons behind individual sentences.

2. Evidence and Procedure at Sentencing Hearings

In order to clarify the existing case law with respect to rules of evidence and procedure at the sentencing hearing, and in order to address a number of the concerns discussed above, a proposed code of procedure has been formulated. In the provisions, the procedure and rules of evidence relating to the sentencing hearing are defined for the first time. They reflect current practice and adopt some procedures which have proved successful in other jurisdictions. The following represents a summary of those proposed legislative provisions.

At the sentencing hearing it is proposed that the judge must ask for submissions by the parties on the facts relevant to sentence, including the availability, practicality and effectiveness of various sentencing alternatives applicable in the circumstances of the case. The judge must also hear evidence on disputed facts. These mandatory provisions ensure that relevant information is put before the court. The offender's right to address the court has been embodied in a provision which parallels the present *Criminal Code* provision and provides that the court must ask the offender whether he or she has anything to say prior to sentence being passed.

Limiting the judge's role to that of an arbitrator in an adversary proceeding inadequately addresses the goal of careful fact-finding at the sentencing stage, and thus is inappropriate. The sentencing judge is therefore provided with discretionary powers which reflect the inquisitorial aspect of his or her role at the sentencing hearing. The judge may question or call any witness, other than the offender, deemed necessary to the proceedings. Provision is made for the court to hear representations made by any person to whom restitution could be made. This proposal is consistent with the recommendation of the Victims Task Force that judges consider restitution in all appropriate cases and provide victims with the opportunity to make representations to the court regarding their cases. In cases where restitution is not in issue, the victim's views should be channelled through the prosecutor or be included in the pre-sentence

report. Any witness or person so called or heard may be cross-examined by both the Crown and defence.

Rules of evidence have been formulated to reflect the sentencing hearing's unique character as a blend of the adversarial and inquisitorial systems. To reflect current practice, the court may accept as proved and act upon any information disclosed at trial or as agreed upon by the parties.

The proposed rules of evidence also relate to the proof of facts which are of consequence to the determination of sentence. In contrast to trial proceedings, it is proposed to make all relevant evidence admissible unless its probative value is substantially outweighed by considerations of undue delay or undue prejudice. This provision reflects the characterization of the sentencing hearing as a comprehensive inquiry into all matters which can assist the court in its sentencing decision. To this end the proposals entrust the court with the control of the proceedings to avoid needless time delays, to ascertain the truth and to protect witnesses from harassment. The court may also require production of all witnesses and evidence helpful to prove or clarify facts or to provide relevant information. This latter provision is subject to a provision preserving the evidentiary rules of competency and compellability which govern at trial. While at trial these privileges protect the presumption of the accused's innocence, at the sentencing hearing they are directed to the preservation of his or her personal relationships and recognition of the continuing right against self-incrimination. Provision has been made for the reception of hearsay evidence subject to the proviso that persons with personal knowledge of a matter may be required to testify if the best interests of justice are thereby served.

Pre-Sentence Reports

In some cases, the information required by a judge to determine the nature and length of sentence to impose is presented at the trial. In a vast majority of cases, however, the accused has pleaded guilty and no trial is held. The judge then must be provided with the necessary information after the adjudication of guilt. That information is presented by the Crown, the offender, defence counsel, or witnesses. In the past thirty years, judges have increasingly obtained information relevant to sentencing through a pre-sentence report.

The proposed provisions dealing with pre-sentence reports constitute an expanded version of the provisions currently found in the *Criminal*

Code. The pre-sentence report is defined as a report relating to the offender for the purpose of assisting the court in imposing sentence. This definition encompasses not only the reports currently prepared by probation officers but also reports from other sources (such as an offender's school, employer or a community agency) containing relevant information.

A general duty on the court to order a pre-sentence report has been proposed in cases where it is considering incarcerating an individual who has not previously been incarcerated. Provision is made for exceptions to this general presumption in limited, appropriate circumstances.

Flexible guidance is also provided with respect to the contents of the pre-sentence report. The proposed section states that, unless otherwise specified by the court, the pre-sentence report is to contain the following information: the offender's juvenile and criminal record; information about the offender's employment and social history, financial status and any active steps taken toward rehabilitation; and a victim impact statement, as well as any other information requested by the court. In addition,the pre-sentence report may contain the probation officer's assessment as to the suitability of the offender for a non-carceral sentence, and the programs, services and resources available to effect such a sentence. The report may also contain any other information the probation officer deems relevant.

The proposed section has two aims: to promote consistency in the type of information a pre-sentence report will provide the court while maintaining a great deal of flexibility in the content of such reports. Depending upon the nature of the information the court requires, a pre-sentence report may range from a very comprehensive document to a brief oral report relating only to selected issues.

Provision for the victim impact statement as part of the pre-sentence report would create a mechanism to bring information related to harm or loss suffered by the victim to the attention of the court. To protect the interests of the offender, defence counsel would have an opportunity to challenge representations made by the victim in the pre-sentence report.

Provision would also be made for medical and psychological reports in the context of the sentencing hearing. It is proposed that a medical or psychological report may be ordered either on consent of the parties or where the court, on its own motion or on the application of either party, has reasonable grounds to believe that the offender may be suffering from any one or more of the enumerated illnesses or conditions.

The current law is reflected in a general provision which requires disclosure of all pre-sentence reports to the court, the offender, defence counsel and the prosecutor. The proposed general rule with respect to medical reports is also one of full disclosure, with exceptions allowing for non-disclosure of all or part of the medical or psychological report to the offender where disclosure would likely be detrimental to the treatment or recovery of the offender or would likely result in bodily harm or be detrimental to the mental condition of a third party.

It is also made clear that a pre-sentence, medical, psychiatric or other report received by the court forms part of the court record. This proposal implies full disclosure of the reports to the public. However, the disclosure may be restricted where the court determines that it would be unduly prejudicial to the offender, having regard to the public's right to know the basis for a sentencing decision. There is a further provision to exempt from public disclosure any part of a medical or psychological report which has been withheld from the offender. As well, provision is made for the grant of limited access to non-disclosable information for legitimate research, administration of justice, or other reasons.

Complementary provisions are proposed relating to the possible exclusion of the public from the court, and banning publication or broadcast of information ordered non-disclosed, to preserve the integrity of exclusionary provisions.

To ensure the accuracy of the facts upon which the judge bases his or her decision, disclosure must be made sufficiently in advance of the sentencing hearing to afford the parties a reasonable opportunity to verify the facts. The proposed minimum disclosure period is two clear days prior to the sentencing hearing. All parties are to receive a copy of the report at that time.

There is also a proposal which allows the parties to submit written arguments or submissions to the court, with service of a copy on the other party, prior to the sentencing hearing. The aim of this provision is to encourage pre-sentence discovery of written argument and submissions to reduce delays in the sentencing process and to encourage counsel to be better prepared for the hearing.

Onus and Burden of Proof

Confusion is evident from the case law regarding the party upon whom the onus of proof lies at a sentencing hearing and what burden of proof

must be met. The proposals address these issues by providing that the onus and burden of proof at the sentencing hearing depends upon the identification of a particular fact as an aggravating fact. What is contemplated by this term are facts which tend to increase the gravity of the offence. Where an aggravating fact is advanced by the prosecutor and disputed by the offender and is material to the determination of the sentence, it must be proven by the prosecutor beyond a reasonable doubt. The current case law is reflected in a provision which also requires the Crown to prove the offender's criminal record, where disputed, beyond a reasonable doubt.

