Solicitor General Canada
Ministry Secretariat

Solliciteur général Canada
Secrétariat du Ministère

FEDERAL-PROVINCIAL ISSUES IN CORRECTIONS

Correctional Law Review
Working Paper No. 8
February, 1988

Canada

FEDERAL-PROVINCIAL ISSUES IN CORRECTIONS

Correctional Law Review
Working Paper No. 8
February, 1988

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

Working Group:	Alison MacPhail	Chair
	Mario Dion	National Parole Board
	Karen Wiseman	Correctional Service of Canada
	Robert Cormier	Secretariat of the Ministry of the Solicitor General
	Fernande Rainville-LaForte	Department of Justice

Project Team:	Alison MacPhail	Coordinator
	Joan Nuffield	
	Paula Kingston	

PREFACE

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

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

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

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

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

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

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

Please send all comments to:

Alison MacPhail
Co-ordinator
Correctional Law Review
Ministry of the Solicitor General
340 Laurier Ave. West
Ottawa, Ontario
K1A 0P8

FEDERAL-PROVINCIAL ISSUES IN CORRECTIONS

EXECUTIVE SUMMARY

INTRODUCTION

Outlines the aims of this Working Paper, which are to deal with legal issues respecting the following three areas in federal-provincial matters in corrections:

1. The split in jurisdiction between the federal and provincial governments;

2. The exercise of the federal government's criminal law power to impose legislative prescriptions on the provinces' and territories' correctional systems; and

3. Federal-provincial irritants and emerging issues in federal-provincial relations in corrections.

PART I

Describes the federal-provincial split in jurisdiction in Canada and some of the options which have been proposed to address the anomalies, problems, duplications and overlaps which arise from the present split. To the Working Group it appears that:

* Any change to the law resulting in a change to the federal-provincial split in jurisdiction all across Canada should only be made if all parties believe that change in a certain direction is desirable;

* Since it is apparent that no unanimity exists, there will be no across-the-board change in the split.

The Paper asks whether federal law should explicitly authorize changes in the split by mutual agreement between the federal government and interested provinces or territories, where both parties wish to alter the current arrangements.

PART II

Describes the federal government's current approach to the use of the federal criminal law power to set out legislative requirements in the provinces and territories. Discusses the implications of the Canadian Charter of Rights and Freedoms in terms of the permissible differences in the treatment of offenders from one jurisdiction to another. Sets out options for an overall approach to federal legislative imposition of various types of standards on provincial and territorial corrections.

PART III

Lists federal-provincial-territorial irritants in corrections. These are of two general types: disputes regarding provision of and payment for services by one jursidiction, to the benefit of another; and concerns about the imposition of federal restrictions on provincial and territorial discretion in the conditional release and remission spheres.

Discusses new or emerging areas in federal-provincial-territorial relations in corrections. Asks whether federal law should address any of these emerging issues, such as criteria or conditions respecting the transfer of an offender from one jurisdiction to another.

TABLE OF CONTENTS

FEDERAL-PROVINCIAL ISSUES IN CORRECTIONS

INTRODUCTION

In this Working Paper of the Correctional Law Review, issues will be reviewed which are of particular significance to the provinces. To some extent, some of these are covered in other Working Papers of the CLR, in particular the Working Paper on Conditional Release. This Paper will deal with three fairly distinct sets of issues: first, the federal-provincial split in jurisdiction; second, the overall approach which the CLR should take with respect to legislating new provisions which would affect provincial correctional administration; and third, a series of specific concerns at the provincial level.

As suggested by the nature of Correctional Law Review Project, only those issues will be dealt with which bear on what is currently contained in federal law in corrections, or what might conceivably be contained in such law as a result of decisions made through the CLR. Thus, matters which are of relevance to federal-provincial issues, but which do not reach the level of law, will not be covered in this Paper. On the other hand, certain issues are addressed which are not presently legislated, but which some have suggested could or should be resolved in law.

PART I: FEDERAL-PROVINCIAL SPLIT IN JURISDICTION

Perhaps the most notable characteristic of the administration of corrections in Canada is its fragmentation, both between levels of government, and within individual systems. Jurisdiction over corrections in Canada is established by the Constitution Act, 1867, sections 92(6) and 91(28), which provide that the provinces have jurisdiction over prisons and reformatories, and the federal government over penitentiaries. The distinction among these different types of penal institutions is established, in turn, in section 659 of the Criminal Code, which states that offenders sentenced to two years or more must be sentenced to imprisonment in a penitentiary. Offenders against provincial statutes are also sent to provincial jails, which hold a considerable number of such persons in addition to those sentenced for Criminal Code offences. As part of their Constitutional responsibility for the administration of justice, the provinces also administer all community-based sentences, such as suspended sentences with probation, fines and community service orders, as well as parole supervision in those provinces with their own parole boards. However, the federal government also conducts programs of community-based corrections, namely in the areas of temporary absence, parole supervision and mandatory supervision of offenders who are released from a penitentiary.

Although the provinces administer prison sentences, as part of its criminal law powers the federal government establishes certain powers and practices pertaining to provincial corrections. For example, the federal Prisons and Reformatories Act sets out certain provisions which touch upon this provincial responsibility, principally in areas which can affect the length and manner of serving the sentence. These issues will be dealt with in Part II of this Working Paper.

