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A FRAMEWORK FOR THE CORRECTIONAL LAW REVIEW

Correctional Law Review
Working Paper No. 2

Canada

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

CORRECTIONAL LAW REVIEW

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PREFACE

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

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

In addition, certain parts of the Criminal Code and other federal statutes which touch on correctional matters will be reviewed.[1]

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

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

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

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

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

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A FRAMEWORK FOR THE CORRECTIONAL LAW REVIEW

EXECUTIVE SUMMARY

INTRODUCTION

Identifies the aim of the Correctional Law Review, which is to develop a framework for corrections that accomplishes the following:

(i) reflects the philosophy of Canadian corrections,
(ii) establishes the correctional agencies in law and provides clear and specific authority for their functions and activities; and
(iii) facilitates the attainment of correctional goals and objectives.

The main concern of this paper is the form and, to some degree, the substance of a legislative framework which would accomplish the above, and would, as a result, provide consistency and continuity among pieces of legislation and parts of the system, promote fair and effective decision-making, be clear and unambiguous, facilitate operations, give guidance to correctional staff, promote the dignity and fair treatment of offenders, and reflect the interests of staff, offenders, and all others affected by the correctional system.

PART I

Examines the characteristics of rules currently governing federal corrections. These rules have several sources - the constitution, which includes the Canadian Charter of Rights and Freedoms; international law; legislation; and judicial decisions. The legal nature of other rules which shape our system, found in Commissioner's Directives, policy and procedure manuals, and sets of standards, is discussed.

This Part concludes with an assessment of our present legislative scheme. A number of general deficiencies which underlie more specific problems are identified:

- correctional legislation lacks a statement of philosophy or principles to guide its interpretation and application;
- correctional legislation represents an accumulation of incremental changes made by way of ad hoc amendments since the Penitentiary Act was first adopted in 1868;
- as a result correctional legislation is out-dated, confusing and inadequately related to current realities.

PART II

Examines the constitutional and other aspects of our justice system that must be taken into account in developing a legislative scheme to govern corrections.

Identified as playing a major role in shaping the form and content of correctional legislation are:

- the Canadian Charter of Rights and Freedoms,
- Canada's international obligations in regard to corrections,
- the constitutional split in jurisdiction between the federal and provincial governments, and
- the philosophy of Canadian corrections.

PART III

Addresses the central question of how best to achieve in law the specific goals of the Correctional Law Review. Discussion focuses on two main goals:

1) developing legislation which promotes voluntary compliance with its provisions:

   - the interests of offenders, correctional staff and the public are examined and it is determined

that although each group has concerns which must be addressed, and even though the interests of staff and inmates are in many ways inherently conflicting, there are many areas where their interests overlap and converge, most notably in the shared interest amongst both guards and inmates in a secure, smooth-running institution. It is concluded that in devising rules to govern the institution, priority ought to be given to compliance enhancement techniques emphasizing participation and cooperation rather than confrontation.

2) furthering fair and effective decision-making:

- discretion and accountability in corrections are examined, and it is concluded that an appropriate balance between discretionary power on the one hand, and formal rules on the other, must be found, to ensure that discretion can operate according to clearly stated principles and objectives in order to present the greatest degree of flexibility while ensuring the greatest possible degree of accountability;

- to accomplish this, there is a need for a clear statement of philosophy in law which would contribute to the use of discretionary powers according to legitimate and clearly established principles, rather than according to the unguided and potentially arbitrary feelings of an individual decision-maker.

PART IV

Compares the relative advantages and disadvantages of various approaches to codification and concludes that rather than developing an exhaustive code of detailed legal rules to govern conduct in every situation, the goals of the Correctional Law Review would be better met by including in legislation a clear statement of correctional philosophy

from which legal and policy rules are derived and which will guide their interpretation and application.

In considering the question of which matters should be included in statute and regulation, and which in policy, it is concluded that the statute should:

- contain a statement of philosophy;
- establish the agencies and authority for their functions;
- contain the objectives as well as the principal features of agency functions and activities; and
- provide for the protection of individual rights in the correctional context.

Regulations would complement and particularize the statute and flesh out the details of many of the statutory provisions.

Policy directives should be reserved for matters of a routine management nature involving day to day operations, and should not have the authority to limit offender rights, nor should they be relied on as the sole source of offender rights since they are not legally binding or enforceable at the instance of an offender.

In considering whether our legislative framework would have an effect on litigation, it is concluded that our approach which is to develop a reasonable, balanced system of rules beforehand that

- controls discretion and takes into account the interests of all those affected by the system,
- articulates in clear terms the philosophy of Canadian corrections and the rights protected by the Charter in the correctional context, and
- provides for effective grievance procedures,

should reduce the need for resort to the courts, while at the same time providing for "justice within the walls".