It is further proposed that all disputed facts other than aggravating facts must be proven on a balance of probabilities. Many of the facts relevant to sentencing, such as the character of the offender, cannot be ascertained with the same certainty as facts predicating guilt or innocence, and yet are useful in arriving at an appropriate disposition. The standard of proof required in civil cases is more likely to lead to a more accurate and complete assessment of such facts and circumstances than the standard of proof required in adjudicating guilt or innocence.

The final proposed rule of evidence reflects the current jurisprudence that "he who alleges, must prove". It defines the evidentiary onus of proof and provides that any fact relevant to the sentencing decision which is disputed must be proven by the party wishing to rely upon it. This section is of course subject to the provision which places the onus of proving aggravating facts and the criminal record of the offender on the Crown.

Disposition of Outstanding Matters

To expedite the disposition of matters outstanding against an accused, the draft proposals have provided means whereby the offender may "clean his slate" in appropriate cases. Where an accused pleads guilty to or is found guilty of two or more offences, all matters will be considered at one time in determining the proper sentence unless such a procedure is manifestly inappropriate. Similarly, where the accused is prepared to plead guilty to a number of outstanding charges, he or she may, with the consent of the Crown, plead guilty to all the offences at one time. A similar provision is proposed respecting facts which could form the basis for a separate offence and which are constituent circumstances of the offence for which the accused is being sentenced. The rights of the offender are protected by a provision prohibiting future prosecution of offences based on these facts unless the conviction which is the subject of

the sentence is set aside or quashed on appeal. This proposal embodies a practice which has been approved by the Ontario Court of Appeal.

Reasons for Sentence

A very significant proposal is the inclusion of a provision which requires the judge in certain circumstances to accompany the imposition of sentence with a statement of the reasons for imposing that particular sentence. The statement of reasons is to be entered in the record, or where the proceedings are not recorded, must be in writing. A clear statement of the reasons for sentence is of value to correctional officers and is necessary for meaningful appellate review of the sentence. It protects the rights of the offender and is essential to public understanding of sentencing.

The final procedural provision proposed requires the court to state the precise terms of the sentence. Such a provision is a directive to the courts to avoid the problem posed by imprecise sentences.

3. Range of Sanctions

The proposals dealing with the range of sanctions available to the court open with a provision that establishes the general principle that non-carceral sentences are to be viewed as legitimate and independent sanctions. In other words, this provision would permit the court to impose each of the sanctions as a sentence in its own right, or in combination with other sanctions (subject to any specific exceptions or limitations). The imposition of a combination of sanctions would, of course, be subject to the principles of proportionality and totality as articulated in the purposes and principles part of the sentencing proposals.

Absolute and Conditional Discharges

Discharges, whether absolute or conditional, represent the most lenient sanction presently available in the *Code*. The perceived problem with discharges at present is the misleading notion that a discharge carries no negative consequences. While for purposes of appeal, the offender is deemed not to have been convicted, a criminal record is still registered and can only be expunged after a specific eligibility period through an application for a pardon under the *Criminal Records Act*.

The legislative proposals attempt to lessen the adverse consequences of a discharge by removing any disqualification associated with an absolute

discharge or a conditional discharge (upon successful completion of the conditions) and by making it an offence for any department or agency within the legislative authority of Parliament to require anyone seeking employment with the government to disclose that they have been charged with or found guilty of an offence for which they have been discharged. The anomaly of a criminal record, however, remains pending the results of the Clemency Project undertaken under the aegis of the Ministry of the Solicitor General as part of the Criminal Law Review.

The essential elements of the existing absolute and conditional discharge provisions in the *Code* are preserved. They are still available to all accused, except corporations, who plead or are found guilty of an offence other than an offence for which a minimum punishment is prescribed. The *Code* also presently prevents the use of discharges in cases involving offences punishable by imprisonment for fourteen years or life; this feature is also retained. The discharge may still be absolute or upon conditions prescribed in an order of probation, with or without supervision. The feature permitting an unsupervised probation order in this set of circumstances is an exception to the new approach to probation generally, which provides for supervision as a mandatory condition. Without this exception the current flexibility with a conditional discharge would be lost.

Conditional Sentence

The conditional sentence, which is based upon but differs significantly from the current "suspended" sentence, is the next most lenient sentence. Like a conditional discharge, a suspended sentence is currently tied to a probation order which may or may not involve supervision. Unlike a discharge, however, a suspended sentence is considered a criminal conviction carrying a criminal record. An offender granted a suspended sentence is subject to any disqualifications associated with a criminal conviction. This important qualitative distinction between suspended sentences and discharges is at present somewhat obscured as a result of their common link to probation.

It has been suggested that the common practice of tying a suspended sentence to probation, with supervision as one of the conditions of probation, is often of little benefit to the offender and needlessly burdens the probation service which has the responsibility for monitoring such offenders.

As well, the name "suspended sentence" seems inappropriate in certain respects, given that the suspended sentence carries with it conditions which the offender must obey as part of a probation order. The element of "suspension of imposition of sentence" is thus partly a fiction, notwithstanding the fact that the offender can be called back and "sentenced" for the original offence. The term "conditional sentence" was therefore chosen to reflect more clearly the nature of the sanction, and to eliminate the apparent contradiction whereby a "suspended sentence" is – if the conditional terms are satisfied – the actual sentence.

The legislative proposals for a conditional sentence address these problems by making probation and conditional sentences independent sanctions; and by making supervision a mandatory condition of probation, but not of a conditional sentence.

Though the proposals frame the conditional sentence as an independent sanction, it remains available only for offences without a prescribed minimum punishment and for offenders other than corporations.

Because probation has been made an independent sanction with supervision as a mandatory condition, and in order to retain the flexibility of attaching conditions without supervision, the proposed conditional sentence requires the offender to enter into a recognizance to be of good behaviour, with a possible maximum duration of two years. Breach of this recognizance exposes the offender to re-sentencing for the original offence for which he or she was convicted—a strong incentive for compliance.

Probation

The legislative proposals with respect to probation first and foremost establish probation as an independent sanction that may be imposed in its own right. For the sake of conceptual clarity, probation is distinguished from conditional sentences and conditional discharges by making supervision a mandatory condition of probation only.

The legislative proposals remove most of the limitations on the availability of the sanction presently found in the *Code*. Under the proposals, probation may be imposed on its own or in addition to any other sanction, subject to the principle of totality, and a specific ban on combining probation with imprisonment for two years or more.

In response to concerns raised by the Ouimet Committee, the Law Reform Commission and the Canadian Association for the Prevention of Crime about the relevance and enforceability of some of the current discretionary conditions of probation, several discretionary conditions have been either deleted or replaced by what are regarded as more practical and relevant conditions, and several new possible conditions have been added. The condition that the offender refrain from the consumption of alcohol has been replaced with the condition that he or she may be required to submit to treatment for alcohol or drug abuse. The condition that the offender make reasonable efforts to find and maintain employment has been amended to include as an alternative that the offender may be required to attend an educational or training program. A new condition has been added which may require the offender to attend a program of driver education or improvement. This is in some measure a response to the increasing number of driving-related offences before the courts today.

