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CORRECTIONAL AUTHORITY AND INMATE RIGHTS

Correctional Law Review
Working Paper No. 5
October 1987

Canada

Correctional Authority and Inmate Rights

orrectionnelles et les droits des détenus

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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 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, the second, round of public consultations. In addition, the views of inmates and correctional staff will be directly solicited.

Since the completion of the first consultation, a special round of provincial consultations has been carried out. This was deemed necessary to ensure adequate treatment could be given to federal-provincial issues. Therefore, wherever appropriate, the results of both the first round of consultations and the provincial consultations have been reflected in this Working Paper.

The second round of consultations is being conducted on the basis of a series of Working Papers. 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.

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EXECUTIVE SUMMARY

This paper provides a basis for discussion of the wide range of complex issues surrounding inmate rights and the closely related area of staff powers.

The main feature of the paper is a set of proposals for possible inclusion in the law to govern inmate rights and staff powers. These proposals, provided in summary form in Appendix C, are intended to clearly set out the individual rights of inmates while incarcerated and to provide guidance to staff in how to carry out their duties. Areas covered include transfer of inmates, administrative segregation, the inmate disciplinary process, search of inmates, visits, mail, and freedom of religion, as well as general conditions of confinement.

It should be noted that these proposals do not represent a government position, as no decisions have as yet been taken as to appropriate legislation. At this stage, the proposals are intended to raise issues for discussion and consultation. The government is not committed to a particular course of action, but is actively soliciting public and professional input before a final determination is made.

In developing these proposals, the nature of the inmate's interest in retaining certain rights and freedoms has been analysed, as have specific security and other institutional concerns. Even though it is a relatively simple matter to state the basic premise, that is, that "inmates retain all rights, subject to any limitations necessitated by the fact of incarceration", it is much more difficult to determine what specific limitations on rights are appropriate and justifiable. The proposals represent an attempt to balance the various interests, and accompanying commentaries explain how the various factors thought to be relevant were weighed. During the course of the consultations we will be discussing the factors relevant to a particular area, as well as whether appropriate weight has been given to those factors, and whether other factors should be considered.

In many cases, these proposals reflect present CSC policy found in the Commissioner's Directives (CDs). The paper takes the position, however, that they should be set out in law. We have not, at this stage, distinguished between those provisions which should be contained in a statute, and those which are more appropriately a matter for regulations. Nor have we drafted the proposals in the precise language which will be necessary for legislation. The focus at this point is on the substantive issue of "what should be set out in law", rather than on questions of formal drafting and the details that should be in regulations as opposed to statute.

The paper concludes with an examination of common issues and concerns that arise in enforcing rights in an institutional context. Judicial remedies available to inmates who feel that their rights have been infringed or denied are first considered, followed by a discussion of other approaches, such as inmate grievance procedures and the Correctional Investigator.

CORRECTIONAL AUTHORITY
AND
INMATE RIGHTS

INTRODUCTION

The advent of the Canadian Charter of Rights and Freedoms[1] has sparked a renewed interest in the protection of fundamental rights in Canada. In light of this, few areas of the correctional system are undergoing more scrutiny than that having to do with the rights of inmates.

This paper seeks to provide a basis for discussion of the wide range of complex issues surrounding inmate rights and the closely related area of staff powers. It addresses issues that arise in relation to incarceration in federal penitentiaries. It does not, however, deal with rights issues in regard to release, which is the subject of a separate Working Paper entitled Conditional Release. Nor does it deal with any issues arising under the equality rights section of the Charter in relation to differences, if any, in the treatment of inmates in the federal and provincial systems. These issues will be dealt with in the Working Paper on the Relationship Between Federal and Provincial Jurisdictions. The Correctional Law Review Working Group is, however, sensitive to the fact that although this paper is directed at the federal system, it may nonetheless have an impact on provincial systems.

This paper does not discuss every area where inmates may have certain entitlements, but chooses a number of major areas for consideration: conditions of confinement, fairness in decisions affecting inmates, and procedures to govern activities such as search of inmates. The paper's main feature is a set of proposals for possible inclusion in law concerning inmate rights and staff powers. These tentative proposals attempt to clearly set out the safeguards and limitations on individual rights and staff powers in the correctional context in order to generate discussion about what legislative provisions should look like, what degree of specificity is appropriate, and what impact such proposals might have on correctional operations. It should be noted that these proposals

do not represent a government position, as no decisions have as yet been taken as to appropriate legislation. At this stage, the proposals are intended to raise issues for discussion and consultation. Rather than being committed to a particular course of action, the government is actively soliciting public and professional input to aid it in developing new correctional legislation.

The context within which these proposals have been developed is most important and is discussed in detail in the first two Working Papers of the Correctional Law Review. Two basic questions addressed in the first Working Paper, entitled Correctional Philosophy, are: What is the correctional system supposed to accomplish, and, how do we, as a modern society, want to go about it?

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

The second Working Paper, entitled A Framework for the Correctional Law Review, examined, amongst other questions, whether inmate rights, although protected through the constitution and common law, should nonetheless be further specified in statute or regulation. The proposals made in this paper are, for the most part, consistent with current CSC policy as described in the Commissioner's Directives. However, there are a number of reasons why matters governing inmate rights should now be placed in law.

One is that legislative provisions are particularly important where the Charter is concerned. Because the Charter is drafted in general, abstract terms, legislative provisions play a crucial role in articulating and clarifying Charter rights and any restrictions on them that are necessary in the corrections context. This latter point is most significant, as limitations or restrictions on Charter rights must be "prescribed by law", and it appears that limitations in policy directives are not consistent with the Charter's demands.

In addition, development of legislative provisions at this time appears vastly preferable to a future of incremental and potentially inconsistent change forced upon the correctional system by the courts. Although judicial intervention plays an important role in providing outside inspection and scrutiny, the courts should be relied on as a last resort, rather than a first measure. In short, there is a need for legislative provisions to be developed in a way which does justice to all participants, in an effort to improve their collective enterprise. Litigation, in contrast, results in a win or loss for one side or the other, and often results in maximizing polarity.

In considering long-term solutions, the need for resort to the courts should be avoided by developing legislative rules that recognize yet structure discretion consistent with principles that are understandable to inmates, prison staff and administrators, and the public. Legislative rules that are based on clearly stated principles and objectives would structure discretion to allow for the necessary degree of flexibility while ensuring the greatest possible degree of accountability.

Development of legislative provisions to govern inmate rights and staff powers with input from all those affected by the corrections system is necessary to strike an appropriate balance. In addition, legislative rules which reflect the interests of staff, offenders, and the public are critical if they are to be fair and voluntarily complied with. It should also be noted that pro-active legislation that takes into account the administrative and resource burdens on correc-

tions would allow inmate rights to be protected in the most cost-efficient manner.

Legislative rules help to accomplish other goals: to clearly set out the individual rights of inmates in the corrections context, and to provide guidance to staff in how to carry out their functions. Inmates should be aware of and understand the restrictions which may be lawfully imposed on them, as well as the rights and responsibilities they have, and staff must be aware of their legal responsibilities and duties and the extent of their powers. Uncertainty in the law is not conducive to either a fair or effective correctional system; it is therefore in the interests of both staff and inmates that the law clearly define inmate rights and staff powers.

The following discussion will first examine how rights are defined in the correctional context, and then examine the powers of staff. Of particular importance is the careful balancing of interests which must take place in order to give effect to individual rights in the corrections context, while at the same time meeting the legitimate security concerns of the institution. This part will end with a discussion of the balancing process.

Rights of Inmates

It is important, at the outset, that the nature of a "right" be clearly understood. Major legal consequences are dependent on whether we are dealing with a right in the legal sense, or in the non-legal sense of a moral or social obligation. We wish to make it clear that we are discussing rights and freedoms in the legal sense - that a "right" signifies something which is legally enforceable, something which creates an inescapable legal duty or obligation on some other person, the proper discharge of which can be secured by recourse to the law and the courts or a legal tribunal set up to provide the machinery for the enforcement of the right.[2]

In these terms, inmates already have many rights. Like other persons, they are accorded constitutional rights through the Charter. These constitutional rights include various fundamental freedoms, as well as democratic and legal rights, which are guaranteed "subject only to such reasonable limits

prescribed by law as can be demonstrably justified in a free and democratic society". As well, inmates have rights created by statute, such as the right to food, clothing and shelter, and the right to be considered for parole, provided through the Penitentiary Act and the Parole Act. The common law, in the form of judicial decisions, also operates to supplement and protect rights of inmates by imposing, for example, the duty to act fairly in certain situations. Commissioner's Directives, on the other hand, which set out policy directives in the form of rules, do not confer rights as the rules are not generally considered to be legally enforceable at the instance of an inmate. The various sources of rights and rules which currently govern corrections were examined in detail in A Framework for the Correctional Law Review (Working Paper #2) and therefore are discussed only briefly in this paper.

Of major significance to rights of inmates is the first principle of our correctional philosophy which states that inmates retain all the rights of a member of society, except for those that are necessarily removed or restricted by the fact of incarceration. This principle recognizes that offenders are sent to prison as punishment, not for punishment, and therefore, while in prison, retain the rights of an ordinary citizen, subject only to necessary limitations or restrictions. The view that an individual in prison does not lose "the right to have rights" is recognized in Canadian law. Even before the Charter, in R. v. Solosky[3], the Supreme Court of Canada expressly endorsed the view that inmates retain rights, except for those necessarily limited by the nature of incarceration or expressly or impliedly taken away by law. Moreover, the Supreme Court endorsed the "least restrictive means" approach which recognizes that any interference with inmate rights by institutional authorities must be for a valid correctional goal and must be the least restrictive means available.

In effect, the "retained rights" principle means that it is not giving rights to inmates which requires justification, but rather, it is restricting them which does. Undoubtedly, some individual rights of inmates, such as liberty, must be limited by the nature of incarceration, in the same way that the rights of non-inmates in open society must be limited in

certain situations. The important point, however, is that it is limitations on inmate rights which must be justified, and that the only justifiable limitations are those that are necessary to achieve a legitimate correctional goal, and that are the least restrictive possible.

There are also very significant policy reasons, flowing from our statement of purpose, for recognizing and protecting the rights of inmates. Aspects of the statement of purpose which have a major impact on how inmates should be treated include encouraging offenders to prepare for eventual release and successful re-integration into society, and providing a safe and healthful environment to incarcerated offenders which is conducive to this goal. As practically all inmates eventually get out of prison, society's long-term interests are best protected if the correctional system influences them to begin or resume law-abiding lives. According rights and responsibilities to inmates supports and furthers this goal. On the other hand, lack of respect for individual rights in the corrections context can build up resentments and frustrations on the part of inmates and undermine the system's short-term and long-term security goals. Arbitrary treatment may lead not only to resentment on the part of inmates who are sent to prison for breaking the law, but the ensuing tension could create an atmosphere of mistrust, which could lead to violence, and which is contrary not only to the interests of inmates, but to staff, management and the larger community as well.

Thus, the Working Group is firmly of the view that humane treatment of inmates and recognition of their rights while they are in prison aids in their successful re-integration into the community. While we have argued in the Correctional Philosophy paper that a person should not be sent to prison for rehabilitation, we have at the same time recognized that it is the responsibility of the correctional system to actively encourage 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.

In an effort to promote this, the correctional system should provide staff selection and training that encourages dealing

with problems in an innovative, humane manner; provide appropriate correctional programs; encourage bridges between the inside and outside world through strengthening contacts with family, friends and volunteers; and generally do everything possible to contribute to a stable, humane institutional environment.

Accordingly, even though the Charter protects fundamental rights and proscribes cruel and unusual treatment or punishment, we view such constitutional standards as minimums and recognize a higher standard (a safe, healthful environment) as being more conducive to achieving the purpose of corrections.

Looking at the goal of successful re-integration of an inmate into the community in a broader fashion leads to the conclusion that it is not only the institution, but also the community which must be responsive to an individual's needs. For example, the institution can provide job skills, but society or the community must be able to provide jobs. The individual must be able to develop links with all facets of society - work, home, interpersonal relationships, etc. - and this may require structural change in society, a matter of broad social reform that is beyond the scope of correctional law and policy.

Staff Powers

As noted in the Framework paper, the rights and interests of correctional staff are key elements to be kept constantly in mind throughout the course of the Correctional Law Review. It is important to recognize two facts: that staff are as integral a part of penitentiary life as the inmates, and that no correctional system will be effective unless the rights, interests and concerns of staff are taken into account.

The job of a correctional staff member is a difficult one, often exacerbated by a misunderstanding of staff concerns on the part of inmates, management, and the public. Many issues of concern to correctional staff will be addressed in detail in a separate Working Paper devoted exclusively to them. But one issue, that of appropriate staff powers, is so

closely related to inmate rights that it must be discussed here.

We wish to make it clear that for the purposes of the present discussion, the word "power" is being used not in a broad sense but in the more narrow legal sense of a specially created exception to the normal law applying to individuals. This exception enables an official such as a staff member to do something, such as search a person, which an individual is forbidden, in ordinary circumstances, to do by the civil or criminal law.[4] Because powers allow officials to do what is normally prohibited, they conflict with important individual rights ordinarily protected by law, such as the right to security of the person, privacy, and so on. It is in this sense that powers are so closely connected with rights and are therefore examined here.

"Appropriateness" of staff powers implies two things: that the powers granted to staff are necessary for the performance of their duties, and that the powers are defined in relation to the principles underlying our justice system. These principles are expressed in the Charter, in The Criminal Law in Canadian Society (CLICS), and in the statement of purpose and principles of corrections referred to above. As well, they are being developed in projects dealing with powers of state officials, such as the Police Powers Project of the Criminal Law Review and the FLEUR (Federal Law Enforcement Under Review) project.

The underlying theme of restraint in the CLICS document is of particular relevance to staff powers. The doctrine of restraint in the use of the criminal law and in the criminal justice system implies that we should incarcerate an offender in the least restrictive environment possible, and that state intervention, particularly with respect to limiting individual rights, should only be authorized to the degree necessary.

Our statement of purpose and principles of corrections is also particularly relevant in many ways. One aspect of the statement of purpose - providing the degree of custody or control necessary to contain the risk presented by the offender - recognizes the short-term security concerns in the

correctional setting and the need to prevent escapes, control contraband and ensure the safety of staff and inmates, which, in certain instances, may require the use of staff powers. Other aspects of the purpose of corrections discussed above, - namely, encouraging offenders to prepare for eventual release and successful re-integration into society, and providing a safe and healthful environment to offenders which is conducive to this goal - recognize the long-term goals of the system, and that society's long-term interests would be best protected if the correctional system has the effect of influencing offenders to begin or resume law-abiding lives. Staff have a critical role to play in this regard, and in regard to the attainment of the correctional system's overall purpose and objectives.

Taking all the above into account, and adapting the work on powers of state officials in other criminal justice initiatives, we arrive at the following principles to guide us in defining staff powers:

1. Staff powers should be granted by law and should be clearly defined.

The Framework paper considered the question of which matters should be included in law and which could properly be left to policy directives, and concluded that staff powers should be placed in law. There are several reasons for this - accessibility and certainty of the rules relating to staff powers, the development of these rules through the democratic process, and the necessity for any provision which limits fundamental rights and freedoms to be "prescribed by law" rather than contained in Commissioner's Directives.

The concepts of accessibility and certainty of the law imply that exceptional powers should be defined clearly, both as to the actions which constitute the exercise of the power, and the circumstances under which it can be exercised.

Thus, unlike the present situation where powers are not clearly provided for but are derived from various sources including the Penitentiary Service Regulations, the Commissioner's Directives, the Criminal Code and the common law,

correctional legislation should contain a clear framework of specific procedures which is accessible to all.

2. The purpose for which the power is granted should be clear and the power authorized should be necessary to the fulfillment of the agency's mandate.

Specific enforcement powers may only be justified if they can be shown to be necessary in the carrying out of the agency's mandate. Thus a reasonable approach to defining powers is to first determine the agency's mandate, then decide what activities are necessary to achieve the mandate, and finally what powers are necessary to successfully carry out the activities. The mandate of the Correctional Service of Canada (CSC) and the powers necessary to carry it out are examined in detail in the Working Paper on Powers and Responsibilities of Correctional Staff. We have drawn heavily on this work in defining staff powers as they relate to inmate rights in parts of the present paper such as in regard to search of inmates.

Another aspect of this principle, linking the granting of powers to specific purposes, implies that there should be no general granting of powers. If the powers granted do not coincide with the mandate of the agency, then either the power is not used and its granting is therefore unnecessary, or else it is used by staff to perform an activity for which they have no clear mandate. Granting exceptional powers to officials which are not necessary to the successful performance of their mandate is incompatible with the principle of restraint, one of the cornerstones of our criminal justice policy.

3. In determining the appropriate staff powers for the correctional setting, the interests of staff, offenders and the public should be balanced.

As discussed in the Framework paper, in order to promote voluntary compliance with the law, we must take into consideration not only the competing interests in corrections but the point at which interests overlap and converge. That Working Paper noted that there is a shared interest of staff and inmates in having a predictable, secure and smooth-

running institution. Although extensive use of coercive powers of staff might achieve a secure institution in the narrowest sense of the word, it would undermine the ultimate purpose of corrections. In determining the extent and scope of staff powers, we must be mindful of the fundamental rights and freedoms of offenders, and only limit these to the extent necessary to ensure that security is maintained and human health and safety are not put at risk.

4. To reduce potential arbitrariness and ensure fair treatment of individuals under sentence, controls on the use of staff powers should be established.

There are several reasons why controls should be placed on the exercise of staff powers. First, powers are by their nature coercive, that is, they authorize normally prohibited conduct which affects such rights as liberty, privacy, and bodily integrity. Second, the exercise of staff powers may involve a large degree of discretion on the part of the individual officer. In order to reduce arbitrariness and inconsistency in the exercise of powers, standards must be set to give guidance to staff and to structure their discretion.

Traditionally, police powers have been controlled in several ways, for example, by the requirement of prior judicial authorization for certain powers such as search and by the requirement of a high standard of belief that an offence has been committed before the police have the power to search or arrest. In the correctional context it is unrealistic to require prior judicial authorization for routine, non-intrusive searches, but it may be appropriate to require authorization by the institutional head for certain types of searches. As well, an objective standard of reasonableness should be a requirement in the exercise of all staff powers. The appropriate reasonableness standard for the corrections context will be discussed further in the section in Part I on search of inmates.

Another important goal in the development of staff powers is ensuring that accountability mechanisms are in place, to encourage substantial compliance by those exercising the powers.

5. Physical force should only be used where there exists an immediate threat to personal safety, or the security of the institution or community, and there is no reasonable alternative available to ensure a safe environment. When force must be used, only the minimum amount necessary shall be used.

This principle is derived from the doctrine of restraint. The use of force may be justified in exercising a power in certain situations but criminal justice policy requires that this be the minimum possible in the circumstances. As well, it is necessary to ensure that fair and effective remedies are available to inmates for excessive use of force.

Balancing Inmate Rights and Institutional Concerns

Our task in arriving at the proposals for possible inclusion in law contained in this paper was to carefully balance the various rights and interests at stake in order to determine what should be set out in law. Starting with the retained rights principle, the exercise was essentially to determine what limits on rights were necessitated by the fact of incarceration, and from there, the least restrictive means of limiting them, and, as well, the safeguards that should be specified. In the balancing process, we relied on the approach of the courts, in Solosky and in Charter cases, as our starting point in analyzing the scope and substance of inmate rights and staff powers in relation to particular activities.

It is important to remember that, despite the focus on the Charter, if the activity or practice is not covered by the Charter this does not mean that any individual rights or interests affected are not or should not be protected under law. Even if not covered by the Charter they may still be created, protected, and limited by other means, such as through the common law, legislation, or regulations. In regard to tests developed by the courts in relation to the Charter, if the court determines that particular conduct or an activity does affect rights protected by the Charter, it then goes on to determine the extent of protection given by the Charter in the circumstances of the case.

In doing this the Supreme Court relies on what it terms a "purposive" analysis; this means it considers the "purpose" of protecting the right in the Charter. In effect, the courts consider the purpose of the guarantee "in light of the interests it was meant to protect", and this is determined by several factors identified by the Supreme Court:

1. the "character and larger objects of the Charter itself";
2. the language of the right in question;
3. the "historical origins of the concepts enshrined";
4. and, where applicable, to the "meaning and purpose of the other specific rights and freedoms with which it is associated within the text...."[5]

Therefore, in regard to search and seizure, for example, the courts first looked at the purpose of protecting a right to be secure against unreasonable search and seizure, and determined that it was basically to protect the right to privacy. Thus, even though privacy is not specified in the Charter, it is protected.

Once the purposive analysis is completed, and the need for any safeguards is established, the court must deal with arguments concerning limitations. Charter rights can be limited subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", according to the limitation clause in section 1 of the Charter.

In a series of cases dealing with such diverse areas as immigration and narcotic control, the Supreme Court of Canada has set the test for limits on Charter rights. This test is extremely important for corrections, as it is at this stage that such serious concerns as security and good order of the institution will be balanced against the guarantee of Charter rights. The Supreme Court stresses that in applying this test it is committed to upholding Charter rights, and that any limits on Charter rights must be proven by the government to be necessary, and not just preferable as a matter of administrative convenience.[6]

The court set out the strict test to be met before Charter rights could be limited in R. v. Oakes.[7] Two central criteria must be satisfied to establish that a limit is reasonable

and justified under section 1. First, the objective to be served by any measure limiting a Charter right (for example, security of the institution) must be sufficiently important to warrant overriding a constitutionally protected right or freedom. Second, the party invoking section 1 (in the corrections context, this would be the government for the correctional authorities) must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test that has three components:

1) the measure must be fair and not arbitrary, carefully designed to achieve the objective and rationally connected to it;

2) the means should impair the right in question as little as possible; and

3) there must be a proportionality between the effects of the limiting measure and the objective - the more severe the negative effects of a measure, the more important the objective must be.

This proportionality test shows that protection of inmate rights must be balanced against the important and legitimate institutional and security concerns of penitentiaries and the community; concerns that in several respects relate to human life and safety. Such factors play an important role when it comes to the question of the extent to which inmate rights may be restricted or limited by the nature of incarceration. The answer to this question is complex and depends not only on security concerns but also on the nature of the particular right or interest at stake, the limit in question, and the impact on the inmate.

Of major significance in balancing the various factors involved is the recognition that prison practices and programs vary in degree of intrusiveness on inmate rights, and that as the level of intrusiveness increases, the objective must be increasingly important and protections and safeguards must correspondingly increase. Finding the proper balance necessary to protect inmate rights while maintaining a safe, secure institution through a sliding scale approach is one of the primary concerns of this paper.

In both the Framework paper and in the Introduction to this paper we have explained our essential task as being the balancing of the interests of staff, inmates and the public. The next part of this paper represents an attempt to implement this approach in provisions governing the operation of federal penitentiaries, for example, in relation to inmate transfer, mail, visiting, segregation, discipline and search. These proposals are presented to generate discussion prior to the development of recommendations to the government.

These and other areas have been selected because of their critical nature, yet the list is not comprehensive; due to considerations of length not every area of inmate rights has been included in this paper. We feel, however, that the areas covered will serve to demonstrate the approach in all areas. In developing the proposals which follow, we have analysed both the nature of the inmate's interest in retaining certain rights and freedoms, and have also analysed the specific security and other institutional concerns. Even though it is a relatively simple matter to state our basic premise, that is, that "offenders retain all rights, subject to any limitations necessitated by the fact of incarceration", it is much more difficult to determine what, in practice, are the necessary limitations on specific rights which arise from the fact of incarceration. The proposals for consideration are an attempt by the Working Group to balance the competing interests, and the commentaries explain how the various factors which we think are relevant were weighed. During the course of the consultations we will be discussing the extent to which we have captured all the factors relevant to a particular area, as well as whether we have given appropiate weight to these factors.

Proposals for discussion, with commentary, are presented in the next two sections of this paper. Part I deals with correctional practices that affect rights retained by inmates. Part II sets out proposals in regard to rights which inmates derive from their status as inmates, such as the right to basic amenities of life. In Part III, common issues and concerns that arise in enforcing rights in an institutional context are examined. Judicial remedies that should be available to inmates who feel that their rights have been infringed or denied are first considered, followed by a dis-

cussion of other avenues, such as inmate grievance procedures and the correctional investigator.

In most cases, the proposals in Parts I and II are consistent with present CSC policy found in the Commissioner's Directives (CDs) and, except where noted, their implementation would likely not greatly affect operations. The Directives have recently been revised and up-dated to reflect the Service's mission statement. This approach is intended to ensure that the responsibilities of the corrections system are carried out in a coordinated way through services based on common principles. As well, it flushes out the limited guidance provided by present correctional legislation. We are of the view, however, that the current skeletal legislation provides insufficient guidance with respect to inmate rights, and for the reasons set out above, it is critical that inmate rights be further specified in law.

In developing the proposals for possible inclusion in law we have been particularly mindful of the dangers of over-legislating. We recognize that a certain level of discretion is desirable to allow officials the degree of flexibility necessary to respond to the widely varying circumstances of individual cases. However, serious concerns have been expressed about the lack of accountability or controls associated with much of the discretion in our corrections system, and the unintended and undesirable consequences which arise as a result.[8] The real dilemma over discretion stems from the fact that it may be seen at the same time as harmful and helpful. In the former case, discretion is regarded as a threat to individual rights; in the latter, as the necessary means to achieve flexibility. One of the most difficult tasks in developing these proposals for possible inclusion in law is ensuring that the rules are balanced to permit the necessary degree of flexibility while providing the greatest possible degree of accountability. Whether this has been achieved will no doubt be the subject of much discussion during our consultations on this paper.

Statute or Regulation

It should also be noted that we have not at this stage distinguished between legislative provisions which should be

contained in a statute, and those which are more appropriately a matter for regulations. Considering the relative ease with which regulations may be changed, they are a much more suitable vehicle for matters which are likely to change most frequently. Nor have we at this stage drafted the proposals in the precise language which will be necessary for legislation. The focus at this point is on the substantive issue of "what should be set out in law", rather than on questions of formal drafting and the details that should be in regulations as opposed to a statute. However, these questions should be kept constantly in mind when considering all the provisions set out in this paper.

