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VICTIMS AND CORRECTIONS

Correctional Law Review
Working Paper No. 4

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VICTIMS AND CORRECTIONS

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October 1987

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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 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 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. 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 after all the Working Papers are released, and will meet with interested groups and individuals at that time. This will lead to the preparation of a report to the government. 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.

Please send all comments to:

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VICTIMS AND CORRECTIONS

EXECUTIVE SUMMARY

INTRODUCTION

Identifies the context of competing interests and rights in which victims' suggestions for correctional reforms are considered. Notes the historical decline in the role of the victim in the criminal justice system, against which the victims' movement has evolved, and summarizes recent developments.

Outlines effects of victimization and identifies the needs of victims.

PART I

Discusses how general information about the correctional system can best be communicated to victims.

Explores the case-specific informational needs of victims; examines the present policies regarding the release of information about offenders to victims; and identifies considerations (including operational difficulties, and possible solutions) which should be taken into account if access to information about offenders is to be expanded legislatively.

Recommends that correctional decisions be made on full, complete, relevant information (including victim impact statements) provided by the sentencing court.

PART II

Describes a range of correctional programs of benefit to victims (or surrogate victims) where offenders have been imprisoned. The paper identifies recent trends in federal corrections which seem to support reconciliation and recommends that such reparative activities be maintained and encouraged when offenders have been incarcerated.

Discusses the philosophy of reconcilation and considers the implications of adding it to the statement of Correctional Philosophy.

Considers the implications of expanding the mandate of corrections to include the provision of corrections-related supportive services and programs for victims of crime.

Explores suggestions for deducting restitution payments from inmate pay and identifies the legal and practical impediments to so doing.

PART III

Considers victims' suggestions and other options for increasing relevant victim input in the parole process, including the possibility of opening parole hearings to the public. The paper reviews present policies and explores options for expanding victim involvement in the parole process in the context of meeting the victim's "need to know" about the offender, and reviews issues related to presentation to parole decision makers of victim-related information and opinion.

Favours permitting written VIS to be submitted or updated to ensure that adequate information is before decision-making authorities, but declines to recommend participation of victims at hearings.

Suggests that changes to the parole process should promote good decisions in the first instance, with internal procedures to review those decisions, rather than setting up outside review mechanisms.

Discusses the composition of parole boards, including the recruitment of "community members".

SUMMARY

Affirms the appropriateness of corrections exploring ways of responding creatively and effectively to the needs of victims.

Acknowledges the controversy surrounding, and the emotional impacts on all of us of, victim suggestions for correctional reform.

Challenges respondents to propose the appropriate balance of competing victim and offender interests in responding to the issues raised in the paper.

Note

Not all issues raised by victims are discussed in this paper. Some, such as many general concerns about parole, are discussed in other working papers. Generally, only those issues which are clearly and specifically linked to the special needs of victims are addressed. Furthermore, questions focus on the appropriateness of dealing with these issues in law or policy, since the Correctional Law Review is a review of federal legislation governing corrections. Thus, questions related to program design, for example, or funding for victim-related programs, are not dealt with here in any detail.

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INTRODUCTION

Although victims or their families played a prominent role in resolving criminal disputes in ancient societies, the state gradually replaced the victim as "the central actor" in the criminal justice system.[1] In recent years, it has been recognized that the fact that the victim's part in the process steadily lessened over time does not justify the lack of a formal place for victims today, and all areas of the criminal justice system have been challenged to review the role of victims.

Generally, victims have been excluded from key correctional - and other criminal justice system - decisions, to which they believe they have something to contribute. They may be denied access to information about specific offenders, and often find it hard to get general information about the correctional system. Increased recognition of the needs and interests of victims, as well as the Federal Government's commitment to addressing the needs of victims of crime, makes consideration of the role of victims by the Correctional Law Review both appropriate and timely.

Proposals for correctional reform responsive to victims are controversial and have an emotional impact on all of us. In this paper we will examine these proposals and our assumptions about corrections and offenders in keeping with earlier proposals in the paper on Correctional Philosophy, seeking to balance the competing interests and rights of all people who will be affected by the outcome.

Obviously not all victims' needs and concerns can be responded to by corrections: many arise at a time prior to the imposition of sentence, while others may be wholly or in part outside the mandate of federal corrections. This paper explores possible avenues for responding to victim concerns in the federal correctional sphere where it is possible and reasonable to do so without unduly intruding on the legitimate rights of offenders. In particular we may expect corrections to respond where doing so prevents further victimization by the criminal justice system, where victims' needs can only be, or can best be, met by

corrections, or where meeting the needs of victims will also further the objectives of corrections.

Outline of Recent Developments

Since the 1970's, interest in the role of the victim in the criminal justice system has increased. Many factors - often complex and interrelated - contributed to this development; some of the more obvious ones are worth identifying. The international victimology symposia held in that decade began to focus more on research related to victim trauma, victim needs and the role of the victim in the criminal justice process than on its traditional preoccupation with the role of the victim in the offence and his or her relationship with the offender.

At the same time, community interest in child abuse, especially child sexual abuse, increased. The growing prominence of the women's movement, and its articulated concerns about victims of spousal abuse and sexual assault, contributed to a rapid expansion of services for these particular victims. Surviving family members and victims of both impaired drivers and violent crime, angered by what they perceived to be their further victimization at the hands of the criminal justice system, began to develop small self-help and advocacy groups in various parts of the country. These groups have received assistance and encouragement from a wide range of intermediaries concerned about the welfare of victims and their families, such as police, victim movement advocates, interested individual politicians and bureaucrats, and academics. Financial assistance from different levels of government has also been increasingly available.

Court-related victim/witness assistance programs designed to satisfy the emotional and social needs of victims (and witnesses) and to increase their cooperation with police and prosecutors now exist in a number of centres across the country. Through all of these developments, victims have sought to make the criminal justice system more responsive to their needs and concerns.

During this period, governments also established task forces, commissions, committees and working groups to review the needs and concerns of victims, some of which are relevant to the Correctional Law Review.

The Federal-Provincial Task Force on Justice for Victims of Crime was established in 1981 to examine the role of the victim in the criminal justice system. The recommendations in its 1983 report focused on the provision of information to victims, the development of victim services, the desirability of giving victims a more prominent role at sentencing through the introduction of victim impact statements, the utilization of existing (or modified) provisions of the Criminal Code (compensation for losses, return of property, etc.), and on the special needs of particular victim groups (elderly, children, assaulted wives, sexual assault victims).[2] The Federal-Provincial Working Group on Justice for Victims of Crime, established to assess the implementation of the recommendations of the original Task Force, submitted its report to provincial and federal Ministers of Justice in February 1986.[3] While these reports do not have much to say about corrections per se, the discussion surrounding their recommendations with respect to sentencing and information dissemination are relevant to related issues in the correctional context.

In 1982, the President of the United States created a Task Force on Victims of Crime. Its report, which recommends a constitutional amendment to ensure the right of victims to be present and be heard at all critical stages of judicial proceedings, has had considerable influence on the thinking of victim organizations in Canada, particularly with respect to parole.[4]

The Metropolitan Toronto Task Force on Public Violence Against Women and Children, set up in 1982 in response to public concern following a series of brutal crimes in that municipality, assessed the effectiveness of the criminal justice system (including the prosecution of offenders, and the roles of the corrections, probation and parole systems) in deterring violence against women and children. Its 1984 Final Report made many wide-ranging recommendations, directed at municipal, provincial and federal governments, as well as the private sector.[5]

In May of 1984, the Ontario government sponsored a two-day Consultation on Victims of Violent Crime to study the Federal-Provincial Task Force Report. The resulting report[6] recommended the establishment of victim advocacy mechanisms to assist victims to participate in various criminal justice processes, including corrections and release. While this report was critical of

conditional release, the Metro Toronto Report focused on the need to study causes of violence, and to identify, treat or control offenders who have the potential for further violence.

In August 1985, Canada sponsored, at the Seventh UN Congress on the Prevention of Crime and Treatment of Offenders, a Declaration of Basic Principles of Justice Relating to Victims of Crime, which it had played a key role in drafting. The Congress recognized the desirability of ensuring more effective measures at the international and national levels on behalf of victims of crime; it resolved to promote progress by all member states in their efforts to respect and to secure for victims the rights due to them. The declaration (see Appendix B) was adopted by the UN General Assembly in November 1985.

The declaration states that victims are entitled to access to the mechanisms of justice and to prompt redress (i.e. restitution and compensation) as provided for by national legislation. The resolution urges member countries to ensure that the views and concerns of victims be heard at all appropriate stages of criminal proceedings, to the extent that such participation does not compromise the rights of the accused and is consistent with the nation's criminal justice system. Furthermore, it urges that the criminal justice system strive to avoid unnecessary delay in disposing of cases or granting awards to victims and that restitution and compensation be made available to victims. While Canada has laws and practices in place presently for victims' protection that meet the standards contained in the UN resolution, it is important to review these laws and practices periodically to determine whether they can be further improved and made more responsive to crime victims. The Correctional Law Review provides an opportunity to review those laws and practices related to corrections.

The Effects of Victimization and the Psychological Needs of Victims

It is important to recognize that victims are not a homogeneous group. They may be the victims of robbery, sexual assault, attempted murder, break and enter, or of fraud, vandalism or petty theft. The crime may have been unforeseeable, sudden, arbitrary, or part of a pattern of abuse. The crime may have been committed by a stranger or by a neighbour, employer or

employee, spouse or other family member. The family of the actual victim may also suffer because of the offence. Clearly individual victims will respond in different ways, and will require different things to recover from the experience of victimization.

The effect of crime on victims may vary from mild shock, or a feeling of moral indignation, to long-term physical and psychological trauma which may spill over into every aspect of their lives. Several models of victim response have been advanced to describe the basic intellectual and emotional changes that occur after victimization. All describe symptoms and phases closely linked to the clinical features of post-traumatic stress syndrome.[7] Common to all the models of victim response are feelings of disorganization, fear, numbing, anger, and denial, which occur in alternating fashion.[8] Confidence and self-esteem are lowered, leaving victims more vulnerable and dependent than usual.[9] This may be compounded by secondary psychological trauma if the victim feels rejected by or does not receive expected support from the community (social agencies and the criminal justice system) as well as family and friends.[10]

Victims may require assistance in moving from these responses to the development of strategies for coping and survival.[11] Revenge and retribution are unlikely to heal their psychological wounds; what is needed is a sympathetic and empathetic response from the community toward the victim.[12] Measures which reduce victims' feelings of isolation, aloneness and helplessness will also reduce their secondary psychological trauma.[13]

In coming to terms with their victimization, certain "stages" appear crucial. An acknowledgement that the crime actually happened, and a coming to terms with feelings of mortality, vulnerability and lack of control appear vital if the victim is to be able to put the crime behind him or her, and re-establish control over his or her life.[14]

In this paper we will be looking in more detail at how the correctional system can respond appropriately to victims, but it appears that the following issues have been identified as being important to consider:

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

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

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

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

5. Effective protection from re-victimization or retaliation is crucial to alleviate the victim's feelings of vulnerability. This is particularly important where victims know and have a continuing relationship with the offender. Some victims articulate their concerns for protection of other members of the public, as well.[15]

PART I: INFORMATIONAL CONCERNS OF VICTIMS

Almost every study made of victims has highlighted information as their greatest priority.[16] Victims have a legitimate interest in knowing not only how the criminal justice system operates, about matters related to their own cases and about the perpetrators of crimes against them, but also about any services that may be available to assist them in recovering from their experiences with crime. Victim advocates suggest that keeping victims informed about the status of their cases at pre-correctional stages of the criminal justice process and providing victims with information about particular offenders throughout their involvement with criminal justice systems (including corrections) prevents the sense of being further injured by the process and may contribute to victims' capacities to put the crime behind them.

