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CORRECTIONAL PHILOSOPHY

Correctional Law Review
Working Paper No. 1

Canada

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This paper represents the tentative views of the Working Group of the Correctional Law Review. It is prepared for discussion purposes only and does not represent the views of the Solicitor General or of the Government of Canada.

CORRECTIONAL LAW REVIEW

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PREFACE

The Correctional Law Review is one of more than 50 projects that together constitute the Criminal law Review, a comprehensive examination of all federal law concerning crime and the criminal justice system. The Correctional Law Review, although only one part of the larger study, is nonetheless a major and important study in its own right. It is concerned principally with the five following pieces of federal legislation:

- the Department of the Solicitor General Act
- the Penitentiary Act
- the Parole Act
- the Prisons & Reformatories Act, and
- the Transfer of Offenders Act

In addition, certain parts of the Criminal Code and other federal statutes which touch on correctional matters will be reviewed.

The first product of the Correctional Law Review was the First Consultation Paper, which identified most of the issues requiring examination in the course of the study. This Paper was given wide distribution in February 1984. In the following 14-month period consultations took place, and formal submissions were received from most provincial and territorial jurisdictions, and also from church and after-care agencies, victims' groups, an employee's organization, the Canadian Association of Paroling Authorities, one Parole Board, and a single academic. No responses were received, however, from any groups representing the police, the judiciary or criminal lawyers. It is anticipated that representatives from these important groups will be heard from in this, the second, round of public consultations. In addition, the views of inmates and correctional staff will be directly solicited.

Since the completion of the first consultation, a special round of provincial consultations has been carried out. This was

deemed necessary to ensure adequate treatment could be given to federal-provincial issues. Therefore, wherever appropriate, the results of both the first round of consultations and the provincial consultations have been reflected in this Working Paper.

The second round of consultations is being conducted on the basis of a series of Working Papers, to be released during the summer of 1986. A list of the proposed Working Papers is attached as Appendix A. The Working Group of the Correctional Law Review, which is composed of representatives of the Correctional Service of Canada (CSC), the National Parole Board (NPB), the Secretariat of the Ministry of the Solicitor-General, and the federal Department of Justice, seeks written responses from all interested groups and individuals.

The Working Group will hold a full round of consultations in the winter of 1986-87, and will meet with interested groups and individuals at that time. This will lead to the preparation of a report to the government in the spring of 1987. The responses received by the Working Group will be taken into account in formulating its final conclusions on the matters raised in the Working Papers.

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CORRECTIONAL PHILOSOPHY

EXECUTIVE SUMMARY

Introduction

Outlines the aims of this paper which are to:

1. Provide a summary description of corrections in Canada, and the major trends in the development of correctional philosophy;

2. Review the purpose and principles of the criminal law and assess the implications for corrections;

3. Articulate a statement of purpose and principles for corrections, and indicate some of the implications for operations of adopting such a statement; and

4. Discuss whether a statement of philosophy should be placed in legislation.

Part II

Describes the scope of corrections in Canada, and analytically discusses the development of our penitentiary system and the use of parole, as well as the numerous attempts to articulate a correctional philosophy. This part concludes:

- the diverse and contradictory nature of its underlying values and objectives has been apparent since the "invention" of the penitentiary in Pennsylvania in 1818, which was intended to both reform and punish wrongdoers.

- although the approach has varied over time, there has always been the fundamental recognition that society is best protected through the reformation of offenders. The purpose of corrections has thus always been thought

to be a dual one - to provide secure custody of convicted offenders, while contributing to long-term protection through the rehabilitation of offenders.

Part II

Dicusses the fundamental premise of the Criminal Law Review, that Canada needs an integrated criminal justice policy, and reviews the policy document for the Criminal Law Review, The Criminal Law in Canadian Society (CLICS). CLICS concludes that:

- the criminal law and the criminal justice system must pursue two major sets of purposes - "justice" and "security".

- In pursuing its objectives, the criminal law must be guided by the principles of restraint, accessibility, necessity and justice.

In considering the implications of this for corrections, it was concluded that:

- the criminal law sanctions, particularly imprisonment, are always punitive;

- corrections contributes to the security goals of the criminal justice system by incapacitating offenders, and thus providing immediate protection for society, and also by assisting in the personal reformation of offenders, thus contributing to long-term protection;

- the deterrent function of corrections is achieved by the fact of incarceration, and corrections should not try to increase the deterrent effect by making the conditions of confinement more unpleasant and austere than necessary;

- the justice goals of the criminal law - equity and fairness, guarantees of rights and liberties, a fitting response to wrongdoing - all have application to corrections. However they do not form part of the overall purpose of corrections, but rather affect the way in which corrections goes about its business. It is through the application of the justice principles that corrections assists the criminal justice system as a whole to achieve its justice goals.

Part III

A STATEMENT OF PURPOSE AND PRINCIPLES FOR CORRECTIONS

The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:

a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

b) providing the degree of custody or control necessary to contain the risk presented by the offender;

c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;

e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society;

The purpose is to be achieved in a manner consistent with the following principles:

1. Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.

2. The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime.

3. Any punishment or loss of liberty that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.

4. In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, consistent with public protection and institutional safety and order.

5. Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

6. All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

7. Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services.

8. The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives.

This statement provides explicit direction to corrections as to how it is to achieve the ultimate purpose of contributing to the maintenance of a just, peaceful and safe society. It stresses the need for corrections to be integrated with sentencing policy and practice, and requires corrections to treat offenders fairly and humanely. Public protection is promoted in two ways: through the safe custody of offenders, and through active efforts of correctional staff to return offenders to the community as law-abiding citizens, always taking into account the potential risk to public safety. All correctional activities should be carried out in a manner reflecting the human dignity of all persons and consistent with the principles of restraint, fairness and openness.

Part IV

Concludes that in order for correctional legislation to provide adequate guidance to correctional staff while at the same time leaving them with sufficient discretion to deal appropriately with the variety of daily operational problems, a statement of philosophy should be in legislation.

The statement of philosophy should apply to both federal and provincial corrections, in order to promote a fully integrated criminal justice system.

Summary

Concludes the paper by reiterating the importance of a statement of philosophy to guide the application and interpretation of correctional legislation, and to provide a clear framework for policy development.

The ability to develop correctional law which is credible, effective and which reflects contemporary Canadian values and interests requires the support of the public at large. For this reason, comment and reaction to the concepts put forth in this paper is invited.

Table of Contents

INTRODUCTION

This is the first of the Working Papers of the Correctional Law Review Working Group. It is being released simultaneously with a paper entitled "A Framework for the Correctional Law Review".

As the first step in this fundamental review of federal correctional legislation, it is important to consider what it is that corrections should be trying to achieve - that is, what is the basic purpose of corrections, and what principles should govern its operations. A clearly articulated statement of philosophy will then govern the development of specific substantive proposals, to be developed during the course of this review. In addition, clarity of purpose and principles should permit inmates, correctional staff and the public, as well as judges, to better understand the "meaning" of a sentence of imprisonment in Canada.

Before tackling the substantive areas of the review, such as release and clemency, offender rights, staff powers, victims and the correctional process, etc, the Framework paper referred to above discusses the existing legal framework within which new correctional legislation must be developed, composed of the constitution, including the Charter of Rights, the common law, and Canada's international obligations, as well as other federal legislation. In addition there are a number of broad concerns such as consistency and clarity, the desirability of legislation which promotes the appropriate and professional use of discretion, as well as the need for legislation which minimizes litigation.

The discussion in this paper of a Statement of Philosophy to guide corrections, together with the discussion in the Framework Paper about the legal framework and subsidiary objectives such as consistency and coherency, will provide the context for the rest of the review and the development of new correctional legislation.

Part I of this paper will describe briefly the nature of corrections in Canada, and discuss some of the major trends and their influence on the development of a correctional philosophy. Part II will review the purpose and principles of the criminal law, and assess the implications for corrections. Part III will propose a statement of purpose and principles for corrections and indicate some of the implications for operations of adopting such a statement. Finally, Part IV will consider the appropriate "form" for the statement, that is, should it be placed in legislation or policy, and if the statement is legislated, how, if at all, should it affect provincial jurisdictions.

Definition of Terms

Before going further, we think it would be helpful to define our terminology. Distinctions between objectives and principles are difficult to draw clearly - and indeed our own failure to do so adequately in the First Consultation Paper may have been responsible for some confusion in that regard in the responses to that paper. In an attempt to assist respondents in this round of consultations, the following definitions are offered.

An objective is the end to which an activity or group of activities is directed. To some extent it is usually measurable, even though precise measurement may not be possible. All too often, this is the case in corrections.

