Solicitor General Canada
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Secrétariat du Ministère

CORRECTIONAL ISSUES AFFECTING NATIVE PEOPLES

Correctional Law Review
Working Paper No. 7
February, 1988

Canada

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This paper represents the tentative views of the Working Group of the Correctional Law Review. It is prepared for discussion purposes only and does not represent the views of the Solicitor General, or 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 and 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 view 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, whenever 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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CORRECTIONAL LAW REVIEW: CORRECTIONAL ISSUES AFFECTING NATIVE PEOPLE

EXECUTIVE SUMMARY

INTRODUCTION

Identifies the main focus of this paper, which is to highlight the serious problems faced by Native offenders in the correctional system, and to suggest legislative and policy approaches in correctional law reform that could ameliorate these problems. The issues and approaches to solutions are discussed within the context of the Correctional Law Review, and in view of the unique legal status that native people have in Canada.

PART I: THE NATIVE OFFENDER

Native offenders are an especially disadvantaged group in Canada. They are over-represented in the correctional system, and their proportion seems to be increasing. They have special problems and needs, stemming from their unique social, cultural and spiritual backgrounds. Native offenders are reluctant to participate in programs run by non-Natives, but there is increased participation in programs that have Native orientation and are run by Natives. Natives also do not benefit from release programs to the same extent as non-Natives. Problems are also created by low Native representation in the correctional service staff, despite efforts at affirmative action, and low representation on the National Parole Board.

PART II. THE LEGAL FRAMEWORK

Aboriginal people have a special and unique legal status in Canada. It is a product of aboriginal and treaty rights, and various constitutional and legislative provisions. Insofar as aboriginal persons are members of ethnic, religious or linguistic minorities, Canada also has international legal obligations to respect specified rights. The legal definition of the rights of

aboriginal peoples is imprecise. However, the development of aboriginal self-government is the major issue now facing aboriginal peoples and the government of Canada, as new institutions run by aboriginal peoples begin to assume greater control over critical areas of community life, including justice, law enforcement and correctional matters.

PART III. THE AMELIORATION OF CONDITIONS FOR NATIVE OFFENDERS

During the consultations on the Correctional Law Review the major questions for consideration will be whether legislative change would be helpful in ameliorating the conditions for Native offenders. Would either or both of the following two approaches be appropriate?

1. Through the development of special legislative provisions for Native people to assume greater control over the provision of certain correctional services to Native people.

   In enabling legislation, a significant degree of jurisdiction could be transferred to aboriginal communities or other organizations under a clearly stated legal relationship with the Solicitor General. Correctional services, parole and aftercare services could be provided in facilities operated by Aboriginal correctional authorities. Services provided would still have to meet the basic requirements of the law, and provide adequate containment of offenders.

2. The second approach would be to ameliorate the situation of Natives in correctional institutions through amendments to existing correctional legislation governing all offenders. This is a more limited approach, and entails no fundamentally new arrangements. Control would remain with the existing correctional system.

   Under this scheme there would be:

   - significant consultation with aboriginal authorities, through regional and national Aboriginal advisory committees.

- guarantees for native spirituality, culture and rehabilitation.

- greater aboriginal community involvement in release planning for Native offenders.

- increased efforts at affirmative action in hiring and promotion of Native staff, together with increased awareness training for correctional staff.

PART IV: CONCLUSION

The two approaches outlined in the paper are complementary, and could operate to improve the situation of incarcerated native offenders, while facilitating efforts of native communities and other native organizations to assume greater control of correctional services to Native offenders.

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NATIVE OFFENDERS

INTRODUCTION

The Correctional Law Review is an examination of federal correctional legislation through an in-depth analysis of the purposes of corrections and a determination of how the law should be cast to best reflect these purposes. The ultimate aim of the review is to develop legislation that accomplishes the following goals: i) establishes the correctional agencies in law and provides clear and specific authority for their functions and activities; ii) reflects the philosophy of Canadian corrections; and iii) facilitates the attainment of correctional goals and objectives. Such a legislative scheme is intended to promote fair and effective decision-making, be clear and unambiguous, facilitate operations, give guidance to corrections staff, be internally consistent, promote the dignity and fair treatment of inmates and reflect the interests of staff and of all others affected by the correctional system. The interest of the public and correctional administration and staff, as well as offenders, must therefore be taken into account in developing a legislative scheme.[1]

Native offenders constitute a group warranting specific attention both because of the special legal status of Aboriginal peoples and because of the serious ongoing problem of their substantial overrepresentation in the correctional system and other manifestations of their situation as a traditionally disadvantaged group. This latter issue was recognized by the 1984 Carson Report.

> Natives constitute up to 30 percent of the inmate population in at least one region of the Service. Since 1960, the growth rate of the Native population in federal institutions has doubled that of the non-Native population. Moreover, relative to non-Natives, only a small proportion of Natives are approved for conditional release programs (eg. temporary absences or parole), and most are released on Mandatory Supervision. The recidivism rate for Natives also is higher than for non-Natives.[2]

This paper begins with an examination of the continuing problem facing Native people in corrections by reviewing correctional processes as they relate to the Native offender and the larger Native community. Part II discusses the legal context which must

be considered in developing correctional legislation pertaining to Native people. This discussion includes possible implications for corrections of aboriginal rights and Native self-government, the Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, and international law. Part III discusses the advantages and disadvantages of codifying provisions affecting Natives, and examines a number of specific issues, including Native spirituality, Native culture, correctional programming, transfers, parole and aftercare, as well as staff recruitment and training.

PART I: THE NATIVE OFFENDER

In this part, the problems associated with Native offenders in the correctional system will be reviewed. Some of these are problems inherited by corrections from other parts of the criminal justice system or the larger socio-economic system. Others are problems inherent in corrections itself, and concerning which corrections may be able to effect some meaningful change.

The most obvious problem is the large number of Natives in the system, in proportion to the number of Natives in Canadian society as a whole. Ironically, although it is distressing to see such high proportions of Natives in the correctional system, their small numbers, taken in absolute terms, in turn inhibit the mounting of a serious effort to provide programming within the existing correctional systems which will be responsive to Natives' needs. Compounding this is the fact that Native Canadians are not a homogeneous group, with a single language and culture. They therefore do not have a single set of problems for the correctional system to address. Not only are there several distinct aboriginal languages in Canada (there are 16 aboriginal languages that are in widespread use out of a total of 53 distinct aboriginal languages in Canada[3]), but the problems are different for status and non-status Indian, on and off reserves, and between rural and urban areas.

In the latest reported census figures, Native peoples made up only 2% of the population of Canada.[4] However, according to official statistics - which reflect varying definitions of "Native" and are thought by many to underestimate the numbers of offenders who consider themselves Native - about 9.5% of the penitentiary population is Native including about 13% of the federal female inmate population.[5]

In the West and North, the proportional representation is more dramatic, and indeed, is increasing. In the Prairie region, for example, Natives make up about 5% of the total population. However, in 1980, the Native population was 27.6% of the total Prairie federal inmate population; in 1987, it was 32.2%. In 1980, the Pacific Region showed a Native inmate population of 9.4%; in 1987, it increased to 12.2%.

The Native inmate population in Quebec has remained relatively stable, increasing from .2% in 1980 to .5% in 1987. In the same period, however, the percentage of Native inmates in the Atlantic Region dropped from 4.3% in 1980 to 2.6% in 1987. Similarily, Ontario dropped from 5.0% in 1980 to 4.0% in 1987.[6]

These figures are cited not to suggest a racist bias of individual criminal justice decision-makers or even of the system as a whole, but in order to illustrate that Natives represent a sizable minority in corrections, and to suggest that the root causes of their overrepresentation may be deeply buried in a breakdown in social structures outside the criminal justice system. Whatever the causes, however, it is clear that the numbers raise very real questions within corrections about how best to handle the needs and problems presented by Native offenders.

