LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

PUBLIC AND PRESS RESPONSE

TO

SENTENCING WORKING PAPERS

- 1976 -

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SENTENCING WORKING PAPERS

Prepared by
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INTRODUCTION

The following pages are an attempt to summarize the public response that we have received to our four working papers in the area of sentencing and disposition, both by the public in general and by the press. Several organizations and individuals sent briefs to the Commission and these have been briefly summarized. Copies of these briefs are also included as appendices. The names of all individuals responding have been excluded from this report.

We received the most response to our first paper on The Principles of Sentencing and Dispositions, and very little on Diversion. However, many of the responses to the first paper included comments on diversion.

Generally, as far as response from the public is concerned, 62% were in favour of our proposals, 9% against, and 29% had mixed feelings. Of the responses that we received from the press, 11% were general and gave no opinion, 59% were in favour of the proposals, 23% were against, and 7% were mixed. The most response that we received against one of our proposals were those concerning imprisonment - 44% of the press reactions were against our proposals.

Explanation of Codes

The codes were used merely to simplify counting the numbers of responses. The first number in the code is that of the working paper (i.e. 3 - Working Paper #3, The Principles of Sentencing and Dispositions). The letter A is used to signify that it is a letter response - not a newspaper article. The second number is used to count the number of responses received. For example, on page 14, 3A-37 indicates that it is a letter on The Principles of Sentencing and Dispositions Working Paper, and chronologically it was the 37th response received.

TABLE OF RESPONSES

INDIVIDUALS

Category	Positive	Negative	Mixed	Total
Laypersons	2	0	2	4
Judges	2	4	7	13
Lawyers	3	2	1	6
Educators	1	0	1	2
Probation Officers	2	0	0	2
Social Worker	1	0	0	1
Doctor	0	0	1	1
	11	6	12	29
GROUPS	8	0	0	8
	19	6	12	37

(Released March, 1974)

RESPONSES TO WORKING PAPER BY LETTER

3A-1 LAYPERSON

(1) law reform should concern itself with elimination of present system's inequities;

(2) elimination of poverty would diminish criminal tendencies;

(3) major criminal acts should be considered an illness;

(4) incarceration often does more harm than good since people are inclined to adopt the character of their environment;

(5) generally in favour of restitution, not imprisonment.

3A-2 JUDGE

strongly disagrees with reforms suggested in paper, particularly in area of diversion, and also sentencing.

3A-3 JUDGE

(1) challenges our view that only a few of those engaged in theft are caught and feels that we should make punishment more severe for those who are;

(2) reconciliation ignores the physical and psychological affect on the victim. Impossible to pay with money some of the damage that has been done. Restitution is a good idea in some cases. While a subductive idea, in practice it would be ineffective;

(3) reduction of sentences - imprisonment is now only used as a last resort; first offenders are never sent to jail;

(4) release procedures lead to abuse - agrees with our comment;

(5) present system of parole is not controlled and not structured;

(6) need for fundamental change in this system;

(7) need more human science research into the area;

(8) uniformity of sentences - forget that we are dealing with the individualization of crime, and punishment, and not with a general approach; pre-sentence reports are used to individualize sentences;

(9) better to use judge to reflect views of community than to use the public;

(10) feels that we are very liberal about crime.

3A-4 JUDGE

(1) takes exception with why in a free society it is necessary to tolerate a certain amount of crime;

(2) difficult to reconcile tolerance for the criminal with the interest of society;

(3) includes a list of suggestions that should be advanced in sentencing.

3A-5 JUDGE

(1) agrees with proposal of diversion in minor cases;

(2) feels that judges do not have comprehensive ideas of why individual appears in court; doesn't follow-up to find out what happens to an individual as a result of their sentence and therefore has no experience on which to base the "common sense" attributed to them by the paper;

(3) feels it is essential sometimes to take a few days to discuss an offender with probation officers, medical doctors and other experts before deciding on suitable sentence for an offender;

(4) agrees that judges should have more contact with the community.

3A-6 JUDGE

(1) gives example of system in Greenland;

(2) cannot see Sentencing Boards as doing anything but prolong and confuse;

(3) Crown must always be one of the parties;

(4) request that special problems encountered in the Northwest Territories not be lost sight of - some of the suggestions would be unworkable in that jurisdiction.

3A-7 LAWYER

(1) in general agreement with basic principles set out in paper;

(2) feels that sentencing is the most difficult function of a judge.

3A-8 JUDGE

(1) in agreement with proposals of paper;

(2) questions effectiveness of restitution by offender to victim;

(3) feels that participation by lay persons in sentencing process would be valuable, if it was done on a rotation basis; if panel remains static, it would suffer the same infirmities as present disposition by single judge.

3A-9 JUDGE

(1) agrees with approach being taken;

(2) lack of psychiatric services one of the greatest shortcomings in our system;

(3) should be community involvement or a provision or opportunity for judges to be kept aware of community attitudes towards sentencing;

(4) would be in favour of conferences every two or three years for discussions of sentencing;

(5) would be beneficial for judges to have statistics or follow-up reports to indicate to what extent the sentence he imposed on an offender has operated to his benefit;

(6) if judges do not receive information on the adequacy of the sentences they impose they do not have any experience upon which to call when imposing further sentences.

3A-10 LAWYER

(1) in general agreement with principles stated in paper;

(2) restitution should encompass all situations and be enforceable in practice.

3A-11 JUDGE

(1) proposals familiar through Juvenile Court practices across Canada;

(2) substantial criticism in many communities of pre-trial intervention;

(3) whole system of diversion and intake would be more involved, confusing and costly and more open to abuse;

(4) feels diversion invites corruption to the whole process; not in a monetary concept;

(5) thinks discretion should be diminished - not widened;

(6) does not feel that appearing in court is a bad experience.

3A-12 JUDGE

(1) completely against diversion as alternative to trial;

(2) restitution should not be used as an alternative to punishment;

(3) feels if diversion was to be widely used, victims might be threatened with violence and would thus not report the crime;

(4) should be provision for continuing education for judges and magistrates regarding sentencing and resources available for rehabilitation;

(5) would like to see further investigation into the concept of community involvement in sentencing.

3A-13 LAYPERSON

(1) agrees in general with many comments in paper;

(2) believes proposals, if implemented, will upgrade the present judicial system;

(3) proposals should be implemented gradually.

3A-14 PSYCHIATRIST

(1) the sentencing court should be obliged to take into account treatment needs prior to sentencing;

(2) sentencing should be based on appropriate principles of sentencing and not on treatment needs per se;

(3) consent is necessary for treatment programmes.

3A-15 SCHOOLTEACHER

(1) supports document;

(2) treats with dignity those unfavoured by society.

3A-16 PROBATION OFFICER

(1) agrees wholeheartedly with objectives in report;

(2) difficulties arise when restitution is part of a probation order;

(3) restitution by offender to victim seems very good idea;

(4) victims of crimes often wait too long for restitution;

(5) in favour of promoting uniformity of sentences;

(6) particularly approve of suggestion for lightening load on lower courts by diversion and out-of-court resolution of conflicts.

3A-17 LAW STUDENTS

sent copy of thesis "Notes Towards the Development of a Rational Sentencing Policy" prepared in 1972 at the University of Toronto.

3A-18 LAYPERSON

(1) incarceration is ineffective tool both for offender and society;

(2) Canadians are adverse to change; would probably accept stiffer penalties;

(3) agrees with proposals suggested in paper.

3A-19 CIVIL LIBERTIES ASSOCIATION

(1) necessary to change attitude with regard to prisoners;

(2) necessary to denounce abuses of discretionary power;

(3) necessary to respect rules of natural justice and prisons;

(4) necessary to have judges who are in charge of prisons;

(5) creation of visitors committee a good idea;

(6) pre-sentence report cannot be a routine affair by a probation officer;

(7) generally favourable to paper.

3A-20 JUDGE

(1) thinks it is an excellent paper;

(2) people concerned in crime prevention tend to become preoccupied with the criminal group - which is only a fraction of one percent of our population; this results in a danger in the rehabilitative schemes to bring society generally down to the level of the undisciplined rather than vice versa; this is the real danger in proposals since if the offender is not properly controlled he may tend to spread his particular type of poison to others in the community;

(3) courts do disservice to public and criminals by placing the criminal on suspended sentence;

(4) sympathize with most offenders, particularly the young, but we must ensure that the risks we take to bring them back into society are justifiable.

3A-21 LEGAL RESEARCHER, CENTRE OF CRIMINOLOGY - See Appendix II

(1) onus should be on official to justify imprisonment;

(2) must meet criteria before imposing imprisonment;

(3) opposed to sentencing boards;

(4) opposed to indeterminate sentences, need for judges to be informed about advances in social science and correctional research.

3A-22 PROBATION OFFICER

(1) state is in a better position to collect restitution;

(2) victims should receive compensation from the Crown - Crown should then attempt to collect restitution from offender.

3A-23 LAWYER

(1) does not believe imprisonment rehabilitates or deters offenders;

(2) alternatives to imprisonment should be given more consideration, and be formulated into our criminal law;

(3) should consider present and future penal policies of Solicitor-General's - who is planning to build several new institutions;

(4) suggestion that prisons should be abolished altogether (Jessica Mitford: Kind and Unusual Punishment) is worth considering;

(5) if Solicitor-General goes ahead with building new institutions we will have lost the opportunity to discuss alternatives to imprisonment for another fifty years.

3A-24 JUDGE

(1) severity of sentence is important part of punishment - would like to see it dealt with in more detail;

(2) where general deterrence is the chief consideration in length of sentence it might be useful for judges to know the range of sentences for a particular offence across Canada.

3A-25 LAWYER

(1) feels that the Commission's opinion of "elaborated" trial is not justified;

(2) disparity of sentence may better be corrected by a more intensified continuing education program for magistrates;

(3) doubts if codification will help judge in sentencing decisions.

3A-26 SOCIAL WORKER

(1) impressed with paper;

(2) feels that providing the victim with a role in the criminal justice system and requiring offenders to undo wrong as part of sanction are both very useful concepts;

(3) agrees that process of conciliation and negotiation can be used with non-dangerous offenders;

(4) hopes the paper will become a basis for public policy in Canada (and hopes U.S. will follow suit).

3A-27 LAYPERSON

(1) generally in agreement with proposals in paper;

(2) feels Commission should suggest adequate resources be made available for provision of social work input in diversion and sentencing;

(3) in favour of providing work for offenders in order that they may make restitution;

(4) restitution could thus serve to reduce a prison sentence, providing incentive;

(5) recognize the need for tolerance but not necessarily approval of deviant behaviour.

3A-28 CHURCH ASSOCIATION

commends the study and gives general support to the principles in it that reflect a Christian concern for reconciliation and restitution.

3A-29 JUDGE

(1) compensation for victims very good idea;

(2) agrees with mandatory requirement of written reasons for every custodial sentence;

(3) agrees that community should somehow be involved with sentencing, but feels experimentation is necessary to find out how;

(4) feels more research necessary on "supervising the execution of the sentence".

3A-30 JUDGE

(1) pre-trial diversion already practised by some police in matrimonial problems;

(2) requires approval of superior and experienced officers; greater availability of social services;

(3) mutual victim-offender consent necessary in diversion;

(4) some element of "privilege" is necessary in diversion proceedings to protect accused;

(5) in some areas judge may be in best position to order diversion;

(6) restitution should be used more frequently.

3A-31 LAWYER

(1) generally critical of paper;

(2) recommends more discussion on sentencing methods and reasons in first papers;

(3) firmly believes in deterrence and argues that it is proved effective.

3A-32 ELIZABETH FRY SOCIETY OF KINGSTON

(1) in general agreement with position outlined in paper;

(2) favours use of sentencing boards;

(3) treatment services, etc., should be equally available to all despite differences in background of offenders;

(4) Society will set up a committee to study the feasibility of a diversion programme and alternatives to sentencing in the Kingston area;

(5) recommend an intensive public education programme to tell of problems faced and how public can assist in search for acceptable alternatives to the present system;

(6) agree with uniformity of sentencing, but judges should have discretionary powers;

(7) citizenship participation on advisory committees to judges could be valuable at pre-trial and sentencing levels.

3A-33 LAY ASSOCIATION

(1) very thoughtful and well-reasoned paper; strongly approve and support work done by Commission;

(2) support uniformity of sentencing; especially written reasons for decision;

(3) urges Commission to recommend legislation repealing all laws against crimes without victims.

3A-34 FAMILY ASSOCIATION

(1) support inclusion of proposals in Criminal Code;

(2) actively support principle of diversion in domestic conflicts;

(3) should be mutual consent between victim and offender and dispositions should be recorded;

(4) recommend pilot projects be established and assessed in a variety of communities across Canada.

3A-35 ELIZABETH FRY SOCIETY OF OTTAWA

(1) agree with Commission that present methods of sentencing are of questionable value to the offender and to society;

(2) alternatives proposed sound more humane, less destructive to individual, and less expensive to tax payers;

(3) experience of members of Society in operation of halfway house bear out advantages;

(4) those in prison should be given every opportunity for education, vocational training and other rehabilitative measures, not only for their own sake but also for the benefit of society as a whole;

(5) people should be encouraged to visit prisons;

(6) sentencing institutes and guidelines are a good way of reducing discrepancies;

(7) welcome suggestions for more involvement and volunteers;

(8) pilot project on citizen participation and sentencing;

(9) principle of compensation should be mandatory.

3A-36 LAYPERSON

(1) supports idea that the legal system ought to ensure that equal treatment is received by people in similar circumstances whether they are rich or poor, young or old, influential or not;

(2) diversion of minor criminal cases to mediation and conciliation procedures is a very good idea as well; persons put on diversion should not be allowed to drop out and courts should be responsible for their conduct;

(3) rights of the victim ought to be recognized by a good legal system and offender should pay compensation; if not society as a whole ought to be able to do so.

3A-37 ELIZABETH FRY SOCIETY OF TORONTO

(1) in general agreement with proposals;

(2) existence of Commission is very encouraging;

(3) pleased to see how attitudes have changed over the years;

(4) feel victim-offender confrontation could act as an effective deterrent;

(5) indicate concern over role of victim in some cases;

(6) feel community input in dispositions would be very helpful and welcome expansion of their role;

(7) financial support for experiments in alternatives to imprisonment would be very helpful;

(8) disagree with idea of citizen participation in sentencing;

(9) feel it would have a considerable deterrent effect if new proposals were widely publicized in schools and elsewhere before they were effected.

TABLE OF RESPONSES BY PRESS

Category	General	Positive	Negative	Mixed	Total
Articles	2	6	1	0	9
Editorials	0	8	1	1	10
Letters	0	3	0	0	3
	2	17	2	1	22

RESPONSES TO WORKING PAPER BY PRESS

3-1 Article, Toronto Star - March 27, 1974

supportive (favourable to proposals)

3-2 Article, Toronto Star - March 27, 1974

general

3-3 Editorial, Globe and Mail - March 28, 1974

favourable; restitution an approach worthy of debate.

3-4 Editorial, Sudbury Star - March 29, 1974

(1) paper is hedged in generalities;

(2) public attitudes not likely to favour changes which appear to relieve offender of deserved punishment;

(3) Commission must bring forth the rest of its arguments; set out formal recommendation: primarily statement that change for the sake of change has no part in proposal;

(4) know present system does not work well - why believe something softer will do any better.

3-5 Editorial, Windsor Star - March 30, 1974

supportive - changes recommended are radical in their implication, but long overdue.

3-6 Editorial, Montreal Gazette - March 30, 1974

(1) overcrowded prisons witness sterility of traditional ideas of punishment and rehabilitation;

(2) amazing that we have been able to pretend for so long that a man can be taught the ways of a free society by being put in a cage;

(3) if we adopt this approach we shall go far to free overburdened criminal justice system to do what it should be doing - protecting society from violence and depredation.

3-7 Editorial, Hamilton Spectator - March 30, 1974

(1) merit in recommendations but it raises serious questions about the effectiveness of a major revision in the judicial process and on public attitudes;

(2) would mediation turn into an ineffectual but expensive debating league?

(3) would recommendations help create respect for the law?

(4) present system should not be turned upside down until society can be fairly certain its successor will do a better job;

(5) first objective should be protecting people and property.

3-8 Editorial, Thunder Bay Chronicle Journal - March 30, 1974

(1) favourable;

(2) punishment is best left up to judge;

(3) questions reality of proposed increased victim role.

3-9 Editorial, Sault Ste. Marie Star - April 4, 1974

(1) in favour of restitution;

(2) questions whether victim should be involved in deciding upon form restitution should take;

(3) should be deeper explanation of recommendations offered by Commission for them to take on the shape or acceptable and feasible reforms of the Criminal Code.

3-10 Article, Port Hope Guide - April 4, 1974

summarized paper and urged comments be sent to Commission.

3-11 Editorial, The Ryersonian (Toronto) - April 5, 1974

(1) favourable to proposals;

(2) may find out if the old saying "hard work builds moral character" has any truth in it.

3-12 Letter to Editor, Globe and Mail - April 5, 1974

supports recommendations

3-13 Editorial, Owen Sound Sun-Times - April 9, 1974

(1) Commission has performed its task (of research and reform of Canadian law) well;

(2) obviously "old methods" have not worked because we still have crime;

(3) Commission is doing what it was set up to do, examine new methods to deal with people who break laws, with a view to fairness to offender and society which the laws are designed to protect.

3-14 Article, Moncton Transcript - April 20, 1974

favourable - reprint of editorial of March 20, 1974 in the Globe and Mail.

3-15 Editorial, Calgary Albertan - April 20, 1974

supportive of Commission's position; comparing it to the Alberta Kirby Commission.

3-16 Article, Muenster Prairie Messenger - April 28, 1974

supportive of Commission's position, relating it to support for expanded parole releases proposed by National Parole Board.

3-17 Article, Oshawa Times - May 8, 1974

by President, Oshawa Branch Canadian Consumer's Association, supporting proposals.

3-18 Letter to Editor, Toronto Star - May 16, 1974

supportive of position of Commission.

3-19 Article, Winnipeg Tribune - May 24, 1974

reprinted from Windsor Star of March 30, 1974; supportive.

3-20 Article, Montreal Star - September 13, 1974

interview with William Outerbridge, including summary of paper, indicating his support of proposals.

3-21 Letter to Editor, Hamilton Spectator - January 8, 1975

response to editorial, expressing support of Commission's proposals.

3-22 Article, Calgary Herald - February 7, 1975

article on sentencing patterns in courts, mentioning proposals of Commission and expressing doubt as to their feasibility.

TABLE OF RESPONSES

INDIVIDUALS

Category	Positive	Negative	Mixed	Total
Laypersons	5	1	0	6
Lawyers	0	1	3	4
Educators	1	0	1	2
Probation Officers	0	1	1	2
Social Worker	1	0	0	1
Doctor	1	0	0	1
Inmate	1	0	0	1
Judge	1	0	0	1
	10	3	5	18
GROUPS	4	0	1	4
	14	3	6	23

(Released November, 1974)

RESPONSES TO WORKING PAPERS BY LETTER

6A-1 LAWYER

(Enclosed two articles from "The Banner" of November 8 and 15 - "Is Crime A Punishment")

6A-2 LAYPERSON

(1) some parts of paper should be made into law;

(2) must take preventative steps now to help teenagers of tomorrow;

(3) laws of Canada seem to be hanging in limbo; Commission seems to be the only hope we have to change things for the better;

(4) police, schools, probation officers, welfare department could work together to help youth of today.

6A-3 LAYPERSON

(1) system of fines is being studied in Belgium, but it is very difficult to apply;

(2) formalities necessary to fix tax aspect - may be disproportionate to the importance of affair.

6A-4 SOCIAL WORKER

in agreement with position of attempting to elevate the role of restitution in criminal justice system.

6A-5 LAWYER

would like to see victims of fraud covered by restitution order - large numbers of old people are duped every year.

6A-6 PROBATION AND PAROLE OFFICER

(1) praises paper except for its treatment of probation;

(2) regards statement "probation as an additional penalty for offenders requiring community supervision" as the lowest level of probation and the least desired type of officer-offender relationship.

6A-7 LAYPERSON

(1) discussion of compensation is first rate;

(2) feel the right time and place to assess restitution for the victim is at the trial.