A principle is a statement of policy at a fundamental level which has broad application throughout an organization. It is essentially a statement about how an organization should go about its business.

In this paper - and indeed for the entire Correctional Law Review process - purpose is used to signify the overall goal of corrections, together with a statement of the primary ways or strategies in which that goal is to be achieved. Although we could have used the word "objective" instead of "purpose", we prefer to keep objective to describe the

individual goal of the various components of corrections, for example, the objective of parole may be quite different from the objective of inmate classification, although both should contribute to the overall purpose of corrections.

"Philosophy" is used as a short form, to denote a statement including both purpose (what is to be achieved) and principles (how it is to be achieved).

PART I: CORRECTIONS IN CANADA

The complexity of Canada's correctional system has been widely noted. It is a highly diverse, dispersed and segmented system in which a wide array of public and professional constituencies participate or have an interest.

By virtue of Canada's constitution, jurisdiction for both the criminal justice system itself and many of its component parts is divided between federal, provincial and territorial governments. The Constitution Act, 1867 establishes provincial jurisdiction over prisons and reformatories and federal jurisdiction over penitentiaries. The essential difference between provincial prisons and federal penitentiaries is the length of sentences that are served in them. Sentence lengths are determined within the parameters established in the Criminal Code, and other federal statutes such as the Narcotic Control Act, which is a federal responsibility, by courts that are administered by provincial governments.

Although both federal and provincial governments have legislation governing the correctional matters that fall under their jurisdiction, the federal government is also responsible for the basic legal framework governing offenders serving prison sentences for offences against federal statutes. This responsibility is given effect through the Prisons and Reformatories Act. The Criminal Code provides that offenders sentenced to two years or more must be sentenced to serve their terms in penitentiary. Those with sentences of less than two years are sentenced to provincial institutions.

The term "corrections" covers a wide variety of institutions, programs, services and activities. There are approximately 12,000 inmates in 60 federal institutions across the country, run by 10,000 staff. There are a further 7,000 federal offenders on some form of conditional release. There are approximately 20,000 inmates in provincial institutions across the country, with approximately 20% in custody on remand. In addition,

provincial correctional systems have at any time approximately 77,000 persons serving non-custodial dispositions. These include probation, provincial parole, community service orders, fine options, etc.

Even this description is too general to give a true impression of the diversity in corrections. The federal institutions vary from maximum security institutions with comparatively little programming or inmate movement, to farm and forestry camps, and community correctional centres where inmates work at a variety of jobs in the community but return to the institution at night. Correctional staff, too, have different interests and concerns, from security to counselling, from how to provide the best vocational training to how to provide needed medical or psychiatric services. Provincial institutions, staff and programs are even more diverse.

The segmented or "fractionated" nature of Canada's correctional system and its apparent lack of over-all coordination has been widely criticized by observers calling for greater integration and consistency. It has often been said that the correctional system is not a system at all but only an array of disparate components. However the hallmark of a system is not its internal consistency or coordination but its synergy - the interaction of its parts so that change anywhere in the system affects all the other parts and the balance between them. In this sense the correctional system clearly is "a system". Indeed the most often heard criticism is precisely with regard to change in one component of the system that does not adequately take into account its impact on others. The comprehensive planning that would be essential to overcome this criticism would require a centralized organizational structure, a uniform statutory and regulatory framework, voluntary subscription of all components to similar objectives and procedures, or some combination of these three.

A variety of community groups and individuals are also involved in corrections at all levels. They participate on

Citizens Advisory Committees, on other advisory committees or as volunteers in social, cultural or therapeutic programs. They sit as community members of the National Parole Board, and act as volunteer probation officers. They provide a wide range of services to offenders through such organizations as the John Howard Society, Elizabeth Fry Society, the Salvation Army, Seven Steps Society, Alcoholics Anonymous and many, many more. Others, particularly victims organizations, advocate more effective public protection from dangerous inmates. These and many other organizations and individuals, including other sectors of the criminal justice system such as the police, judiciary and legal profession, hold strong, diverse and often conflicting views about what corrections should be doing. Many correctional programs reflect compromises among these divergent points of view and consequently institutionalize these conflicts. Indeed, it may be that the co-existence of apparently contradictory correctional objectives is a necessary condition to achieve adequate consensus for the use of the state's coercive power.

It is clearly a difficult task to articulate a statement of philosophy which will provide appropriate guidance to, and receive support and agreement from, all parts of this extremely complex correctional system. It is perhaps impossible to expect to articulate a statement which would satisfy all sectors with an involvement or an interest in corrections. In that regard, however, it was encouraging to see the extent of agreement from the respondents to the First Consultation Paper on the possible objectives and principles for corrections.

The structural complexity of today's correctional system has evolved over time. However the diverse and contradictory nature of its underlying values and objectives has been apparent since the "invention" of the penitentiary in Pennsylvania in 1818 to reform and punish wrongdoers. When Canada's first penitentiary opened its doors a short 16 years later it embodied the same principles and objectives.

Early in the 19th century the Quakers in Pennsylvania reacted against the prevailing punitive and inhumane conditions in the local jails of the day. They argued that a prison should be an institution which promotes reformation through penitence. This "moral treatment" would be achieved through strict isolation, silence, hard work and austere conditions to promote reflection and repentance. This new regime, which was criticized for breaking the spirit and driving many inmates to madness, was at the same time expected to produce disciplined, religious, law-abiding and industrious citizens.

Shortly thereafter, in 1821, a somewhat different approach was taken in Auburn, New York. It adhered to the same principles and objectives of the Pennsylvania or "separate" system but in its "congregate" approach, work was done in association with other inmates. Communication in any form was strictly forbidden and cause for severe disciplinary measures. The innovative feature of communal work was designed to enhance productivity in pursuit of the elusive objective of a "self-sufficient" penitentiary. The consequence of including work with the goals of punishment and reform was to provide temptation and opportunity for communication and other breaches of discipline. This led in turn to increasingly harsh and inhumane punishments in an effort to maintain the discipline and regimentation deemed essential to reform convicts.

In 1835, Canada's first penitentiary was opened in the Upper Canada village of Portsmouth (today's Kingston Penitentiary). It was based on the congregate system which, by then, was becoming the most common North American model (the separate system was adopted in most European countries and in Quebec). During the next few years, Kingston, like Auburn, emphasized maximum employment of, and profit from, convict labor. Also similar to Auburn, the corruption that accompanied the absolute control of the Warden and the cruelty of the punishments used to maintain order eventually led to scandal, public inquiry - the Brown Commission of 1849 - and reform of some of the most atrocious barbarities

and corrupt practices. The emphasis on work has continued until today, however, irrespective of the many periods when there has been little productive work to occupy the convict workforce. On such occasions it has usually been deemed preferable to find make-work than to turn to non-work activities. Indeed, it has not been uncommon for educational programs to be limited so as not to conflict with work programs.

During the latter half of the 18th century the Crofton or Irish system came to prominence, was strongly advocated by correctional officials and reformers and had many of its elements introduced in the Canadian system. Based on the earlier work at Norfolk Island Penal Colony of Alexander Maconochie, Sir Walter Crofton introduced in the Irish Prison System a system of inmate grades, earned remission, gradual release, open institutions and parole. These features were strongly advocated by correctional reformers and, by the turn of the century, had been introduced in part to the Canadian system. Earned remission was introduced in 1868 and it and certain other privileges were graduated according to the grade of the inmate, higher grades being earned by good conduct. During the later 1800's, pardons were increasingly used and, in 1899, the Ticket of Leave Act was passed to routinize this practice and to more clearly base it on merit. These measures ushered in a new era that increasingly came to rely on individualized case by case assessments of performance and potential to make decisions about the administration of sentences. This new emphasis on individualized measures tended to conflict with notions of a uniform regime that applied to all and also conflicted with the value placed on a highly regimented prison program.

The 20th century witnessed continued development in the social sciences, with the accompanying belief that crime resulted from natural, understandable, and potentially curable causes. This growing confidence, especially following World War II, led to the development of the "treatment" orientation and the growing belief that criminality would be reduced by individualized treatment

within prison settings. The promised results of the changing theories were too often naively accepted without being questioned but, on the other hand, were often not accompanied by corresponding changes in practice to give them a fair trial.