The social and economic situation of Native Canadians as compared to non-Native Canadians is discouraging. Generally, Native Canadians have a lower average level of education, have fewer marketable skills and have a higher rate of unemployment. The infant mortality rate for Indian children is twice the national rate, while life expectancy for those children who live past one year is more than ten years less than for non-Indian Canadians.

The rate of violent death among Indian people is more than 3 times the national average. The rate of suicide is nearly 3 times that of the total population of Canada, but in the 15-25 age range, the suicide rate is more than six times that of the total population in that age group.[7]

Studies also suggest that Native offenders, perhaps to an even greater extent than non-Native offenders, come from backgrounds characterized by a high degree of family instability and considerable contact with various types of institutions operated by social service and criminal justice agencies.[8] Native offenders show a high incidence of single-parent homes, family problems and foster home placements. The majority of Native offenders have long criminal records both as juveniles and as adults. Native offenders are also more likely to be admitted to correctional institutions for a violent offence than are non-Natives, although the reasons for this finding are difficult to trace clearly.[9] Alcohol abuse tends to be a serious problem for the majority of native offenders. Both the rate of alcohol abuse and the extent of individuals' abuse of alcohol are a greater problem for Native offenders than for non-Native offenders.

About half of the Native federal inmate population are status Indians, and of this group, about a third come from reserves. Generally speaking, most Native inmates now appear to come from urban areas, although still in considerably smaller proportions than do non-Native offenders. Where only some 15 years ago, 40% of the Native inmates in Stony Mountain Penitentiary were listed as having come from urban areas, the figure is now closer to 70%. Native offenders' rate of urban residence appears to be higher than for the Native population in Manitoba as a whole.[10]

Once the Native offender arrives in prison or penitentiary, further differences are observed. A substantial portion of Native inmates perceive themselves and are perceived by others as significantly different from their non-Native counterparts in terms of their attitudes, values, interests, identities and backgrounds.

Native inmates tend not to participate to any meaningful extent in general rehabilitation programs within penitentiaries. This seems to be true despite the significant enhancements made over the last few years in available programs and the expansion of services by Native organizations interested in providing corrections-related services and counselling. The Native offender participation rate is, however, higher for Native-specific programs involving private sector representatives such as Native Brotherhoods and Sisterhoods, and educational and cultural programs such as the Sacred Circle. Perhaps because of the increased openness of the correctional system to Native spiritual and cultural representatives, which is at least in part due to representations from Native organizations, and perhaps also because of the cultural revitalization taking place within certain Native communities, there seems to be an increase in Native culture and spiritual awareness among Native inmates.

Many Native offenders have special social, cultural and spiritual needs. These include the observation of such traditional group ceremonies and rituals as pipe ceremonies and the sweat lodge. For Native offenders who have not had much prior contact with traditional culture and spirituality, the opportunity for instruction and participation in these areas can become an important part of their incarceration experience. It can also provide a link to free Native communities.

A significant number of Natives serve their sentence in correctional institutions which are a considerable distance from their home communities. The problem is aggravated for female offenders, both Native and non-Native, because there is only one federal penitentiary in Canada for female offenders. The Correctional Service of Canada (CSC) attempts to alleviate these distance problems by using Exchange of Service Agreements, by which federal inmates may be placed in provincial prisons closer to home, and vice versa. However, distances remain a problem, particularly for offenders from northern and isolated areas, since the majority of provincial institutions are also in central locations. This has obvious effects on the maintenance of family and community ties.

Before CSC's transfer policy was changed to reflect the principle of keeping inmates as much as possible in their home regions, transfers exacerbated the problem of distance from an offender's home community. This in turn disrupted plans for the re-integration of offenders back into their families and peer communities. It was partly in order to respond to these types of re-integrative problems that the Carson Report recommended the establishment of more work camps and community correctional centres for Natives, and even the consideration of "separate medium-level security institutions designed for Native inmates, operated and managed by Native staff".[11] On this subject, Carson remarked that "we believe that staff-inmate relations will always remain somewhat strained in institutions run by non-Natives and populated by large numbers of Native inmates".

Consistent with these recommendations, 1988 should see the establishment of Native-run Community Correctional Centres in Alberta (Edmonton) and British Columbia (the lower mainland). These centres, to be run by Native community organizations, will offer life-skills programs, substance-abuse treatment, and culturally appropriate programs for native offenders.[12] The Pacific and Prairie regions are also seeking additional space in provincial work camps for natives.[13]

Differences between Natives and non-Natives are also observed in the release system. Native offenders tend to waive their rights to a parole hearing more often than do non-Natives, choosing not to be considered for parole. Native inmates are more unfamiliar with parole regulations than their non-Native counterparts. Even where Native offenders come from reserves, the Native community

often does not form part of the parole or other release plan, sometimes because the offender is unwelcome on the reserve or because there are more extensive supervision and rehabilitative resources located in urban areas, as compared to rural Native communities, or because the offender no longer feels linked to the reserve. Often the situation is caused by a complex set of interrelated factors.

In a six year study covering the period January 1, 1979 to December 31, 1985, in the Prairie Region of CSC, Native federal offenders had a slightly higher grant rate for unescorted temporary absences than did non-native offenders, but significantly fewer full paroles were granted to Natives (25.5% of Native applicants granted as opposed to 39.2% of non-Natives).[14] In Saskatchewan, however, these parole rate differences for federal offenders do not appear to hold true, and in fact Native federal offenders appear to receive parole more frequently than non-Natives. Following release, Natives have a higher rate of return to penitentiary, and are more likely to be revoked for "technical violations" than for new criminal convictions.[15]

Many people who work with Native offenders complain that the small numbers of Natives among National Parole Board members and staff contribute to a lack of understanding of Native offenders and a lack of parole plans which are suitable for Natives. Some Native representatives claim that parole criteria or the assessments made about individuals in preparation for parole hearings are inappropriate to Natives. It is also claimed that there is little input from Native communities into the parole preparation process and the development of an aftercare plan for Native offenders.

In response to these concerns, a Working Group was established by the Solicitor General in March 1987 to examine the process that Native offenders go through from the time of admission to a federal penitentiary until warrant expiry. The Working Group On The Re-Integration of Aboriginal Offenders as Law-Abiding Citizens is looking at ways of improving the opportunities for Native offenders to re-integrate into society through appropriate penitentiary placement, relevant institutional programs, improved preparation for temporary absences, day parole and full parole, and through improved and innovative supervision. The Working Group is consulting provincial and territorial governments, aboriginal communities and other organizations actively involved in the re-integration of Native offenders into society.[16]

Attempts to recruit and retain significant numbers of Native staff into the Correctional Service have had modest results. CSC has what amounts to an affirmative action program for the hiring of Native staff, but there is still a much lower proportion of Native staff than offenders at the local levels. Native staff who do work in the correctional setting often find themselves under pressure from both Native offenders on the one hand (who may put unrealistic demands on them because they are Native) and other staff. This pressure on Native staff often causes frustration and early departure from the Service.

Observations

Several common themes appear in key writings and reports about Natives in the correctional system.

First, it is very difficult for non-Native correctional workers to understand the social, cultural, spiritual and religious backgrounds of Native offenders and thus to understand the dimensions which affect many of them most strongly. The greater the lack of mutual understanding, the more compounded become the difficulties of running a correctional program.

Second, even where Native offenders make "model prisoners" in the sense that they cause little or no trouble in the institution, there has been a marked lack of success in persuading Native offenders to participate actively in programs of education and counselling provided for the general population. There appears to be a consensus among correctional authorities and aboriginal groups that a significant problem is that Native offenders appear to be largely unfamiliar with the workings of the correctional system. However, it does appear that Native offenders are most likely to participate in programs if they are run by Native organizations which are not identified as being a part of the system.