Finally, the proposals introduce a requirement that the court provide specific reasons whenever it has resort to the residual clause in imposing a unique condition of probation. Probation is also given "teeth" by making wilful breach subject to serious penalties, including imprisonment for up to two years where the offence for which probation was originally ordered was an indictable offence, and six months for summary cases.

The imposition of supervision as a mandatory condition constitutes a noteworthy departure from probation as found in the present *Code*. Supervision is regarded as an essential aspect of probation that qualitatively distinguishes it from a conditional sentence, and will enable the court to address corresponding qualitative differences between individual offenders and fact situations.

Restitution

Promoting and providing for redress and recompense for harm done to an individual or to the community was discussed earlier as a means of enhancing the primary purpose of sentencing: the protection of the public. The current provisions for restitution and compensation in the *Code* do not serve that objective in an effective and consistent way.

In the legislative proposals, all the reparative provisions have been consolidated under one sanction that can be imposed alone or in conjunction with another sanction. The sanction has been expanded to include repa-

ration in the form of "special" and "punitive" damages for both property damage and damages resulting in bodily injury. Finally, procedural changes have been introduced to allow the victim or victim's representative to make representations regarding loss or damage sustained.

The proposals begin by addressing what appears on the surface to be a minor question of semantics. Presently in the *Code* "compensation" and "restitution" are used in a misleading fashion. The Federal-Provincial Task Force on Justice for Victims of Crime expressed concern over the careless use of the term "compensation". "Restitution", it observed, should be restricted to contributions made by the offender to the victim, while "compensation" would refer to contributions or payments made by the state to the victim. The Law Reform Commission of Canada in its Working Paper, "Restitution and Compensation" (October 1974) similarly reserved use of the term "compensation" for contributions or payments made by the state.

The scrupulous use of the term "restitution" in the legislative proposals is meant to underscore the fact that the provisions do not address all the needs of the victim and that their orientation is first and foremost that of a criminal sanction. With respect to the needs of the victim, a complementary role is played by victim compensation schemes enacted by the provinces.

There are no limits on the availability of restitution, under the proposals. It could be imposed on both corporate and individual offenders, and in conjunction with any other sentence. Unlike current restitution provisions, however, its operation would not require an application by the victim of the offence, but as with the other sanctions, could be imposed by the court on its own motion in appropriate cases. The operational scope of the sanction would also be significantly expanded in a number of ways. Restitution could be awarded for damage to property and in cases involving bodily injury. In the latter case, such an award could be equal to all special damages—as that term is understood in the civil context—and loss of income or support arising from the offence. In addition, the court could award punitive damages, subject to prescribed maxima of $2,000 and $10,000 for damages arising out of the commission of summary and indictable offences, respectively. Where the offender is a corporation the amount of punitive damages would be in the discretion of the court in indictable cases, and up to $25,000 in summary cases.

One of the principles that underlies criminal law and should in turn inform the sentencing process is the need to promote and provide for redress or recompense for the harm done to the victim of the offence. Much of the reform urged in criminal law today, and which these draft proposals reflect, begins with consciousness-raising regarding the victim's needs. This should not be done, however, in such a way as to obscure a more basic principle or rationale underlying restitution. Civil reparation is intended to "settle" a dispute between individual citizens. Criminal reparation, on the other hand, is intended to express the principle of equitable justice as a basic social principle. Restitution as a sanction, in other words, responds to certain societal needs that may be paramount to those of an individual victim. As a civil remedy in a strictly civil context one would look for a precise assessment of quantum. The same cannot and should not be expected of the criminal courts. One of the purposes, and perhaps the main purpose, of reparative criminal justice is to promote and preserve principles of justice. As long as the principle is vindicated, an award for "punitive damages" need not be concerned with the niceties of a specific assessment of quantum. In any event, the assessment of quantum under the proposals is subject to a maximum award, as is currently the practice with English courts, for example, with respect to compensation orders by magistrates. Special damages are similarly subject to the proviso that the loss, damage or injury to be remedied must be "readily ascertainable".

Under the proposals, the court would be directed to consider factors that may affect the offender's "ability to pay". These factors may include information about the offender's employment, financial resources and any other special circumstances in the present or foreseeable future. Not only does this accord with the sentencing principle of proportionality, but it strengthens the sanction as an effective non-carceral alternative.

To ensure the full participation of the victim in the sentencing process and to avoid creating further harm by imposing the sanction at the expense of third parties, the proposals would give the court the discretion to order that notice be directed to the victim or such other person who may have an interest, proprietary or otherwise, in property subject to an order of restitution.

There is a further provision for restitution to be made in an amount or in a manner provided for in an agreement between the victim and the offender. Restitution in such a case may be in the form of unpaid work. This provision provides some flexibility where a restitution order in the form of a monetary award would not be practical. The offender would

have an incentive to enter into such an agreement as it may prove a factor in the mitigation of any other sentence contemplated by the court.

Under the proposals, restitution may be made immediately, or by instalment payments over a period of not more than three years. The purpose of this time limitation on instalments is to avoid burdening the administration of the court, and to prevent diluting the punitive impact of a sentence of restitution.

Where the offender's means would preclude him or her from complying with a sentence imposing both an order of restitution and a fine or a forfeiture order, a further provision would direct the court to give priority to the imposition of the restitution order.

Forfeiture

In attempting to develop new sentencing strategies which involve a greater use of non-carceral sanctions, credible and effective non-carceral alternatives must be developed. They are best developed by directly addressing those aspects of criminal activity in Canadian society today that are of primary concern. In the case of forfeiture, this means attacking what has been recognized as one of the prime motivating factors in crime: profit.

The size of profits generated through organized criminal activity, through illicit drug trade and through other consensual crimes, is enormous and growing. Imprisonment in such a context becomes less of a deterrent when an offender can look forward to the enjoyment of huge profits upon release.

Because the current forfeiture provisions available in the *Criminal Code* are inadequate, an entirely new, general forfeiture scheme has been proposed, dealing with both the instruments of crime and the profits and proceeds of crime. New freezing and seizure powers have been proposed to aid investigations related to the successful application of the sanction. Problems with the onus of proof and the safeguarding of the rights of innocent third parties have been addressed.

The proposed forfeiture provisions cover both property which constitutes the means for committing a crime, and property which represents profits or proceeds of criminal activity, whether such property was obtained directly or indirectly (i.e. the property may have been legitimately acquired with funds which were generated through criminal activity).

Establishing that property has been indirectly realized as the result of the commission of an offence may often involve evidence which does not strictly meet the test of proof beyond a reasonable doubt, but from which reasonable inferences may be drawn as to the origin of the property. The present inability of law enforcement officials to attach such property can only bring the administration of justice into disrepute and derogate from one of the avowed purposes of sentencing: to protect the public by promoting respect for the law through the imposition of just punishment. A rebuttable presumption, therefore, has been proposed. Property shall be deemed indirectly realized as the result of the commission of an offence in the absence of evidence to the contrary connecting such property to legitimate sources of income. The presumption that an increase in the value of property held by an offender was brought about as a result of applying the proceeds of crime could also be rebutted by evidence that such increase arose from extraneous sources (for example, inflation). The danger of an infinite regression in tracing the origins of property as embodied in the concept of "property indirectly realized as a result of the commission of an offence" would be avoided through the application of judicial discretion and the principle of proportionality.