6A-8 PROBATION AND PAROLE OFFICER

(1) disagree with conclusion of working paper no. 5 where it talks of combined trial system;

(2) feels that one can take account of restitution in the criminal courts.

6A-9 PSYCHIATRIST

(1) gratified about commonsense and clarity in papers;

(2) work order might also be applied to failure to pay fines;

(3) compensation should include psychological damage, though it is more difficult to prove;

(4) offender, sentenced to prison, should be given opportunity to make valid social restitution, thus earning privileges such as early parole.

6A-10 LAY ASSOCIATION

(1) agrees with concept of restitution, but does not feel it would reduce offences;

(2) feel there is a deliberate effort to cloud processes of law in a mystique, which provides work for professionals rather than providing justice for victim and offender;

(3) how far does collection of fines go towards offsetting the cost of the judicial system? it would be helpful to have a study of the economics of the present system;

6A-11 LAYPERSON

(1) restitution should take precedence over imposition of fines, or of a jail sentence, or both;

(2) restitution, though used now occasionally, should become the rule rather than the exception;

(3) widespread use of principle of restitution along the lines advocated in paper would be recognized as a valuable input in creating a healthier, happier society.

6A-12 LEGAL RESEARCHER, CENTRE OF CRIMINOLOGY - See Appendix V

sent critique of working paper to be published in the Ottawa Law Journal.

6A-13 RETIRED SCHOOL TEACHER - See Appendix IV

(1) encloses article written before reading papers;

(2) media focuses on failings and not on constructive searches for remedies - old theory of punishment prevails;

(3) supports proposals in paper;

(4) advance information on the thinking of the Commission, spread by the media, would give the public assurance that the problems are being attacked by experts and that solutions will be found.

6A-14 LAWYER

(1) agrees with proposal of day-fines;

(2) should not be responsibility of court clerk to determine amount of fine; perhaps there should be a standard form which could be completed by solicitor acting for the accused - or duty counsel in the case of legal aid;

(3) if information is available prior to the trial, it might assist the judge and expedite the whole matter;

(4) there may be other ways in which the legal profession can assist in the procedure so that provincial court system does not become further bogged down.

6A-15 ELIZABETH FRY SOCIETY OF KINGSTON - See Appendix VI

(1) encloses analysis of papers;

(2) endorses workable system of restitution and compensation;

(3) agency would welcome opportunity to work in a pilot project of this nature;

(4) one important role in a project of this type must be public education.

6A-16 CHURCH ASSOCIATION

(1) approves and supports proposals in both papers;

(2) a document containing excerpts of papers was sent to the Clerks of the Presbyteries (forty-four across Canada) to encourage wider study of the issues raised in working papers.

6A-17 LAYPERSON

(1) agrees with principle of recognizing rights of victim;

(2) agrees with principle of day-fines.

6A-18 LAYPERSON

(Comment re The Victim vs. The Offender - "the publication which has led to the writing of this letter is an affront to any mildly logical thinking willy-washy attempt to hoodwink the nation into the acceptance of the fuzzy thinking of do-gooders and tear-jerkers at a time when crime is growing at a rate which was unthinkable only a few years ago.")

6A-19 LAW PROFESSOR

should consider income tax implications in restitutionary schemes -

(1) to prevent weakening deterrent aspect of fines, they are not deductible in computing income;

(2) damages are restitutionary and compensating, and may be deductible.

6A-20 CANADIAN CRIMINOLOGY AND CORRECTIONS ASSOCIATION - See Appendix VII

(1) support proposals on restitution;

(2) feel compensation should have same scope as restitution; is given too minor a role in paper;

(3) would prefer a system of restitution where victim receives compensation from the state and the state recovers what it can through restitution; there may be cases (especially non-financial) where restitution is best paid direct to the victim, but feel this would be an exception;

(4) feel compensation should apply to property offences, with exceptions to that rule;

(5) do not feel probation should be imposed where restitution is main sanction, except maybe for period of restitution only; if probation is main sanction, length depends on factors other than restitution;

(6) support proposals concerning fines, except procedure suggested for non-payment of fines.

6A-21 PRISON INMATE

(1) supports proposals in paper;

(2) should consider behavioural patterns of offender when sentencing;

(3) there are many offences under Criminal Code where it would not be possible to make restitution;

(4) by ordering restitution, less money would be spent on imprisonment;

(5) money would also be saved on court costs;

(6) feels there would be longer remands while information is being gathered on an accused about his family, working habits, etc.

6A-22 JUDGE

mentions experiment over past two to three years - offenders coming before Magistrates Court in Moose Jaw on property offences have been placed on probation with the condition that they make restitution to the victim - will send us further details of results in due course.

6A-23 ELIZABETH FRY SOCIETY OF OTTAWA

(1) in agreement with proposals in paper;

(2) feels that offenders will accept, as a form of natural justice, restitution and compensation, or fines, related to circumstances of the offender more readily than imprisonment;

(3) such acceptance would reduce guilt and resentment and increase the potential for rehabilitation.

TABLE OF RESPONSES BY PRESS

Category	General	Positive	Negative	Mixed	Total
Editorials	0	10	0	1	11
Press Reports	0	4	0	0	4
Articles	0	2	0	0	2
	0	16	0	1	17

RESPONSES TO WORKING PAPERS BY PRESS

6-1 Editorial, Victoria Colonist - November 9, 1974

very favourable to proposals.

6-2 Editorial, Niagara Falls Review - November 12, 1974

(1) hope that when these proposals come into effect that crime will no longer pay for the criminal;

(2) disadvantages of victim should be redressed fully before any thought is given to rehabilitation of the criminal;

(3) payment of compensation to victims should be prompt and terms of compensation more widely known.

6-3 Press Report, Aurora Banner - November 13, 1974

generally favourable comments on proposals.

6-4 Press Report, Breton Record - November 13, 1974

(reprint from Aurora Banner - see 6-3)

6-5 Press Report, Barrie Examiner - November 15, 1974

(reprint from Aurora Banner - see 6-3)

6-6 Article, Winnipeg Tribune - November 16, 1974

(1) very favourable to proposals;

(2) unfortunate that it only applies to federal legislation;

(3) landmark in Canadian legal history if provinces were to go along with recommendations.

6-7 Editorial, Nelson News (B.C.) - November 18, 1974

(reprint from Victoria Colonist - see 6-1)

6-8 Editorial, Thunder Bay Chronicle Journal - November 18, 1974

(1) Commission is bringing out suggestions that could revitalize, modernize and vastly improve our judicial system;

(2) in principle suggestions seem to have many advantages over our present system.

6-9 Press Report, Alliston Herald (Ont.) - November 20, 1974

(reprint from Aurora Banner - see 6-3)

6-10 Editorial, Prince Albert Herald - November 21, 1974

(1) favourable to proposals;

(2) points out Commission has had difficulty arousing public interest in its work, although several approaches have been tried.

6-11 Editorial, Halifax Mail Star - December 5, 1974

(1) favourable to proposals;

(2) encouraging to note burgeoning concern for the victims of crime;

(3) restitution concept will only work if government compensates victims and requires criminals to make restitution to authorities;

(4) hope that good and practical progress in the matter will be made without delay.

6-12 Editorial, Kitchener-Waterloo Record - January 14, 1975

(1) generally supportive of proposals;

(2) may make more work for already overworked court staff.

6-13 Editorial, Oshawa Times - January 15, 1975

generally supportive of proposals (set out in pamphlet Victim vs. Offender)

6-14 Article, Winnipeg Tribune - January 25, 1975

generally favourable to proposals.

6-15 Editorial, Chatham Times - January 27, 1975

generally favourable to proposals.

6-16 Editorial, Yorkton Enterprise (Sask.) - January 29, 1975

(reprinted from Prince Albert Herald - see 6-10)

6-17 Editorial, Winnipeg Free Press - March 6, 1975

generally favourable to proposals.

TABLE OF RESPONSES

INDIVIDUALS

Category	Positive	Negative	Mixed	Total
Judges	1	1	0	2
	1	1	0	2
GROUPS	4	0	1	5
	5	1	1	7

(Released January, 1975)

RESPONSES TO WORKING PAPER BY LETTER

7A-1 JUDGE

(1) serious reservations about practice of diversion in family matters;

(2) child abuse one area of difficulty - in serious cases offender is prosecuted; in other cases offender referred for treatment and in either case may temporarily or permanently lose custody of child;

(3) alarmed about police discretion - it is grossly variable; depends on amenities within jurisdiction of alternative methods of dealing with minor offenders;

(4) perhaps minor offences should be removed entirely from the criminal justice system;

(5) suggestion that shop-lifting is not a serious matter should be re-examined;

(6) believe police are the least competent to make screening decisions in above matters.

7A-2 JUDGE

(1) generally agrees that diversionary techniques ought to be tried, since previous sanctions have not worked;

(2) charges should be laid in diversion cases to avoid problems such as limitation period for summary conviction offences.

7A-3 CHURCH COMMITTEE

(1) generally favourable to proposals;

(2) outlines details of victim-offender reconciliation proposal for Kitchener area.

7A-4 JUVENILE DIVERSION PROJECT

(1) paper is representative of many of the goals and philosophies of this organization, which deals on the pre-arrest, pre-court and post-court levels;

(2) feels that paper could serve as valuable tool in building credibility for the project in this community.

7A-5 CANADIAN CRIMINOLOGY AND CORRECTIONS ASSOCIATION - See Appendix VIII

(1) in general agreement with principle of diversion;

(2) disagree with proposal that onus should be on officials to show cause why the case should proceed further;

7A-6 LAY ASSOCIATION

(1) support basic idea of diversion;

(2) feel it should only be used for juveniles and first offenders;

(3) it should be available in all areas and to all groups of people, with broad guidelines for every diversion level, with the main object of allowing justice system workers to join citizen groups and individuals to find the best method of meeting diversion needs in a community;

(4) should not build a diversion bureaucracy which amounts to a new court system, or which saddles policemen and prosecutors with added discretion to such an extent that they obtain court-like powers or suffer from over-large workloads;

(5) there should be special planning and use of diversion in the field of drug users;

(6) there should be a fitness hearing if mental illness is an issue;

(7) should have accurate, up-to-date records of diversion use;

(8) no one should benefit from diversion procedure more than once.

7A-7 ELIZABETH FRY SOCIETY OF OTTAWA

(1) in agreement with Commission's proposals to reserve for court trial only those cases which deal with major offences of a violent nature;

(2) the system of reconciliation and restitution could help to clear courts of their backlogs and deal with both offenders and victims in a more humane and practical way;

(3) system would become more just, costs for holding persons awaiting trial would be reduced and the minor offender would remain part of the community during reconciliation, enhancing the possibility of rehabilitation;

(4) feel that many of the persons who seek help from the Society would benefit from diversion.

TABLE OF RESPONSES BY PRESS

Category	General	Positive	Negative	Mixed	Total
Interviews	0	1	0	0	1
Editorials	0	3	1	0	4
Articles	0	2	0	0	2
	0	6	1	0	7

RESPONSES TO WORKING PAPER BY PRESS

7-1 Interview, St. John's Telegram - February 7, 1975

(1) generally supportive;

(2) minor offences should be dealt with in the community;

(3) offender, by directly paying back the victim, will be better able to see the consequences of his actions and gain a reponsible attitude;

(4) avoids lifelong stigma of criminal record;

(5) individual offenders should be strictly supervised.

7-2 Editorial, Oshawa Times - February 8, 1975

supports proposals.

7-3 Editorial, Calgary Herald - February 14, 1975

favourable comment.

7-4 Editorial, Chatham News - February 17, 1975

(1) more staff and more work for "law dealing agencies", hence more costs and greater delays in administration of justice;

(2) police will be expected to give more time to settling these trivial (minor) offences.

7-5 Editorial, Penticton Herald - February 19, 1975

(reprinted from Calgary Herald - see 7-3)

7-6 Article, Montreal Gazette - March 7, 1975

favourable to suggestions in paper.

7-7 Article, Toronto Star - June 2, 1975

(1) supports recommendations;

(2) suggests experiments in alternative sentencing practice.

TABLE OF RESPONSES

INDIVIDUALS

Category	Positive	Negative	Mixed	Total
Laypersons	6	0	1	7
Inmates	2	0	3	5
Judge	0	1	0	1
Lawyer	0	1	0	1
	8	2	4	14
GROUPS	2	0	2	4
	10	2	6	18

(Released June, 1975)

RESPONSES TO WORKING PAPER BY LETTER

11A-1 LAYPERSON

(1) supports Commission's proposals wholeheartedly;

(2) commends Commission for its progressive and enlightened proposals;

(3) attaches copy of letter to J. Gregory, President of Canadian Association of Chiefs of Police, opposing his views.

11A-2 PRISON INMATE

(1) thoroughly supports guidelines for imprisonment and would like to see the concept of rehabilitation removed from the rationale for imprisonment;

(2) rehabilitation in prison is not impossible, but cannot foresee enough major changes in the correctional apparatus and attitudes to make it a fact;

(3) rehabilitation would require skills, efforts and motivations that are not available in the present system;

(4) feels officials do not want to change prisoners so that they will not return (like expecting Ford to build a cheap car that will never be obsolete);

(5) feels there have been many changes in the past fifteen years that should reduce recidivism rates;

(6) prisoners should be allowed the same opportunities for development of skills and potential as are other modern citizens;

(7) hopes our final report will be conservative enough to gain acceptance and cause some change.

11A-3 PRISON INMATE

(1) supports proposals in paper;

(2) doesn't feel there is really rehabilitation in prisons;

(3) feels proposals would be a step in the right direction;

(4) at present a prisoner is given a few dollars when he is released, which doesn't go far enough and he easily falls into more crime;

(5) feels judges are inconsistent in their sentencing practices;

(6) requests copies of all working papers for prison library.

11A-4 JUDGE

disagrees with our use of statistics, espcially the rate of imprisonment of first offenders.

11A-5 PRISON INMATE

(1) supports proposals; feels their clarity and simplicity gives them force and understanding;

(2) feels guidelines are logical and simple for a progressive, intelligent system of corrections;

(3) absence of vengeance in proposals is noticeable, makes them acceptable even to offenders;

(4) agrees with our comment that no sentence should deny hope to the offender - having been an inmate in B.C. Penitentiary until March of this year, is quite familiar with the climate there, "it is unbelievable that the threat of violence or death is ever present for the slightest provocation - for inmate as well as guard. This is due to ridiculously long and inappropriate sentences, lack of positive programs. It is chaos! Coming from an inmate - the guards fears are well-founded."

11A-6 LAYPERSON

(1) comments on Chapter Five: Guidelines for Imprisonment - supports proposals;

(2) likes idea of community service orders, especially if it included volunteer firefighting, flood clean-up, provincial park maintenance and reforestation;

(3) "in times when a majority of Canadians are demanding the return of the death penalty" feels such a program might satisfy them.

11A-7 PRISON INMATE

(1) feels proposals are generally very good and progressive;

(2) feels that there are some shortcomings in the paper - suggested changes open up new dangers of misapplication and possible injustice;

(3) good to see public statements concerning number of people who are imprisoned who should not be;

(4) feels concept of "denunciation" would be a weapon of vengeance for the courts; feels it should be looked at again and either deleted or redefined;

(5) feels "Sentence Supervisory Board" should be given more study; at present seems to be just a "Super Parole Board" - powers suggested are broad and wide-sweeping and could become just another bureaucracy;

(6) feels need for fair and judicial function of existing boards and disciplinary courts;

(7) need for definition in paper of exactly what type of institutions and living conditions;

(8) agrees with recommendation of gradual release early in sentence;

(9) feels direction of paper progressive and realistically constructive, but danger of some abuse.

11A-8 PRISON INMATE

(1) generally supportive of proposals;

(2) feels some proposals may be too radical and cause a rejection of the entire paper;

(3) concept of amounts of time taken out of a person's life should be brought into perspective;

(4) feels inmates can think concretely about periods up to six months only;

(5) Canadians generally seem to be in punitive mood - not sure Commission is influential enough to sway that mood;

(6) courts and public have no real concept of the sentences that are handed out in terms of real time;

(7) thinks this is not a good time to put forward our proposals.

11A-9 MEMBER OF JOHN HOWARD SOCIETY

(1) personal reaction - agrees with general proposals outlined in other sentencing papers;

(2) does not fully support proposals in this paper;

(3) does not agree that correctional practices should be under the control of a judge;

(4) agrees with concept of length of prison sentence;

(5) agrees with our suggestion of repealing habitual offender and dangerous sexual offender legislation; feels some special sentencing procedures should be developed for a class to be known as the dangerous offender;

(6) agrees that "imprisonment should include a controlled release program";

(7) feels "Sentence Review Board" deserves more extensive discussion - disagrees with our proposal.

11A-10 LAYPERSON

(1) makes several general notations with regard to individuals who come into conflict with the law in Ontario - no opinion on proposals;

(2) "Society has to ascertain what priorities are required and to what extent should the law protect the private sector?"

(3) "Society should expect that all inmates with specialized community skills have an opportunity to continue their trade in some capacity";

(4) "Society should expect that the odour of imprisonment and retribution vanish from the shoulders of those individuals who earn their release".

11A-11 CHURCH ASSOCIATION

(1) analysis of imprisonment is indeed important and explicit and we are in accord with views expressed;

(2) agree with proposals outlined in previous papers;

(3) feel courts should not decide the conditions of imprisonment and supervision of release procedure;

(4) agree with concept of length of prison terms and that "no sentence of imprisonment should deny hope to the offender";

(5) agree with recommendation that habitual offender legislation be repealed, but feel that a review of those now imprisoned under this legislation should be by the Parole Board, not a judge;

(6) same suggestion as above regarding dangerous sexual offender legislation;

(7) against setting up Sentence Supervisory Board - feels it would be a duplication of Parole Board.

11A-12 LAYPERSON

(1) agrees with basic intent of paper - suspects imprisonment is a costly, ineffective means of dealing with a problem;

(2) agrees that true rehabilitation should take place and that more direct involvement with the community is desirable;

(3) disturbed by emphasis placed on behavioural sciences;

(4) finds merit in notion of gradual release from prison but feels most inmates would reject this from a basic distrust that any new idea could possibly be of help; if things were done clearly and simply it might work;

(5) should offer inmates the chance to earn the money they will need to re-enter society.

11A-13 LAWYER

(1) strenuously disagrees with virtually all our proposals;

(2) feels that murderers should be denied hope of release since they denied their victims of life;

(3) for premeditated murder, society must exact the only penalty to balance the crime - death;

(4) feels that capital punishment is a deterrent to murder.

11A-14 LAWYER

(1) support the basic aims of the Working Paper, including the reduction of the use of imprisonment, the drawing up of a correctional plan for each inmate and the development of an appeal procedure so that the inmate is not completely in the hands of the prison authorities;

(2) concerned with some of the specific proposals, since public opinion is sensitive on the subject of criminal justice and fear adverse public reaction to some of the proposals;

(3) question whether goals of separation of dangerous offender and denunciation of the crime can be distinguished to the extent proposed, since all crimes have a denunciatory element and we do not believe this extent can be determined and subject to time measurement by the court;

(4) do not think prison sentences should be limited to twenty years - few people serve a sentence of over twenty years, but those who do are people who present a serious threat to members of society; to suggest that they be dealt with under mental health legislation does not seem practical since they would already have been declared fit to stand trial;

(5) fear the suggestion that an onus be placed on prison authorities to justify a decision not to permit an inmate to move to the next step in his correctional plan would create a right on the part of the inmate;

(6) question the wisdom of requiring court approval for changes in an inmate's program;

(7) concerned with the tendency to put the emphasis on the crime rather than on the criminal.

11A-15 LAYPERSON

(1) applauds our suggestions and agrees with the underlying assumptions on which they are based;

(2) pleased to see a basic qualitative distinction made between crimes against property and crimes against people;

(3) feels solitary confinement is a most inhuman and unjust practice which should be completely redefined and more carefully administered if it is to be used at all;

(4) welcomes the efforts being made by the Commission, but wonders if we will ever eliminate the built-in bias of the system which, from the outset, selects the people who pass through the courts along class lines.