PART ONE: RETAINED RIGHTS

Fairness in Institutional Decision-making

Even though the meaning of procedural fairness in regard to decision-making has been the subject of considerable litigation, it may be looked at in simple terms as consisting of two essential elements: the right to know the case against you, and the right to be heard or present your case. These two basic rights underlie the discussion and the proposals for consideration in this section. The important questions to be answered are: whether procedural protections are required in a particular situation and, if so, the extent or scope of the requirements. What is required in a given situation is determined by a number of factors identified by the courts over the past fifteen years.[9]

The courts have developed a spectrum approach which means that fairness is always required in a decision-maker whose decisions affect the liberty of subjects, but the extent of procedural protections may vary depending on the exigencies of the case, having regard to such factors as the significance of the consequences to the individual and the administrative constraints of the decision-maker.[10] This recognizes one of the important aspects of fairness, its fluid quality. Fairness varies from one situation to another; it may require a full-fledged hearing in one situation, and in another, mere notice of allegations and an opportunity to respond in writing. One factor which the courts stress is the likelihood of a significant adverse impact or loss to the inmate in a particular case. The courts are using the spectrum approach in the sense of a sliding scale to balance the impact or intrusion on the inmate with the degree of protection to be accorded.

Even though procedural protections associated with the duty to act fairly were in place prior to the Charter, with the advent of the Charter in 1982 the issue of the relationship between "principles of fundamental justice" in section 7 of the Charter and the common law "duty to act fairly" emerged. Section 7 guarantees to everyone "the right to life, liberty and security of the person and the right not to be deprived

thereof except in accordance with the principles of fundamental justice".

One major distinction between the two standards of fairness stems from the different legal nature of a constitutional provision on the one hand, and a common law entitlement on the other: the Charter, being part of the constitution, supercedes legislation, whereas the common law duty to act fairly is subject to the will of Parliament.[11]

The issue of the scope of fundamental justice has been considered by the Supreme Court of Canada on a number of occasions and their decisions support the view that the requirements of section 7 of the Charter exceed those imposed by the common law fairness doctrine.[12] The Court adopts the position that the principles of fundamental justice include, at a minimum, procedural fairness and that procedural fairness demands different things in different contexts. However, the court has also indicated, in what may prove to be a significant expansion of their scope, that the principles of fundamental justice are not limited to procedural guarantees, implying that they have substantive elements as well.

The role of the courts in requiring that penitentiaries treat inmates fairly in making decisions concerning their liberty was reflected in the simultaneous treatment of three cases by the Supreme Court of Canada in December, 1985.[13] The Court dealt with largely procedural questions relating to inmates' access to the habeas corpus remedy in a manner which reaffirms recognition of inmate rights, in this case of rights to "residual liberty" in regard to placing inmates in administrative segregation and special handling units. Characterizing such practices as creating "a prison within a prison", the Court held that even though inmates have a limited right to liberty, they must be treated fairly in regard to any limitations on the liberty they retain as members of the general prison population. As with all individuals, inmates have the right to be treated fairly in regard to any decision affecting them. It is in this sense that "fairness" is a retained right that inmates share with all members of society.

In the next section we set out for discussion both general and more specific provisions in the areas of transfer and administrative segregation that have been developed in light of the spectrum approach outlined above. The development of these proposals for possible inclusion in law serves as a model for provisions governing other decisions, such as institutional placement and temporary absence decisions, which also affect an inmate's liberty and other interests.

These provisions are designed to structure discretion in an effort to promote fair and effective decision-making; both by providing clear objectives and criteria, as well as through procedural protections.

An important question in regard to institutional decision-making which remains to be addressed, however, is who should make such decisions. Should they be made by the person with ultimate responsibility within the institution, that is, the institutional head or his or her designate, or should they be made by an independent person or body?

Some critics would argue that prison administrators are necessarily much more concerned with immediate short-term issues involved in maintaining an orderly institution than with the long-term goals of re-integration of individual inmates, and that this will inevitably, and sometimes inappropriately, influence their decisions. This has already been recognized in the context of the inmate disciplinary process, where decisions concerning serious and intermediary disciplinary offences have been taken out of the hands of the institutional head and given to independent chairpersons. It has been suggested that decisions regarding other aspects of incarceration, for example, those affecting an inmate's liberty, such as transfer and administrative segregation, would also be better dealt with by an independent person or body. Suggested alternatives range from an extension of the independent chairperson's role, to the establishment of a judicial official similar in capacity to the "juge de l'application des peines" (JAP) which operates in the French system to manage the administration of the sentence handed down by the court.

The literature suggests, however, that many problems are still unresolved in regard to "independent" decision-makers.

For example, the JAP, as a member of the judiciary, is in theory independent. In practice, however, a lack of adequate resources has forced him to be dependent on the information and recommendations of the institutions. Consequently, the JAPs are frequently viewed as "rubber stamps".

Our main concern is to promote an environment where the best possible decisions are made, whether by institutional management or some other person or body. In the proposals which follow we have specified that the institutional head is the decision-maker (with the exception of the independent chairperson for certain disciplinary proceedings). However, we ask the reader to consider whether any of the decisions would be better made by a more independent decision-maker, and if so, by whom.

a) General Provisions for Fairness in Institutional Decision-making

Objective

1. To ensure that the requirements of procedural fairness are complied with in decisions affecting an inmate's liberty or other interests.

General Rule

2. When making a decision which affects the liberty or other rights or interests of an inmate, the institutional authorities shall ensure that the greater the impact on the inmate the greater the procedural protections provided.

Inmate Access to Information

3. Where a decision affects an inmate's liberty or other interests, the inmate shall be entitled to all information which is relevant to his or her case. However, where the decision-maker receives information which

a) could reasonably be expected to threaten the safety of individuals;

b) could reasonably be expected to be injurious to the security of penal institutions; or

c) could reasonably be expected to be injurious to the conduct of lawful investigations or the conduct of reviews pursuant to the Penitentiary or Parole Acts, or the Penitentiary Service or Parole Regulations,

it need not disclose the information, if after

i) taking all available steps to confirm the accuracy of the information;

ii) considering the effect of disclosure on the source of the information or on a third party, or on an ongoing investigation or review; and

iii) considering the impact of non-disclosure on the applicant's opportunity to respond to matters at issue

it is satisfied that the information should not be disclosed.

4. Where information is not disclosed pursuant to section 3, the inmate shall be provided with specific reasons or grounds for non-disclosure and with the gist of the information.

Commentary

The objective and general rule regarding fairness in decision-making has been specifically set out to ensure that all decision-making is consistent with the "spectrum" approach discussed above. The goal is to ensure that the greater the degree of liberty or other interest at stake, and therefore the greater the impact on the inmate, the greater the requirement for procedural fairness. More specific instances of what this general rule means in a particular situation may be seen in the provisions regarding transfer and administrative segregation, which follow.

The provision concerning an inmate's access to information reflects an essential element of fairness: that the person concerned have access to all information that the decision-maker may be using in coming to a decision. This allows the person to respond intelligently to the information, and either attempt to correct any mistakes or give an explanation if one is required.

Although the criteria for withholding information are narrower in certain respects than present CSC policy,[14] the provisions are consistent with case-law, in particular, with the principle enunciated in Re Cadieux and Director of Mountain Institution[15]. In that case the Federal Court, Trial Division held that because of the liberty interest protected by s.7 of the Charter, the general rule is that an inmate or parolee must be advised of the information being used in a decision (in this case, in regard to conditional release). The Court went on to say that in very rare cases, where there is a strong competing public interest in non-disclosure, the inmate or parolee is entitled to at least the "gist" of the information. The provision uses an "injury test" to set out the situations where public interest over-rides disclosure. According to this test, it must be shown that disclosure would cause harm in the sense of threatening individual safety, or injuring the security of the institution. Where this is determined, however, the inmate should receive the "gist" of the information, which should be enough to enable him or her to respond. As noted by the Federal Court of Appeal in DeMaria, the authorities are entitled to protect confidential sources of information, but "it should always be possible to give the substance of the information while protecting the identity of an informant. The burden is always on the authorities to demonstrate that they have withheld only such information as is strictly necessary for that purpose."[16]

It should be noted that the access to information provisions go beyond the present law in that they relate not only to an inmate's liberty, but also to his or her "other rights and interests". Thus, where a decision is made, for example, to restrict an inmate's visits, the inmate would, under the provision, be told why.

In other instances decisions relate more to management of the institution as a whole rather than to the conduct of an individual inmate. Yet, here again, the reasons for such decisions should be given to individuals affected. Therefore, where a decision is made, for example, to close the gym for repairs, the reason should be given. This approach promotes an environment in which people affected know what's happening and why, unless of course there's a valid reason for withholding an explanation.

b) Provisions Related to Transfer of Inmates

Objective

1. To meet the security requirements and program needs of individual inmates while recognizing the impact of a transfer decision on an inmate's liberty and other interests.

Authority

2. The Commissioner or any officer directed by the Commissioner may transfer an inmate in accordance with the provisions of this part.

Reasons for Transfers

3. The transfer of an inmate may take place for one or more of the following reasons:

a) to respond to reassessed security requirements;
b) to provide access to the home community or a compatible cultural environment;
c) to provide access to relevant programs;
d) to provide adequate medical or psychological treatment;
e) to provide adequate protection;
f) to relieve serious overcrowding; and
g) to respond to an inmate's application for transfer.

Involuntary Transfers

4. Before being transferred involuntarily, an inmate shall be informed, in writing, of the proposed involuntary transfer and the particular allegations on the basis of which the transfer is being proposed, and of the fact that he or she is entitled to respond to the proposal, in person before the institution head, or, if the inmate prefers, in writing, within 48 hours.

5. The inmate's response to a proposal of involuntary transfer shall be reviewed by the Commissioner or a senior regional official and the inmate shall be informed of the decision reached. When the involuntary transfer is to proceed despite the inmate's objection, reasons for the decision shall be given.

6. In an emergency situation, a transfer may take place without prior notification to the inmate. In such cases, the inmate shall be informed of the reasons for the transfer and the particular allegations on which it is based within 48 hours of the transfer and shall have the opportunity to respond, in person, within 48 hours.

Commentary

Inmates are often moved from one location to another in serving their sentences depending on their security status, program and treatment assignments, and the administrative exigencies of the correctional service. Decisions to transfer between penitentiaries may be initiated by an inmate's application for transfer or by the institutional authority. The provisions for possible inclusion in the law set out above relate mainly to involuntary transfer of an inmate at the instigation of the institution. They would normally not be applicable to gradual release and "cascading", which imply progressive transfers of inmates to lower security as their release dates approach. Statutes, agreements and treaties provide for transfers between jurisdictions including provincial correctional authorities, provincial psychiatric or medical facilities and foreign correctional authorities. Offenders serving parole or mandatory supervision may also transfer to different district office locations. This discussion will, however, be limited to an examination of domestic transfer of an inmate from one penitentiary to another.

According to the Reports of the Correctional Investigator, by far the majority of complaints received from inmates have to do with institutional transfers. Inmates complain that they are involuntarily transferred to more restrictive institutions, often with less access to programs and facilities, or to institutions thousands of miles away from their home

communities without adequate notice, reasons, or a chance to respond. Even though CSC has recently changed its policy in regard to inter-regional transfers, its efforts to deal with this problem have resulted in another problem - overcrowding in some areas.

As a result of investigations of these complaints the Correctional Investigator has made several recommendations calling for procedural safeguards for involuntary transfers between institutions. Moreover, the courts, in dealing with transfer cases, have recognized that transfers from open to close or closer custody can certainly engage the provisions of the Charter dealing with fundamental justice (s.7), arbitrary detention and imprisonment (s.9), and cruel and unusual treatment or punishment (s.12). In light of the significant rights and interests at stake, it is most important that safeguards be clearly set out in law. Current provisions in legislation and regulations fall far short in this regard.

Institutional transfers are presently authorized by subsection 13(3) of the Penitentiary Act which provides that once an inmate has been sentenced or committed to a federal penitentiary, the Commissioner or any officer directed by him may direct the transfer of an inmate to any penitentiary in Canada. The Act does not set any guidelines to govern transfers, but section 13 of the Penitentiary Service Regulations provides that an inmate shall be confined in the institution that "seems most appropriate", having regard to the degree and kind of custodial control considered necessary or desirable for the program of training considered most appropriate for the inmate.

Commissioner's Directive No. 540 sets out the transfer procedure. Section 13 of the Directive prescribes that an inmate is entitled to be informed, in writing, of a proposed involuntary transfer and the reasons for it and of the fact that he or she has the opportunity to respond to the proposal, in writing, within 48 hours. Written reasons for the final decision to proceed are to be supplied to the inmate.

The courts have tended in the past to defer to the decisions of prison administrators with respect to transfers of inmates. Courts in Canada are now taking a more active role

in reviewing transfer decisions, particularly where an inmate is transferred to another region or to a higher security institution. Courts are being more receptive to claims concerning qualitative differences in amenities between institutions and have considered such factors as an inmate's loss of ability to receive visits from family, loss of opportunity to participate in various programs and receive medical treatment and jeopardy to parole status in imposing procedural safeguards on transfer decisions. The courts have required the principles of fundamental justice where the right to liberty under the Charter is affected:

> In light of the well founded notion of "a prison within a prison", transfers from open to close or closer custody can certainly engage the provisions of sections 7 and 9 of the Canadian Charter of Rights and Freedoms. The decision to effect such an involuntary transfer, without any fault or misconduct on the part of the inmate, as it is abundantly clear was done in the applicant's case is the quintessence of unfairness and arbitrariness.[17]

The proposals for possible inclusion in law are intended to provide these safeguards recognizing that an inmate has the right to notice, to information concerning allegations supporting the transfer, and an opportunity to respond to them in person. This opportunity for the inmate to appear personally represents the main change in practice, and therefore, we wish to receive comments as to its possible impact and whether it is an appropriate addition to the process. The major justification for such a change is the fact that significant rights and interests are affected, and a hearing is in line with the demands of the principles of fundamental justice. Also to be considered is the fact that a hearing would avoid possible difficulties that inmates may have in expressing themselves adequately in writing, compared to the relative ease with which correctional authorities can meet with an inmate to discuss his or her case. In a certain sense, a hearing avoids the demands of a formal, written procedure, although at the same time it could be quite time-consuming and administratively burdensome for CSC. We point out, as well, that in case of an emergency, the inmate would be given reasons and an opportunity to respond after-the-fact. This latter point is consistent with present CSC

policy and also reflects case law which holds that fairness does not entitle the inmate to prior notice of the decision to transfer if an emergency situation has arisen in the prison.

It is, however, necessary that reasons and an opportunity to respond be provided as soon as possible after the transfer. In our proposals we have suggested an in-person hearing because of the liberty interest at stake; this goes beyond the present policy allowing for written responses.

c) Provisions Related to Administrative Segregation

Objective

1. To ensure that inmates who must, for a limited period of time, be kept from associating with other inmates are confined as a result of a fair and reasonable decision-making process, in a secure and humane fashion, and returned to normal association as soon as possible.

Placement in Segregation

2. An inmate may be segregated where the institutional head or his or her designate is satisfied that no other reasonable alternative exists, and:

a) there are reasonable grounds to believe that the inmate has committed, attempted to commit, or plans to commit acts that represent a serious threat to the security of the institution or the safety of individuals; or

b) disciplinary or criminal charges have been laid involving actual or threatened violence or an associated threat of reprisal or destruction of government property and there is a substantial likelihood that the offence will be continued or repeated or there will be violent reprisals by other inmates; or

c) there are reasonable grounds to believe that the presence of an inmate in normal association would interfere with the investigation of a criminal or serious

disciplinary offence through that inmate's intimidation of potential witnesses; or

d) there are reasonable grounds to believe that an inmate's presence in normal association represents a risk to the good order of the institution in that the inmate has refused to obey the lawful order of a staff member or officer and there is a substantial likelihood that the refusal will be repeated or will lead to widespread disobedience by other inmates; or

e) there are reasonable grounds to believe that the inmate's life is in danger.

3. An inmate placed in administrative segregation shall be informed, in writing, of the reasons for the placement in segregation within 24 hours of placement.

4. Where an officer other than the institutional head has ordered administrative segregation, the institutional head shall, within 24 hours of placement, review the order and either confirm the placement in segregation or issue a further order directing that the inmate be released from segregation.

Conditions of Confinement

5. An inmate placed in administrative segregation shall not be considered under additional punishment and shall be accorded the same conditions of confinement and rights and privileges as the general population except for those that can only be enjoyed in association with other inmates, including but not limited to

a) correspondence;

b) personal effects;

c) clothing, bedding, and linen and exchange thereof;

d) personal hygiene, including opportunities to shave and shower;

e) canteen;

f) borrowing from the institutional library and receiving reading material from outside the institution;

g) access to legal materials and legal services; and

h) daily exercise.

Reasonable access to visits and telephone calls to persons or agencies outside of the institution shall be provided.

6. Inmates who have been placed in administrative segregation shall be provided with:

a) case management services;

b) educational, spiritual and social development activities;

c) psychological counselling; and

d) administrative and health care services.

Review of Administrative Segregation

7.a) A review of the case of each inmate placed in administrative segregation shall take place within 3 days of the initial placement and no less frequently than once a week thereafter.

b) The review shall be carried out by a Segregation Review Board consisting of the Assistant Director (Security) or Assistant Director (Socialization); the Classification Officer or psychologist in charge of segregation; the security officer in charge of segregation; and an independent outside person.

c) Each inmate shall be notified at least 24 hours in advance of the review and shall be permitted to present his or her case in a hearing before the Segregation Review Board.

d) The board shall consider whether there are continuing grounds for segregation according to the criteria in section 2 and shall recommend in writing to the institutional head either that segregation be continued or that the inmate be returned to the general population.

e) A copy of the recommendation shall be given to the inmate.

f) The institutional head retains the final authority to make the decision (subject to 8(b)). In a case where the institutional head does not intend to act in accordance with the recommendation of the Board that an inmate be returned to the general population, the institutional head shall inform the inmate in writing of the reasons for his or her intended decision and provide the inmate with an opportunity to present his or her case for release into the general population.

g) Where the inmate continues to be segregated, the Segregation Review Board shall develop a plan to re-integrate the inmate into the general population of the institution as soon as possible, and shall monitor the plan during subsequent reviews. The inmate shall have an opportunity to make representations as to the proposed plan.

8.a) Where segregation is to be continued beyond 30 consecutive days the Segregation Review Board shall hear the evidence of a psychologist or psychiatrist who has assessed the inmate.

b) Where the psychologist or psychiatrist presents evidence that continued segregation will cause the inmate substantial psychological or physical harm, the institutional head shall order the inmate's return to the general population, unless return would be an immediate danger to life or safety.

Maximum Time in Administration Segregation

9. No segregation shall be continued for more than ninety days unless

a) during this period the inmate commits further acts which under section 2 justify further segregation. Any further period of segregation shall also be subject to a ninety day limitation; or,

b) no reasonable alternative exists and the inmate must remain in the institution to attend court proceedings.

Commentary

Segregation, the "hole", and solitary confinement are all terms used to describe the dissociation of inmates from the rest of the prison population. Dissociation falls into three broad categories. The first category is the equivalent of protective custody whereby an inmate is segregated for his own protection. This form of dissociation is usually entered into at the inmate's own request, and will not be discussed here. Of more relevance to this examination of inmate rights are the other two categories of dissociation - punitive dissociation and administrative segregation.

Punitive dissociation is authorized by section 38 of the Penitentiary Service Regulations which provides that an inmate found guilty of an intermediary or a serious misconduct is liable to dissociation for a period not exceeding thirty days. Issues arising in connection with punitive dissociation will be examined under Inmate Discipline. However, for comparative purposes, it is interesting to note here that before an inmate may be dissociated as a punitive measure several procedural hurdles must be met. The inmate must first have been convicted and sentenced by a disciplinary board at a hearing. Entitlement to a hearing carries with it many corresponding rights such as the right to be fully apprised of the charges being faced, the right to present evidence, the right to cross-examine witnesses (through the independent chairperson), and in certain instances, the right to be represented by counsel. Furthermore, the term of dissociation which may be imposed is of a certain and limited duration (although consecutive sentences can be imposed in multiple count situations).

By way of contrast, no similar procedural safeguards are set out as being applicable to administrative dissociation. An

inmate may be placed in administrative segregation under section 40 of the Penitentiary Service Regulations which provides:

> 40(1) Where the institutional head is satisfied that
>
> (a) for the maintenance of good order and discipline in the institution, or
>
> (b) in the best interests of an inmate
> it is necessary or desirable that the inmate should be kept from associating with other inmates, he may order the inmate to be dissociated accordingly, but the case of each inmate so dissociated shall be considered, not less than once each month, by the Classification Board for the purpose of recommending to the institutional head whether or not the inmate should be returned to association with other inmates.
>
> (2) An inmate who has been dissociated is not considered under punishment unless he has been sentenced as such and he shall not be deprived of any of his privileges and amenities by reason thereof, except those privileges and amenities that
>
> (a) can only be enjoyed in association with other inmates, or
>
> (b) cannot reasonably be granted, having regard to the limitations of the dissociation area and the necessity for the effective operation thereof.

Unlike punitive dissociation, there is no set limit on the length of time an inmate may be segregated. This fact, coupled with the relative absence of procedural safeguards, renders administrative dissociation an easy target for abuse. As noted by the John Howard Society:

> [N]o allegations need be made, no evidence offered, no reasons given. Because there is nothing to answer, the inmate does not receive a hearing. It is possible for an inmate to spend every day of his penitentiary life in dissociation on the basis of an original decision made by the director....[18]

Although administrative dissociation is undoubtedly necessary in certain situations, it must be recognized that it is a tool which may, in practice, be used for punitive purposes.

It may, for example, be used where inmates suspected of having committed disciplinary offences are placed in administrative segregation rather than being charged and tried in accordance with disciplinary procedures which may or may not result in punitive dissociation. In this manner, inmates may be punished for suspected offences without a trial or hearing and segregated for a term far exceeding that permitted under the current punitive dissociation provisions. Moreover, cases have come to light where inmates were kept in segregation to encourage them to plead guilty to disciplinary charges. In addition, inmates have been placed in administrative dissociation indefinitely following the expiry of a finite period of punitive dissociation.[19]

Since administrative segregation is an area which is lacking in statutory or regulatory procedural requirements, and which significantly affects rights to liberty and freedom of association, it is not surprising that this is an area in which inmates have turned to the courts in an attempt to clarify what rights they have and to seek remedies for what they perceive as unjust treatment.

In McCann v The Queen,[20] a pre-Charter case, inmates successfully argued that the dissociation conditions in the (now closed) British Columbia penitentiary constituted cruel and unusual punishment contrary to the Canadian Bill of Rights. McCann himself had spent a total of 754 days in administrative segregation between July 1970 and August 1972, in conditions which required, amongst other things, that each inmate be confined to a small cell with a light burning 24 hours a day, to sleep with their heads next to the toilet, and to be subjected to strip searches in the open. Although the Federal Court found that conditions such as these constituted cruel and unusual punishment, it did not, at this early stage in the evolution of inmate rights, go so far as to require due process in decisions concerning dissociation. This situation has, however, been changed in recent cases by the Supreme Court of Canada, as discussed below.

In Re Cardinal and Oswald and The Queen,[21] the applicants were kept in administrative segregation pending the disposition of charges relating to an alleged hostage-taking incident notwithstanding that the Segregation Review Board had

recommended that they be released. The Director had not investigated the allegations and the inmates had been given no opportunity to present their side of the story. At the lower court level, in the course of deciding whether the Director had treated the inmates fairly, the Court concluded essentially that since no procedural standards existed, it could not be said that the duty of procedural fairness had been breached.[22] In the absence of evidence of bad faith, judicial review was unavailable. This decision was, however, overturned on appeal. The Supreme Court of Canada recognized administrative segregation as "a form of containment involving severe restrictions on mobility, activity, and association".[23] It went on to equate confinement in administrative dissociation or segregation with that in a special handling unit, stating that "both are significantly more restrictive and severe forms of detention than that experienced by the general inmate population".[24]

Because of the significant impact administrative segregation can have on an inmate, the Supreme Court of Canada held that the institutional head is under a duty of procedural fairness. The Court basically extended the duty of procedural fairness which has been held to apply to disciplinary proceedings within a penitentiary since Martineau (No.2) to decisions concerning administrative segregation:

> The duty of procedural fairness has been held to apply in principle to disciplinary proceedings within a penitentiary, and although administrative segregation is distinguished from punitive or disciplinary segregation in the Regulations, the effect on the prisoner is the same and gives rise to the duty to act fairly.[25]

Cardinal and Oswald is also important in regard to remedies. The Supreme Court of Canada held that habeas corpus lies to determine the validity of the confinement of an inmate in administrative segregation, and if such confinement is found to be unlawful, to order the inmate's release into the general population of the institution. In effect, this means that the breach of the duty of procedural fairness is of sufficient consequence to render the continued segregation of the inmates unlawful, even if it seems that had a hearing been held, the decision to segregate or to continue

segregation would have been justified. In strong terms, the Supreme Court of Canada reaffirmed the importance of an inmate's right to a fair hearing:

> The denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.[26]

The proposals for discussion set out above are intended to meet the serious shortcomings and potential for abuse of the present administrative segregation scheme. These proposals have been developed to provide a statutory framework for a system that would be fair and reasonable for inmates without compromising the institution's obligation to provide safety and security to staff, other inmates, and the public, and programs to all inmates, including those dissociated.

The proposals attempt to clarify the criteria for placement in administrative segregation and to avoid broadly worded tests such as "for the good order of the institution". Included in the criteria is 2(e) which relates to a situation where an inmate's life is in danger. This recognizes the duty of the correctional system to protect an inmate, but raises the difficult issue of whether it is appropriate to use these provisions to segregate someone against his or her will for reasons believed to be in his or her best interests. We are of the view, however, that administrative segregation as set out here, which is limited to situations where no other alternative exists and only as a temporary measure, would be appropriate for an inmate whose life is in immediate danger. The inmate would be protected while long-term alternatives, such as protective custody, are developed with the inmate's input.

Criteria for placement in administrative segregation should be clearly set out, in order to aid the institutional head and the Review Board in making their decisions, to ensure that the inmate is not segregated arbitrarily, and to allow the inmate to formulate a case for release into the general population. The inmate must be given reasons for the placement, and a chance to present his or her case before the Segregation Review Committee. Although the criteria in the CDs are very broadly worded, this is the basic approach of CSC policy. In order to comply with the case-law, the proposals also provide that where the institutional head does not intend to follow a recommendation to release, the inmate should receive reasons for the institutional head's decision, and have an opportunity to respond to them before the institutional head.

In addition to supplying essential procedural protections, the proposals contain a ceiling on continuous time an inmate may spend in segregation. This represents a departure from present policy, under which no time limit is specified. The Working Group recognizes that segregation is a destructive experience which can only be justified as a temporary measure where no other alternative exists. Moreover, it is of the view that the severe emotional and psychological damage which may be inflicted by segregation is most often counter-productive in terms of the major correctional goal of re-integrating an inmate into the community. As noted in the Report of the Study Group on Dissociation:

> Indeed, the ultimate goal of the criminal justice system is the re-integration of the offender into the community - adjustment to life outside the prison - and the basic fact of life is association. Similarly, the ultimate goal of a segregation unit ought to be to return the segregated inmate to association ... as soon as possible.[27]

The proposals recognize the importance of returning the inmate to the general population of the institution as soon as possible by requiring the Segregation Review Board to develop a plan for the inmate's re-integration and to monitor the plan during any subsequent reviews. In general, these proposals are intended to ensure that administrative segregation is used only in the event that all other measures have

failed and not as a means of solving day to day problems of institutional management.