The entire scheme of forfeiture as developed in these legislative proposals presupposes that all investigative efforts to gather evidence in support of a potential forfeiture sanction will have been conducted as part of a general criminal investigation into the offence. Because an accused may thereby be forewarned of the potential consequences of a successful prosecution and seek to dispose or render property immune to attachment, new seizure and injunctive powers have also been proposed.

The injunctive power is in the form of a freezing order. It would be appropriate in cases where the potentially forfeitable property cannot be seized because of physical restrictions or because of its intangible nature. It may involve the appointment of a receiver, especially where larger scale interests may be subject to forfeiture. This would prevent the accused from continuing to profit from his or her business while awaiting trial and would protect innocent third parties who are involved in the business and who would suffer harm if it were simply closed down. It may also involve filing a caveat in the appropriate registration systems of each province for personal or real property. This would thereby put on notice any third party dealing with property subject to a freezing order.

Because the freezing provisions are extensive, several procedural safeguards have been proposed. The application for a freezing order must be made in writing by the Crown, supported by the necessary facts, and

must be heard by a judge. To discourage frivolous and vexatious applications, the court may require as the condition of the order that the Crown give an undertaking with respect to payment of damages or costs arising out of the execution of a freezing order. This would also encourage the Crown to consider the cost-benefit aspect of an order before making the application. While the application for practical reasons is available on an *ex parte* basis, the court may order that notice be given before making such an order. Both the accused and third parties with an interest in the accused's property may seek a review of the order.

Where the accused is convicted and the property or part thereof has not otherwise been dealt with (for example, by an order of restitution) and it is established to be forfeitable property, the proposals provide that the court may order its forfeiture. No formal application would be required on the grounds that, unless the Crown conducts the necessary investigation into the existence of such forfeitable property—which should be part of the general investigation into the offence—and leads evidence at trial or at the sentencing hearing, the court will have no basis for making such an order. The burden of proof on the Crown to establish that property is subject to forfeiture is, under the proposals, the civil burden of a balance of probabilities in keeping with the overall evidentiary scheme of the proposed sentencing provisions. It should be noted, too, that where the forfeitable property is evidence of the commission of the offence itself, and is used as such at trial to establish the guilt of the accused, it is subject to proof beyond a reasonable doubt.

The scope of the new forfeiture provisions is broad and will go a long way in dealing with the profits of crime. It is not, however, designed or equipped to rid Canadian society entirely of organized criminal activity, or to capture all the profits generated through such activities. Experience in the United States with their anti-racketeering legislation (R.I.C.O. – Racketeer Influenced and Corrupt Organizations Act) and its radical forfeiture provision is beyond the scope of these reforms. The American legislation provides extensive investigative tools required to overcome present limits on the possibility of tracing proceeds outside the country and the problems of access to confidential financial information. Finally, it proscribes such activity by making it a new criminal offence.

Fines

In spite of traditional and current wide usage, there are several perceived problems with the fine provisions in the *Code* that either limit or militate against its use as an effective non-carceral option.

The legislative proposals address these deficiencies in a number of ways. Present restrictions on the availability of fines would be removed, so that the court could order a fine as the sentence for any offence, subject only to any minimum penalty prescribed.

The maximum fine the court may impose for summary conviction offences would be increased from five hundred to two thousand dollars for an individual, and to twenty-five thousand dollars for a corporation. The maximum fine for both an individual and a corporation in the case of indictable offences would be left to the discretion of the court, as is the case at present.

One of the most important changes to the fine provisions is designed to reduce the incidence of default. Where the offender has not acknowledged his or her ability to pay a fine, a mandatory means inquiry is to be conducted by the court before the fine is imposed. At present the only mandatory means inquiry in the *Code* arises after default and is only directed to youthful offenders. The inquiry would be conducted not only to determine the appropriate quantum of fine but the terms and conditions of payment as well.

While the means inquiry would be mandatory, the procedure for obtaining information on the offender's financial status would be left in the court's discretion, subject to the rules of procedure proposed for the sentencing hearing. An expeditious method of obtaining information about the offender's financial affairs, however, would be possible through a direction by the court for self-disclosure. Such a direction would probably only be warranted where the offender has considerable financial resources, or is a business or corporate entity, and whose cooperation in an involved financial investigation would be essential. No formal enforcement mechanism is provided for the means inquiry. The offender who fails to obey a direction to disclose his or her financial resources would risk contempt of court charges. In addition, adverse inferences may be drawn by the court, and the offender may lose the benefit of bringing mitigating factors to the court's attention.

Because of the potential for prolonged sentencing hearings, an alternative to a means inquiry is also proposed. The court may direct some other person to conduct such an inquiry and submit a report to the court upon its completion. An official in the court's office would be the most likely candidate, although professional assistance outside the court's administration is not precluded. The Law Reform Commission of Canada, in its Working Paper No. 6, entitled "Fines", recommended that a position in the clerk's office be created to deal with such administrative functions.

Fines could be discharged by an offender (other than a corporation) through participation in a fine-option program, where such programs have been approved by the provinces.

Finally, imprisonment for default in payment would be limited under the proposals to those cases where the default is without "reasonable excuse". This, when viewed in conjunction with the new alternative means of enforcement described below, should result in a lower rate of admissions for default to provincial prisons.

Community Service Orders

Community service orders represent a major non-carceral alternative. It is a sanction that benefits the community in two ways: first, it avoids the significant cost of confining offenders in prisons; and, second, the offender, as part of his or her sentence, is engaged in an activity of direct benefit to the community.

Community service orders are currently available only as a condition of probation imposed under the non-specific residual clause of the probation section. The legislative proposals are designed to give community service orders separate, independent legislative recognition.

The proposed sanction may be imposed on an offender convicted of either an indictable or summary conviction offence and is subject to a maximum of 400 hours. The sentence must be completed within a year from the date of imposition subject to the possibility of the court extending it for a further year. The offender will be given a copy of the order, advised of the terms and conditions of the order and informed of the enforcement provisions. Because this sanction is intended to be used as an alternative to imprisonment, wilful default will lead directly to incarceration of up to two years in cases involving indictable offences, and six months in summary cases. No alternative enforcement mechanism is provided.

Intermittent Sentences

Intermittent sentences stand at the threshold between carceral and non-carceral sanctions. As with suspended sentences, however, an intermittent sentence is currently found under the probation sections of the *Code*.

No major substantive changes are proposed. The sanction has been framed separately, although probation is a mandatory complement to

ensure control over the offender during the period he or she is not incarcerated. Several administrative problems respecting the duration and availability of the sanction are addressed with the proposed provisions.

It is proposed to make the availability of an intermittent sentence subject to several limitations: the sentence of imprisonment must not exceed 92 days; it may only be imposed where there are facilities available in the province for the enforcement of the order; and the period during which an intermittent sentence is to be served should not exceed one year.

The maximum of 92 days is to deal with a common misreading of the current 90 day maximum. Many courts have read and imposed the maximum as a sentence of three months. Sentences of three months intermittent may involve more than 90 days. A 92 day limit would cover any three month period and thereby preserve the sanction from any attacks based on such technical deficiencies.

Unless proper facilities are available there would be serious administrative problems in dealing with intermittent sentences. The availability of such facilities is, therefore, made a condition precedent to the imposition of this sentence.

Variation and Enforcement

If non-carceral sentences are to be priorized over incarceration, they must, as has already been noted, be credible and effective. This can only be achieved through sure and consistent enforcement of the sanctions.