11A-16 EX-INMATE - See Appendix X

"The Commission should be lauded for its insight and wisdom, when reviewing Working Paper 11, Imprisonment and Release, because they recognize that "A change in one area of the law may seriously affect many other parts of the system." (p. 1) What must be advocated is a system change. However, to integrate change of the nature which will affect all the complex components of the criminal justice system is a monumental undertaking that can be expected to experience a tremendous amount of resistance. But without the careful analysis and dissection as well as the sensitivity currently expressed by the Commission, in terms of its relations and duty to Canadian society, the task of advocating these changes would be insurmountable."

11A-17 LAY ASSOCIATION

(1) Association strongly supports the work of the Commission;

(2) in agreement with proposals in paper;

(3) feel that our views get very little public airing, and that if newspaper readers and radio listeners could hear more details about the Commission's observations and conclusions, perhaps the public and politicians would be more willing to move in the direction we advise;

(4) suggest that Commission members should do more speaking and writing about their views and the reasons for them;

(5) feels that our work so far has only received response from right wing, vengeful people but few spokesmen have pointed out that our present method of imprisonment is inhumane, unjust and counter-productive;

(6) suggest that we emphasize the financial cost of imprisonment to the taxpayer, considering that the public is unconcerned about the unjust and inhumane practices involved.

11A-18 LAYPERSON

(1) feels working paper is an excellent statement on the employment of prisons in the correctional system;

(2) feels some of the proposals would be unacceptable to the public, but would regret any modification of them;

(3) feels there is a failure in the general philosophy of the paper to place primary emphasis upon the protection of society;

(4) finds it difficult to see how the Sentence Supervision Board could function effectively except as an administrative tribunal.

TABLE OF RESPONSES BY PRESS

Category	General	Positive	Negative	Mixed	Total
Editorials	3	3	9	3	18
Press Reports	3	2	0	1	6
Articles	1	1	1	0	3
Letters	0	0	4	0	4
	7	6	14	4	31

(Released June, 1975)

RESPONSES TO WORKING PAPER BY PRESS

11-1 Editorial, Ottawa Citizen - June 20, 1975

(1) feels many of ideas in Commission paper will be overlooked and most emphasis put on the recommendation of the 20-year maximum prison sentence;

(2) agrees that the penal system is not being used correctly.

11-2 Press Report, Ottawa Citizen - June 20, 1975

brief description of recommendations - no opinion.

11-3 Press Report, Toronto Star - June 21, 1975

brief description of recommendations - no opinion.

11-4 Editorial, Montreal Gazette - June 21, 1975

(1) finds recommendations of paper refreshing;

(2) suggestion to convert National Parole Board is a humane and reasonable suggestion;

(3) "with such a large proportion of serious crime committed by a small habituated group, it seems wise to reserve this group for special treatment, though not necessarily life terms. Some people spurn crime despite provocation; others seem to seek it out. Until we can cure the disease, quarantine is in order."

11-5 Editorial, New Westminster Columbian - June 21, 1975

(1) doubts that methods of Commission will lower the crime rate;

(2) feels the study is trying to produce a means of lowering prison population by turning prisoners loose and letting the future find the answers;

(3) "It leads us to ask, what is the cost of such commissions?"

11-6 Editorial, Oshawa Times - June 21, 1975

Commission's recommendations should be considered.

11-7 Editorial, London Free Press - June 23, 1975

(1) feels proposals will raise even more serious doubts in the public's mind about the direction law makers are going;

(2) a society which is prepared to punish by imprisonment must also be prepared to pay the cost;

(3) data on numbers and types of offenders in prison today would seem to support the existing process of law;

(4) "Increasing numbers of Canadians have come to view with a jaundiced eye some of the regrettable results of relaxed laws, ranging from liberalized bail and parole to the current death-penalty moratorium."

11-8 Editorial, Toronto Star - June 23, 1975

(1) feels proposals too idealistic;

(2) this is not law reform, but penal reform and an improvement in rehabilitation methods; that should come "before the prison gates are swung open".

11-9 Editorial, Sault Ste. Marie Star - June 24, 1975

(1) against proposals of paper;

(2) public has a right to feel it is being protected by punishment of those who undermine law and order;

(3) feel some people deliberately set out on a course of law-breaking and should expect to pay a heavy price for their deliberate criminality;

(4) agrees with Judge C.O. Bick (Chairman of Metropolitan Toronto Board of Police Commissioners) that the public is sick and tired of theoretical approaches to dealing with crime.

11-10 Editorial, Brockville Recorder and Times - June 24, 1975

(1) feels recommendation to abolish life sentences could destroy the image of the Commission and its work;

(2) only those liberal minded souls who see the humanitarian aspect of the new leniency towards criminals as a step out of the "dark ages" support proposal;

(3) public fear of rising crime rate makes recommendation less than desirable;

(4) would rather see discretion left with prison authorities and the Parole Board as to length of sentence.

11-11 Article, North Bay Nugget - June 25, 1975

(1) against proposals in paper;

(2) believe police, who chance their lives for us, should be protected by the death sentence.

11-12 Editorial, Winnipeg Free Press - June 26, 1975

(1) finds recommendations in paper disturbing;

(2) certain that recommendations will draw little support from the public.

11-13 Editorial, Thunder Bay Times News - June 26, 1975

(reported from Montreal Gazette - see 11-4)

11-14 Editorial, Hamilton Spectator - June 27, 1975

(1) feels suggestions are one-sided;

(2) feels attitude of "let's go easy on the poor convict" is not really making the policeman's lot any easier;

(3) police actions are frequently criticized - but they are not dealing with nice law-abiding citizens.

11-15 Letters to Editor, Toronto Star - June 28, 1975

(1) (a) completely against proposals of Commission - "Are they afraid the convict will lose the instincts that put him behind bars in the first place?"

(b) "There are always plenty of studies telling us what grave concern we should have for the poor unfortunate criminal. But it is the public that usually ends up paying the price."

(2) (a) only way to prevent spread of crime and violence is by instituting stricter laws;

(b) feels public beheading (the fate of the assassin of King Faisal of Saudi Arabia) is just the deterrent that is needed for offenders from doing what they do best.

11-16 Letter to Editor, Globe and Mail - June 30, 1975

(1) suggestions not in keeping with the world of reality;

(2) rather have offenders jailed for 30, 40 or 50 years rather than have one innocent individual raped or murdered by a criminal who is released too soon;

(3) criminals have rights, but so do victims and potential victims.

11-17 Letter to Editor, Toronto Sun - June 30, 1975

(same letter as (2) to Toronto Star - see 11-15)

11-18 Editorial, Brandon Sun - July 2, 1975

(reprinted from Ottawa Citizen - see 11-2)

11-19 Editorial, Winnipeg Tribune - July 2, 1975

(1) hope for offender is noble aim, but one wonders how much an offender considers the hopes of his victim;

(2) habitual criminals do have hope - their sentences are reviewed from time to time;

(3) one of cornerstones of social communities is that its members live by a set of rules to protect them; as conditions change the rules may change, but members of a community have the right to expect that society will protect them from those who flout the rules.

11-20 Editorial, Chatham News - July 4, 1975

(1) feels Commission is straying into weakness in its proposals;

(2) victims and their relatives should receive some consideration when studying the conditions regulating the imposition of sanctions.

11-21 Editorial, Owen Sound Sun Times - July 5, 1975

(1) society must be protected when rehabilitating offenders and from dangerous persons;

(2) should try to find out what causes criminal behaviour;

(3) steps must be taken in prisons to ensure violent inmates are not allowed to have the run of the institution;

(4) should ensure that people who uphold the law - prison guards and police - are given as much protection as possible;

(5) tighter gun and bail laws might be useful;

(6) internal prison security must be tightened;

(7) do not believe capital punishment serves as a deterrent to crime;

(8) might be wise for government to introduce legislation to ban capital punishment;

(9) society must be protected from ruinous criminal activities, but this protection should not have to revert to execution.

11-22 Press Report, Ottawa Citizen - July 5, 1975

mentions some points in paper - no opinion given.

11-23 Editorial, New Glasgow News - July 12, 1975

(reprinted from Ottawa Citizen - see 11-1)

11-24 Press Report, Regina Leader Post - July 21, 1975

(1) generally favourable to proposals;

(2) mentions diversion schemes have successfully been tried in Britain, with some financial savings over imprisonment;

(3) always will be a need for some prisons for some people;

(4) too many lawbreakers come out of our prisons a more dangerous threat to the community than when they went in; no reasonable alternative should be overlooked.

(reprinted from Vancouver Sun - not previously documented).

11-25 Editorial, Nelson News - July 3, 1975

(reprinted from Vancouver Sun - see 11-24)

11-26 Editorial, Calgary Herald - July 29, 1975

(mentions working paper in article on the Calgary Police Commission's special review board - no opinion given)

11-27 Press Report, Corner Brook Western Star - July 21, 1975

(1) impractical at this time to talk about lightening prison sentences since there aren't enough trained people to deal with offenders outside prison system;

(2) long sentences are allowed by the law, but they are seldom used because judges seldom feel long sentences are useful as deterrents or for rehabilitation;

(3) removal from society is a valid reason for imprisonment but the disease of crime doesn't go away in prison - it is a brutalizing influence that doesn't prepare inmates for life in the outside world;

(4) we should not accept imprisonment as a final solution, but an intermediate one while better methods are planned and tested.

11-28 Letter to Editor, Winnipeg Free Press - September 6, 1975

completely against proposals in paper.

11-29 Article, Chatham News - September 10, 1975

general comments on paper - no opinion given.

11-30 Article, Kingston Whig - October 20, 1975

article on seminar of John Howard Society held in Kingston on our working paper; 25 inmates were present and gave the following views:

(a) objected to playing roles in order to get temporary absence passes;

(b) feel that youthful offenders serving over two-year sentences should be sent to different institutions or at least segregated from older inmates;

(c) feel that inmates will never be able to resume a place in society because of their financial status on release;

(d) have little chance of employment when it is known they were recently released from prison;

(e) believe inmates should be allowed to assume greater responsibility in the operation and direction of the prison; prison life must become more representative of that in the community;

(f) inmates should be allowed to work, to be paid what their services would be worth on the street, and to spend it as they wish.

11-31 Press Report, Sarnia Observer - September 27, 1975

comments of Bill McCabe, John Howard Society;

(a) inmates must be kept in touch with community during their confinement;

(b) John Howard Society in Sarnia mailed 150 copies of working paper to legal, social and educational sectors for feedback; will also be conducting discussions with various local service groups and prison inmates for their reactions.

CANADIAN CRIMINOLOGY AND CORRECTIONS ASSOCIATION

C O M M E N T S

ON

THE LAW REFORM COMMISSION'S WORKING PAPERS

The Principles of Sentencing and Dispositions

June 20, 1974

The Canadian Criminology and Corrections Association applauds the policy adopted by the Law Reform Commission of releasing working papers intended to inform the Canadian public on matters related to criminal justice and to solicit an expression of opinion from community groups on these difficult issues. We submit herewith our comments on Working Papers 2 and 3 and plan to submit comments on later working papers as they are released.

The Association has already presented a brief to the Commission entitled Toward a New Criminal Law for Canada which deals with many of the matters under discussion in Working Papers 2 and 3. We will refer to that brief frequently in order to avoid repetition here. For brevity, we will use the designation CCCA Brief when referring to our earlier presentation.

Conflict in Philosophy

In our opinion, the Commission should move with all possible speed to prepare a statement of aims and purposes basic to the whole system of criminal justice (CCCA Brief pages 1 - 10). In the absence of such a unifying statement, individual papers released by the Commission will inevitably express conflicting theoretical positions. We believe this has occurred in the two working papers under discussion and we will illustrate the point later in this presentation.

Layman's Language

We commend the effort made in these two working papers to use non-technical language understandable to the layman. However, this effort illustrates once again a basic problem faced in any program intended to inform the public about the field of criminal justice, and that is how to present these complicated issues in terms understandable to members of the public without over-simplification. In our opinion, some of the issues dealt with in these working papers are made to seem less complex than they really are.

The philosophical basis for this working paper seems to us to be quite different in tone from that underlying Working Paper 2. Two purposes of the criminal law are identified. The first appears on page 1, and is repeated twice on page 4 and again on page 6:

> ... the criminal law is ... one of the ways in which society attempts to promote and protect certain values respecting life, morals and property ...

The second appears in the Preface and, more fully, on page 3:

> ... the sense of justice which demands that a specific wrong be righted.

This working paper makes one statement that seems to contradict explicitly the position taken in Working Paper 2:

> ... state intervention be limited so that ... dispositions are not degrading ... (page 3).

We endorse a different philosophy of the criminal law, stressing the protection of individual members of society or of hard-to-define "values respecting life, morals and property" (CCCA Brief pages 2 and 3). Some actions, such as treason and illegal possession of arms, pose a direct threat to public security and social order and should be classed as crimes but care should be taken not to extend the list beyond what is essential.

We support many of the positions taken in this working paper. This includes the emphasis on diversion (although we have reservations about much of the publicity being given diversion at present), restitution (CCCA Brief page 25), the need for guides to sentencing in criminal legislation (CCCA Brief page 25), the importance of written reasons for sentence (CCCA Brief page 25), the importance of seeing the sentence as a continuing process that extends beyond the trial period, and the opposition to minimum mandatory sentences.

There are also a number of items raised in the working paper as questions on which we could make comments, such as community input in dispositions, structuring discretionary powers in sentencing, supervising the execution of the sentence, and prison release procedures. However, these are raised only as questions and comment on them at this time may be premature.

We do, however, have serious reservations on the basic purpose of sentencing and dispositions as set out in the working paper. We realize that if all proposals made in the working paper were adopted many minor and even relatively major offenders would be screened out of the system by diversion and the use of restitution, but even for the group who remain such a basis for sentencing seems to us to be short-sighted.

As we understand the proposition in the working paper, rehabilitation, deterrence and incapacitation would be recognized in sentencing but assigned relatively minor roles. The major purpose of sentencing is seen as educating the public as to the importance of selected community values by making the punishment fit the crime:

> ... it is important ... that state intervention be limited so that ... (3) dispositions and sentences are proportional to the offence, (4) similar offences are treated more or less equally ... (page 3).
>
> ... dispositions and sentences ought to be proportional to the offence; and similar types of situations ought to be dealt with more or less equally (page 34).

We suggest that the offence alone is not a satisfactory guide to sentencing, even if the aim is "justice and fairness" in a very narrow legal sense. The offender must also be considered. Offenders differ one from another, even though they may have committed similar offences. They differ in emotional stability, in maturity, in mental aptitude and in their life experiences which give them greater or lesser capacity to understand fully the implications of the offence. They differ in provocative experiences in the period immediately preceding the crime that may have temporarily impaired control over their own actions. They differ, too, in degree of involvement. Some commit a crime deliberately and consciously while others get involved by chance or with only partial commitment.

We suggest, therefore, that the offender should probably be given even greater weight than the offence in sentencing. The offence is of obvious importance if only to give some indication of the offender's personality and the nature and extent of the danger he poses for members of society, but it cannot stand by itself.

The full meaning of rehabilitation should also be clear before it is assigned a role in sentencing. The term is often interpreted to mean in-depth therapy intended to solve the offender's personality problems. We agree that experience casts doubt on the efficacy of such efforts and that no convicted person should be given a longer or more restrictive sentence so that he can be "treated". However, the term can be more properly defined in this context as a consideration of the individual offender's ability to adjust to community living and the effect the sentence will have on his efforts to adjust. Under this definition the avoidance of damage to the offender's chances of social adaptation may be more important than any direct, positive assistance to him.

In considering whether to place a particular offender on probation or send him to prison, the judge might consider the following rehabilitative (defined as above) advantages of probation:

1. Offenders, particularly young or first offenders, are protected from the undesirable influences they would be exposed to in prison.

2. There is less stigma to probation than to prison and therefore less handicap to the offender's reacceptance into the normal community. Such reacceptance is essential if he is to lead a settled life.

3. Probation permits the offender to continue at his job or to attend school, and to discharge his personal and family responsibilities. This continuity is important if he is to develop a stable life.

4. Probation provides a greater opportunity for restitution by the offender to the victim.

5. The offender must learn to live in normal society, not in prison, and he does that best living in the free community.

6. Probation provides an opportunity for the probation officer to help the offender with such practical problems as employment and

housing. He can also help him with interpersonal problems on a practical level.

7. The fact that he has been dealt with in a positive manner gives the probationer maximum encouragement to respond in like manner.

It will be noted that no mention is made of in-depth therapy in the above.

We would stress the importance of rehabilitation as a guide in sentencing and dispositions. The public education effect of the criminal justice process seems to lie in the process as a whole rather than in just the sentence or disposition. To jeopardize the future of a young offender in order to emphasize the importance of the community value he has flaunted seems to us to be self-defeating. If the sentence has the effect of turning him into a professional criminal the resulting harm to society is far greater than the good obtained through articulating the pertinent community value at the sentencing stage.

We would also question the direct participation of the victim in the trial, as suggested on page 19 of the working paper, except to the extent that the partie civile process is accepted (CCCA Brief page 23). We think the victim should be directly involved in efforts to reach reconciliation through diversion or similar practices, but if those efforts fail and the offender is brought to court, the participation of the victim in the trial would, we suggest, lead to resentment and recrimination.

We would suggest that witnesses be included among those dealt with in the section entitled Roles and Functions within the Sentencing Process beginning on page 19 of the working paper. The witness is often the forgotten man in the criminal process. Little attention is paid to his convenience or even to the demands of his business when trial dates are set. Little effort is made to schedule hearings so as to make minimum demands on his time. Comfortable and dignified waiting facilities are seldom provided for him. He is obten subjected to unnecessary abuse on the witness stand. The financial remuneration paid him is unrealistic.

The need for public acceptance and support for our system of criminal justice is now commonly recognized. A good place to start is with the witnesses.

The statistics given on page 26 of the working paper that "Crown counsel spoke to sentence in 72 per cent of the cases while defence counsel spoke in only 24 per cent of the cases" have been questioned by many of our members who have extensive court experience. We recognize the risk in relying on personal experiences, but the consensus among these people is that these percentages appear inaccurate.

COMMENT

Law Reform Commission of Canada:
Working Paper 3, "The Principles
of Sentencing and Dispositions."

Legal Researcher
Centre of Criminology

June 1974

Before dealing with the substance of this paper it is necessary to make a couple of points concerning its style and content which will help place the comments contained in the body of this note in perspective. At the same time, and for the same reason, it is important to set out my basic attitude to the central issues raised in the paper.

In general the paper suffers from two major drawbacks which seriously effect its impact as an academic document, as a means of informing the public of the thinking of the Commission, and as a working paper designed to elicit comment and constructive criticism. Firstly, the lack of citation and analysis of empirical research coupled with the author's obvious reliance on such research is, quite frankly, infuriating. It renders discussion difficult at any level other than the very general and will, I suggest, serve to inhibit constructive public discussion of the paper's contents. To say that "supporting material and references are available at the Commission" simply begs the question insofar as public discussion is concerned, and is tantamount to a "research shows and you'd better believe it" attitude which is patronising and, as I read it, at odds with the basic philosophy of the Commission.

Secondly, the paper attempts to cover far too much ground in far too short a compass. Numerous issues which lie at the very core of our legal, judicial and administrative systems are raised, briefly discussed and then left hanging. The result is that the paper is superficial in the extreme, and anyone wishing to comment on or criticise the proposals

is put in an invidious situation in that a firm base for discussion is rarely laid. The proposals themselves are often vague and hazy and the arguments for them are so badly stated as to invite disbelief from all but the most devoted. For example, the dismissal of rehabilitation as a basis for sentencing policy on page 4 is long overdue, but the arguments for this view that are advanced there are surely inadequate for an official turnaround of this nature. Similarly with the deterrence argument on page 5. The content of this paper and its treatment also leaves the field wide open for misinterpretations to creep in,[1] and even the careful commentator is often obliged to use phrases such as "the proposal seems to be that ..."