Inmate Discipline

Like any social organization, prison has at its disposal a host of rewards for acceptable behaviour - parole, temporary absence, earned remission - as well as penalties for non-compliance through the formal disciplinary process. These incentives and sanctions are designed to ensure, amongst other things, social control and conformity to institutional norms. While recognizing the importance of these goals we stress that a further goal of corrections must be taken into account. Corrections must not sacrifice measures that are designed to assist the inmate towards successful re-integration into the community. Therefore, in addition to clarifying and reinforcing the organization's values through punishment and deterrence, a disciplinary system should also be designed to influence inmates to adopt acceptable behaviour patterns to facilitate their eventual re-integration.

In response to recent case law and the coming into effect of the Canadian Charter of Rights and Freedoms, the prison disciplinary process has, of necessity, undergone dramatic change in recent years - from the informal "warden's court" to one approaching a "quasi-judicial" process presided over by an Independent Chairperson.

The courts have intervened in prison disciplinary matters more than in any other area of institutional decision-making. This is mainly due to the fact that punishments imposed as a result of disciplinary convictions can affect the amount of time an inmate will spend imprisoned (through forfeiture of remission) and can significantly affect the conditions of confinement (through punitive dissociation). In addition, significant fines can be imposed as well as a range of less onerous penalties.

In order to comply with judicial decisions, particularly in relation to the duty to act fairly, clear rules governing the conduct of the hearing have been developed. Most recently, the Federal Court of Appeal, in Howard v. The Presiding Officer of The Inmate Disciplinary Court of Stony Mountain[28]

(presently under appeal to the Supreme Court of Canada), has ruled that in at least some situations inmates charged with disciplinary offences should be entitled to counsel, due to the potentially serious impact on their liberty which a disciplinary conviction could entail. In the Howard case the Court commented specifically about the seriousness of loss of remission as a punishment, since such loss would effectively increase the period of time the inmate must spend in confinement. The federal government has subsequently taken the position that it is only where remission is at stake that counsel is necessary. A number of commentators, on the other hand, have argued that this narrow interpretation inappropriately limits the effect of Howard. What is important, they say, is the liberty of the inmate, and the Supreme Court of Canada, in the recent cases of Cardinal & Oswald, Miller and Morin,[29] has affirmed that inmates have a significant liberty interest in remaining in the general population, and that this interest is adversely affected by dissociation.

The proposed disciplinary code, set out below for discussion, is quite similar to the existing provisions, although changes have been made where appropriate to reflect the need for greater clarity and certainty in the law. The reasons for these changes are discussed in the commentary. As well, the proposals recognize the need for the disciplinary process, as all correctional processes, to further the ultimate goals of corrections.

a) Proposed Disciplinary Code

Objective

1. To foster an environment in which inmates conduct themselves according to acceptable and approved standards of behaviour thereby promoting good order in the institution and contributing to their successful re-integration into the community, through a fair and reasonable disciplinary process.

Offences

2. Every inmate commits an offence who:

a) wilfully disobeys a lawful order;

b) wilfully breaches a regulation or written rule governing the conduct of inmates;

c) commits or threatens to commit an assault against another person;

d) behaves towards any other person, by his or her actions, language or writing, in a threatening or extremely abusive manner;

e) takes or converts to his or her own use or that of another any property or article without the consent of the rightful owner or other person in lawful possession of the property;

f) wilfully or negligently damages any property of Her Majesty or of any other person;

g) has contraband in his or her possession;

h) deals in contraband with any other person;

i) consumes, absorbs, swallows, smokes, inhales, injects or otherwise uses an intoxicant within the institution or when prohibited as a condition of any release from custody;

j) participates in, creates or incites a disturbance likely to endanger the security of the institution;

k) does any act with intent to escape or to assist another inmate to escape;

l) leaves his or her cell, place of work or other appointed place without proper authority;

m) gives or offers a bribe or reward to any person;

n) is in an area prohibited to inmates;

o) wilfully wastes food; or

p) attempts to do anything mentioned in paragraphs a) to o).

Definitions

3. "Contraband" consists of any item that is not on an approved list distributed to each inmate upon reception, unless the inmate has obtained written permission from the institutional head to have the item in his or her possession.

"Intoxicant" consists of any substance, not on the approved list distributed to each inmate that, if consumed, absorbed, swallowed, smoked, inhaled, injected or otherwise used, would result in intoxication.

Manner of Proceeding

4. Where a staff member has reasonable and probable grounds to believe an inmate has committed or is committing a disciplinary offence, the staff member shall, where circumstances allow:

a) stop the commission of the offence and explain to the inmate the nature of the breach; and

b) where a person aggrieved by the alleged breach consents, allow the inmate to correct the breach where possible and make amends to the person aggrieved.

5. Where a staff member has reasonable and probable grounds to believe an offence has been or is being committed and where it cannot be resolved informally as in section 4, the institutional head or the staff member designated by the institutional head shall determine whether, depending on the circumstances surrounding the offence, to charge the inmate with a minor or serious violation, or to inform the police force having jurisdiction.

Procedures

6. An inmate charged with a disciplinary offence shall:

a) receive in writing notice of the date, time and place of his or her disciplinary hearing, and the specific charge and whether it is designated as minor or serious, not less than twenty-four hours in advance of the hearing;

b) have the charge described in sufficient detail to permit the inmate to know exactly what behaviour has lead to the charge;

c) be entitled to a hearing within seven working days of written notice of the offence;

d) have access to an interpreter, if necessary;

e) have the opportunity to be present and to be heard;

f) be entitled to assistance from another person or persons of the inmate's choice where the offence is designated as serious, provided the person has been approved for entry into the institution;

g) have the opportunity to question witnesses and call witnesses on his or her own behalf; and

h) have the opportunity to make submissions with respect to punishment in the event of a conviction.

7. An inmate charged with a minor offence shall appear before the institutional head or his or her delegate; and an inmate charged with a serious offence shall appear before an independent chairperson.

8. All proceedings related to the hearing of serious offences shall be recorded; those related to a minor offence shall be summarized.

9. The standard of proof required for conviction for any disciplinary offence shall be proof beyond a reasonable doubt.

10. A disciplinary conviction or acquittal is determinative of issues of fact relevant to subsequent institutional decisions.

Penalties

11.a) An inmate found guilty of a serious offence is subject to one or more of the following:

i) a warning or reprimand;

ii) the loss of privileges;

iii) a fine of not more than $50.00;

iv) reimbursement of up to $500.00 for the amount of damages caused wilfully or negligently;

v) a work order for a specified number of hours, not to exceed 100;

vi) dissociation from other inmates for a period not exceeding (seven) consecutive days.

b) An inmate found guilty of a minor offence is subject to one of the following:

i) a warning or reprimand;

ii) the loss of privileges;

iii) reimbursement up to a maximum of $50 for the amount of damages caused wilfully or negligently.

c) The presiding officer of the disciplinary court may, in the case of a serious offence, suspend the carrying out of the sentence on the condition that the inmate is not found guilty of another serious offence during a specified period not exceeding ninety days from the date of the order. Where this condition is not complied with, the suspended punishment shall be carried out.

Independent Chairpersons

12.a) The Minister shall appoint an independent chairperson, other than an official of the Service, to preside over the hearing and adjudicate charges of offences designated serious.

b) The independent chairperson shall have relevant experience in the practice of criminal law, or experience with adjudicative bodies.

13. The Minister shall appoint a person other than an official of the Service to serve as Chief Independent Chairperson for each region of the Correctional Service of Canada whose duties shall include:

a) hearing appeals on matters of process and substance, for both convictions and sentence; and

b) monitoring and promoting consistency in dispositions.

b) Commentary

The proposed objective for our disciplinary code specifies that the disciplinary process must not only promote an orderly and secure institution, but also contribute to the future re-integration of inmates. This implies that all disciplinary measures must be evaluated not only in terms of their immediate impact on institutional security, but also their long-term effect on the behaviour of the offender.

(i) Offences

Section 2 proposes for consideration a revised list of disciplinary offences. In determining what conduct should be proscribed in a prison disciplinary code, it is important to remember that inmates, as all citizens, are bound by our criminal law, and violations of the law may be, and often are, prosecuted in the normal way in the courts. Nonetheless, we recognize that relatively minor violations of the criminal law, for example, vandalism, minor assaults or threats, or minor drug offences, might be more appropriately dealt with in an expeditious manner in an internal disciplinary process.

In addition, we recognize that certain kinds of behaviour, which do not constitute a criminal offence, may present a significant problem in an institutional context which warrants control through the disciplinary process. For

example, it is important to the smooth running of a correctional institution that inmates comply with the orders of correctional staff and that inmates obey written rules governing their conduct. Possession of certain objects such as knives is a further example of conduct which may not be criminal, but which is generally thought to be inappropriate in an institutional setting.

The current offences have come in for considerable criticism by both the courts and others, on grounds that they are vague, over-broad, and may penalize behaviour which is not particularly serious.

The offence "does any act that is calculated to prejudice the discipline or good order of the institution" has perhaps come in for the most criticism on the basis that almost any act could potentially be included. This provision was traditionally used to deal with two kinds of behaviour not specifically covered in the Regulations: being intoxicated, and situations where an inmate slashes his or her body. The latter use for this disciplinary provision was criticized as being inappropriate, and the Regulations have recently been amended to provide for a specific offence of consuming an intoxicant, although that amendment has also been struck down by the Courts. This issue will be dealt with below.

As we argued in the Framework paper, inmates should know with some certainty the rules which govern their behaviour. In a disciplinary code it is desirable to articulate as clearly as possible the specific kind of behaviour which is prohibited. We therefore propose for consideration that the above offence be reworded as follows: "participates in, creates or incites a disturbance likely to endanger the security of the institution". This formulation would restrict the ambit of the offence to actions which clearly have a connection to the security of the institution.

Offences such as "disobeys or fails to obey a lawful order" and "contravenes any rule, regulation or direction made under the Act" have been criticized because the prohibited conduct can vary enormously from the most trivial to the most serious. Nonetheless these provisions are important to the running of an orderly institution. Staff have to be able to

expect compliance with their orders, and even where an inmate disagrees with an order (if, for example, he feels it is unreasonable), he should nonetheless comply with it. However, it is also essential that he be able to complain about the appropriateness of the order at a later point in time, either through the grievance procedure or the courts.

Nonetheless, the charge "disobeys or fails to obey a lawful order" by itself is so vague that an inmate may find it difficult to prepare a defence against the charge. It should therefore be mandatory to include on the notice of offence sufficient detail of the lawful order in question to permit the inmate to know the specific charge against him or her as required in section 6(b) of our proposals.

A number of the current provisions provide that an offence is committed not only when the inmate wilfully commits an act but also when he or she fails to comply with the institutional rule or lawful order, or when the inmate negligently damages government property or the property of another person. In our view the disciplinary process should be reserved for intentional violations of institutional rules. Failure to hear an order, for example, should be grounds for acquittal rather than merely a reduced penalty. We would suggest, however, that the standard of negligence is acceptable in relation to cases of property damage, as this would allow cases of negligently damaged property to be dealt with within the institution rather than relying on outside courts.

The disciplinary regime controls a much more extensive range of behaviour than does the criminal law. It is our view, however, that behaviour should only be prohibited under the disciplinary regime where it constitutes a threat to the security or good order of the institution and where it cannot be controlled by any other means. Using these criteria, a number of the current offences should be either restricted or omitted entirely.

The offence "refuses to work or fails to work to the best of his ability" can be criticized on a number of grounds. First, failure to work to the best of one's ability requires a subjective judgement that is more appropriately made in the context of decisions about promotions, demotions and work

assignments. Although a refusal to work can be objectively documented, it does not constitute a threat to institutional security. In addition, the institution has a number of means at its disposal to penalize inmates who refuse to work. In addition to the foregoing examples of demotions or job loss, it would also be appropriate to withhold pay for days not worked, as well as to withhold all or part of the inmate's remission for the month.

Although these sanctions appear to be adequate, it should be asked whether they would be sufficient in cases where there is an institution-wide work stoppage. In our view there is still no need for a specific offence provision. If the behaviour is sufficiently aggressive to constitute participating in, creating or inciting a disturbance, then that offence can be charged.

The current provision "behaves toward any other person, by his actions, language or writing, in an indecent, disrespectful, threatening or defamatory manner" is framed in extremely broad language. Generally speaking, there appears to be a fair amount of tolerance in the penitentiary setting for language which might loosely be termed "crude", much of which would contravene this provision if enforced rigourously. A broad provision of this nature tends to be enforced selectively, when inmates step over the "line" - a line which is inevitably drawn in different places by different staff members. In our view, therefore, language should not constitute an offence unless it is threatening or extremely abusive towards another person. We therefore propose the following: "behaves towards any other person, by his or her actions, language or writing, in a threatening or extremely abusive manner".

The offence provisions regarding possession of contraband and use of intoxicants within the institution are designed to be as precise as possible, in line with the requirement that penal provisions be defined with enough precision so that those to whom they are addressed will have advance notice of what conduct is prohibited and those who are required to adjudicate on violations of the rule will have clear standards upon which to base their adjudication in order to avoid arbitrariness.

The current offence provisions in regard to possession of contraband and use of intoxicants have been criticized on several counts. The Parliamentary Sub-committee Report has pointed out the problems with vagueness inherent in prohibiting "contraband" without specifying in any way those items which constitute contraband. It is difficult to develop a complete or inclusive definition of contraband, and we have therefore proposed that each inmate should receive a list of approved items, substances, etc., upon reception in an institution. Inmates would have to obtain written permission to possess an item not on the list, if circumstances warrant.

Recently the Quebec Superior Court struck down the provision in s.39 of the Regulations prohibiting consumption or other use of intoxicants.[30] In this decision (now under appeal), the offence was struck down for being both too broad and too vague, and because it could lead to arbitrariness in enforcement. The judge was of the view that a total prohibition on use of intoxicants, both inside and outside the institution, makes it impossible for the subject to know within what limits he or she can exercise his or her right to liberty and security of the person. The judge concluded that a proportional prohibition that would make it an offence to consume more than a specified level of an intoxicant would permit the subject to know the limits on his or her consumption.

After careful consideration we have come to the conclusion that a total prohibition on the use of such substances within the institution, rather than being too vague, is in fact exact and precise (provided the prohibited items are also clearly established). In regard to the broadness of the provision, we are of the view that a total ban on use of intoxicants in the institution is not only justifiable, but in fact necessary. In the special world of prisons, such a prohibition is both a necessary crime control provision and a necessary management tool. Controlling the use of intoxicants in a prison is aimed at both maintaining order, and at eliminating the trade in controlled substances and the associated conflict and violence among inmates which it engenders. This reasoning applies as well in regard to a prohibition on the use of intoxicants as a condition of temporary release from custody.

Finally, we considered whether the offence of "wilfully wasting food" should continue to be a disciplinary offence. On its face, it appears to be a relatively trivial matter in comparison with the other prohibitions against assault, escape, etc. It is our view, however, that gratuitous, wilful wasting of large amounts of food can constitute a significant problem in institutions. Another way of controlling the problem would be to ration the food given to each inmate in a more controlled fashion. Overall, it seems more desirable to maintain an environment where inmates are permitted as great a degree of freedom and responsibility as possible in relation to everyday matters such as meals. It seems inappropriate to restrict the majority of inmates to deal with relatively isolated problems, and on that basis, therefore, we are of the view that the offence should be retained.

(ii) Procedure

Sections 4 to 10 of the proposals discuss the procedures to be followed once a staff member is of the view an inmate has committed a disciplinary offence.

We recognize that in fact most infractions of the rules will be dealt with informally, through cautions, or suggestions to inmates about how to deal with particular problems. Indeed, the system simply could not function if all staff-inmate interaction were conducted at the formal level of the disciplinary system.

The Working Group is of the view that conflict resolution through informal means should be further encouraged before recourse is had to the formal disciplinary process. The regulations governing the disciplinary process in British Columbia specify that staff members have a duty to attempt to resolve problems informally before laying a disciplinary charge.[31] We have adopted this approach in section 4(a) of our proposals. This provision will be beneficial to the extent that it encourages staff and inmates to solve disputes/problems in an informal manner, through negotiation skills, rather than by resorting to the full blown disciplinary process. This model is designed to be similar to interpersonal dynamics in the outside community, and may assist

inmates to develop better problem-solving skills. In addition, we suggest that voluntary compliance with institutional norms is more likely to come about through this more personal, non-coercive, approach in which the inmate may actively participate in the resolution of the conflict.

In particular, this approach is more likely to contribute to the maintenance of order in the prison community by resolving inmate conflicts. A punishment meted out by a disciplinary board does not usually resolve the conflict between two disputing inmates. Indeed, the fact of one inmate being punished may intensify the conflict. Informal methods of conflict resolution must be recognized as a legitimate and integral part of the prison's disciplinary scheme and not be perceived simply as a means of avoiding the traditional disciplinary process.

The success of informal methods in the prison is dependent upon an educative process - both staff and inmates must learn a new set of values. Training in problem solving and anger management skills should not be limited to staff members. Inmates can benefit in two ways: the more they understand about the informal process, the more likely they are to regard it as a legitimate strategy for problem solving. Secondly, a by-product of inmate training in this area is the development of life skills for inmates which may carry over into their life in the community.

In conclusion, we suggest that conflict resolution through informal methods may better satisfy the goals of the inmate disciplinary system. It can contribute to the maintenance of good order in the institution in that it is more likely to actually <u>resolve</u> disputes than the traditional dispositions. Furthermore, it "normalizes" the disciplinary process by introducing a degree of flexibility that allows it to more closely approximate the nature of interpersonal relations outside the prison and thereby serves as an aid to the inmate's re-integration into the community.

The procedural protections in section 6 are, for the most part, identical to the current provisions. The significant difference is an inmate's entitlement in s.6(f) to an assistant at all hearings for serious offences. The interests

that are at stake when an inmate is charged with a serious disciplinary offence under our proposed provisions have led us to include this provision.

Recent judicial decisions have recognized that the principles of fundamental justice include a right to be represented by counsel in certain situations where an inmate's right to liberty or security of the person may be affected. In Howard, the Federal Court of Appeal dealt with the issue of whether the appellant had a right to counsel at a disciplinary hearing and more particularly whether section 7 of the Charter guaranteed him that right. The appellant had 267 days earned remission standing to his credit and it was subject to forfeiture as a result of the proceedings. According to Chief Justice Thurlow: "It is undoubtedly of the greatest importance to a person whose life, liberty or security of the person are at stake to have the opportunity to present his case as fully and adequately as possible....it appears to me that whether or not the person has a right to representation by counsel will depend on the circumstances of the particular case, its nature, its gravity, its complexity, the capacity of the inmate himself to understand the case and present his defence. The list is not exhaustive. And from this it seems to me, it follows that whether or not an inmate's request for representation by counsel can lawfully be refused is not properly referred to as a matter of discretion but as a matter of right where the circumstances are such that the opportunity to present the case adequately calls for representation by counsel."[32]

The current Parole Regulations contain a provision which entitles an inmate to be assisted by a person of the inmate's choice when appearing before the Parole Board.[33] This provision is broad enough to allow an inmate to be represented by counsel, or if he or she prefers, to be represented or assisted by a law student or another person who has been approved for entry into the institution. We recommend the same for serious offences. Where the charge is for a minor offence and the proceedings are in front of the institutional head, there would be no 'right' to assistance, although it would be within the adjudicator's discretion to provide it where appropriate.

What are the implications of the presence of legal counsel at disciplinary hearings?[34] Concern has been expressed that it would impose an additional burden on the prison administration such that the process will become both more cumbersome and more costly. Nonetheless counsel have been present at disciplinary hearings to a greater or lesser extent across the country, with far less disruptive effect than was first feared. Indeed, in many cases counsel may actually expedite matters, since they will advise their clients that there is little point in trying to fight charges which are clearly well founded. We are thus of the view that this type of concern is not substantiated.

A further change to the current provisions is the elimination of the intermediate offence category. This category of offence was created in response to Howard to provide for offences where remission is not at stake. However, elsewhere in the present provisions, it is suggested that loss of remission is not an appropriate penalty and that it should therefore be eliminated. In accordance with this, there would be no need for a separate category of intermediate offences. The elimination of this extra category also makes the disciplinary scheme more straightforward and understandable.

There is a need for a consistent standard of proof to be applied in all disciplinary matters. Section 9 specifies that the standard of proof for conviction for a disciplinary offence should be proof beyond a reasonable doubt. In considering the appropriate standard of proof, it is important to recognize that many of the disciplinary offences encompass the same elements or acts which constitute a criminal offence. It would thus be inappropriate to substitute a lower burden of proof than exists in the criminal courts, especially since the punishments imposed may be at least as severe as those imposed by the courts.

In addition, case law appears to indicate (despite some conflicting decisions) that s.11 of the Charter applies to disciplinary offences,[35] and therefore a lower standard of proof, such as perhaps "preponderance of evidence", may offend section 11(d), which holds that:

> 11. Any person charged with an offence has the right .... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; ....

Present CSC policy requires that the evidence presented at a disciplinary hearing substantiate beyond a reasonable doubt each act of misconduct contained in the offence report.

Section 10 is a new provision which specifies that the findings of a disciplinary court as to matters of fact are binding on institutional officials in subsequent institutional decisions. This protects inmates in the case of acquittals, and should assist the institution where there has been a conviction.

(iii) Penalties

The punishments currently available to the disciplinary court range from a "warning or reprimand" at one extreme to a period of dissociation or forfeiture of remission at the other. The latter two - dissociation and forfeiture of remission - are considered to be the most serious, are frequently imposed, and thus warrant special consideration here.

Punitive dissociation has been the subject of considerable discussion in the correctional literature. The conditions of confinement and the procedures have been extensively examined and, although the courts have held that they do not constitute "cruel and unusual" punishment, punitive dissociation is still regarded as the most severe disciplinary measure at the disposal of prison officials.

Is punitive dissociation a deterrent? The spate of literature, particularly in the early seventies, on the effects of isolation in this regard has not produced definitive results. We can say that the isolation of the inmate for a specified period of time clearly has an incapacitating effect for the duration of his or her confinement in punitive dissociation. Beyond that, there is little evidence that this strategy will deter the inmate from future rule-breaking following the expiration of his or her isolation. The 1975 federal Study

Group on Dissociation was of the opinion that the effects "appear to be negligible in terms of deterring unacceptable behaviour"; that it "simply fulfills the need for a 'cooling out' period".[36] In addition, punitive dissociation may have extremely harmful effects on individual inmates.

For these reasons, the Working Group wishes to raise the question of whether punitive dissociation should be discontinued completely, or whether it should remain available but for a more limited length of time than at present. We have tentatively suggested seven days as a more acceptable length of time, and invite comments as to the effect this may have on inmates and the system.

Forfeiture of remission as a disciplinary measure is a curious case. It is clearly a very serious disciplinary measure, as it results in more time spent incarcerated. However, not all inmates can be punished through this mechanism. Remission has no meaning in the sentence of an inmate serving an indefinite term. A "lifer" cannot benefit directly from the accumulation of remission and cannot be penalized by a forfeiture of remission. In addition, any inmate who is paroled will avoid the impact of what amounts to a "paper punishment".

It is also important to recognize that an inmate serving a very long sentence may feel the impact of remission loss less than an inmate serving a short sentence whose remission loss is proportionately more severe. Furthermore, an inmate must have remission to his or her credit in order to lose it. Therefore, an inmate with little remission accumulated cannot be subjected to the same remission loss as an inmate who has accumulated considerable remission.

Is there a "payoff"? That is, does forfeiture of remission deter the inmate from further unacceptable behaviour? Does such a punishment deter other inmates? Forfeiture of remission is viewed as a severe punishment in that it constitutes a deprivation of liberty at the end of the sentence. In addition, a disposition of loss of remission can impact indirectly on other discretionary decisions made about the inmate.

Nevertheless, as a primary punishment its usefulness is questionable. We pointed out in our Correctional Philosophy paper that deterrence is most effective when coupled with speed and certainty of punishment. In the case of forfeiture of remission, the punishment is neither swift nor certain. The inmate who forfeits remission may lose "liberty" - if he or she is not granted parole. And even where he or she is not granted parole, the punishment - the loss of liberty - may follow the commission of the act by several months or even years. As a general deterrent, it would appear to have limited capacity in view of the fact that it is not a highly visible act. Finally, there is no reason to believe that detaining an inmate for a few days longer will have any positive effect on his or her behaviour while on the street. Other dispositions currently available to the disciplinary court, such as fines and restitution, are more direct and constructive responses to disciplinary offences.

Our proposals have eliminated forfeiture of remission as a possible disciplinary penalty. However this will be an important issue for discussion during the consultations. Other aspects or functions of remission are discussed in the Working Paper on Conditional Release where we note that remission is not necessary to achieve a period of supervised release in the community at the end of a sentence, since this can readily be done through a system of presumptive release. It is also the view of the Working Group that earned remission has not been effectively implemented as a system of positive incentives towards better program participation and behaviour. The issue of whether remission should be retained at all in Canada will have to be addressed in light of all relevant factors.

The Working Group does, however, propose the addition of a new penalty, that of a work order. This is modeled on the notion of a community service order, and would provide an opportunity for an inmate to perform some useful work, in addition to his regular work or educational responsibilities, as punishment for an offence. Ideally, such an order would be related in some fashion to the offence committed, but could also involve the utilization by the offender of some special skill he or she may have, for example, tutoring in the school, assisting in one of the shops, or assisting in a

project designed to benefit either the institution or the local community. We are of the view that far greater attention should be paid to the constructive use of time by offenders, rather than placing them in isolation or keeping them in custody longer.

We have maintained the existing penalties for serious offences of $500 reimbursement and $50 fine. However we are of the view that the current arrangement which permits an order for reimbursement of up to $500 for conviction for a minor offence is inappropriate, and we recommend that this be reduced to a maximum of $50. This could be imposed in addition to a loss of privileges. We also propose a new provision permitting reimbursement to persons other than Her Majesty, for example, where another inmate's property is damaged.

In light of our proposed restrictions on the use of punitive dissociation and forfeiture of remission, it may be that the levels of monetary penalties should be raised. This could also be done in conjunction with a provision extending the period for which a punishment can be suspended from 90 days to 6 months. We therefore invite comments on the nature and appropriate limits of disciplinary sanctions.

(iv) Independent Chairpersons

Section 12 provides for the appointment of an independent chairperson to preside over hearings of offences characterized as serious. A major change is found in section 12(b), which provides that such chairpersons must have relevant experience in the practice of criminal law or a related area. Studies of the discipline process have indicated that experience with the adjudicative process is essential to the carrying out of the ICP function.