Third, there has been modest success at best in recruiting Natives to work in correctional settings, which is especially regrettable since Native offenders appear most likely to participate in regular CSC programs staffed by Natives and having a Native cultural orientation.

Fourth, the problem of Native criminality - like crime in the mainstream - is closely tied to the general socio-economic conditions experienced by Natives on and off reserves, and any solution to Native criminality must address these socio-economic conditions, which include unemployment, poverty, alcoholism and family breakdown. Nonetheless, the factors of violence, lengthy criminal record, alcohol abuse and lack of community ties are strongly associated with risk, and cannot be ignored when individual case management and release decisions are made.

All these themes lead many Native and non-Native observers to conclude that Native offenders are an especially disadvantaged group, that Native people should be more closely involved in the planning and delivery of correctional services, and that in some cases special services and programs should be established by and for Native offenders, either on or off Native land bases.

At the same time it must always be born in mind that Native offenders are not a homogenous group and that the large numbers of Native offenders who come from urban areas and who do not have strong links to Bands or reserves require approaches which involve urban native organizations as well as Bands or Tribal Councils.

PART II: THE LEGAL CONTEXT

Natives in Canada have a unique legal status. This status is the product of their treaty and/or aboriginal rights, and provisions of various constitutional documents. These rights, together with certain provisions in international law, have important implications for Natives and their relations with the justice system. In this chapter we will describe these elements in the legal framework relating to Natives.

Aboriginal Rights and Indian Self-Government

Constitutional jurisdiction to make laws concerning "Indians, and lands reserved for Indians" was given to the Parliament of Canada by section 91(24) of the Constitution Act, 1867. Many Native groups entered into treaties with representatives of the Crown in which they surrendered their claims to the land in return for reserves and other treaty rights.

More recently, certain rights of the aboriginal peoples of Canada were specifically included in the Constitution. The provisions related to these rights are contained in sections 25 and 35 of the Constitution Act, 1982. Section 25 states:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
> a) any rights or freedoms that may have been recognized by the Royal Proclamation of October 7, 1763; and
> b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

This section is important for any correctional legislation pertaining to Native people because it is probable that the "equality rights" section of the Charter (section 15), cannot be used to strike down any existing or other rights of Native people on the grounds that they discriminate against non-Natives. Thus, distinctions are likely not discriminatory if they flow from the rights of aboriginal peoples. In addition, as we discuss below at p.20, s.15(2) of the Charter permits ameliorative programs to

remedy disadvantages faced by individuals or groups quite apart from matters related to the rights of aboriginal peoples.

An even more important development for Native people was the constitutional entrenchment of existing aboriginal and treaty rights through the inclusion of section 35 in the Constitution Act, 1982, as amended by the Constitution Amendment Proclamation, 1983.

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

There continues to be a variety of interpretations as to what these "aboriginal rights" mean in practice. Native leaders argue that a wide range of specific rights are implied in the meaning of aboriginal rights. Precise legal definitions await future constitutional conferences and court decisions. However, in dealing with issues of land claim settlements and self-government, a revised Comprehensive Land Claims Policy was adopted by the Government of Canada in December 1986. Within the framework of the policy, the Government of Canada is prepared to address a range of issues, including the key issue of self -government.

> The federal government's policy approach to self-government is to acknowledge the desire expressed by communities to exercise greater control and authority over the management of their affairs.... The objectives of the Government's policy on community self-government are based on the principles that local control and decision making must be substantially increased.... In the context of the comprehensive claims policy, self-government is an issue that is tied

> closely to the expressed need of aboriginal peoples for continuing involvement in the management of land and resources as well as in the development of self-governing institutions that recognize their place in Canadian society.[18]

For many native political leaders, self-government is undoubtedly the most pressing issue facing Native people today. At its most fundamental level it concerns the survival of Native peoples as distinct groups in Canadian society. However, just as there is no agreement as to the exact nature of aboriginal rights, there is also no consensus as to what, in a specific sense, is entailed in Native self-government. At the same time there is no doubt that it is seen as a desirable goal by government and Native people alike. Much has been accomplished toward implementing this goal, including: four constitutional conferences involving the Prime Minister, the provincial Premiers and Native leaders; a study by a special parliamentary committee (the Penner Report);[19] a major land claims settlement which includes self-government - the James Bay and Northern Quebec Agreement[20] and the North Eastern Quebec Agreement;[21] amendments to the Indian Act[22] to grant increased powers to local Native communities; federal self-government legislation - the Cree Naskapi Act[23] and the Sechelt Indian Band Self-Government Act;[24] and provincial legislation which allows Native people to provide certain social services in a manner that recognizes their culture, heritage and traditions.[25]

The movement towards Native self-government will have major implications for the Correctional Law Review because it can be anticipated that the criminal justice system, including corrections, will be a component of many comprehensive self-government negotiations.

Of course, there is immense variety among Native communities as to the priority they attach to criminal justice matters in their self-government negotiations, to say nothing of the differences in various Native groups' economic and other readiness to take over various functions. Criminal justice has been to date a much lower priority with Native organizations than issues such as education and health care. Within the criminal justice area itself, corrections has been a far lower priority than matters

such as policing and court operations. The Federal Government is conscious of the differing perspectives and needs that aboriginal communities bring to the process of defining self-government.

At the 1987 First Ministers Conference on Aboriginal Constitutional Matters, the Federal Government stated that it recognized the right of aboriginal peoples to self-government, and was prepared to support proposals for self-government that:

- provide explicitly for a process of negotiation amongst aboriginal peoples and governments to define and implement that right; ...
- permit aboriginal control over matters that directly affect them, this right to be applicable to all aboriginal peoples.[26]

Implied as part of the self-governing arrangements would be the authority to deliver services and programs.

The approach taken by the Federal Government in the Sechelt Indian Band Self Government Act[27] was to allow that Native community to determine the details of specific powers it wishes to assume. The Act is essentially enabling legislation which establishes the Sechelt community as a legal entity with responsibility for writing its own Constitution. Its Constitution can, within the limits specified in the legislation, define the powers and procedures of the community government, which would in turn allow the community to make laws in relation to a variety of areas.

While not going as far as the development of parallel institutions, the landmark James Bay and Northern Quebec Agreement between the federal government, the province of Quebec, and the Cree and Inuit of Northern Quebec, which was signed in 1975, provided for specialized correctional institutions, programs and services appropriately modified to meet the needs of Cree and Inuit offenders.[28] Sections 18 (Cree) and 20 (Inuit) set forth wide-ranging provisions related to the justice and correctional systems. With regard to corrections, section 18 provides for the following:

- detention facilities in the James Bay Territory;
- Cree staff where possible, and special training for Crees to

permit them to be employed in correctional institutions and in probation, parole, rehabilitation and aftercare services;
- language rights upon arrest or detention;
- Crees sentenced to imprisonment could be detained in northern institutions, after consultation with the Cree local authority;
- care in northern facilities of incarcerated Crees who are or become mentally ill or seriously physically ill during their incarceration;
- special facilities for young Crees under the ages of 21 and 16;
- programs and services appropriate for Crees, in the Cree language, where possible; and
- the undertaking of studies for the revision of the sentencing and detention of Crees, taking into account their culture and way of life.

Section 12 of the North Eastern Quebec Agreement contains similar provisions governing services to the Naskapis. These Agreements thus recognize not only that specialized programs and services have to be developed, but also that Native staff are vital to the provision of appropriate services to Native offenders and that Native communities can also play a critical role.

Although few steps have as yet been taken to implement the kinds of facilities and services described in the Agreement (in large part because of the higher priority given to other aspects of the Agreement), there appears to be some impetus now to look at how the corrections part of the Agreement could be implemented. The James Bay and Northern Quebec Agreement Implementation Negotiation, (established June, 1986), under the auspices of DIAND, is trying to resolve outstanding issues and focus action on implementation by various federal departments.