If victims' informational concerns are addressed, the criminal justice system is more likely to be perceived as relevant and effective, and in turn may expect better cooperation from victims and the public.[17] However, it has been suggested that increased information in the absence of increased participation may only heighten victim frustration with the criminal justice system.

General Information

Although general information about the criminal justice system has been increasingly available in recent years, its distribution to victims remains uneven. Victims have had insufficient information about certain aspects of the criminal justice system and about services available to assist them (particularly access to legal advice and the victim compensation funds available in almost all of the provinces to victims of violent crime).[18] The lack of systematic provision of information means that only those victims who happen to hear about victim services will benefit, and those who hear about them too late to apply will feel cheated or neglected.

The Federal-Provincial Task Force on Justice for Victims of Crime recommended that every victim and witness be provided with general information about the criminal justice system, the rights and obligations of victims and witnesses, and the explanation of a subpoena and enforcement of court orders, such as restitution

and peace bonds. This information was to be provided in pamphlets prepared jointly by police, prosecutors, and victim service workers, and distributed within each jurisdiction with subpoenae.[19] However, victims and witnesses often report not receiving information, and the Implementation Working Group found that even when information is distributed, it is not always in a form comprehensible to the ordinary person, nor in a manner or form which takes adequate account of the effects of victims' trauma.[20]

Correctional systems across Canada publish general information about their programs, designed for the use of the general public, police, prosecutors and judges. However, as with other general criminal justice pamphlets, those about corrections are not always readily available, nor are they always in a form considered by victims to be useful or meaningful.

A number of options have been suggested to improve the distribution of correctional information. Crown Attorneys could be asked to provide victims with appropriate pamphlets about corrections at the time of plea "consultations" or at the sentencing hearing; however, many cases are disposed of in the absence of the victim. Another option is to have such pamphlets provided to victims by police upon their first contact with the criminal justice system. However, a proliferation of information at this stage could be counterproductive, overburdening both police and victims. A further option is to ensure that pamphlets which are already being distributed by the police contain a reference as to where the victim may obtain information about corrections.

While current activities of the Ministry reflect an acknowledgment that victims and the public at large require better access to general correctional information, we must ask whether this should be formalized:

1. Should federal law relating to corrections require the dissemination of meaningful information about correctional processes to victims and members of the public generally? If so, should the law require this information to be provided in any particular form? Alternatively, are such matters better left to policy?

Case-Specific Information

As regards information about their own cases at early stages of the criminal justice process, it is generally agreed that victims should be given information about charges laid, the name of the accused, the date and place of the bail hearing, if applicable, and reasonable notice of dates and locations of court proceedings, including sentencing. The outcome of decisions at each of these stages is also considered to be information to which victims should have access.[21] For the most part, no legal confidentiality attaches to such information; making such information accessible to victims is both a courtesy and a positive action by the state designed to minimize victims' anxieties. Although the complexity of criminal law processes (including changing court dates) contributes to the difficulties in keeping victims informed, very often the problem is that, at present, no one in the criminal justice system is clearly identified as being responsible for providing this information.

The issues related to victim access to case-specific information about offenders who are incarcerated are more problematic. Victims may need information about the offence, the offender, and criminal justice processes in order to make sense of what has happened to them and to re-establish control over their lives. However, there is no defined set of information which all victims require, nor even that which will clearly meet the needs of particular groups of victims. Nor are there mechanisms in place currently to provide such information. Furthermore, there may be a perception of secretiveness which breeds suspicion that criminal justice and correctional authorities are not acting in the best interests of victims or the public.

There is no consensus as to how much information victims and the general public should be entitled to receive about specific offenders after sentencing. Some victims have requested information about the offender's treatment or involvement in prison programs, the security classification of an inmate, the place of incarceration, the fact of an inmate being unlawfully at large, an inmate's eligibility dates for various forms of release, the inmate's actual release dates, the location to which he or she is released, and the conditions of release. On the other hand, personal information about individuals which is held in federal

(and some provincial) government files is normally not released to third parties.

Legislation protecting the privacy of information about individuals must strike a delicate balance between competing interests - in this case, between the interests of victims and the interests and rights of individual offenders. Offenders, like other members of our society, have the right not to be harrassed or threatened, nor to have information about them released, particularly that which is highly personal (such as medical or psychological details) and not directly relevant to the legally recognized entitlements of the person making the request.

Respect for privacy is the acknowledgement of respect for human dignity and of the individuality of the person. It is "the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is to be communicated to others."[22]

In certain cases, the state compels the individual to provide it with some personal information (for example, people must disclose their income to the federal government so that the amount of income tax they are to pay may be assessed), but generally the scope of disclosure and the purposes for which it may be used are extremely limited (i.e. with a few exceptions, Revenue Canada is not free to disclose that information to anyone else). Even where there may appear to be a socially valid purpose (for example, releasing an address taken from Income Tax records to a spouse who is seeking enforcement of a support order), federal legislators have been reluctant to permit direct access to such information.[23]

Although privacy is not specifically mentioned in the Charter, the courts have recognized that a reasonable expectation of privacy is protected by section 7, which entitles people to "security of the person", and by section 8, which prohibits unreasonable search or seizure. However, regardless of whether all claims to privacy are protected by the Charter, privacy has been recognized as being fundamental in Canadian society, and privacy of information has been accorded increased legal safeguards and protections.

Since 1983, the release of information by the federal government to any person has been regulated by the Access to Information and Privacy Acts.[24] Correctional authorities have been reluctant to release information about an offender's treatment, security classification and place of incarceration due to the restrictions set out therein. Section 8(1) of the Privacy Act prohibits the disclosure of personal information to third parties except in the circumstances prescribed in section 8(2) of that Act. Consistent with this, section 19 of the Access to Information Act provides that except in specified circumstances "the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act". This is defined as information about an identifiable individual that is recorded in any form including, "... information relating to the education or the medical, criminal or employment history of the individual" and "the address of the individual."

Section 19(2) of the Access to Information Act permits disclosure of personal information in three circumstances: a) when the individual to whom it relates consents; b) when the information is publicly available; or c) when the disclosure is in accordance with s.8 of the Privacy Act. The provisions in that section related to "consistent use" and "public interest" can be used for limited disclosure of information about inmates to third parties.

"Consistent use" is not defined in the present legislation; it has been interpreted quite broadly by some ministries or agencies and more narrowly by others.[25] Basic factual information about offenders is released to victims (but not the public at large) pursuant to section 8(2)(a) of the Act which permits disclosure of personal information "for a use that is consistent with the purpose for which the information was originally obtained." Also, information about escapes is presently released to the public for law enforcement purposes pursuant to this section - regaining custody of an escapee is viewed as a purpose consistent with the administration of the sentence.

Subparagraph 8(2)(m)(i) permits disclosure where "the public interest ... clearly outweighs any invasion of privacy that could result from the disclosure". Disclosures made pursuant to this provision may only be made by senior officials after advising the

Privacy Commissioner of the intention to do so. (In emergency situations the Privacy Commissioner may be advised after the information is released). It has been suggested that this special condition for disclosure is being used in ways that may not be totally appropriate,[26] and that individuals should generally be notified of impending disclosures and be entitled to contest them, particularly where the Privacy Commissioner determines such disclosures constitute unwarranted invasions of personal privacy.[27] Corrections officials have preferred the use of s.8(2)(a) to that of 8(2)(m) for the release of information about offenders, since 8(2)(m) was really designed as an exceptional measure.

Within the constraints of current legislation, the government has endeavoured to ensure that accurate information about offenders is released to victims and, in some cases, to the general public. Pursuant to s.8(2)(a) of the Privacy Act, present National Parole Board (NPB) policy allows victims or their representatives access to information about release eligibility dates, a decision to release an inmate (including type of release, general reasons for and terms and conditions of release/permits, and number of votes cast), destination of the offender upon release, and general reasons for revocation of an offender's release, where applicable. (Victim groups which request information about the location, treatment, and release of all offenders in their area, or about large numbers of offenders of a certain type, however, are not granted such information. Of course, statistical information about such things as release rates and types of offenders incarcerated or released can be made available to such groups, provided that the information does not identify particular individuals.)

Correctional Service of Canada (CSC) policy permits the release to victims of three types of information about federal inmates: pursuant to s.69(2) of the Privacy Act, some items which are already a matter of public record and could be obtained through other channels (such as name, age, court of conviction, date and length of sentence, nature of current offence, criminal record); pursuant to s.8(2)(a) of the Act, limited information which may be of particular importance for the security of the victim (institution from which the inmate is to be, or has been, released - but not place of incarceration otherwise); and some

information about release (release eligibility dates, terms and conditions of release appearing on release certificates/permits, actual date and type of release, and destination of the offender upon release). All of this information except some parole-related matters may also be released to the general public.

Ontario is taking a slightly different approach to the release of personal information from that of the federal government. Its Freedom of Information and Privacy Act[28] would permit the release to third parties of personal information where the individual about whom the information pertains consents to its disclosure, where it has been collected and maintained specifically for the purpose of creating a record available to the general public, where its release is expressly authorized by Ontario or federal statute, where the disclosure is for a purpose consistent with that for which it was obtained or compiled, or where the disclosure does not constitute an unjustified invasion of personal privacy.

In determining the latter, consideration must be given to all the relevant circumstances, including whether the disclosure is desirable for subjecting the activities of the government or its agencies to public scrutiny, whether such access will promote public health and safety, whether the information is highly sensitive or whether the person to whom the information relates will be exposed unfairly to pecuniary or other harm, among other factors. The legislation specifically establishes a number of types of information the release of which can be presumed to constitute an unjustified invasion of personal privacy (e.g. release of medical and psychological records). Furthermore, the person about whom the information has been compiled is entitled to notice of the proposed disclosure, to make representations as to why the information should not be disclosed, and to appeal any decision made to disclose information against his or her wishes. (Similarly, where disclosure is denied, the person requesting the information may also appeal the decision.)

Although the legislation specifically permits the withholding of correctional records from third parties and the individual concerned, Ontario correctional authorities may nonetheless be able to release somewhat more information to victims than may their federal counterparts where the release of such information

would not result in any harm to the offender, particularly where its release is provided for by enabling legislation. In all cases, the decision maker must weigh the competing interests.