Having said this, I must stress that I am essentially very much in sympathy with the basic thrust and philosophy of the paper. As a lawyer I am continually perturbed by the pathetic and undignified spectacle presented daily in our urban courts. I am concerned at the increasing trivialization of the criminal law, and its application to situations which it is patently powerless to handle effectively. And I am worried by the knee-jerk reaction that leads to the application of the criminal law to virtually every form of behaviour that is even mildly aberrant. Similarly I am in general sympathy with the view of sentencing put forward in this paper. That this involves a rejection of the concepts of rehabilitation as a central concern and a reversion to more "legalistic" values does not worry me unduly.

In this comment I intend to deal primarily with the concept of diversion. As will soon become clear, while I am basically sympathetic toward the aims of diversion, I see a number of serious practical and theoretical problems which have not yet been answered to my satisfaction either by operating pre-trial diversion schemes or by theoretical writing on the subject. I do not intend to comment here on the part of the paper which deals with sentencing. Essentially I am in full agreement with the approach taken by the paper in this area. The only comments I would make are that firstly, it seems to me that it would be more

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1. For example, I was recently sent a cutting from a New Zealand newspaper stating that Canada proposes to "abolish" a large number of "petty" offences. I assume this refers to the paper under discussion.

consistent with the philosophy of the paper if the onus were to be placed on the sentencer to show why an offender should not be dealt with in a non-custodial fashion. Secondly, I have a number of vague legalistic worries about giving the victim a say in the sentencing process. Will this breed excessive resentment? Will such involvement deter prosecution? What happens where the offence is serious but is largely or partly victim-precipitated, etc? These are vague quibbles which indicate my basic uncertainty over this rather minor point.

Apart from that I am in agreement with most of the points made in the latter section of the paper. I would only suggest that the recommendations of the Hugesson Report (1972) as regards the parole process and the need for protections therein, be incorporated in future papers on the topic of release.

DIVERSION

Before dealing with the actual diversionary scheme outlines in this paper there are a number of questions common to all pre-trial diversionary schemes that need to be mentioned. None of these questions, so far as I am concerned at least, has been dealt with adequately in this working paper.

In the first place, it is evidence that over the last six or seven years[2] pre-trial diversion has gradually come to replace over-criminalization as a major rallying cry for those concerned with the reform of the criminal law. By and large the overcriminalization argument has not proved too successful in bringing about radical reform, and it could be suggested that diversion represents a scaling down of the aspirations of the reform movement to take account of "political reality." Thus if one cannot get possessing marijuana rendered legal, one can at least try and get

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2. Actually nearer nine years if one regards the Flint, Michigan Citizens Probation Authority Program (1965) as the first true formal adult scheme. I would, however, prefer to date the "movement" from the President's Commission (1967). Advocacy of diversion and the operation of sporadic informal schemes is, of course, much older even in legal circles. (See for example Arnold (1932).)

possessors diverted from the full rigors of the system. If this is a reasonably valid interpretation, then it seems to me that it raises a number of quite fundamental points.

So far we have, as a society, tolerated the nullification of outdated or just plain stupid laws by discreet nonenforcement on the part of the police. Can we and should we tolerate the formalization of such nonenforcement through a diversionary scheme which effectively recognises officially that the law does not mean what it says? Leading on from this, how far should we be prepared to go in accepting the erosion of the judicial trial by the introduction of administrative procedures designed to take over so-called petty cases? In the civil field there is no doubt that this sort of development has been generally healthy, but the criminal process is a very different thing, and it may well be that formal diversionary schemes will serve to dissipate the symbolic effect of the ritualistic criminal trial with harmful results. (Nejelski (1974) pages 5-6). On the other hand, of course, it could be argued that diversion would serve to enhance the symbolic impact of the criminal process by removing those cases which are not generally regarded as being suitable for public denunciation. (Morton, (1962) pages 34-54). This argument ignores the fact that by and large such cases can be removed from the process by methods which do not involve the introduction of administrative "competitors" for the court.

If an activity is so trivial that the state has no legitimate interest in punishing the offender, and would in fact prefer to see the matter either ignored completely or settled informally between citizens, is there any real justification for retaining that activity as criminal? In a number of cases a strong argument can still be made for outright abolition, or at least substantial modification of the law. It would be cause for considerable concern if the emphasis on diversion were to divert attention from the need for a fundamental reconsideration of all aspects of the criminal law.[3]

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3. By "fundamental reconsideration" here I do not mean just with an eye to abolition alone. A number of perfectly serviceable offences can be salvaged by judicious reformulation or by reforming the penalties involved. For example, if one does not choose to abolish the offence of bigamy and leave it to its "component" offences, it could at least be rendered realistic by providing a defence where no deception is involved. Similarly we should perhaps give serious consideration to our tendency to prescribe imprisonment as a possible sentence for the majority of offences.

A second general question raised by pre-trial diversion schemes relates to the need to ensure justice and fairness in this sort of situation. It can be argued, on the one hand, that diversionary schemes, because they are "non-criminal", do not involve punishment, and are intended primarily to promote the welfare of the accused do not need to be encumbered with all the legal protections deemed appropriate to the full criminal trial. On the other hand, it is now fairly generally accepted that good motives and a flexible vocabulary do not necessarily result in fairness and can, in fact, sometimes produce fairly unpleasant results (see, for example, the American Friends Service Committee, (1971); Mitford, (1973) and, of course, the copious post - Gault literature on juvenile justice in the United States). In relation to this latter argument it is worth noting that one of the reasons for the current interest in pre-trial diversionary schemes, at least in relation to juveniles in the United States, seems to be the desire to avoid the restrictions on court "therapy" imposed by Gault. (See Pitchess (1974) p. 52).

In the light of this sort of argument we must be prepared to ask a number of general questions about the sorts of protections that should be incorporated in such programmes. For example, what sort of procedures must we set-up to ensure that an accused person makes a free and informed decision in agreeing to be diverted? How can we prevent 'double jeopardy' where diversionary programmes are terminated? How can we ensure consistency as between intake officers? How do we get around problems relating to invasion of privacy where we wish to investigate the home background etc. of an unconvicted man? Is it fair that a divertee be subject, for example, to six months agreed counselling as the price of his diversion when if he had insisted on going to court he would only have received a $50 fine, etc.?

Many of these questions are currently being asked in relation to a number of American schemes and the answers are not particularly hopeful (Goldburg, (1974)). If they are going to be answered in a more positive manner in Canada it is important to recognise that the accused person who is diverted from the court system is still in fact being punished for what he has done. Whether he is subject to counselling, psychiatric help or some form of arbitration with the victim, he is being compelled to participate in something under threat of being sent to court. In this context procedures designed to ensure fairness and justice are essential. (For an example of the sorts of protections

considered necessary in the United States see National Advisory Commission on Criminal Justice Standards and Goals (1973)).

A final general problem flowing from the concept of pre-trial diversion relates to the potential that diversionary schemes may have for "generating" crime. By this I mean that the existence of such a scheme may lead to the public reporting more crime to the authorities, and also to the law enforcement agencies processing more offenders officially.

People do not report crimes to the police for a variety of reasons (Ennis, (1967)). Among the reasons given is the belief that the matter is not a "police problem" or that the police can do nothing about it anyway. In a number of cases, especially those where the offender is a friend, neighbour or member of the family, offences are not reported for fear of harming the offender to an extent disproportionate with his offence.[4] It is at least arguable that a well-publicised diversionary scheme would effect these patterns by, for example, indicating that certain matters are now "police matters" because the new facilities enable proper action to be taken. Similarly the existence of official arbitration may result in more offences being reported to take advantage of the chance of arbitration. In this sort of manner, for example, there is some evidence which suggests that the creation of avowedly therapeutic police Youth Bureaux has resulted in shopkeepers and the like reporting more youthful shoplifters to the police.

Whether or not any "generation" of this sort that might take place is a good thing is a matter of personal opinion. I incline to the view, with (Schur, (1973)), that simply keeping people out of the system is, per se, a good thing. It is surely not too idealistic to suggest that if, at the present time, offences are not being reported then no one is too upset, and the behaviour in question is being coped with reasonably adequately. Of course, ones opinion depends to some extent on the ostensible reasons for non-reporting, but I doubt whether in Canada fear of the offender or fear of the police is a major factor.

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4. Interestingly enough these would seem to be the very cases that the Working Paper regards as being most suitable for diversion since the ongoing relationship renders arbitration especially attractive as a solution.

In a rather similar vein it can be argued that such schemes will also suck more people into the official system. That is, suspected offenders who would have been handled informally by the police or by other bodies prior to the introduction of the scheme will now be officially diverted. This means that they will be labelled (hopefully less harmfully than if they went to court, but still labelled), examined and decided upon and will inevitably run the risk of ending up in court. This sort of generation could be the result of a number of factors. For example, the diversionary process may end up being regarded by the police as simply providing a useful "way out" for handling problematic cases which would previously have either been ignored or handled informally. Diversion in this situation may be used as a sanction by the police where previously no case could have been brought in court. Similarly the scheme may be seen as a means of getting "expert" help to some clients which will save the harassed patrolman from the trouble of finding the help for himself. In both these situations the fear is that diversion will generate a reliance on itself by undermining the ultimate responsibility of the police. (For an indication that this happens, at least in some youth schemes, see Pitchess, (1974)). Thus diversion may in fact become an end, i.e. a self-contained system equipped with its own special clientele and its own special sanctions, rather than simply a means to the laudable end of reducing the number of persons passing through the courts. This problem of generating "upwards" is one which is common to a number of areas of the criminal justice system. For example, the claim that measures designed as alternatives to incarceration often end up largely as alternatives to fines, is a frequent and apparently justified complaint. The problem is to try and prevent that happening without losing too much flexibility.

Once again whether or not this is a good thing is a matter of personal opinion. It seems to me that the whole thrust of the Working Paper under consideration is contrary to such a result, and on the whole I am in agreement with this. If such matters are being settled satisfactorily by the police at the present time without recourse to the courts, and there is no real evidence to suggest that they aren't, then any move which makes official processing more likely is misguided whatever its motives.

Turning now to the diversionary scheme outlined in the working paper, there are a number of specific criticisms and comments that can be made. These will be presented below in a fairly haphazard fashion. Some are plainly more

fundamental than others. In addition, because the area is such a speculative one at the present time, some of the arguments presented are plainly mutually exclusive.

(1) The Working Paper advocates diversion partly on the basis that fairness demands that the poor and the uneducated receive the same sort of treatment as the rich and educated. This is laudable but I doubt whether the scheme as constituted at present will ensure this in any but a minority of cases. Cases involving the better off, the articulate, those from supportive (or ostensibly supportive) homes and those whom it is evident that a criminal trial will hurt most, will be prime candidates for diversion. Those whose cultural setting does not dispose them to regard marriage guidance counselling, psychiatric help, etc. as useful solutions to their problems, those who are scruffy, who cannot pay restitution, who are not disposed by their upbringing to talk out their problems, etc. will not be obvious candidates for diversion.

We know the police discriminate, we know the courts discriminate and we know that middle-class society generally discriminates; is there any real reason to suppose that intake officers will not apply similar criteria, and that the system as a whole will not continue to operate in the same general way that our whole society operates?

(2) In a similar vein the paper implies that an intake officer working from pre-determined criteria will, at least partially, avoid the criticisms of arbitrariness and inconsistency that have been levelled at judicial sentencing. There is no real reason to suppose that this will be the case. Of necessity an intake officer must be flexible, perhaps even more flexible than a judge. Criteria, at all but a very crude offence-type level, will be very difficult indeed to formulate. The result is likely to be that, as has been stated in relation to juvenile schemes in the United States:

> "His decisions are generally held to be too sensitive to be bound by specific criteria, and the officer is left free to exercise his discretion, so that the criteria for diverting juveniles vary greatly from officer to officer. Any intake officer's diversion decisions depend principally on his own general correctional philosophy, knowledge of alternative services, informal relations with other probation

> officers and personnel of outside agencies, and the types of juvenile case he receives, or thinks he receives."
> (Cressey & McDermott, (1973) p. 12).

Which means we are back to Hogarth's magistrates. (Which is perhaps not too bad a thing).

(3) The scheme requires the consent of the victim to be given prior to the diversion. This raises a number of questions even apart from the obvious one of protection against possible intimidation or bribery. For example:

(a) If it is quite evident that the victim is motivated by sheer malice, should this be permitted to prevent diversion? If it should not, who is to make the decision as to whether a victim is being reasonable or not? And on what criteria? It is very easy for the academic or the disinterested observer to say that an offence is trivial and should be diverted, but the traditional "day in court" may mean a lot to some victims and "triviality" is always relative.

(b) Doesn't relying on victim consent introduce a basic unfairness? So much depends on the nature of one's victim. Presumably the corner grocery store would be generally inclined towards consenting to restitution and diversion. There is no real reason to suppose that Dominion or Loblaws will since they are undoubtedly firm believers in the salutary effect of prosecution. This is far more valuable to them than the return of a 75¢ tube of toothpaste and an apology. Should this be permitted to make the difference between court and diversion? Especially when corporations like Dominion actually encourage offending of this sort. To say that that is the situation that applies now is no real answer to the proposals in the paper will have the effect of institutionalising it.

(c) Is it legitimate to consult the victim anyway in relation to criminal matters? So far as I know none of the American schemes make this requirement. (See American Bar Association, (1974)). By definition criminal matters involve a state interest that overrides that of the citizen, if the case in hand doesn't involve such an interest then it is inappropriate to regard it as a criminal matter which is to be "diverted" from the courts.

(d) What will be the effect on the accused of being hauled into court because the victim specifically refuses to

agree to diversion? At present it is likely that much of the resentment that an offender feels at being arraigned before the court is absorbed by the amorphous system which faces him. Under the scheme outlined in the paper such resentment will now have a focus which will be intensified in the embarrassing event of an aquittal. Is this desirable?

(4) Two of the main avenues of informal settlement proposed are arbitration and restitution. Both present a number of similar problems:

(a) They may make sense in some situations, such as family quarrels, intra-familial thefts, offences committed in the course of an ongoing relationship which is important to both parties, etc. However, it is probably true to say that in most cases such situations are handled by such methods informally at the present time. The police simply do not charge in normal domestic disputes, they will generally try to get a neighbour or the corner shop to accept an apology and restitution and so on. If they were better trained and had greater access to other agencies they could probably do more. What then is the scope for such devices in the diversionary process? (c.f. the argument relating to crime "generation" above).

(b) Both arbitration and restitution will probably involve questions relating to the value of the harm done to the victim. It is worth just pointing out that disputes over value are likely to be very difficult to sort out, especially when the diversion officer cannot just impose his assessment of the true extent of the injury on the parties. In this sense the officer is hampered in a way that no court or Criminal Injuries Compensation Board is. (On the problems of victims and reparation generally see the Report of the Advisory Council on the Penal System (1970)).

(c) In spite of the statement in the working paper to the effect that indigent persons accused of offences will be found jobs, presumably partly so that restitution can be ordered with some hope of success, the problem of the indigent or unemployable defendant remains. Diversion ought not to depend on ability or even willingness to pay, but so long as the emphasis is on restitution, and so long as the consent of the victim is required, it will.

(5) The specific diversionary scheme proposed here does, by its retention of the chance of ultimate trial even after committal to a diversionary programme, raise the problem of double jeopardy. There are a number of related problems that arise here:

(a) As a matter of general principle should a man who has agreed to a diversionary scheme be placed before the court in the event of breach? In most cases it is probable that the breach will not be entirely his own fault. How can this be taken into account? (For example, he and his compulsory counsellor cannot stand the sight of each other).

(b) In the event of a subsequent appearance before the court can his involvement in a diversionary scheme, with its accompanying assumption of guilt, be utilized? Can the reasons for his failure to complete the diversionary programme be utilised in sentencing? Can time spent in a diversionary programme be taken into account in sentencing, etc.?

In general I would prefer to see participation in a diversionary programme as an absolute bar to subsequent proceedings on the offence in question. If necessary wilful breach of the conditions of a diversionary programme could then be made a separate offence for which the offender could also presumably be diverted.

(6) A more general comment, which draws on much of what has been said already, relates to the necessity of a formal scheme of this sort at all. The scheme outlined in the paper effectively places an intermediate layer between the police and the courts. Presumably it is hoped that the police will continue to behave in much the same way as they do now, and the "diversion layer" will be concerned simply to filter the cases being sent to court with a finer tooth comb than is currently the case. If this is what is going to happen, and as I indicated above I tend to feel that the proposal is too optimistic in this regard, why not simply work directly at the police level and avoid the proliferation of bureaucrats and decision-stages that formal diversion requires? Why not put our efforts into police training programmes, into changing the law to force the police to try alternatives before sending a man to court, into fostering greater cooperation between the police and other social services, and indeed into the provision of adequate social services on a 24-hour basis.

The seemingly endless proliferation of new structures in the criminal justice system simply adds to an

already chaotic situation. The idea of diversion is largely valid, perhaps we should devote rather more effort to seeing whether it can be achieved without setting-up another set of boards and committees.

(7) I have dealt so far with the question of police reaction to the proposed scheme solely in terms of the likely "generation" of more officially processed crime. There are, however, at least two other important points which need to be mentioned in relation to the police.

(a) In the first place, we know very little about the possible effects of a scheme of this sort on police morale generally. The scheme envisaged by this paper involves the police referring cases, either before or after an internal review, to an intermediate body which will, in a proportion of the cases at least, overrule the police decision to charge. It is important to note that this review is by an independent body and that the police apparently have no say in its decision. If we can assume that the police do not generally lay charges frivolously, won't the diversion of even a small number of cases in this way and by such a body cause considerable resentment among the police? Most studies of police culture, for example, stress that one of the central strands is the assertion of exclusive competence in the identification and handling of crime. (See, for example, Milner (1971)). Rebuffs by the court are an accepted hazard of police work and can generally be nullified by defining the situation as either being the result of a failure of technique or by blaming legal technicalities or dishonest lawyers. How will the police react to rebuffs by a body or an individual who does not enjoy the prestige of a court, who is not surrounded by the aura of "the law", and who is challenging police judgment on a rather more fundamental level than any court does?[5]

(b) A second point relates to the sort of interaction that is liable to develop between the intake officers and the police as the diversionary scheme matures. On the one hand there is a danger that intake officers will become too

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5. I.e. in rejecting a case and channelling it towards diversion the intake officer is calling in question the professional competence of the police. In acquitting an accused person the court is simply challenging their technical competence.

compliant to the wishes of the police. On the other there is a danger that the police will tailor their enforcement patterns to ensure that too many cases are not diverted. At its simplest this would involve simply not bothering to take any action where the past pattern of the intake officer indicates that the likelihood of diversion is high. At first sight this would be a desirable development in that it would achieve diversion without the need for a formal scheme. On closer analysis however it is unlikely that matters would be as simple as this. In a large number of the cases where the police actually invoke the law at the present time it is plain that the use of the law is justified by the need to interfere in a crisis situation with a decisive use of force. (For an analysis of the police role emphasising this point see Bittner (1970)). The police do not generally invoke the law lightly. In the future it is reasonable to suppose that the need for authoritative "troubleshooting" will continue unabated. This means that the police cannot simply refuse to take action because a case is likely to be diverted. If my earlier argument about police resentment of the intake process is in fact correct is it not likely that the police may seek to avoid the diversion of cases by juggling the charges so that a case becomes more difficult to divert? Of course, this will not be possible in all situations and it will be subject to a certain amount of control by both the courts and the crown attorneys, but the notorious breadth of the law in most minor offences leaves plenty of scope for such a reaction. It also, of course, leaves plenty of scope for overcharging to induce acceptance of diversion by an accused, but that is another matter.

In conclusion, this comment has attempted to outline a number of fairly basic questions raised by both the concept of diversion, and by the specific scheme which is roughly outlined in this working paper. I have not discussed the theoretical advantages of diversion in any detail because they have been handled adequately in the paper, and because they are, in any case, manifest. Nevertheless, it is important that when we came to consider individual cases and individual "solutions" we are in a position to say that divertees will in fact benefit by submission to the scheme. This may either be in a negative sense in that committal to the scheme will simply avoid the stigma and stress of a court appearance, or in a positive sense in that diversion, for example, to a counselling service will do some positive good. In this context it is as well to be aware of Cressey and McDermott's warning that:

> "The faddist nature of diversion has produced a proliferation of diversion units and programs without generating a close look at whether the juvenile subject to all this attention is receiving a better deal."
>
> (Cressey & McDermott (1973) p. 59).