Legislative recognition of Native peoples' special situation is not confined to federal initiatives. In the area of child welfare, several provincial governments have enacted legislation which gives recognition to the principle that Native people should provide services to their own people in a way that reflects their culture, heritage and traditions. For example, in Ontario the Child and Family Services Act, 1984[29] contains

several special provisions regarding Native people. The underlying approach is reflected in the Declaration of Principles, for example:

> f) to recognize that Indian and Native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and Native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concepts of the extended family...

The Act then details the ways in which native organizations can participate in or take over decisions affecting the provision of services to Indian and Native children. Some provisions of the Child and Family Services Act, 1984 relevant to Native people are included in Appendix B of this paper as an example of the kind of approach which has been tried in this area. The provinces of Alberta, Manitoba, New Brunswick and Nova Scotia have similar provisions with regard to Native child welfare.

Several provincial governments have also developed policies relating to education and health care that more accurately reflect the needs and aspirations of aboriginal people.

The various legislative initiatives outlined above recognize the need to ameliorate the situation of Natives through the provision of programs and services which reflect Native culture, heritage and traditions, and take the approach that such programs and services ideally should be provided by Natives, or at least with the involvement and advice of Native organizations.

While a great deal of attention has been directed toward status Indians living on reserves, much of the legislation pertains to Native people generally. Section 35 of the Constitution Act,1982 states that the aboriginal peoples of Canada include the "... Indian, Inuit and Métis people of Canada". Similarly, the Ontario Child and Family Services Act, 1984 is clear in stipulating that "... band and Native communities" is to be interpreted as including status, non-status and Métis people.

Clearly corrections initiatives designed to promote the re-integration of Native offenders must include all those of Native heritage, whether or not they are status Indian, Inuit or Métis, on or off reserves, from urban or rural areas.

As the previous discussion has demonstrated, there has been a growing recognition of the shortcomings of a system which uses the institutions of the dominant society with an expectation that Natives will benefit from them in the same ways as non-Natives. Both governments and Native people have agreed upon the need to work toward a new relationship, even if most of the specifics of this relationship have yet to be worked out. New institutional arrangements and programs that are based on Native values, culture and traditions may all be appropriate and important.

For some Native groups the assumption of power under some form of self-government based on traditional culture could simply be a continuation of what has been occurring all along. Others will develop new forms of government.

The Community Negotiations Branch of DIAND has funded many Native groups to carry out research to help them determine the most appropriate means of blending traditional institutional forms and customs with the contemporary situation. For some this will entail legislative schemes leading to the development of new institutions and programs. For example, a reserve in Manitoba is currently working on a plan to change its form of government from the band council system to a system based on traditional Native clans. Others will be content to make changes to the existing band council system.

The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms has special significance in any discussion of a legal framework for correctional legislation. As a constitutional document, the Charter binds both the federal and provincial governments by guaranteeing fundamental rights to everyone. The Charter protects these rights from the powers of the state.

With the advent of the Charter, the courts have been given expanded power to decide on the constitutionality of legislation and the actions of state officials that may affect constitutionally protected rights and freedoms.

In section 15, the Charter offers new constitutional equality rights protections for minorities, including Native persons.

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex or mental or physical disability.

The adoption of this equality rights provision creates a new situation whereby policy issues related to equality rights which were formerly resolved through political processes have taken on a new constitutional dimension and are now potentially subject to judicial scrutiny. The previous part of this paper discussed some of the implications of Natives' unique legal status and the drive towards self-government. It remains to examine the legal implications for Native offenders of section 15.

Under section 15, an individual may challenge a policy or program (or absence of a policy or program) as violating the right to equality before and under the law, or to equal benefit and protection of the law. Most government programs are of course authorized by some form of law whether a statute or regulation, if only through the general authority of a department or agency. How section 15 will in fact be interpreted by the Supreme Court of Canada is as yet largely unknown, but arguments that unequal application of a program for which the law provides constitutes a denial of "equal benefit of the law" can be expected.

Even where a law or program is apparently neutral on its face, it may have a different impact on some minority groups than on the mainstream.30 For example, it could be argued that the National

Parole Board, carrying out its responsibilities "... to grant release, and determine release terms and conditions" under the Parole Act, would be in violation of the Charter if decisions, procedures and conditions of parole could be demonstrated to de facto discriminate against Native inmates. In such a case the inmate would likely have to demonstrate that there is a differential treatment, not justified by valid government objectives (such as protection of the public) between Native parole applicants and non-Native parole applicants and that the distinction has the effect of denying the "protection" or "benefit" afforded to non-Natives or that there is a lack of sameness (equality) between what is afforded Native applicants and non-Native applicants. It would be argued that although the legislation does not single out Natives, the effect of the procedures is discriminatory.

This kind of discrimination is "systemic discrimination", or the adverse impact of an apparently neutral law or program. As a 1985 federal Department of Justice discussion paper states, "it is discrimination when neutral administration and law have the effect of disadvantaging people already in need of protection under section 15." ... [T]his form of discrimination is often not readily identified; it commonly takes statistical analysis to detect it."[31]

The parole release power is a good example of an obvious "benefit" created specifically in law to which no discrimination should attach. Perhaps a more complex question is posed by programs like inmate employment. Can it be argued by a Native inmate that the training and work offered to inmates is designed for and more beneficial to non-Natives than to Natives, and thus constitutes "systemic discrimination"? And should correctional legislation be developed which includes provision for special programs, plans, criteria or even institutions for Native offenders to prevent future discrimination?

The issue of "systemic discrimination" raises the question whether, under the Charter, the courts can impose obligations not just to redress imbalances or inequalities in legislative provisions and programs, but also to legislate in a positive way. Can a challenge under the Charter result in a court's finding that the government must pass legislation or provide programs to redress these imbalances?

It is still unclear how far the courts might go. Several forms of positive remedies (mandatory orders) are available to the courts which pertain to minority groups: orders to provide employment or a denied service to a victim of discrimination, to provide educational or government services to members of a minority group, or to carry out an affirmative action program for the benefit of a disadvantaged group.[32] Section 24 of the Charter is expansive in the extensive remedial powers it bestows on the courts. It states that "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."

In order to preclude, or at least minimize, litigation alleging "systemic discrimination" against particular groups, governments may institute affirmative action programs in the form of special treatment or consideration for members of disadvantaged minorities. It is such legislation and programs that are referred to in section 15(2) of the Charter: "... Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups". The purpose of an affirmative action program is the achievement of a more proportional representation, or more equal treatment, of groups than currently exists, in the workplace and elsewhere.

Since equality of results - not just equality of opportunity - is the main concern of affirmative action programs, such programs must include both "equal opportunity" and "remedial" measures. Equality of opportunity alone is not enough because the differences and disadvantages of certain groups would lead to a continuance of discrimination against those groups. Equality of opportunity alone can perpetuate the effects of past injustice. A remedial program, therefore, is required to make affirmative action effective. In the workplace, this usually entails the establishment of numerical goals or targets and timetables for achieving them.

Affirmative action programs have become a common vehicle for redressing past discrimination and are usually voluntary. In certain circumstances, however, the establishment of such a

program can be imposed by federal or provincial Human Rights Commissions. For example, section 41 of the Canadian Human Rights Act, 1983 states:

> a) that such persons cease such discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures including:
> i) adoption of a special program, plan or arrangement referred to in subsection 15(1) (i.e. an affirmative action program).