In 1938, the Archambault Report[1] found an almost complete lack of programs designed to bring about rehabilitation, although the Report noted in passing that "the difficulty in laying down principles of penology is increased by the fact that it still is the subject of profound and scientific inquiry, and of much controversy, and that, at the present time, many of its problems appear to be practically insoluble."[2]

Archambault made a series of recommendations that echoed reformers, superintendents of penitentiaries and earlier reports back to the Brown Commission: more central control of all prisons (including provincial), classification of inmates, fair discipline process, control of use of firearms, improved recreation, education, medical and religious services, modernized work activities, prisoner pay, provincial custody for women prisoners, probation, the creation of a Parole Board, assistance to voluntary organizations - all were among the recommendations. Although the Archambault Commission Report was and is regarded as an important watershed in Canadian correctional thinking and practice, it had little immediate practical effect. A revised Penitentiary Act was passed by Parliament in 1939, but was not proclaimed in force until 1947. Even then little change was in evidence for at least another decade, but the widespread popular and professional acceptance of the ideas expressed by Archambault is significant. Principles of scientific penology, or principles which were at least believed to be rooted in science, were by then well accepted and paved the way for later practical innovations.

In 1956, the Fauteux Committee[3] found that the reforms recommended by Archambault, most of which had been accepted

in the following two decades, were either incompletely or inadequately implemented in practice. It recommended a renewed emphasis on rehabilitative programming coupled with conditional release geared to progress made in treatment. Fauteux's reiteration of these long-standing principles and recommendations coupled with a crushing crowding problem and change of government led to a decade of major change and reform in the federal system. The National Parole Board was created in 1958 to face criticisms for the next few years that they were releasing too few inmates too slowly. Also, perhaps one of the most important yet least known federal committees was appointed - the Correctional Planning Committee. This Committee recommended and rapidly set about implementing an expanded and regionalized penitentiary system of small modern institutions of three security levels, which included specialized institutions such as drug and psychiatric treatment facilities. In the ensuing 10 years the system expanded from nine old maximum security fortresses to a modern diversified system of 33 institutions.

The Ouimet Committee Report[4] in 1969, suggested that the conflict as to the appropriate aims in dealing with convicted offenders was still a major problem for corrections. The Committee stressed the importance of a dual function; to provide security but also to provide long term protection through rehabilitation. Ouimet also stressed the need for an integrated criminal justice policy, and a clearly articulated sentencing policy which stressed restraint in the use of imprisonment. Nonetheless by the 1970's the primary concern of the system was how it could be made to work effectively and as efficiently as possible.

Since 1970, however, there has been growing scepticism about rehabilitation programs and the theories they are based upon which attempt to treat offenders as we treat disease - as problems beyond the offenders' control but which could be corrected by prison authorities. Instead, the Law Reform Commission, in its 1975 Report on Imprisonment and Release[5] stressed the need to deal with offenders by encouraging them

to accept responsibility, and to provide an environment as close as possible to that in the community. The Law Reform Commission also questioned the use of rehabilitation as a justification for sentencing offenders to prison, and again stressed the need for restraint in the use of incarceration.

The current view of rehabilitation has evolved, consistent with the Law Reform Commission's recommendation, towards a model of providing offenders with opportunities to improve their educational, vocational and social skills. Rather than transforming inmates, it is recognized that corrections should not be expected to do more than provide an environment conducive to offenders making responsible choices among reasonable opportunities to help themselves.

Despite the articulation of this policy in 1977 by the Federal Corrections Agency Task Force Report[6], there is still no reason to believe that corrections has come to grips with what it should be doing. As recently as 1984, Vantour[7] and Carson[8] observed that there was a poor understanding of the "opportunities model" and how it should be put into effect, although Carson suggested that there appeared to be considerably less confusion than in 1977.

Elsewhere, particularly in some U.S. jurisdictions, there has been disappointment with the results of abandoning the concept of rehabilitation while not having a direction-setting philosophy to replace it. At the present time there may be a willingness to explore the principle of rehabilitation again, in the more realistic light of a clearer understanding of the limitations of rehabilitation theories - as well as the limitations of available alternatives.

PART II: THE PURPOSE AND PRINCIPLES OF THE CRIMINAL LAW AND IMPLICATIONS FOR CORRECTIONS

One of the fundamental premises of the Criminal Law Review was the recognition that Canada requires an integrated criminal justice policy, relevant to the changing needs of modern Canadian society and of individual members of that society.

The concerns about our criminal justice system which led both to the creation of the Law Reform Commission, as well as to major criminal law reform initiatives undertaken in many western countries, were articulated forcefully by the Parliamentary Sub-committee Report on the Penitentiary System in Canada (1977) in its conclusion that the criminal justice system "lacks any clear or acceptable governing conception of what we as a society intend to accomplish under the rubric of 'criminality'...and we can only achieve justice, in a rational sense of that very significant term, through a major commitment to fundamental reform.... Reform of our prisons should be no more than one part of a thorough, open and necessarily painful candid assessment of **what the criminal justice system ought to do.**" (original emphasis).

As a first step in the Criminal Law Review process, the government published The Criminal Law in Canadian Society (CLICS) in 1982. This paper articulated a statement as to the appropriate scope, purpose and principles of the criminal law, on the basis of a discussion of its basic nature and philosophical underpinnings. The statement of philosophy articulated in CLICS was designed to govern the approach to more particular issues of criminal law policy, to be determined during the course of the Criminal Law Review. It is thus the appropriate starting point for this paper.

Purpose of the Criminal Law

Although recognizing the conflicts between the retributionists and the utilitarians, CLICS suggested that it is possible to accommodate both positions within a policy framework that does not try to provide a moral or philosophical justification for the use of the criminal law power, but instead concentrates on delineating what it is that the use of criminal law should achieve, and how it should carry out its functions. On these latter issues there is a considerably greater degree of consensus. Society expects, suggests CLICS, that the criminal law should be used in order to contribute to the protection of society from seriously harmful conduct. At the same time, the inherently punitive nature of criminal law sanctions is recognized, and society therefore also demands that the criminal law be used justly and with restraint.

CLICS therefore concludes that the criminal law has two major purposes:

1. Security goals - i.e., preservation of the peace, crime prevention, security of the public; and

2. Justice goals - equality, fairness, guarantees for the rights and liberties of the individual against the powers of the state, and the provision of a fitting response by society to wrongdoing.

The purpose of the criminal justice system is to be achieved in accordance with a number of principles which reflect contemporary society's values in relation to the criminal law. Some of these principles are designed specifically to guide the criminal justice processes of court and trial, but others are of more general applicability, while some are specifically aimed at corrections. The following principles have some relevance to corrections:

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

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

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

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

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

(i) opportunities for the reconciliation of the victim, community, and offender;
(ii) redress or recompense for the harm done to the victim of the offence;
(iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community;

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

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

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

Implications for Corrections

It was suggested earlier that it is generally acknowledged that the criminal law sanctions are, whatever their justifications and whatever their form, at heart punitive. This is of course particularly true for imprisonment.

In earlier times, punishment consisted of an intentionally brutal regimen, which at different times included the tread-mill, the shot-drill, the chain-gang, the rock pile, extended solitary confinement and the rule of silence. Discipline was enforced by floggings and bread-and-water diets.

Conditions today are immeasurably more humane, as even the sternest critics of the system would agree. In fact, it would be fair to say that the present regimen is designed to be humane. Yet it remains punishment.

From the point of view of basic care -- accommodation, hygiene, nutrition and essential services -- inmates are for the most part provided with a level that usually meets, and may exceed, the United Nations minimum standards. In most institutions inmates are offered a range of programs designed to provide useful work and leisure activities. On

a per capita basis, it costs a great deal to house an inmate, for example, an average of $40,000 a year at the federal level. Although this might suggest that inmates are living well, in fact these statistics are misleading, since most of the money spent is to contain and control inmates, not to provide them with goods or services. The largest portion of correctional budgets goes to staff salaries, and the standard of living for prisoners is not much above a basic level.

The real punishment of imprisonment is the loss of liberty. In addition, confinement inevitably carries with it a host of related deprivations: the regimentation, the limitation of choice, the separation from family and friends, the loss of the myriad opportunities that a free society provides for development, enrichment, diversion and profit.

The tension of prison life is debilitating for many inmates -- not only the tension between keeper and kept, but the tension of the inmate culture. A certain proportion of the prison population has a propensity for violence -- which is why many are behind bars in the first place -- and a disconcerting number suffer at one time another from some form of mental or emotional disorder. Having to spend day after day in the close company of such individuals often causes a great deal of stress for those inmates, perhaps a majority, who want nothing more than to serve their sentences without incident.

The question for corrections is two fold: in carrying out the sentence of the court, the "punishment", how can corrections best contribute to the <u>security goals</u> of the criminal law, and in what respects is it constrained by <u>justice goals</u>?