As with the general organization of the sanctions currently in the *Code*, the variation and enforcement provisions appear to be the result of piecemeal design. As well as contributing to the perceived problems of disparity in sentencing, the provisions, as they now exist, may result in the needless use of incarceration.

The legislative proposals provide a detailed variation and enforcement mechanism for all of the sanctions, with the exception of forfeiture. In the case of forfeiture, a variation and enforcement provision is not required because property that would be subject to forfeiture would normally either already be before the court or subject to a freezing order. Breach of the freezing provisions carries its own penalties.

Under the proposals, the terms and conditions attached to any of the sanctions described above may be varied on application by either the

Crown or offender. Substantive aspects of the sanctions, such as the quantum of fine, the number of hours of a community service order, or the number of days of an intermittent sentence, however, would not be subject to variation.

The court may vary the sentence only where the offender or Crown demonstrates a material change in the circumstances affecting the offender's ability to comply with the sentence: that is, a change which may adversely affect the ability of the offender to comply, or an improvement in the offender's conditions permitting more expeditious compliance.

The default provisions include a reverse onus provision. Unless the offender can demonstrate a "reasonable excuse" for not complying, he or she may be subject to tougher, alternate measures. The reverse onus could be met on a balance of probabilities.

The options available to a court in the case of wilful default would include: the ability to vary the terms and conditions of the original sentence; in the case of a discharge or conditional sentence, revocation of the order and imposition of sentence for the original offences; with fines and orders of restitution, orders of attachment of the offender's wages, orders of seizure of the offender's property or a direction that the order be filed as a judgment in the unpaid amount of the order in a Superior Court of a province where it may be enforced through civil proceedings; or the imposition of a term of imprisonment. Like the original sentence, some of these alternate measures may be imposed in combination.

A current provision in the *Code* has been retained which permits the defaulting offender to reduce his or her term of imprisonment in an amount proportionate to the amount of payment of the fine after default. It is further proposed to extend this provision to restitution. This is consistent with one of the objectives of the sentencing reform: to reserve use of imprisonment only to appropriate cases.

Where imprisonment is imposed in default of compliance with the original sentence, the proposals provide that such a term of imprisonment should take effect after any other term of imprisonment currently being served or to be served in the future by the offender.

Imprisonment

The current provisions in the *Code* dealing with imprisonment are to be consolidated, without substantive alteration, in the proposed sentencing

part of the *Code*. These provisions include sections such as section 658 of the current *Code*, which prescribes a maximum of five years imprisonment for any indictable offence which does not specifically prescribe a punishment. The approach of prescribing maxima for individual offences will be preserved. The maxima themselves are to be reviewed by the proposed Sentencing Commission (see below) as to their appropriateness.

Miscellaneous

All the administrative provisions currently in the *Code* dealing with the allocation of revenue generated by the sanctions are also consolidated and included in the legislative proposals dealing with sentencing. No substantive changes are proposed to these sections.

4. Dangerous Offenders

The current dangerous offender provisions are contained in Part XXI of the *Criminal Code*. They were introduced in 1977 as a replacement for the former provisions relating to habitual offenders and dangerous sexual offenders.

Since the enactment of the current Part XXI, there have been 36 successful applications in Canada up until August 1983. In addition, two further offenders were designated as dangerous offenders, but definite sentences were imposed in lieu of the usual indeterminate period authorized by the *Code*. There has been one successful application that was reversed on appeal and six prosecutions that failed altogether, one of which is being appealed by the Crown. It is interesting that 31 out of the 36 successful applications were with respect to primarily or exclusively sex offenders and that 17 of these 31 are from Ontario, where 20 of the total 36 successful prosecutions and all six unsuccessful prosecutions were carried out. Quebec, on the other hand, has seen no Part XXI applications at all, as of August, 1983. This would appear to suggest the same incidence of regional variation as was observed with the former habitual offender provisions, although in that case the law was applied most often in British Columbia's Lower Mainland. Of the 36 fully successful prosecutions, none, as of that date, has been granted any form of unescorted conditional release.

Most of the proposed changes flow from a fundamental realignment in the orientation of the provisions. Whereas the current provisions are explicitly future-oriented both in purpose and evidentiary requirements,

the proposals look back to the nature of the offence or pattern of offences.

With regard to the present provisions, the test for future behaviour runs throughout:

- the offender must be found to be a threat;
- evidence of the threat may be repetitive behaviour showing likelihood of violence "through failure *in the future* to restrain his behaviour";
- evidence of the threat may be specific to one offence such as to show that his "*behaviour in the future* is unlikely to be inhibited"; and
- psychiatric testimony is mandatory and remands for observation are discretionary.

In contrast, the new provisions would retain only the word "threat", implicitly recognizing the link with future behaviour but *without* predicating the application of the sections on its prediction by psychiatrists. The change in orientation reflects the views of many critics, including psychiatrists, that such heavy reliance upon our ability to predict future behaviour at the level of the individual is an unjustifiable leap of faith. The elimination of both the explicitly future-oriented tests and the mandatory requirement for psychiatric evidence would also remove barriers that some contend make the provisions so cumbersome as to be almost useless. Note, however, that removing these mandatory features would in no way preclude the court from seeking or receiving psychiatric or psychological evidence.

A second, related change in the nature of the proceedings results from the reorientation described above. In the current provisions, a successful application results in a finding of "the offender to be a dangerous offender". This is a "status" decision which may result in the imposition of an indeterminate sentence of imprisonment. Because of the mandatory psychiatric evidence, the status is virtually a psychiatric one. The proposals, on the other hand, being oriented to past conduct, bear a closer relationship to the standard model of criminal offence and sanction. Under the proposals, upon being satisfied that the criteria are met, "the court shall impose a sentence of life imprisonment". The emphasis is on punishment, incapacitation and denunciation, rather than on mental health and future propensity. Note also that whereas currently the judge need not impose indeterminate imprisonment even if he or she

finds the offender to be dangerous, a life sentence would be mandatory in the future following such a finding. For these reasons, the proposed provisions are contained in the same part of the *Code* which deals with all other aspects of sentencing, rather than in a totally separate part, as is presently the case.

The proposed changes would also eliminate the tests of "severe psychological damage", "mental well being" and likelihood of "other evil", currently found in Part XXI. As well, no specific mention is made of individual sexual offences. This change tightens and refines the provisions and is in keeping with the emphasis on violent and brutal conduct, sexual and otherwise, that these proposed provisions are intended to address. In focusing on the violent rather than the sexual aspect of such offences, the proposals are consistent with the general philosophy underlying the amendments to sexual offences, enacted in 1982.

The proposals would also introduce a determinate aspect to the sentence by the imposition of a 10-year parole eligibility date. This adds an element of certainty missing from the current provisions and should serve to reassure the public that it is being adequately protected, because any offender found to be dangerous will serve at least 10 years in penitentiary. This provision would replace the current parole review at three years and every two years thereafter, and would parallel similar kinds of provisions in respect of murder and high treason.

There would also be a new notice provision requiring the prosecutor to give notice, before the accused's plea, of the intention to make an application. The purpose of this provision is to protect an accused who might be considering entering a plea of guilty, by giving notice that the Crown will be seeking to have the special dangerous offender sentencing provisions applied. This requirement will complement provisions to be retained from the current part XXI: consent of the provincial Attorney General, and notice of the basis on which the application is made. Full rights of appeal such as those from the current Part XXI would also be retained, but are shifted to the general sections of the Code dealing with sentencing appeals.