Concerns have been expressed about the degree of disparity in decision-making among ICP's. At present, the inmate may seek redress through the inmate grievance procedure with respect to claims that the established procedures were not followed by institutional staff or the institutional head where he or she is the presiding officer. However this will not usually affect the sentence imposed by the ICP. An inmate may also

apply to the Federal Court for judicial review of the decision on procedural grounds, although recent case law suggests that the wording of the Charter may also refer to or embrace substantive standards.

There are a number of ways in which disparity in sentencing and the absence of inmate recourse could be addressed. For example, the use of "sentencing guidelines" for ICP's (and institutional heads, where appropriate) may reduce disparities. The appointment of a "Chief Independent Chairperson" whose responsibility would be to hear appeals on matters of process and substance, and to promote consistency in dispositions, could further enhance standardization, and could operate in conjunction with guidelines. Section 13 provides for a chief ICP in each region. In our view this is preferable to one chief ICP located in Ottawa because of the importance of regular contact with both local ICP's and the hearing process.

At the same time, it is necessary to canvas any alternatives that may exist, short of adding an extra administrative layer, to eliminate unwarranted disparity. One possibility would be improved information systems which would promote more informed and effective decision-making.

Search of Inmates

This section deals with search of inmates and their cells. Its main concern is the tension between the legitimate security concerns of penitentiaries which may require extensive search of inmates, and an inmate's right to be secure against unreasonable search or seizure protected in s.7 and s.8 of the Charter.

Few areas are more difficult to balance. On the one hand, the significant nature of individual rights affected by search and seizure, particularly rights to security of the person and privacy, call for search procedures to be carried out according to the "least restrictive" means available. On the other hand, the institution clearly has a legitimate interest in preventing the possession of contraband; weapons, drugs and other items that may pose a real threat to the security of the institution in the most direct way by

affecting human life and safety. The Working Group presents the following proposals for consideration as to whether the proper balance has been struck.

The types of searches dealt with in this section are (1) general inspections of the living facilities of inmates; (2) sporadic and unscheduled "shakedowns" of cells and/or inmates; (3) frisk, strip, and body cavity searches of inmates; (4) searches of inmates which involve extraction of bodily substances such as urine and blood, and (5) searches by X-ray, ultra-sound or other technological means. The searches are those which apply to inmates "in custody", that is, within the institution, as well as inmates on escorted temporary absences in hospitals, etc.

a) **Proposal Regarding Search of Inmates**

Objective

1. To authorize and regulate search procedures necessary to maintain a safe, secure environment while ensuring respect for the inmate's privacy and other rights.

Definitions

2. The following definitions shall apply to all searches of inmates:

"Contraband": any item that is not on an approved list distributed to each inmate upon reception, unless the inmate has obtained written permission from the institutional head or his or her designate to have the item in his or her possession.

"Administrative search" or "inspection": the power to conduct a routine search of a person, place or vehicle without individualized suspicion, and to seize contraband or evidence of an offence, to ensure compliance with security requirements or health and safety standards of the institution.

"Investigative search": the power of search and seizure where there are reasonable grounds to believe or suspect that

a person, place or vehicle is carrying or containing contraband or evidence of an offence.

Search of a Person

Personal search may include the following:

"Walk-through scanner": a procedure in which the person being searched is required to walk through a metal detector scanner or subjected to a similar non-intrusive search by technical means.

"Frisk search": a hand search of a clothed person from head to foot, and includes the method of searching by use of a hand-held scanning device. If necessary, a frisk search may be expanded to require the person being searched to open his or her mouth, raise, lower, or open outer garments of clothing to permit a visual inspection.

"Strip search": a procedure in which the person being searched is required to undress completely before a staff member, and as well the person may be required to open his or her mouth, display the soles of his or her feet, present open hands and arms, and bend over to allow a visual inspection. In addition, all clothing and things possessed in the clothing may be searched.

"Urinalysis": a procedure in which the person being searched is required to provide a urine sample by the normal excretory process to a qualified technician for scientific analysis by an approved instrument.

"Manual body cavity search": a procedure in addition to a strip search which includes the physical probing of the rectum or vagina.

Search of Inmates

3.a) All searches are to be conducted in circumstances respectful of the privacy and dignity of the inmate to be searched. A strip search shall only be conducted by a staff member of the same sex as the inmate, and shall take place in a private area out of the sight of others,

except for a witness of the same sex. A manual body cavity search shall only be performed by a qualified medical practitioner upon written authorization of the institutional head.

b) Where a staff member seizes things he or she shall issue a receipt to the inmate. The staff member shall bring the things seized to a senior official and file with him or her a full report including the time and place of the search and seizure, the names of the inmate and staff members conducting the search, the reason why the search was made, and a description of the things seized. The report, subject to the limitations in s.3 of the provisions on inmate access to information, shall be available on request to the inmate who was searched.

c) A staff member who conducts an investigative strip search in which nothing is seized shall be required to file a post-search report with a senior official. The report shall include the time and place of the search, the names of persons involved, and the reason for the search. The report, subject to the limitations in s.3 of the provisions on inmate access to information, shall be available on request to the inmate who was searched.

d) Copies of all reports shall be retained.

Administrative Routine Search

4.a) A staff member of either sex may conduct a routine walk-through scanner search or a frisk search of an inmate

i) immediately prior to the inmate's leaving or on his or her entry or return to the institution;

ii) immediately prior to the inmate's entering or on leaving the open visiting area of an institution;

iii) where the inmate is leaving a work or activity area; and

iv) where the inmate is on a temporary absence outside the institution.

b) A staff member may conduct a routine strip search of an inmate

i) on an inmate's return to an institution;

ii) immediately on leaving the open visiting area of an institution; and

iii) on an inmate's leaving work areas in a situation where the inmate has had access to items which may constitute contraband that is of a nature which may be secreted on the body.

c) If a staff member, in the course of a lawful administrative search, discovers contraband or evidence of an offence he or she may seize it.

Investigative Search

5.a) A staff member of either sex may conduct a frisk search of an inmate where he or she has a reasonable suspicion that the inmate is carrying contraband or evidence of an offence. A reasonable suspicion is a subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent staff member to suspect that a particular person is concealing contraband on his or her body.

b) Where a staff member has reasonable grounds to believe that an inmate has committed or is committing the offence of using an intoxicant and that a urine sample is necessary to provide evidence of the offence, he or she may demand that an inmate submit as soon as possible to a urinalysis, carried out by a qualified technician. A sample shall be provided to the inmate upon request.

c) Where a staff member believes on reasonable grounds that the inmate is carrying contraband or evidence of an offence and that a strip search is necessary to detect the presence of the contraband or evidence, and he or she so satisfies his or her superior, the staff member may conduct a strip search.

d) Where a staff member, in the course of a lawful investigative search, discovers contraband or evidence of an offence, he or she may seize it. However, if during a strip search the staff member discovers contraband secreted in an intimate body cavity, he or she must obtain authorization for a manual body cavity search. A manual body cavity search shall only be authorized where the institutional head is satisfied that there are reasonable grounds to believe that an inmate is carrying contraband within an intimate body cavity and that such a search is necessary to detect and seize the contraband.

Search of Cells and Other Areas

6. If a staff member in the course of a lawful cell search discovers contraband or evidence of an offence he or she may seize it.

Administrative Search

7. Routine searches of cells and activity areas may be conducted without specific grounds on a periodic basis by staff members in accordance with a search plan providing for random, thorough searches. An inmate representative shall be present when search of a cell is conducted.

Investigative Search

8.a) A staff member who has a reasonable suspicion that contraband is located in an inmate's cell may, with written authorization from a supervisor, enter the cell and conduct a search of the cell and its contents.

b) Where the staff member in s.8(a) believes on reasonable grounds that the delay necessary to obtain written authorization would result in loss or destruction of the contraband he or she may enter the cell and search for contraband without prior written authorization.

Emergency Search

9.a) Where an uprising or similar emergency has occurred in the institution, necessitating a general lockup whereby

all inmates are confined to their cells, and there are reasonable grounds to believe that weapons, contraband or evidence relating to the emergency are to be found, a general shakedown of inmates, cells and other areas may be conducted incident to the lock-up on written authorization of the institutional head.

b) In the case of a shakedown search the staff members performing the search shall file a post-search report with the institutional head. The report should include the names of all staff members conducting the search, a list of all persons, cells and areas searched, and a description of any things seized. The portions of the report that pertain to a particular inmate shall be available on request to the inmate.

c) Copies of all reports should be retained.

b) Commentary

This part examines the present rules governing search and the impact of the Charter. It goes on to discuss the development of the proposals for discussion, set out above.

(i) Present Legal Framework

Search and seizure powers of prison officials are not mentioned in the Penitentiary Act. The only provision relating to search and seizure is found in section 41 of the Penitentiary Service Regulations, established pursuant to subsection 29(1) of the Penitentiary Act.

Subsections 41(2), (3) and (4) provide:

> (2) Subject to subsection (3), any member may search
>
> (a) any visitor, where there is reason to believe that the visitor has contraband in his possession, and if the visitor refuses to be searched he shall be refused admission to or escorted from the institution;

(b) any other member or members, where the institutional head has reason to believe that a member or members has or have contraband in his or their possession;

(c) any inmate or inmates, where a member considers such action reasonable to detect the presence of contraband or to maintain the good order of an institution; and

(d) any vehicle on institution property where there is reason to believe that such a search is necessary in order to detect the presence of contraband or to maintain good order of the institution.

(3) No female person shall be searched pursuant to subsection (2) except by a female person.

(4) There shall be a sign posted at the entrance to an institution, in a conspicuous position, to give warning that all vehicles and persons on institution property are subject to search.

In addition to these regulations, Commissioner's Directives outline procedures to be used by staff members conducting searches.[37]

(ii) Pre-Charter Law

Prior to the entrenchment in the Charter of the right of everyone "to be secure against unreasonable search or seizure", challenges to prison search practices were generally limited in scope to the argument that a directive or order sanctioning a certain practice was inconsistent with the Penitentiary Act or Regulations and that it should therefore be declared unlawful to the extent of such inconsistency.[38]

(iii) Impact of the Charter

With the introduction of the Charter, additional avenues have been opened on which challenges to prison search procedures

may be based: that the conduct complained of amounts to cruel and unusual treatment or punishment under s.12; that it infringes on security of the person protected by s.7; or, most directly, that it infringes s.8 of the Charter which guarantees to everyone the right to be secure against unreasonable search or seizure. The Supreme Court of Canada has stated that the purpose of constitutionalizing the right to be secure against unreasonable search or seizure is to protect individuals from unjustified state intrusion upon a reasonable expectation of privacy.[39] In effect, the Court has established a minimum privacy threshold to be protected by the Charter. According to the Supreme Court of Canada, section 8 protects "persons not places" and the Charter applies where there is a reasonable expectation of privacy, rather than being limited to the more narrow protection of property or privacy interests traditionally associated with a dwelling.

It is clear that while incarcerated a person does not have as great an expectation of privacy as he or she would have in a dwelling house or private office. Nonetheless an inmate retains an expectation of privacy based on what is reasonable in the circumstances. The test of what is reasonable in the circumstances is not necessarily limited by present penitentiary conditions, under which inmates retain little privacy. Such deprivations of privacy are arguably a "functional prerequisite to the institutionalizing operation, deriving from the social organization of prisons and not from the legal status of persons found in them."[40]

It may be argued for instance, that an inmate has an expectation of privacy in his or her cell which is greater than in other parts of the institution, and which may require more protection in regard to search.[41] Such protection could take the form of accountability mechanisms requiring that, except in an emergency situation, the inmate whose cell is being searched could be present during the search. This would go a long way to meet inmate complaints and concerns about what may be happening to their cell or property when they're not there. Such a provision could, however, present serious logistical problems for both management and inmates; it may, for instance, result in inmates spending more time in their cells when they would otherwise be participating in programs.

To meet this concern, it may be more appropriate for an inmate representative, such as a member of the Inmate Committee, to be present during cell searches. The Working Group seeks comments as to the advisability of such an approach proposed in s.7 of the foregoing provisions. In addressing all these questions, it should be remembered that today the right to privacy is recognized as fundamental in Canadian society, and protection of privacy is being accorded increased legal safeguards and protections. In line with this approach, every effort should be made to provide an inmate with as much privacy as possible.

A further reason for protecting an inmate's reasonable expectation of privacy relates to the statement of purpose and principles of corrections, which recognizes the importance of a safe and healthful environment in encouraging offenders to prepare for successful re-integration into the community. A reasonable expectation of privacy is an element of the kind of institutional environment which is conducive to this goal.

Moreover, social scientists studying the escalation of violence in prisons have suggested that dealing with this problem through increases in search and seizure may be counter-productive.[42] Increases in search may lead to increased violence by interfering with whatever amount of privacy an inmate may reasonably expect. Without legal protection, an inmate's rights in this regard may be thoroughly eroded and at the expense, rather than the benefit, of prison security:

> "Depriving inmates of any residuum of privacy or possessary rights is in fact plainly contrary to institutional goals. Sociologists recognize that prisoners deprived of any sense of individuality devalue themselves and others and therefore are more prone to violence towards themselves or others."[43]

The Supreme Court of Canada, in Hunter v. Southam, made a number of important observations on the nature of the right protected in section 8 of the Charter and on the reasonableness standard which it embodies. Some of the conclusions drawn from this influential decision may be summarized as follows:

1) "The Canadian Charter of Rights and Freedoms is a purposive document...intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for government action."

2) The purpose of section 8 is "to protect individuals from unjustified state intrusions upon their privacy". Section 8 guarantees a "reasonable" expectation of privacy. "There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass." Section 8 protects people, not places, in dwellings and other premises.

3) In determining the reasonableness or unreasonableness of the search or seizure, regard must be paid to the impact on the subject of the search and seizure and "not simply on its rationality in furthering some valid governmental objective".

4) As a general rule, a search warrant is required for a reasonable search and seizure. Where it is feasible to obtain prior authorization, "such authorization is a precondition for a valid search and seizure".

5) For such an authorization to be meaningful, the person granting authorization for the search must "be able to assess the evidence in an entirely neutral and impartial manner".

6) There must be an objective standard for granting an authorization for a search. The minimum standard for section 8 in relation to the investigation of offences is "reasonable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search".

7) The relevant standard for granting an authorization might well be a different one "where the state's interest is not simply law enforcement" for instance, where state security is involved, or arguably, where the state's interest relates to security concerns of correctional institutions.

The "protection" afforded an individual by the Charter corresponds to the requirement for procedural safeguards and restrictions upon government officials. For example, the requirement that officials obtain a search warrant or other form of authorization before conducting a search protects the rights of the subject of the search by ensuring that the need for the search is verified by an independent official.

The issue, then, is the degree to which the safeguards and protections afforded individuals outside prison must be applied within prison. This may be restated in terms of whether the protections provided by the Charter are limited either through the meaning of "unreasonable" in section 8 or through the limitation clause in section 1 of the Charter.

The first question is whether section 8 applies to search of inmates. An examination of the wording of section 8 shows that "everyone" has the right to be secure against unreasonable search or seizure. There is nothing to indicate that the plain meaning of "everyone" should in any way be construed as limiting the right in regard to any group or individual. "Everyone" has already been given a broad and liberal interpretation in another context. It has been held that "everyone" means all human beings and all entities that are capable of enjoying the benefit of security against unreasonable search or seizure, and includes corporations.[44] In short, section 8 wording indicates that everyone, including an inmate, has the right to be secure against unreasonable search or seizure.

This is consistent with the fundamental principle that an inmate retains rights except for those necessarily limited by incarceration. The fact of being imprisoned cannot alone be enough to alter the individual's right to privacy, dignity, and personal security. The question then becomes whether a particular search or seizure, or search or seizure provision, intrudes on an inmate's reasonable expectation of privacy.

It is obvious that the state would have a great deal of difficulty in operating a secure prison system if all search and seizure protections of open society, such as a requirement for a search warrant, were to be imposed before every search of an inmate. There is a strong need for the state's conduct in the prison context to be regulated under a different, more flexible standard.

In the United States, the concept of flexible application of Fourth Amendment search and seizure protections originated with the US Supreme Court in routine government inspection cases, in weapons frisk cases, and in border search cases. In these cases, however, the courts, while recognizing tradi-

tional state interests, have been highly sensitive to the varying degrees of intrusiveness involved.[45] Of particular relevance is the American jurisprudence surrounding border searches.[46] Under the Fourth Amendment, border searches can be conducted on less than reasonable grounds. The standard shifts with the intrusiveness of the search. The courts have recognized a sliding scale of reasonableness which matches the intrusiveness of the search with the degree of prior suspicion or reasonable grounds necessary to satisfy the Fourth Amendment. In the border context, a customs inspector may search baggage or outer garments with "little or no threshold suspicion". Strip searches and visual body cavity inspections, however, require a showing of antecedent 'real suspicion'. Finally, manual body cavity probes can be performed only where there is a "clear indication" that contraband is secreted in the area searched.

In Canada, as well, border searches for contraband have been recognized by the courts as falling into a very special category. If a person reasonably arouses suspicion by giving the appearance of concealing something on his or her person, then he or she must expect to be asked to remove sufficient clothing to confirm or dispel the suspicion.[47]

The border search cases provide a useful precedent for constructing an analytical framework for prison searches. The sliding scale of reasonableness adopted in the border search cases shows that there exists a "middle ground" between, on the one hand, saddling the government with an unrealistically high standard of proof, such as individualized reasonable grounds to believe, and on the other, allowing officials unfettered discretion to conduct searches. A sliding scale of reasonableness that balances the interests of the state and the individual and that recognizes how these interests change in varying circumstances has been adopted in the proposed procedures for search of inmates.

A major consideration in relying on a "sliding scale of reasonableness" is the precise type of search at issue. There is a basic distinction between "investigative" searches and "administrative" or routine searches or inspections.

Investigative searches are those which most closely resemble a criminal law enforcement search. They are based upon reasonable grounds to believe or suspect that an offence has been committed. An investigative search is one which would be performed, for example, where there is reason to believe a particular inmate is concealing contraband in a particular place.

Administrative searches, on the other hand, are based on ongoing general institutional security needs and are performed on a routine basis. They are not based on grounds of suspicion or belief that an offence has been committed, nor are they directed at a particular inmate. An administrative search may consist, for example, of a personal search performed on a routine basis on every inmate entering or reentering an institution in order to prevent the introduction of contraband. It is this type of search for which a more flexible standard may be necessary. It must at the same time be recognized that without some suspicion or other basis justifying the search, an administrative search without specific cause on a periodic basis may offend the standard in section 8 of the Charter. Provisions authorizing administrative searches must be clearly justifiable in relation to a legitimate correctional purpose in order to comply with section 1 of the Charter. Thus routine searches of inmates entering the penitentiary from outside appear reasonable, while mandatory searches of all inmates in a situation where they have had no access to the outside, to visitors or to contraband would likely be perceived as arbitrary and not justifiable.

Any departures from the constitutional protection generally given to search and seizure rights may be justified in relation to inmates either through the "reasonableness" standard of section 8 or the limitation clause of section 1 of the Charter. Section 8 of the Charter does not proscribe all searches, only unreasonable ones. Therefore, a challenged search which deviates from the traditional criminal law standard could still be found to be reasonable in the prison context.

There is more scope for balancing rights and interests affected through the section 1 limitation clause. As

discussed in the Introduction, the Supreme Court of Canada has established a strict test to be met before Charter rights may be limited. A form of proportionality test is involved with 3 components: 1) the limiting measures must be fair and not arbitrary, carefully designed to achieve the objective and rationally connected to it; 2) the means should impair the right in question as little as possible; and 3) there must be a proportionality between the effects of the limiting measure and the objective - the more severe the negative effects of a measure, the more important the objective must be.

The sliding scale of reasonableness on which the proposals are based, which matches the intrusiveness of a search with the safeguards which must surround it, would appear to fit squarely within the Supreme Court of Canada's test. Where the limitations on the rights set out in the Charter meet the test articulated in section 1, the Charter has not been violated and the court's remedial powers thereunder are not called into play.

(iv) Deficiencies of the Present Framework

As noted earlier, search and seizure powers of prison officials are not mentioned in the Penitentiary Act, but are dealt with in section 41 of the Penitentiary Service Regulations. This section sets out the standard for searches of inmates, visitors, staff members and vehicles on penitentiary property. Different standards apply to these groups. A visitor may be searched "where there is reason to believe that the visitor has contraband in his possession". A staff member may be searched "where the institutional head has reason to believe that a member or members has or have contraband in his or their possession". Inmates are subject to a much lower standard and may be searched "where a member considers such action reasonable to detect the presence of contraband or to maintain the good order of the institution". It is important to note that the justification for this power is not limited to the control of contraband, but in addition, includes the much broader "interests of good order" test which considerably expands the basis of inmate search.

Despite this broad test, the Regulation is not comprehensive. It fails to make the necessary distinction between administrative and investigative search of inmates. Correctional authorities clearly have an interest in inspecting and searching inmates in order to control contraband. However, if an offence against the penitentiary regulations or other law is committed, it is also important that there be a residual power to enable staff members to search for and seize evidence of the offence. Such a power should be explicitly provided and the extremely vague "interests of good order" test replaced with specific grounds. Furthermore, the provision ought to specifically provide for the power to conduct routine administrative searches. In the provisions for discussion, the test for investigative search is specific and is based on the reasonableness standard of the Charter, and administrative searches are specifically allowed to be conducted on a routine basis.

The nature of the different standards in section 41(2) is significant. It is possible to view visitors and staff members as having a status in which "consent" may be realistically viewed as a factor. In other words, since both groups exercise some degree of choice in entering penitentiary premises, it is possible to argue that any departure from normal rules pertaining to search is a matter which these groups may agree to in order to gain access to the restricted area of the penitentiary. The Regulation, however, does not use consent as a basis for search; it adheres rather to the association of the members or visitors searched with contraband, and requires "reason to believe". The "reasonable to detect the presence of contraband" test for inmates, on the other hand, is extremely ambiguous, and arguably, deviates far from the reasonableness standard prescribed by the Charter.

The primary concern in relation to section 41(2)(c) is the extraordinarily broad discretion given to the individual staff member. The decision to perform any kind of search is totally within the discretion of the individual member. When this discretion is coupled with a weak and vague test (where a member "considers" rather than "believes on reasonable grounds"), it creates great potential for abuse. The problem is further exacerbated by the lack of post-search account-

ability mechanisms, such as reporting requirements. The proposals for consideration provide that receipts be given when things are seized, and that reports be filled out when more intrusive types of searches are conducted.

One further issue concerning the present Regulations arises from the provision in 41(3) that no female shall be searched except by another female. This provision appears to be clearly discriminatory on its face, as it precludes male searches of females, but not female searches of males. Without going into the various rationales both for and against such a position, it should be noted that there are presently cases before the court in which male inmates have challenged under the Charter the practice of cross-sex frisk searches and strip searches, even in cases of emergency, because of violation of their privacy. In these cases the courts must balance the privacy interests of the inmates (both male and female) against the equal opportunity interests of the female staff members. Depending on the outcome of these decisions, subsection 41(3) may be amended.

In addition to the Penitentiary Service Regulations there exist policy guidelines in the form of Commissioner's Directives and Divisional Instructions which outline procedures to be used by staff members conducting searches. Although these Directives result in limitations on inmate rights in regard to search, they are not generally considered to have the force of law. As discussed in the Framework paper, serious concerns are raised since any limitations on Charter rights must be "prescribed by law". These concerns would be met by setting out the procedures governing search of inmates in legislation or regulation. Searches performed in the course of administering and enforcing legislative schemes as diverse as the Criminal Code and the Migratory Bird Convention Act are provided for in the relevant legislation, and search of inmates in penitentiaries should not constitute an exception to this rule. The security element in penitentiaries does not provide a convincing reason for an exception as the Criminal Code and the Official Secrets Act, as well as other federal statutes, involve matters deemed critical to public safety and security, and yet contain detailed search provisions. Rules governing search and seizure should be rationally set out in the legislation itself, as in the case of

all other federal search powers. This would represent the main change over the present situation, in addition to the more clearly articulated tests for different kinds of searches articulated above.

A further difference between current policy and these proposals is in relation to manual body cavity searches. While section 7(c) of CD571 requires the consent of the inmate before such a search can be performed, section 5(d) of the above proposals would permit a manual body cavity search without the inmate's consent where a number of safeguards are met, including requirements for prior authorization and that the search be conducted only by a qualified medical practitioner.

Even though it is recognized good practice to seek the cooperation of the subject of the search by asking them, for example, to voluntarily hand over the things to be seized, this issue raises for discussion questions about the validity of "consent" in the context of an inmate faced with the choice of consenting to a manual body cavity search or being placed in an "observation cell" for an indefinite period of time.

A further factor to be considered is whether it would be unrealistic to expect that medical practitioners will agree to conduct body cavity searches in the absence of a free and voluntary consent.

(v) Other Types of Searches

Also relevant to this discussion are searches of inmates which involve extraction and collection of internal bodily substances (such as urine and blood) and searches by technological means (such as X-ray and ultra-sound).

Searches which require extraction and collection of internal bodily substances fall generally within the class of investigative procedures which involves the gathering of evidence directly from the individual's person.[48] Such procedures have received special attention in Anglo-Canadian jurisprudence insofar as they are inextricably bound to general concepts of fairness and individual rights. Such procedures

have traditionally only been allowed where there are reasonable grounds to believe a person has committed an offence, and subject to the strictest procedural safeguards. Even so, several issues arise in regard to the authorization, execution, and evidentiary use of such procedures. With the Charter, concerns have arisen that such tests could infringe the protection against self-incrimination (providing evidence against yourself) and security of the person, as well as potentially constituting unreasonable search or seizure, or cruel and unusual treatment or punishment.

Our proposals have been developed with a recognition of the intrusive nature of such procedures. We have refrained from recommending the use of blood sampling searches which require the puncturing of human skin, as we are of the view that they are unacceptably intrusive.[49] This approach is also consistent with CSC policy.

Changes to present CSC policy are raised for discussion in regard to urinalysis, however. CSC implemented a urinalysis program to detect the presence and deter the use of drugs and alcohol by inmates. Amendments to the Penitentiary Service Regulations (PSRs) in May 1985 provided authority for urinalysis. The test set out in the Regulations, however, was a very broad one: "where a member considered it necessary to detect the presence of an intoxicant in the body". We have suggested, because of the concerns set out above, that one approach would be that urinalysis should be authorized only where there are reasonable grounds to believe that the offence of being intoxicated has been or is being committed and urinalysis is necessary to obtain evidence to confirm it. This would restrict the authority for urinalysis in s.41.1 of the PSRs, and is consistent with a judgement of the Quebec Superior Court[50] (now under appeal) which declared the Regulation null and void.