The parole power is created in the federal Parole Act, which creates the National Parole Board and enables the provinces to establish their own paroling authorities. The three largest provinces have their own paroling authority, and operate their

own programs of parole supervision for those provincial prisoners who are paroled. However, for federal offenders and for those offenders held in provincial correctional systems in the remaining provinces and the territories, the federal government both makes releasing decisions and supervises those offenders who are conditionally released. Temporary absences, on the other hand, are administered by each correctional system, save that the National Parole Board is, in the federal system, responsible for unescorted temporary absences and for escorted temporary absences of offenders sentenced to life, until they are eligible for parole. Clemency on criminal cases is the sole responsibility of the federal government. Issues relating to release of various kinds will also be dealt with in the next Section.

The two-year rule, as set out in section 659 of the Criminal Code, has been described as both arbitrary and the source of duplications and overlap in federal and provincial responsibilities, inasmuch as both levels of government perform many of the same functions, albeit on different populations of offenders. Various committees and task forces have reviewed the two-year rule over the years, but to date no change has been made to the legislative provision for it.

The last major federal-provincial review of the matter was in 1976-78, in the form of the federal-provincial Steering Committee on the Split in Jurisdiction in Corrections.[1] This Committee was unable to agree on the ideal solution to the split, and instead recommended that improvements in coordination be made between the two levels of government. The Justice System report of the 1985 Task Force on Program Review (Nielsen Task Force), which included representation from some provinces and territories but not all, also reviewed the split, and suggested that

> ... [the split] creates practical difficulties which impede effective service delivery and efficient administration. Both federal and provincial governments operate programs of

> imprisonment and programs of community supervision of offenders. Both systems must bear the attendant administrative and other overhead costs associated with their service delivery. The two levels of government often end up competing in an unhealthy way for staff, community services and private sector resources. Since the great majority of related social services (education, health care, housing, etc.) are largely delivered at the provincial level, there are problems of planning and coordination created by two levels of government, placing often conflicting demands and priorities upon these services.[2]

The Nielsen Task Force Study Team concluded that "interested provinces or groups of provinces [should] be allowed to assume full responsibility for all corrections within their borders, through the most appropriate mechanism (constitutional reform or delegation)".[3] The Task Force qualified this recommendation with the condition that "certain basic standards of human rights, programs and dates of release eligibility would be assured through the federal criminal law power and through monitoring the spending of funds which would be transferred from the federal government".[4]

The Task Force also considered, but offered "less support" for, an option of greater use of exchange of services between the federal and provincial governments in order to reduce duplication and overlap in services. Under this option, "more program delivery functions could be passed to the provinces" through "ad hoc sharing arrangements", with the provinces retaining primary responsibility for community-based sentences and "institutions whose linkages to community services are of primary importance" and the federal government focusing on correctional services where security is the primary consideration.[5]

In 1987, the Canadian Sentencing Commission issued its report.[6] While making no specific recommendations about the split in jurisdiction, the Commission did make proposals about sentencing which would cause dramatic changes in the federal and provincial correctional populations if the two-year rule were not altered. The Commission felt that Canada has an over-reliance on imprisonment as a sentencing option, and would support a lesser use of imprisonment for non-violent offenders. In addition, the Commission would greatly reduce the average length of sentence by reducing the range of the sentence over which correctional authorities would have the power to release. Thus, the time served imprisoned by any offender would more closely approximate the actual sentence length imposed by the judge.

Clearly, if the two-year rule remained under the Commission's scheme, there would be more persons given community-based sentences and sentences of less than two years, while a far lesser proportion of the total number of incarcerated offenders in Canada would be sent to a federal penitentiary.

Persons sentenced to imprisonment would, however, serve more of their sentence in close custody, before eligibility or entitlement to release. The impact of such an initiative on provincial correctional budgets would certainly be the subject of considerable federal-provincial discussion.

The Provincial Consultation Paper [7], issued by the Correctional Law Review for the purpose of discussions with provincial governments in July 1985, once again posed the question of changing the two-year split. In the written responses which were submitted, the majority of the seven provinces and territories which responded favoured retention of the two-year split. British Columbia suggested that "provincial takeover" would be the most rational approach, but recognized that the current situation is most acceptable at this time due to the fiscal burdens which would be expected from a provincial takeover. Manitoba (in response to the Consultation Paper) preferred that corrections become a federal responsibility,

with provision for provinces that wish to opt out to be able to do so. Ontario expressed the view that the matter should be subject to further discussion after the completion of the CLR, and noted that any changes would depend on "an appropriate agreement for the continued federal funding and cost-sharing in correctional services". Both Quebec and the Northwest Territories opted for the status quo, but with more exchange of services between levels of government. The Canadian Association of Paroling Authorities (CAPA) has, however, indicated that its views should not be taken as supportive of the two-year rule.

Options

Thus, not all interested parties agree that the present split in jurisdiction should stand, or that it should be amended. In a matter as fundamental as this, it would seem that any suggestion of federal imposition of a new Constitutional arrangement would be both inappropriate and unlikely. Therefore it appears to the CLR Project Team that:

> **Any change to the law resulting in a change to the federal-provincial split in jurisdiction all across Canada should only be made if all parties believe that change in a certain direction is desirable.**
>
> **Since it is apparent that no unanimity exists, there should be no across-the-board change in the split.**

However, the question remains as to whether, as the Nielsen Task Force suggested, there could be a change affecting only those provinces and territories, or groups thereof, who would be interested in such a change. In other words, if no jurisdiction should have a change in the split forced upon it, perhaps the converse should be true as well: that federal law should permit a radical change in the split if both federal and individual provincial or territorial governments agreed.