Present federal legislation contains mandatory and discretionary exceptions to access to personal and governmental information. Such exceptions are "class exemptions" in which a category of records is exemptable because it is deemed that an injury could reasonably be expected to arise if they were disclosed. A "harms" or "injury" test to restrict access to information on a case-by-case basis would require the government institution to demonstrate the kind of harm that could reasonably be expected to occur as a result of disclosure. It suggests that government institutions should be able to withhold records or personal information when disclosure could reasonably be expected to be significantly injurious to a stated interest; otherwise access would not be restricted.[29] Of course, any test which requires a case-by-case analysis of possible harm will be administratively far more cumbersome than a class test.

In considering what modifications might be made to existing federal legislation, we start from the proposition enunciated in the first principle of the proposed correctional philosophy (see Appendix C): that an individual under sentence retains all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. This position, which reflects both the common law and the Charter, suggests that inmates' rights to privacy should only be interfered with when there is a justifiable reason for doing so. While it is obvious that incarcerated persons cannot be accorded the degree of privacy they would have in a house or private office, nonetheless they retain an expectation of privacy based on what is reasonable in the circumstances. Indeed, the fact that inmates' privacy is already curtailed to such a significant degree by incarceration makes protection of the limited privacy they retain even more important. On the other hand, some people may feel that the importance of responding to the recognized needs of victims may be sufficient to warrant some intrusion into inmates' privacy. Moreover, some would go so far as to suggest there is a "public right to know" about offenders.

Using the criteria of potential harm to the offender which could result from disclosure, it would seem to be reasonable to

disclose information about an inmate's place of incarceration, proposed date and area of release and, where relevant, escapes. The release of such information is clearly linked to victims' perceptions of security. Although in practice it is very rare that an offender continues to pose a threat to his or her victim upon release from incarceration, provision of this information will permit those victims to make any changes in their lifestyle they feel are warranted.

It is less clear, however, how the release of information about an offender's treatment, or participation in prison programs, could be related to victims' needs. While release of such information may not pose a risk or harm to the offender, it is potentially of such a personal nature to offend our standards of personal privacy and, in the absence of a significant benefit to the victim, is an unwarranted invasion of the offender's privacy. Nevertheless, making such information available to victims may increase the accountability (or at least the visibility) of correctional and release decision-making.

Since the offender's vulnerability vis-à-vis the release of personal information increases as he or she moves from being an inmate to a parolee, many people would consider it inappropriate to release the address of a parolee. Offenders living in the community are expected to become integrated in and reconciled with the community. While it is desirable that they be accountable for their behaviour (and hence, they are subject to some restrictions to which other people in the community are not), as much as possible, they should receive the same entitlements as others living in the community.

Furthermore, correctional authorities wonder whether it is really important, desirable or feasible to advise victims each time a correctional decision is made about an offender. It is important to bear in mind that a great number of decisions are made about each offender during the administration of the sentence. These range from decisions about disciplinary infractions, work placements, treatment, institutional transfers etc., at least some of which may be relatively insignificant to the victim, to those decisions which may be more significant, such as the granting of temporary absences (TAs) and other forms of conditional release. Even TAs vary from those which permit emergency medical assistance - generally escorted and of short

duration - to a 3-day unescorted absence in the community. Over the course of a year, a myriad of decisions are made about Canada's 12,000 federal inmates. Simply from an administrative point of view, it is important to reach some consensus as to which decisions victims should have better access.

In reviewing the existing federal legislation on access to information and privacy as it governs the release of information about offenders, the competing interests of a victim's "need to know" and an offender's right to privacy should be balanced. This could be done by taking into account the significance of the privacy interest, any possible harm that release of the information could cause, including serious disruption of the offender's program, and the significance of the "need to know" on the part of the person making the request. (For example, personal medical or psychological records should probably never be disclosed, whereas matters of public record, such as the inmate's conviction and sentence, perhaps always should be.) Furthermore, something more than idle curiosity should motivate the request. In the absence of a legitimate connection between a victim's "need to know" and the information sought, the privacy rights of inmates should prevail. Consistent with our position in the Correctional Authority and Inmate Rights paper, every effort should be made to provide inmates with as much privacy as possible.

2. Do you agree with the general principles described above respecting the release of case-specific information to victims? i.e.,

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

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

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

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

If not, what general principles would you propose? What information do you think should be provided to victims about individual offenders? Should it be provided in every case, or should correctional authorities have discretion to give or withhold information either to certain classes of victims or to individual victims? on what grounds? Which issues, if any, should be dealt with in law and which ones in policy? Why?

In addition to the privacy problems associated with giving victims information about offenders, the matter of how appropriate information can be released in a timely fashion also presents difficulties. As well as the need for good services to victims at or prior to sentencing, there will always be a need for some information to be sought from and provided by correctional authorities.

It is not always easy to respond to this need effectively, at least in part because correctional systems frequently have no precise or up-to-date information about the identity or address of the victim, and are unable to supply information unless contacted in time by the victim. Some victim groups feel that victim-initiated requests are difficult for individual victims, and have suggested, for example, that at the time of initial contact with the criminal justice system (or at any subsequent time), the victim be allowed to indicate whether he or she wishes to be kept informed about correctional decision-points and actual decisions pertaining to the individual offender in his or her case. Such requests could accompany the offender's file through the various stages of the criminal justice process and be kept with appropriate correctional case management and parole files for systematic response. It would be the responsibility of the

victim to advise of changes in the victim's address or phone number.[30] The National Parole Board is now considering a policy whereby victims or their representatives may file a written "notice of interest" that would entitle them to receive certain information pertaining to the offender on an ongoing basis.

This approach has some appeal because it meets, at least partially, the concern of correctional authorities about the inappropriateness of them approaching directly, often many years after the offence, victims who have not indicated a desire to receive such information. However, although this procedure has been used in some American jurisdictions, critics have suggested that it is a bureaucratic approach which does not address victims' real needs and that it encourages some victims to seek information they might not otherwise have requested.

The "form" approach is also complicated by the likelihood that a victim's desire for information may change (and possibly lessen) over time. While initially a victim may want access to lots of information, where an offender is serving a long sentence, much of the requested information may not be available until many years after sentencing. Just as victims who have not requested information may be offended by approaches from correctional systems, so too may those whose desires for such information have declined with the passage of time. In the event that a request form is used, consideration could be given to updating the request form periodically to determine whether the victim still requires the information originally requested. Once again, this may be subject to the criticism of a depersonalized, bureaucratic approach. It may in fact be more important for correctional systems to provide adequate information about how individuals can get information that they want when they want it than to develop systems of automatic notifications of particular events.

Also important is the question of whether information about an offender may be released to others, for example, to someone, other than the victim, who may be at risk, or to the press. The Correctional Philosophy paper reflects the principle that inmates ought not to be deprived of any rights or liberties beyond those necessarily curtailed by virtue of their incarceration. While it is appropriate to recognize the special status and needs of victims by permitting disclosure of limited personal information about offenders to them (or their designated representatives),

information should not normally be released to others in the absence of threats or some other danger posed by the offender.

In addition, the surviving spouse or parents (perhaps all those in the immediate family) of a deceased victim may have the same needs for case-specific information as do victims. However, friends and family members of victims of offences such as theft, fraud or break-and-enter could not really be considered to have the same need for such information, although they may wish to obtain it. The extent to which close family members of victims who have been seriously injured could be considered to have case-specific informational needs similar to victims is much less clear and probably varies from case to case.

Finally, it makes sense to consider whether or not inmates should be advised about what information correctional authorities have released about them and to whom it has been released. Generally, it is important that inmates be kept informed of all matters related to their incarceration. Consistent with maintaining as open a prison environment as possible is the notion that inmates should be informed of decisions being made about them. Furthermore, in some cases, information about a victim's ongoing interest in the offender may affect release planning.

3. Do you think that victims of crime should be given the opportunity to enter a standing request for and receive timely advance notice of the date, time and place of critical decisions in the correctional process, as well as information about the outcome of and reason for each critical decision? If so, what constitutes "critical decisions" and is this a matter to be put in legislation or policy? Why? Alternatively, do you think that requests for information should be made by a victim (or her or his representative) at (the) time(s) when the victim feels the need for such information? How should victims' changing needs for information be accommodated?

4. Do you think inmates should be entitled to know what information has been released about them and to whom it has been released? Are there circumstances where the offender should not be so advised?

5. How should "victim" be defined for these purposes? To what extent, if any, should the definition be flexible?

Use of Victim Impact Statements by Prison Authorities

Although issues related to sentencing are beyond the mandate of the Correctional Law Review, the fairly recent practice of permitting or encouraging victim impact statements (VIS)[31] is extremely important for corrections.

If a VIS is a sensible and useful means of ensuring that a prosecutor and judge have available to them all relevant information about the offence and its impact on the victim, it would appear also important that the VIS, together with other sentencing information, should be forwarded to correctional authorities in order to assist them in making the most sensible case management decisions about offenders.

Paradoxically, correctional systems often have great difficulty obtaining from courts what would appear to be the most basic information about offenders. Parole boards routinely request that judges specify the reasons for sentence and any intentions which judges may have regarding the offender's custody and treatment, but such information is only rarely forthcoming. This may in part be due to many judges feeling that their expertise does not lie in the assessment and treatment of offenders, activities which may be best left to correctional officials experienced in such work. It may also be connected to their understanding that such recommendations are not binding on correctional authorities, and/or to the large number of cases they consider. In some cases, judges may feel that correctional authorities could ascertain their reasons by ordering a transcript of the reasons for sentence (although in many cases detailed reasons for sentence are not given).

Proceedings on sentencing (which may include the gist of a VIS) are not generally transcribed unless there is an appeal. Yet it is unlikely that a full and proper administration of the sentence can take place in the absence of a clear understanding of the offence which occurred and the purpose of the sentence. To the extent that it is considered important for correctional decisions to be made on full, complete, relevant information, it is desirable that all information presented at sentencing (including pre-sentence reports, victim impact statements, where prepared, and counsel's submissions) and sentencing judges' reasons be transmitted to correctional authorities so they may inform place-

ment and program decisions and pre-release planning. (The Canadian Sentencing Commission recently recommended that judges provide written reasons in some circumstances and that a transcript of the sentencing judgement be made available to the authorities involved in the administration of the sentence.[32]) The most comprehensive (although perhaps the most costly) method of achieving this objective would seem to be the routine transcription of the proceedings of sentencing hearings and the transmission to correctional authorities of such transcripts and exhibits filed. In addition, of course, victims may always make written submissions directly to correctional and release authorities about individual offenders.

There are two significant obstacles to transmitting sentencing transcripts to correctional authorities - their cost, and time delays associated with their preparation. To alleviate these problems, it may be desirable to specify the types of cases for which transcripts should be prepared. They could be prepared in all cases where a carceral sentence is imposed, or only in cases of lengthy carceral sentences. Even then, some transcripts may contain considerable information which is not entirely relevant or useful to correctional authorities. In any event, if transcripts are to be provided to correctional authorities, it will be necessary to determine which level of government should bear this cost.

6. Should federal law require the transmission of sentencing information to correctional authorities? If so, should this occur only in cases involving violence or sizable property loss or damage? perhaps only in cases of, for example, a sentence of imprisonment in excess of six months? in all cases of imprisonment? Do you have any suggestions as to how only the most relevant information could be selected, so as to limit the amount of material transmitted, some of which may not have been relied upon by the sentencing judge?