Diversion, as a formal part of the criminal justice system, is still in its infancy. More experience with the programmes already in operation in the United States and elsewhere is vital. Similarly more research of the East York type is essential in this country. A large scale commitment to diversion is premature so long as we have no concrete results and so long as basic questions of the type raised in this comment remain unanswered. As I said at the outset, I am basically in sympathy with the aims of diversion. If, however, the current emphasis on diversion and on the informal handling of offenders in general acts so as to obscure the very real need to decriminalise large areas of human conduct, and to devise schemes whereby "non-criminal" matters can be removed from the jurisdiction of the criminal courts completely, then diversion may do much more harm than good.

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Legal Researcher
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Comments on Principles of Sentencing and Dispositions

I was encouraged in several ways by the recent report, but would like to bring to your attention certain disagreements and concerns that I have with respect to some of the specific discussions. It was good that the report recognised that many of the traditional dispositions used by the courts in Canada are not acheving the objectives that many ascribe to them. It was also exciting to see the interest being taken in encouraging, where possible, victim-offender conflict resolution.

In making you aware of my concerns, I must preface my remarks by stating how difficult it is to discuss a report based on references to empirical research, when these are not foot noted. It would be difficult for the general members of the public to simply accept that "research shows ...". From the few discussions I have had within the Centre, the debate would have been more fruitful if we had known what your working group had used.

(1) Show cause for custodial sentences (page 13)

It seemed to me highly inconsistent to talk in the chapter on custodial or non-custodial dispositions on the one hand - rightly - about the doubtful effectiveness of imprisonment in reducing recidivism, its high costs both economic and social, etc. - and then go to the sentencing guide list in the new draft code of the U.S. As you are aware, the philosophy behind the Bail Reform Act and the recommended parole structure in the Hugessen Report, both placed the onus on those who want to keep the man in prison to justify their case. Given the ways that magistrates operate as identified by Hogarth (and not refuted that I am aware) I would like to suggest that the report's rationale would be more consistent with guidelines such as the following:

A judge may only impose a custodial sentence when he is of the opinion that one or more of the following circumstances apply to the case in front of him. In each instance evidence should be heard supporting one or more of these conditions and the judge should provide written reasons which explain the basis for his decision.

1. There is a substantial risk that the offender will not conform to the conditions of absolute or conditional discharge, a community service order, probation or a suspended sentence and that as a result there is a risk of serious harm to society; or

2. His release at that time would depreciate the seriousness of his crime or promote disrespect for the law; or

3. There are reasonable grounds to believe that there is a correctional treatment, medical care or vocational or other training in an institution which will substantially enhance his capacity to lead a law abiding life when released at a later date and no equivalent treatment or training is available in the community.

These three criteria would seem to me consistent with the general philosophy of the working paper but provide viable and improved alternatives to current sentencing practice.

(2) Co-ordination in the Criminal Justice System (pages 15, 17, 21-23)

The report agrees with the lack of co-ordination but did not suggest mechanisms of co-ordinating the various component parts of the criminal justice system. [I still fully endorse the Hugesson Report on these points]. Undoubtedly much must be done beyond criminal justice councils to ensure co-ordination within the criminal justice system. Perhaps the two most important levels at which this can take place is first of all the humane concern for a particular offender's case; thus ensuring that he does not go from one section of the criminal justice system to another without some effective co-ordination. The Hugesson recommendations on members of regional boards would ensure this.

The other lies in an area totally overlooked by the working paper and that is in the use of sophisticated

information systems to try and ensure both consistency and co-ordination. This is surely an area in which Canada does not need to be restricted to scissors and paste analysis of the United States or England but can develop and test in real life experiments plausible, realistic and practical ideas. In other areas of life, the computer has provided a valuable tool for large system decision-making. The Americans are testing its use by the decision-makers for setting terms and indeed John Hogarth has already suggested some of its uses in Canada for reducing disparity in sentencing. I would strongly suggest that your working group examine closely the use of information systems as applied to the parole board in England and within the U.S. Federal System in the States. There have also been examples of applications to sentencing in certain local jurisdictions in California. There use is along the lines of some of the recommendations of John Hogarth in Sentencing as a Human Process: that is the computer is used to provide, to the sentencer, the norm for an offender with normal characteristics convicted of a certain offence. They do not take the discretion totally away from the sentencer and obviously cannot contain all the information necessary. However, they do require the sentencer to think about his reasons for deviating from that norm.

(3) Co-ordination of Recommendations as release procedures

I will look forward with interest to the material coming forward on release procedures, but I hope it will take into account the substantial efforts that have been made by the Hugessen Report, The Senate Committee on Parole, as well as the various staff of the Solicitor-General's Department and provincial correctional ministries to develop legislation in that area.

(4) Sentencing Boards (pages 21-23)

Perhaps in judicial circles there are persons still discussing boards where rehabilitation is the primary aims, but this is surely not a serious argument for a sentencing board and not surprising that your report discusses it.

- indeterminate sentence myth. The indeterminate sentencing structure in California should not be blamed for the long periods of imprisonment experienced by State inmates in that State. A cursory analysis of the mean term served by State (Hawkins, K.O., Parole: the American Experience, unpublished

Ph.D. dissertation, Cambridge University, 1971, pp. 63-66) will show that there is no pattern associated with indeterminate as opposed to definite sentencing structures in the jurisdictions of the U.S.A. Indeed among the States with the longest mean terms served are those that have a definite sentencing structure.

As you will see from analysis such as Hawkins, see above, (page 67 and following) which include historical discussion of the development of the adult authority that it was the result of the huge disparities in sentencing by individual judges that resulted in the setting up of the centralized adult authority. The State of California introduced indeterminate sentence legislation in 1917, [Hawkins, see above, (1971) pp. 75-76], which placed authority to fix terms in the hands of the Board of Prison Directors. (According to normal usage in California, the courts 'sentence' by virtue of selecting prison as the disposition. How long a prisoner remains in prison once 'sentenced' is a matter for the administrative board). The chief motivation behind the passage of this legislation was the attainment of "greater equality and consistency in sentence."

- long terms in California. Again as I believe the literature in this area would show some of the lengthening of mean terms in California are associated with a statistical artifact. The introduction of the probation subsidy programme in California has probably shifted men who would have served short terms on a felony conviction to the local authority (where many are serving definite terms in the worst conditions of local jails). Thus they are no longer included in the State's statistics. If you remove short sentence persons from the total aggregate you will automatically get an increase in the mean term served.

As the crime rate in California is notoriously high and violent, it is not surprising that prison sentences are long. As you will see from Hawkins' analysis among several others, the adult authority was never set up to apply social science expertise in the sentencing process. The administrators in the Department of Corrections, not in the adult authority have tried to work within that framework, to attempt various rehabilitative techniques. As your working paper correctly pointed out most board members, even recently, were former policemen or prison personnel but were not treatment persons.

- uncertainty. As Hawkins recognises the principal problem in the so-called indeterminate sentencing structures is

uncertainty and lack of due process. Uncertainty does not apply to all jurisdictions, as a hearing is held shortly after admission to the institution. Even so it should not be exaggerated; a man serving fifteen years in Canada does not know when he is likely to be released. A man on a so-called twenty year term in California would have a fairly accurate estimate of when he would be released.

- due process. It seems clear that the most serious criticisms against the typical stereotype of an indeterminate sentencing or parole board in the U.S.A. is their total lack of concern with constitutional rights and natural justice for their subjects. In Appendix A of the Hugessen Report, which discussed statutorily fixed sentences for longer periods of incarceration, the co-ordinated system of high level regional boards were to have their powers extended to include both prison (length and level) and parole term setting. This was designed to reduce disparity and inconsistencies between the different components of the criminal justice system (courts, prison directors, parole boards, police), particularly within the five regions of Canada.

However, a main thrust of the report is that the elements of Natural Justice that are well known to lawyers and referred to in the Bill of Rights, have been strongly recommended in the McRuer Report in Ontario and should apply to regional boards. Thus there should be a right to a hearing before the final decision-makers; written reasons should be given for negative decisions; there should be a recording of the hearing; there should be reasonable public access to the hearing; and normal right to access to files.

- monitoring. Public access does not provide the best safeguard. A system of information monitoring can provide very much better safeguards to the public. While it may be anathema to lawyers to think of a consumer index or unemployment rate for crime and for prison terms, technologically and financially these are now feasible. It seems to me that these techniques should be applied to social indicators to show whether mean terms served are increasing or not.

(5) Sentencing Councils

If I have understood the proposal on sentencing councils it would seem to advance little beyond the occasional meetings of judges and magistrates, which do not seem to provide any guarantee for obtaining reasonable consistency in the application of certain criteria to sentencing. Certainly

Hogarth's analysis of sentencers' behaviour in Ontario would be pessimistic in this regard. Sentencers do not seem to be influenced much by other sentencers. If these meetings were supplied with the appropriate information, I would see a much more realistic possibility of some consistency being achieved. I would see two sorts of information as being important. First of all material identifying the extent to which legislated criteria and goals were being followed.

At a different level, general information on questions like deterrence and impact and operation of various dispositions could be brought together into a guide to the sentencer for the vast majority of decisions that involve minor deprivations of liberty.

Conclusions

If the aim of the guidelines is to modify sentencers' behaviour and reduce the amount of public money squandered on imprisonment, one has to substantially change the environment in which those sentencers work. One must make those wanting imprisonment "show cause"; one must co-ordinate the disparate parts of the criminal justice system; one should co-ordinate the legislation affecting the man in the corrections system; one must consider the sentencing boards whose goals are to consider the conflicting purposes and constraints on criminal justice; one must consider the use of information systems.

Despite the length of these comments, they are only being made in the belief that they will be considered seriously and the appropriate items in the working paper reconsidered. I would not like them interpreted as implying that the philosophy and general approach of the working paper is not accepted. I wholeheartedly support and agree with those underpinnings but would like to see consideration given to these alternative mechanical but essential details.

CRIME REDUCTION THROUGH EDUCATION AND RESTITUTION

Our Urgent Problem - The Rapid Increase in Crime

The rate of recent increase in individual and organized crime, projected only one generation into the future forces us to the conclusion that the citizens of democratic nations have before them two alternatives upon which they must reach decisions very soon. They must choose to take firm action leading to control of crime or they will automatically choose by default to allow the present increase in crime to continue. Since "all that is necessary for the triumph of evil is that good men do nothing", failure to act and to control crime will mean that we are leaving to our childrens' generation a heritage of violence and chaos that will be followed by the rule of a dictatorship. The dictators who take over will be strong enough to control not only the criminal minority but also all aspects of the lives of the law-abiding majority of citizens. There is no lack of evidence in other nations of what dictator rule will be like for the first several generations placed under its control. History also repeatedly tells the story.

We are in danger of being recorded in history as an affluent democracy that failed because its citizens allowed their criminal minority to destroy it. Our present adult generation has already seen long steps taken downward toward future chaos, threatened by highly organized criminal groups preying upon our over-tolerant democratic society. We have increased and improved our police forces but the resources, technology and power of organized crime have increased more rapidly as is shown by the continual and rapid increase of armed robbery, kidnapping and murder.

Our enlarged and improved police forces are hindered and prevented in their efforts to control crime by the extreme, "Do-your-own-thing" syndrome promoted by noisy minority groups that claim for criminals more personal freedom and privilege than can be allowed to law-abiding citizens. These disruptive groups frequently are permitted to defy the law with impunity, injuring their fellow citizens without requirement of restitution of any kind.

Our society has already allowed the problem of violent crime to grow to the state of an advanced cancer in our civilization. To survive as a democracy we must deal with this potentially terminal disease vigorously and without delay.

Short-Term Step Toward Solution - Enforcement of Present Laws

An immediate short-term step toward restoring the power of society to protect itself against crime would be properly to enforce the laws that we now have on our books. To do this we would need to abolish weak favouritism toward law-breakers and to the loud-mouthed demonstrators now demanding unjust privileges that cannot be given to honest citizens. We would need to allow no failure of law enforcement through influence of social, political or financial pressures. These improvements would immediately strengthen our defences against crime and would give warning to criminals inside and outside Canada, that we are no longer softly tolerant of defiance of the law. In addition to enforcement of present laws some new laws would be required to deal with the new devices constantly being invented by criminals to take advantage of their fellow citizens.

Along with these short-term steps we need to proceed at once to build longer-term solutions to the crime problem and to make them part of our way of life.

Longer-Term Solutions - Preventive and Corrective Education

Long-term solutions of our crime problem can develop in education. These can be applied in two separate areas. The two areas will be preventive education in our schools and corrective education of inmates, especially young inmates, in our correctional institutions. All of our youth needs to be given, at home and at school, clear understanding not only of the freedoms and privileges that we enjoy in a democracy, but also of the responsibilities that we must accept in order to defend and retain these gifts, earned by the long and painful struggles of our forebears. It must be made clear to all citizens, young and old, that freedom does not come without cost, that it must be earned by continual effort and must be defended by constant vigilance. "Eternal vigilance is the price of freedom" is not an empty motto but a true statement of the price we must pay if we want freedom.

As a result of home and school training, youth should grow up with the understanding that society has the right to demand of every citizen that he or she deal fairly with all other citizens without requiring outside supervision. In other words, conscientious cooperation is the price of success in democracy. This means self discipline. The minority who are too selfish or too irresponsible to obey just laws and act as good citizens must first be stopped short and then must be trained up to good citizen standard by sound correctional education. A prime need in corrective education is that the offender should understand that he must make restitution for his mistake by doing useful work for the benefit of those injured - not as punishment but as a means of paying for the damage done. This work should continue, with possible respite earned by good cooperation, until the debt has been paid or until evidence has shown that he will act the part of a good citizen. The physical experience of doing useful work as definite restitution would have prime corrective and preventive effect, especially among young offenders.

Widespread knowledge and acceptance of the fact that offenders against the laws of society are required to work thirty or forty hours a week, under able supervision as restitution to the injured would be an understandable and effective deterrent to a dull as well as to a smart offender and a warning to those who might fail to respond to the claim of society for fair play without outside supervision. It would also be a justifiable requirement while society is providing them with food, clothing, shelter, medical services and other benefits.

The type of work imposed as corrective education and restitution could be chosen to suit the needs of the individual but should be productive of useful articles that can be sold for funds definitely allotted to benefitting the victims of crime. For example, a young man who normally would become a labourer could be set at making cement blocks needed for use in buildings. A potential skilled worker could make sheet metal pails, kitchen chairs, brushes or leather gloves or he might repair small electric motors. All of these things can be seen to have commercial value. They would be sold to produce funds used to benefit victims of crime. Work done as restitution and corrective education would differ completely in objective and in administration from the punishment of "hard labour" formerly applied.

It would seem reasonable to hope that this sort of treatment of offenders, combined with increasingly effective law enforcement would reduce the threat of future chaos and breakdown of democracy that looms if we fail to control individual and organized crime. Trouble lies ahead if we neglect to think this thing through and then do something.

The Law Reform Commission of Canada's Working Paper No. 5

Restitution and Compensation

A Review by

Legal Researchers
Centre of Criminology

The Law Reform Commission's latest Working Paper on "Restitution and Compensation",[1] although it can of course stand entirely on its own, represents an important elaboration and development of ideas which the Commission developed in its earlier Working Paper No. 3 on "The Principles of Sentencing and Dispositions".[2] It will perhaps be fairer to the Commission, therefore, if we review this latest offering in the light of its conceptual predecessor.

Working Paper No. 5's most refreshing quality is its direct and pointed style. The Commission has first to be commended for avoiding the typical legal jangle of official reports, and stating its position in clear and eminently readable terms. Nowhere is this refreshing style more apparent than in the opening paragraph of the Paper which, because it poses questions and assumptions which are so crucial to the whole theme developed in the Paper, we wish to quote in full here:

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1. Law Reform Commission of Canada, Working Paper 5: Restitution and Compensation (Ottawa: Information Canada, October 1974). Referred to hereafter as WP5.

2. Law Reform Commission of Canada, Working Paper 3: The Principles of Sentencing and Dispositions (Ottawa: Information Canada, March 1974). Referred to hereafter as WP3.

> "Doesn't it seem to be a rejection of common sense that a convicted offender is rarely made to pay for the damage he has done? Isn't it surprising that the victim generally gets nothing for his loss? Restitution - making the offender pay or work to restore the damage - or, where this is not possible, compensation - payment from public funds to the victim for his loss - would seem to be a natural thing for sentencing policy and practice. Yet, under present law they are, more frequently than not, ignored".[3]

A review of this Working Paper could scarcely have asked for a more suitable point of departure than that presented to us in this opening paragraph. Central to the Paper is the Commission's expressed assumption that restitution and compensation "would seem to be a natural thing for sentencing policy and practice" and, presumably by logical extension, that they would seem to be an obvious principal focus of the entire criminal process. We say "presumably" because we recollect an enigmatic but critical observation which was tucked away in the last paragraph of the Preface to the Commission's earlier Working Paper No. 3 on "The Principles of Sentencing and Dispositions":

> "... we do not consider "sentencing" as a function which begins at the end of the trial and ends at the beginning of the sanction but as a process related to all stages of the administration of justice"[4] (emphasis added).

Moving from this assumption as to the obvious and "natural" place of restitution and compensation as central functions of the criminal law and process, the Commission not surprisingly reaches the conclusions that restitution should "be made a central consideration in sentencing and dispositions", thus restoring it to its "natural" place among the criminal law's main priorities, and that compensation should similarly be established and developed through compensation boards which "must be brought visibly to the forefront of the administration of justice and linked to the courts in determining compensation".[5] In reaching these

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3. WP5, at p. 5.

4. WP3, at p. x.

5. WP5, at p. 20.

conclusions, the Commission has detailed with great clarity the reasoning which leads it to them. It notes modern criminology's perception of "crime" as an inevitable (and in some senses desirable) reflection of healthy conflict within society, from which change and new values emerge, rather than as some kind of social disease against which a massive war has to be waged. It goes on to review the obvious therapeutic effects restitution and compensation could have, both on the actors in a criminal transaction ("offender", "victim" and "complainant") and on society as a whole. With these views, and with the Commission's central statement that "not only is restitution a natural and just response to crime, it is also a rational sanction",[6] we cannot but agree, and congratulate the Commission on the clear and open manner in which it has expressed them.

It is with the central assumption and the major practical conclusions of the Paper, however - namely, that restitution and compensation "would seem to be" a natural and obvious primary focus of the criminal law and process, and that they should therefore be achieved through the adaptation of sentencing policies and practices at the conclusion of criminal trials - with which we take issue. In this connection, whatever might be the difficulties of implementing the Commission's proposals on "diversion" (a word whose recent over-use has virtually stripped it of any further practical utility) in its Working Paper No. 3 (and doubtless there would be substantial problems), we feel they will not be as great as the problems in trying to reconcile some of the views expressed on it in that Paper, with some of the views expressed on restitution and compensation in this more recent one. Before developing this point, however, we must return to examine the central assumption of the Paper on "Restitution and Compensation". In what sense are restitution and compensation obvious and "natural" foci of the criminal law and process?

We might perhaps start by asking what may at first seem to be a somewhat facetious question. It is not intended to be so, however. If restitution and compensation are such obvious and natural priorities of the criminal law and criminal "justice" system in the common law world, how is it that over the eight or nine hundred years of the development

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6. WP5, at p. 6.

of that criminal law they have received such little attention? And why is it that, as the Commission is at pains to point out, "under present law they are, more frequently than not, ignored"?[7]

There are two, at first apparently contradictory, ways of answering these questions, both of which are to be found within the Commission's Paper, although neither of them appear to be explicitly recognized as such by the Commission (probably because it did not expressly ask the question). Their contradictoriness, however, is apparent and not real, since it arises solely from the fact that they answer the question at different levels.