5. Sentencing Commission

There remain some concerns with sentencing that cannot be addressed in a comprehensive manner through the foregoing proposed legislative changes to the *Criminal Code*. The numerous anomalies and inconsistencies with respect to current maximum sentences prescribed for each

offence, for example, require further intensive consideration. Many offences carry the same maxima but are of substantially differing degrees of seriousness. Other offences with different maxima are perceived to be similar in all other respects.

Mandatory minimum sentences have been criticized on the basis of their rationale, their effectiveness, and their appropriateness, even though there are very few such provisions in the *Criminal Code*. The issue of their continued or increased use is hotly debated.

Perhaps the most fundamental concerns associated with sentencing, however, relate to information, as was noted throughout Part II of this paper. Perceptions as to what information is relevant and appropriate to the sentencing hearing vary from court to court. There exists very little statistical information to provide the judiciary and the public with an overall view of sentencing practices and trends in general, or in respect of specific crimes or types of crimes. There is almost no information available regarding the effectiveness of various sentencing options. Consequently, the court has no feedback as to whether or not the purposes of sentencing in general are being met, or whether a particular sentence has been effective in an individual case.

The proposed enactment of the purposes and principles of sentencing is aimed at assisting in remedying this lack at a general level. At the level of the individual case, reforms relating to sentencing procedure and evidence will establish the general powers of the court to obtain specific information from pre-sentence, medical and psychological reports.

There remains a gap, however, between the abstract and very general information provided by a statement of purposes and principles, and the very specific information presented to the court relating to the individual offender at the sentencing hearing. Concerns relating to this gap have given rise to suggestions that more structured information be provided to the court at the sentencing stage through some form of guidelines to better inform those involved in the sentencing hearing and the public in general.

Unlike the issues surrounding purpose and principles, procedure, evidence and range of sanctions, these concerns cannot be satisfactorily addressed through immediate legislative change. In order to fulfill the comprehensive mandate of this reform, these concerns must be addressed within the context of an ongoing body that can gather, evaluate and

disseminate information on sentencing, while responding to changes occurring in other areas of the criminal justice system.

It is in this context that a Sentencing Commission is being established by the Government of Canada. In addition to its mandate to investigate and develop model sentencing guidelines and examine maximum and minimum sentences in the *Criminal Code*, the Commission is also to perform a broad function in overseeing and studying the relationship between sentencing guidelines and other aspects of the criminal justice system.

To ensure appropriate consideration of all these issues, the Sentencing Commission is to be composed of nine part-time Commissioners, a majority of whom are to be drawn from all levels of the judiciary. The remaining members are to be individuals knowledgeable and experienced in the criminal justice field. The Commission is also to be authorized to hire the professional and support staff necessary to fulfil its mandate. It will also be open to the Commission to hear from interested members of the public. The Commission is to report to the government on its findings and recommendations within two years.

The role of the Sentencing Commission to investigate and develop model guidelines in the Canadian context is described in greater detail below.

Guidelines

In one sense, sentencing guidelines resemble the informal "tariff" system that judges in some jurisdictions use as a rule of thumb in imposing sentences, especially for very common offences. Tariffs, however, because they are local and vary in different parts of the country, are by no means exhaustive, and cannot serve as a sentencing aid in all cases. A system of guidelines holds out potential for addressing these and other problems, and therefore merits serious consideration.

Because the concept of sentencing guidelines has taken dramatically different forms in various jurisdictions, it is useful to provide some background on the proposal to be studied. The idea of a guidelines approach to sentencing has been developed within the last decade in response to a number of the sentencing concerns discussed earlier. In general, guidelines are an attempt to address the issues of disparity and equity by structuring the sentencing discretion of judges, while at the same time preserving their power to impose the sentence that an individual case may warrant. They thus aim to strike a balance between highly indeterminate systems which are criticized for their uncertainty and disparity and, at

the other extreme, legislated mandatory sentences which are inflexible and cannot respond to relevant differences among individual offenders.

Although there is no specific definition of what a sentencing guideline is, or what form it should take, the key element of the guideline model is that it indicates a sentence, or range of sentences, to the court for particular types of offences and offenders. The judge, therefore, has a very concrete piece of information regarding what *may* be an appropriate sentence for the offender, and can then decide whether it *is*, in fact, the appropriate sentence given the individual facts of the case.

The guideline concept was first developed in the context of the American federal parole system and put into place in 1976 as an administrative aid in deciding when federal offenders sentenced to prison should be released. It incorporated offence and offender characteristics into a guideline in order that parole authorities could advise prisoners shortly after the start of their sentences when they could expect to be released. Because the information used by the parole authorities was largely known to the judge at the time of initial sentencing, it soon became apparent that this type of guideline was applicable to sentencing. Since then, a number of different sentencing guidelines systems have been implemented in the United States.

Guidelines can take many forms, and be implemented in different ways with different effects. Some early experiments used local, voluntary guidelines. At the other extreme, California legislated guidelines directly into their *Penal Code*. Others (Minnesota and Pennsylvania),established by statute a Sentencing Commission with the task of formulating guidelines. They were subsequently approved by the legislature and are now in place, although there are significant differences between them.

Guidelines are not solely an American phenomenon, however. In 1980, the Australian Law Reform Commission recommended the adoption of an advisory guidelines system, and there are indications that this recommendation is viewed with favour by the government.

In the Canadian context, it would seem that guidelines could most appropriately be conceived of as advisory, forming part of an overall effort to provide judges with a better basis of information on which to determine sentences. The development of "indicated" sentences, or ranges of sentences, for generally-comparable cases, would not mean that the judge would lose his or her discretion to determine sentence on the basis of the facts of the individual case in question. Instead, a system of guidelines

would present the court with an approach based on general sentencing practices and trends, in an attempt to assist in identifying the factors most relevant to the case. The judge would not be bound to follow the indicated guideline sentence. Nor, indeed, *should* the judge apply the guideline where individual circumstances relevant and appropriate to the case distinguish it from the guideline sentence. All the guidelines would do is provide the court with a structured sentencing aid as a reference point.

Because there are numerous philosophies and varieties of guidelines, the Sentencing Commission is being requested to investigate systems already in place or currently being developed before drafting model guidelines for Canadian use. The Commission will also suggest means for their implementation and ongoing revision and evaluation, an essential part of any guidelines system. Since it is quite possible that different kinds of offences may require separate guidelines, these questions are also within the scope of the Commission's work. The Sentencing Commission will not work in a philosophical vacuum, but rather will be guided by the fundamental principles and purposes of sentencing discussed earlier.

In view of the knowledge and experience that will be gained from its study of existing guidelines systems, the Commission has been asked to address the question of the relevance of various offender characteristics, such as personal attributes and criminal record, and, if relevant, to decide what weight they should carry in sentencing.

It will also need to rank offences in order of seriousness to a far greater degree than is done in the current *Code*, which merely has broad bands of maximum sentences. As a further consequence of the legislative proposals in respect of dangerous offenders, the Commission's consideration of this subject should also encompass study of the offences currently carrying the possibility of life imprisonment. There are some two dozen such offences, as was noted earlier. Since the basic rationale of the proposed provisions relating to dangerous offenders is to deal with what are, in effect, the most serious instances of serious personal injury offences, it may be advisable to re-examine the life "band" with a view to lowering the maximum for the "normal" case to, say, 14 or 15 years. This would allow for a clear distinction to be drawn between such "normal" cases of these offences and the seriously brutal and violent cases which form the basis for public concern, and which are the focus of the proposals regarding dangerous offenders.