PART II: CORRECTIONAL PROGRAMS WHICH RESPOND TO VICTIMS' NEEDS AND INTERESTS

Earlier in this paper, it was noted that victims have multiple interests. Some require opportunities to express their feelings formally; some wish to obtain restitution and compensation for losses; some need assistance in achieving resolution or closure in relation to the crime; some want opportunities to forgive and let go.[33]

Community corrections is the arena in which most victim-related correctional activity presently takes place. Many community sanctions provide opportunities, where it is possible and appropriate, for offenders to "repair the harm done" to victims in some way. For example, if an offender is willing to engage in reparations, therapy, supportive counselling, etc., suitably supervised conditions of probation provide the criminal justice system with opportunities to have him or her do so in a manner which permits reasonable accountability.

Judges may order restitution or compensation,[34] where applicable, as a mechanism for offenders to acknowledge responsibility for their acts. These orders are believed to encourage, and to provide a positive means for, offenders to recompense victims or society. Repayment can take many forms: It generally takes the form of financial restitution to the individual victim or, less commonly, reparation through service to the victim. It may also consist of service to a "substitute victim" (the community), commonly known as community service orders (CSOs). Fine option programs, as well as CSOs, also permit offenders of meagre economic means to make tangible efforts to "repair the wrong done."

A relatively recent development in community corrections has been Victim-Offender Reconciliation Programs (VORPs) in which trained mediators work closely with offenders and victims in order to establish settlements acceptable to both. In addition to meeting the victim's desire for reparation (either through restitution or service to the community or the victim), victim-offender reconciliation may lead to the resolution of specific disagreements between offenders and victims. Furthermore, both may be assisted in coming to terms with the criminal event by the insights gained by each about the other.

Although it may be easier to respond to victims' needs while offenders remain in the community, it is also possible to do so while they are incarcerated. Outlined below are some existing prison programs which respond to victims' needs or interests. Of course, legislation may not always be necessary to implement these programs. Nonetheless, they are discussed here because such programs can be of great benefit to both victims and offenders and because some proponents of their use feel that a legislated mandate would ensure their development and proliferation.

Victim-Offender Confrontation Programs

Programs in which victims and offenders meet in the correctional setting to discuss the impact of crimes from both perspectives can sensitize offenders to the pain and suffering of victims and can give them opportunities to deal with remorse and guilt. One example of such a program is an Alberta Seventh Step "Surrogate Perpetrators Program" which matches offenders with victims - but not their own victims. Other such programs are a Victims of Violence program which allows groups of victims or their families to meet with sex offenders in Fort Saskatchewan, and a Centre d'Aide aux Victimes program which brings together Cowansville inmates with victims.

These programs give each participant an opportunity to meet the "other side" and exchange feelings. Victims have an opportunity to tell offenders how much they have been hurt by their victimization, and the encounter also permits victims to develop an alternate view of offenders which is frequently not as frightening as when the offender remains faceless. These programs benefit offenders too by allowing them to face their guilt and deal with it constructively, hopefully affecting their future behaviour as well.

Victim-Offender Reconciliations

There have also been meetings inside correctional facilities between an inmate and his or her actual victim. This may occur at the request of victims who cannot resolve their feelings about the crime without such an encounter. Sometimes the offender and victim each express the desire for a meeting; often such requests are conveyed to a prison chaplain or volunteer. Usually the

offender wants to express his or her feelings of remorse; the victim may feel the need to express forgiveness. It has been suggested that the inability of victims to overcome hatred and to forgive can be ultimately harmful to victims themselves; to forgive may be psychologically liberating, not just something one "should" do out of moral obligation.[35] Some have suggested that neither victims nor offenders can really recover from a serious offence without such a meeting.[36]

Encounters between offenders and victims take many forms - not all of them are face to face. The principle of reconciliation calls for a variety of things to be done that meet victims' needs, allay their fears, relieve emotional stress, and humanize their experience. It is of interest that there have been dramatic instances of close relationships developing between offenders and victims. Whether or not this occurs, these encounters usually result in significant changes in each of their lives.

Many victims' needs for assistance to deal with trauma are neglected and this may contribute to hostility towards "the system" and to those working with offenders. While much more could be done to provide conditions conducive to uncovering and supporting the desire for reconciliation expressed by victims and offenders, it is important to remember that these meetings cannot, and should not, be forced on unwilling participants.

Involving Incarcerated Offenders with the Community and Vice-Versa

Just as the underlying reparative functions of victim restitution have led to the development of community service orders for impecunious offenders not requiring incarceration, institutional authorities have begun to see the value of community service programs, which may take place inside or outside prison walls, during an offender's period of incarceration. Indeed, many inmate committees and other inmate groups have identified opportunities for community service, most typically in the areas of charitable fundraisers and recreational and social programs for the disabled.

Many community service programs across the country are supported by offenders who have been incarcerated. For inmates who cannot

leave prison, many community programs can be brought into the institution: ball games, parties for the aged, olympiads and gym classes for the disabled. At Matsqui Institution, for example, an inmate group meets with disabled adults weekly in the prison: each inmate group member is paired with one guest and together they jog, run, play floor hockey or other games. The group also sponsors an annual "Con Camp" sports event one weekend each summer for their adopted group.

During 1984, 256 inmates from Quebec penitentiaries used their day parole or temporary absences to contribute some 30,000 hours of free work for the benefit of many non-profit organizations and needy individuals. The opportunities for such work may be limited, of course, by outside labour's objections to inmates performing unpaid work where it takes jobs away from non-offenders; however, the value of this work to the community and to offenders are good reasons for maintaining and encouraging such initiatives.

While it may be suggested that victims themselves receive no direct benefits from the performance of community service by offenders, some satisfaction may be taken from the knowledge that some offenders endeavour to make reparations through their contributions to the community. Besides helping others, inmates benefit from such activities by learning organizational and vocational skills, reducing the boredom in their lives, reducing institutional tension, and helping to change the community's stereotypes about offenders.

It is also possible that through a greater emphasis on victim-offender reconciliation, such activities could be more specifically linked to victims' wishes where victims do not want any direct contact with offenders or do not require restitution (or recognize the offender's inability to pay), but wish to see the offender do something tangible to "make good" or to compensate society.

Reconciliation in Penitentiaries - Philosophical Considerations

In the Criminal Law in Canadian Society (CLICS), the Government of Canada articulated the overall goals and principles of the criminal law, which included the principle of reconciliation:

> Wherever possible and appropriate, the criminal law and the criminal justice system should also 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;
> ....

Reconciliation, as proposed in CLICS, is aimed at resolving the dispute which resulted in the criminal act and at solving the problems or changing the circumstances which contributed to the dispute. Its inclusion in CLICS was intended to underline the legitimacy of alternatives to the usual criminal law processes and sanctions, so as to remove formal and informal barriers to their use where the nature and circumstances of the case make them appropriate.

Since reconciliation is one of the overall goals of criminal law, it is desirable to consider what modifications in current practices (such as placing a greater emphasis on the interests of victims and allowing them, where it is appropriate to do so, more participation in the criminal justice process) may be required to reflect this principle. Correctional opportunities may be provided for the victim, the offender and the community to restore the social balance of the community through activities which meet the needs of all. Corrections has long recognized the importance of the broader social context in meeting offenders' needs (particularly those related to family, education and employment). From this perspective, victim-offender reconciliation is a natural extension of the other reconciliative aspects of correctional activities.

The Working Group's tentative statement of correctional purpose and principles was discussed in the Working Paper on Correctional Philosophy (see Appendix C). It proposed a general purpose for corrections (...to contribute to the maintenance of a just, peaceful and safe society...) and it identified a number of methods by which this purpose may be achieved and the principles which should govern correctional agencies in the conduct of their affairs. If greater emphasis is to be put on reconciliation in corrections, the following strategy could be added to those already proposed:

> Wherever possible and appropriate, promoting and providing opportunities for the reconciliation of the victim, offender, and community.

In the corrections context, "opportunities for reconciliation" would include opportunities for the offender to make "redress or recompense for the harm done to the victim". The concept of reconciliation is based on the premise that in order for society to function in harmony, it is essential that any individual who has disrupted that harmony make amends by accepting the consequences of his or her actions and by attempting to repair the wrong. What constitutes "making amends" varies considerably from case to case. Some victims may require little more than a heartfelt apology. In other circumstances, the victim and offender may reach an agreement whereby the offender may engage in a more extensive program of reparations vis-à-vis the victim and/or the community, some of which may occur while the offender is incarcerated (as described in the previous section) and some upon conditional release (discussed further in the next Part of the paper). Flowing from such a strategy would be the obligation of corrections to facilitate the development of communication and problem-solving skills among its staff and all individuals under correctional supervision or control.

Incorporating the proposed addition to the statement of philosophy could imply broadening the mandate of corrections to encompass victims, insofar as their concerns relate to activities or decisions within the correctional sphere, as well as offenders. It has been suggested that the criminal justice system, and therefore correctional agencies as part of this system, should have added to their responsibility to protect society a "positive obligation to take care of those who have been hurt."[37] This could include the provision of corrections-related supportive services and programs for victims of crime. However, such a move might require additional resources to meet the expanded mandate and could lead to a dilution of both the focus of and resources for correctional agencies, particularly during periods of restraint.

7. In what ways do you feel the principles of victim-offender-community reconciliation are/are not applicable to inmates and the victims of incarcerated offenders?

8. Do you think the proposed statement of purpose of corrections should be amended to include reference to reconciliation?

9. Is the suggested addition to the statement of philosophy adequate and sufficient to support such initatives? If not, what else do you think is required?

10. What would be the advantages or disadvantages of broadening the mandate of corrections to provide services for victims as well as offenders? If this were to occur, do you think that such victim services should be limited to those which are directly related to the mandate of correctional agencies? Would further amendments to the statement of purpose or principles be required to do so?

Reconciliation in Penitentiaries - Practical Considerations

Resistance to the idea that offenders can "right the wrong" tends to be stronger where inmates are concerned because they tend to be the offenders who have committed the most serious crimes. Because some of them have shown themselves to be dangerous in the past (a few, extremely dangerous), society has not considered that it may be possible for victims to have any kind of danger-free meeting with them. Finally, there has been an assumption that victims (and offenders) would be uninterested in such programs and unwilling to participate.

To those who suggest that victim-offender reconciliation may only be a viable option for certain (less serious) types of cases, the response is made that the most serious crimes are likely to be the ones in which the participants most need to deal with the trauma they have experienced and to overcome the feelings that may continue to hurt them. The Genesee County Sheriff's Department in New York State has been operating a VORP program since 1983 as part of an intensive victim assistance program. The program, which operates primarily at the pre-sentence stage, but often while offenders are imprisoned on remand, concentrates its efforts on only the most serious crimes. The program claims to have worked well in urban as well as rural settings.[38] It must be recognized, of course, that in the most serious cases, many meetings will have to be held with the victim and some with the offender prior to their face-to-face meeting; in these meetings a bond of trust must be built between the participants and the mediator.