At present, federal law permits exchange of service agreements[8] between the CSC and provincial correctional (and mental health) departments, but the language of the provisions appears to contemplate limited usage, rather than complete devolution of correctional responsibilities to one jurisdiction or another. While there might be sufficient authority in s. 15 of the Penitentiary Act and in s. 4 of the Prisons and Reformatories Act for the Solicitor General to authorize comprehensive devolution agreements with interested provinces or groups of provinces, when taken together with the enabling provisions of the Parole Act, if this is viewed as a reasonable policy option, it would be preferable to explicitly authorize it in the legislation.

Although most analyses of the split have not offered serious objections to the option of complete provincial takeover of corrections, some concerns might be raised. It might be argued that the federal government should remain in the business of corrections, at least to some extent, in order to represent a certain standard, to promote indirectly certain uniformities of practice or innovative programs, or to administer certain correctional programs of a unique or infrequently-used nature (such as super-maximum security housing for those relatively few offenders who are dangerous to others in a prison environment). The implication of s.15 of the Charter as between provinces is discussed below, at pp. 14-15.

Presumably, each of these concerns could be addressed to at least some extent by legislative refinement or other means, such as permitting the federal government to conduct certain specialized programs, or by establishing certain standards governing correctional programs or systems devolved to the provinces.

Although the reverse option is rarely advocated, it would of course be possible for the federal government to administer, at the invitation of a province or territory, all correctional services within a province or territory. This option, like its converse, would reduce duplication and

overlap, eliminate competition for services, and permit the pooling of resources and programs for all offenders who need them. It would not, however, carry the advantage of having the correctional and social service functions handled by the same level of government.

> **Should federal correctional law explicitly authorize changes in the split in jurisdiction by mutual agreement between the federal government and interested provinces or groups of provinces and territories?**

Readers' answers to this question may, of course, vary according to whether such a change would be accompanied by standards governing the quality, nature or substance of the services transferred. More will be said in the next Part about the types of standards which would have to be considered.

Under a model involving a complete takeover by one or more province or territory of the Correctional Services within their borders, the question naturally arises of whether the paroling authority for all offenders in each system should also devolve to the province or territory. The Nielsen Task Force suggested that in a system of "provincialized" corrections, it would also make sense to "provincialize" the administration of the parole authority.[9] This was justified on the grounds of optimal coordination of correctional and paroling functions, reduction in duplication and overlap of effort, the rendering of decisions in an expeditious fashion and the desirability of smaller, local decision-making authorities. Presumably, however, the full "provincialization" of parole decisions would make little or no sense except in a system of "provincialized" corrections.

> **Should federal correctional law explicitly authorize provincial authority for release decisions with respect to all offenders housed**

within provincial or territorial borders if a province or territory assumes full responsibility for all correctional operations within its borders? Should federal correctional law explicitly authorize the reverse type of arrangement?

Alternative means for the federal government to maintain certain standards in the services for which it is constitutionally responsible are possible. Because of limitations on provincial capacity to offer additional services, it is likely that no devolution would occur without federal financial compensation to the provinces, and the funds could be tied to administratively established standards and an audit process. A middle ground between these two options would be for federal law to mandate the establishment of standards, perhaps mentioning specifically certain areas, and a procedure for monitoring of federal funds transferred to the provinces.

PART II. THE CLR APPROACH TO SETTING OUT LEGISLATIVE REQUIREMENTS IN THE PROVINCES

In this section, we will explore questions related to the overall approach which the CLR should take towards either preserving or enacting provisions in federal correctional law which affect the provinces.

Certain legislative provisions exist now at the federal level which pertain to the administration of corrections at the provincial level. These provisions derive from the federal criminal law power. The purpose of this power, which is provided in addition to the provinces' consitutional responsibilities for the administration of justice, was to ensure certain national criminal justice standards through the federal legislative power, while permitting the provinces the necessary flexibility to respond to local and regional concerns.

The federal approach to the Prisons and Reformatories Act in recent years has been to amend the Act increasingly in such a way as to grant the provinces greater discretion over the operation of their institutions. What remains deals almost entirely with matters affecting time served in close custody such as release through temporary absences, and remission. Although the provision which is made in the Act for the existence of remission does not appear to present many problems for provincial correctional authorities, the Act's imposition of a 15-day limit on the duration of temporary absences is a major irritant. Many provinces make extensive use of "back-to-back" temporary absences - that is, extend them successively beyond 15 days - and object to having to violate the spirit, if not the letter, of the Act.

Parole in its present form was established through the federal Parole Act of 1959. At that time, the Act created the National Parole Board as the sole paroling authority in

the country, but in 1977, in response to requests from certain provinces, the Act was amended to enable the provinces to establish their own parole boards to govern the release of all provincial inmates serving sentences other than life imposed as a minimum or indeterminate sentences (although normally sent to federal custody, offenders with life or to indeterminate sentences may become provincial prisoners through transfer to provincial institutions). Three provinces (Ontario, Quebec and British Columbia) have now created their own paroling authorities and they have authority over some three-quarters of all offenders held in provincial institutions. In the remaining provinces and the territories, the National Parole Board remains the paroling authority for provincial prisoners.

The Parole Act's provisions with respect to provincial parole establish consistent practices in certain critical areas. Provincial regulations pertaining to the operation of provincial parole boards are, by virtue of section 9(4) of the Act, void if they are inconsistent with any provision of the Act or federal regulations; consequently, federal law establishes for provincial as well as federal paroling authorities the criteria governing release, the times of eligibility, and a few other important matters.