Although all parts of the criminal justice system must be concerned with these two sets of objectives, the balance between them will vary across the system - and indeed will vary with the different functions of a particular component of the criminal justice system. It is therefore important

to separate out the implications of these two sets of goals for corrections. In addition, many of the principles articulated in CLICS also have implications for corrections.

Security Goals

The security goals for the criminal justice system as a whole include the preservation of the peace, prevention of crime (whether through pro-active programs or through deterrence), immediate protection through the incapacitation of persons who have committed offences which are seriously harmful or dangerous, and long-term protection through the rehabilitation of offenders. In administering a sentence of imprisonment, the correctional system certainly incapacitates, may also deter, and ideally should promote the rehabilitation of the individuals in its custody.

o **Incapacitation**

Once a sentence of imprisonment is handed down, the correctional system clearly has an obligation to keep the offender safely in custody for the period of the sentence (subject to lawful forms of release), thus preventing further crimes by that offender in the community. The incapacitation of the offender constitutes the punishment, and contributes to the security of society, at least for the duration of the sentence. Consistent with this obligation, corrections must also keep the offenders in a safe environment where opportunities for further criminal acts are minimized. Corrections may achieve incapacitation through other means besides incarceration, such as parole conditions forbidding contact with certain individuals or travel outside certain boundaries, electronic tracking by means of ankle bracelets, or alcohol antabuse substances.

o **Deterrence**

At the sentencing stage, deterrence is one of the purposes of the imposition of a criminal sanction, particularly a sentence of imprisonment. The sanction is imposed to

demonstrate the consequences of undesirable conduct, and in so doing it is hoped the offender will be influenced not to repeat the offence and that other potential offenders will be dissuaded from criminal activity.

The notion of deterrence is controversial, inasmuch as many people dispute the effectiveness of punishment as a deterrent. In support of their position, they cite the oft-told story of pickpockets working the crowd at Newgate during the public execution of one of their own number. On a more banal level, they point to the long histories of many repeat offenders, who in spite of the increasing severity of each successive sentence never change their ways. There is in fact some evidence that most important to the deterrence of crime are the probability of getting caught and the swiftness and certainty of punishment.

It does appear that some offences can be deterred more effectively than others, for example, drinking and driving, particularly in conjunction with roadside checks, and that some offenders may be more readily deterred than others, but no simple cause and effect relationship can be established.

Perhaps the case can best be summed up by the 1967 U.S. President's Commission on Crime and The Administration of Justice:

> Deterrence -- both of people in general and offenders as potential recidivists -- and, where necessary, control, remain legitimate correctional functions. Unfortunately there has been little attempt to investigate by research and evaluation the extent to which various methods of handling offenders succeed in these respects. It is no more logical, however, to suppose that various methods operate with uniform effect in deterrence than to suppose that any sort of rehabilitative treatment will work with all sorts of offenders.

It is worth adding, however, that even those who most support the principle of deterrence appear to agree that it is most effective when coupled with speed and certainty of punishment.

To extend this further, it could be argued that if punishment does in fact deter, then the more severe the punishment the more effective the deterrent is likely to be. Carried to its extreme, of course, such reasoning could lead us back to the brutal prison conditions of earlier times, with floggings, maimings and sadistic regimens designed to break both the body and spirit of the offender. In any event, today such treatment would be regarded as offensive to contemporary values - certainly none of the respondents to the First Consultation Paper supported such practices. It is contrary to the principles enunciated in the United Nations and other international conventions to which Canada is a signatory, and would contravene the Charter of Rights and Freedoms. For the purposes of this discussion, therefore, this type of treatment can be disregarded.

Without going to these unacceptable extremes, however, it would still be possible to make prison a much more unpleasant experience than it already is. This could be done by making the living conditions more austere -- accommodations, food, clothing, other amenities -- by making the work routine much harder, and by limiting to the barest essentials other programs and social activities and, in general, by tightening the discipline and imposing a much more authoritarian -- but fair -- regime.

However it is our view that corrections simply cannot make effective distinctions between the punitive and deterrent functions of a sentence. If the judge in handing down a sentence wishes to make a special point about deterrence, it seems more appropriate to do so by making the sentence longer, within the appropriate limits.

In short, it is our view that the primarily deterrent function of corrections arises from the fact of incarceration, and not the conditions of confinement.

o **Rehabilitation**

Although rehabilitation has generally been discredited as a legitimate justification for sentencing an offender to imprisonment, no major report has ever recommended an end to rehabilitation as a goal of corrections. Even the 1977 Parliamentary Sub-committee, which rejected the use of imprisonment in order to rehabilitate offenders, said that "once a decision to imprison has been taken ..., the correctional techniques employed should be aimed at encouraging and assisting personal reformation by wrongdoers". Thus, imprisonment (and corrections generally) contribute to the protection of society, in the Sub-committee's view, in two ways:

> "Protection of society" as a purpose of imprisonment includes not only protection during a term of imprisonment by the physical removal of a person who is dangerous or who has failed to respect values that are protected by the criminal law, but also the protection of society after his release by means of a prison system designed to assist him towards personal reformation.

Corrections is the only segment of the criminal justice system which is supposed to assist and encourage the offender to overcome the factors which contribute to his criminality. Other stages in the criminal justice system may occasionally or accidentally have this effect, but it is only after sentencing that any government agency is authorized to try to "treat" an offender. Even in an era of financial restraint, most corrections professionals, academics, and even members of the public still support the principle of rehabilitation, perhaps simply on the grounds that it would be irresponsible and cynical to give up so soon.

Despite the foregoing, it is nonetheless true that during the 1970's in Canada, rehabilitation fell into disfavour as a correctional ideal. The disfavour was on two fronts:

first, that rehabilitation had been costly and ineffective, and, second, that it had caused more cruelty and longer punishment than the intentionally "punitive" model which had preceded it.

In fact most of the allegations that treatment is "tyrannical" stem from the study of a few jurisdictions, primarily California and Maryland, and the concerns arose from the use of extremely lengthy or indeterminate prison sentences combined with a highly interventionist treatment philosophy. Nonetheless, there is probably some truth to the notion that offenders see an element of unfairness in almost any attempt to rehabilitate them. After all, virtually any type of personal change is in some respects painful. For offenders, "personal reformation" (as the 1977 Parliamentary Sub-committee on the Penitentiary System put it) can entail a painful and difficult struggle to give up alcohol or drugs, working at a low-paying and unsatisfying job instead of pursuing the risk and excitement of less legitimate earnings, or a protracted process of acquiring new methods of recognizing and dealing with anger and frustration.

Despite this painful element to rehabilitation, however, it is probably fair to say that most people would support rehabilitation if it were proven to be effective and if it did not create excessive additional punishment, costs and risks. How strong is the case, then, that rehabilitation is proven to be ineffective?

Some criminologists have in fact characterized this as one of the greatest over-generalizations in criminal justice. They argue that most evaluated programs in corrections could, in the words of one official, be characterized (as was one particularly well-documented one) as "a poorly conceptualized program that was inadequately delivered by unqualified personnel to individuals who might have been inappropriately assigned to it".

Has "rehabilitation", even in the form just described, been "proven" ineffective, however? Is the evaluative research on programs definitive? Here again, the bulk of expert opinion has it that the quality of evaluative research has, in the main, approached that of the programs themselves. Probably the most authoritative review of the literature, by the U.S. National Academy of Science Panel on Research and Rehabilitative Techniques, conclude that most of the research in the area has been inconclusive if not meaningless, because of poor methodology and a tendency to "evaluate" a multi-faceted correctional experience (such as probation) as if it were a single phenomenon. Very little correctional research to date has been sophisticated enough to differentiate which offenders are helped - and which are made worse - by which techniques under which conditions. Most programs, with good and bad results, thus are felt to have, overall, "no effect".

We are of the view then, that it cannot be concluded that rehabilitation is ineffective. The evidence is too sparse, and the actual attempts to design, fund, and carry out a rehabilitative model for corrections have, to date, been inconsistent and incomplete. Should corrections therefore continue to try to correct offenders?

The best protection for society is widely acknowledged to be the re-integration of offenders into the community as law-abiding citizens. Actively pursuing the goal of encouraging and assisting the personal reformation of offenders, rather than relying on punishment and deterrence to achieve the same goal, is thought by the Working Group to be more appropriate for three reasons.

First, it treats individual offenders as responsible individuals capable of change and taking charge of their lives.

Second, it gives a role to correctional authorities which is positive, humane and which actively supports the long term criminal justice objectives. This role, rather than one

which emphasizes the containment of inmates and maintenance of order, is far more rewarding for staff who assume responsibility for assisting and encouraging offenders to take advantage of rehabilitation opportunities.