Although there exist a number of barriers to the implementation of reconciliation in prison settings, some recent trends in federal corrections would seem to support more comprehensive use of reconciliation: the decentralization of administration and decision making, as well as the placement of offenders closer to home; deregulation, and more flexibility in the system generally; the increasing use of mediation as a problem-solving technique; and the development of more offender support programs. Most noteworthy perhaps, people-oriented security is now considered more important than static security.

Nevertheless, further initiatives are required if meaningful opportunities for reconciliation are to be provided in the prison setting. Enhanced staff training in problem solving, conflict resolution, communication skills, and the psychodynamic phases that victims and offenders, respectively, go through to cope with the trauma of the crisis situations each is facing should be provided to those interested in developing reconciliation options. Correctional officials and mediators must have the freedom to be flexible without fear of violating guidelines or regulations. Each offender will require an individual program plan, worked out in negotiations with the victim and/or a representative of the community. Preparation for reconciliation could begin at the time options for the offender's initial placement are being considered.

11. Do you think there should be an obligation on correctional authorities to promote opportunities for victim-offender reconciliation or surrogate victim-offender encounters while offenders are incarcerated? What do you consider to be appropriate kinds of circumstances for reconciliation? If so, do you think the wording proposed on page 27 as an addition to the statement of correctional philosophy is adequate?

12. Is it sufficient to include in the correctional statement of purpose a reconciliation strategy or do you think some other legislative provision is required? Or is it a matter best left to policy?

Payment of Restitution by Inmates

Canadian Crime Victims Association (CCVA) has proposed that part of inmate wages be deducted for court-ordered restitution. While

restitution and compensation are seldom ordered when offenders are incarcerated, this practice could change.

Presently, unpaid restitution orders may only be enforced through civil court procedures. Provincial laws govern the garnishment of wages and other remedies available to creditors. Better enforcement provisions for all restitution orders is a matter presently under consideration by the Department of Justice.

Authorizing the deduction of restitution from inmate pay could raise two Charter concerns. It is not clear that inmates may justifiably be treated differently than other persons with outstanding restitution orders. Although it could be argued that inmate pay is not "wages" in the same way as income from employment outside a penitentiary, and can therefore be treated differently, this may not be sufficient to avoid the application of s.15 of the Charter. In addition, automatic deductions from inmate pay may violate the provisions of s.7 of the Charter in relation to the question of appeal from, or judicial review of, restitution orders.

From a practical viewpoint, however, most correctional systems pay inmates at such minimal levels (once "room and board" deductions are made) that the amount of funds left over for victims would be negligible. There are, of course, exceptions to this rule, usually involving inmates who are fortunate enough to find employment with outside private employers who operate businesses within or close to institutions and pay inmates at rates which are at least somewhat competitive with outside labour. In these instances, deductions for court-ordered victim restitution, as well as taxes and family support, may be desirable.

13. Do you think that legislation which would permit court-ordered restitution to be deducted from inmate pay should be explored? Why? What do you see as the merits/drawbacks of deductions for court-ordered restitution from inmate pay where the wages are minimal?

PART III: CONDITIONAL RELEASE

Conditional release from penitentiary is undoubtedly the most contentious issue in corrections, from the point of view of victims. While Canadian victim organizations have not recommended the abolition of parole (as have their American counterparts), they have made numerous criticisms of conditional release generally, and have called for many reforms. Only those recommendations for change which speak directly to the interests or role of victims will be addressed in detail here. This is because the more general issues related to conditional release, raised by other members of the public as well as some victims, are dealt with in the third Working Paper of the Correctional Law Review, Conditional Release. Readers who wish to respond to the whole spectrum of conditional release issues are referred to that document.

Considerations of Victim Reparation at Parole

Ways in which offenders may make restitution or reparation directly to victims or indirectly to society have been discussed in the preceding Part of the paper. We consider now what, if any, victim interests could be addressed in relation to this during the release process.

With respect to victim-offender reconciliation, it seems unlikely that much would come of efforts to initiate it at this stage of the correctional process. Although permitting victims to attend or speak at parole hearings would certainly provide for a face-to-face meeting of the victim and offender, it is difficult to believe that much reconciliation is likely to result from such encounters unless parole boards, in cases where victims express a desire to be present, considered it part of their mandate to facilitate reconciliation - in which case considerable preparatory work would have to be done with both offenders and victims. Although this could be done, it would seem to be too late in the process.

It has been suggested that correctional systems permit offenders to use work release programs so that they may apply some of their earnings to making restitution to victims. As offenders are encouraged to seek employment when applying for or when obtaining parole, in addition to applying some of their earnings to the

support of family members, such offenders could be required to make court-ordered or otherwise agreed-upon restitution payments. In appropriate cases, community service could be performed in lieu of making restitution.

The National Parole Board policy permits the imposition of restitution as a condition to which the offender must agree before being granted release only where the restitution has been court-ordered.[39] While the Ontario Parole Board has no policy specifically forbidding restitution, as a practical matter it is seldom made a condition of parole, perhaps because so many offenders are already subject to probation conditions upon their release, which may include restitution. (That Board's policy also cautions that special parole conditions should be used judiciously and viewed as an aid to assist the parolee's reintegration into the community and to reduce the risk to the community. The Board must ensure that the special conditions are reasonable and enforceable by the parole supervisor.[40])

The British Columbia Board of Parole takes a somewhat different view, actually encouraging restitution, compensation, and victim or community service.[41] That Board considers that encouraging the offender to undertake reparative measures enhances the victim's and society's view of the concept of justice in fair sentence administration and provides an opportunity for the offender to acknowledge his or her responsibility for the offence and to make amends for it. It is believed to have the benefit of building public confidence in offenders by demonstrating their capacities to act responsibly.

In establishing its victim reparation policy, the British Columbia Board considered the following guidelines:

1) Inmates should be made aware of the possibility of reparative conditions or agreements prior to application.

2) The program should not be punitive but should emphasize its positive and constructive values.

3) When the possibility of victim reparation can be readily identified and the prisoner/parolee is willing and capable then the Parole Board should ensure that a Victim Reparation Program is designed to meet the reasonable needs of the victim and the reasonable capabilities of the offender.

4) Reparative conditions and agreements should be consistent with the offence and with the intent of sentence when known.

5) Any program involving contact between the victim and the offender must be mutually agreed upon and either party should have the right to refuse interaction.

6) All reparative conditions or agreements must be clearly defined and accepted and any consequences for failure to meet them must be understood from the onset of the program.

The Board decided that where the sentence contains an order for victim reparation which remains outstanding at the time of the parole hearing, the Board may impose a special condition on the parole certificate that the parolee complete a specified portion of the court-ordered reparation within the timeframe of the parole certificate, default of which could lead to suspension.

Where no reparative order has been made at sentence, the Board may include as an "agreement for release" on the parole certificate a statement of the parole applicant's proposed reparative activities provided that the victim (if identified) and inmate are both willing to be involved. Where the agreement breaks down, the focus in supervision should be to seek restoration, or an alternative, rather than suspension.

There are, however, a number of arguments against imposing parole conditions related to restitution and reparations. Perhaps most importantly, such conditions (especially restitution) might well be illegal, in that they could be seen to impose a sentence (which only the court has the authority to do), or to impose an additional punishment contrary to section 11(h) of the Charter which provides that a person found guilty and punished for an offence has the right not to be punished for it again. This argument would be stronger in cases where the sentencing judge has considered the appropriateness of such an order and declined to make it. Alternatively, in the absence of such a consideration at sentencing, the argument may be weaker in instances in which the offender can be said truly to have voluntarily entered into the arrangement or when the released offender chooses to serve part of his or her sentence in a residential setting in the community and take employment in and

be paid through a state-organized workshop (which does not occur frequently in Canada). However, it may be difficult to draw the line between subtle coercion and voluntary participation.

It is also not clear that restitution or reparations are appropriate conditions for paroling authorities to impose. Parole conditions are generally designed to minimize the risk an offender may present, and to facilitate the reintegration of the offender into the community. It may be argued that restitution is not related to risk containment, nor is it directly related to reintegration. Furthermore, in the absence of a court order establishing the quantum of restitution, concern has been expressed about the adequacy of procedural safeguards at the parole hearing - at a sentencing trial, the offender's counsel may cross-examine Crown witnesses regarding the quantum of restitution claims.

Finally, we also have to recognize that, since most offenders have very few resources at the time they leave prison or penitentiary, to require restitution will in many instances create an unfulfillable condition, the violation of which would result in suspension and return to the institution. Parole conditions of restitution could seriously jeopardize offenders' readjustment to life in the outside community and, in extreme cases, they could even push offenders back into crime in the effort to accumulate the funds needed to make restitution payments.

Questions about such programs may be lessened in instances where a client-specific plan is developed, often with the help of a skilled mediator who obtains the agreement of both victim (or community) and offender, especially where the offender is given special consideration for release at an early date. Furthermore, other reparative conditions, such as community service, may be viewed more favourably, particularly where they may be characterized as a component of the program or method of serving the sentence.

In addition to the issue of whether parole boards should consider victim reparation which might take place during the parole period, one might ask whether parole boards should or should not be permitted to take into account in their release decision-making what efforts offenders have already made towards victim/

community reparation. Few opportunities are presently available to inmates which would facilitate such efforts. Nevertheless, if these opportunities are to be expanded, this is a factor parole boards could be encouraged to review.

14. Do you think it would be appropriate for parole boards to use restitution or reparative conditions connected with parole release where court-ordered? Why? What action should be taken if an offender is in breach of such a condition? Why?

15. Do you think "voluntarily entered into" restitution or reparative conditions connected with parole release are appropriate in the absence of a court order? Why? What action should be taken if an offender is in breach of such a condition? Why? What procedural safeguards, if any, do you feel should be added to the hearing process to ensure due process in the assessment of quantum?

16. Are reparative conditions or agreements suitable for all types of offences? All offenders? If not, which ones should be excluded? Why?

17. What role, if any, should community groups and agencies play in relation to the use of victim reparation during parole?

18. Do you think the criteria for release set out in section 10 of the Parole Act should be amended to require consideration of reparative activities or reconciliation? Alternatively, should parole boards be permitted to consider or be precluded from considering what efforts prisoners have made, or propose to make, towards victim reparation:

(a) where restitution or some other reparative order was made by the sentencing judge?

(b) where no order was made at the time of sentencing?

Opening Parole Hearings - The Roles of Victims and Other Members of the Public

The issue of whether victims should be entitled to, or permitted, any form of participation at parole hearings is an extremely sensitive subject. Such participation could take a number of forms: victims could be permitted to attend the entire hearing as observers, without the opportunity to make comments; they

could be authorized to attend at the beginning of the hearing to make an oral presentation to the board; or, they could be permitted a more active role, including making submissions at the end of the hearing.

It has been suggested that victims of violent crime have a legitimate interest in seeing that their attackers are not released prematurely. Some victims argue that their participation at parole hearings would ensure that the parole board has in front of it an accurate and detailed depiction of the nature of the offence and any related, relevant information (such as subsequent threats received from the offender) which could describe the crime committed or the risk of future crimes being committed. Such information could also assist parole boards in imposing appropriate conditions on the offender after release, such as that he or she remain out of the area in which the victim resides. This argument is strengthened in cases where the parole board has not received, for whatever reason, a victim impact statement in the case.