In the recent decision of the Supreme Court of Canada in Action Travail des Femmes and the Human Rights Commission v. Canadian National Railway Company, it was held that a tribunal under s. 41(2)(a) of the Canadian Human Rights Act can impose a prescribed employment equity program with specified quotas on an employer.[33]

Affirmative action programs for the hiring of Native people in the justice and correctional system are anticipated in sections 18 and 20 of the James Bay Agreement. For example, Cree and Inuit are to be employed in a variety of capacities:

> 18.0.34
> After consultation with the Cree local authorities or Cree Regional Authority, and when it will be appropriate to do so, Crees will be recruited, trained and hired in order to assume the greatest possible number of positions in connection with the administration of justice in the "judicial district of Abitibi".[34]

Similar programs have been instituted through policy in many federal and provincial correctional agencies. It can be anticipated that there will be increased demand for affirmative action programs as a means to ensure the adequate participation of Native people in the criminal justice system under both the Charter and human rights legislation. However a recent unreported case of the Manitoba Court of Queen's Bench suggests that in order to be protected by s.15(2), an affirmative action program must be rationally related to the cause of the disadvantaged state of the target group, and must be reasonable required in order to ameliorate the conditions of hardship of the group.[35] Not all programs, therefore, may be Charter protected.

International Law

The final aspect of the legal context which requires consideration in developing correctional legislation is the variety of international obligations Canada has undertaken. These include the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its Optional Protocol, the International Covenant on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Economic, Social and Cultural Rights. Canada has also endorsed the United Nations Standard Minimum Rules for the Treatment of Prisoners.

Article 27 of the International Covenant on Civil and Political Rights specifically addresses the rights of members of minorities within states where they exist:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[36]

The Covenants are international treaties which are binding in international law, although they are not enforceable in domestic courts unless they are incorporated in domestic law. The UN Human Rights Committee receives information by way of regular reports from state parties under both Covenants, and by complaints from individuals under the International Covenant on Civil and Political Rights. A finding that a state has failed to observe the Covenants can result in censure by the Committee. The observation of covenants thus depends in large measure on the impact of international and domestic public opinion.

The provisions of the Covenants have not been directly incorporated into Canadian domestic legislation, and thus Canadians cannot resort to domestic courts to enforce compliance. However, the Canadian Charter of Rights and Freedoms specifically protects many of the human rights recognized in these documents. Furthermore, there is judicial authority to the effect that where legislation is ambiguous, it should not be given an interpretation that is inconsistent with Canada's international obligations.

In addition, the existence of international obligations such as those in the UN Covenants may often provide political support for arguments on behalf of minority groups.

An increasing number of Native groups are utilizing international law to support their efforts to gain control over their affairs through the formation of several international Native groups including the World Council of Indigenous People, the International Indian Treaty Council and the Inuit Circumpolar Conference.

PART III: AMELIORATION OF CONDITIONS OF NATIVE OFFENDERS

We have suggested that the high number of Native people coming into conflict with the law remains a serious problem for the correctional system and that programs designed to ameliorate the problem have, to a large extent, failed to achieve the desired results. As we noted earlier, Native offenders are not a homogeneous group linguistically, culturally or tribally. Native offenders thus have unique and various needs that require special measures to meet them.

In addition, the discussion has indicated that Native people in Canada are entering a new era in the history of their relations with the larger society. This is manifest in the development of two related legal and political issues: the movement toward Native people assuming more control over their own affairs through self-government, and their increased demands for their aboriginal and treaty rights, as well as any rights under the Charter and human rights legislation. These issues are, in turn, closely tied to the major cultural revitalization that is presently occurring in many Native communities across Canada. It can be anticipated that these movements will continue to gain momentum in the future.

Each of these developments has important implications for the future administration of the correctional system. The Correctional Law Review provides an opportunity to address at least some of the problems related to Native offenders and the correctional system. The CLR is of course concerned with correctional legislation and regulation, and not with operations. It is therefore limited in the types of solutions it can offer. The key question is: how much of the body of correctional rules, procedure, criteria and authority should be set out in law as opposed to a strategy of policy and operational improvements in programs and services?

A Note about Codification and the CLR

One of the fundamental premises of the CLR, and indeed the Criminal Law Review as a whole, is that the present correctional legislation is in need of revision because it "... is outdated, confusing, and often inadequately related to current realities".[37] Our second Working Paper, A Framework for the Correc-

tional Law Review, suggests that it is important for correctional legislation to take into account recent developments in the law and the wider justice system, particularly the Charter, which have an impact on corrections. The impact of the Charter " ... may require fundamental restructuring of the legislative scheme and a reorientation of its substance to be consistent with Charter demands".38

In addition, we suggested in the first Working Paper on Correctional Philosophy that a clear statement of correctional purpose and principles is necessary to form the basis of any revised correctional legislation (see Appendix B). In carrying out the task of revising the legislation, the interests of the correctional staff, inmates and the public must be considered and the resulting legislative scheme must be seen as fair by all people affected.

Appendix C contains the full statement of purpose and principles proposed by the Review. Of particular relevance are strategies c), d) and e), which emphasize the rehabilitation of the offender "... through the provision of a wide range of program opportunities responsive to their individual needs", and principle 1 which suggests that "... 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." In addition, principle 7 speaks to the need to involve the larger Native community in the correctional system. "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."

In the Framework Paper, it was suggested that correctional legislation should be sufficiently detailed to provide clear guidance with respect to correctional goals and objectives, and a structured framework for decision-making, while permitting sufficient flexibility for appropriate decisions by correctional staff.

The approach recommended in the Framework paper entails legislating the purpose and principles of corrections, the objectives of all major agency functions and activities and essential requirements but leaving the details to the initiative of those who must account for the functioning of the system. In this approach all elements of the legislation, including regulations, must be framed to be consistent with the stated purposes and principles. Specific policies will be developed by the correctional agencies themselves to reflect the philosophy.[39]

Given the Correctional Law Review's approach, a number of questions arise with regard to the situation of Native offenders and the Native community: Is the development of special legislative provisions for Native people an effective approach to the amelioration of the serious problems of the Native offender? With regard to such legislation, what specific approaches should be considered? What matters affecting the Native offender, as a special offender group, should be included in legislation and which should be set out in policy? What are the legislative implications for the Native offender of the purpose and principles of corrections?

It would appear that two broad issues must be addressed by the Correctional Law Review in its attempts to respond to the unique situation of the Native offender: (1) the extent to which legislative provisions can facilitate the assumption by Nativecommunities of control over correctional services to Native offenders, and (2) the recognition of the unique needs of those Natives who do find themselves in the correctional system.

These approaches are not intended to be mutually exclusive but rather could co-exist and, in the case of initiatives giving Native communities or organizations more control over corrections, would be viewed as options for the Correctional Service and Native organizations and communities to discuss. In these negotiations, it is important to be cognizant of the immense variety of circumstances among Native communities in terms of their readiness and willingness to assume control of their affairs. Any changes should be compatible with the enhancement of aboriginal community decision-making, and involve appropriate consultations with aboriginal people. Recognizing that increasing numbers of Native offenders come from urban areas, it is

particularly important that urban aboriginal organizations be included in the process of consultations. This implies that different legislative approaches will be appropriate to meet the diverse interests of Native offenders. In addition, any change in programs, policy and law affecting aboriginal people must not diminish treaty and aboriginal rights.

The CLR takes a two track approach to the problem. One is to encourage the creation of a new approach, in law and in policy, that incorporates aboriginal participation in and possibly control over correctional issues affecting aboriginal people, and to systematically involve aboriginal organizations in this process from the outset. The other is to improve the current system by putting specific protection in law with respect to important aspects of correctional programming vis-a-vis aboriginal inmates.

Enabling Legislation

This approach is the most far reaching in the sense that it entails a fundamental shift in the correctional system's legislative position. It would involve the inclusion in correctional or other legislation of measures to enable Native people to assume control of certain correctional processes that affect them.