Finally, the rehabilitative approach holds more potential than a simple punishment/deterrence approach, simply because it recognizes the inevitable reality that there are causal factors which contribute to criminality which no amount of punishment will remedy. By this we mean such things as unemployment, poor impulse control, lack of job skills, low frustration tolerance, functional illiteracy, poor social and problem-solving skills, inability to cope with emotional stress. Many of these problems can be effectively dealt with through teaching offenders cognitive and behavioural skills. Offenders are extremely unlikely to learn the necessary skills themselves, and punishment through deterrence or simple incapacitation will not teach them. Experience also suggests that offenders are unlikely to take advantage of program opportunities unless they are actively encouraged to do so, and one of the most effective incentives to program participation is a high-quality program.

o **Reconciliation**

Reconciliation - of the offender with society, or the offender with the individual victim - has gained greater legitimacy in recent years. Long considered more appropriate to the civil courts which resolve disputes between individuals, restitution to victims as a sentence in criminal matters has grown with the increased recognition of victims' rights in the past decade. In addition, sentences which involve service to the community generally, such as community service orders, have become more common. All these reflect a greater recognition of the need to make reconciliation more prominent as a criminal justice goal.

Once a sentence of imprisonment is handed down, however, reconciliation of offender and victim or offender and

community has generally not been seen by correctional authorities in Canada as part of their mandate, particularly at the federal level. Some U.S. states have been experimenting with allowing correctional authorities to put together a restitution or community-service plan for sentenced offenders, and to put this plan before the sentencing judge as a possible alternative after up to three months following initial sentencing. In addition, many correctional institutions encourage offenders to engage in community service work (such as organizing benefits for the disadvantaged) during their leisure hours or, more rarely, during the inmate work-day.

It has been suggested by some groups, particularly Church groups and after-care organizations, that the reconciliation of the offender with the victim and community may play a critical role in the offender's personal reformation and ultimate re-integration in the community.

Quite apart from victim-offender reconciliation leading to the re-sentencing of an offender, victim-offender reconciliation could be encouraged within institutions as a part of the rehabilitative process, that is, encouraging the offender to accept responsibility for his acts. Where individual victims are unwilling or unable to met with an offender, some reconciliation programs have used substitute or symbolic victims to meet with offenders to talk about the effect on their lives that being victimized has had.

Victim-offender reconciliation could be incorporated into parole planning, for example restitution to the victim if the offender has a job, or some form of service to the victim or to the community .

Reconciliation principles could also be incorporated in the ways in which conflict within institutions is handled. Correctional staff already handle most conflict between offenders, or between offender and staff member, in an informal manner, without resort to formal disciplinary procedures. This could be expanded if correctional staff

and inmates are given training in mediation and conflict resolution skills.

o **Conclusion**

It is the view of the Working Group that corrections can and should contribute to the security goals of the criminal law through the incapacitation of offenders sentenced to incarceration and through the provision of a wide range of correctional programs and services designed to encourage offenders to become law-abiding citizens.

Justice Goals

CLICS suggests that the justice goals include "equity, fairness, guarantees for the rights and liberties of individuals against the powers of the state, and the provision of a fitting response by society to wrongdoing".

Although these goals are clearly articulated in our criminal law, largely as rules of criminal procedure, they are also important for corrections.

o **Equity and fairness**

Equitable and fair treatment is the cornerstone of the "rule of law". In 1977, the Parliamentary Sub-committee described the Canadian Penitentiary Service in the following words:

> There is a great deal of irony in the fact that imprisonment - the ultimate product of our system of criminal justice - itself epitomizes injustice. We have in mind the general absence within penitentiaries of a system of justice that protects the victim as well as punishes the transgressor; a system of justice that provides a rational basis for ordering a community - including a prison community - according to decent standards and rules known in advance; a system of justice that is manifested by fair and impartial procedures that are strictly observed; a system of justice that proceeds from rules that cannot be avoided at will; a system of justice to which all are subject without fear or favour. In other words, we mean justice according to Canadian law.

> In penitentiaries, some of these constituents of justice simply do not exist. Others are only a matter of degree - a situation which is hardly consistent with any understandable or coherent concept of justice.

They concluded:

> Justice for inmates is a personal right and also an essential condition of their socialization and personal reformation. It implies both respect for the persons and property of others and fairness in treatment. The arbitrariness traditionally associated with prison life must be replaced by clear rules, fair disciplinary procedures and the providing of reasons for all decisions affecting inmates.

The situation has clearly changed considerably since these comments were made by the Parliamentary Sub-committee in 1977. The common law notion of fairness has been developed and applied by the Courts to major correctional decisions affecting inmates' lives. The Charter extends additional protections to inmates, and guarantees equal treatment. Rules have been developed to cover all aspects of the treatment and custody of inmates - indeed there has been criticism that the pendulum has swung too far, and that an excess of rules governing staff decision-making has removed discretion to the point of impinging on the ability of staff to make professional and appropriate judgements in matters affecting inmates. At the same time, however, the vast majority of these rules are found in Commissioner's Directives and are thus not enforceable by offenders in the courts.

Nonetheless, the rule of law remains an important constraint on the way correctional operations are conducted today.

o **Guarantees of Rights and Liberties**

Protection for the rights and freedoms of individuals, including prisoners, is found in the common law, in the Charter of Rights and Freedoms, as well as in various United

Nations Treaties and Resolutions which Canada has endorsed, and which provide for certain minimum standards of treatment for prisoners.

Although the Charter gives rights to all individuals (in some cases just to citizens) in Canada, and does not specify the precise nature of those rights in the correctional context, it is clear that the Charter does apply to prisoners, subject to restrictions on rights upheld pursuant to section 1. In the jurisprudence to date, the courts have been particularly concerned that any correctional decisions which affect a prisoner's liberty, that is to say, any decisions which could either extend the period of his incarceration or place him in a more restrictive environment, must be made in accordance with fundamental justice.

The impact of the Charter will be discussed in more detail in later working papers on offender rights. For our purpose here it is sufficient to recognize that all of corrections must be brought into line with the Charter guarantees of rights and freedoms.

o **A fitting response to wrongdoing**

At the sentencing stage, this requirement of justice implies the need to impose a sentence which is appropriate and adequate given the circumstances of the offence. Anything less would unduly minimize or down-play the gravity of the act. At the same time, the sanction should be the least restrictive alternative which is adequate to protect society's interest - an approach which is frequently described as "restraint" or "parsimony" in the application of the law. As CLICS pointed out, however, restraint should not be misinterpreted as leniency. Rather it requires a balance to be sought between leniency and harshness. It implies a fair and appropriate penalty for criminal behaviour.

This suggests that it is important that in carrying out the sentence, correctional officials may not either increase the punishment imposed by the court (the deprivation of liberty), nor may they mitigate it, except in accordance with law. In this regard, conditional release practices have frequently come under attack when critics claim that early release undermines the intentions of the sentencing judge. Although eligibility periods for release are set out in law, and judges may be presumed to know about them when they impose sentences, the perception still exists in some quarters that the degree of flexibility corrections now has to vary the conditions of confinement is simply too great to be consistent with the purpose of carrying out the sentences of the court.

Conversely, restraint requires correctional authorities to justify all restrictions on the rights and freedoms of offenders, apart from their confinement. Obviously the fact of incarceration, and the responsibility of corrections to maintain a safe, orderly environment will, in itself, justify interventions or restrictions on offenders which would not apply to ordinary citizens. It is critical, however, that these restrictions be justified by legitimate or necessary institutional constraints.

o **Conclusion**

It is the view of the Working Group that the justice goals of the criminal law clearly have application to corrections. However it seems to us that they do not form part of the overall purpose of corrections, but rather affect the way in which corrections goes about its business. That is to say they contribute guiding principles which determine the way in which corrections pursues its primary purpose of contributing to the protection of society. It is through the vigilant application of these principles that corrections assists the criminal justice system as a whole to achieve its justice goals.

The Influence of Public Attitudes on the Delineation of a Correctional Philosophy

What the public has a right to reasonably expect from corrections should and will affect how corrections views its mandate. First and foremost, the public expects protection from crime, especially violent crime. For corrections, this means carrying out the requirements of the sentence, including the maintenance of a sufficient degree of security to prevent escapes from correctional institutions. It means always having regard for the potential risk to the public interest in all decisions about the treatment and handling of offenders. The public also has a right to expect that the punitive and deterrent aspects of the sentence will be respected by correctional authorities, and that any conditional release from imprisonment following the service of the punitive portion of a sentence will be made in accordance with the overall criminal justice goals of justice and security.