At the same time, we recognize that with the serious problem of drug use inside institutions the system must use all appropriate means at its disposal to reduce and eliminate it. The main question for consultation is thus whether mandatory or random drug testing would be more appropriate, considering the seriousness of the problem, than a more

limited urinalysis provision based on reasonable grounds to believe.

When it comes to consideration of searches conducted by X-ray, ultra-sound and other technological means, we are of the view that, absent proof of ill effects on health, they should be used instead of body cavity searches whenever feasible, provided the inmate agrees. Although we have at this stage made no specific proposal, we urge the development and refinement of such methods.

One final word on search: although this paper is primarily concerned with search and seizure powers as they relate to inmates, it must be noted that efforts to increase the security of the institution through increases in both the number and level of intrusiveness of search of inmates may be both counter-productive and ill-conceived. As argued previously, increases in search of inmates may lead to further erosion of their privacy, which in turn may dehumanize and result in increased frustration and violence.

Basic Rights and Freedoms

a) **Contact With the Outside World**

Losing meaningful access to the outside world has been and continues to be one of the most debilitating aspects of incarceration. These sections' proposals are designed to overcome, so far as may be possible, certain common aspects of incarceration which undermine and impede an inmate's chances of preserving meaningful contact with the outside world.

Outside prison, the freedom to visit with friends, talk on the telephone, or use the mails is not something that is provided for in legislation, nor is it specifically protected in the Charter. However these freedoms are matters falling within the ambit of the fundamental freedoms, such as freedom of expression, assembly and association, articulated in section 2 of the Charter[51], and should be protected to the greatest extent possible. In addition, they supply a vital link between the inmate and the outside world; numerous studies have concluded that reintegration of offenders into

the community is enhanced where there has been regular contact between the inmate and the outside world during incarceration.

We therefore approach this area from the perspective that inmates retain the freedom to maintain contact with the outside world, through visits, correspondence and telephone. This freedom should be limited only where necessary to assure the security and good order of the institution, and the mechanisms chosen to limit the inmate's access to the outside world should be the least restrictive alternatives available.

Insofar as contact with the outside world reduces inmate frustration by providing an outlet, by increasing self-esteem and by enhancing the sense of belonging to the outside world, the goal of immediate institutional security may actually be enhanced by contact with the outside world. Nonetheless, it is also apparent that contact with the outside world may, in some instances, jeopardize the immediate security of the institution by, for example, introducing "outsiders" into the institution, thereby providing an avenue for the introduction of contraband. Accordingly, while clearly affirming an inmate's right to access to the outside world, we recognize that the security concerns of the institution must be identified and taken into account in the following proposals governing mail and visits.

(i) Mail

The right to correspond, to receive publications such as books, newspapers, magazines and other mail, is protected by the Charter's guarantee of freedom of expression. Therefore, it constitutes a retained right for inmates which may be restricted only in line with the Oakes standard. The outside communicator's expression is implicated in these substantive areas as well, and thus any restrictions must take into account the impact upon free persons' expression.

Correspondence is fundamental to the reintegration goal of corrections: most prisons are sufficiently remote that the mail constitutes the prime means of communication. Where inmates' families and friends reside beyond easy commuting distance to the institution, correspondence serves as the

most important link between inmates and others outside the prison environment. Access to publications such as newspapers, magazines and books is also important as a means of keeping current with the political, economic and social concerns of the outside world, a world which the inmate, in almost every case, will one day re-enter.

Arbitrary and broad restrictions upon correspondence, literature, and other mail, such as officials' reading of correspondence and censorship of correspondence and literature, raises serious legal and policy concerns. Although current policy proscribes the reading of mail in federal institutions without the prior approval of the institutional head, inmates cannot enforce this policy, and indeed, have no way of knowing whether it is being followed.

The potential which correspondence has for maintaining ties with the outside world can only be negatively affected by the knowledge that correspondence may be read or censored by institutional authorities. Moreover, short term institutional security may be jeopardized by the frustration and anger inmates experience when they feel that restrictions are arbitrary and overbroad. In 1976, the Ohio Advisory Committee to the United States Commission on Civil Rights reported that their hearings revealed that after the state of Ohio ended mail censorship and enhanced other contact-with-the-outside-world rights, such as visits and contact with the media, prisoner morale was bolstered. Moreover, one expert witness testified that in her opinion violence and brutality within the Ohio prisons had "ceased to be a large-scale problem". She attributed this improvement to the newly instituted prohibition on mail censorship.[52]

The right to confidential correspondence also provides a crucial avenue to obtain the ear of the general public, public officials, the media and the courts. Censorship and other "chilling" exercises, on the other hand, render prison a closed society, one which operates away from the scrutiny which public institutions deserve. As such, uncensored, confidential correspondence provides an enormously important conduit for public access to and knowledge of the prison system. Due to the importance of such contact, correspondence between legal counsel, the courts and public officials

receives special attention in the proposals for possible inclusion in law which are set out below.

The major security concern which must be balanced against the above considerations is the potential for introducing contraband into the institution in envelopes and packages. The introduction of drugs and money is of particular concern, but the introduction of weapons concealed in packages is also a possibility. Secondary security concerns articulated by correctional authorities include the potential for escape plans and the planning of illegal activities as well as the potential of some reading and viewing material to increase prison violence. Given the importance of freedom of expression in a society such as ours, however, these concerns must be met in such ways as infringe as little as possible upon inmates', and in some cases their outside correspondents', freedom of expression.

Complaints have been made with regard to institutional authorities reading inmates' correspondence.[53] It has been suggested that this may frequently be done without specific authorization from the institutional head and with no valid security concern in mind. The suggestion has also been made that even authorized reading of inmates' correspondence has very rarely exposed immediate threats to institutional security, conspiracies to promote illegal activity or escape plans. Moreover, the fact that institutions rarely censor correspondence by deletion suggests that they are finding little which would constitute a threat to the institution or the public. For our purposes it is important to note that in jurisdictions where routine reading and censoring of inmate mail has been abolished (in the US in Washington, Ohio and New York, for example) there has been no escalation in security violations.[54]

Given the importance of protecting inmates' freedom of expression and the fact that the major security concern is associated with the passage of contraband through the mail, the provisions have tailored the restrictions upon inmates' retained right of expression to deal specifically with that concern. Additionally, they suggest that content restrictions upon publications which are thought likely to increase or lead to prison violence may be called for. They also

provide for certain restrictions as to who an inmate may correspond with.

Mail

1. Inmates have the right to send and receive mail freely except as restricted herein and subject to any other legal restrictions on the use of the mails.

Postal Observer

2. The inmate committee may appoint an inmate, designated the postal observer, to observe the actions of the postal officer in receiving, opening, and distributing mail. The postal observer shall witness any opening of mail, and shall sign, as witness, a daily statement by the postal officer indicating all items of alleged contraband found in the mail, or that there was none, and that mail was not read or censored, if such is the case.

Privileged Correspondence

3. Correspondence to and from persons listed in Schedule A hereto is designated as privileged, and may not be opened or inspected by correctional authorities.

Outgoing Correspondence

4. Outgoing correspondence other than that covered by s.3 above may be sealed by the inmate and shall not be opened, but

a) such correspondence may be submitted to inspection that does not involve opening the mail, and where such inspection reveals reasonable grounds to believe that the envelope or package contains an object which may constitute a threat to public safety or evidence of an offence, the institutional head may authorize the opening of the package or envelope for inspection, but not reading, of the contents.

b) A package or envelope may only be opened pursuant to paragraph a) above in the presence of the postal observer, and the inmate sending the mail must be advised in writing of the reasons that the mail was opened.

5. Inmates may correspond with whomever they wish, except that the institution may refuse to permit correspondence where the addressee, or the parent or guardian of an addressee who is a minor, requests that they receive no further correspondence from an inmate. The inmate must be notified in writing that the correspondence may not be sent, with reasons for the prohibition.

Incoming Correspondence

6. Incoming correspondence may be opened in the presence of the postal observer so that the contents of the envelope may be inspected for contraband, but the correspondence may not be read.

Publications

7. The institutional head may prohibit entry into the institution of any publication which

a) violates federal or provincial legislation governing publications;

b) portrays excessive violence and/or aggression and which is likely to incite inmates to violence; or

c) contains detailed information on the fabrication of weapons or the commission of criminal acts which would endanger the security of the institution or public safety; and

d) where publications are prohibited pursuant to paragraph a), b) or c) above, the inmate shall be given reasons in writing for the prohibition.

General

8. Inmates who are unable to read or write are entitled to the assistance of a staff member, volunteer, or another inmate for correspondence purposes.

9. Indigent inmates shall receive postage, stationary and envelopes for at least five general correspondence letters per week and as many privileged correspondence letters as requested.

Schedule A

1. Solicitor General of Canada
2. Deputy Solicitor General of Canada
3. Commissioner of Corrections
4. Chairman of the National Parole Board
5. Correctional Investigator
6. Inspector General
7. Governor General of Canada
8. Canadian Human Rights Commission
9. Commissioner of Official Languages
10. Information and Privacy Commissioners
11. Members of the House of Commons
12. Members of the Senate
13. Members of the Legislative Council for the Yukon and the Northwest Territories
14. Members of the Provincial Legislatures
15. Provincial Ombudsmen
16. Consular Officials
17. Judges and Magistrates of Canadian courts (including their Registrars)
18. Legal counsel, legal aid services or other agencies providing legal services to inmates

Commentary

Section 1 articulates the basic right to send and receive mail freely, subject to permissible restrictions which are set out subsequently in the proposals for discussion and subject to restrictions which may exist in other legislation. These latter restrictions include laws concerning sedition, defamation, libel, hate literature, pornography and obscenity and the like: they may be utilized to control inmates' freedom of expression to the same extent that the expression of free persons may be controlled.

Section 2 proposes the most significant change to institutional operations related to mail: that an inmate observe and inspect any opening of inmate mail. Although the most desirable approach from the inmate's perspective would be for

all mail to be inspected in the presence of the inmate who is sending or receiving it, the Working Group recognizes that this would place a significant burden on institutional authorities. On the other hand, it has long been recognized that inappropriate inspection and scrutiny of inmate mail is particularly difficult for inmates to challenge. For the most part they cannot know whether their mail is being read, and yet the belief that it may be has a significant "chilling" effect on their communications. An inmate observer who oversees the inspection of correspondence would improve inmate confidence that, in the absence of formal notification, his or her mail is not being routinely opened and read. This would be of benefit not only to inmates, but also to staff. Of course, the provision for a postal observer raises several concerns which must be discussed during the course of our consultations. It has been pointed out, for instance, that it may not, on occasion, be in an inmate's best interests to have it known by other inmates that contraband was seized from a particular inmate's mail or that a particular inmate received money to be deposited into his or her account. In fact, it may even constitute a threat to the inmate's personal security and affect his or her privacy rights and thus may contravene section 7 of the Charter.

The power to open and inspect mail is dealt with in sections 4 and 6. Because outgoing and incoming mail present different levels of concern, they are treated differently. Clearly, outgoing mail presents far less of a security threat to the institution than does incoming mail. Outgoing mail may, however, present some contraband concern. For example, money may be mailed in exchange for a future receipt of contraband. Thus section 4 permits the institution to inspect outgoing envelopes and packages without opening them. Where that inspection reveals reasonable grounds to believe that the envelope or package contains an object which may constitute a threat to safety, or an object which could constitute evidence of an offence, the institutional head may authorize the opening of the mail to inspect the contents. Thus, the institution may deal with concern for both protection of the public and trafficking in drugs or other contraband without resort to a search warrant. At the same time, the inmates'

and prospective recipients' freedom of expression rights are protected to the fullest extent possible, consistent with institutional security concerns, by ensuring that the mail is opened in the presence of the observer and the inmate sending the mail is notified in writing of the action taken. Incoming mail may be opened on a routine basis pursuant to section 6 of the proposals because it presents a greater security threat than does outgoing mail. Again, it is proposed that this be done in the presence of the inmate observer.

Unlike the proposals for discussion regarding the receipt of publications (s.7) which require some reading or other perusal of the publication in order to determine content, other mail may not be read. It seems clear that on a sliding scale of rights and interests, correspondence, both general and privileged, is entitled to more privacy-protection and protection against censorship than are publications. By their very nature, the latter are intended for public consumption. Correspondence, on the other hand, is not, and the chilling effect of potential reading or perusal is much greater. Insofar as the introduction of contraband is the major concern, physical inspection will meet this important security concern. We have also suggested that while illegal dealings, conspiracies and escape plans may occasionally pass through the mail, the threat is relatively remote and the importance of unchilled freedom of expression to successful re-integration so great, that to allow broad-based reading of mail would amount to using "an elephant gun to kill a mouse", which is precisely the sort of overreaction prohibited under the Oakes section one test. This is not to say, however, that authorities would not be able to deal with situations where there are reasonable grounds to believe that criminal activity is taking place or being planned through inmate mail: in such situations the normal criminal process would apply. The experience in American jurisdictions referred to earlier in this section suggests that this is the preferable approach.

Section 5 would allow the institution latitude to restrict correspondence where the addressee, or the parent or guardian of an addressee who is a minor, requests it. This provision is designed to deal with situations where victims of an offence receive unwelcome correspondence from an inmate. It

is the view of the Working Group that the situation of victims mandates special protection. However the proposal as presently framed is also broad enough to encompass a situation where a family member who wishes to terminate contact with an inmate may request that the correctional authorities intervene to intercept mail. We would suggest that routine consent to this type of a request by a family member should be avoided, since it would place institutional authorities in an inappropriate role vis-à-vis the personal relationships of inmates. If threats are being made in letters, the recipients can, and should, report these to the police. If the letters are simply unwelcome, the recipients need not open them.

There remains the question of whether correspondence with other persons should ever be prohibited, for example, with ex-inmates, or with persons believed to be associated with organized crime. The Working Group suggests that this should not be done. As noted above, the criminal process may be utilized where there are reasonable grounds to believe criminal activity is being planned. We are of the view that a restriction based only on the correspondent's status as an ex-inmate is too great an infringement on freedom of expression.

Section 7 provides for restrictions on the entry of publications in addition to the Criminal Code and other limitations discussed above. Recognizing that penitentiaries may be more explosive environments than other institutions, subsections b) and c) empower the institutional head to prohibit the entry of publications which are likely, by virtue of their violent or aggressive content, to incite violence. It must be noted that in light of the decision in Ontario Film and Video Society v. Ontario Board of Censors,[55] objective standards and criteria by which to judge what constitutes excessive violence and/or aggression would have to be developed. According to the case, any limitations on freedom of expression cannot be left to administrative discretion and instead must be articulated with some precision in a provision that has the force of law.

(ii) Visits

The opportunity to visit with friends, family members and other persons from the outside world may be the most effective way to maintain bonds necessary for successful re-integration. As the Correctional Philosophy paper stresses, activities such as visits should be viewed as fulfilling an important objective of the institution, not just as a humanitarian concession to inmates. By introducing outside persons into the institution, however, visiting may present a greater potential threat to the immediate security of the institution than correspondence and telephone conversations. Thus, in developing proposals in this area, the potential problems associated with visiting must be identified and balanced with the benefits. This is the approach of present CSC policy; these provisions go further in that they would be specified in law.

Visits

1. All inmates have the right to visit with whomever they choose, subject to reasonable time and place limitations and to the restrictions herein.

Refusal or Suspension of Right to Visit

2.a) The institutional head or designate may refuse or suspend a particular visit

i) where there are reasonable grounds to believe that immediate and pressing security concerns demand it, and where restrictions on the manner in which the visit takes place would not be adequate to control the risk; or

ii) where during a public visit, either the inmate or the visitor behaves in a manner that exceeds the bounds of acceptable behaviour in a public place.

b) Where the visit is suspended or refused, reasons for such shall be documented and the inmate and visitor informed of such reasons.

c) The institutional head may order a complete suspension of all rights to visit in an institution only where the

security of the institution is at significant risk and where there is no less drastic alternative. Any such order must be reviewed by the Deputy Commissioner of the Region after 5 days and by the Commissioner of Corrections after 14 days.

Security and Monitoring of Visits

3. The institutional head shall respect, protect and enhance the privacy of inmate visits to the greatest degree possible, however, he or she may authorize the visual supervision of the visiting area in an unobtrusive, nonmechanical manner, and, in the case of a section of a visiting area which is inaccessible, he or she may authorize mechanical visual monitoring.

4. The institutional head shall protect the privacy of inmate-counsel interviews by

a) providing interviewing facilities which may be within sight but not within hearing of any person and

b) providing interview facilities which have no glass or metal barrier between inmate and counsel, except where counsel requests a barrier for his or her safety.

5. Interviews between inmate and legal counsel shall not be monitored or recorded with listening or video devices.

6. Subject to s.3, there shall be no interception by means of an electro-magnetic, acoustic, mechanical or other device of an inmate's visit, unless prior authorization from the institutional head has been obtained, on the basis that there is evidence of a threat to the security of the institution.

Open Visiting

7. Visits shall take place with no physical barrier to personal contact except where

a) it is necessary for the safety of the visitor, or

b) the visit would present a serious threat to the security of the institution,

and, where less drastic means (such as non-intrusive search) will not meet the security concern.

8. Where visiting is restricted pursuant to section 7 a) or b), the reasons shall be fully documented and the inmate and visitor informed of those reasons and provided with an opportunity to respond.

Commentary

These proposals recognize the importance of the right to privacy in the context of visiting while at the same time providing for the possibility of monitoring visits where legitimate security concerns warrant it. They follow Maltby[56], which held that nonmechanical visual surveillance of visits through glass is a reasonable limit on freedom of association and expression.

The importance of privacy to the well-being of inmates, and the importance of contacts with the outside world to the goal of re-integration, is documented in numerous studies on inmate visits.[57] However, the retained right of privacy, or at least "a reasonable expectation of privacy", and the importance of privacy in communications between inmates and others must be balanced against the security needs of the institution. The major security concern related to visits is the passage of contraband, particularly drugs and money.

Finally, while intrusive surveillance has been justified on the theory that it is instrumental in monitoring the pulse of the institution, it has also been suggested that close relationships between staff and inmates and awareness of and sensitivity to inmate-inmate interactions and patterns is much more telling. To the extent that personal, nonmechanical supervision of such relationships is less intrusive than mechanical surveillance of inmate-visitor interactions, and promotes better staff-inmate relationships, the former is to be preferred. This is recognized in present policy: CD 770, entitled Visiting, states that to the greatest extent possible, visits shall be provided in a friendly, relaxed environment. It stresses that dynamic security is of particular importance in visiting areas. It seems reasonable, however, that where there exists a section of a visiting area which is

inaccessible from view, mechanical surveillance may take place where the institutional head authorizes it.

Security is not the only issue to be considered here: the impact of different types of surveillance on inmates and their visitors is also relevant. Views on the relative intrusiveness of personal monitoring of visits, as opposed to video or audio monitoring, will be solicited during our consultations. The proposal in section 3 recognizes inmates' retained right to privacy while allowing nonmechanical, visual supervision of the visiting area in response to legitimate institutional security concerns. Insofar as the major, enduring security concern is the passage of tangible items, viewing of the area coupled with legitimate non-intrusive searches which may be permitted pre- and post-visit, and the provision in section 6 for more intrusive surveillance in certain, unusual circumstances appear to be the most appropriate means of balancing the interests at stake.

Sections 4 and 5 of the recommendations essentially codify the common law in regard to solicitor-client privilege. Communications between solicitor and client are confidential and therefore require 'extraordinary precautions'. In R. v. Faid,[55] the Alberta Supreme Court held that the Canadian Bill of Rights required that the institution in question must provide facilities for inmate-solicitor interviews that are "within sight but not within hearing of any person" and that the interview facility must not, as a general rule, impose a barrier between inmate and counsel. This is also reflected in present CSC policy.

Clandestine surveillance and monitoring of visits by means of tape recording and video cameras is highly intrusive. Section 6 of the proposals therefore attempts to provide for reasonable, yet restricted, monitoring powers by requiring prior authorization to ensure that electronic monitoring is not carried out routinely.

While visual surveillance by video taping might be slightly less intrusive than auditory surveillance, it is felt that the chilling effect fear of video surveillance would most likely have upon visiting with family and friends, where

closeness and touching is to be expected, requires that its use should be reserved for specific situations of concern. The fact that many inmates do not have conjugal visits highlights the importance of limiting the use of video surveillance. Moreover, given the typical security concerns, unaided visual surveillance should be able to meet those security needs as a matter of course.

The importance of open or contact visits to both inmates and the security of the institution is highlighted in many different sources. In Maltby, where the inmates were not allowed contact visits, the Saskatchewan Court of Queen's Bench relied upon Karl Menninger's assessment of the importance of contact visits. The Court stated:

> The impact of deprivation of contact visits and their psychological importances are real. Dr. Karl Menninger, the psychiatrist of national renown, who has studied and written about prison conditions over a long lifetime, deplored non-contact visits as "the most unpleasant and most disturbing detail in the whole prison" and described them as "a violation of ordinary principles of humanity".[59]

In keeping with the importance of maximizing the opportunity for contact visits on potential reintegration of the inmate, section 7 of the proposals seeks to enhance the availability of contact visits.

b) Inmate Organization, Association and Assembly

General Rights

1. Inmates have the right to form and join organizations for any lawful purpose, to solicit membership without coercion, to associate, to assemble, to circulate petitions for signature and to peacefully distribute lawful materials subject to reasonable time, place and staff limitations and subject to the following restrictions.

2. All inmate organizations desiring to associate, to assemble, to use institutional facilities and to have access to available institutional resources and materials, must

provide the institutional head with a membership list and a written description of the purpose of their organization.

3. The institutional head may restrict organizations and assembly in the following ways:

a) Where an assembly is to take place, the institutional head may assign staff to observe the assembly, but he or she shall seek to accomodate the organization's request for the assignment of specific staff.

b) Where an assembly is to take place that would, in the opinion of the institutional head, pose a threat to the security of the institution or to the protection of the public, he or she may prohibit it.

Inmate Committees

4. Inmates in every institution are entitled to form inmate committees, which shall be governed by the above provisions, and which shall, to the greatest extent possible, be involved on a continuing basis in the decision-making processes of the institution as they concern the inmate population.

5. The institutional head may remove a member of the inmate committee only where:

a) that member's committee activities pose a substantial threat to the security of the institution or to the protection of the public; or

b) that member abuses his committee position to achieve ends which are patently inconsistent with institutional security.

6. Where an inmate committee member is removed, the institutional head shall inform the affected inmate of the reason for the decision, in writing, and the inmate-member shall have an opportunity to respond.

Commentary

Freedom of association is crucial for inmates, whose normal channels of communication with others are severely limited

and whose incarceration dissociates them from society. In the following discussion of organizations, association and assembly we shall discuss several issues which are also relevant to the next section of the paper, on freedom of religion in penitentiaries. Freedom of religion is typically exercised in groups. Therefore, the associational aspects of religious observance are covered by the present provisions. We deal separately with inmate committees in the proposals for discussion above because, insofar as they constitute 'inmate government', they are amenable to additional considerations.

Inmate committees are provided for in present CSC policy. They are vehicles through which inmate representatives may express inmate concerns, needs and grievances. Fully functioning inmate committees, moreover, act in concert with the penitentiary administration, representing inmates' interests on a wide variety of institutional concerns. Inmate committees both encourage citizenship skills and permit and encourage responsible behaviour by permitting inmates to exercise their decision-making powers, to make choices, and to take positions for which they will be held responsible.

Institutional security is also enchanced by the presence of active inmate committees. Representation of inmate concerns and inmate input into institutional decisions solidifies the interests of inmates and institutional authorities. It also permits the systematic and structured communication of inmate concerns and problems to institutional authorities, thereby permitting the authorities to 'monitor the pulse' of the inmate population in a positive manner and to respond constructively and prospectively. Inmate committees can thus serve to stabilize the prison and assist administrators.

As well as supporting important correctional goals, inmate committees and other inmate organizations are protected by the Charter's guarantees of freedom of association, freedom of peaceful assembly and freedom of expression. Therefore, as with the other rights and freedoms considered in this paper, these retained rights must be restricted as little as possible, consistent with institutional security and protection of the public.

c) Religion

Freedom of religion has long been recognized and protected in Canadian prisons and penitentiaries. The right of inmates to exercise freedom of conscience and religion is supported by the principle of retained rights and the goal of re-integration. Section 2 of the Charter protects the right to manifest religious beliefs through practices, as well as to hold religious beliefs. Judicial decisions indicate that both section 15 of the Charter, the equality section, and section 27, the section which mandates that the Charter must be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians", suggest that freedom of religion must protect minority and newly-founded religions as well as established, majority religions. This raises an important issue in the corrections context: how far should the institution go to accomodate different religions?

The major institutional concerns regarding freedom of religion centre more upon the responsibility of the institution for providing for special religious rites and rules than upon security concerns. The issue of equality of treatment is also paramount. Religious observances and religious diets have been particularly problematic in this regard as they may impose considerable expense as well as an administrative burden upon the institution. Security concerns do arise, however, in the context of certain religious symbols, such as the wearing of daggers required by the Sikh religion.

Freedom of Religion

1. All inmates have the freedom of conscience and religion and are entitled to express their spirituality and exercise their religion freely, restricted only by immediate and pressing security concerns of the institution.

2. Without limiting the foregoing, this freedom includes

a) the freedom to express religious beliefs through religious practice which may include expression orally, in writing, in dress, behaviour and religious possessions, and

b) the freedom to congregate together, in accordance with the provisions on inmate assembly and association.

3. Correctional authorities shall make available the necessities required for inmates to manifest their religious beliefs equitably, and to the degree possible, including, but not so as to limit the foregoing:

a) interfaith chaplain;
b) facilities, such as chapel for religious worship;
c) worship service;
d) pastoral counselling;
e) special diets as required by the inmate's religious tenets; and
f) special religious rites on holidays generally observed by their religion.

Commentary

The proposals for possible inclusion in law on freedom of religion do not deal with visits by outside clergy and other religious leaders, nor with religious mail and publications, as these are covered by the proposals governing visiting and mail.

Section 1 above articulates the right of inmates to express and manifest their religious beliefs, subject only to restrictions based upon pressing security concerns. The provision is consistent with the Supreme Court's definition of freedom of religion, which includes the right to 'teach and disseminate' and to 'declare religious beliefs openly and without fear of hindrance or reprisal.'[60]

The provisions place an onus on the institution to provide necessary aspects of inmates' religious beliefs and expression. Section 2 seeks to avoid placing an excessively onerous burden on the institution by stipulating that the provision of religious necessities need only be 'to the degree possible'. The requirement that such necessities be provided equitably ensures that minority and newly-founded religions shall not be discriminated against. At the same time 'equitable' implies that considerations such as the proportion of inmates belonging to or affiliated with a

particular religion shall be relevant considerations in determining the amount of resources to be provided.