One could also argue that the victim's "need to know" what ultimately becomes of the offender entitles the victim to attend the hearing as an observer, or that increasing victim participation will make victims feel better about the criminal justice process. However, the reasons for making such a change must be examined in the context of what is relevant to the decision-maker's mandate. The extent of the trauma suffered by the victim is not necessarily as relevant to the decision to grant or deny parole as it was to the sentencing decision. Sentencing is based in part on denunciation and deterrence of criminal behaviour, while release decisions are based primarily on an assessment of the offender's risk. Of course, the actions of the inmate that caused or contributed to the trauma are relevant to the assessment of the risk the offender poses to the community, if released, and may be relevant to the establishment of suitable conditions of release. Taking into account the experience and/or opinions of victims seems most appropriate where the victim (or his or her family) and offender are likely to be in contact with one another after release.

It should be remembered also that parole boards are not created to re-sentence offenders. A parole hearing is not the place to make submissions about the appropriateness of the statutory

eligibility and criteria for parole; the role of the parole board is to apply the statutory criteria in a particular case.

The question of whether victims should be permitted to attend parole hearings, even as observers, is complicated by both legal and policy concerns. Unlike judicial processes such as trial and sentencing, parole hearings are not open to public scrutiny. (Parole boards are one of several administrative tribunals whose hearings are held in camera.) Some advocate that parole board hearings should be open to the public, including the media, and that official transcripts be made of the proceedings so that hearings would "move out of the shadows", for the benefit of victims, offenders and the public alike. It is also argued that public hearings would enhance parole board accountability and restore public confidence, for the functioning of parole boards is one which directly affects public safety.

On the other hand, the principal argument against public hearings is that they would be less likely to evoke a free and frank exchange of information and opinion between parole board members and the offender. Also, highly personal information about the offender, which is presently subject to Privacy Act protections, would be disclosed. Media reports of individual cases could lead to the identification or harrassment of individual offenders, thereby adversely affecting their ability to reintegrate into the community.

Although the latter concern might be addressed through a ban on publication of the identity of parole applicants, it is not at all certain that such a blanket prohibition would withstand a Charter challenge. Indeed, the current rules providing for in camera hearings for many administrative tribunals may themselves be vulnerable.[42] Nonetheless, the likely adverse impact on the reintegration of offenders which could result from fully open parole hearings justifies continuing some restrictions. As we have seen in other issues, it is necessary to balance the parole applicant's privacy interests with the public's concerns about safety and with the integrity of the parole decision-making system.

At the same time, it is valuable for parole boards to make every effort to be as open as possible. The National Parole Board, for example, has on occasion permitted representatives of the press

and victim organizations to attend parole hearings as observers. This appears to have led to a greater understanding of the parole process, and has increased its credibility in the eyes of the observers. For these reasons, such efforts should be continued, at least on a selective basis.

A number of arguments are advanced against the desirability of permitting victim participation at parole. At sentencing the offender has considerable scope to challenge the validity of the victim's statement both through cross-examination and the presentation of his or her own evidence. Not only is the offender more limited in such opportunities at parole, some aspects of a new statement by the victim at the time of release consideration may be less reliable than those made closer in time to the date of the offence.

It is also feared that the presence of victims will unduly bias parole boards and that, especially in cases of impassioned presentations from victims, it will be impossible for the board to objectively assess the offender's risk and other factors which it is supposed to consider. A related objection is that since only some victims will appear before the boards (a US study suggests that very few will),[43] this bias will be injected only into some cases, and the outcome may be determined not by the full range of case-related factors, but by the circumstances of the victim. As articulate and well-educated victims may be able to make more persuasive cases for their viewpoints than may other victims (or those who do not participate), it is feared that permitting victims to speak at hearings would cause disparity in parole decisions. Some bluntly assert that such proposals are designed to intimidate parole board members by attempting to influence them to deny parole more frequently.[44]

However, if victims were authorized to attend parole hearings to make oral comments to the board, the principles of fundamental justice suggest that these comments should be made at the beginning of the hearing. This procedure is presently employed by the Ontario Board of Parole, which ensures that a record of the comments is prepared and presented to the parole applicant for comment. It would be preferable for such statements to be made in the presence of the inmate, except in those rare circumstances where the board may withhold from the offender all but the "gist" of information. Such a procedure would maximize

the prospects of fairness (both real and apparent) for the inmate seeking to affect his or her release.

The submission or updating of victim impact statements does not present the same problems. The policy of the National Parole Board is to consider, either before or during hearings, any written submissions received from victims, although Board members will not meet with victims personally. Victims may meet with Parole Board staff who will make a record of their comments for the Board members. The Board will also consider VIS which have been submitted at sentencing. These may be updated by Board staff; procedures instruct case preparation officers to contact victims where appropriate.[45] These written statements form part of the information considered by the voting members of the Board; they are disclosed to inmates unless it can be demonstrated that the public interest in withholding the information (threats to the victim, etc.) is greater than the offender's right to obtain access to the information.[46]

While victims in Canada have the prerogative of writing to parole boards expressing their views about the early release of an inmate, few seem to be aware of this. It has been suggested that the fact that victims may write to the National Parole Board should be more widely publicized and that more victims might avail themselves of the opportunity to express their views if this prerogative, along with the obligations of Parole Board members to consider such submissions, were entrenched in legislation. Others feel that it is unnecessary to place the "right to write" in legislation, but that the obligations of parole boards when receiving such submissions could be codified. The NPB is presently circulating its new policy on victim representation. This may increase public awareness of its willingness to consider victim submissions.

Victim impact statements which are considered at sentencing and forwarded with all sentencing information to correctional authorities (as discussed at p. 20 <u>supra</u>), including parole boards, will ensure that adequate information is before decision-making authorities and will address the expressed concerns of victims. Where VIS have not been previously submitted, or where they require updating, victims may, where they wish to do so, send a written submission to the National Parole Board. (Such statements and submissions should of course be made in sufficient time to permit disclosure to the offender.)

19. Where a victim has indicated an interest in being informed about the release of an inmate, should solicitation of a written victim statement be a standard part of case management procedures? Should victims be permitted or encouraged to update statements which have already been submitted? What limitations, if any, should there be on the content or form of such statements? Are such issues best dealt with through law or policy? Why?

20. Should individual victims be permitted to attend parole hearings for the case about which they are concerned? If so, do you think that their role should be limited to observer status or should victims be entitled to some form of participation? Should they be permitted to attend the whole hearing? Is this issue best dealt with through law or policy? Why?

21. Should federal law permit the opening of parole hearings to the public? Why? If so, should the Board have discretion to control who attends the hearings? Why?

22. What limitations, if any, should there be on publication of information about the parole applicant? Why?

Review/Appeal of Parole Decisions by Victims

If victims were permitted to attend or testify at parole hearings, it could be argued that they should also be advised of the decisions of the board and their reasons, as is the situation in some American jurisdictions. Does it follow that the victim should then also have the right to appeal an "adverse" decision of the board?

It has been advocated that in some cases where a parole board decides to release an offender against the wishes of the victim, the victim should have the right to appeal the decision to a court on its substantive merits. (Such advocates also support the right of the offender to substantive judicial appeal of parole decisions.)

A distinction should be drawn between a situation where a victim wishes to bring new information to the attention of the decision maker after the decision has been made, and a situation where a victim simply disagrees with the decision and wishes to

have it reviewed by someone else. Unlike a court, which generally loses jurisdiction once a decision has been pronounced, a parole board retains jurisdiction to reconsider its decisions.[47] Should information come to light which was not considered in reaching the decision, the board may reconsider. While it will be reluctant to reverse an earlier decision to release an offender except where there is very clear evidence of risk, new information could lead to additional conditions being placed on the release, or more intensive supervision of the parolee.

Presently, the Parole Regulations provide that federal offenders who have been denied full parole or who have had their parole or mandatory supervision revoked may request a re-examination of the decision. NPB policy provides that such decisions may be modified or reversed if the appeal division of the Board is of the opinion that the decision may have been prejudiced by a breach or improper use of the procedures under the Act, Regulations or policies, that it was based on erroneous or incomplete information, or that the information available at the re-examination indicates the decision was inequitable or unfair.[48]

While consideration could be given to broadening the scope of this Regulation to encompass victims, perhaps in more limited circumstances than its availability for offenders, it seems unlikely that this would offer victims anything more than the informal remedies already available to them. Victims do not need statutory authority in order to write to parole boards with information about an offender, either before or after the offender's release. Even without such statutory provisions, parole boards take information received from victims extremely seriously. Nonetheless, as has been suggested previously, it may be desirable to formalize this. Obviously it is preferable for such views to be considered prior to the initial decision. The provision of timely information to victims about the parole process, should facilitate this.

With respect to the question of external review of parole board decisions, there is presently no judicial appeal[49] from parole board decisions, and only a limited right of judicial review[50] where offenders can demonstrate a failure on the part of the board to comply with the common law duty to act fairly or with s.7 of the Charter.

Substantive judicial appeal from decisions of a tribunal such as a parole board is precluded because it is recognized that, particularly where decision makers are operating in a relatively well-defined area, there is limited value in permitting judges to simply substitute their decisions for those of tribunals, which are often constituted for their expertise. Furthermore, in a court, judges have to make findings of fact and then choose and apply the relevant legal rules. Appeal from judicial decisions is normally based on mistake of law, and only in limited circumstances on mistake of fact. A parole board, however, makes a very different type of decision. On the basis of the circumstances of the original offence, together with information about the offender's participation in prison programs, any psychiatric and other assessments and the offender's plans for release, the board makes an assessment of the offender's potential risk to the community, and the viability of his or her release plans. Provided that the board conducts itself according to the normal rules of procedural fairness, considers all relevant information and applies the statutory criteria for parole, the decision is not and should not be subject to external review just because someone disagrees with the result. As noted above, a victim who disagrees with a parole board decision can write to the board explaining the nature of his or her disagreement.

It should be noted that, to date, only offenders have applied for judicial review of National Parole Board decisions under the Federal Court Act. Interestingly, victims do not appear to be precluded from pursuing such applications, and while it seems unlikely that "standing"[51] would be granted except in unusual circumstances where a victim (or perhaps some other member of the public) could demonstrate a very direct connection between his or her safety and the decision to release or the conditions related to the release, the courts would have to consider such an application. Presumably the applicant would have to show something beyond the offence itself for which the offender was incarcerated as a clear and significant reason for ongoing apprehension.

In summary, it is preferable that changes in the role of victims at parole should focus on those which are likely to ensure that parole boards make good decisions in the first place and on those which contribute to public confidence in parole decision-making,

while taking into account the importance of protecting offenders' rights to fair hearings. The submission and updating of VIS contribute to both of these goals. Mechanisms, either periodic or on a regular basis, which permit victims, the press or members of the public to attend the hearings as observers may contribute to the second.

23. Do you think that victims should be accorded a right of internal re-examination or review of decisions by parole boards? If so, in what circumstances? If not, why not? Should this be incorporated in law?