Consistent with Federal Government policy discussed above at pp. 12-14, which supports approaches which permit greater aboriginal control over matters which directly affect them, it would be possible to transfer jurisdiction for providing at least some correctional services to Native groups under a stated legal relationship with the Solicitor General. One of the major issues for consultation is whether this type of legislation would be appropriate, and if so, what form it should take.

This paper has discussed the large number of different Native communities, and noted that many incarcerated Native offenders do not have strong connections with a particular Native community. If enabling legislation is developed, it will be important to frame it in sufficiently flexible terms to allow a wide variety of Native organizations or communities to participate in the provision of correctional services. An important question is how best to recognize the diversity of Native communities and communities and groups.

The services provided could range from the establishment of correctional institutions to the running of parole and aftercare facilities or other culturally appropriate services. The legislation will presumably need to be open-ended enough to take into account a wide variety of correctional arrangements which might result from the negotiations. In an effort to develop a culturally-based system or systems, Native groups may propose correctional facilities or services which are very different from existing structures.

It is true that most, if not all, of the correctional services and programs authorized under the proposed legislation could be implemented under the present legislative scheme through contracts with native organizations. However, while such enabling legislation may not be strictly necessary, it would nonetheless demonstrate a clear Government endorsement of the role of aboriginal organizations in the delivery of correctional services in the context of a new legislative framework for federal corrections. They would then be in a position to enter into negotiations with correctional authorities within an explicit legislative framework, and continuation of funding arrangements will not depend on government policies on privatization, or general voluntary sector involvement. This would have the effect of putting aboriginal groups in a stronger position to negotiate programs if they can point to specific supporting legislation.

Clearly there would have to be provision for adequate compensation to be paid to the Aboriginal correctional authority. However issues for consultation include whether agreements to transfer an aboriginal offender to an Aboriginal correctional authority should contain the consent of; a) the offender; b) the Aboriginal correctional authority; and c) the CSC. Should agreements also make reference to the conditions upon which the federal government would accept an aboriginal offender back into the federal correctional system, if such offender wishes to transfer from the custody of the Aboriginal correctional authority?

To some extent, of course, the Correctional Service of Canada already enters into arrangements of the sort contemplated by this kind of legislation. CSC contracts with various Native groups for the provision of halfway houses, parole supervision, and

other services required by Native offenders, although to date most of these arrangements have occurred in urban areas. A good example of a native organization currently engaged in providing correctional services for Native offenders is the Native Counselling Services of Alberta. Formed in 1970, and with 130 employees, NCSA offers programs in Family, Criminal and Young Offender Courtwork. As well, NCSA operates a minimum security camp, a young offenders group home, a community residential centre, parole and probation supervision (for adult and young offenders), Native Awareness Program, a family living skills program, a training department, a legal education-media department, and a research department. The NCSA also operates a fine options program and a community service order program. Funding is provided by the provincial and federal governments.[40] Of note is the fact that NCSA is an urban-based Native organization which provides corrections services to Native offenders from a variety of backgrounds.

The principal difference flowing from enabling legislation would be that while the current arrangement are created as a matter of policy through contracts, the new arrangements discussed here would be recognized in law and formalized through the designation of certain organizations and correctional authorities as providers of Native correctional services. This would give Native communities a clear legal basis from which to negotiate changes in the way services are delivered to Native offenders, and would give a greater measure of security to the Native organizations providing the services.

A key issue for consultation is the extent to which agreements made between the Aboriginal correctional authorities and the CSC for transferring offenders should contain detailed specification of the programs and services to be delivered, as well as the appropriate standard of services. Flowing from this, to what extent should the government assure itself on a regular basis that the services provided in this way meet certain basic requirements, such as the protection of the rights of the offenders involved, and other minimum standards, as well as the provision of adequate containment for offenders who are being cared for off reserves, in the larger community.

Due to the large number of issues of this type, it might be also helpful to include provision for regular consultation between the Government and Native communities on the subject of these services.

As we noted earlier, placing these sorts of provisions in correctional legislation would not preclude the negotiation of broader self-government initiatives by Natives groups and the federal government. What this approach would allow is the transfer of suitable correctional authorities to Native communities in the absence of a more comprehensive agreement.

It is also worth mentioning that such arrangements could in many cases involve federal, provincial and Aboriginal authorities in a given area.

Should federal correctional or other legislation include enabling provisions which would provide explicit authority for Native communities or organizations to assume control of certain correctional processes that affect them? What should these provisions contain?

Reform of Existing Correctional Legislation

This approach represents a more limited attempt to ameliorate the problems of the Native offender than the previous proposals in that no fundamentally new arrangements are envisioned and the focus of control remains with the existing correctional system. It entails the development of a legislative scheme which recognizes the unique status of Natives as well as Native offenders as a particularly disadvantaged offender group and therefore deserving of particular consideration for the reasons discussed earlier in this paper. The intent of this approach is twofold: (1) the codification of selected aspects of the operation of the correctional system as they pertain to Native offenders, that is, to specifically protect such things as native spirituality, and (2) the formal encouragement of greater involvement of the Native community and Native institutions in the correctional system. Details as to the components of corrections which might be included in the legislation are discussed below.

Codification of certain Native offenders' concerns accomplishes two central goals of the Correctional Law Review. First, the legislative scheme suggested would be consistent with the purpose and principles of corrections as set forth in Part I, and would permit Native offenders to enforce the provision in the courts if necessary, something they are not able to do if the protection remains only in policy. Second, the proposed approach to codification would ensure that correctional legislation is in line with Charter requirements as well as Canada's obligations under international law.

Value of Specific Provisions in Correctional Legislation with Respect to Aboriginal Offenders

The unique status of Canada's aboriginal peoples, and their acute problems once they arrive in correctional care suggests that there is merit in statutory entrenchment of appropriate protections.

Legislation in this area would clearly demonstrate the government's concern to improve the situation of aboriginal people in corrections. Parliamentary approval in the form of legislation will be a solid guarantee of the implementation and survival of what is a significant policy development. Grounding aboriginal corrections policy in legislation gives such policy greater authority, and provides explicit protection for specific entitlements such as religious freedom.

a) Consultation with Native Authorities

Several provincial precedents for this approach to legislation affecting Native people currently exist, as we have seen, in the areas of child welfare, family services, social welfare, health care and education. These initiatives have been implemented largely because the generalized policy and program approach has failed to adequately address Native people's needs in these areas. They are intended to give Native people a greater role in providing services to their own people. There has been a recognition that, despite numerous attempts to develop special programs and involve Native people in their delivery, the situation has not improved significantly and a new approach is

required. The enactment of provisions in law which required agencies to provide specific services and to involve native people in the process has been determined by many provincial governments to be the most appropriate approach.

Even where Indian and Native communities do not take over correctional services entirely, they, together with aboriginal advisory bodies with experience and expertise on aboriginal customs and/or offenders can and should advise governments as to the kinds of programs and services which are appropriate for aboriginal offenders, and how these might best be delivered. In the correctional context, both CSC and NPB have, as a matter of policy, established National Native advisory committees, and CSC Prairie Region has established a regional committee. These committees advise on Native correctional policy and programs. This approach could be expanded to all regions, and even to the local institutional level.

The question for the Correctional Law Review is whether or not this approach should be mandated in legislation. Although the composition of the Committee would not be detailed in legislation, it will be important to comment on the appropriate membership for such committees, for example, service providers, political organizations and community organizations.

Should correctional law provide for a requirement like the following?

1. The Correctional Service of Canada shall regularly consult with Aboriginal communities and with recognized aboriginal advisory bodies with experience and expertise on aboriginal customs and offenders, about the provision of programs and services to aboriginal offenders, by

(a) establishing an Aboriginal advisory committee to provide advice on national policy issues relating to Aboriginal offenders;

(b) where requested by an Aboriginal community or recognized aboriginal advisory body, establishing a Regional Aboriginal Advisory Committee to provide advice on regional policy issues relating to aboriginal offenders. Regional Aboriginal Advisory Committees will form part of an overall National Aboriginal Advisory Committee;

(c) where requested by an Aboriginal community or recognized Aboriginal advisory body, and where practical, establishing an Aboriginal Advisory Committee to provide advice to a particular institution or parole office about programs and services for Aboriginal offenders; and

(d) the Aboriginal Advisory Committee would provide advice, upon request, to other jurisdictions.