Once a decision has been made by the court to use imprisonment in an individual case, the public also has a right to expect that what goes on inside institutions will be optimally directed towards reducing the offender's chances of coming back. The 1977 Parliamentary Sub-committee on the Penitentiary System said that "society has spent millions of dollars over the years to create and maintain the proven failure of prisons. Incarceration has failed in its two essential purposes - correcting the offender and providing permanent protection to society". The Sub-committee went on to recommend both the availability of more community-based alternatives to incarceration, and the wiser use of the time which imprisoned offenders spend incarcerated. In the Sub-committee's view, imprisonment too often becomes just a very expensive warehousing operation. "Personal reformation" instead was what the Sub-committee felt should be the goal of prisons. The public too has a right to expect more for its imprisonment dollars than a revolving-door warehouse.

The public also reasonably expects that its tax monies will be spent in the most effective possible way. Public attitude surveys suggest that it is violent crime which most concerns Canadians, and that the public is more willing to accept non-carceral handling of non-violent offenders than many criminal justice professionals assume. This is a reasonable approach, especially in view of the high costs of imprisonment. As competition among social programs for increasingly scarce tax dollars increases, it makes sense to reserve the most costly correctional intervention for those who most deserve or require it.

PART III: A STATEMENT OF PURPOSE AND PRINCIPLES FOR CORRECTIONS

Given the foregoing discussion, what can be said about the appropriate purpose of corrections, and the appropriate principles to govern its operations? One thing is clear: that it is important for the goals of corrections to be well understood. When they are not, the results can be disastrous for the entire system. This is how the 1977 Parliamentary Sub-committee described the effect of a lack of mission on penitentiaries, but the effects on community-based corrections can be equally serious, if less dramatic:

> ...This fundamental absence of purpose or direction creates a corrosive ambivalence that subverts from the outset the efforts, policies, plans and operations of the administrators of the Canadian Penitentiary Service, saps the confidence and seriously impairs the morale and sense of professional purpose of the correctional, classificational and program officers, and ensures, from the inmate's perspective, that imprisonment in Canada, where it is not simply inhumane, is the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country.

The First Consultation Paper, in which the initial exploration of philosophy took place, listed for comment 16 objectives and 17 principles. These were drawn from multiple sources, including many of the documents already referred to in this paper. As we noted earlier in this paper, this led to some confusion about the distinction between objectives and principles. Nonetheless, the responses proved of value when, in light of our earlier discussions, the new statement was developed.

Overall, it is fair to say that there was general agreement with most of the objectives and principles listed in the First Consultation Paper, although sometimes with

reservations. The degree of consensus is encouraging, but at the same time we are mindful that even with substantial agreement with the elements of a statement of philosophy, there can still be significant disagreement about the importance of the elements.

Rather than using the terminology of the First Consultation Paper, the Statement of Philosophy which follows adopts the approach taken in CLICS which is to define the Purpose of Corrections, consisting of the overall goal of the correctional system, together with the major strategies or ways of pursuing that goal, and then a list of principles which provide guidance as to how corrections should pursue the strategies listed in the Statement of Purpose. Adoption of this Statement of Purpose and Principles will then have implications for all correctional activities. Each will have its own objective, which should contribute to the overall purpose of corrections.

A Statement of Purpose

The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:

(a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

(b) providing the degree of custody or control necessary to contain the risk presented by the offender;

(c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

(d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;

(e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society;

This restatement of correctional purpose emphasizes the multifaceted nature of corrections in modern society, as well as CLICS's vision of the dual nature of criminal justice goals: security and justice.

Because of the complexity of corrections, it would be unrealistic for corrections to pursue any one strategy, such as punishment or rehabilitation, to achieve its ultimate goal. Not only does society demand more, but the vast differences in the risks and needs presented by different offenders demand a flexible approach. At the same time, the overall purpose for corrections is the same as the overall purpose of the criminal law, "to contribute to the maintenance of a just, peaceful and safe society."

The first component of the purpose, (a) speaks to the need for corrections to be part of an integrated criminal justice system. As we saw earlier, it is critical that each component of the system operate within the same policy framework, pursue the same ultimate goal, with a clear understanding of what the other components can and should do. This requires communication, both in relation to the functions, capabilities and resources of the various components of the justice system, and also with respect to the treatment of individual offenders.

Corrections thus relies on judges to be open and explicit about the factors influencing their decision to incarcerate, and requires also that they have an understanding of both

the purpose of corrections and the resources available to it to carry out its functions. Conversely corrections should be under an obligation to communicate clearly how it operates, the criteria for major correctional decisions and the kinds of programs and services available to offenders. In administering the sentence, correctional authorities must consider the stated reasons for sentence as well as relevant material presented at trial or at the sentencing hearing, although they will also be guided by considerations of equity (vis-à-vis other offenders), changes in circumstances over time, resource constraints, etc.

To comply with this component of the purpose, some mechanism for communicating information to the judiciary about corrections will have to be developed. This could serve the dual purpose of informing judges about the kinds of programs offered in institutions and in the community, and about how the various release programs operate, and in addition, judges could use the forum to explain why and how certain factors influence sentencing decisions.

Components (b), (c) and (d) of the Purpose reflect the need to respond to individual offenders. For some offenders, the seriousness of their crime simply requires punishment, even if there is no risk that they will offend again. For them, incarceration, with its inevitable measure of painfulness, will often be the only possible response. Even where these individuals require no "rehabilitation", however, corrections is under a positive obligation to ensure that they are discharged no worse than when they were sentenced, and are no less able to function productively in society after release. In addition, the public demands protection from offenders who present a high risk, especially a risk of violence, even if the offence for which they were most recently convicted is not exceptionally serious. For those offenders who are considered dangerous, incapacitation (normally by way of incarceration) is the primary correctional goal, and risk assessment must inform all correctional decisions.

This implies continuing efforts to develop more accurate and sophisticated methods for risk assessment. In addition, corrections would have to explore different ways of controlling risk. Recent studies and reports on the Correctional Service of Canada have stressed the need for "dynamic" rather than "static" security to control inmates. There is a growing recognition that imaginative programming, as well as the active involvement in programming of all correctional staff, is not only appropriate from a rehabilitative perspective, but is also effective to reduce tension levels in institutions and the risk presented by offenders.

Similarly for parole and probation, it may be the case that more imaginative and individually designed supervision conditions would permit more offenders to remain safely in the community.

A large number of offenders come into the correctional system with multiple problems which may contribute to their criminality: chronic unemployment, little education, few job skills, perhaps learning disabilities, alcoholism, difficulty in dealing with social services, family problems, poor coping abilities. Society has a right to expect that corrections will make an effort to help the offender deal with these problems. Thus, for those offenders who need it and are receptive to it, corrections should also offer opportunities in the form of appropriate programs, and actively motivate offenders to take advantage of them.

Because of the focus of this strategy on return to the community, it is important that the programs developed by corrections focus on skills necessary for life on the street. Vocational skills should relate to work opportunities in modern society, and it is important that training programs meet outside certification standards.

Additionally, this strategy defines an active role for correctional staff as motivators and encouragors. This is not confined to the "treatment personnel" but should extend

to all staff who have contact with offenders. This may require changes in job descriptions, and will involve an additional emphasis in job training and development on counselling and communication skills, problem solving and peaceful dispute resolution.

Equally important are the strategies identified in (d) which require corrections authorities to respond to the individual needs of offenders. In addition, the important role of release planning is highlighted. This strategy may have implications for the allocation of program opportunities in different types of institutions. Those offenders considered to require a high level of control and who are then placed in maximum security institutions may also frequently be characterized as "high need" offenders. Typically, however, there are more program opportunities in less secure facilities.

These goals are primarily "security" goals. However, our proposed statement of correctional goals also encompasses "justice" objectives which require that the correctional system take care of the basic human needs of offenders. For those put in prison, these needs are extensive; shelter, food, exercise, medical and dental care, protection from other prisoners. It is also necessary to ensure that this environment is conducive to active program participation.

For offenders in the community, it is usually not necessary for corrections to provide these services directly. But many offenders in the community need assistance, initially at least, coping with the basics of life - finding a job, making a good impression on the job, establishing a budget, even eating an adequate diet. Without becoming a substitute for existing social services, correctional workers will often find themselves advising offenders on how to make use of educational, vocational and other opportunities in the community, sometimes acting as a liaison between the offender and the elements in the community with which he must interact successfully in order to survive.