24. Do you think that judicial appeals should or should not be available to victims and/or offenders? Why?

25. In what circumstances, if any, do you think it would be appropriate to permit a victim to apply to a court for judicial review of a parole decision? Why?

Composition of Parole Boards

One victims' group has advocated a "complete overhaul" of parole boards to ensure a larger representation of the public. Others have called for the appointment of victims to parole boards to ensure that victims' perspectives are considered in parole board decisions. Generally, there is a feeling among victim groups that there is insufficient "community input" in parole decisions.

Parole board members come from all walks of life and in that sense can be said to represent the community. Currently, parole board members are appointed by Order in Council for fixed, renewable terms, on either a full-time or part-time basis. Much public criticism has focused on the political nature of these appointments, the lack of relevant experience of some members - in such areas as psychology, criminology, and law - and the inadequacy of formal instruction given to parole board members.

The Parole Act and Regulations are silent on the question of appropriate qualifications of board members; no special prior experience or training is required. The BC Board of Parole recommends the following criteria for appointment to its Board: demonstrated sense of responsibility and interest in community affairs and concerns; ability, experience and objectivity

consistent with the independent decision-making role of the Board within the framework of the justice system; and broad credibility within the community, as opposed to the more limited representation of specific interest groups, attained through endeavour and achievement in community participation, as well as in the appointee's career.[52] The Solicitor General has recently established guidelines for the recruitment of qualified National Parole Board members.

Since 1977, the NPB has been composed of a number of "community members" in addition to regular members: the Parole Act permits the federal Solicitor General to designate representatives of police forces, local and provincial governments, trades, professions, and community associations on regional panels of the National Parole Board. The participation of these community members is required in certain kinds of hearings concerning offenders serving indeterminate sentences or life imprisonment for murder; in these hearings, community members exercise the same powers and duties as regular Board members. Where an appeal panel disagrees with a decision of a panel involving community members not to grant parole, it may only order a reconsideration of the case by a new panel (which will also have community members) - it cannot overturn the decision.

There exists no explicit prohibition against the appointment of victims to parole boards. Victim organizations suggest that it may be beneficial to appoint persons who have been victims, or who are associated with the victims' movement, in order to ensure that the viewpoint of victims is represented. However, to do so raises the prospect of potential conflicts of interest.

Obviously, victims could not be entirely impartial in cases which have affected them directly or even indirectly. Presumably, this could be dealt with through appropriate selection of cases to be heard by individual members. One might also caution against the appointment of victim advocates who may have been or may be lobbied by other victims with respect to particular offenders. The Ontario Parole Board has established conflict of interest guidelines which address some of these concerns. For example, someone who has been a victim of an offence of a similar nature as the one presently before the Board would have a potential conflict, and would not form part of the panel hearing that particular case.[53] Similarly, regulations governing the NPB

require that Board members withdraw from cases where "a reasonable apprehension of bias may result from the particular circumstances of the case, including ... connections with the inmate or the victim ... [of the case]; ...." The Chairperson may order a member to withdraw from a case where, in his or her opinion, participation may result in a reasonable apprehension of bias.[54]

If victim representation on parole boards were considered either desirable or undesirable, it would be important to clarify who would be considered to be within the category "victims". Some people think of victims as those people who have suffered violence at the hands of an offender; others would interpret the word more broadly to include anyone who has been the victim of any criminal act - property-related or against the person - whether or not it resulted in charges being laid. Family members of victims, particularly of those victims who have been seriously injured or killed, may also consider themselves to be victims in that they may experience the same sort of trauma or grief that victims themselves may - their lives may be profoundly affected by the criminal act.

If victim representation were to be solicited for parole boards, consideration might be given to the appropriateness or inappropriateness of selecting victims who are members of, or active in, victim organizations. If such persons were selected, should they be expected to resign their membership in such organizations after appointment?

Whether federal law should specify particular criteria or qualifications for the appointment of parole board members or whether such matters should be left to policy or individual discretion are topics for consideration in the Conditional Release Working Paper. The following questions focus on the possible participation of victims as parole board members.

26. Should federal law either require or, alternatively, preclude the appointment of victims of crime to parole boards? Why? How should membership in victims' organizations be treated?

SUMMARY

The role of victims in criminal justice processes has changed over time. As a society we have become more aware of the needs and interests of victims in recent years. Exploring ways in which corrections may respond effectively and creatively to these needs is both appropriate and timely.

The proposals victims make for the reform of corrections and their role in correctional processes are controversial and have an emotional impact on all of us. In this paper we have examined these proposals and our assumptions about corrections and offenders in keeping with earlier proposals in the paper on Correctional Philosophy, seeking to balance the competing interests and rights of people who will be affected by the outcome.

Recognizing the importance of informational concerns, the paper recommends improving the access of correctional officials to information about the offence and the victim to ensure that sound decisions are made about offenders during their incarceration and upon release. The paper acknowledges the importance of the victim's experience and the desirability of ensuring that victims have ready access to the information they are entitled to receive.

Victim-offender-community reconciliation is considered as a technique to meet the needs of and enhance the positions of victims and the community in ways which may have positive effects on (and be well-received by) offenders and on the relationships among victims, offenders and the community. In particular, the paper examines the ways in which offenders might be able to engage in reparative sanctions, such as restitution and community service, during probation, incarceration, and parole.

In considering ways in which victims might play a more active role in parole decision-making, the paper recognizes the validity of the competing interests at stake. The challenge facing corrections and those who seek to influence its course is to find the appropriate balance of these interests.

ENDNOTES

1. For a discussion of the historical development of the role of victims, see J. Hagan, Victims Before the Law: The Organizational Domination of Criminal Law (Toronto: Butterworth And Co. (Canada) Ltd., 1983).

2. Canadian Federal-Provincial Task Force, Justice for Victims of Crime: Report (Ottawa: Minister of Supply and Services Canada, 1983).

3. Canadian Federal-Provincial Working Group, Justice for Victims of Crime: Implementation Report (Ottawa: Ministry of the Solicitor General Canada, not yet released).

4. President's Task Force, Victims of Crime: Final Report (Washington: Government of USA, December 1982).

5. Metropolitan Toronto Task Force, Public Violence Against Women and Children: Final Report (Toronto: Municipality of Metropolitan Toronto, March 1984).

6. Consultation on Victims of Violent Crime, Justice for Victims (Toronto: Government of Ontario, May 1984).

7. Dr. N.C. Andreasen, "Post-traumatic Stress Disorder" in H.I. Kaplan, A.M. Freedman, and B.J. Sadock (eds.), Comprehensive Textbook of Psychiatry, III, 3rd edition (Baltimore: Williams and Wilkens, 1980), pp. 1517-1525, cites the DSM III definition of post-traumatic stress syndrome as follows:

> The essential feature is the development of characteristic symptoms after the experiencing of (a) psychologically traumatic event(s) outside the range of human experience usually considered to be normal. The characteristic symptoms involve re-experiencing the traumatic event, numbing of responsiveness to, or involvement with, the external world, and a variety of other autonomic, dysphoric, or cognitive symptoms (exaggerated startle response, difficulty in concentrating, memory impairment, guilt feelings, and sleep difficulties).

The World Federation for Mental Health subscribes to the view that post-traumatic stress syndrome is at the heart of the mental health needs of all types of victims: "Meeting Notes of Scientific Committee on Mental Health Needs of Victims," World Federation for Mental Health, Vancouver, p. 2.

8. S. Salasin, "Services to Victims: Needs Assessment" in Salasin (ed.), Evaluating Victim Services (Beverly Hills: Sage, 1981), pp. 25-29. Salasin reviews the models of M. Symonds ("Victims of Violence: Psychological Effects and After-effects," 1975 (35) Amer. J. of Psychoanalysis, p. 24), C.R. Figley and D.H. Sprenkle ("Delayed Stress Response Syndrome: Family Therapy Indications," July 1978, Journal of Marriage and Family Counselling), and M. Bard and D. Sangrey (The Crime Victims' Book [NY: Basic Books Inc., 1979] pp. 31-47).

9. M.O. Hyde, The Rights of the Victims (Toronto: Franklin Watts, 1983), p. 45.

10. M. Symonds (1980) "The 'Second Injury' to Victims" in S. Salasin (ed.), [1980, Special Issue] Evaluation and Change, pp. 37-38.

11. World Federation for Mental Health, supra, note 7, p.2.

12. M. Symonds (1975), supra, note 8, p.26.

13. Ibid, p. 25.

14. M. Bard and D. Sangrey, supra, note 8, pp. 34-35.

15. Others have identified these elements of victim needs similarly: I. Waller, The Role of the Victim in Sentencing and Related Issues (Ottawa: Canadian Sentencing Commission, 1987), pp. 4-7; M. Symonds, supra, note 8, p. 26; M.O. Hyde, supra, note 9, p. 52; WHO/V&M Working Group on the Psychosocial Consequences of Violence, "Summary and Recommendations," April 6-10, 1981, The Hague, Netherlands, pp. 6-8; Proceedings of the NAACJ Seminar, Criminal Justice and Victim-Offender-Community Reconciliation (Ottawa: September 1985), pp. vii; and J. Gittler, "Expanding the Role of the Victim in the Criminal Action: An Overview of Issues and Problems," (1984) 11 Pepperdine Law Review 117 at 149.

16. Federal-Provincial Task Force, supra, note 2, p.73.

17. In support of this view, see K.P. Kelly, "Victims' Perceptions of Criminal Justice," 11(1984) Pepperdine Law Review 15 at p. 20 and F. Cannavale, Witness Cooperation (Washington: Institute for Law and Social Research, 1975), p. 16, who hypothesize that the negative assessments by witnesses and victims contribute to an undercurrent of popular dissatisfaction that is undermining the US public's respect for its court system.

18. Federal-Provincial Working Group, supra, note 3, p. 8. This situation has improved in recent years: more publications

are now available. See, for example, Department of Justice, Sexual Assault... Your Guide to the Criminal Justice System (Ottawa: Department of Justice, 1986).

19. Federal-Provincial Task Force, supra, note 2, Recommendation 71.

20. Federal-Provincial Working Group, supra, note 3, pp. 12-13.

21. Federal-Provincial Task Force, supra, note 2, Recommendations 66-68, and pp. 124-125.

22. Standing Committee on Justice and Solicitor General, Open and Shut: Enhancing the Right to Know and the Right to Privacy, Report of the Standing Committee on the Review of the Access to Information Act and the Privacy Act (Ottawa: Ministry of Supply and Services, March 1987), p. 58.

23. Pursuant to Family Orders and Agreements Enforcement Assistance Act, S.C. 1984-85-86, Chap. 5, the federal and provincial governments have set up enforcement mechanisms which will permit support enforcement officials, but not spouses, access to governmental information indicating the location of the defaulting spouse.

24. The Access to Information Act, and The Privacy Act, are Schedules I and II respectively of Chapter 111, S.C. 1980-81-82-83, as amended. (A number of provinces and territories have similar legislation.) The Privacy Act replaces Part IV of the Canadian Human Rights Act, S.C. 1976-7, Chap. 33, sections 49-62.