An essential question for the CLR is whether it is appropriate for federal law to continue to impose certain constraints on provincial correctional authority. In addition, inasmuch as the CLR may enact new provisions governing the exercise of federal correctional authority, there is the further question of the extent to which such new provisions should apply equally to provincial correctional authorities.

The Canadian Charter of Rights and Freedoms

All correctional legislation, whether federal or provincial, must be in compliance with the equality rights provisions of section 15 of the Charter. Section 15 defines the right to equal protection and equal benefit of the law without discrimination. According to Section 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 disability.

On the face of it, this would appear to mean that any protections or benefits that are provided to either federal or provincial inmates must apply equally to both groups without discrimination. However, notwithstanding that being an inmate is not one of the listed prohibited grounds of discrimination, the courts in interpreting s.15 have stated that the essential meaning of the Constitutional requirement is that persons or groups who are "similarly situated be similarly treated, and conversely, that persons who are differently situated be differently treated. The issue for consideration is whether the law treats members of two classes differently, and whether any differences between the two classes are relevant to and justify the difference in treatment."[10]

The "similarly situated" test has been applied in a equality rights case based on different treatment of federal and provincial inmates in regard to mandatory supervision. In Dempsey v. The Queen and A.-G. for Ontario,[11] the Federal Court, Trial Division, concluded that federal inmates are not "similarly situated" with provincial inmates in respect of entitlement to mandatory supervision. According to Mr. Justice Muldoon, in analysing the "inherent dissimilarity between federal and provincial inmates" it is necessary to realize that "there is an exponentially intensifying continuum of culpability which proceeds from the minor to the grievous. A statutory line of differentiation (2 years) is drawn rationally, if somewhat pragmatically, across it...Those whose depradations are more serious undergo a longer confinement with more elaborate supervision.... On the other side of the line, the confinement is of shorter

duration.... This [MS] is not discrimination of the kind so evidently condemned in s. 15 of the Charter". The Court of Appeal has affirmed this decision.

Thus, this decision finds that this difference in treatment of federal and provincial inmates is non-discriminatory, based on the fact that federal inmates are, as a group, "more serious" offenders than provincial inmates. The differences between federal and provincial inmates will not justify all differences in treatment, however differential treatment will have to be justified in every case on the basis of relevant differences between the two groups of inmates.

It is also important to remember that not all differences in treatment will be upheld by the courts. Any differences in treatment must also be reasonable and fair, having regard to the purposes and aims of the legislation and its effects on persons adversely affected. Thus, there is still much uncertainty surrounding the future effect of the Charter on current and future differences between the federal and provincial correctional systems.

The second major area of concern is relation to equality rights is whether section 15 is violated by differences in treatment as between provinces, of persons imprisoned for committing criminal or other federal offences. Recent decisions involving matters of split federal and provincial jurisdiction and cooperation[12] indicate that section 15 has imposed limits on Parliament's power to enact federal legislation that discriminates between similarly situated persons based on their province of residence. Departures from the principle of equality will only be permitted if they meet the criteria laid down in the decision of R. v. Oakes[13], that the legislation is in furtherance of a valid federal objective of sufficient importance to warrant overriding a constitutionally protected right; the means employed are reasonable and demonstrably justifiable in that the measures are fair and not arbitrary, designed to achieve

employed are reasonable and demonstrably justifiable in that the measures are fair and not arbitrary, designed to achieve the objective and rationally connected to that objective, they impair the infringed right as little as possible, and there is proportionality between the effects of the measures and the objective.

The implications of Hamilton and related cases are that federal correctional policy must accord with section 15 of the Charter, and that the courts may require provincial governments to implement that federal policy or may strike down the policy itself for leaving undue discretion to the provinces. Thus in federal-provincial matters, the federal government should ensure that it treats similarly situated persons in a similar fashion.

Options

As was seen in Part I, the Nielsen Task Force suggested that, even with the transfer of all correctional service delivery to the provinces, the federal criminal law power ought to apply in three areas: human rights, dates of eligibility for conditional release, and offender programs.

The 1977 MacGuigan Committee on the Penitentiary System in Canada complained of the two-year rule because:

> the provinces are not able to allocate equal amounts of financial and human resources to their correctional services, so that the quality of treatment varies widely, depending on the resources available to each province. It is therefore possible for an inmate incarcerated in a poor province to be subjected to much harsher conditions than an inmate who is imprisoned for the same offence in a wealthier province. The jurisdictional split also impedes the development of a

> coherent system of correctional treatment in Canada, since programs existing in federal institutions may or may not be available in provincial institutions and vice versa.[14]

This question of federal legislation in the provincial correctional sphere has been raised in CLR consultations to date. Provinces generally have been of the view that it is consistency rather than absolute uniformity which we should strive for. They suggest that while consistency between provinces in matters of early release and remission is necessary, there are legitimate differences between provincial systems and inmates and the federal system and inmates which justify different programs and approaches.

With respect to the philosophy of corrections, all jurisdictions agree that a common approach is desirable. There are however serious disagreements as to how this might be achieved.

Questions related to this issue were posed in the 1985 Provincial Consultation Paper[15] of the CLR. Written responses to the Paper varied. Six of the eight provinces and territories which responded on this issue favoured placing in law a statement of objectives and principles governing corrections, although there has since been a shift in opinion on this question. Most respondents were, however, opposed to establishing national uniformity in law respecting conditional release from imprisonment. One respondent suggested that the important issue was not uniformity but rather "the confusion which exists regarding the various kinds of early release". Another argued in favour of uniformity, suggesting that "there is a need to limit correctional discretion and ensure the consistent application of principles of fairness and equity". Still another contended that "national uniformity in broad terms is essential" and should be established "in those areas which address length of time and nature of the review" (for release).