These proposals for possible inclusion in law are consistent with CSC's policy objective, which is to ensure recognition of the spiritual dimension of life by actively encouraging inmates to express their spirituality and exercise their religion.[61] The proposals would allow limits, however, based only upon pressing security concerns, whereas present policy relies on the "good order of the institution" test as a limit.

PART II: RIGHTS BASED ON STATUS AS AN INMATE

As emphasized throughout this paper, the inmate's inherent dignity as a person must be respected in correctional law and practice. This has been stated as meaning that at all times procedures and practices for ensuring that an inmate's treatment is just, fair and humane must be reflected in law. The previous section dealt with individual rights which an inmate shares with all other individuals, by virtue of his or her status as a citizen and a member of society, and the limitations on these rights necessitated by incarceration. In this section, proposals will be presented for discussion in regard to rights which an inmate has by virtue of his or her status as an inmate, such as the right to be provided with the basics of care. Because society, through the operation of the criminal justice system, has deprived convicted offenders sentenced to a period of incarceration of certain rights, and has thereby increased their dependence on the state, the state must provide, as of right, the necessary food, shelter and care. In essence, the proposals aim to ensure that accommodation, food, medical attention, hygiene and safety all attain a satisfactory standard.

Ensuring that inmates are provided with the basics of care is conducive to an inmate's eventual re-integration into society: a feeling on the part of inmates that they are being treated fairly and that their dignity is not needlessly undermined is more likely to promote respect for society and its laws than harsh or inadequate treatment. This approach facilitates a further objective; namely, the reduction of tension within institutions which, in turn, eases frustrations and reduces confrontations, resulting in more easily managed institutions.

Proposals Regarding Conditions of Confinement

Physical Conditions

1. Every inmate shall have a healthful and safe environment in which to live. Every correctional institution shall comply with the health, safety, sanitation and fire codes applicable to public buildings and shall be inspected regularly by independent inspectors.

2. The correctional authority shall ensure a reasonable standard of care in the protection of inmates from assault by other inmates and by staff.

3. In particular, but not as to limit the generality of the foregoing:

a) all parts of the institution shall be properly maintained, and kept clean at all times;

b) institutions shall be designed, structured and situated in such a manner that programs to fulfil the needs of inmates are facilitated;

c) all rooms in the institution shall have adequate and healthful space, heating, lighting and ventilation;

d) every inmate shall be provided with clothing adequate for warmth and health, according to the requirements of the season and the nature of his or her activities, including use at work where this is needed;

e) clothing provided shall be clean and kept in proper condition;

f) every inmate shall be provided with three nutritional meals each day; water fit for drinking shall be available to every inmate whenever he or she needs it;

g) every inmate shall occupy a cell or room by himself or herself, but if it is necessary for inmates to temporarily share a cell, each inmate shall be supplied with a separate bed;

h) every inmate shall be provided with clean bedding, appropriate for the season;

i) every cell or other area occupied by inmates shall have a clean, functioning and private toilet and other facilities for the maintenance of personal cleanliness;

j) adequate bathing and shower facilities shall be provided; and

k) every inmate shall have the opportunity for at least one hour of daily recreation and physical exercise in the outdoors, when weather permits; otherwise, in indoor facilities.

Medical and Health Care

4.a) The standard of health care for inmates shall be the same as for the general population.

b) Every institution shall provide the services of qualified competent medical, psychiatric and dental officers. Although services shall normally be provided during reasonable hours, emergency services shall be available at any time.

c) No health services shall be administered by persons who are not professionally recognized as competent to provide those services. No person who is not professionally qualified shall make a decision regarding an inmate's need for health services.

d) Every institution shall have ready access to all of the services of an accredited hospital.

e) Every inmate shall have the right to prompt medical attention when so requested, taking into account the nature of the problem and the institution's reasonable procedures for providing daily medical services.

f) The reasons for any disability, injury or illness shall not have any bearing on the provision of quality medical attention.

g) An inmate may obtain the services of a qualified physician of his or her choice for the treatment of medical complaints where the inmate pays for costs incurred.

Medical Records

5.a) Complete and confidential medical records shall be maintained in respect of each inmate. Where an inmate is transferred to another institution, his or her medical records shall be promptly transferred to that institution.

b) Complete records shall be maintained of the administration of all drugs to inmates. These shall include the type and quantity of the drug administered, and the date, time and reasons for its administration.

Right to Refuse Medical Treatment

6.a) Compulsory treatment of inmates can only be administered pursuant to applicable provincial legislation.

b) The inmate may voluntarily consent to medical treatment, provided:

i) the objectives of the treatment are clearly explained to the inmate-patient; and

ii) any known risks and dangers are also explained.

Access to Legal Materials

7. All inmates shall have access to legal materials.

8. In particular, but not so as to limit the generality of the foregoing:

a) every maximum and medium security institution shall have legal materials as specified in the regulations (see Schedule A), to which inmates have access;

b) legal materials shall include adequate writing supplies and instruments;

c) each institution shall have at least one person on staff or available who is properly qualified and authorized for the taking of oaths;

d) inmates shall be entitled to acquire law books and other legal research materials from any source.

Schedule "A"

1. The most recent Revised Statutes of Canada and Regulations, with up-to-date annual volumes.

2. The most recent Revised Statutes and Regulations of the province in which the institution is located, with up-to-date annual volumes.

3. An up-to-date annotated Criminal Code of Canada, and related criminal statutes.

4. Criminal case reports: C.C.C.'s and C.R.'s

5. Most recently available basic textbooks on criminal law and procedure, correctional law, constitutional law and administrative law.

6. Correctional Caselaw Manual.

7. The rules of procedure in the Federal Court of Canada.

8. The rules of procedure in the provincial courts in which the institution is located.

9. All Senate and/or House of Commons and/or Legislative Assembly reports on prison and/or parole; all relevant Royal Commissions, Commissions of Inquiry; and any government reports on corrections which are made public.

10. Canada Law List.

Commentary

a) Conditions of Confinement

The proposals in this section are drawn largely from the UN Standard Minimum Rules for the Treatment of Prisoners. While there is little doubt that most facilities in Canadian penal institutions already do meet or exceed the standards for physical conditions outlined in this section, there is a constant need for vigilance in these most fundamental aspects of an inmate's existence, and they should be implemented in law to ensure that Canada meets international obligations.[62]

This section also requires correctional authorities to protect inmates, so far as reasonably possible, from assaults during the course of their stay in the institution. Homicide and assault, including sexual assault, are all too common in some of our correctional institutions, and in some instances become a major concern in the daily lives of some inmates. A reasonable standard of care in protecting inmates against

violent attack is considered an appropriate onus to be placed on the prison administration. At the same time, in keeping with the principle that the least restrictive alternative should be used to achieve the correctional objective in question, measures such as extended lock-up of inmates would be justified only in extraordinary circumstances.

b) Medical and Health Care

The primary goal of these proposals is to ensure access to medical care within reasonable time periods. Although provisions for medical care in other jurisdictions are often cast in terms of the number of personnel needed for specific inmate populations, the Working Group has concluded that the essence of the standards is qualitative rather than quantitative.

The proposals emphasize that community standards governing care in other types of institutions, such as hospitals and nursing homes, are appropriate in the correctional setting. This care may be provided directly through medical personnel employed by the prison system, or equally, especially in smaller institutions, through contracts with existing health care facilities in the community. It is intended that this principle of standardized health care would cover specific aspects of medical service delivery such as annual medical examinations.

Issues related to the mental health of inmates will be examined in detail in the Working Paper on Mentally Disordered Offenders.

c) Access to Legal Materials

Inmates' right to counsel has been discussed previously in relation to the disciplinary process. The provision in this section which mandates inmates' access to basic legal material is not meant to be a substitute for any right to counsel, but to supplement it by requiring maximum and medium security institutions to provide inmates with an adequate law library and access to other legal research tools. Recognizing the reality of legal service delivery systems, the Working Group is of the view that every inmate should have

direct access to basic legal materials. An individual outside prison normally has the freedom to pursue legal remedies on his own without the assistance of counsel, or, indeed, in the face of adverse advice by counsel. Direct access to legal materials not only facilitates access to the courts but acts as an escape valve for relieving tensions and frustrations that could build up in inmates who are unable to have access to such material.

Part III: ENFORCING THE RULES

Judicial Remedies

Of vital importance to inmate rights is the question of appropriate remedies for their breach. A discussion of non-judicial remedies (specifically inmate grievance systems and the ombudsman's office) follows this section. As well, accountability and discipline of the rules governing staff for breach of staff powers is canvassed in the Staff Powers Working Paper. Most minor and many major complaints may be resolved through these less formal processes. However the judicial system must always be available to an individual to challenge a denial of rights or abuse of power, to ensure that the rule of law is applied in our correctional system. The issues which must be addressed are:

- what purpose(s) is the remedy to serve?
- are the traditional judicial remedies adequate and appropriate to the correctional setting?
- are additional remedies needed for breach of statutory rights (i.e. are there aspects of the correctional system that are unique enough to require specific and unusual remedies)?

Despite certain technical complexities, in the vast majority of cases judicial remedies currently available generally provide an appropriate resolution to most of those problems which are not adequately dealt with by the informal methods mentioned above. These remedies can be grouped into four general categories:

1) civil action for negligence, assault, battery or trespass. Recovery in these cases is limited to damage provable, and the award is monetary compensation for damage flowing from the wrongful act;

2) administrative law remedies available to
   a) enforce compliance with a statutory duty (such as the Parole Board's duty to give each inmate a hearing at or prior to his or her parole eligibility date); and
   b) enforce any common law duty of administrative tribunals such as to act fairly. The remedy in administrative law cases is generally to send the matter back to the

tribunal - to exercise its statutory duty in the proper fashion, or where the duty the duty of fairness has not been met, the court will quash the decision of the tribunal and order a new hearing by the administrative tribunal.

3) Habeas corpus is available to determine the validity of confinement of an inmate, both within the general inmate population or in administrative segregation.

4) criminal charges that may be laid if the breach of rules complained of constitutes a criminal act (e.g. assault). However, the sanction imposed by the criminal court is intended to punish and deter the offender from future criminal acts, and rarely involves any compensation for the victim.

The scope of judicial remedies for infringement of rights was expanded with the advent of the Charter. Section 24 provides a general remedy provision and a conditional exclusionary rule for evidence obtained in contravention of a Charter right:

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Although s.24 expands the courts' jurisdiction to develop remedies appropriate to the situation, it only comes into play when a violation of the Charter is proven. In many instances a violation of a statutory rule does not constitute

a Charter violation and therefore remedies for breach of statutory rules will have to be relied on. We must consider how broad such remedies should be.

One of the first issues to be considered is the purpose of the remedy - is it to compensate the injured party, punish and deter the violator, or ensure compliance with the rules? An ideal remedy would do all of these things. The Working Group believes that the remedy should, above all, be aimed at enhancing future compliance with the law. To this end, it will likely be appropriate to discipline staff internally for breaches of the rules. However, in addition, should the judiciary be empowered to order the staff member to personally pay compensation to the inmate, or formally apologize for improper behaviour? The experiences of labour boards and human rights commissions are instructive with respect to developing a variety of remedies for different situations - awards of costs, letters of undertaking to abide by the law in future, apologies to victims, etc., are all aimed at promoting compliance with the law.

A question that the Working Group wishes to raise for discussion is whether additional specific remedies should be legislated, or whether there is a need for a more general provision, framed along the same lines as s.24 of the Charter (appropriate and just remedy in the circumstances) to be considered for breaches of statutory rules. Such a provision might read:

> **Any person whose rights as set out in this Act have been infringed or denied, may apply to the Federal Court of Canada, and the Court may award such remedy as it considers appropriate and just in the circumstances.**

Legislating new specific remedies presents problems as it is difficult to anticipate all situations which may occur. However, consideration could be given to a provision specifying that any secondary sanctions attached to institutional decisions which are subsequently struck down must also be changed. Conviction for an institutional offence usually results in failure to earn remission, loss of privileges and sometimes loss of remission. It may be appropriate for a court, in quashing the institutional conviction, to direct

the agency to remove all adverse consequences of conviction. Should this be specifically set out in legislation or made available under a general remedies provision?

Is monetary compensation appropriate in certain circumstances, or should we look at a reduction in time served to compensate for unfair treatment? What remedies are appropriate where a body cavity search is conducted on an inmate where there are no reasonable grounds to believe the inmate is secreting contraband; an inmate is denied appropriate medical care, but no long-term injury results; or a visitor is denied entry to an institution arbitrarily? A general remedy would allow the offended party an opportunity to request the redress he or she believes appropriate and give the judiciary full discretion as to what is "appropriate and just in the circumstances".

Access to the Courts

In conclusion, we wish to stress the primary importance of an inmate's access to the courts in enabling rights and remedies to become meaningful in a practical way. Whether the remedy sought in the court is intended to compensate, offer redress, compel performance of a duty, deter, punish or affirm fundamental values, it is essential that inmates be able to gain access to a court in the first place.

Throughout this paper we have attempted to put into place the elements necessary to ensure that inmates can enforce their rights in cases of non-compliance with rules. The section on access to legal materials is aimed at ensuring that inmates have access to materials which may indicate whether they have a case worth pursuing. The provisions on mail and visiting protect solicitor-client privilege. Along this line, an essential element is the availability of legal counsel. In the section on the disciplinary process we recognized the advantages of having legal counsel at disciplinary hearings and we proposed a statutory right to assistance.

Looking at inmate rights in a broader sense, we have argued first in the Framework Paper, as well as throughout this paper, that there is a need for rights to be protected in

Canadian correctional legislation. If such rights are to be effectively enforced, counsel must be available.

But who is to pay? Cost concerns are central to any discussion of availability of counsel. Unless either an inmate can afford to pay, or counsel for indigent inmates is provided under the legal aid system of the province, the right to counsel becomes meaningless. Legal aid schemes in some provinces provide duty counsel and other services to inmates on a regular basis, yet other provinces have refused to even provide counsel for disciplinary proceedings. A recent case from BC denies legal aid on the ground that, although Howard may give the right to counsel, "nothing is said of any reciprocal obligation to provide and pay for counsel".[63]

It must be noted, however, that resource implications affect the availability of legal aid to all citizens of certain provinces; it is not only inmates' access to legal aid that varies from province to province. While recognizing the complexities and the resource implications involved, we must ask whether the federal government's responsibilities for persons incarcerated in penitentiaries should include the provision of at least a minimum level of legal services.

Non-Judicial Remedies

The previous section dealt with remedies which involve the use of the courts in the resolution of institutional grievances and disputes. As any correctional worker is aware, however, the vast majority of disputes and grievances which arise in the penal setting will never reach the courts. Too many grievances inevitably arise in the penitentiary setting for the courts to be able or willing to deal with them.

Nor would it be appropriate for the courts to review all of the many and varied complaints which inmates have about the way they are treated; complaints which frequently are of the most commonplace nature. Courts are too slow, costly and cumbersome a vehicle for the resolution of a great number of such disputes. However, inmate complaints cannot be treated as if they were trivial, even when they seem trivial to staff. Inmates' frustration over the perceived inability to get themselves heard, to establish lines of communication

with the administration, and to have some say in the running of their own lives, can be among the most destructive forces within a penitentiary.

In this section, we will examine this need for effective grievance resolution mechanisms, and explore what is known about the most effective means of resolving complaints before they become bigger problems. We will not deal in detail here with avenues such as "privileged correspondence" - confidential mail from an inmate to an MP, the Solicitor General, etc. because these are not "remedies" in the sense of being enforceable means of redress, and because these are dealt with under inmate mail, earlier.

(a) Inmate Grievance Procedures

The proposed "correctional philosophy" statement set out in Appendix A, as well as the Criminal Law Review principles on which that proposed philosophy is in turn partially based, recognize the importance of effective complaint resolution procedures.

The Criminal Law in Canadian Society (CLICS), which establishes the basic framework for the review of the criminal law, in fact proposes, as Principles (j) and (k), that:

> j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;
>
> k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure.

The proposed correctional philosophy statement echoes these principles, and as will be seen later, suggests other principles which reflect some of the design aspects of successful grievance procedures in use.

Effective grievance procedures have been advocated by numerous official commissions and reports on corrections in

Canada, including the Archambault Commission (1938) and the Swackhamer Report (1971). More recently, the 1977 Report to Parliament of the all-party Sub-committee on the Penitentiary System in Canada stated that "whether (inmate) grievances are justified or not, they require to be dealt with so that order and morale of institutions may be maintained". The Sub-committee recommended, with modifications, the inmate grievance procedure which is described later in this section.

The more recent standards for prison administration of the Canadian Criminal Justice Association advocate a grievance procedure which would "provide for an appeal to an impartial external body when alleged infringements of rights have not been satisfactorily resolved in the prison".

The Correctional Service of Canada's recent Report on the Statement of CSC Values (1984) also recognizes that "in our dealings with offenders we are proud to act in accordance with the duty to act fairly, and to see that those in our charge are provided a right of redress for our actions". The 1985 Justice System report to the Task Force on Program Review (Nielsen Task Force) noted "concerns about the effectiveness and timeliness of the (CSC) inmate grievance procedure", and concluded that "an improvement in the administrative remedies available to inmates before resort to the Correctional Investigator (discussed later) seems essential to greater effectiveness". One of the options suggested by the Study Team was to "revitalize the CSC inmate grievance procedure" to conform more to the model described by the 1977 Parliamentary Sub-committee."

Clearly, then, inmate grievance procedures have been considered important enough to deserve mention by several major inquiries and official reports. CSC Commissioner's Directives provide for an inmate and parolee grievance procedure which was originally based, in part, on the recommendations of the 1977 Parliamentary Sub-Committee Report. Let us examine the reasons why these various bodies have considered grievance procedures so important.

(i) Why Grievance Procedures are Important

- An alternative to litigation. As suggested above, the courts are often a very slow, expensive, and cumbersome means for resolving prison disputes. For offenders serving brief terms, resort to the courts is effectively not available for most issues to be resolved before the offenders' release. Many of the matters which inmates find most irritating about prison life do not, in fact, reach the level of a "right", but if left unresolved, will cause greater problems later on. Just as importantly, solutions imposed by the courts will not always be ideal ones from the point of view of either the inmate or the administration, since they will not benefit from a full understanding of prison life or the individual problems which arise. If the two parties can agree on a solution before or instead of bringing the matter to court, that solution is usually more workable and more acceptable to both parties than a court-imposed solution would be. Finally, the resort to litigation leaves staff with the feeling - justified or not - of having lost some of the authority and discretion needed to perform their duties. If sensible solutions can be found - and experience suggests they can - without resort to courts, both staff and inmates are left with the feeling of having greater control over their lives.

- Institutional climate of fairness. This objective was emphasized by the Parliamentary Sub-committee. A grievance procedure which preserves the appearance and reality of fairness prevents much of the feeling of frustration and bitterness experienced by inmates, and emphasizes to all parties that they are responsible for reaching workable solutions. In contrast to the impact of litigation, the effect of a grievance procedure based on negotiation and mediation can leave parties on all sides feeling they have a voice in running their own lives. In addition, decisions tend to be more effectively carried out when the persons affected have helped to formulate them.

- Reformative impact on inmates. A fair and effective grievance procedure can encourage inmate rehabilitation by encouraging self-reliance and responsibility, teaching

problem-solving skills, and serving as an example for treating others fairly.

- Legitimate means of inmate protest. Having available a legitimate, effective means of airing complaints and disputes gives inmates an alternative to undesirable forms of expression, such as self-mutilation, fighting and damaging prison property. Evaluations show that inmate assaults on staff and on other inmates decrease when this procedure is used.

- Manager's early warning system. An inmate grievance procedure with a proper record-keeping system and "bring forward" procedure attached will improve communications, help correctional administrators identify recurring sources of inmate complaints, and allow opportunities to correct problems before they get out of hand.

Commissioner's Directive No. 081 currently provides for a procedure for resolving inmates' grievances, and CD 082 for parolees' grievances. The procedure's stated objective reflects the concerns reviewed above for prompt and fair resolution of complaints, whenever possible "at the lowest level" - that is, at the level where problems occur and can often be expeditiously solved. It differs, however, in several important respects from the "exemplary procedure" proposed below for possible inclusion in law. For example, unlike the proposed procedure, it appears to require the inmate to attempt informal resolution of his complaint before filing a written complaint or grievance; it excludes from the procedure matters for which other review procedures exist; and the outside review board members are selected by the Director of the penitentiary, not through methods which derive from the arbitration field.

(ii) Exemplary Procedure

The inmate grievance procedure described below has been found to be effective in resolving prison disputes fairly in institutions where it has been properly implemented. In 1975, this procedure was designated by the US Department of Justice as an "exemplary project" - one of special usefulness and quality. In 1984, it was advocated by the US National Institute of Corrections as an alternative dispute resolution

mechanism in a reference manual for correctional managers on how to "avert litigation". It is, with modifications, the program recommended by the Parliamentary Sub-committee of 1977 and, again with modifications, the program on which the CSC inmate grievance procedure was based. It is a difficult model to implement properly, and as the Nielsen Task Force Study Team notes, can fall into disuse and present other difficulties.

The model procedure described below is based on principles of negotiation between the parties (staff and inmates) and mediation (attempts by a third party to get the parties to arrive at a solution themselves), and if necessary (usually in only about 1% of cases), arbitration (resolution of a dispute by an external third party acceptable to both sides). It is normally possible for the parties to find sufficient common ground to arrive at a solution which both sides can live with. In fact, research on the procedure suggests that the outcome of most grievances resolved through this method is a compromise reached by an unanimous agreement of the individuals involved.

This point is worth emphasizing because it speaks to two major concerns of staff. First, staff who are unfamiliar with the procedure tend to fear that unworkable solutions will be the result of the process; and second, staff often find the "trivial" nature of many inmate grievances irritating and even vexatious. In fact, as suggested earlier, such grievances usually do matter a great deal to the grievant, and the solution to most grievances becomes obvious when they are examined in detail. When the two parties - staff and inmates - are required by the process to discuss the matter with the help of a mediator, the obviousness of the solution becomes clear.

The stages involved in the process proposed here are typically the following. The grievant files a written grievance, usually with the help of an inmate grievance clerk, who plays an important role in the process. The clerk assists the inmate to articulate the problem in writing - a difficult matter for many inmates - and in sufficient detail to make the complaint and the requested solution understandable. The clerk also assists inmates in seeking informal resolutions to

their grievances. Frequently, a similar grievance has been filed in the past, and the clerk can advise the inmate accordingly. In addition, the existence of the inmate clerk helps make the procedure less threatening to inmates.

An attempt may be made informally to resolve the grievance through mediation between the inmate and the staff member most closely connected to the subject matter being grieved. Since, as has been seen, many grievances are rather minor in nature and their solution rather obvious, it is often possible for an informal discussion to result in a satisfactory solution. An attempt at informal resolution should not be mandatory, however, nor a prerequisite to the use of the formal process described below. Otherwise the informal resolution stage may deteriorate into a series of imposed rather than mediated solutions, and research shows that inmates typically report a lesser degree of satisfaction with outcomes reached informally than with outcomes reached through the full process.

The first step in the formal process is a hearing at which all parties are given an opportunity to participate in the resolution of the grievance. This hearing is held before a committee of equal numbers of appointed staff and elected inmates, with a non-voting chairman or mediator. This committee is intended to hear all sides of the dispute and encourage a negotiated solution, if the parties can be persuaded to agree on one. It is usually best if the committee works on a living unit (rather than institution-wide) basis in order that a significant number of staff can become involved in it on a rotational basis, and in order that "local" solutions can be reached.

The subsequent levels of review within the correctional system should reflect the relevant levels of the department, but should not be numerous enough to make the procedure cumbersome and delays lengthy. Where a grievance involves challenges to regional or national policies, however, these levels should always have the opportunity to review the grievance. Any party to a grievance may appeal the decision of any level to the next level in the procedure. All responses to a grievance should be in writing, with reasons given for decisions and a deadline established for follow-up,

if applicable. Reasonably brief time limits should be imposed for responses at each level and, unless the inmate agrees otherwise, the violation of time limits should permit the inmate to proceed to the next level automatically. Lack of a written response or the failure to carry out the agreed-upon solution should also entitle the grievant to proceed to the next level.

The final review should be to an independent party, one external to the correctional authority and the inmate body. Often, this independent is drawn from a list of persons previously agreed to as acceptable to both staff and inmates. The independent review authority could also be an ombudsman, although this would be a deviation from the traditional role of an ombudsman. The decision of the outside reviewer should be final unless it would be contrary to law, would endanger any individual, or would require funds not available in the current budget. Some jurisdictions have enshrined their grievance procedure in law and given the decisions of outside review boards the force of law. Although experience shows that the independent review level is required in only about 1% of all cases, it is the most critical element in ensuring credibility, and in encouraging the parties to work hard at finding workable solutions at earlier levels.

There should be a special fast-track system available for handling grievances considered to be an emergency. The procedure should also include a guarantee of no reprisals for grieving, and grievance forms should not appear on permanent inmate files. The procedure must be evaluated regularly and monitored carefully to ensure that it is working as intended. Any elements in a grievance which could result in disciplinary action against a staff member should be referred directly to the institutional head for investigation and prompt written report to all concerned parties. (See also the Working Paper on Powers and Responsibilities of Correctional Staff for a discussion of procedures for ensuring staff accountability.) The grievance procedure itself should be the means for deciding whether any given matter is "grievable". The main question for discussion is whether the law should include inmate grievance procedures along lines similar to the following:

(iii) Proposed Inmate Grievance Procedure

Objective

1. There shall be an inmate grievance procedure established at each penitentiary whose purpose shall be to provide a fair and timely means to resolve grievances about matters falling within the responsibility of the Commissioner of Corrections.

Procedure

2. Once a grievance has been filed, there may be an attempt to resolve the matter informally, without reference to the grievance resolution committee. There shall be no requirement for such informal resolution, however, and attempts at informal resolution shall not in any way prejudice the grievant's right to be heard through the formal grievance resolution process.

3. The Commissioner shall establish, at each penitentiary under his or her jurisdiction, grievance resolution committees to hear and resolve grievances of persons within the penitentiary. Such grievance resolution committees shall consist of equal numbers of staff appointed by the institutional head and inmates elected by their peers, as well as a non-voting chairperson.

4. The Commissioner shall promulgate rules and regulations establishing procedures for the fair, simple and expeditious resolution of grievances, including but not limited to setting time limitations for the filing of complaints and replies thereto for each stage of the grievance resolution process.