At the local level, this provision would entitle bands, Native communities and urban-based experts on Aboriginal matters to play a strong advisory role in respect of institutions located nearby. For a variety for reasons, however, including the isolated location of many penitentiaries, and the fact that many federal inmates are incarcerated far from their home communities, it is important also to have a national advisory committee which can provide policy advice on Native programming generally.

An alternative to, or possibly in addition to, the national committee would be regional committees. Such committees would be able to respond more directly to regional differences among native communities, although some coordination at the national level might still be desirable. Should legislation provide for regional committees as well as a national committee?

b) Programs of Native Spirituality, Culture and Rehabilitation

The Correctional Law Review's statement of purpose and principles covers, in a general way, the need for "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" (see Appendix B). To the extent that this principle will ensure the provision of programs to meet the needs of all offenders, therefore, Native-related programming will be assured.

Two questions are raised by this issue, however: first, should there be a special guarantee in law respecting Native-related programs; and second, how clearly can Natives' unique needs be defined, in law or in fact?

It is clear that many Natives have special needs surrounding Native spirituality and the observance of ceremonies, and many Native offenders give positive reports of the Native Elder programs in CSC and other institutions. Beyond spiritual and related cultural needs, however, the unique program needs of Natives are not well understood or documented by correctional systems. It appears that across the country, Native and non-Native offenders could benefit from educational, vocational and alcohol programs, as well as programs designed to improve social skills. Whether Native inmates should be receiving more of the same type of programming given to non-Native inmates - but perhaps with Native staff running the programs - or require a different type of correctional program or experience, is not well understood, at least by traditional correctional systems.

Since the federal correctional system is already committed to providing suitable programming for Natives, there would appear to be no conflict in principle with a statutory guarantee of Native programming. One practical question which arises, however, is in what circumstances the guarantee would operate. Should the sole Native inmate in a penitentiary receive the full range of Native-related programs which would be offered in, for example, a Prairie institution like Stony Mountain Penitentiary?

One approach to this question would be to rely on the general guarantees for all inmates which have been proposed in the Correctional Philosophy and Correctional Authority and Inmate Rights papers.[41]

This approach could be criticized as not providing sufficient guidance as to Native offender program needs. The general objective, for example, of providing "programs responsive to individual needs" may not necessarily lead to programs which take into account the various Native attitudes, traditions and orientation. It has been suggested that, to be effective, correctional programs for Natives must in fact adopt such an orientation, even if their ultimate practical aims are to teach job skills, reduce alcoholism, or achieve any of the other objectives which are pertinent to the inmate population as a whole. Similarly, since complaints continue to arise about the recognition of Native spirituality as a religion, and about the particulars of Native spiritual observance, some critics would support special guarantees.

Should correctional law supplement general guarantees with particular references to Native program needs, such as the following?

2. The correctional system shall make available programs which are particularly suited to serving the spiritual and cultural needs of Aboriginal offenders and, where numbers warrant, programs for the treatment, training and reintegration of Aboriginal offenders which take into account their culture and way of life.

3. Aboriginal spirituality shall be accorded the same status, protection and privileges as other religions. Native Elders, spiritual advisors and ceremonial leaders shall be recognized as having the same status, protection and privileges as religious officials of other religions, for the purposes of providing religious counselling, performing spiritual ceremonies and other related duties.

4. Where numbers warrant, correctional institutions shall provide an Aboriginal Elder with the same status, protection and privileges as an institutional Chaplain.

5. The correctional service shall recognize the spiritual rights of individual Aboriginal offenders, such as group spiritual and cultural ceremonies and rituals, including pipe ceremonies, religious fasting, sweat lodge ceremonies, potlaches, and the burning of sweetgrass, sage and cedar.

This wording would acknowledge both that the freedom to practice one's religion is protected in the Canadian constitution, and the special place of spiritual and cultural values in native traditions. The proposed wording would require that Natives be given access to spiritual and cultural programs, regardless of their numbers in the population. This is in conformity with existing Correctional Service of Canada policy. The Service established a Commissioner's Directive on Native Offender Programs and prepared a "Native Spirituality Information Kit" to acquaint correctional staff with elements of Native spiritual practice. The CSC policy " ... accords Native religion status and protection equal to that of other religions. It extends to Native individuals under its supervision, those opportunities necessary to practice religious freedom which are consistent with the prudent requirements of

facility security. This shall include access to appropriate space and materials, Elders, spiritual advisors, publications and religious objects or symbols".[42] Natives in institutions occasionally report, however, that there are still problems with the recognition of Native spirituality as a religion. Placing the existing policy in law would enshrine these more specific guarantees, although not all of the detail proposed above need necessarily be included in legislation.

The wording of this draft provision also mandates other special Native programming, where numbers warrant. This might include such things as special halfway houses exclusively for Natives, as recommended by the Carson Report. It might also include the creation of alcohol treatment programs which draw on Native spiritual concepts as part of the treatment approach, as suggested by the Native Sisterhood at the Prison for Women. The provision acknowledges without precisely defining these other unique needs or how to respond to them. The breadth of this language allows for analysis and negotiation of the needs and appropriate programs for Natives at the local level, where discussion of real needs is most likely to be informed and practical.

The draft wording would allow for these programs to be delivered by private Native groups and individuals (as spiritual ceremonies and teaching are now delivered in CSC institutions). The provision would not require correctional authorities to offer programs directly, but only to make them available. This would apply equally to all Natives.

c) Transfers

It was seen earlier that another area of concern among Native offenders is transfers and the long distances from home often involved in serving a sentence of incarceration. We have seen that the Carson Report recommended a general policy of retaining inmates in their home region. This is now formal CSC policy.

Some Native experts have recommended that the institutional placement of Native offenders be specifically guaranteed in legislation in order to ensure their incarceration in the region in which they were sentenced, thereby facilitating the participation of the larger Native community in the correctional process.

The proposals made in Correctional Authority and Inmate Rights appear to encompass this concern, at least in part by circumscribing the criteria which may justify a transfer of any inmate and prescribing a procedure for involuntary transfers. A question for consultation is whether there are unique considerations in respect of transfer of Native offenders which need to be the subject of a special guarantee.

d) Release

For Native offenders who come from reserves, a particular concern has been expressed about release planning and the degree to which releasing authorities are willing to consider paroling or releasing on mandatory supervision a status Indian offender to the reserve, perhaps under the supervision of status Indian community members. Some Native representatives claim that correctional and releasing authorities do not sufficiently consider the Native community's need for the offender's return to the community as a worker and family member, or the community's willingness to supervise the offender or otherwise play a vital part of the re-integration plan. Correctional authorities, by contrast, suggest that bands often do not really wish to accept an offender back, or that when they do, the community does not play the active role in his supervision or re-integration which is necessary to protect society and fulfill other criteria for parole.

It would appear that these arrangements can only be addressed on a local, specific level. However, it has been suggested that perhaps correctional law should require that bands and Nativecommunities receive notice of a Native band member's parole application or mandatory supervision plan, with his or her consent and providing he or she has expressed an interest in returning to the reserve.

Perhaps such a provision might read as follows:

6. With the offender's consent, and where he or she has expressed an interest in being released to his or her reserve, the correctional authority shall give adequate notice to the Aboriginal community of a band member's parole application or approaching date of release on mandatory supervision, and shall give the band the opportunity to present a plan for the return of the offender to the reserve, and his or her re-integration into the community.