A FRAMEWORK FOR THE

CORRECTIONAL LAW REVIEW

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INTRODUCTION

As noted in the Preface, the mandate of the Correctional Law Review is very broad. The Review encompasses much more than a mere review of correctional legislation: it is an in-depth examination of the purposes of corrections and a determination of how the law should be cast to best reflect these purposes. The first Working Paper of the Correctional Law Review Working Group examined issues relating to the philosophy of corrections. "A Framework for the Correctional Law Review" is the second of the Working Papers; it provides a framework for carrying out the future work of the Correctional Law Review.

The ultimate aim of this whole endeavour is to develop a framework for corrections that accomplishes the following: (i) reflects the philosophy of Canadian corrections, (ii) establishes the correctional agencies in law and provides clear and specific authority for their functions and activities; and (iii) facilitates the attainment of correctional goals and objectives. Such a framework is intended to provide continuity and consistency among pieces of legislation and parts of the system, to promote fair and effective decision-making, be clear and unambiguous, facilitate operations, give guidance to correctional staff, be internally consistent, promote the dignity and fair treatment of offenders, and reflect the interests of staff, offenders and of all others affected by the correctional system. A balancing of interests of these groups is critical if the legislation is to be fair and reasonable. This is, in turn, necessary if the legislation is to be effective; that is, if it is to be accepted and, for the most part, voluntarily complied with and have the necessary public support.

The main concern of this paper is the form and, to some degree, the substance of a legislative scheme that would best accomplish all these goals. In arriving at such a scheme, the current framework of rules governing federal corrections will first be

examined and assessed. Following this, the key elements that shape both the form and substance of a piece of correctional legislation will be discussed. Of major importance is the constitution, which includes the Canadian Charter of Rights and Freedoms. Other key elements to be discussed are the international law obligations Canada has undertaken in regard to corrections, and the implications of the constitutional split in jurisdiction between the federal and provincial governments. The section will conclude with a discussion of a statement of philosophy of corrections.

The central question of how best to achieve in law the goals of the Correctional Law Review will then be considered. The interests of all participants in the correctional system will be examined in an effort to promote voluntary compliance with the legislation to be developed. Achieving a further goal, fair and effective correctional decision-making, will also be discussed. We will be comparing the relative advantages and disadvantages of detailed codification as opposed to more general legislation. This will include an examination of two important questions: first, whether it would be appropriate or desirable to put a statement of philosophy and objectives in legislation and second, which substantive or procedural matters should be put in legislation or regulation and which should remain matters of policy. In this connection, the issues of discretion and accountability will be discussed. The task here is to determine the level of codification that would promote the best correctional decision-making - that is, decisions which further the fundamental goals of the system.

In conclusion, a framework or approach will be proposed that will be applied in a subsequent series of Correctional Law Review papers. These papers will deal in depth with specific corrections issues in the areas of release and remission, offender rights and remedies, powers and responsibilities of correctional staff, native offenders and corrections, mentally disordered offenders, and so on. The papers will identify issues and explore options consistent with the stated principles in an effort to ensure that all aspects of drafting new legislation will be fully canvassed.

PART I: PRESENT FRAMEWORK: RULES GOVERNING CORRECTIONS

The rules which currently govern the federal correctional system have several sources - the constitution, which includes the Canadian Charter of Rights and Freedoms; international law; legislation, consisting of statutes and regulations; and judicial decisions involving the application and interpretation of all of these as well as the development of the common law. Other rules which shape our system are found in Commissioner's Directives, policy and procedures manuals, and manuals of standards. This part examines the form of our current rules, and some of the characteristics of each. It concludes with an assessment of our present legislative scheme.

The Constitution

a) Federal-Provincial Split in Jurisdiction

As a result of the Canadian constitution, corrections in Canada is organized and maintained at both federal and provincial levels. Both the federal and provincial governments have legislation governing correctional matters under their jurisdiction. The Constitution Act, 1867 establishes jurisdiction over place of incarceration, with the provinces allocated jurisdiction over prisons and reformatories and the federal government having jurisdiction over penitentiaries. These terms are not defined and carry little more inherent meaning than places of secure custody operated by provincial governments (prisons and reformatories) and by the federal government (penitentiaries). How these institutions should differ is established primarily in practice. The dividing line between prisons and penitentiaries is contained not in the constitution, but rather in a federal statute. Section 659 of the Criminal Code provides that offenders sentenced to two years or more are to be sentenced to imprisonment in a penitentiary.