The life "band" currently includes a number of offences which would not qualify as serious personal injury offences, and the Commission would have to examine these offences carefully to see whether they merit the possibility of life imprisonment. It might be noted that lowering the maximum to fourteen years for all those offences now carrying that possibility (except murder, where it is mandatory) would bring the law into line with sentencing practice, in that more than 95% of all sentences of imprisonment for such offences do not exceed fourteen years. This figure arguably includes the "most serious case" which would be dealt with under the new dangerous offender provisions (if the offence is a "serious personal injury" offence), and does not include the large majority of offenders sentenced for such offences who are sent to provincial prisons (with sentences of less than two years), or given non-carceral sentences (for such offences as breaking and entering a dwelling, which now carries the possibility of life imprisonment).

Another important set of issues that the Commission will address relates to imprisonment. It is important that any guidelines specify when imprisonment would be proper. For those categories of offences and offenders for whom imprisonment is indicated, the Commission is being asked to make a recommendation as to the length of such a sentence.

As the case law indicates, there exists a large number of circumstances relating to individual cases that in some cases aggravate, and in some cases mitigate, sentence. The Commission will indicate a non-exhaustive list of such factors and decide what sentence variation from the guidelines may follow a finding of either aggravating or mitigating circumstances.

The Commission is also being mandated to examine the relationship between sentencing guidelines and other aspects of the criminal justice system, to ensure that an attempt to structure discretion at one point in the system (sentencing by the judge who hears the case) does not adversely affect other points. For example, police, prosecution, prison authorities and parole officials all exercise discretion which may affect the length of a sentence. In devising and implementing guidelines, it is therefore important to take a broad view of sentencing. Care must be taken not simply to shift discretion inadvertently from judges to the prosecution through enhanced plea bargaining opportunities. Similarly, the impact of discretionary decisions in respect of parole and remission have to be taken into account. To treat discretion and sentence disparity narrowly as only a judicial problem would be to overlook the variety of sources of discretion in the current system, and might result in changes

more apparent than real. It would also single out that part of the current system, judicial discretion, that is the most open and accountable.

For these reasons the Commission is also being asked to advise on prosecutorial discretion in the area of plea negotiation and the parole and remission provisions of the *Parole Act* and the *Penitentiary Act*, as these subjects relate to sentencing guidelines.

6. Related Issues

The discussion of the mandate of the Sentencing Commission clearly identifies the need to consider the linkages between the formal sentencing decision made by the court and a number of other decisions in the context of the criminal law process.

It is crucial that these mutual relationships be borne clearly in mind because, as the Law Reform Commission of Canada pointed out in 1976:

> The place and nature of judicial sentences can...only be understood in the light of dispositions preceding trial as well as subsequent dispositions. There are many points of decision in the criminal process, some of which have had low visibility quite out of proportion to their importance. Before trials there are decisions by citizens to call the police, by the police to lay charges, by the prosecution to proceed and in which way; following sentencing, important decisions are made by probation officers, prison officials and parole boards. There is often confusion both by individuals and agencies in this process concerning their roles and mutual expectations.

The point made by the Law Reform Commission is clearly embodied in the very process established to carry out the Criminal Law Review. Just as the Law Reform Commission itself divided the area of substantive and procedural criminal law into smaller sets of subjects in order to allow for a series of mutually-connecting recommendations to be made, so too has the Criminal Law Review process been established in such a way that discrete and definable elements of the law may be identified and worked upon in an independent, but coordinated fashion. For its part, the Law Reform Commission will work at Phase I of the review process on some fifty individual projects. At Phase II, the Government—in cooperation with the provinces—will analyze the findings and recommendations of the Law Reform Commission and present proposals to Parliament in logically-connected policy groupings, to enable the coordinated and timely implementation of the review process.

The process itself is set up to ensure the comprehensiveness, consistency and coherence of the overall result of the review by forging the necessary

linkages between projects. The implications of action in a particular area for other connected areas is a key consideration in the planning and coordination of the various projects.

The mandate being given to the Sentencing Commission, referred to above, ensures that the necessary linkages are made between the question of guidelines, maximum and minimum sentences, and the pre- and post-sentencing issues of chief importance to the sentencing decision itself.

In the broader context of the Criminal Law Review as a whole, the subjects of pre- and post-sentencing decision points are being addressed in various projects. The question of discretion and its control, as is pointed out in *The Criminal Law in Canadian Society*, is a major issue of relevance to a number of stages of the process. It is in this context that police discretion, Crown discretion, and correctional administrative discretion will be addressed by other projects. For example, the Phase I work on police powers has resulted in the recent publication of a report and a working paper by the Law Reform Commission, following up on publication of earlier studies on various aspects of this important subject. It is clear that much public discussion will be required in the coming months and years on the issues raised in the context of these and other reports on this subject, as conclusions and recommendations are determined. The same comment applies to ongoing work on the subject of the powers of Attorneys General, a project currently at Phase I of the review process. It should be noted, as well, that the very broad legislative proposals being put forward by the Government at this time contain a number of provisions related to the procedure at trial, and the rights of the accused at trial, which have a relationship to and impact upon sentencing.

Recognition of this relationship takes into account the point made by the Law Reform Commission that the criminal law process must be viewed as a system of mutually-interacting elements, rather than as a set of independent decisions. Similarly, work at Phase I on the subject of corporate criminal liability will require further consideration to be given to the subject of corporate criminal sanctions and sentencing. This is why there is relatively little mention made in the current legislative proposals of this subject, apart from some fairly minor amendments regarding the maximum fine for summary conviction offences and the availability of probation and pre-sentence reports in cases of corporate offenders. By the same token, the manner in which the criminal law deals with mentally disordered individuals is a subject raising important issues at several stages of the process. The Law Reform Commission has also completed

work in this area, and the government is currently engaged in a major Phase II project related to all aspects of this subject.

With respect to the administration of sentences imposed by the courts, and conditional release of inmates sentenced to terms of imprisonment, a special word is necessary at this point. The Law Reform Commission, in its 1976 report, recommended that the *Parole Act* be repealed, and the Parole Board replaced by a Sentencing Supervision Board "vested with authority to carry out the sentence of the court and to make decisions necessary for meeting the purpose of the sentence." The rationale advanced by the Law Reform Commission for this recommendation was that "release from prison is...no longer one single decision such as underlies the concept of parole. A series of important decisions have to be made throughout the course of the sentence."

The Government is not at this time proposing legislation with respect to this recommendation. The entire subject will be considered in the context of the Corrections Law Project of the Criminal Law Review, which is embarking on a first round of consultations over the winter and spring of 1984. In the course of this project, a number of major issues have been identified with regard to the linkage which does and should exist between the sentencing decision of the courts, and the implementation of that decision following pronouncement of sentence.