Subsequent consultations with provincial correctional officials suggest that while provinces could agree to a common policy statement, they would view the enactment of a statement of philosophy in federal legislation governing both federal and provincial corrections as being an inappropriate intrusion on provincial ability to legislate in respect of provincial corrections, and indeed, on their ability to run their systems as they think most appropriate.

A number of broad options seem to present themselves, ranging from complete federal withdrawal from legislating in the provincial correctional sphere, to expansion of current federal law in certain areas.

What approach should the Correctional Law Review adopt to the exercise of the federal criminal law power as it pertains to provincial correctional authority? For example, which of the following options represents the best approach? Are there others to suggest?

1. **Complete federal withdrawal from legislating any constraints on provincial correctional discretion?**

2. **Enactment of a statement of purpose and principles only?**

3. **The status quo (i.e., deals principally with remission and early release)?**

4. **The status quo, plus a statement of purpose and principles?**

5. **The status quo, plus legislation in essential areas of human rights, basic programs and early release and remission?**

6. **The status quo, plus legislation in essential areas of human rights?**

7. **Legislation which would establish complete uniformity between federal and provincial corrections in all areas important enough to be covered in law?**

Let us examine each of these possible options in turn.

1. **Complete federal withdrawal from legislating any constraints on provincial correctional discretion**

Under this option, the federal government's exercise of its criminal law power, other than its enabling powers, would cease at the time of sentence and sentence appeal, with the exception of the Royal Prerogative of Mercy (pardons), the law and presumably practice of which would still rest with the federal government in respect of offences against federal statutes. (Conceivably, however, Her Majesty could decide to devolve this power to the provincial Lieutenant-Governors.)

Thus, this option would place no restrictions on when, by whom, under what conditions, and for how long, or for what portion of the sentence, any provincial offender could serve or be released from a prison sentence. The Prisons and Reformatories Act would contain only the necessary provincial authorities needed to carry out its responsibilities (for example, the authority for interprovincial transfers and the authority for temporary absences and remission credits against the sentence). The Parole Act would contain, in respect of provincial parole, only the authority to parole. None of the present restrictions on these authorities - such as the permissible length of temporary absences and the date of earliest eligibility for parole - would remain.

Many of the provinces have advocated some form of this option, at the least including removal of the 15-day limit on unescorted temporary absences. As noted earlier, many provinces rely on the use of TA power which is broad enough to permit full release into the community for large numbers of offenders.

This option runs contrary, however, to the thrust of the recent Canadian Sentencing Commission report, Sentencing Reform: A Canadian Approach.[16] The Commission felt that there should be greater judicial control over the entire range and "meaning" of the sentence, and recommended a reduction in the proportion of a sentence of imprisonment which may be reduced through remission (reduced from one-third to one-quarter) or "day release" (available at the two-thirds mark in the sentence instead of at one-sixth). These changes to post-sentence release authorities would, according to the Commission's recommendations, be enacted in federal law, and sentencing guidelines and other sentencing matters would be the responsibility of a permanent Sentencing Commission established by Parliament.

Public reaction to federal removal of all restrictions on early release eligibility for provincial offenders would be expected to be at least somewhat negative. Although provincial prisoners are known or assumed by some members of the public to be of a generally lesser risk than federal offenders, public sympathy towards released offenders as a group is not high. To some extent, this view is conditioned by inaccurate perceptions about recidivism, and many Canadians' "hard" views about certain criminal justice issues soften when they are presented with the details of individual cases. Nonetheless, there might be expected to be public opposition to this option, if it were accompanied by public perceptions that too many provincial offenders would inappropriately be released too early in their sentence.

2. Enactment of a statement of purpose and principles only

In the CLR's Working Paper on Correctional Philosophy[17] a statement of purpose and principles is proposed to govern the administration of federal corrections.

The statement proposed in that paper (currently under discussion for possible improvements) is as follows:

A STATEMENT OF PURPOSE AND PRINCIPLES FOR CORRECTIONS

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

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

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

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

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

e) providing a safe and healthful environment to incarcerated offenders which is conducive to their pesonal 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.

Placing the same or a similar statement in federal law governing provincial corrections, even if all provinces agreed with the substance of the statement, would be opposed by a majority of the provinces as unnecessary and potentially the subject of extensive litigation, both frivolous and significant. At the other extreme, it has been suggested that such a statement would be unnecessary because it would have no effect.

Favouring the enactment of such a statement of purpose and principles is the view that corrections, as a profession, ought to be guided by a professional credo, a statement of its mission. The 1977 Parliamentary Subcommittee on the Penitentiary System (MacGuigan Committee) [18] spoke of a "corrosive ambivalence" at the line level within corrections about the "purpose or direction" of corrections. A legislated statement of purpose and principles would serve, for federal and provincial correctional workers alike, as a "sword and shield" in the carrying out of their duties. For legislators, the statement is a signal about what minimum needs have to be addressed in correctional budgets. For offenders, the statement might be used to interpret correctional policies and decisions, but it would be unlikely to serve as the sole basis for an attempt, for example, to have the courts make orders to or against correctional authorities.

Under this option the federal government would repeal current provisions which restrict matters like the permissible purposes of parole, remission and TAs, and the proportion of the sentence which can be affected by the operation of these programs. Instead of these restrictions, any concerns about provincial use of these powers would be addressed through,

for example, the legislated purpose to provide "the degree of custody or control necessary to contain the risk presented by the offender".