5. A person aggrieved by the decision of a grievance resolution committee may apply to the Commissioner for review of the decision. The Commissioner or his or her delegate may take such action as he or she deems appropriate to resolve the grievance fairly and expeditiously to the satisfaction of all parties. If the resolution of the grievance by the Commissioner or his or her delegate is deemed unsatisfactory by any party to the grievance, that party shall have the option to refer the matter to an independent arbitrator. The decision of the independent arbitrator shall be binding unless it is established to the satisfaction of the Federal

Court that such a decision would be contrary to law, would represent a clear danger to any individual or group of individuals, or would require funds not available in the current budget. In the latter case, the Commissioner shall present present to the Court a plan for the implementation of the decision in future fiscal years.

6. The Federal Court has jurisdiction to hear and determine an application to review and set aside a decision or order made by an independent arbitrator upon the ground that the arbitrator:

a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise his or her jurisdiction;

b) erred in law in making his or her decision or order, whether or not the error appears on the face of the record; or

c) based his or her decision or order on an erroneous finding of fact which he or she made in a perverse or capricious manner or without regard for the material before him or her.

7. There shall be no reprisals for the use of the grievance procedure. Copies of grievances shall not be placed on files which form part of the case documentation for significant decisions made about the offender, such as transfer and release.

8. Replies to all grievances shall be made in writing and shall detail the reasons for the decision and the deadline for action to be taken on the grievance, if applicable.

9. Those elements of a grievance which could result in disciplinary action against a staff member shall be referred to the institutional head for proper action through the normal procedure for staff discipline. No findings or recommendations regarding staff discipline shall be made by a grievance resolution committee or an independent arbitrator, nor shall the outcome of any inmate grievance be used as a basis for staff discipline.

Commentary

This draft legislation embodies the key design principles for the model which it has been shown must be observed if the procedure is to operate as intended and resolve grievances successfully.

First, the model must be based on participation by both staff and inmates in the design and operation of the procedure. The detailed procedures must not be imposed by management, but rather should be written by line staff - ideally, security or living unit - and inmates at each institution, because these are the parties who must live with them. As many staff as possible should also be involved in the operation of the procedure, through rotational duty on the committee. Inmate participation is critical to ensure the model's credibility with inmates; it has also been found that greater inmate participation discourages frivolous grievances, and the greater the inmate participation in the procedure, the less work there is for staff, and therefore the more staff support there is for the model. There must also be strong support for the model from top management within the institution and the correctional agency as a whole.

Equally important is the participation of an outsider in the independent review level. This individual must not be appointed by the administration, but by agreement of the parties. In California Youth Authority institutions, independent review is by volunteer members of the American Arbitration Association. Often, it is helpful for a staff representative and an inmate representative to sit with the independent reviewer on the final review, in order to ensure that the independent reviewer fully understands all the facts and the dynamics of the situation, particularly the security requirements of the institution.

Although independent review is often feared by staff, who question whether security concerns will be given sufficient consideration, experience in other jurisdictions suggests that correctional authorities which use it are quickly reassured by the fairness and reasonableness of the solutions decided by outsiders.

Third, the procedure must be clear and easy to use. Complex procedures discourage inmates and create frustration on all sides. The clearer the procedure, the easier it is to solve problems at early stages.

Thorough training and orientation for staff and inmates is also essential to the success of the procedure. All participants - clerks, committee members, coordinators, warden - should receive a solid grounding in the principles behind the model and the techniques of mediation and negotiation. This is particularly important because some staff will object at first to sitting at the same table as inmates, and it must be understood that for the model to be successful, all concerned parties have to work together to settle disputes.

Implementing this procedure properly can take months to achieve, and keeping it on track is an ongoing responsibility. However, those jurisdictions which have used it properly are strong proponents of the procedure.

As noted above, Commissioner's Directives already provide for a procedure for CSC inmates and parolees which is similar in many important respects. The key differences would be that virtually all matters falling within the responsibility of the Commissioner would be grievable, with the exception of grievances which could result in disciplinary action against staff; that all grievances involving matters of national policy (i.e., CDs) would be reviewed at the Commissioner's level; that there would be no requirement for the inmate to attempt to resolve his or her complaint informally before filing a written grievance; that the independent review level members would be selected according to principles of arbitration; and that their decisions would be binding unless they were contrary to law, would represent a clear danger to any group or individual, or would require funds not available in the current budget.

b) Correctional Investigator

An ombudsman is a government-appointed official who has extensive powers to investigate citizen complaints against government action. He or she investigates complaints, reports on his or her findings to the complainant and to the

government authority in question, and makes his or her findings public.

In Canada, all the provinces but Prince Edward Island have an ombudsman, who receives complaints from all citizens, including prisoners. There is an ombudsman at the federal level who deals exclusively with the complaints of federal inmates, the Correctional Investigator. The Correctional Investigator varies somewhat from the traditional ombudsman mould in that he or she reports to the Solicitor General, not to Parliament. The Office is not authorized by specific legislation but derives its powers from the Inquiries Act, under which the Correctional Investigator is appointed. He or she serves at pleasure.

Ombudsmen typically receive a large percentage of complaints from inmates. They are able to be of assistance in some cases, but do not consider their offices adequate to the task of taking on all inmate complaints. The 1977 Parliamentary Sub-committee called the Office of the Correctional Investigator "a small response to a very large problem". From time to time, it has been suggested that changes should be made to the Office of the Correctional Investigator, in order to enhance the independence of his or her role from correctional authority. These suggested changes include: separate statutory creation of the Correctional Investigator's Office; explicit legislative mention of the powers of the Office; appointment for a term of years, not "at pleasure" of the Governor in Council; reporting directly to Parliament on an annual and as-needed basis; and provision for necessary staff and contracting authorities. The proposal for a Special Report in addition to the annual Report is designed to give the Correctional Investigator speedy access to Parliament in those rare cases where the issue is so serious that waiting for the next annual report would be unsatisfactory.

Legislative Option Regarding Office of Correctional Investigator

1. The Governor in Council may appoint a person to be known as the Correctional Investigator of Canada. The Correctional Investigator shall hold office during good behaviour for a term of five years, but may be suspended or removed for cause at any time by the Governor in Council.

2. The Correctional Investigator has the control and management of all matters connected with the Office of the Correctional Investigator, including the use of such officers and employees as are necessary to enable the Correctional Investigator to perform the function and duties of the Office.

3. It is the function of the Correctional Investigator to conduct investigations into the problems of inmates related to their confinement or supervision on temporary absence, day parole, parole or mandatory supervison. In performing this function, the Correctional Investigator may investigate any decision, recommendation, act or omission of the Commissioner of Corrections or any person under the control and management of, or performing services for or on behalf of, the Commissioner of Corrections that affects inmates either individually or as a group.

4. In the course of an investigation, the Correctional Investigator may hold any hearing and make such inquiries as the Correctional Investigator considers fit, but no person is entitled as of right to be heard by the Correctional Investigator.

5. In the course of an investigation, the Correctional Investigator may require any person:

a) to furnish any information that, in the opinion of the Correctional Investigator, the person may be able to furnish in relation to the matter being investigated; and

b) to produce, for examination by the Correctional Investigator, any document, paper or thing that, in the opinion of the Correctional Investigator, relates to the matter being investigated and that may be in the possession or under the control of that person.

6. In the course of an investigation, the Correctional Investigator may summon and examine on oath

a) where the investigation is in relation to a complaint, the complainant, and

b) any person who, in the opinion of the Correctional Investigator, is able to give any information relating to the matter being investigated,

and for that purpose may administer an oath.

7. The Correctional Investigator may, on satisfying any security requirements applicable thereto, at any time enter any premises occupied by or under the control and management of the Commissioner of Corrections and inspect the premises and carry out therein any investigation or inspection.

8. When informing the Commissioner of Corrections of a problem, the Correctional Investigator may make any recommendations the Correctional Investigator considers appropriate.

9. The Commissioner of Corrections shall advise the Correctional Investigator within 45 days of receiving a recommendation what action will be taken with respect to the recommendation.

10. The Correctional Investigator shall, within three months after the end of each fiscal year, submit to the Solicitor General a report in both official languages of the activities of the Office of the Correctional Investigator during that year and the Solicitor General shall cause every such report to be laid before each House of Parliament on any of the first fifteen days on which the House is sitting after the Solicitor General receives it.

11. If within a reasonable time after the Correctional Investigator has informed the Solicitor General of a problem no action has been taken which seems to the Correctional Investigator to be adequate and appropriate, the Correctional Investigator may submit a special report to the Solicitor General about the problem and the Solicitor General shall cause every such report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Solicitor General receives it.

END-NOTES

Introduction

1. With the enactment of the Canada Act in 1982, the Canadian Charter of Rights and Freedoms became part of the constitution of Canada.

2. For further discussion on the meaning of a right, see Hall Williams, Changing Prisons (1975).

3. R. v. Solosky (1980), 50 C.C.C. (2d) 495 (S.C.C.).

4. The nature of a power is discussed further in Law Reform Commission of Canada, Police Powers - Search and Seizure in Criminal Law Enforcement [Working Paper 20] (Ottawa: Supply and Services, 1983), para. 49-51 and 101-113.

5. R. v. Big M Drug Mart Ltd. (1985), 18 C.C.C. (3d) 385 (S.C.C.).

6. Singh et al v. Minister of Employment and Immigration et al (1985), 58 N.R. 1 (S.C.C.).

7. R. v. Oakes (1986), 24 C.C.C. (3d) 321, p. 347-350.

8. Discussed in A Framework for the Correctional Law Review, [Working Paper No. 2] (Ottawa: Solicitor General Canada, 1986)

9. The development of case-law in regard to the duty to act fairly is traced in the Framework Paper, supra, note 8, p. 5-12.

10. The spectrum approach is discussed further in Fergus O'Connor, "The Impact of the Canadian Charter of Rights and Freedoms on Parole in Canada", (1985)10 Queen's L.J. 336, at p. 348.

11. Discussed, ibid.

12. Singh, supra, note 6, and Reference re Section 94(2) of the BC Motor Vehicle Act, [1985] 2 S.C.R. 486.

13. Morin v. National Special Handling Unit Review Committee et al; R. v. Miller; and Cardinal et al v. Director of Kent Institution; [1985] 2 S.C.R. 613 et seq.

14. Commissioner's Directive No. 095, entitled Information Sharing, provides as follows:

> CRITERIA FOR SHARING INFORMATION WITH OFFENDERS
>
> 4. As a general rule, staff members are obliged to share with the offender information that is relevant to his or her case. Staff members should refer to establishd guidelines for particulars.
>
> 5. Exempted from the obligation to share with the offender are types of information which may not be disclosed on grounds of the public interest, including information of which the disclosure:
>
> a. could reasonably be expected to threaten the safety of individuals;
> b. could reasonably be expected to lead to the commission of a crime;
> c. could reasonably be expected to be injurious to the security of penal institutions;
> d. could be injurious to the physical or psychological health of the offender; or
> e. could be injurious to the conduct of lawful investigations or the conduct of reviews pursuant to the Penitentiary or Parole Acts, or the Penitentiary Service or Parole Regulations, including any such information that would reveal the source of information obtained in confidence.

15. Re Cadieux and Director of Mountain Institution (1984), 13 C.C.C. (3d) 330 (F.C.T.D.).

16. DeMaria v. Regional Classification Board and Payne (1987), 30 C.C.C. (3d) 55 (F.C.A.).

17. Hay v. National Parole Board (1985), 13 Admin. L.R. 17 (F.C.T.D.), at p. 27.

18. Submission of the John Howard Society of Ontario, Penitentiary System in Canada, p. 91. Cited in R. Price, "Doing Justice to Corrections" (1976-77), 3 Queen's L.J. 214, at p. 277.

19. Michael Jackson, Prisoners of Isolation: Solitary Confinement in Canada (Toronto: University of Toronto Press, 1983), p. 63.

20. McCann v. The Queen (1976), 29 C.C.C. (2d) 377. This case forms the centre-piece of Michael Jackson's study of solitary confinement in Canada, ibid.

21. (1982), 67 C.C.C. (2d) 252 (B.C.C.A.). Reversed on appeal to the Supreme Court of Canada, supra, note 13.

22. Ibid., (B.C.C.A.), at p. 259.

23. Ibid., (S.C.C.), p. 4.

24. Ibid., p. 12.

25. Ibid.

26. Ibid., p. 16.

27. Vantour, J. (Chair). 1975. Report of the Study Group on Dissociation, p. 29.

Discipline

28. Howard v. The Presiding Officer of The Inmate Disciplinary Court of Stony Mountain Institution (1985), 19 C.C.C. (3d) 195 (F.C.A.).

29. Supra, note 13.

30. Dion v. Commissioner of CSC, Re Dion and The Queen (1987), 30 C.C.C. (3d) 108 (Que. Sup. Ct.).

31. Section 29 of the British Columbia Correctional Centre Rules and Regulations provides:

> Duty of officer to attempt to resolve breach by inmate of rules and regulations
>
> 29. Where an officer has reasonable and probable grounds to believe an inmate has committed or is committing a breach of the rules or regulations of the correctional centre, the officer shall,
> (a) where circumstances allow, stop the breach and explain to the inmate the nature of the breach, and
> (b) where the person aggrieved by the alleged breach consents, allow the inmate to correct the breach, where possible, and make amends to the person aggrieved.

32. Howard, supra, note 28.

33. Parole Regulations, s.20.1.

34 All aspects of this question are explored in Michael Jackson, "The Right to Counsel in Prison Disciplinary Hearings", (1986) 20 U.B.C. Law Rev. 221.

35. Re Russell and Radley, (1984) 11 C.C.C. (3d) 289 (F.C.T.D.) held that a disciplinary offence committed by a penitentiary inmate is an offence within the meaning of the Charter.

36. Report of the Study Group on Dissociation, supra, note 27, p. 80.

Search of Inmates

37. Commissioner's Directives which are relevant in regard to search include: Searches - CD 571; Contraband - CD 570; and Urinalysis - CD 572.

38. An application based on this ground was successful in Gunn v. Yeomans et al (1979), 48 C.C.C. (2d) 544 (F.C.T.D.), where the question addressed was not whether a directive to thoroughly "skin frisk" all inmates in certain circumstances was necessary but rather whether it lawfully permitted the action taken with respect to the applicant. It was held that the institutional head may not make an order which conflicts with a provision dealing with the same subject matter found in the Penitentiary Act or the Penitentiary Service Regulations. An injunction restraining the respondents from carrying out searches except in accordance with the Regulations was granted. As a consequence of the decision, subsection 41(2) of the Penitentiary Service Regulations was amended to its present form.

39. Hunter et al v. Southam Inc. (1984), 14 C.C.C. (3d) 97 (S.C.C.).

40. Ronald R. Price, "Of Privacy and Prisons", in Gibson, D. (ed.), Privacy in Canada, (1984), p. 376.

41. The scope of an inmate's right in this regard is unsettled at the present time. A ruling of the Federal Court which held that inmates do not have a right to privacy in their cells sufficient to prohibit double-bunking is on appeal: Piché, Newfeld, Daher, Breland and Smyth v. The Solicitor General of Canada, The Commissioner of Corrections, and the Institutional Head of Stony Mountain Institution (1984), 17 C.C.C. (3d) 1.

42. A summary of the literature on point is found in Schwartz, "Deprivation of Privacy as a Functional Prerequisite: The Case of Prison" (1972), 63 J. Crim. L. and Criminology 229.

43. Hudson v. Palmer 52 L.W. 5052 (1984), 5061 (U.S.S.C.).

44. Southam Inc. v. Director of Investigation and Research et al, (1982) 136 D.L.R. (3d) 133 (Alta.Q.B.).

45. Discussed in David C. James, "Constitutional Limitations on Body Searches in Prisons" (1982) 82 Colum. L. Rev. 1033 at p. 1050.

46. See Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (St. Paul, Minn.: West Publishing Co., 1978), in particular Volume 3, section 10.9: "Searches Directed at Prisoners". Also, "From Bags to Body Cavities: The Law of Border Search" (1974), 74 Colum. L. Rev. 53.

47. R. v. Simmons (1984) 45 O.R. 609 (Ont.C.A.). Under the Customs Act a person may be searched upon reasonable suspicion of a customs inspector; the person to be searched may require the inspector to take him or her before a police magistrate or justice of the peace, or chief officer of the place.

48. Discussed in Law Reform Commission of Canada, Investigative Tests [Working Paper 34], (Ottawa: Supply and Services, 1984), p. 2.

49. This reflects the present law; see Laporte v. Laganière, J.S.P. (1972), 18 C.R.N.S. 357 (Qué.Q.B.).

50. Dion v. Commissioner of CSC, supra, note 30.

Fundamental Freedoms

51. Section 2 of the Charter provides:

> 2. Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

52. Ohio Advisory Committee of the U.S. Commission on Civil Rights, Protecting Inmate Rights: Prison Reform or Prison Replacement?, February 1976.

53. Price, supra, note 40.

54. American Bar Association, "The Legal Status of Prisoners" (1977), 14 American Criminal Law Review 377, at p. 496.

55. Ontario Film and Video Appreciation Society v. Ontario Board of Censors, (1983) 147 D.L.R. (3d) 58 (Div. Ct.); affirmed, (1984) 5 D.L.R. (4th) 766 (Ont. C.A.); leave to appeal granted (S.C.C., April, 1984).

56. Maltby v. Attorney General of Saskatchewan et al (1983), 2 C.C.C. (3d) 153 (Sask.Q.B.)

57. For example, see Stanley L. Brodsky, Families and Friends of Men in Prison (Lexington, Mass.: D.C. Heath & Co., 1975) and Chelene Koenig, Life on the Outside: A Report on the Experiences of the Families of Offenders from the Perspective of the Wives of Offenders (Chilliwack, B.C.: Chilliwack Community Services, 1985).

58. Faid v. The Queen (1978), 44 C.C.C. (2d) 62 (Alta.S.C.), at p. 64.

59. Maltby, supra, note 56, p. 167.

60. R. v. Big M Drug Mart, supra, note 5.

61. Commissioner's Directive 750: Religious Services and Programs, s.1.

Conditions of Confinement

62. Report on the Standard Minimum Rules prepared for the Seventh UN Congress in 1985.

Judicial Remedies

63. Landry v. Legal Services Society (1987), 28 C.C.C. (3d) 138 (B.C.C.A.).

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

STATEMENT OF PURPOSE AND PRINCIPLES OF CORRECTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appendix C:

SUMMARY OF RECOMMENDATIONS

I. GENERAL PROVISIONS FOR FAIRNESS IN INSTITUTIONAL DECISION-MAKING

Objective

1. To ensure that the requirements of procedural fairness are complied with in decisions affecting an inmate's liberty or other interests.

General Rule

2. When making a decision which affects the liberty or other rights or interests of an inmate, the institutional authorities shall ensure that the greater the impact on the inmate the greater the procedural protections provided.

Inmate Access to Information

3. Where a decision affects an inmate's liberty or other interests, the inmate shall be entitled to all information which is relevant to his or her case. However, where the decision-maker receives information which

a) could reasonably be expected to threaten the safety of individuals;
b) could reasonably be expected to be injurious to the security of penal institutions; or
c) could reasonably be expected to be injurious to the conduct of lawful investigations or the conduct of reviews pursuant to the Penitentiary or Parole Acts, or the Penitentiary Service or Parole Regulations,

it need not disclose the information, if after

i) taking all available steps to confirm the accuracy of the information;
ii) considering the effect of disclosure on the source of the information or on a third party, or on an ongoing investigation or review; and
iii) considering the impact of non-disclosure on the applicant's opportunity to respond to matters at issue

it is satisfied that the information should not be disclosed.

4. Where information is not disclosed pursuant to section 3, the inmate shall be provided with specific reasons or grounds for non-disclosure and with the gist of the information.

II. PROVISIONS RELATED TO TRANSFER OF INMATES

Objective

1. To meet the security requirements and program needs of individual inmates while recognizing the impact of a transfer decision on an inmate's liberty and other interests.

Authority

2. The Commissioner or any officer directed by the Commissioner may transfer an inmate in accordance with the provisions of this part.

Reasons for Transfers

3. The transfer of an inmate may take place for one or more of the following reasons:

a) to respond to reassessed security requirements;
b) to provide access to the home community or a compatible cultural environment;
c) to provide access to relevant programs;
d) to provide adequate medical or psychological treatment;
e) to provide adequate protection;
f) to relieve serious overcrowding; and
g) to respond to an inmate's application for transfer.

Involuntary Transfers

4. Before being transferred involuntarily, an inmate shall be informed, in writing, of the proposed involuntary transfer and the particular allegations on the basis of which the transfer is being proposed, and of the fact that he or she is entitled to respond to the proposal, in person before the institution head, or, if the inmate prefers, in writing, within 48 hours.

5. The inmate's response to a proposal of involuntary transfer shall be reviewed by the Commissioner or a senior regional official and the inmate shall be informed of the decision reached. When the involuntary transfer is to proceed despite the inmate's objection, reasons for the decision shall be given.

6. In an emergency situation, a transfer may take place without prior notification to the inmate. In such cases, the inmate shall be informed of the reasons for the transfer and the particular allegations on which it is based within 48 hours of the transfer and shall have the opportunity to respond, in person, within 48 hours.

III. PROVISIONS RELATED TO ADMINISTRATIVE SEGREGATION

Objective

1. To ensure that inmates who must, for a limited period of time, be kept from associating with other inmates are confined as a result of a fair and reasonable decision-making process, in a secure and humane fashion, and returned to normal association as soon as possible.

Placement in Segregation

2. An inmate may be segregated where the institutional head or his designate is satisfied that no other reasonable alternative exists, and:

a) there are reasonable grounds to believe that the inmate has committed, attempted to commit, or plans to commit acts that represent a serious threat to the security of the institution or the safety of individuals; or
b) disciplinary or criminal charges have been laid involving actual or threatened violence or an associated threat of reprisal or destruction of government property and there is a substantial likelihood that the offence will be continued or repeated or there will be violent reprisals by other inmates; or
c) there are reasonable grounds to believe that the presence of an inmate in normal association would interfere with the investigation of a criminal or serious disciplinary offence through that inmate's intimidation of potential witnesses; or
d) there are reasonable grounds to believe that an inmate's presence in normal association represents a risk to the good order of the institution in that the inmate has refused to obey the lawful order of a staff member or officer and there is a substantial likelihood that the refusal will be repeated or will lead to widespread disobedience by other inmates; or
e) there are reasonable grounds to believe that the inmate's life is in danger.

3. An inmate placed in administrative segregation shall be informed, in writing, of the reasons for the placement in segregation within 24 hours of placement.

4. Where an officer other than the institutional head has ordered administrative segregation, the institutional head shall, within 24 hours of placement, review the order and either confirm the placement in segregation or issue a further order directing that the inmate be released from segregation.

Conditions of Confinement

5. An inmate placed in administrative segregation shall not be considered under additional punishment and shall be accorded the same conditions of confinement and rights and privileges as

the general population except for those that can only be enjoyed in association with other inmates, including but not limited to:

a) correspondence;
b) personal effects;
c) clothing, bedding, and linen and exchange thereof;
d) personal hygiene, including opportunities to shave and shower;
e) canteen;
f) borrowing from the institutional library and receiving reading material from outside the institution;
g) access to legal materials and legal services; and
h) daily exercise.

Reasonable access to visiting and telephone calls to persons or agencies outside of the institution shall be provided.

6. Inmates who have been placed in administrative segregation shall be provided with:
a) case management services;
b) educational, spiritual and social development activities;
c) psychological counselling; and
d) administrative and health care services.

Review of Administrative Segregation

7.a) A review of the case of each inmate placed in administrative segregation shall take place within 3 days of the initial placement and no less frequently than once a week thereafter.
b) The review shall be carried out by a Segregation Review Board consisting of the Assistant Director (Security) or Assistant Director (Socialization); the Classification Officer or psychologist in charge of segregation; the security officer in charge of segregation; and an independent outside person.
c) Each inmate shall be notified at least 24 hours in advance of the review and shall be permitted to present his or her case in a hearing before the Segregation Review Board.
d) The board shall consider whether there are continuing grounds for segregation according to the criteria in section 2 and shall recommend in writing to the institutional head either that segregation be continued or that the inmate be returned to the general population.
e) A copy of the recommendation shall be given to the inmate.
f) The institutional head retains the final authority to make the decision (subject to 8(b)). In a case where the institutional head does not intend to act in accordance with the recommendation of the Board that an inmate be returned to the general population, the institutional head shall inform the inmate in writing of the reasons for his or her intended decision and provide the inmate with an opportunity to present his or her case for release into the general population.
g) Where the inmate continues to be segregated, the Segregation Review Board shall develop a plan to re-integrate the inmate into the general population of the institution as soon as possible, and shall monitor the plan during subsequent reviews. The inmate shall have an opportunity to make representations as to the proposed plan.

8.a) Where segregation is to be continued beyond 30 consecutive days the Segregation Review Board shall hear the evidence of a psychologist or psychiatrist who has assessed the inmate.
b) Where the psychologist or psychiatrist presents evidence that continued segregation will cause the inmate substantial psychological or physical harm, the institutional head shall order the inmate's return to the general population, unless return would be an immediate danger to life or safety.

Maximum Time in Administration Segregation

9. No segregation shall be continued for more than ninety days unless

a) during this period the inmate commits further acts which under section 2 justify further segregation. Any further period of segregation shall also be subject to a ninety day limitation; or,

b) no reasonable alternative exists and the inmate must remain in the institution to attend court proceedings.

IV. INMATE DISCIPLINE

Objective

1. To foster an environment in which inmates conduct themselves according to acceptable and approved standards of behaviour thereby promoting good order in the institution and contributing to their successful reintegration into the community, through a fair and reasonable disciplinary process.

Offences

2. Every inmate commits an offence who:

a) wilfully disobeys a lawful order;

b) wilfully breaches a regulation or written rule governing the conduct of inmates;

c) commits or threatens to commit an assault against another person;

d) behaves towards any other person, by his or her actions, language or writing, in a threatening or extremely abusive manner;

e) takes or converts to his or her own use or that of another any property or article without the consent of the rightful owner or other person in lawful possession of the property;

f) wilfully or negligently damages any property of Her Majesty or of any other person;

g) has contraband in his or her possession;

h) deals in contraband with any other person;

i) consumes, absorbs, swallows, smokes, inhales, injects or otherwise uses an intoxicant within the institution or when prohibited as a condition of any release from custody;

j) participates in, creates or incites a disturbance likely to endanger the security of the institution;

k) does any act with intent to escape or to assist another inmate to escape;

l) leaves his or her cell, place of work or other appointed place without proper authority;

m) gives or offers a bribe or reward to any person;

n) is in an area prohibited to inmates;

o) wilfully wastes food; or

p) attempts to do anything mentioned in paragraphs a) to o).

Definitions

3. "Contraband" consists of any item that is not on an approved list distributed to each inmate upon reception, unless the inmate has obtained written permission from the have institutional head to the item in his or her possession.