As CLICS suggested, it is clear that the "security" goals of corrections and the "justice" goals of corrections are inextricably interconnected. The basic human needs and life skills just described are a good example. While they must be met as part of a just and humane correctional system in a modern, complex society, they should be met for the additional reason that an offender who cannot cope with the basics of his own life is far more likely to be unable to stay out of trouble with the law.

A Statement of Principles

Given our starting point that incarceration is, by its nature, punitive, what principles are necessary to establish the appropriate level of punitiveness? In addition, what principles are required to provide positive guidance to correctional staff in carrying out their mandate?

Perhaps the first question which logically arises is: To what extent, if at all, are the rights of the offender as a citizen curtailed by the fact of conviction and sentence of incarceration. The concept of civil death was abolished in Canada in 1892, thus permitting offenders to retain the right to own property. However a number of civil rights are still explicitly removed by legislation, such as the right to vote, the right to hold public office, the right to certain future employment and licences, the right to remain in Canada in certain circumstances. Other rights have been held to be implicitly removed or restricted by virtue of incarceration: freedom of movement or association, use of the mails and telephones, or the right to marry.

The Supreme Court of Canada, in the case of Solosky and the Queen, reiterated that at common law, inmates retain all their civil rights other than those expressly or impliedly taken from them by law. This position is developed further by the Charter, which extends its protections to inmates, subject only to restrictions prescribed by law pursuant to section 1. These restrictions must, however, be demonstrably justifiable.

Many of the specific rights referred to in the Charter would touch on correctional authority: freedom of association, the right to vote, mobility rights, the right to life, liberty and security of the person, security against unreasonable search and seizure, and freedom from cruel and unusual treatment or punishment.

Section 1 of the Charter will increasingly mean that the burden will fall on government to articulate and "demonstrably justify" the limits which it wishes to place on offenders' rights. These limits will, furthermore, have to be stated in law.

This apparent Charter trend is echoed by the CLICS principle (a) that the criminal law should be administered "in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose". Indeed, fairness suggests that we should not arbitrarily limit the civil rights of offenders, although we must recognize that some restrictions are a necessary consequence of a sentence of imprisonment. One principle, therefore, which should govern punishment could be stated as follows:

1. **Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.**

From an operational point of view, this principle could have an impact on numerous correctional activities. Correctional authorities will have to look at each restriction imposed on offenders and determine if the limitation is necessary to the protection of the public or necessary for the good and safe functioning of the institution rather than just a matter of administrative convenience. The starting point in this analysis will be that an offender has all the rights and privileges of an ordinary citizen - for example, mobility rights to move from one place to another. Given

the fact of incarceration, mobility rights are necessarily restricted. However, applying principle 1 will mean that mobility may only be restricted to the extent which is absolutely necessary to maintain a secure institution, and run a correctional system.

Since mobility rights are protected by the Charter, any limitation on those rights must also be set out in law. It will thus be necessary to ensure that these limitations are provided for in statute or regulation rather than administrative directives.

This principle also recognizes the need for clarity and certainty in relation to all matters affecting rights, and requires that all such matters be set out in law.

As matter of policy, however, corrections is still faced with numerous operational choices - such as the deliberately unappealing but nutritious diet - which do not reach the level of legal rights. In other words, most of the daily operational issues of corrections are more a matter of social policy than legal requirement, although at a certain point, the conditions of confinement could be made so unpleasant as to offend our sense of humane treatment. They could also constitute cruel and unusual punishment, and thus be subject to attack in the courts. We are thus still faced with the need for principles to govern the punitiveness of corrections: i.e., should corrections impose punishments beyond what is implied, of necessity, in the sentence. "Punishment", of course, is difficult to define; what is an administrative necessity to a warden might be seen as punishment by a prisoner. Moreover, the overall level of government spending on corrections will, to some extent, affect the punitiveness of certain correctional environments.

Some authors have suggested that corrections has no authority to impose additional punishments, that only a judicial officer may do so. The 1977 all-party Parliamentary Sub-committee on the Penitentiary System in

Canada took this view:

> The mere fact that an individual is sentenced to incarceration constitutes the punishment for his offence, since the sentence inherently means that the offender will, for a certain length of time, be restricted in his freedoms of movement and association. The Penitentiary Service is neither required nor authorized to levy further sanctions against the inmate, unless he in some way violates the rules of the institution. The inmate has the right at all times to expect humane treatment and living conditions, and as much liberty as can be permitted by the requirements of security. There must be a clear distinction made between punishment and vengeance. Punishment is the means by which society expresses its disapproval of the behaviour of one of its members. Vengeance is a much more primitive and illogical reaction to offensive behaviour, and has no place in the correctional practices of an enlightened nation. In cases where imprisonment is determined to be the appropriate response to criminality, in light of the purposes of imprisonment we have stated, we recommend that the following principle should govern behaviour by all officials in the penitentiary system:
>
> > The sentence of imprisonment imposed by the court constitutes the punishment. Those who work in the penitentiary system have no authority, right or duty to impose additional penalties except for proven misconduct during incarceration.

The social policy view of the Sub-committee is shared by many. In Britain, this view is phrased differently: that the criminal is sentenced "as punishment, not for punishment". Similar wording to convey the same notion can be found elsewhere among Western democratic nations. For our purposes, the idea might be phrased as follows:

2. **The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime.**

This principle deals only with the punishment deriving from the sentence. On its own, therefore, it may give the impression that no other punishment can ever be meted out. In fact, punishments can and often do result from disciplinary infractions, and this needs to be made clear. Further, it is possible that the imposition of controls could be construed as a form of punishment. For instance, transferring an inmate to a higher level of security, or suspending or revoking parole or mandatory supervision necessarily carry with them connotations of punishment for failure to behave in an acceptable way or to comply with certain conditions. Therefore, when additional punishment is in fact imposed on an inmate, it must be done in accordance with the law:

3. Any punishment or loss of liberty that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.

This principle affirms the current situation which has developed through the application of the common law duty of fairness, and more recently through section 7 of the Charter (the right to life, liberty and security of the person and right not to be deprived thereof except in accordance with the principles of fundamental justice). From an operational point of view, this will require certain procedural rules and possibly substantive guidelines for processes which involve punishment. Where a significant loss of liberty is a possible consequence, a hearing will be necessary and possibly the right to legal representation.

Even once the question of additional punishments has been settled, however, the reverse side of the question presents itself: Should the more drastic modes of corrections, such as imprisonment, be under an obligation to identify and counteract as far as possible the artificial, debilitating and painful aspects of the correctional environment?

The goal of restraint, discussed earlier in this paper

(Justice Goals), is appropriately incorporated here. It might be stated as follows:

4. In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, and consistent with public protection and institutional safety and order.

The implication of this principle, taken together with others, is that corrections would have the burden of demonstrating why a given correctional environment should not, either in general or in respect of a particular offender, approximate the conditions and freedoms of society generally. If there are two ways of accomplishing the same end, but one impinges considerably less on the offender's rights and interests, it is the less drastic course which should be chosen unless there are defensible reasons to reject it. A good example is the need to have identifiable photos of all inmates in order to assist in finding an escaped convict. One way to ensure an inmate will not be able to use facial hair to thwart identification is to require all inmates to remain clean-shaven at all times; a less restrictive option is to take photos of an inmate with and without facial hair, if he wishes to grow a beard or moustache. The same principle of restraint can apply to much more significant questions of initial placement in maximum, medium or minimum security, as well as transfers, choice of treatment program, and conditions of release.

Finally, it is necessary to delineate a few principles respecting the procedural implications which follow from these substantive principles. As seen from CLICS, there is the need for principles respecting the day-to-day decisions of correctional authorities. Most decisions which extend or limit the punitiveness of the correctional environment will, as we have discussed, be taken by administrative rather than judicial authorities. The Working Group recognizes the essential role of discretion in corrections. As we discussed in more detail in the Framework Paper, discretion may be seen as both harmful and helpful; it may be regarded

as a threat to individual rights, and at the same time as the necessary means to achieve humaneness and flexibility.

The answer is not to eliminate discretion, but rather to attempt to confine and structure discretionary power. This can be achieved partly through a clearly articulated statement of purpose and principles which provides all those working in corrections with a framework for decision-making. In addition there is a need for a system of legal and administrative rules to govern the exercise of discretion at critical points in corrections. The system of rules must recognize the importance to offenders of many decisions made by correctional authorities, particularly those related to the liberty of the offender, such as parole and discipline decisions. Since the basis of these decisions should, at a minimum, be open and decision-makers should be accountable, our principle respecting decision-making could be phrased as follows:

5. Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

Operationally, this will mean that rules must be developed (and made available to staff and offenders) as to the information upon which a particular decision may be made, as well as rules regarding the giving of reasons for decisions, and the development of guidelines for important decision-making processes such as parole and initial classification. Generally, correctional operations should be characterized by a willingness to explain the basis for decisions affecting both individual offenders and operations as a whole, and to listen to the positions or views of those affected by the decisions.