3. The status quo

The Parole Act and the Prisons and Reformatories Act contain two principal types of provisions. Enabling provisions include the authority for ESAs, the authority of provincial officials to release offenders on TAs or on parole, to transfer offenders, to make regulations, and to order the forfeiture of contraband from an inmate. Each of the authorities which touch on release or potential release of the offender is subject to certain qualifications. As was noted earlier, provincial parole regulations must be in accordance with the provisions of the Parole Act. Remission is limited to one-third of the sentence, and the criterion for earning it ("industrious application") is established in the Prisons and Reformatories Act. The purposes of TAs are stated in the Prisons and Reformatories Act (medical, humanitarian and rehabilitative), and the 15-day limit on their duration established.

The second group of federal statutory provisions relating to the provinces deals with the rights and obligations of offenders. While most were repealed in 1986, there remain provisions governing the forfeiture of remission as a punishment for breaches of prison regulations.

Undoubtedly the principal complaints of the provinces about the status quo are the 15-day limit on TAs in the Prisons and Reformatories Act, and s.16(1) of the Penitentiary Act. Few of the remaining provisions have been the subject of sustained provincial comment.

4. The status quo, plus a statement of purpose and principles

Another of the many possible permutations of options would be for federal legislation in the provincial correctional area to extend to the sentence administration areas covered under the status quo, in addition to an enactment of a statement of purpose and principles. This would leave the provinces and territories free to adapt their systems to their own needs, within parameters established by statements of values which are generally accepted by corrections professionals. Differences in the treatment of offenders between provinces and between the provinces and the federal government would be subject to Charter challenges but not to detailed federal prescription.

5. Legislation in essential areas of human rights, basic programs, and early release and remission

Under this option, the scope of current federal legislation would be clearly focused on three areas beyond enabling provisions: human rights, basic programming for offenders, and release from imprisonment.

The CLR's Working Paper on Inmate Rights sets out various approaches respecting the articulation in law of rights of federal inmates and the basis for limiting, where necessary and appropriate, rights protected by the Charter. This option would not go so far as to incorporate into federal law respecting provincial corrections all the human rights provisions which might eventually be enacted respecting federal corrections. (The last option in this series would.)

Rather, legislation might simply mandate the enactment in provincial regulations of permissible limitations on Charter rights of offenders, or mandate the maintenance of effective remedies to protect the rights of provincial offenders, or do both.

Programs to assist offenders to avoid re-offending are considered, by most critics and professionals, to be an essential component of corrections. Few would argue that correctional intervention has been fully tried, meaningfully evaluated, and "proven" to be ineffective and unworkable.

Perhaps even fewer would suggest that there are no defensible grounds for making rehabilitative programs available to offenders, except in those cases of offenders serving only a few hours or days in jail. Indeed, most penal institutions provide programs of one sort or another for the prisoners in their charge.

Under this option, federal law might compel provincial authorities to provide rehabilitative programs to those offenders who are serving sentences not clearly intended only for deterrent or denunciatory purposes, including very brief jail terms. The law might require nothing beyond the obligation to make programs available to offenders, and perhaps to encourage offenders to take advantage of them.

Alternatively, the law might also specify the types of programs - education, training, social development, work - which the system would need to provide.

Under this option, in the early release area, the current provisions in the Parole Act and the Prisons and Reformatories Act would remain, and perhaps others would be added, such as the obligation for provincial authorities to promulgate guidelines for release decisions, or to enact provisions for the review of or appeal from release decisions. Any new provisions would need to be considered essential to preserve independent, fair, quality release decisions.

6. The status quo, plus legislation in essential areas of human rights

Under this option, the features of the previous option would be present, except that there would be no reference to programs to meet offenders' needs. This would meet provincial concerns about the federal government entering into the previously untouched area of programming in provincial prisons. Some provinces and territories are able to maintain only limited programs, or programs only at certain institutions, because of budgetary restrictions. This option would also offset concerns about the provinces having to make programs available to offenders who were sentenced for purely denunciatory reasons, such as those given a sentence of a few days, or having to encourage offenders to participate in programs if they clearly have no intention of deriving any benefit from programs. (Some correctional experts feel that programs will only work if offenders enter into them with at least some measure of voluntariness.)

7. Legislation which would establish complete uniformity between federal and provincial corrections in all areas important enough to be covered in law

A large number of additional provisions might be added to existing federal law under this option. The Parole Act and Regulations would contain identical provisions respecting the operation of parole and MS. Depending on the final resolution of federal law respecting federal corrections, this option could mean additional provincial obligations ranging from a few references to peace officer powers, to a large number of new provisions respecting offender rights, staff powers and obligations, the rights and obligations of victims in the correctional process, and so on.

This option reflects a heavy emphasis on statutory rights and obligations rather than policy and common law, and a broad interpretation of sections 1 and 15 of the Charter.

PART III. FEDERAL-PROVINCIAL IRRITANTS AND EMERGING ISSUES

In this Section, we will review the matters which are an irritant or a potential irritant to the provinces or to the federal government in respect of the current law, and suggest other areas of a specific nature which need to be addressed in the CLR.

1. Matters relating to federal-provincial funding arrangements.

Under this heading can be grouped provincial complaints and federal concerns about federal payment or non-payment for provincial services, and Exchange of Service Agreements (ESAs). Linked to the consideration of various federal-provincial issues is the matter of costs borne by the provinces and by the federal government in areas of shared or disputed responsibility. The Correctional Law Review is, as noted above, concerned only with matters of law, but in the fedeal-provincial area, there are numerous funding issues which are linked to statutory and regulatory provisions, or which, in the view of one party or another, should be dealt with in law in order to clarify the financial questions.