The first answer would be that restitution and compensation are not and never have been ignored by the criminal law and the criminal "justice" system. The Commission itself points this out with some emphasis, when it asks rhetorically, in the opening passages of its Paper,

> "How frequently do business firms settle thefts by employees privately, extracting in many cases a promise to pay the money back? How frequently do police, for example, using proper discretion, suggest to the offender and victim that rather than proceed with charges they should work out a suitable compromise involving restitution?"[8]

In later passages in its Paper, the Commission goes on to point out the various other ways in which the law provides for the recovery of a victim's losses - through such avenues as unemployment insurance, health and hospital insurance, ordinary property insurance, victim compensation schemes and, of course, through the small claims and civil courts. It also describes the quite considerable, though little used, provisions of the Criminal Code relating to restitution, compensation and restoration of property incidental to a criminal charge or conviction. The upshot of all this appears to be that, far from ignoring restitution and compensation, our present law provides a multitude of various avenues for redress of the victim who may seek it. If the Commission's observation to the effect that "sentencing" is to be considered

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7. WP5, at p. 5.

8. WP5, at p. 5.

"as a process related to all stages of the administration of justice" is borne in mind, it may well be argued that through the increasing recognition given by the law and the courts to police and prosecutorial discretion and to all the other modes of achieving restitution and compensation just described, these two objectives are now, and have been for some time, established as part of "sentencing policy and practice" under our present law, and are not "more frequently than not ignored". They have been left to be developed (and, many would say, with good reason) at stages of the process other than the stages of the formal trial and sentencing. According to this concept of the function of criminal law, the formal stages of the criminal process are designed primarily to achieve other objectives, and should be invoked only when these other objectives are considered to be paramount. As the Commission stated in its Paper:

> "Through conflicts over value positions society has the opportunity of reaffirming its view of what conduct is so injurious that it ought to be dealt with by penal sanctions".[9]

It is, however, its primary emphasis on penal sanctions which essentially distinguishes the criminal court from the civil court; both civil and criminal courts serve the function of reaffirming social values, since this is an inevitable incident to any distributive adjudicative decision.[10] Although, of course, which conduct has been considered an appropriate subject of penal sanctions, and which is considered appropriate for civil sanctions, has tended to be, to some extent, a matter of historical accident in the developing of our law, rather than one of consistent taxonomy.[11] Without wishing to pursue this point at great length here, we should perhaps note

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9. WP5, at p. 6.

10. See e.g. Eckhoff, T., "The Mediator and the Judge", in Aubert, V., (ed.) Sociology of Law (Harmondsworth, U.K.: Penguin Books Ltd., 1969), at pp. 171-181. See also Aubert, V., "Competition and Dissensus: Two Types of Conflict and of Conflict Resolution", (1963) 7 Journal of Conflict Resolution 26-42.

11. See e.g. Hadden, T., "Contract, Tort and Crime: The Forms of Legal Thought", (1971) 87 Law Quarterly Review 240-260.

our view that the Commission's apparent unwillingness to confront squarely the issue of the respective roles of the civil and criminal courts in resolving conflicts in our society, constitutes an important weakness in this and earlier Working Papers. The nearest the Commission appears to come to dealing with this most fundamental issue is in its discussion of the European "combined trial", under which "a claim for damages is presented during the criminal proceedings."[12] The Commission's discussion of this European model is, we feel, somewhat less than adequate, both in terms of its description of it, and in terms of the conclusions which it draws from it. In the first place, the Commission asserts that one of the "practical disadvantages" of this model is that "the prosecution is supposed to inform the victim that charges are being laid, but in practice the prosecution frequently fails to give such notice." "The result", claims the Commission, "is that the victim is effectively prevented from making a timely claim for damages during the criminal proceedings."[13] To those who are familiar with the European model, this must sound strange indeed; for it appears to ignore some of the essential features of the "combined trial". Briefly summarized, these are as follows:

(1) In a great many minor cases[14] the consent or request of the "victim" is legally required before any prosecution can be launched at all;

(2) Even when no express consent of the "victim" is legally required, the vast majority of prosecutions in minor cases are instituted only on the request or complaint of the injured party; and

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12. WP5, at p. 11.

13. WP5, at p. 11.

14. E.g., in Italy, insults, defamation, assaults resulting in illness or injury which persists for less than 10 days, all offences of negligence causing bodily harm or illness which persists for less than 40 days and involves no permanent consequences, breaking and entering where no actual theft is involved, and all sexual offences, including rape. Rape, however, is distinct from the others listed, in that once the "victim" has initiated a prosecution, she is not subsequently free to withdraw it. An essentially similar system applies in all other European "civil law" countries.

(3) In any event, the nature and scope of the "instruction" (the inquiry conducted by the investigating magistrate), and the compulsory discovery to all parties of the "dossier" before trial, make it extremely unlikely, if not actually impossible, that a prosecution could proceed to trial without first coming to the knowledge of the injured party.

The Commission rightly points out, however, the tendency a civil claim would have in complicating or delaying the hearing of a criminal charge, especially in the light of the different principles of liability and rules of evidence which would have to be applied in determining the separate issues of civil and criminal liability. Equally importantly, however, it notes the possibility that the existence of a combined civil claim could result in prejudicing the impartial determination of the issue of criminal liability. To this last "problem" with the notion of implanting the "combined trial" into the common law system, the Commission poses a solution whose naivety seems to be matched only by its brevity of expression:

> "Any potential bias, however, could be avoided by putting off consideration of the civil claim until after the verdict in the criminal trial. However, there is no need to complicate the criminal trial with civil issues. After the matter of guilt has been decided, it should be feasible to consider restitution and even compensation under the more relaxed rules of procedure at the sentencing stage."[15]

On the details of this procedure, the Commission appears to have been struck by a sudden fit of vagueness, not only in describing it but in explaining why the question of the offender's liability to make restitution and compensation should require any less careful and detailed procedure than the question of his liability to a penal sanction. The Commission simply and enigmatically states that:

> "In most cases the procedure during sentence is not, and presumably should not be, strictly adversarial as at trial. Notwithstanding the merits of cross-examination and the rules of evidence in clarifying legal issues and determining facts, it is necessary at the sentencing stage to make a broader inquiry than the strict rules would permit into such matters

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15. WP5, at p. 11

> as the history of the offence and the circumstances of the offender. This is not to say that the sentencing process should not be open, fair and accountable. It does mean that a judge should be able to have access to a wide range of material relating to the circumstances of the offence, including the amount of loss suffered on the criminal injury."[16]

As we read this passage in its paper, we could not but reflect on the earlier assertion of the Commission, in its Working Paper No. 3, to the effect that:

> "It goes without saying that justice demands that sentencing procedures, particularly in serious cases, should require specific findings on all disputes issues of fact relevant to the question for the sentence."[17]

What kind of procedure we may expect in a formal sentencing process which is concerned to determine what is essentially an issue of civil responsibility, and which follows a trial the essential purpose of which is to determine the accused's criminal responsibility, remains far from clear from the two Working Papers. Nor can we feel entirely satisfied that removing the issues of restitution and compensation to the formal sentencing stage of the criminal trial will avoid all the problems which the Commission associated with the European "combined trial". In this respect, the Commission seems to have forgotten the insight of its earlier observation as to the limitations of viewing sentencing "as a function which begins at the ends of the trial and ends at the beginning of the sanction". Sentencing, as the Commission pointed out, is "a process related to all stages of the administration of justice", and we have little doubt that the kinds of changes of emphasis which the Commission has recommended - under which in some cases securing restitution or compensation would become the sole objective of sentencing - would have profound effects not only on the earlier stages of the formal trial itself, but on the equally important prior decisions of prosecutorial discretion and plea bargaining. Indeed the complete absence of any consi-

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16. WP5, at pp. 11-12.

17. WP3, at p. 26.

deration by the Commission in its Paper of the implications of its proposals for prosecutorial discretion and plea bargaining - nowadays such crucial elements in the criminal process - is somewhat disconcerting, and leads us to wonder whether the Commission gave its proposals as much careful thought as they demand.

The fact that existing provisions for restitution and compensation at the formal sentencing stage of a trial under the Criminal Code[18] are "little-used", is of course open to diverse interpretations. One of these is that the reason they are little used is that the other opportunities for securing restitution and compensation are perhaps more effective and desirable. In this connection, it is most significant that throughout its Paper, the Commission does not appear to present any clear evidence of what the practical problem is which requires changes in the law relating to restitution and compensation. The only "problem" it seems to mention in this connection is what it rightly, we think, describes as the "futility of strictly punitive sanctions"[19] from all points of view. This "problem", as we shall discuss below, seems to us to be amenable to other solutions than by adding restitution and compensation as a central consideration at the conclusion of a criminal trial. For the moment, however, we may reflect that it would have been most helpful if the Commission had discovered whether there are in fact thousands, or even hundreds, of dissatisfied criminal victims clamouring for more effective restitution and compensation laws. For the existence of such a problem, and its nature, seems to us crucial in deciding upon the necessity for any "solution", and upon the form it might take. Before pursuing this point further, however, we must consider the second answer which may be given to the questions we raised earlier.

The second way of answering the questions as to why restitution and compensation have received so little attention in the development of the criminal law, and why our present law appears, more frequently than not, to ignore them, would be to say simply that restitution and compensation

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18. See e.g. sections 388(2), 616, 650, 653-655, 663, and 742 of the Criminal Code, R.S.C., 1970, c. C-34.

19. WP5, at p. 8.

have never been, and were never intended to be, a primary focus of our criminal law and criminal trials (and hence sentencing policy and practice). It is not, therefore, correct to suggest that they "would seem to be a natural thing for sentencing policy and practice". This answer is only acceptable, of course, in the light of the first answer, if by "sentencing policy and practice" we mean simply the formal process of sentencing at the conclusion of a criminal trial, and not "a process related to all stages of the administration of justice". This answer, however, casts both the "problem" and the Commission's proposed "solution" to it, in a somewhat different light.

This second answer is also to be found within the Commission's Paper. It notes, for instance, (although it apparently does not draw the obvious lesson from it) that "punitive sanctions have been for too long the overriding focus of the criminal process".[20] It also notes that the last time restitution and compensation found a major place in the disposition of criminal-type incidents in England, was in Anglo-Saxon times when "there was no criminal law as we know it".[21] And after what must be one of the shortest histories of criminal law in the common law world ever published, it concludes, we think absolutely correctly, by stating that:

> "It would now seem that historical developments, however well intentioned, effectively removed the victim from sentencing policy and obscured the view that crime was social conflict."[22]

If it is true, and we believe it is, that modern criminal law and criminal process has been developed and designed to achieve purposes completely different from those of restitution and compensation, then it is difficult to see in what sense restitution and compensation can be said to be "natural" components of that law and of that process. Far from being obvious goals of modern criminal law, criminal procedure and the rules of criminal evidence, restitution and compensation would appear to us to be largely incompatible with this branch

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20. WP5, at p. 1.

21. WP5, at p. 8.

22. WP5, at p. 9.

of the law. Indeed, in its rejection of the concept of a "combined trial" (as exists in most continental European countries), the Commission seems to indicate its clearest appreciation of this incompatibility. Modern criminal law, criminal procedure and the rules of criminal evidence in Canada are quite clearly designed to achieve the major purpose of concentrating attention on one of the actors in a "criminal" incident, designating him as a potential offender, and attaching to him "blame" for the incident. They are not normally concerned to discover what parties other than the accused may bear some share of the "blame" for the incident, except in so far as this may assist them in deciding whether the accused was to blame. As hundreds of thousands of potential complainants have learned over the years, this is a process which, far from being useful and effective in securing restitution or compensation, is often completely counter-productive in this regard. This is undoubtedly an important factor in explaining why so much known "crime" goes unreported, and why so many "victims" (both private individuals and corporations) shun the formal criminal process in favour of more effective and less costly alternative means of securing restitution and compensation.

In the light of this historical and present-day reality, substantial questions arise as to the Commission's proposals for introducing restitution and compensation as a major consideration in the sentencing and disposition process following upon a conviction in a criminal trial. If history and current experience tells us that the criminal law and the formal criminal trial are so singularly badly adapted to achieve the objectives of restitution and compensation for the "victim", why, we may ask, does the Law Reform Commission think it would be a good idea to increase the attempts to achieve that goal during the final stages (formal sentencing) of that process? Indeed at one point, the Commission goes so far as to suggest that: "What is needed is to give restitution ... first consideration whenever possible".[23] But if restitution is to be our primary objective in sanctioning state interference in the "incidents" which we currently call crimes, why would we want to continue to seek its achievement through the use of a process whose every detail is designed to achieve completely different and often conflicting purposes? Why would we not want to concentrate on developing other more effective ways of achieving restitution and compensation, which do not involve such conflicts?

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23. WP5, at p. 14.

As we have noted earlier, the reasons why the Commission feels there is a "problem" with restitution and compensation which requires some "solution", are nowhere clearly stated in the Paper; the existence of a "problem" which needs correction seems to be assumed. We have a strong impression, however, that the major "problem" which was on the Commission's mind is the futility of the criminal process as it now operates, in terms of its ability to produce anything other than negative results (both in terms of the "offender" and "victim", and in terms of society as a whole). The style and content of the Commission's reasoning in the Paper suggests to us strongly that it may be to the solution of this problem that its proposals are mainly directed. In our view, however, this is a most unsatisfactory approach. The inclusion of restitution and compensation in a process which in almost every other respect is alien to those objectives, does not seem to us to be the best way of going about either achieving the objectives of restitution and compensation, or of solving the current problems and failures of our criminal process, designed as it is to punish and reject the "offender".

While the Commission's proposals for "diversion" in its third Working Paper on "Principles of Sentencing and Dispositions" are certainly not theoretically in contradiction with its proposals in its Paper on "Restitution and Compensation", in practical terms there would certainly appear to be some problems in reconciling them. For in the latter Paper, the Commission acknowledges that "the chief argument against the implementation of restitution as a major consideration in sentencing and dispositions" is that: "It won't work because all criminals are poor and, even if some of them have money, you'll never be able to make them pay."[24] The Commission's response to this objection is essentially that in the great majority of cases the amounts in question would be quite small and well within the means of the offender. In this connection it notes that the majority of cases coming before the courts involve motor vehicle offences, assault and theft, and cites statistics which suggest that in well over half of these cases the amount of restitution required is below $100. From this, they conclude that restitution would be a viable disposition in most cases in which it was appropriate. These minor offences, however, appear to us to be the very ones which the Commission argues, in its Working Paper No. 3, on "Principles of Sentencing and

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24. WP5, at p. 12.

Dispositions", should be "diverted" from the criminal process, and should not involve a formal criminal trial at all. Thus in that Paper, the Commission stated; "For example, petty theft or having possession of stolen property under $200.00, common assault, homosexual offences, bestiality or exhibitionism, family disputes, mischief to property, joy riding, minor break and enter cases or cases involving certain types of mental illness, probably should be diverted unless there are strong factors pointing to the desirability of a trial"[25] (emphasis added). If these cases are to be removed from the formal criminal process, therefore, it seems to us that the Commission is going to have a hard time meeting the chief objection to its proposals on restitution and compensation in the cases which remain, and the impact of those proposals, if implemented, would be likely to be substantially reduced, if not virtually eliminated. While we have no special interest in seeing the Commission proven wrong, we must confess that, from the point of view of desirable law reform, we can, in this instance, scarcely imagine a more welcome result. For we are among those who believe that many, if not most, of the things that are currently being done to people in the name of criminal "justice" are resulting in more harm than good to society, and that the most desirable way of reforming a great deal of our criminal law and criminal process would be to do away with it and replace it, where necessary (and in many cases it is not), with institutions and procedures which can bring more constructive and humane resolutions to the conflicts which we currently deal with as "criminal". In an age such as this, in which criminal law and the criminal process have been over-extended such as never before, we should be sceptical of any proposals which would attempt to give this over-worked horse a new respectability. If we must continue to put people through the degrading and humiliating experience of our punitively-oriented criminal justice system, we must at least ensure that we only do so in those cases in which no other alternative seems reasonable. The more humane objectives of reconciliation, restitution and compensation should be cultivated in new environments which will be more congenial to their achievement, and which will avoid the predominantly negative stigmatisation of our criminal process.

In its Working Paper No. 3 on "Principles of Sentencing and Dispositions", the Law Reform Commission showed

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25. WP3, at p. 11.

signs of setting its face, albeit somewhat cautiously, in these new directions. We can but hope that its Working Paper No. 5 on "Restitution and Compensation", and the reported disenchantment of its Chairman[26] do not indicate a weakening of that resolve. We are left to wonder, however, at the Commission's unexplained silence up to this point, in all of its Working Papers, about the political, economic and constitutional implications in Canada of its earlier proposals for "diversion" and "decriminalization".[27] Could it be that the Provinces would not entirely welcome responsibility for the "diverted" (and hence, presumably, no longer "criminal") cases? Or that the Federal Government would not entirely welcome the potential lack of uniformity of legal control[28] which it might imagine would result from Provincial assumption of responsibility for such "diverted" cases?

If the Law Reform Commission has any answers to these questions, it is keeping them close to its chest. We are hopeful, however, that when it presents its much awaited (by us) Working Paper on "Diversion", it will address itself boldly to these and other seemingly mundane but difficult issues, and will build on the promise of its earlier work.

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26. See article "A Law Reformer is Disheartened", Toronto, Globe and Mail, 16th Nov. 1974, pp. 1 and 2.

27. In its sole reference to this aspect of the matter in WP5, the Commission simply states: "Moreover, in Canada, combining the civil and criminal trial would raise serious constitutional issues; civil law is generally under the jurisdiction of the provinces, while criminal law is a federal matter": WP5, at p. 11.

28. Let it not be thought, however, that the much-vaunted "uniformity" of existing Federal criminal law in Canada is anything but a myth in reality.

WORKING PAPER 5: RESTITUTION AND COMPENSATION

WORKING PAPER 6: FINES

A Critical Analysis

Elizabeth Fry Society
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On Saturday, February 8, 1975, the front page headline in the Toronto Star read: "Violence: A Growing Fear in Canada." The article contained startling evidence of the increase in crime in Canada, and the explanations which prominent judges, police officers, and Members of Parliament offered in an attempt to rationalize what is happening. Metro Police Chief Harold Adamson and Vancouver Chief Don Winterton both say they sense what Adamson called "a strong public trend toward law and order rather than away from it." Chief Winterton said: "As part of this trend there have definitely been signs that some people are prepared to take the law into their own hands. When that happens it is bad for the community. It seems some people have lost faith in the capacity of the law to look after them."

I mention this article because it is important not to forget that the work of the Law Reform Commission of Canada is not carried out in a vacuum. Some people probably find little value in discussing the theory behind our criminal law when what they see around them merely reinforces an attitude that the rights of the offender are protected to a greater degree than the rights of the victim. Hence, with the crime rate increasing at a healthy pace, it is not surprising that more and more people are losing faith in the process by which alleged offenders are brought to justice. This fact is particularly important when discussing such issues as restitution, compensation and fines.

Restitution

Undoubtedly, the time has come for restitution to be made an essential part of our criminal process. With the pressure now being placed on our system to recognize the legitimate needs of the victim, it is only proper to support measures to ensure that the offender tries to help his victim recover from the consequences of the crime. As the Working Paper points out, this would benefit both the victim and the offender.

However, there are several difficulties with such a scheme. First, as a general comment, the public may not be prepared to accept the proposed system. Perhaps unfortunately, we have a long tradition of demanding imprisonment for those convicted of crime. It has become normal to assume that the only punishment for criminals is a long stay in a penitentiary or jail. Justice has become equated with incarceration.

It will not be easy for people to reject that notion and accept some form of restitution as the proper alternative. For example, there is probably a widespread feeling that someone who commits a crime should not be left in a position wherein he could commit the offence again. That feeling goes right to the heart of the notion of restitution, because under such a scheme, the offender is left in essentially the same position as he was before he committed the crime. That is, he still has his freedom. He still has a job (either the one he had before the offence or the one given to him so he might have a steady income with which to repay the victim), and he still has the opportunity to engage in criminal activity. I can see how the public might think that nothing short of imprisonment will prevent the offender from committing the crime again.

Second, we must consider the way in which the criminal element will view such a system. To be realistic, there must be something in the way of punishment which will hopefully deter to some extent those contemplating committing a crime. However, if the most probable punishment will be either some form of repayment to the victim or accepting a job in order to make some money to repay the victim, it could be argued that the punishment does not fit the severity of the crime. In that sense, it becomes a calculated risk to commit the offence, but a risk which will not seem so formidable when the punishment is so light. Indeed, it is submitted that there will be little incentive not to commit the offence, especially if the offender knows he will be able to pay any amount imposed by the court.