25. The Privacy Commissioner has expressed some concern about the amount of information which may be changing hands for "consistent use" purposes without strict adherence to the provisions of the Privacy Act: Standing Committee, supra, note 22, p. 56. It might be defined as any use relevant to the purpose for which it was collected and necessary to the statutory duties of the collecting agency or for it to operate a program specifically authorized by law; its use or disclosure should have a reasonable and direct connection to the purpose(s) for which it was obtained or compiled: ibid, p. 57.

26. Standing Committee, supra, note 22, p. 25

27. Ibid, p. 26.

28. The Freedom of Information and Protection of Privacy Act was passed by the Ontario Legislature in June 1987.

29. Standing Committee, supra, note 22, p. 20.

30. Such an approach is recommended by the American Bar Association, Guidelines for Fair Treatment of Crime Vicims and Witnesses (Washington: ABA, 1983), pp. 12-16. The Guidelines note that the victim's interest in knowing when certain proceedings will take place is not necessarily diminished by the fact that his or her attendance is not required. Permitting victims to make a standing request for information avoids the victim having the burden of continuously monitoring the status of the case.

31. Although VIS are not provided for in legislation, courts in most Canadian jurisdictions may accept them and, in some jurisdictions, the introduction of VIS at adult sentencing hearings is standard practice. As well, all pre-disposition reports for young offenders must take into account the results of an interview with the victim, where appropriate. Victim impact statement projects are operating in Victoria, Calgary, North Battleford, and Winnipeg, with funding assistance from the federal government. A province-wide VIS policy is in effect in British Columbia and Ontario has established a project in Metro Toronto. The use of VIS is consistent with item 6(b) of the UN Declaration of Basic Principles of Justice for Victims (Appendix B). Of note is the Alberta Court of Appeal which has more than once frowned on the submission of VIS: B. Cox, "Victim Reports Assailed," Winnipeg Free Press, March 13, 1987; R. v. Huntley, (1985) 61 A.R. 239.

    VIS legislation exists in many US states; in France, victims may participate in the sentencing process through the "partie civile" procedure which joins the victim's civil claim with the criminal prosecution.

32. Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach, Report of the Canadian Sentencing Commission (Ottawa: Ministry of Supply and Services, February 1987), Recommendations 11.1 and 12.3.

33. It has been suggested that forgiveness is more likely than vengeance to enable the victim to recover. The act of forgiving permits the victim to take responsibility for what she or he chooses to do about the criminal act and to put it behind him or her: L.N. Henderson, "The Wrong of Victims' Rights," 37(1985) Stanford Law Review 937 at 998.

34. Restitution technically means the return of the thing taken and compensation generally refers to monetary compensation for property damages or out-of-pocket expenses. Both remedies are provided for in the Criminal Code. Where police have recovered stolen goods, they may be held until trial, after which they are returned to the owner

(restitution). In most cases, the goods have disappeared, in which case the judge may order the offender to pay compensation to the victim pursuant to section 653 of the Criminal Code (or restitution or reparation pursuant to section 663(2)(e) as a term of a probation order). In some jurisdictions, the expression "restitution" means compensation. Increasingly "restitution" is used in Canada to refer to compensation ordered by the criminal court. "Compensation" is now used to refer to compensation which is provided by government-funded victim compensation programs.

35. Micheline Baril, Centre d'Aide aux Victimes, Montreal, in L.Berzins, Report for the Task Force on Restorative Justice - Cases of Serious Violence (Ottawa: Church Council on Justice and Corrections, 1986), p. 10.

36. André Thiffault, Vice-Chair, Quebec Provincial Parole Board, in L. Berzins, ibid, p. 12.

37. Ibid, pp. 12-13.

38. D. Wittman, "From Genesee County to New York City: Victim and Offender Find Peace Through Reconciliation," Family and Corrections Network, Working Paper #5, 1984. This article is included in Appendix 3 (Genesee County, New York Sheriff's Department) of the NAACJ Reconciliation Proceedings, supra, note 15. See also p. 9 of that document.

39. National Parole Board, Policy and Procedures Manual, (Ottawa: NPB), p. 87.

40. Ontario Board of Parole, Policy and Procedures User Manual, Section 4, page 10.

41. BC Parole Board, Manual of Policy and Procedures, Chap. 31, pp. 108-111.

42. It seems clear that the press will have access to all judicial proceedings (although in some cases the identity of parties or witnesses may be protected), and it may well only be a matter of time until the press will seek access to most tribunal proceedings which are presently held in camera - particularly those closely associated with the administration of justice. Recently, the Federal Court ruled that immigration inquiries should be open to the media, noting that such hearings have become part of the administration of justice, are subject to all the guarantees of the Charter, and cannot be closed for administrative ease or convenience: Southam Inc., et al v. Minister of Employment and Immigration et al, Doc. T-1588-87, July 27, 1987 (not yet reported).

In the event that the press are permitted to attend and report on parole hearings, the Working Group considered whether parole applicants should be permitted to apply to have some aspects of the hearing held in camera or to have a ban on publication of certain aspects of the proceeding, as well as on the identity of the parole applicant.

If such measures are to survive Charter challenges, they will have to demonstrate that they are designed to protect social values of superordinate importance and it would be wise for legislators to leave with the tribunal some discretion as to whether or not such orders should be made in all circumstances. Ontario endeavoured to accomplish the latter with respect to its child welfare proceedings by enacting sections in its Child and Family Services Act, S.O. 1984, Chap. 55, that provide for hearings to be held in the absence of the public unless ordered open and in the presence of media representatives unless excluded; the Act also prohibits publication of information which would have the effect of identifying young people.

The Ontario Court of Appeal has upheld publication bans on the identity of young persons connected with Young Offenders Act proceedings and of adult complainants in sexual assault trials prosecuted under the Criminal Code. In both cases, the bans were held to constitute a reasonable limit, prescribed by law and demonstrably justified in a free and democratic society. In the former case (Re: Southam Inc. and the Queen, [Southam No. 2], (1986) 20 C.R.R., 7), the Ontario Court of Appeal accepted the reasons of the High Court Judge (reported at (1985), 12 C.R.R. 212 (1985); 14 D.L.R. (4th 683; and (1985) 16 C.C.C. (3rd) 262) who was convinced by the expert evidence he heard that harm could come to such young persons from publication of their identities and that it would be virtually impossible for judges to predict in which cases harm would result. (The Supreme Court of Canada declined to hear a further appeal by the press.) In the latter case, Canadian Newspaper Co. Ltd. v. A.G. of Canada and Regina v. D.D., (1985), 14 C.R.R. 276; (1985), 16 D.L.R. (4th) 642; (1985), 17 C.C.C. (3rd) 385, the Court held that the Criminal Code provision permitting a publication ban, except with respect to its mandatoriness, was valid and a reasonable limit for the purposes of encouraging sexual assault complainants to pursue criminal charges and to testify.

While adults have not traditionally been protected in this way (where children have frequently had special status under the law), it may well be that similar evidence could be adduced with respect to the risks which could be expected to befall parolees whose identities and whereabouts are publicly known while they are attempting to reintegrate in the community successfully. This type of

consideration convinced an Ontario Supreme Court Justice that the equality provisions of the Charter should protect the accused (prior to conviction) as much as the complainant where a publication ban is ordered to protect the identity of the complainant: Regina v. R., (1986) 28 C.C.C. (3d) 188.

43. D.R. Ranish and D. Schichor, "The Victim's Role in the Penal Process: Recent Developments in California," (1985) 4 Federal Probation, p. 54. In only 14 of 818 parole cases heard in the first year after the California Bill of Rights was enacted, did victims (32 in total) file requests to appear before the California Board of Prison Terms. (This parole board hears only cases related to lifers. The public has for some years had an opportunity to submit written comments pursuant to a "public outcry clause".)

44. Ibid, p. 54.

45. National Parole Board, supra, note 39, p. 43.

46. Ibid., p. 62; Parole Regulations, s. 17, SOR/78-428 as amended; Cadieux v. Mountain Institution and National Parole Board (1984), 9 Admin. L.R. 50, 41 C.R. (3d) 30, 13 C.C.C. (3d) 330, 10 C.R.R. 248 (Fed.T.D.).

47. In Re Conroy and the Queen, (1983), 5 C.C.C. (3rd) 501, the Ontario High Court held that the National Parole Board could impose reasonable conditions on a parolee when a change of the circumstances dictated that it do so. The Court noted that the Parole Board had exclusive jurisdiction for parole and that it must have implicit powers to correct any injustices created by its own actions or orders. (The Court went on to hold that a parolee must give an informed consent to waive a post-suspension hearing, otherwise the parolee is entitled to a hearing.)

48. Parole Regulations, s. 22, supra, note 46; NPB Policy & Procedures Manual, supra, note 39, p. 73.

49. Judicial appeal, which must be provided for in law explicitly, permits a more extensive review of the tribunal's decision than does judicial review. There is presently no right of judicial appeal from parole board decisions - by the offender or anyone else - although they are subject to judicial review.

50. Judicial review means the review by the Federal Court of Canada of the decisions of the National Parole Board (as any other federal administrative tribunal) pursuant to section 18 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), as amended. The Court may review decisions of the Board which violate the duty to act fairly, which are in excess of its jurisdiction (failing to take account of

the legislative criteria for release, for example), or which violate an offender's rights under the Charter. Applications before the Federal Court may be brought to hearing quite quickly. Decisions made by provincial parole boards may be subject to judicial review pursuant to provincial legislation.

51. "Standing" means the right to bring an application to be heard. Traditionally, parole decisions were considered to be adminstrative in nature and not quasi-judicial; hence, s.18 of the Federal Court Act determined the appropriate forum (Federal Court Trial Division) for applications to review the decisions of parole boards. No limits have been placed legislatively on who may bring an application under s.18. Historically, the determination as to who has standing to apply for certain prerogative remedies such as certiorari (an application to quash the decision of the tribunal) has been considered to be very broad. While a mere busybody would not have standing to do so, courts have varied in their interpretations of how directly affected a person must be to bring such applications. It should be noted that when (and if) parole decision-making evolves to a quasi-judicial function, victims may find themselves in a more difficult position with respect to standing. Although section 28 of the Federal Court Act refers to a person "directly affected by the decision", except in very unusual circumstances, this likely refers exclusively to the offender in the parole context.

52. BC Parole Board, supra, note 41, Chap. 29, pp. 15-16.

53. Ontario Board of Parole, supra, note 40, section 4, p. 10.

54. Parole Regulations, s. 22.1, SOR/78 - 428 as amended by SOR/86 - 817.

APPENDIX A

LIST OF PROPOSED WORKING PAPERS OF THE CORRECTIONAL LAW REVIEW

Correctional Philosophy

A Framework for the Correctional Law Review

Conditional Release

Victims and Corrections

Correctional Authority and Inmate Rights

Powers and Responsibilities of Correctional Staff

Native Offenders

Mentally Disordered Offenders

Sentence Computation

The Relationship between Federal and Provincial Correctional Jurisdictions

International Transfer of Offenders

APPENDIX B

UN DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal law operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to Justice and Fair Treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

   a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

   b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

   c) Providing proper assistance to victims throughout the legal process;

   d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

   e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option

in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

    a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

    b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Assistance

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

APPENDIX C

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 reintegration 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.