The provinces have a number of complaints about their ability to recover from the federal government the costs which the federal government does not cover, or cover adequately. For example:

- some provinces argue that the federal government ought to assume all financial responsibility in relation to federal offenders, i.e., from the moment an offender is sentenced to two years or more, the federal government would pay for all custody, programs, legal aid, medical care, transportation and demands on police resources and other justice system costs.

- all provinces and territories argue that the federal government ought to reimburse the provinces for the costs of s. 16(1) of the Penitentiary Act. Section 16(1) requires that federal offenders shall not be received in penitentiary until their appeal period has expired or until the offender notifies the court that he is not appealing or has abandoned his appeal. The length of the appeal period is set by the provincial superior courts in their Rules and is thirty days in all provinces but one. The federal government has for years taken the position that the provinces should bear the financial responsibility for housing the offender during the Section 16(1) period, while the provinces largely take the view that an offender sentenced to penitentiary should be the financial responsibility of the federal government from the date of sentencing. The law is silent on the question of financial responsibility.

- a number of the provinces feel that s. 16(1) of the Penitentiary Act should be repealed, and that the federal government should be required to accept its offenders from the date of sentence, at the request of the province;

- most, if not all, provinces argue that the federal government should bear all or more of the cost of transporting federal offenders for the purpose of penitentiary placement, court appearances, and suspension and revocation of conditional release;

- the provinces argue that the federal government should bear the cost of housing all federal offenders whose release has been suspended, whether or not new charges are involved.

Bearing the costs of provincial parole preparation, decision-making and supervision in those provinces and territories without their own paroling authority and service is a concern for the federal government. The provinces benefit

financially as well as otherwise from the operation of parole, simply because it is so much cheaper to supervise an offender in the community than in an institution. Those provinces which now operate their own parole authorities bear the costs of their own parole systems.

2. Matters relating to restrictions on conditional release and remission of sentence

We have reviewed a number of irritants in this area:

- the 15-day restriction on unescorted temporary absences in the Prisons and Reformatories Act;

- the federal government's obligation to impose mandatory supervision on transferred provincial offenders;

- the necessity of making provincial parole regulations (and practice) consistent with the provisions of the Parole Act;

- federal limits on the amount of remission which can be earned by provincial offenders, and on what basis;

- federal limits on the purposes which can be served by temporary absences at the provincial level.

Views on each of these issues vary with the different perceptions which exist of the value of provincial autonomy and federal/provincial consistency.

3. New or emerging matters

Probably the most significant correctional issue negotiated at the federal-provincial level, especially in recent years, is exchange of services between the two levels of government.

Up until a few years ago, federal-provincial Exchange of Service Agreements (ESAs), whereby one jurisdiction might house offenders sentenced to another's care, or provide other types of service for another, were not extensively used. One of their key uses was for female offenders. Since there is only one federal penitentiary for women, in Kingston, federal female offenders sentenced outside Ontario could not be housed in their home province except under an ESA with a provincial correctional system.

In recent years, however, the use of ESAs has increased, and now several hundred federal offenders are presently transferred to provincial correctional systems. Federal offenders who are suspended from a conditional release can also be held in a provincial institution under ESAs. In addition, Alberta has concluded an Agreement with the federal government to conduct community supervision of all federal offenders released within its borders. Other provinces are engaged in discussions on the possibility of their supervising federal offenders in remote areas, where it is not cost-effective for the Correctional Service of Canada to maintain parole offices for those relatively few federal offenders who are released to these areas. These "new generation" ESAs have included provision for transportation between systems and other necessary elements for expanded usage.

The increase in ESA use has thus caused an increasing blurring of the distinction between the federal and provincial systems. A "federal" offender is less and less seen as a distinct creature who can be appropriately housed only by the federal system, and vice versa.

This increased use of ESAs which are principally used for housing federal inmates in provincial jurisdictions creates a greater federal interest in how provincial programs are run.

For example, the Correctional Service of Canada and the National Parole Board are currently conducting, in partnership with the provinces and the private sector, a review of standards for community supervision of offenders. This study was inspired in part by the need for both agencies to be assured of a certain standards and level of service for federal offenders being supervised by the CSC, by provincial staff, or by the private sector, either directly or on contract with the province.

In order to clarify key areas and head off possible federal-provincial disputes, should federal law address any of the principles or standards issues in ESAs? Or are there more appropriate ways, such as policy, to address the following issues?

- whether any transfer of an offender from one jurisdiction to another should be done without his consent?

- whether any transfer of an offender from one jurisdiction to another should disadvantage the offender in relation to programs, eligibility for release, or significant rights areas?

- whether a transfer should normally offer some benefit to the offender, such as an enhanced opportunity to reintegrate successfully into the community?

- whether program standards governing correctional service purchased by one jurisdiction from another should be specified in policy?

- whether any significant change in service delivery (such as contracting out the service previously delivered directly by the province, territory, or the federal government) be subject to the approval of the purchaser?

For a more extensive discussion of the most appropriate placement (e.g., in law, in policy) of matters such as these, the reader is referred to A Framework for the Correctional Law Review (1986), the second Working Paper in the CLR series.[19]

Are there other present or potential future federal-provincial irritants which ought to be addressed in legislation?

CONCLUSION

This Paper, which is intended principally for provincial and territorial governments, addresses federal-provincial-territorial issues and irritants in corrections.