Third, what happens to the offenders who absolutely cannot pay anything to the victim? If the offender is on welfare or is receiving some other form of public assistance, is it reasonable that the system take from him the money he is given in order to provide a basic level of existence? In the final analysis, would not the families of such offenders bear the brunt of the restitution scheme? For example, the husband and father on welfare commits a crime. The courts impose a sentence on him which involves a repayment of a certain sum to the victim. From where does this sum of money come? If it comes from the money which this individual must use to provide the basic necessities to his family, then where is the justice of the system?

The answer suggested by the Commission is to have such an offender do some form of work in order to obtain money with which to pay the victim. However, there are difficulties with this alternative, too. The victim may not want the offender to work for him (and it is suggested that this would be the case in many of the situations). So some outside agency will undertake to find employment for the offender. Where are these jobs supposed to come from? In a time of high unemployment, people might object to the notion that jobs will either be given to, or created for, offenders. Will the offender want to take the job offered to him? If the job involves unskilled or manual labour the offender may not be happy with accepting it.

One final consideration, what happens to repeat offenders? It is straightforward if the Criminal Code provides that second offenders must be sentenced to a term in prison. However, if it is left to the discretion of the judge, it would seem proper that he be given some guidelines. Does this system of restitution apply equally as well to those who have committed the offence before? If it does, it might be the case that the offender realized that his punishment would be another work order or another repayment scheme, and that he did not view this as a very severe penalty, thus not discouraging him from committing the offence again.

In summary, then, there is definitely a place for restitution in our criminal law process, especially in pre-trial settlement procedure under a diversion scheme. However, one must not forget that society demands that punishment be adequate for the crime committed. In that sense, there may be widespread dissatisfaction with a scheme which <u>seems</u> to let the offender off easy, especially in view of our general tradition of imposing prison sentences whereever possible. Again, the punishment must be such as to make the potential

offender think twice before he commits a crime. It could be argued that the restitution scheme proposed does little by way of discouraging crime, since repaying the victim and/or work orders would seem to be rather light punishment when compared to the alternative of a term in prison. Finally, the notion of work orders raises many policy considerations as to the way in which the public will view finding, or creating, jobs for offenders. In short, such a scheme might be seen by the average person on the street as a continuing effort to make it easier for the offender to escape severe punishment for committing his offence.

Compensation

As with restitution, it is time that some form of compensation scheme be introduced to aid the victims of crime. The estimate that less than 3 percent of those eligible for compensation actually apply in Ontario serves to indicate the necessity of such a system. As the Commission rightly points out, compensation boards should be highly visible, payments should be timely, and there should be a general compensation fund from which awards could be made.

The only difficulty I have is in accepting the Commission's distinctions between personal loss and property loss. The former should clearly be included in any type of compensation scheme. As for property loss, the Commission's reasoning is suspect when it attempts to exclude it from the scheme. First, the Commission determined that the cost of including property loss would be too great a burden for any compensation scheme. However, we are here concerned with what happens to victims of crime, and if the government is going to over-spend in any particular area (it is assumed that the government will contribute in some measure to the fund, since fines and forfeitures will probably be inadequate to cover the costs involved), then it should be in this important area. Hence, I do not think costs should be considered in deciding the type of crime which will be included in the scheme.

Second, the Commission feels that extending compensation to claims involving property might increase the reported crime rate. This, it feels, "may be a disadvantage particularly in a society that wants to encourage individuals to handle minor conflicts on their own." (22) I fail to see how that makes any difference at all, especially when the Commission had just indicated that the way people usually handle minor conflicts is to forget about them due to a lack

of faith in the police to apprehend the offender. Surely it would be much more sensible to allow claims for property loss, since under the present system such claims are usually ignored. A scheme for compensation must attempt to deal with victims of all crime as equally as possible.

The Commission finally argues against including claims for property loss because, as they see it, property no longer has the big value it did a hundred years ago. This is certainly debatable, especially when one considers how materialistic our society has become. In addition, whether the value of property has declined in the last century is irrelevant when one realizes that it is the victim's own personal attachment to his property which must be considered. Hence, for these reasons I think claims for property loss should be included in any compensation scheme.

Fines

The system of day-fines proposed in the Working Paper is far superior to anything the criminal law process now knows. As the Commission points out, the "X dollars or Y days in jail" system only serves to force more poorer people into our jails, and allow the rich to be punished in a relatively easy way. Again, there are some problems. First, generally speaking, no matter what system is proposed the imposition of a fine is always going to hurt the poor more than the rich. Even though under the day-fine scheme the penalty is a certain percentage of the offender's gross income, to those with a small gross income, any fine is going to hurt them more than an offender with much more money. It seems that what I am objecting to is the theory that the proper way to punish someone with severely limited funds is to fine him. Somehow, that does seem a bit illogical and unfair.

This would be the case especially if the offender was on welfare and had a family to look after. Under those conditions, the government gives to the offender a certain minimum amount of money to provide for his family. The offender commits a crime, and the penalty is the taking away of some of the money which the government thought best to give him in the first place. It seems that the families of such offenders would suffer the most.

Aside from that consideration, the theory behind day-fines is somewhat questionable. If the offender knows that the penalty he will receive will be 1,000th of his

gross income, and he also knows that he does not have a very high gross income, then could not the potential offender decide that the not-so-severe penalty was worth risking the crime? It seems plausible to suppose that the day-fine system would not prove to be any type of deterrent to the potential offender at all; rather, it could appear to be a nice alternative to a jail sentence.

Finally, assuming that the day-fine system, or a variant, was adopted, the administrative machinery which would have to be utilized would make such a system extremely expensive and cumbersome. There would have to be the personnel in the office of the court clerk or administrator to interview the offender at the means inquiry. There would have to be a system for verifying the information given by the offender (and the expense of computers for a nation-wide scheme would be quite high). There would have to be provision for someone to look after each day-fine imposed, so that enforcement would remain an important part of the system. Finally, there would have to be time available for a second means inquiry if the offender defaulted on the terms of his first penalty. In short, the scheme proposed might involve more time, money and personnel than is now anticipated.

CANADIAN CRIMINOLOGY AND CORRECTIONS ASSOCIATION

C O M M E N T S

ON

THE LAW REFORM COMMISSION'S WORKING PAPERS

Restitution and Compensation

and

Fines

April 5, 1975

The purpose of this submission is to set out the Canadian Criminology and Corrections Association's comments on the Law Reform Commission of Canada's Working Papers 5 and 6. These comments should be read against our earlier brief to the Commission entitled Toward a New Criminal Law for Canada.

Restitution — We support the emphasis on restitution in the Working Paper. We agree that restitution is a valuable procedure and that it should receive greater recognition in Canadian criminal law and sentencing practices.

We believe, however, that the partie civile or combined trial procedure should receive further consideration. It appears to work well in some European countries and received the endorsation of the delegates who attended the Eleventh International Congress on Penal Law. It might leave room for experimentation with new concepts. For instance, would it be feasible to require only civil rather than criminal certainty in establishing a claim for restitution? Are there cases where criminal liability cannot be established but where a civil claim to restitution would be supported? It should be noted that a procedure that has some aspect of the combined trial appears in section 653 and 654 of our Criminal Code.

We would oppose the suggestion on page 15 of the Working Paper that "where restitution is to be the main sanction, it may be useful to impose probation as an additional penalty ...". If restitution is the main sanction, we believe that probation should be imposed only until the restitution is paid so that the probation staff can insure restitution is paid. Probation beyond that time would be pointless. If, however, probation is the main sanction, and restitution is seen as a condition of probation, then the length of probation depends on factors other than restitution.

Compensation — We are of the opinion that compensation is assigned too minor a role in the Working Paper. The aim should be to make up to the victim as promptly as possible the loss he has suffered through criminal activity. He should not be dependent on the uncertain process of restitution since few offenders have immediate means and at best would pay restitution over a period of time. Also, many offenders would resist paying. We prefer a procedure where the victim receives immediate compensation from the state and the state recovers what it can through restitution.

There may be cases where restitution, and particularly non-financial restitution, is best paid direct to the victim, but we see this as the exception.

Further, we believe that compensation should have the same scope as restitution. It is not reasonable that the victim of an offender who has means should receive fuller reparation through restitution than the victim of an offender without means does through compensation.

The Working Paper adopts the principle that compensation should not apply to property offences, allowing exceptions to that rule. We prefer the principle that compensation should apply to property offences, with exceptions to that rule. This reverses the emphasis. Among the exceptions we would suggest are these:

a) Claims for loss under some set amount. This would avoid the heavy administrative expense of dealing with such claims.

b) Claims above some set amount. This would avoid covering the loss, for instance, of a valuable work of art. The owner of such property should be covered under insurance.

c) Offences that are normally covered by insurance, such as automobile offences.

d) Offences against corporations. There would be a definition problem here. The small store owner may be incorporated but as much in need of compensation as any non-incorporated individual.

In this, we support the principle set out on page 5 of the Working Paper: "If justice is to be done, the violation of the individual victim's personal and property rights ought to be redressed".

The arguments set out on pages 21 and 22 of the Working Paper to support the principle that compensation should not apply to property offences seem to us unconvincing:

- the high cost of property losses through criminal action makes the need for compensation even greater. The loss has to be borne under any system. The only question is whether the

loss is to be borne by the victims individually or whether it is to be shared by the community. The higher the loss the greater the need for compensation;

- a clearer picture of the extent of crime through fuller reporting seems to us desirable. To hide the real extent of crime because the victim chooses to bear the loss quietly seems unproductive. To expect the problems created by crime to be settled in a positive manner through informal arrangements between the criminal and his victim seems unrealistic;

- there is no basis for the prediction that fraudulent claims would occur in large numbers. The very low rate of claims now made for compensation for physical damage would suggest the opposite;

- the suggestion that we see property as a "throw-away" item seems to us unacceptable.

Part of the difficulty is that the Commission has committed itself to an ethereal concept of the purpose of the criminal law as the protection of "core community values". Our Association endorses the pragmatic aim of protecting all members of society from seriously harmful and dangerous conduct.

As a result, we see no difficulties in covering victims of crime under broader insurance schemes that might include, for instance, losses arising from illness or industrial accident. Nor do we see any difficulties in the administration of compensation schemes by departments other than justice or attorney-general.

We call attention to pages 21 and 24 of our earlier brief entitled Toward a New Criminal Law for Canada where restitution and compensation are discussed and to the attached policy statement on the topic. A number of points related to restitution and compensation are raised in these documents that are not dealt with in the Working Paper. Among them are:

- claims for compensation on the part of persons injured while assisting the police;

- methods of ensuring that the offender pay restitution if he has the means;

- the use of restitution in combatting major financial crimes and crimes involving pollution of the environment;

- the particular value of restitution as a sanction against corporate offenders.

Fines

We support the intent of the proposals regarding fines set out in Working Paper 6. We agree the court should have more discretion in the use of fines and that imprisonment as an alternative to fine should be resorted to only in the case where an offender who can afford to pay his fine refuses to do so.

We also agree with the principle that the offender should be given the time he requires to pay his fine. However, we do not believe that all offenders will require time to pay and those who want to pay in one sum should be permitted to do so. Corporations might routinely be expected to pay in one sum rather than over a period.

We agree with the proposal of day-fines in cases involving large sums and support the proposal of a means inquiry to determine what the day fine should be.

We do not support the procedure suggested in the event of non-payment on the grounds that it would be too time-consuming and would accomplish little. We would suggest that the court clerk or court administrator be given discretion in assessing whether a particular offender has legitimate reasons for being late in paying an installment on his fine and, if he is of the opinion no legitimate excuse exists, he should bring the offender before the court. In that event, the judge would deal with the matter as he sees fit in the light of all the circumstances.

CANADIAN CRIMINOLOGY AND CORRECTIONS ASSOCIATION

C O M M E N T S

ON

THE LAW REFORM COMMISSION'S WORKING PAPERS

Diversion

May 10, 1975

The purpose of this submission is to set out the Canadian Criminology and Corrections Association's comments on the Law Reform Commission of Canada's Working Paper 7. These comments should be read against our earlier brief to the Commission entitled Toward a New Criminal Law for Canada.

We agree with the statement in support of diversion that appears on page 3 of the Working Paper:

> Underlying diversion is an attitude of restraint in the use of the criminal law ... It is unjust and unreasonable to inflict upon a wrong-doer more harm than necessary ...

We agree that diversion should be available and encouraged at each step in the criminal process. The authority of the police and of the crown to divert should be made clear in the legislation and the principle set out that both the police and the crown should divert whenever feasible within the applicable guide-lines and the circumstances of the case. The guide-lines suggested on pages 6 and 7 of the Working Paper related to diversion by the police and on page 11 for a more advanced stage of diversion seem to us to be reasonable.

In our original submission to the Commission, Toward a New Criminal Law for Canada, we made this recommendation:

> It is recommended that the Code of Criminal Procedure forming part of the Consolidated Act contain the principles of procedure and that a statutory body be set up on a continuing basis with the duty and power to adopt and amend procedural regulations for the implementing of the Act, and to make recommendations to Parliament as to its amendment.

If such a body existed it could monitor the operation of the diversion program and make changes in the guide-lines on the basis of experience, as well as recommending changes in the legislation.

We are concerned, however, about the danger of over-regulation. Discretion that is too tightly controlled is not discretion. Too-detailed regulations raise interpretation problems and can be self-contradictory. A nice balance is required.

We do not agree that

> ... as an incident is investigated by police and passed along the criminal process an onus should rest upon officials to show why the case should proceed further. At different stages in the criminal justice system opportunities arise for police to screen a case from the system, the prosecution to suspend charges pending settlement at the pre-trial level, or the court to exercise discretion to withhold a conviction or to impose a sanction other than imprisonment. At these critical points within the criminal justice system, the case should not be passed automatically on to the next stage. The principle of restraint requires that an onus be placed on officials to show why the next more severe step should be taken.
> (Page 3 of the Working Paper)

Placing an onus on the officials at each step to justify passing the case along to the next step creates a right to diversion and introduces a danger well illustrated in the operation of the Bail Reform Act. The basis on which officials can justify passing the case along would be difficult to define and in the lack of such definition cases would be diverted when all officials involved, including the judge, were of the opinion that diversion should not apply. An example might be a member of the crime syndicates who has never been convicted of a crime or whose last conviction was many years ago, despite the fact that he has been employed full-time in criminal activities. It might be quite impossible for the police or prosecution to present concrete evidence why diversion should not apply. We would strongly prefer to leave discretion in the hands of the officials, with the court having the final decision as to whether diversion applies.

Pre-Trial Diversion

Although we support maximum diversion at each step in the criminal justice process we do not support the plan for diversion following the laying of a charge set out in the Working Paper. Diversion should always be available to the crown through a decision not to lay a charge, but once a charge is laid we believe final authority should rest with the court. The plan set out in the Working Paper presents serious difficulties that would be avoided if responsibility lay with the court and offers

no advantages that would not accompany other procedures.

One great danger in the proposed plan is that the legal rights of the accused might be jeopardized. A charge would be laid in court but the judge would have no authority to assess the evidence against the accused or to influence the decision to divert. The accused would be asked to accept diversion and the commitments that go with it, perhaps including restitution. Would this not constitute a real even if not a legal admission of guilt? What defence would the accused offer if he is later brought to trial?

Many "innocent" people might in effect plead guilty by accepting diversion because of the fear of criminal trial and they would get no guidance from the court. In one United States study forty per cent of a comparison group received dismissal. (See Nimmer, Raymond T. Diversion. Chicago; American Bar Foundation, 1974, p. 105).

It seems that many of the advantages of traditional diversion would be lost in the proposed scheme. If a charge is laid in open court and the results of the diversion plan are "open, visible and accountable", and if a record is kept, the accused would seem to reap no benefit that would not accrue to diversion ordered by the court.

A constitutional difficulty may arise. Diversion of the nature suggested in the Working Paper might move out of the criminal into the social area and might require parallel participation on the part of the provinces, similar to the procedure related to juvenile delinquency.

The Alternative

We are of the opinion that once a charge has been laid responsibility and authority should lie with the court. The court would assure itself that a good case against the accused exists. Diversion could be suggested by the crown or the defence or it could be instigated by the court. Negotiations as to whether diversion is feasible could involve a "community agency or service" as suggested in the Working Paper. If a suitable plan works out, the charge could be suspended with the reason for such suspension given in open court. If the diversion plan works out, the charge could be later withdrawn under provisions that would prevent its being re-laid. In all matters, the court would be in control.

Such a procedure would, we are convinced, provide greater protection for the rights of the accused while giving the same advantages as the scheme proposed in the Working Paper.

CANADIAN CRIMINOLOGY AND CORRECTIONS ASSOCIATION

C O M M E N T S

ON

THE LAW REFORM COMMISSION'S WORKING PAPERS

Imprisonment and Release

October 22, 1975.

The purpose of this submission is to set out the Canadian Criminology and Corrections Association's comments on the Law Reform Commission of Canada's Working Paper 11. These comments should be read against our earlier brief to the commission entitled Toward a New Criminal Law for Canada.

We support the statement of guides to sentencing that appears on page 10 of the Working Paper, particularly as it relates to imprisonment:

> In this context the principles of justice, humanity and economy must be taken into account in sentencing. Justice requires that the sanction of imprisonment not be disproportionate to the offence, and humanity dictates that it must not be heavier than necessary to achieve its objective. In this sense the humanitarian sanction is the minimal or least drastic sanction. This is strengthened by the principles of economy which aims at minimizing the burden to society, the penal system, the convicted offender and his family.

We support the suggestion that a relatively detailed correctional plan should be drawn up for each inmate which sets out the steps he must take to be eligible for parole. We also recognize the need for some outside appeal authority so the inmate is not completely in the hands of the prison authorities.

We do not agree with all the proposals in the Working Paper intended to facilitate the implementation of these desirable policies.

The present sensitivity of public opinion to criminal justice practices should be given full consideration as plans for the future are formulated. There has been a serious drop in public confidence in the criminal justice system and proposals that would be rejected by the public as impractical should be avoided. In our opinion, several of the proposals in this Working Paper would be unacceptable to the public.

Reasons for Imprisonment

The Working Paper sets out three justifications for imprisonment: separation of the dangerous, denunciation of the crime, and enforcing the demands of community sentences. Presumably a denunciatory sentence would have a long-term deterrent effect but no mention is made of the traditional, direct deterrence that may arise from a prison sentence. It seems to us that insufficient evidence exists on this point to justify the assumption that no such direct deterrent effect applies.

We do not agree that the goals of separation of the dangerous and denunciation of the crime can be distinguished and formalized to the extent proposed in the Working Paper. All prison sentences have a denunciatory element and we do not believe its exact extent can be sufficiently determined in each case to enable the court to set a time measurement upon it or for it to serve so specifically to determine the kind of program the individual requires.

It would seem to us that the number of people who will be sent to prison for default of fine, restitution, or probation conditions will be very high, particularly if many of those now sent to prison as unsuitable for community programs are to be tested in such programs. It may well be that the drop in the total numbers going to prison will be minimal.

The general position taken in the Working Paper is to reject the concept of categories of offenders and to reject prediction of future behaviour as a basis of sentencing or as a basis for determining the readiness of the prison inmate to move to the next step in his correctional plan. Yet, the Working Paper establishes quite rigid categories of its own. The definition of the category subject to separation ("... persons who have committed serious crimes and who represent a serious threat to the life and personal property of others") comes very close to the traditional definition of the dangerous offender used whenever an effort has been made to create that category. Further, it is difficult to see how the extent of the "threat" is to be measured except on the basis of prediction.

We do not agree that prison sentences should be limited to twenty years. It is fortunately true that the number of people serving sentences of that length is small, but among them are some who present a serious threat to members of society. To suggest they be dealt with under existing mental health legislation does not seem practical since they may be sane but not safe. We also agree that the

present dangerous sexual offender and habitual offender laws should be repealed, and we are opposed to labelling offenders in unfavourable terms; but society does need some form of protection against violence, and life sentences with the possibility of parole may be the most practical answer to some offences and their perpetrators.