This provision would permit, without requiring, individuals or organizations within a Native community to act as direct or indirect supervisors of a given offender's release. (Existing correctional law gives authorities the power to designate community groups or individuals to act as release supervisors.) Arrangements for indigenous supervision on reserves, of a formal or informal nature, would be worked out at a local level. There are examples of such an approach: the Dakota-Ojibway Tribal Council, for example, has an arrangement with the provincial government whereby the band provides probation supervision for Native offenders on the reserve. The province contributed funds for the initial training of community members to act as probation officers.

e) Native Correctional Workers and Native Awareness Training

The Carson Report suggested, and many Native experts believe, that in order to be effective, correctional programs for Native offenders would have to be delivered by predominantly Native staff. The draft provisions set out earlier in this Part do not require Native staffing for Native programs, but do require that the programs offered be "suited to serving" Native needs or "take into account" their culture and way of life. If, as many believe, only a program delivered by Natives can be truly suited to Natives, then this wording may achieve that result indirectly.

This raises, however, another issue important in itself, which is the hiring of Native correctional staff by traditional correctional systems. It will be recalled that the James Bay Agreement contemplates both special programs for Native inmates and hiring programs for Native staff. CSC has in place an affirmative action program for the hiring of new staff members of Native origin. Known as the Action Plan, it was designed to increase the hiring of Native staff in the CSC, and has been in operation since 1985. Natives have been hired as correctional officers and parole officers, if they meet the basic requirements for the position. They are trained in the normal fashion, and must complete a two year probationary employment period, which is the entry level required of everyone. Competition for higher positions requires 3 - 4 years of experience in the entry level positions. As the Action Plan has only been in operation for 3 years, no Natives have yet advanced to higher positions.

However, it appears that they will be considered for higher positions as a result of their experience, and promoted in the usual way, as any qualified staff of CSC.

There still exist barriers to acceptance of aboriginal correctional workers due to cultural differences. In the past, the stigma of being aboriginal often led to a lack of acceptance on the part of other correctional staff. However, as their numbers grow, and through sensitization of other staff, there is a greater acceptance of aboriginal people. More Natives are staying, and this too adds to a greater acceptance of Natives in the service.

Education has proven to be a barrier to Native staff in competition for some positions. For parole officers, for example, CSC requires a B.A. in criminology. There are no programs offered to assist Natives in CSC to get such a degree, and they must therefore do it on their own. For some positions, however, (e.g. correctional officers), experience in the field of corrections or with juveniles could replace any specific educational requirements.[43]

While the Action Plan has had some success, it is still widely felt that more Native staff would be desirable for CSC, especially at local (penitentiary and district office) levels. Many Native leaders also feel the program should involve affirmative action in promotion as well as hiring, and in management positions.

The hiring and effective management of staff to meet the relevant needs of various offender groups (women, francophones, and Natives) runs through many aspects of corrections. For Natives, the arguments for Native offenders working primarily with Native staff are particularly compelling; they include not just spiritual and cultural bonds, but an understanding which it is claimed can be achieved only after long study by people from the cultural mainstream. Practically, as we saw earlier, Native inmates participate in correctional programs less actively than do non-Natives. Perhaps the participation rate in the same programs, run by Native staff, would be no better. There are good reasons for hiring Native staff to work with Native inmates,

reasons which extend into the security and release areas. It should be made clear, however, that Native staff need not work exclusively with Native offenders. Employment mobility for trained Native staff is also important.

Provisions requiring affirmative action programs need not necessarily be included in legislation. The question for the CLR is whether, in light of the particular situation of Native offenders, a legislated requirement is appropriate, for example:

7. There shall be an affirmative action program for the hiring and promoting of aboriginal professional staff to work with aboriginal offenders.

Recognizing, however, that there is difficulty in attracting Natives to correctional work, the correctional authority should give specific Native awareness training to all staff coming into contact with Native offenders.

It is recognized that such awareness training is not a panacea, but is essential so long as the number of Native staff at the penitentiary and district office level is insufficient, considering the numbers of Native offenders. CSC already holds, as a tenet of its corporate mission, that staff members recognize special needs of offenders. A special Commissioner's Directive was developed: "To ensure that the needs and constructive interests of native offenders are identified and that programs (including native spiritual practices) and services are developed and maintained to satisfy them."[44] Each region in CSC in fact now provides, proportional to the number of Native offenders in the region, Native awareness training on a regular basis for selected staff.

PART IV: CONCLUSION

This paper has identified the major problems faced by Native offenders in the correctional system. Over-representation in the system and the lack of Native-oriented programming run by Native creates problems for both Native offenders and the corrections system.

The approaches outlined in this paper are made within the context of the Correctional Law Review, and in view of the unique legal status that aboriginal peoples have in Canada. These approaches are consistent with developments in aboriginal self-government, whereby aboriginal people will be able to assume control of essential elements in community life, which might include certain justice, law enforcement and correctional matters.

A two-pronged approach has been suggested as possible for the amelioration of the problems faced by Native offenders and the correctional system. At the base of each approach is that aboriginal people should be more closely involved in the planning and delivery of correctional services, and that any direction for change should include the development of special services oriented to the unique needs of Native offenders. The two approaches are compatible with each other and indeed are complementary. They could be pursued either separately or together.

The first approach is that special legislative provisions could turn over a significant degree of jurisdiction to aboriginal-run correctional organizations. Correctional services, parole and after-care services could be provided by Aboriginal correctional authorities within a clearly defined legal relationship with the Solicitor General.

The second approach would be to incorporate in existing correctional legislation proposals that specifically deal with Native needs in corrections. Under this scheme there would be increased native consultation through regional and national Aboriginal Advisory Committees. Programs specifically geared to Native cultural and spiritual needs would be guaranteed, and rehabilitation and release programs would be specially designed for Native people. Affirmative action in hiring and promotion of Native staff is essential to this approach, as is increased Native awareness training for all correctional staff.

END-NOTES

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23. The Cree and Naskapis (Of Quebec) Act, S.C. 1983-84, c. 18.

24. Sechelt Indian Band Self-Government Act, S.C. 1986, c. 27.

25. Child and Family Services Act, 1984, Statutes of Ontario, 1984, c. 55.

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27. See Sechelt Act, supra, note 24.

28. See James Bay and Northern Quebec Agreement, supra note 20.

29. Child and Family Services Act, supra note 25.

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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

Correctional Issues Affecting Native Peoples

Federal-Provincial Issues in Corrections

Mental Health Services for Penitentiary Inmates

International Transfer of Offenders

APPENDIX "B"

CHILD AND FAMILY SERVICES ACT, 1984, Statutes of Ontario 1984, c. 55

Approvals and Funding

13 (3) An approved agency that provides services to Indian or Native children and families shall have the prescribed number of band or Native community representatives on its board of directors in the prescribed manner and for the prescribed terms...

Part X: Indian and Native Child and Family Services

192. The Minister may designate a community, with the consent of its representatives, as a Native community for the purposes of this Act.

193. The Minister may make agreements with bands and Native communities, and any other parties whom the bands or Native communities choose to involve, for the provision of services.

194. 1) A band or Native community may designate a body as an Indian or Native child and family service authority.
2) Where a band or Native community has designated an Indian or Native child and family service authority, the Minister,
a) shall, at the band's or Native community's request, enter into negotiations for the provision of services by the child and family service authority; ...

195. Where a band or Native community declares that an Indian or Native child is being cared for under customary care, a society or agency may grant a subsidy to the person caring for the child.

196. A society that provides services or exercises power under this Act with respect to Indian or Native children shall regularly consult with their bands or Native communities about the provision of the services or the exercise of the powers and about matters affecting the children, including:
a) the apprehension of children and the placement of children in residential care...

"APPENDIX C"

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 the 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.