The course of action proposed now by the Government with respect to sentencing legislation will be a central consideration in all these other Criminal Law Review projects, including the project concerned with corrections law. There can, of course, be no real question that sentencing and conditional release programs are closely linked. Under the present system, the precise amount of time served by an incarcerated offender is determined by a combination of decisions made by the sentencing judge, correctional authorities who administer remission programs, and parole authorities. The judge sets the maximum sentence, and the law fixes the date at which an offender serving such a maximum sentence will be eligible for parole. Parole authorities decide whether or not an offender will in fact be granted a parole release on or after the eligibility date. Remission of sentence for good behaviour is also established by law, and is granted or withheld by institutional authorities up to a limit of one-third of the sentence. For those refused parole, the amount of remission earned or lost on the basis of behaviour in the institution determines how close the actual date of release is to the end of sentence.

Thus, the present system provides for three principal authorities to be involved in determining the actual time served in prison prior to initial release. To ignore considerations of early release in a discussion of custodial sentencing is thus to deal only with part of the reality of sentencing in practice.

It is clear that, among some members of the public, it is highly controversial that any means whatsoever should exist for altering the sentence once it is pronounced. For many of those holding this view, it seems evident that concerns surrounding early release focus on the violent offender alone.

In law and in practice, sentencing judges are independent of programs to release an offender from imprisonment before the expiration of the warrant of committal. The common law forbids a judge from considering, when setting the sentence in an individual case, the possibility that the offender will receive parole. On the other hand, most judges are aware of the workings of parole and remission, and acknowledge that prison sentence lengths both are and should be influenced in part by an understanding of the overall impact of such release programs.

For its part, the Government is convinced that there must continue to be some system providing for conditional release from sentences of imprisonment. There has been some system providing for such release in Canadian law (quite apart from the executive or royal prerogative of mercy) since 1868, and the reasons that programs such as remission and parole have survived to this day are still relevant and compelling.

First, the existence of some system of early release fulfills the humanitarian and very practical function of providing hope to imprisoned persons who might otherwise have none. Especially for those prisoners serving lengthy sentences, to deprive them of all possibility of some kind of release from prison is both cruel and dysfunctional. The chance of release encourages prisoners to take an interest in their own welfare, and to apply themselves in ways which may be positive and constructive.

Second, humaneness and common sense dictate that some possibility be provided for relief from the conditions of sentence in cases where there has been a genuine change in the offender or in the circumstances relevant to his or her incarceration. For example, some offenders may, following incarceration, genuinely repent or make changes in their lives which alter their risk to the public, or which alter the public's interest in seeing them so severely punished. Many such examples exist.

Third, provision for early release is an incentive to good conduct in prison, and can assist markedly in the control of prison populations. This aspect must not be discounted, given the already difficult task assigned to those responsible for ensuring the security of correctional institutions.

Fourth, early release can, through the provisions of flexibility in the choice of the best time and method for conditionally releasing an offender, assist in the reintegration of the offender in the community. Generally, some period of decompression from the unnatural and restrictive environment of the prison is useful both to the offender and to society, and is much preferable to releasing the offender without control, supervision or assistance in the community only at the time the sentence expires. It must be remembered that almost all of those sentenced to a term of imprisonment will be back on the street one day, if only when their sentences expire - and it is only common sense that an effort be made to ensure that they will not, by virtue of lack of preparation prior to their final release, pose a further or even greater threat to the society into which they are being released.

Though not all these objectives are applicable in all cases or for all offenders, their relevance and importance must be recognized to continue to exist as legitimate purposes served by a system or systems of early release.

As was mentioned earlier, the Sentencing Commission will bear in mind the existence of release and remission in its deliberations concerning any system of guidelines it may choose to recommend. It will remain cognizant of the finite capacities of prison systems to house offenders, and will plan accordingly and with reference to the existence of early release.

The Corrections Law Project of the Criminal Law Review will deal with the many questions which remain regarding the criteria to be applied in making release decisions, the nature of the body or authority which should make release decisions, and the various aspects of how release should operate—how much of the sentence it should be allowed to affect, and in what way; what programs of treatment or supervision it should encompass; what safeguards it should include for protecting the rights of the public and of the offender; and so on.

These two initiatives, the Sentencing Commission and the Corrections Law Project, will also need to maintain a close liaison since the nature of their work is in some aspects so closely connected.

IV. CONCLUSION

Consideration of sentencing reform in Canada began following the report of the Ouimet Committee in 1969. The Law Reform Commission produced a number of studies and working papers, culminating in the 1976 publication of its report on "Dispositions and Sentences in the Criminal Process". This work provided both a philosophical approach and a set of specific recommendations.

The principles set out in *The Criminal Law in Canadian Society* served as a framework for the development of the proposals being put forward by the Government at this time, in light of the goals of the Criminal Law Review, which focus on establishing and maintaining public confidence in an effective, equitable and understandable criminal law and criminal justice system, and recognize the need for legislating more coherent and flexible sentencing provisions in the *Criminal Code*.

Public Understanding and Support

As was emphasized in *The Criminal Law in Canadian Society*, it is not so much the laws nor even the agencies of the criminal justice system that have the major impact on creating a just, peaceful and safe society. Rather, it the attitudes and behaviour of individual citizens. The understanding and support of the public is essential to any reform process, and it, in turn, relies on the availability of accurate and clear information regarding the workings of the criminal justice system in general, and sentencing in particular.

Currently, little exists in the way of systematic information about sentencing practices in Canadian criminal courts. This lack of information and lack of clearly stated sentencing policies and principles has left the public with legitimate concerns about the kinds of sentences currently imposed by the courts. The perception that offenders who have committed similar offences in similar circumstances receive very different sentences only magnifies this concern.

Reference to the current sentencing provisions in the *Criminal Code* would provide little assistance to those seeking more information about

the fundamental principles, objectives and factors underlying sentencing. In fact, the *Code* provides little guidance to our judges, who are faced daily with the difficult task of making decisions regarding the liberty of those individuals who appear before them.

Proposed Legislation

In response to issues and concerns regarding the effectiveness, equity and clarity of the laws relating to sentencing, the Government of Canada is proposing the fundamental reform of sentencing law. The legislative proposals, complemented by the creation of an independent Sentencing Commission, represent a major consolidation, expansion and reordering of sanctions in the *Criminal Code*, and represent the most significant sentencing reform since the *Code* was enacted in 1892.

The legislation proposes a statement of purpose and principles—unprecedented in the *Code*—to give a clear indication of Parliament's view of the philosophy underlying, and approach to be taken to the determination of a "fit" sentence. The range of sanctions the legislation proposes to make available to the courts is rationalized, clarified and expanded. The role and needs of victims of crime are given clear recognition and emphasis. Tough new sentencing alternatives are provided to deal effectively with offenders without having to resort to imprisonment when that is not necessary. Particularly brutal and violent offenders are to be dealt with severely, through a fundamental reorientation of the current provisions of the *Criminal Code* dealing with dangerous offenders. Rules of evidence and procedure are enunciated—again for the first time in the *Code*—to give the courts the powers and information they require to carry out the demanding task of determining an appropriate, fair and effective sentence.

The Government clearly recognizes the close relationship between the issues on which it is now proposing legislative action, and a host of other criminal law and criminal justice issues affecting and affected by the sentencing decisions taken by the court. To ensure consistency, completeness and coordination in the manner in which these issues are addressed, the Government has therefore established the appropriate linkages among the relevant projects being undertaken by the Criminal Law Review, as well as with the Sentencing Commission.

Taken together, the proposals put forward by the Government constitute a clear, consistent and comprehensive approach to one of the most, central, visible and significant aspects of criminal law and criminal justice.