Progress Toward Release

We support fully the concept of a correctional plan for each inmate. However, we do not believe that an onus should be placed on the prison authorities to justify a decision not to permit an inmate to move to the next step in that plan, as recommended in the following:

> Temporary absences should be denied only in special cases where the correctional administration shows to the satisfaction of the releasing authority that such an absence would present a threat to the life and security of others (page 37).

To place such an onus on the authorities creates a right on the part of the inmate. The basis on which the authorities refuse to approve a move to the next step would, in many instances, be difficult to set out explicitly and in the absence of an explicit statement some unsuitable inmates would move along the path to parole. The dangers in creating an onus and a right of this nature has been well demonstrated in the operation of the Bail Reform Act.

We also fear the proposal that "... transition from one stage to another should depend on the absence of criminal conduct and the observance of the conditions of that stage; the decision should not be based on a prediction of risk in the abstract but on conduct ..." (page 37). This would mean that the smart criminal would need only to avoid a breach of prison rules to have a right to community freedom under temporary absence, day parole and parole on predetermined dates. Indeed, we would anticipate that progress along this path would become as routine and uncritical as the awarding of earned remission in present prison programs.

The distinction between inmates on the basis of the reason for their sentence does not seem to us to make sense. On page 7 it is said:

> The psychological depression and the anxiety that can be induced by the first few months of imprisonment have been well described in the literature. News reports of suicides and attempted suicides and of violence in prisons give further reality to another aspect of the pressures of prison life.

This would suggest that all inmates who serve a term of any length are equally in need of assistance in meeting prison pressures and in getting re-established in the community. Differences in prison program or in release procedures based on the formal reason given by the court for the committal to prison seem illogical.

We question the wisdom of requiring court approval for changes in any inmate's program, whatever the reason for his commitment to prison. The burden this would place on the courts would be considerable. We also question whether the judge who is necessarily far removed from day-to-day experience with the inmate within the prison is in a position to make such decisions. Controlled access to the courts on the part of prison inmates to protest denial of natural justice would be desirable, but that would not involve detailed supervision.

The functioning of the proposed Sentence Supervision Board will, we believe, require a great deal more clarification. What will be its relationship to the courts? Enlarging the scope of intervention in sentences would bring even greater criticism than is now directed against parole. What will happen if the correctional services are unable or unwilling to carry out the Board's directives? Will the Board have greater power in relation to parole than the National Parole Board has now? Strong opinions persist that even the power now carried by the National Parole Board is too great. Will the new Board be federal only or will there be provincial boards? A large number of divisions of the Board will be required to handle the parolling responsibility along with classification responsibilities if serious delays in parole decisions are to be avoided. How will uniformity of policy and practice be assured?

Emphasis on the Offence

We are concerned with the tendency of the Law Reform Commission to put the emphasis on the crime rather than on the criminal. We dealt with this issue before in our comments on Working Paper 3. We repeat those comments below:

We do, however, have serious reservations on the basic purpose of sentencing and dispositions as set out in the working paper. We realize that if all proposals made in the working paper were adopted many minor and even relatively major offenders would be screened out of the system by diversion and the use of restitution, but even for the group who remain such a basis for sentencing seems to us to be short-sighted.

As we understand the proposition in the working paper, rehabilitation, deterrence and incapacitation would be recognized in sentencing but assigned relatively minor roles. The major purpose of sentencing is seen as educating the public as to the importance of selected community values by making the punishment fit the crime:

> ... it is important ... that state intervention be limited so that ... (3) dispositions and sentences are proportional to the offence, (4) similar offences are treated more or less equally ... (page 3).
>
> ... dispositions and sentences ought to be proportional to the offence; and similar types of situations ought to be dealt with more or less equally (page 34).

We suggest that the offence alone is not a satisfactory guide to sentencing, even if the aim is "justice and fairness" in a very narrow legal sense. The offender must also be considered. Offenders differ one from another, even though they may have committed similar offences. They differ in emotional stability, in maturity, in mental aptitude and in their life experiences which give them greater or lesser capacity to understand fully the implications of the offence. They differ in provocative experiences in the period immediately preceding the crime that may have temporarily impaired control over their own actions. They differ, too, in

> degree of involvement. Some commit a crime deliberately and consciously while others get involved by chance or with only partial commitment.

We suggest, therefore, that in sentencing the offender should be given at least as much weight as the offence. To quote further from our earlier comments on Working Paper 3:

> The offence is of obvious importance if only to give some indication of the offender's personality and the nature and extent of the danger he poses for members of the society, but it cannot stand by itself.
>
> The full meaning of rehabilitation should also be clear before it is assigned a role in sentencing. The term is often interpreted to mean in-depth therapy intended to solve the offender's personality problems. We agree that experience casts doubt on the efficacy of such efforts and that no convicted person should be given a longer or more restrictive sentence so that he can be "treated". However, the term can be more properly defined in this context as a consideration of the individual offender's ability to adjust to community living and the effect the sentence will have on his efforts to adjust. Under this definition the avoidance of damage to the offender's chances of social adaptation may be more important than any direct, positive assistance to him.
>
> We would stress the importance of rehabilitation as a guide in sentencing and dispositions. The public education effect of the criminal justice process seems to lie in the process as a whole rather than in just the sentence or disposition. To jeopardise the future of a young offender in order to emphasize the importance of the community value he has flouted seems to us to be self-defeating. If the sentence has the effect of turning him into a professional criminal the resulting harm to society is far greater than the good obtained through articulating the pertinent community value at the sentencing stage.

REPLY TO

THE LAW REFORM COMMISSION OF CANADA

IN REFERENCE TO

WORKING PAPER #11

IMPRISONMENT AND RELEASE

The Commission should be lauded for its insight and wisdom, when reviewing Working Paper 11, Imprisonment and Release, because they recognize that "A change in one area of the law may seriously affect many other parts of the system." (P. 1). What must be advocated is a system change. However, to integrate change of the nature which will affect all the complex components of the criminal justice system is a monumental undertaking that can be expected to experience a tremendous amount of resistance. But without careful analysis and dissection as well as the sensitivity currently expressed by the Commission, in terms of its relations and duty to Canadian society, the task of advocating these changes would be insurmountable.

As cited in the 'Introduction' imprisonment does fail to achieve objectives as cited. The measurable success is so small that it might be assumed those who 'make it' are exceptions. The conclusion derived by the Commission on certain rates of recidivism are interesting. The figures on recidivism, it must be agreed, are a very troublesome debate which some of the constituent parts of the criminal justice system use to varying ends for justifying their particular position or programmes. However, in an overall range suggested by most criminologists and penologists in Western society, including Canada, the recidivism rate is somewhere between fifty and eighty percent of those incarcerated.

As the 'Introduction' carries on there is a brief discussion on industrial work. It should be noted how a number of work programmes fail to do anything worthwhile towards an individuals' eventual release. A prime example of this would be the 'needles trades' where canvas and tailor shops are proved inefficient. These programmes are

solely for the benefit of institutions and recipient agencies where labour is free and manpower is based on pure usuary. Industrial production, for example, includes repairing mail bags for the Post Office Department, inmate work clothing for institutions, and sample ore bags for the Department of Lands and Mines. There is no benefit for inmate workers insofar as skill training is concerned. Monotonous 'make work' projects do not lead to a strengthening of work habits, but moreover, they breed a contemptuous mentality against work; a feeling of injustice is felt by the inmates who are compelled to participate and this produces no appreciation for society who condone this treatment. The question of pay, particularly where craftsmanship is involved like woodworking, metal work, welding, upholstery, painting and product finishing, is very low and manifests a form of usuary not to be found in any other area of Canadian society. The rather unfortunate result emerging from this type of programme is a rebellious nature rather than the redeeming quality sought by prison administrators. To provide a further illustration it might be considered valid to examine the Works Departments where maintenance of the institutions and construction takes place. Inmates no longer provide the work force for building alterations of anything but minimal operations. Instead contracts are awarded to firms who supply the labour from outside the institution. Formerly, all this work was carried on by inmates - in every detail - but that was too practical.

Psychological depression is a very real phenomenon in prison. The processes of mortification reach their ultimate heights, as an individual proceeds through the criminal justice system, when he is finally totally institutionalized. In this setting the inmate receives a depersonalization of self from which he never fully recovers. His identity becomes challenged and the concept of self formerly held is destroyed; he must accept the humiliation of an environment which is an outright contradiction of its intended purpose. He cannot demonstrate responsibility or exercise any decision-making that will exemplify how he will function in a society at large. This basic tenat, while sought for by institutional programmes, cannot exist in the authoritarian structure and as a result causes a dangerous subculture to emerge and manifest itself against authority in general. The contradictory dilemma adds frustration and confusion to the incarceree.

The Commission's concern over ambiguous and conflicting statutes which "... do not reflect a common or coherent philosophy" (p. 7) should be expanded. There are

actual cases on record where various agencies of the system have become engrossed in power struggles and victims in these events are usually clients in their care. The prerogative powers of one agency are such that they could be likened to a top secret organization where the law may not provide protection. The power of this group is so overwhelming that to consider it a fascist regime within a democratic society is, under its present provisions by statute, the only proper label to adequately describe the organization. This is not to suggest that the people who work in it are responsible for the 'state of being', but rather to infer that 'our' society created it with a hope of receiving more than it could produce. It is the human element that must be understood - we gave a mandate which now requires review with an eye for change. And to safeguard this human element there must be other forms made available for recourse. There should be no criminal justice agency above the law where clients have absolutely no appeal or recourse but accept any decisions rendered, however right or wrong the authority may be.

A look at most bureaucratic organizations will reveal a genuine loss of respect by a segment of clients. This phenomenon is cited by such people as C. Wright Mills and Justice William O. Douglas who have made many revelations on those who wield power through administrative acts. Our correctional system is confusing to the public because of a lack of intimate visibility. However, it would not be fair to admit that an open door policy for accountability is the fault of present correctional administrators; rather, this policy emerged as an historical philosophy that affected community people with an unrealistic picture of the prison as well. At the same time and in the same breath one must admit that management of institutions is becoming a tightrope where administrators are intimidated by the power of the Public Service Alliance (or the Association or the 'Union') and decisions often times are not in anyone's best interests except the poorly educated and non-appreciative members of the security staff. (Note: This remark does not claim all security staff, but more than fifty percent.)

What perplexes reformers as well as enlightened citizens is the actions of correctional line staff who are making 'demands' for a return of capital punishment. There is further aggravation from the ranks of custody personnel for the return of corporal punishments. The constant contact between inmates and custody officers causes personality disorders to occur on both sides and the reaction by both is a 'get even' approach. The lack of sophisticated

training, and even this is no answer, does add considerably to the polarization of staff with inmates. The very fact the Commission cites "... it is known that while the officials are in charge of penal institutions, it is at least partially true that large security prisons can only be run with the co-operation and tacit consent of the prisoners." (p. 8) It might be queried that the term "... at least partially true ..." bears some clarification. It is more than 'partially' when situations become so unbearable that if one wants to take all the risks then any prison can be taken over. We should consider what Vernon Fox suggested in Violence Behind Bars:

> A strong administration can avoid riots by excessive custodial procedures, in which case the prisoners are severely regimented and virtually clubbed into submission, and the hostility is held inward, only to be released on society when the prisoners are paroled or discharged from prison. (Fox, 1956:316)

If, by some chance, the prison is not overthrown by prisoners, then very easily society will reap the benefits of Fox's opinion. The familiar notion of violence begets violence is something we should dwell on and carefully control those who become emotionally involved in the endless battle between keeper and kept.

Our current correctional system is now formally recognized as a warehouse for human beings. Although this is a sad situation to grasp it certainly provokes thoughts and hopefully action to change the dilemma.

The Commission's paper on Sentencing and Dispositions as well as Diversion opened a number of alternatives to warehousing. The "... importance ... to restitution and compensation and the concern for resolution of conflict as an aspect of sentencing and dispositions" (p. 9) would significantly reduce prison populations by forty to seventy percent. The current tendency to use prison as a place to deter crime and rehabilitate offenders has made sentencing a rote process for the judiciary with far too many inconsistencies being demonstrated at the same time.

In terms of how the views of 'Reasons for Imprisonment' affect the public at large is paramount to the essence of change. The grave contradiction must be understood that imprisonment causes recidivism - not the previous offender's

new crime, but the conditioning that he has been given. We can aptly admit that a 'Skinner Box' syndrome should be attached to every recidivists file - noting that he is a product of our ineffective prison system. The failure should not be placed on the offender, but rather, on the system. If this is the case, and I strongly maintain it is, then we must weigh heavily on the nature of this third chapter. In every respect there should be a total support given to the philosophy of separation:

> The Commission is of the view that it is unjustifiable to use imprisonment for the purpose of isolating persons who have committed minor offences against property or the public order. Nor do we think separation or isolation can be justified because of a lack of other social resources to deal with persistent or annoying criminal conduct of a minor nature. (p. 12)

We should consider further that the power of exposure definitely has a role in the nature of social control. Where isolation is not to be taken lightly, the need for its use as a punishment for those offences not representing a threat to life and security should be a guarded exception. The social effects of humiliation and stigma, loss of career in public domain, and the inherent labelling attachments are extremely better tools for denunciation. The offender will be observed more generally by a larger society who will be able to cause sufficient pressure along with judicial sanctions of community service and/or fines of an illuminating type.

As indicated in 'Wilful Default' "Imprisonment must remain as an exceptional sanction ..." (p. 13). Those offenders who fail to cooperate with fulfilling obligations should be subjected to alternatives of impoundment of property, garnishee of wages or other legal devices for financial recovery where possible. While a lot of what is insinuated has the affect of returning to the use of 'stocks', we wouldn't have such a high prison population, particularly that portion conditioned by recidivism. The effects on the values of society might even be shifted to the better and we could perhaps see a reduction in some forms of criminal behaviour.

The main danger to consider in the Working Paper 11 is found in Chapter Four. Leaving sentencing, even if only temporarily to correctional administration, where no

appeal is legally possible, is folly. We have already discussed the ramification of administrative power and in all cases must attempt to safeguard its misuse. The arbitrary power of the Parole Board to release or not, to suspend parole or not, to revoke parole or not, has no appeal procedure through a judicial body. When a negative situation affects a client he cannot become a defendent as there is no adversarial hearing where his presence or his legal representative may make submissions or review the evidence. A client can suffer imprisonment on pure hearsay with no recourse.

The need for standardized, hard and fast guidelines for imprisonment is badly needed. The Commission made two considerations for imprisonment:

> (1) the offender has been convicted of a serious offence that endangered the life or personal security of others; and
>
> (2) the probability of the offender committing another crime endangering the life or personal security of others in the immediate future shows that imprisonment is the only sanction that can adequately promote the general feeling of personal security. (p. 18)

However, to determine "... the probability and degree of risk ..." (per above) some caution should be used where a suggestively biased report can be made. In this case we would assume there is a danger surrounding police reports - and to a large extent they often get coloured when recidivists are written up because police have a 'natural' (and very normal) tendency to attempt to get rid of their problems.

The pre-sentence report should spell out by whom, and in conjunction with whom. This is to prevent an influential trend of one agency becoming sympathetic to another. The other submissions should leave room for behaviour scientists of both the Crown and client. We should eventually unify the behavioural sciences and remove the confrontations which are designed to serve the purposes of whoever is being better represented.

An excellent recommendation has been made where reasonable chance to redeem oneself insofar as violence is concerned was cited:

> The court should rarely make a finding that a person is a probable risk to the life or personal security of others unless he has committed a previous violent offence against persons within the preceding three years as a free citizen in the community. (p. 18)

What the Commission is seeming to consider is a practice where a person can demonstrate some redeeming quality and shouldn't necessarily be crushed if time has ensued since a previous conviction.

The wide discretion given judges in determining prison sentences has plus and minus advantages. However, the disparity that does exist in practice has no foundation in sensibility. As long as a judge believes he can hand out a sentence to one offender as a deterrent to others he causes a political prisoner to evolve and the essence of punishment is lost.

Central to the issue of sentencing is the point that there must be daylight at the end of the tunnel. As the Commission indicates:

> ... the sentence should not deny the offender the possibility of eventual discharge - no sentence of imprisonment should deny hope to the offender. (p. 22)

It is very plain to see, when assessing the behaviour of desperate people, that pure animalistic tendencies are the results we currently experience from our alleged hopeless cases. We reap what we create.

The Commission's suggestion of an upward limit of twenty years is highly provocative, but totally realistic. The inclusion, where necessary, of using mental health legislation provides a measure of safety for the cases specifically needing this treatment. Yet, we must improve the mental health legislation so that an injustice is not perpetrated. Once again a word of caution to those who can wield power through administrative action covered by statute; there is a danger of misuse.

There must be attention given to the fact of 'the longer we keep a person institutionalized the longer a period of readjustment will be necessary.' It is during this period of readjustment we lose the battle and end up with the high rate of recidivists. This is why a refreshingly powerful statement should be reiterated:

> Beyond a certain point the price to society in economic as well as human terms outweighs the gains. (p. 23)

We can only look today at the sad ramifications and acknowledge we are paying a high price for human misery.

In speaking with a countless number of inmates about the issue of deterrence there is support for its ineffectiveness. Deterrence is such a special issue it could be drawn out successfully over a number of volumes and usually end with a substitute label of vengeance. It does not for the most part - and the nature of most is not meant to be a large specificity - have real significant value. However, we could test it by awarding a sentence of twenty years for auto theft. Isn't it strange how you reacted to this suggestion?

The argument on 'Habitual Offenders' is sound and proof of the existing failure of the current system. Canada gains distinction as being a highly punitive society. There are some provinces in this country that have used the legislation without trepidation and made a mockery of justice. But not so much the people of the provinces are responsible, but rather, the occasional Minister of Justice and Crown Attorney who permitted their biased nature to interfere with their office and cause the travesty. The law unquestionably demonstrates how even a Parliament can become emotional - when England found it ineffective in 1908 and Canada found it the answer in 1947.

Chapter Eight has a utopian concept which many previous studies have also cited. Regardless of the nature, we cannot make a prison, we cannot make a total institution's living conditions approximate those in the community. This notion should not be extended because authoritarian presence eliminates it as well as the 'loss of freedom' - including decision-making at a level competent to those in a larger free society. The natural order is disrupted as well when we consider the sex segregation. There must be a clear cut end to the idea "we let living conditions approximate those outside of imprisonment."

In reference to 'Release Procedures' one must dwell on the implications cited in the preceding paragraph and not appear too moralistic. When denial of certain liberties is maintained the urges, at the first opportunity, are to satisfy these needs. We should consider very carefully the issue of needs. For example, if we deprive a rat of food for a few days and then place him in a room full of garbage there is instinctively a crazy reaction as it plunges into the food. When we take a normal person out of society and deprive the individual, as in the case in a total institution, then release the person for a temporary period we should expect non-moralistic behaviour. We should not be so naive to consider otherwise; far better we would be if we allowed provisions for these needs to be met more realistically. We must fully understand human needs and not impose severe bias judgments on temporary absences where dalliance might be the unwritten practice.

'The Sentencing Supervision Board' could be a dangerous or a constructively dynamic unit. The only objection might be to staffing this Board. We must take steps to insure that people selected do not have too much vested interest in an on-going system. For this reason every caution should be maintained with some forms of appeal procedure available in judicial areas for client protection.

The dictates of prison life and enforcement of such pronouncements should come under sharp scrutiny of independent officials. Far too often inmate/clients are not receiving a fair hearing because some administrative officials feel they must support their staff, however right or wrong the issue. Complete documentation should be maintained over any cases where a sentence of disassociation could be imposed. This record may hopefully reduce some 'kangaroo type' procedures if appeals are launched.

In conclusion, Canada has a tremendous opportunity to lead the world in changing the approaches from a punitive orientation to a redeeming one. There is a good chance that this philosophy will take hold and cause an effect at a societal level where the understanding of human needs and responses can be drawn closer together. The Law Reform Commission is breaking ground that has been badly needing attention. We should support this endeavour; the society must warm up and understand that:

> Beyond a certain point the price ...
> in economic as well as human terms
> outweighs the gains.