It suggests that there is unlikely to be any across-the-board change in the split in jurisdiction in corrections in Canada because not all parties agree on the most appropriate new formulation for the split. However, it asks whether federal law should explicitly authorize a de facto change in the federal-provincial or federal-territorial division of responsibilities in corrections, where both parties wish to alter the current arrangment. The Paper recognizes that individual responses to this question may vary according to the reader's views about such practical questions as fair and reasonable financial compensation for services previously assumed by another party, and the feasibility and effectiveness of ensuring the provision of a certain standard of service.

The Paper turns next to the question of whether and how, under the current split in jurisdiction or under a different scheme of division of correctional responsibilities, the federal government should continue to impose certain legislative standards on the provincial and territorial systems of corrections. Various broad options for proceeding are described. A reader's views on this question will be influenced by such factors as his or her perception of the desirability of regional and local variation and discretion, and the appropriateness of ensuring that offenders are treated in a similar fashion in respect of certain key areas.

Finally, certain specific issues are addressed which represent either irritants in the current system, or new and emerging issues in federal-provincial-territorial relations in corrections. The Paper asks whether the law is the appropriate vehicle for addressing these matters.

ENDNOTES

1. See Federal-Provincial Task Force on Long-Term Objectives in Corrections. The Long-Term Objectives and Administration of Corrections in Canada. Ottawa: Solicitor General, 1976; and Federal-Provincial Steering Committee on the Split in Jurisdiction in Corrections. Final Report to the Continuing Conference of Ministers reponsible for Criminal Justice. Ottawa: Solicitor General, 1978.

2. Canada. Task Force on Program Review. The Justice System. Ottawa: Supply and Services, 1986, pp. 296-7.

3. Ibid., p. 288.

4. Ibid., pp. 288-9.

5. Ibid., p. 289.

6. Canada. The Canadian Sentencing Commission. Sentencing Reform: A Canadian Approach. Ottawa: Supply and Servies, 1987.

7. Correctional Law Review. Provincial Consultation Paper. Ottawa: Solicitor General, 1985.

8. Penitentiary Act, ss. 15 and 19, and Prisons and Reformatories Act, s. 4.

9. Task Force on Program Review, supra, note 2, pp. 329.

10. Andrews v. Law Society of B.C. (1987) 2 BCLR (2d) 305 (BCCA) on appeal in the Supreme Court of Canada.

11. Dempsey v. The Queen and Attorney-General for Ontario (1986) 32 CCC (3d) 461 (FCTD).

12. R. v. Hamilton, R. v. Asselin, R. v. McCullough (1986), 57 O.R.(2d) 412 (Ont. C.A.), leave to appeal refused, (1987), 59 O.R.(2d) 399 (SCC).

13. R. v. Oakes [1986] 1 SCR 103.

14. Canada. Sub-Committee on the Penitentiary System in Canada. Report to Parliament. Ottawa: Supply and Services, 1977, p. 39.

15. Supra, note 7.

16. Supra, note 6.

17. Correctional Law Review. Correctional Philosophy. Ottawa: Solicitor General, 1986.

18. Sub-Committee on the Penitentiary System in Canada, supra, p. 156.

19. Correctional Law Review. A Framework for the Correctional Law Review. Ottawa: Solicitor General, 1986.

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

STATEMENT OF PURPOSE AND PRINCIPLES OF CORRECTIONS

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

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

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

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

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

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

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

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

2. The punishment consists 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 sentencing should be made openly, and subject to appropriate controls.

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

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

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

APPENDIX C

SUMMARY OF QUESTIONS AND RECOMMENDATIONS

- Any change to the law resulting in a change to the federal-provincial split in jurisdiction all across Canada should only be made if all parties believe that change in a certain direction is desirable.

- Should federal correctional law explicitly authorize changes in the split in jurisdiction by mutual agreement between the federal government and interested provinces or groups of provinces and territories?

- Should federal correctional law explicitly authorize provincial authority for release decisions with respect to all offenders housed within provincial or territorial borders if a province or territory assumes full responsibility for all correctional operations within its borders? Should federal correctional law explicitly authorize the reverse type of arrangement?

- What approach should the Correctional Law Review adopt to the exercise of the federal criminal law power as it pertains to provincial correctional authority? For example, which of the following options represents the best approach? Are there others to suggest?

1. Complete federal withdrawal from legislating any constraints on provincial correctional discretion?

2. Enactment of a statement of purpose and principles only?

3. The status quo (i.e., deals principally with remission and early release)?

4. The status quo, plus a statement of purpose and principles?

5. The status quo, plus legislation in essential areas of human rights, basic programs and early release and remission?

6. The status quo, plus legislation in essential areas of human rights?

7. Legislation which should establish complete uniformity between federal and provincial corrections in all areas important enough to be covered in law?

In order to clarify key areas and head off possible federal-provincial disputes, should federal law address any of the principles or standards issues in Exchange of Service Agreements? Or are there more appropriate ways, such as policy, to address the following issues?

- whether any transfer of an offender from one jurisdiction to another should be done without his consent?

- whether there should be any limits on the transfer of an offender from one jurisdiction to another which would disadvantage the offender in relation to programs, eligibility for release, or significant rights areas?

- whether a transfer should normally offer some benefit to the offender, such as an enhanced opportunity to reintegrate successfully into the community?

- whether program standards governing correctional service purchased by one jurisdiction from another should be specified in policy?

- whether any significant change in service delivery (such as contracting out the service previously delivered directly by the province, territory, or the federal government) be subject to the approval of the purchaser?

Are there other present or potential future federal-provincial irritants which ought to be addressed in legislation?

NOTES