"Intoxicant" consists of any substance, not on the approved list distributed to each inmate that, if consumed, absorbed, swallowed, smoked, inhaled, injected or otherwise used, would result in intoxication.

Manner of Proceeding

4. Where a staff member has reasonable and probable grounds to believe an inmate has committed or is committing a disciplinary offence, the staff member shall, where circumstances allow:

a) stop the commission of the offence and explain to the inmate the nature of the breach, and

b) where a person aggrieved by the alleged breach consents, permit the inmate to correct the breach where possible and make amends to the person aggrieved.

5. Where a staff member has reasonable and probable grounds to believe an offence has been or is being committed and where it cannot be resolved informally as in section 4, the institutional head or the staff member designated by the institutional head shall determine whether, depending on the circumstances surrounding the offence, to charge the inmate with a minor or serious violation, or to inform the police force having jurisdiction.

Procedures

6. An inmate charged with a disciplinary offence shall:

a) receive in writing notice of the date, time and place of his or her disciplinary hearing, and the specific charge and whether it is designated as minor or serious, not less than twenty-four hours in advance of the hearing;
b) have the charge described in sufficient detail to permit the inmate to know exactly what behaviour has lead to the charge;
c) be entitled to a hearing within seven working days of written notice of the offence;
d) have access to an interpreter, if necessary;
e) have the opportunity to be present and to be heard;
f) be entitled to assistance from another person or persons of the inmate's choice where the offence is designated as serious, provided the person has been approved for entry into the institution;
g) have the opportunity to question witnesses and call witnesses on his or her own behalf; and
h) have the opportunity to make submissions with respect to punishment in the event of a conviction.

7. An inmate charged with a minor offence shall appear before the institutional head or his/her delegate; and an inmate charged with a serious offence shall appear before an independent chairperson.

8. All proceedings related to the hearing of serious offences shall be recorded; those related to a minor offence shall be summarized.

9. The standard of proof required for conviction for any disciplinary offence shall be proof beyond a reasonable doubt.

10. A disciplinary conviction or acquittal is determinative of issues of fact relevant to subsequent institutional decisions.

Penalties

11.a) An inmate found guilty of a serious offence is subject to one or more of the following:
  i) a warning or reprimand;
  ii) the loss of privileges;
  iii) a fine of not more than $50.00;
  iv) reimbursement of up to $500.00 for the amount of damages caused wilfully or negligently;
  v) a work order for a specified number of hours, not to exceed 100;
  vi) dissociation from other inmates for a period not exceeding (seven) consecutive days.

b) An inmate found guilty of a minor offence is subject to one of the following:
  i) a warning or reprimand;
  ii) the loss of privileges;
  iii) reimbursement up to a maximum of $50.00 for the amount of damages caused wilfully or negligently.

c) The presiding officer of the disciplinary court may, in the case of a serious offence, suspend the carrying out of the sentence on the condition that the inmate is not found

guilty of another serious offence during a specified period not exceeding ninety days from the date of the order. Where this condition is not complied with, the suspended punishment shall be carried out.

Independent Chairpersons

12.a) The Minister shall appoint an independent chairperson, other than an official of the Service, to preside over the hearing and adjudicate charges of offences designated serious.

b) The independent chairperson shall have relevant experience in the practice of criminal law, or experience with adjudicative bodies.

13. The Minister shall appoint a person other than an official of the Service to serve as Chief Independent Chairperson for each region of the Correctional Service of Canada whose duties shall include:

a) hearing appeals on matters of process and substance, for both convictions and sentence; and

b) monitoring and promoting consistency in dispositions.

V. PROPOSAL REGARDING SEARCH OF INMATES

Objective

1. To authorize and regulate search procedures necessary to maintain a safe, secure environment while ensuring respect for the inmate's privacy and other rights.

Definitions

2. The following definitions shall apply to all searches of inmates:

"Contraband": any item that is not on an approved list distributed to each inmate upon reception, unless the inmate has obtained written permission from the institutional head or his/her designate to have the item in his or her possession.

"Administrative search" or "inspection": the power to conduct a routine search of a person, place or vehicle without individualized suspicion, and to seize contraband or evidence of an offence, to ensure compliance with security requirements or health and safety standards of the institution.

"Investigative search": the power of search and seizure where there are reasonable grounds to believe or suspect that a person, place or vehicle is carrying or containing contraband or evidence of an offence.

Search of a Person

Personal search may include the following:

"Walk-through scanner": a procedure in which the person being searched is required to walk through a metal detector scanner or be subjected to a similar non-intrusive search by technical means.

"Frisk search": a hand search of a clothed person from head to foot, and includes the method of searching by use of hand-held scanning device. If necessary, a frisk search may be expanded to require the person being searched to open his or her mouth, raise, lower, or open outer garments of clothing to permit a visual inspection.

"Strip search": a procedure in which the person being searched is required to undress completely before a staff member, and as well the person may be required to open his or her mouth, display the soles of his or her feet, present open hands and arms, and bend over to allow a visual inspection. In addition, all clothing and things possessed in the clothing may be searched.

"Urinalysis": a procedure in which the person being searched is required to provide a urine sample by the normal excretory process to a qualified technician for scientific analysis by an approved instrument.

"Manual body cavity search": a procedure in addition to a strip search which includes the physical probing of the rectum or vagina.

Search of Inmates

3.a) All searches are to be conducted in circumstances respectful of the privacy and dignity of the inmate to be searched. A strip search shall only be conducted by a staff member of the same sex as the inmate, and shall take place in a private area out of the sight of others, except for a witness of the same sex. A manual body cavity search shall only be performed by a qualified medical practitioner upon written authorization of the institutional head.

b) Where a staff member seizes things he or she shall issue a receipt to the inmate. The staff member shall bring the things seized to a senior official and file with him or her a full report including the time and place of the search and seizure, the names of the inmate and staff members conducting the search, the reason why the search was made, and a description of the things seized. The report, subject to the limitations in s.3 of the provisions on inmate access to information, shall be available on request to the inmate who was searched.

c) A staff member who conducts an investigative strip search in which nothing is seized shall be required to file a post-search report with a senior official. The report shall include the time and place of the search, the names of persons involved, and the reason for the search. The report, subject to the limitations in s.3 of the provisions on inmate access to information, shall be available on request to the inmate who was searched.

d) Copies of the report shall be maintained.

Administrative Routine Search

4.a) A staff member of either sex may conduct a routine walk-through scanner search or a frisk search of an inmate

i) immediately prior to the inmate's leaving or on his or her entry or return to the institution;
ii) immediately prior to the inmate's entering or on leaving the open visiting area of an institution; where the inmate is leaving a work or activity area; and
iv) where the inmate is on a temporary absence outside the institution.

b) A staff member may conduct a routine strip search of an inmate

i) on an inmate's return to an institution;
ii) immediately on leaving the open visiting area of an institution; and
iii) on an inmate's leaving work areas in a situation where the inmate has had access to items which may constitute contraband that is of a nature which may be secreted on the body.

c) If a staff member, in the course of a lawful administrative search, discovers contraband or evidence of an offence he or she may seize it.

Investigative Search

5.a) A staff member of either sex may conduct a frisk search of an inmate where he or she has a reasonable suspicion that the inmate is carrying contraband or evidence of an offence. A reasonable suspicion is a subjective suspicion supported by objective, articulable facts

that would reasonably lead an experienced, prudent staff member to suspect that a particular person is concealing contraband on his or her body.

b) Where a staff member has reasonable grounds to believe that an inmate has committed or is committing the offence of using an intoxicant and that a urine sample is necessary to provide evidence of the offence, he or she may demand that an inmate submit as soon as possible to a urinalysis, carried out by a qualified technician. A sample shall be provided to the inmate upon request.

c) Where a staff member believes on reasonable grounds that the inmate is carrying contraband or evidence of an offence and that a strip search is necessary to detect the presence of the contraband or evidence, and he or she so satisfies his or her superior, the staff member may conduct a strip search.

d) Where a staff member, in the course of a lawful investigative search, discovers contraband or evidence of an offence, he or she may seize it. However, if during a strip search the staff member discovers contraband secreted in an intimate body cavity, he or she must obtain authorization for a manual body cavity search. A manual body cavity search shall only be authorized where the institutional head is satisfied that there are reasonable grounds to believe that an inmate is carrying contraband within an intimate body cavity and that such a search is necessary to detect and seize the contraband.

Search of Cells and Other Areas

6. If a staff member in the course of a lawful cell search discovers contraband or evidence of an offence he or she may seize it.

Administrative Search

7. Routine searches of cells and activity areas may be conducted without specific grounds on a periodic basis by staff members in accordance with a search plan providing for random, thorough searches. An inmate representative shall be present when search of a cell is conducted.

Investigative Search

8.a) A staff member who has a reasonable suspicion that contraband is located in an inmate's cell may, with written authorization from a supervisor, enter the cell and conduct a search of the cell and its contents.

b) Where the staff member in s.8(a) believes on reasonable grounds that the delay necessary to obtain written authorization would result in loss or destruction of the contraband he or she may enter the cell and search for contraband without prior written authorization.

Emergency Search

9.a) Where an uprising or similar emergency has occurred in the institution, necessitating a general lock-up whereby all inmates are confined to their cells, and there are reasonable grounds to believe that weapons, contraband or evidence relating to the emergency are to be found, a general shakedown of inmates, cells and other areas may be conducted incident to the lock-up on written authorization of the institutional head.

b) In the case of a shakedown search the staff members performing the search shall file a post-search report with the institutional head. The report should include the names of all staff members conducting the search, a list of all persons, cells and areas searched, and a description of any things seized. The portions of the report that pertain to a particular inmate shall be available on request to the inmate.

c) Copies of all reports shall be retained.

BASIC RIGHTS AND FREEDOMS

VI. Mail

1. Inmates have the right to send and receive mail freely except as restricted herein and subject to any other legal restrictions on the use of the mails.

Postal Observer

2. The inmate committee may appoint an inmate, designated the postal observer, to observe the actions of the postal officer in receiving, opening, and distributing mail. The postal observer shall witness any opening of mail, and shall sign, as witness, a daily statement by the postal officer indicating all items of alleged contraband found in the mail, or that there was none, and that mail was not read or censored, if such is the case.

Privileged Correspondence

3. Correspondence to and from persons listed in Schedule A hereto is designated as privileged, and may not be opened or inspected by correctional authorities.

Outgoing Correspondence

4. Outgoing correspondence other than that covered by s.3 above may be sealed by the inmate and shall not be opened, but

a) such correspondence may be submitted to inspection that does not involve opening the mail, and where such inspection reveals reasonable grounds to believe that the envelope or package contains an object which may constitute a threat to public safety or evidence of an offence, the institutional head may authorize the opening of the package or envelope for inspection, but not reading, of the contents.

b) A package or envelope may only be opened pursuant to paragraph a) above in the presence of the postal observer, and the inmate sending the mail must be advised in writing of the reasons that the mail was opened.

5. Inmates may correspond with whomever they wish, except that the institution may refuse to permit correspondence where the addressee, or the parent or guardian of an addressee who is a minor, requests that they receive no further correspondence from an inmate. The inmate must be notified in writing that the correspondence may not be sent, with reasons for the prohibition.

Incoming Correspondence

6. Incoming correspondence may be opened in the presence of the postal observer so that the contents of the envelope may be inspected for contraband, but the correspondence may not be read.

Publications

7. The institutional head may prohibit entry into the institution of any publication which

a) violates federal or provincial legislation governing publications;

b) portrays excessive violence and/or aggression and which is likely to incite inmates to violence; or

c) contains detailed information on the fabrication of weapons or the commission of criminal acts which would endanger the security of the institution or public safety, and

d) where publications are prohibited pursuant to paragraph a), b) or c) above, the inmate shall be given reasons in writing for the prohibition.

General

8. Inmates who are unable to read or write are entitled to the assistance of a staff member, volunteer, or another inmate for correspondence purposes.

9. Indigent inmates shall receive postage, stationary and envelopes for at least five general correspondence letters per week and as many privileged correspondence letters as requested.

Schedule A

1. Solicitor General of Canada
2. Deputy Solicitor General of Canada
3. Commissioner of Corrections
4. Chairman of the National Parole Board
5. Correctional Investigator
6. Inspector General
7. Governor General of Canada
8. Canadian Human Rights Commission
9. Commissioner of Official Languages
10. Information and Privacy Commissioners
11. Members of the House of Commons
12. Members of the Senate
13. Members of the Legislative Council for the Yukon and the Northwest Territories
14. Members of the Provincial Legislatures
15. Provincial Ombudsmen
16. Consular Officials
17. Judges and Magistrates of Canadian courts (including their Registrars)
18. Legal counsel, legal aid services or other agencies providing legal services to inmates

VII. VISITS

1. All inmates have the right to visit with whomever they choose, subject to reasonable time and place limitations and to the restrictions herein.

Refusal or Suspension of Right to Visit

2.a) The institutional head or designate may refuse or suspend a particular visit

i) where there are reasonable grounds to believe that immediate and pressing security concerns demand it, and where restrictions on the manner in which the visit takes place would not be adequate to control the risk; or

ii) where during a public visit, either the inmate or the visitor behaves in a manner that exceeds the bounds of acceptable behaviour in a public place.

b) Where the visit is suspended or refused, reasons for such shall be documented and the inmate and visitor informed of such reasons.

c) The institutional head may order a complete suspension of all rights to visit in an institution only where the security of the institution is at significant risk and where there is no less drastic alternative. Any such order must be reviewed by the Deputy Commissioner of the Region after 5 days and by the Commissioner of Corrections after 14 days.

Security and Monitoring of Visits

3. The institutional head shall respect, protect and enhance the privacy of inmate visits to the greatest degree possible, however, he or she may authorize the visual supervision of the visiting area in an unobtrusive, nonmechanical manner, and, in the case of a section of a visiting area which is inaccessible, he or she may authorize mechanical visual monitoring.

4. The institutional head shall protect the privacy of inmate-counsel interviews by

a) providing interviewing facilities which may be within sight but not within hearing of any person and

b) providing interview facilities which have no glass or metal barrier between inmate and counsel, except where counsel requests a barrier for his or her safety.

5. Interviews between inmate and legal counsel shall not be monitored or recorded with listening or video devices.

6. Subject to s.3, there shall be no interception by means of an electro-magnetic, acoustic, mechanical or other device of an inmate's visit, unless prior authorization from the institutional head has been obtained, on the basis that there is evidence of a threat to the security of the institution.

Open Visiting

7. Visits shall take place with no physical barrier to personal contact except where

a) it is necessary for the safety of the visitor, or

b) the visit would present a serious threat to the security of the institution, and, where less drastic means (such as non-intrusive search) will not meet the security concern.

8. Where visiting is restricted pursuant to section 7 (a) or (b), the reasons shall be fully documented and the inmate and visitor informed of those reasons and provided with an opportunity to respond.

VIII. INMATE ORGANIZATION, ASSOCIATION AND ASSEMBLY

General Rights

1. Inmates have the right to form and join organizations for any lawful purpose, to solicit membership without coercion, to associate, to assemble, to circulate petitions for signature and to peacefully distribute lawful materials subject to reasonable time, place and staff limitations and subject to the following restrictions.

2. All inmate organizations desiring to associate, to assemble, to use institutional facilities and to have access to available institutional resources and materials, must provide the institutional head with a membership list and a written description of the purpose of their organization.

3. The institutional head may restrict organizations and assembly in the following ways:

a) Where an assembly is to take place, the institutional head may assign staff to observe the assembly, but he or she shall seek to accommodate the organization's request for the assignment of specific staff.

b) Where an assembly is to take place that would, in the opinion of the institutional head, pos a threat to the security of the institution or to the protection of the public, he or she may prohibit it.

Inmate Committees

4. Inmates in every institution are entitled to form inmate committees, which shall be governed by the above provisions, and which shall, to the greatest extent possible, be involved on a

continuing basis in the decision-making processes of the institution as they concern the inmate population.

5. The institutional head may remove a member of the inmate committee only where:

a) that member's committee activities pose a substantial threat to the security of the institution or to the protection of the public; or

b) that member abuses his committee position to achieve ends which are patently inconsistent with institutional security.

6. Where an inmate committee member is removed, the institutional head shall inform the affected inmate of the reason for the decision, in writing, and the inmate-member shall have an opportunity to respond.

IX. RELIGION

1. All inmates have the freedom of conscience and religion and are entitled to express their spirituality and exercise their religion freely, restricted only by immediate and pressing security concerns of the institution.

2. Without limiting the foregoing, this freedom includes

a) the freedom to express religious beliefs through religious practice which may include expression orally, in writing, in dress, behaviour and religious possessions, and

b) the freedom to congregate together, in accordance with the provisions on inmate assembly and association.

3. Correctional authorities shall make available the necessities required for inmates to manifest their religious beliefs equitably, and to the degree possible, including, but not so as to limit the foregoing:

a) interfaith chaplain;
b) facilities, such as chapel for religious worship;
c) worship service;
d) pastoral counselling;
e) special diets as required by the inmate's religious tenets; and
f) special religious rites on holidays generally observed by their religion.

X. PROPOSALS REGARDING CONDITIONS OF CONFINEMENT

Physical Conditions

1. Every inmate shall have a healthful and safe environment in which to live. Every correctional institution shall comply with the health, safety, sanitation and fire codes applicable to public buildings and shall be inspected regularly by independent inspectors.

2. The correctional authority shall ensure a reasonable standard of care in the protection of inmates from assault by other inmates and by staff.

3. In particular, but not as to limit the generality of the foregoing:

a) all parts of the institution shall be properly maintained and kept clean at all times;

b) institutions shall be designed, structured and situated in such a manner that programs to fulfil the needs of inmates are facilitated;

c) all rooms in the institution shall have adequate and healthful space, heating, lighting and ventilation;

d) every inmate shall be provided with clothing adequate for warmth and health, according to the requirements of the season and the nature of his or her activities, including use at work where this is needed;

e) clothing provided shall be clean and kept in proper condition;

f) every inmate shall be provided with three nutritional meals each day; water fit for drinking shall be available to every inmate whenever he or she needs it;

g) every inmate shall occupy a cell or room by himself or herself, but if it is necessary for inmates to temporarily share a cell, each inmate shall be supplied with a separate bed;

h) every inmate shall be provided with clean bedding, appropriate for the season;

i) every cell or other area occupied by inmates shall have a clean, functioning and private toilet and other facilities for the maintenance of personal cleanliness;

j) adequate bathing and shower facilities shall be provided; and

k) every inmate shall have the opportunity for at least one hour of daily recreation and physical exercise in the outdoors, when weather permits; otherwise, in indoor facilities.

Medical and Health Care

4.a) The standard of health care for inmates shall be the same as for the general population.

b) Every institution shall provide the services of qualified competent medical, psychiatric and dental officers. Although services shall normally be provided during reasonable hours, emergency services shall be available at any time.

c) No health services shall be administered by persons who are not professionally recognized as competent to provide those services. No person who is not professionally qualified shall make a decision regarding an inmate's need for health services.

d) Every institution shall have ready access to all of the services of an accredited hospital.

e) Every inmate shall have the right to prompt medical attention when so requested, taking into account the nature of the problem and the institution's reasonable procedures for providing daily medical services.

f) The reasons for any disability, injury or illness shall not have any bearing on the provision of quality medical attention.

g) An inmate may obtain the services of a qualified physician of his or her choice for the treatment of medical complaints where the inmate pays for costs incurred.

Medical Records

5.a) Complete and confidential medical records shall be maintained in respect of each inmate. Where an inmate is transferred to another institution, his or her medical records shall be promptly transferred to that institution.

b) Complete records shall be maintained of the administration of all drugs to inmates. These shall include the type and quantity of the drug administered, and the date, time and reasons for its administration.

Right to Refuse Medical Treatment

6.a) Compulsory treatment of inmates can only be administered pursuant to applicable provincial legislation.

b) The inmate may voluntarily consent to medical treatment, provided:
i) the objectives of the treatment are clearly explained to the inmate-patient; and
ii) any known risks and dangers are also explained.

Access to Legal Materials

7. All inmates shall have access to legal materials.

8. In particular, but not so as to limit the generality of the foregoing:

a) every maximum and medium security institution shall have legal materials as specified in the regulations (see Schedule A), to which inmates have access;

b) legal materials shall include adequate writing supplies and instruments;

c) each institution shall have at least one person on staff or available who is properly qualified and authorized for the taking of oaths;

d) inmates shall be entitled to acquire law books and other legal research materials from any source.

Schedule "A"

1. The most recent Revised Statutes of Canada and Regulations, with up-to-date annual volumes.

2. The most recent Revised Statutes and Regulations of the province in which the institution is located, with up-to-date annual volumes.

3. An up-to-date annotated Criminal Code of Canada, and related criminal statutes.

4. Criminal case reports: C.C.C.'s and C.R.'s

5. Recently available basic textbooks on criminal law and procedure, correctional law, constitutional law and administrative law.

6. Correctional Caselaw Manual.

7. The rules of procedure in the Federal Court of Canada.

8. The rules of procedure in the provincial courts in which the institution is located.

9. All Senate and/or House of Commons and/or Legislative Assembly reports on prison and/or parole; all relevant Royal Commissions, Commissions of Inquiry; and any government reports on corrections which are made public.

10. Canada Law List.

ENFORCING THE RULES

XI. JUDICIAL REMEDIES

Any person whose rights as set out in this Act have been infringed or denied may apply to the Federal Court of Canada, and the Court may award such remedy as it considers appropriate and just in the circumstances.

XII. PROPOSED INMATE GRIEVANCE PROCEDURE

Objective

1. There shall be an inmate grievance procedure established at each penitentiary whose purpose shall be to provide a fair and timely means to resolve grievances about matters falling within the responsibility of the Commissioner of Corrections.

Procedure

2. Once a grievance has been filed, there may be an attempt to resolve the matter informally, without reference to the grievance resolution committee. There shall be no requirement for such informal resolution, however, and attempts at informal resolution shall not in any way prejudice the grievant's right to be heard through the formal grievance resolution process.

3. The Commissioner shall establish, at each penitentiary under his or her jurisdiction, grievance resolution committees to hear and resolve grievances of persons within the penitentiary. Such grievance resolution committees shall consist of equal numbers of staff appointed by the institutional head and inmates elected by their peers, as well as a non-voting chairperson.

4. The Commissioner shall promulgate rules and regulations establishing procedures for the fair, simple and expeditious resolution of grievances, including but not limited to setting time limitations for the filing of complaints and replies thereto for each stage of the grievance resolution process.

5. A person aggrieved by the decision of a grievance resolution committee may apply to the Commissioner for review of the decision. The Commissioner or his or her delegate may take such action as he or she deems appropriate to resolve the grievance fairly and expeditiously to the satisfaction of all parties. If the resolution of the grievance by the Commissioner or his or her delegate is deemed unsatisfactory by any party to the grievance, that party shall have the option to refer the matter to an independent arbitrator. The decision of the independent arbitrator shall be binding unless it is established to the satisfaction of the Federal Court that such decision would be contrary to law, would represent a clear danger to any individual or group of individuals, or would require funds not available in the current budget. In the latter case, the Commissioner shall present to the Court a plan for the implementation of the decision in future fiscal years.

6. The Federal Court has jurisdiction to hear and determine an application to review and set aside a decision or order made by an independent arbitrator upon the ground that the arbitrator:

a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise his or her jurisdiction;

b) erred in law in making his or her decision or order, whether or not the error appears on the face of the record; or

c) based his or her decision or order on an erroneous finding of fact which he or she made in a perverse or capricious manner or without regard for the material before him or her.

7. There shall be no reprisals for the use of the grievance procedure. Copies of grievances shall not be placed on files which form part of the case documentation for significant decisions made about the offender, such as transfer and release.

8. Replies to all grievances shall be made in writing and shall detail the reasons for the decision and the deadline for action to be taken on the grievance, if applicable.

9. Those elements of a grievance which could result in disciplinary action against a staff member shall be referred to the institutional head for proper action through the normal procedure for staff discipline. No findings or recommendations regarding staff discipline shall be made by a grievance resolution committee or an independent arbitrator, nor shall the outcome of any inmate grievance be used as a basis for staff discipline.

XIII. OFFICE OF THE CORRECTIONAL INVESTIGATOR

1. The Governor in Council may appoint a person to be known as the Correctional Investigator of Canada. The Correctional Investigator shall hold office during good behaviour for a term of five years, but may be suspended or removed for cause at any time by the Governor in Council.

2. The Correctional Investigator has the control and management of all matters connected with the Office of the Correctional Investigator, including the use of such officers and employees as are necessary to enable the Correctional Investigator to perform the function and duties of the Office.

3. It is the function of the Correctional Investigator to conduct investigations into the problems of inmates related to their confinement or supervision on temporary absence, day parole, parole or mandatory supervison. In performing this function, the Correctional Investigator may investigate any decision, recommendation, act or omission of the Commissioner of Corrections or any person under the control and management of, or performing services for or on behalf of, the Commissioner of Corrections that affects inmates either individually or as a group.

4. In the course of an investigation, the Correctional Investigator may hold any hearing and make such inquiries as the Correctional Investigator considers fit, but no person is entitled as of right to be heard by the Correctional Investigator.

5. In the course of an investigation, the Correctional Investigator may require any person:

a) to furnish any information that, in the opinion of the Correctional Investigator, the person may be able to furnish in relation to the matter being investigated; and

b) to produce, for examination by the Correctional Investigator, any document, paper or thing that, in the opinion of the Correctional Investigator, relates to the matter being investigated and that may be in the possession or under the control of that person.

6. In the course of an investigation, the Correctional Investigator may summon and examine on oath

a) where the investigation is in relation to a complaint, the complainant, and

b) any person who, in the opinion of the Correctional Investigator, is able to give any information relating to the matter being investigated,

and for that purpose may administer an oath.

7. The Correctional Investigator may, on satisfying any security requirements applicable thereto, at any time enter any premises occupied by or under the control and management of the Commissioner of Corrections and inspect the premises and carry out therein any investigation or inspection.

8. When informing the Commissioner of Corrections of a problem, the Correctional Investigator may make any recommendations the Correctional Investigator considers appropriate.

9. The Commissioner of Corrections shall advise the Correctional Investigator within 45 days of receiving a recommendation what action will be taken with respect to the recommendation.

10. The Correctional Investigator shall, within three months after the end of each fiscal year, submit to the Solicitor General a report in both official languages of the activities of the Office of the Correctional Investigator during that year and the Solicitor General shall cause every such report to be laid before each House of Parliament on any of the first fifteen days on which the House is sitting after the Solicitor General receives it.

11. If within a reasonable time after the Correctional Investigator has informed the Solicitor General of a problem no action has been taken which seems to the Correctional Investigator to be adequate and appropriate, the Correctional Investigator may submit a special report to the Solicitor General about the problem and the Solicitor General shall cause every such report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Solicitor General receives it.