Correctional decisons which affect important interests of offenders, particularly their liberty, are increasingly subject to judicial review, as a result of both the Charter and the common law duty of fairness. Litigation, however, is recognized to be particularly costly, slow and (often for reasons of slowness alone) ineffective to serve as an adequate remedy for the hundreds of decisions made daily by

correctional authorities in relation to inmates. For this reason, it is becoming increasingly necessary to establish effective grassroots dispute resolution mechanisms in corrections which are both fair and - equally important - perceived to be fair by offenders under correctional control. Our principle might then read as follows:

6. All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

Grievance procedures are now recognized as an integral part of modern correctional systems. However it is important to evaluate the effectiveness of programs already in place, to ensure that they meet the objective of speedy and appropriate problem-solving within a process which involves the parties to the dispute or problem.

To promote the restoration in the community of offenders, the public, both general and specialized, should be encouraged to participate in the programs which are aimed at the offender. By this means, offenders will come into more contact with normative role models and are more likely to be treated in ways which reflect the community at large, rather than ways which reflect the correctional environment:

7. Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services.

On an operational level, this principle implies the development of public education programs and the recruitment of lay people for involvement in prison and release programs (Citizen Advisory Comittees, volunteer parole supervisors, participation of community service clubs). Also the participation of private citizens in important correctional processes such as parole and disciplinary hearings would be encouraged. Continued and increased involvement of private agencies would be indicated, as well as the expanded use of

existing social services in society to promote integration with the community.

In our opinion, the principles as proposed now reflect the consensus of the respondents. Nonetheless, they may go further than some feel warranted and not as far as others feel necessary.

Further, they do not, it should be pointed out, reflect the distinction between violent and non-violent offenders that the victims' groups feel is so important. This does not mean we are unsympathetic to their concerns about public protection -- in fact we share them -- but we believe that component (b) of the Purpose, which establishes the importance of risk assessment of offenders, is the best way to meet the concerns expressed most strongly by the victims' groups and, to a lesser extent, by some of the other respondents.

Not discussed in the First Consultation Paper as a possible principle was the role of correctional staff in achieving the overall purpose of corrections. The working group recognizes that in order for new correctional legislation to have an impact on correctional operations, the proposals must be fully supported and actively implemented by correctional staff.

The purpose of corrections as articulated earlier in this paper recognizes the fundamental role of staff in implementing all of the strategies identified as contributing to the overall goals of the system. The strategies rely on personal interventions and interaction, rather than increasingly sophisticated technologies and facilities. We therefore propose the following principle:

8. The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives.

This principle reinforces the earlier discussion with

respect to the purpose of corrections. It implies a recognition of the responsibility of all correctional staff to encourage and assist inmates to adopt acceptable behaviour patterns. Job descriptions may have to be changed so as to emphasize this role as part of all correctional staff positions, and appropriate staff training must support it. Above all, this principle means that staff must be used to their full potential in the correctional process, not relegated to professional lives which consist primarily of custodial and paperwork functions. Correctional resources are too valuable - and increasingly scarce in this era of fiscal restraint - for corrections to make less than full uses of the skills and sometimes untapped talents of all its members.

Finally, we considered the inclusion of a principle which recognized the reality of economic restraint, which has affected corrections in the same way as it has all other aspects of Canadian life. Cost-benefit analysis is an essential part of any operation, including corrections. For instance, this principle could influence a decision to prepare inmates for release (assuming there are release programs) as soon as possible after their eligibility dates, provided they pose no undue risk to the public. On the reverse side, of course, the application of the principle could result in the cancellation of certain programs which are more costly than others or which reach only a small number of offenders with special needs.

Despite the importance of the notion of cost-effectiveness, it is our view that this necessarily applies to all operations, public and private, and thus does not require re-stating here.

The preceding set of principles are proposed with a view towards further consultation with interested groups. Additional refinements will no doubt be made during the forthcoming round of consultations.

PART IV: THE ROLE OF A STATEMENT OF PHILOSOPHY

The final issue for consideration is what role the statement of philosophy should play in the new correctional legislation. Should it be a matter of policy, which guides the development of the substantive provisions but is not itself legislated? Or should it be included in the legislation?

If the latter, further questions arise about the ambit of such legislation. Should the statement be in federal legislation which applies to both federal and provincial jurisdictions or should it govern the federal system only, leaving provincial jurisdictions to legislate it or not, as they choose?

In the paper "A Framework for the Correctional Law Review", which was released simultaneously with this one, we discuss the different approaches that could be taken to drafting legislation in order to develop a scheme which best reflects the philosophy of Canadian corrections and which facilitates the attainment of correctional goals and objectives. We suggest in that paper that we want new correctional legislation which gives guidance to correctional staff and promote fair and effective decision-making; it should facilitate operations and be clear and unambiguous; it should be internally consistent; it should promote the dignity and fair treatment of inmates; and reflect the interests of staff, offenders, and of all others affected by the correctional system. The legislation should be perceived by inmates, staff and the public as fair and reasonable. What kind of legislation would best achieve these goals?

As is discussed in more detail in the Framework Paper, it is clear that new correctional legislation must establish the correctional agencies and authority for their functions in law, provide for the principle features of major correctional activities and programs, and provide for all matters of rights. This can be done, however, in a number

of ways, ranging from very general provisions leaving correctional authorities maximum authority, to very detailed codes of procedure governing all correctional decisions and provision of services.

It is our view that in order to provide sufficient guidance to the correctional system to ensure that correctional operations are conducted in conformity with Parliamentary intentions and in conformity with publicly supported correctional policy, while at the same time leaving sufficient flexibility in the hands of correctional authorities to control operations, it would be preferable to place the statement of philosophy in legislation, together with specific objectives for each major correctional program or activity (such as parole, security clarification, discipline, remission, etc). Detailed matters can be left to subsidiary legislation and policy, although this must still be consistent with the legislated philosophy and program objectives.

Finally, it is also the view of the Working Group that the statement of philosophy should apply to corrections at both the federal and provincial levels, in order to promote a truly integrated criminal justice system.

SUMMARY

In this paper, we have developed a statement of purpose and principles for corrections in Canada, which we propose should be put in legislation. This statement would serve to guide the application and interpretation of the legislation, and would provide a clear framework for policy development.

The statement stresses the need to treat offenders fairly and humanely, and places an onus on correctional authorities to actively assist offenders to prepare for their future release back to the community. At the same time, risk assessment must always play an important role in all correctional decisions.

In developing this statement, the responses we received to the First Consultation Paper were extremely helpful. Indeed the degree of consensus among respondents was particularly encouraging, given the diverse views expressed on other issues. We therefore hope that this paper, which is so fundamental to the Correctional Law Review as a whole, will attract an even wider response.

As we have stated earlier, written comments on this paper are invited, and the Working Group will meet to discuss all of the Working Papers with any group or individuals who wish to do so during the public consultations in the winter of 1986-87.

Footnotes

1. Archambault, J. (Chairman). 1938 Report of the Royal Commission to Investigate the Penal System of Canada. Ottawa: King's Printer.

2. Ibid, pp. 7,8.

3. Fauteux, G. (Chairman). 1956 Report of a Committee Appointed to Inquire Into the Principles & Procedures Followed in the Remission Service of the Department of Justice of Canada. Ottawa: Queen's Printer.

4. Ouimet, R. (Chairman). 1969 Report of the Canadian Committee on Corrections - toward Unity: Criminal Justice & Corrections. Ottawa: Information Canada.

5. Law Reform Commission of Canada, Imprisonment & Release, (1975).

6. Federal Corrections Agency Task Force Report, (1977).

7. Vantour, J. (Chairman). Report on Murders and Assaults in the Ontario Region, (1984).

8. Carson, J. (Chairman) Report of the Advisory Committee to the Solicitor General of Canada on the Management of Correctional Institutions, November, 1984.

Appendix "A"

List of Proposed Working Papers of the Correctional Law Review

Correctional Philosophy

A Framework for the Correctional Law Review

Release and Clemency

Staff Powers and Responsibilities

Sentence Computation

Native Offenders

Offender Rights

Mentally Disordered Offenders

International Transfer of Offenders

Victims and the Correctional Process

The Relationship between Federal and Provincial Correctional Jurisdictions

NOTES