Although the provinces have jurisdiction over provincial prisons and reformatories, the federal government - through the Prisons and Reformatories Act - provides the basic legal framework governing offenders serving sentences for violating federal statutes. Release issues have traditionally been viewed as an

exercise of the criminal law power, and therefore have been considered principally a matter of federal responsibility from a constitutional standpoint.[2] Federal jurisdiction is exercised primarily through the Penitentiary Act and the Parole Act, to be discussed in further detail throughout this paper.

b) The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms[3] has special significance in any discussion of a legal framework. As a constitutional document, the Charter binds both the federal and provincial governments by guaranteeing fundamental rights. To accomplish this, the Charter imposes limits on state power which interferes with these rights.

With the advent of the Charter, the courts have been given expanded power to decide on the constitutionality of legislation as well as the actions of state officials that may affect Charter rights and freedoms. These include fundamental freedoms such as freedom of religion, expression and association; democratic rights, such as the right to vote; legal rights such as the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice; and equality rights which guarantee to everyone equality before and under the law and the equal protection and benefit of the law. All Charter rights are guaranteed subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (section 1).

The most significant aspect of the Charter for our purposes is the fact that its protections apply to inmates and parolees. Thus, correctional legislation and practices are subject to the Charter. The impact of the Charter on offender rights and the correctional system will be examined in the discussion of entrenchment, enforcement and limitation of Charter rights, in Part II. The response of the courts in applying the Charter to corrections will be discussed as part of the examination of judicial decisions, which follows.

Judicial Attitudes and Decisions

Case law relating to corrections has generally been dependent upon the attitude of the courts to the prospect of going behind prison walls to scrutinize correctional practices and to review the internal decision-making procedures of prison officials.

Until relatively recently, Canadian courts exhibited a marked reluctance to assume an active role in reviewing the activities and decisions of prison administrators. This judicial reticence, known as the "hands-off" approach, had the effect of immunizing prisons and the actions of prison officials from public scrutiny.[4]

One justification for the courts' approach was the belief that, having regard to the difficulties inherent in running a prison and safe-guarding prison security, the job should be left to those best equipped to handle the situation - the prison administrators themselves.[5] A second reason for the "hands-off" approach was the suggestion that confrontations between inmates and prison administrators would escalate, and would in fact be fuelled by the courts' open reception to suits brought to challenge conditions in Canadian prisons. Furthermore, the enormity of the task of rectifying conditions was regarded as a cogent factor militating against judicial interference. In this regard, the Parliamentary Sub-Committee on the Penitentiary In Canada[6] stated:

> "The gross irregularities, lack of standards and arbitrariness that exist in our penitentiaries, by their very quantity, make and always have made, the possibility of judicial intervention into prison matters a rather impracticable, time consuming and dismaying prospect...
>
> The sheer immensity of the task of straightening it out is enough to discourage even the most committed members of the judiciary."[7]

One of the strongest reasons offered in explanation of the courts' "hands-off" attitude was the once-popular notion that, once convicted and sentenced to a term of incarceration, a prisoner became automatically stripped of all rights.[8]

Although the concept of civil death, whereby a person lost all rights upon conviction, was abolished in Canada in 1892, the traditional view of courts, that review of prison administration was something beyond their jurisdiction, lingered.

Further factors involved two vitally important administrative law principles: first, that the only decisions which could be characterized as judicial or quasi-judicial were those which affected a person's rights; and second, that only decisions which could be characterized as judicial or quasi-judicial were subject to judicial review. Since prisoners were regarded as having few "rights", most of the decisions made by prison officials were regarded as being purely administrative in nature and were therefore immune from review by the courts. As a consequence, "inmates who had few rights, also had few remedies and were left essentially defenseless against the wide-ranging administrative decision-making power of the prison authorities."[9]

Only as recently as the 1970's did changes begin to take place. A series of decisions which relied, essentially, on the argument that an individual in prison does not lose "the right to have rights" served to strengthen the position of those in favour of offender rights[10]. In R v. Solosky[11] the Supreme Court of Canada expressly endorsed the proposition that a person confined to prison retains all civil rights, except for those necessarily limited by the nature of incarceration or expressly or impliedly taken away by law. Moreover, the Supreme Court endorsed the "least restrictive means" approach which recognized that the courts have a balancing role to play to ensure that any interference with inmates' rights by institutional authorities is for a valid correctional goal and must be the least restrictive means available.

In other cases, the Federal Court applied the cruel and unusual punishment clause of the Canadian Bill of Rights to administrative segregation[12], and the courts began to develop the common law duty to act fairly in decisions affecting both inmates and parolees.

It is not entirely clear why the courts gradually began to assume a more active role in reviewing prison officials' decision-making procedures and to intervene to recognize and protect offender rights. It has been suggested from a sociological perspective that the increased awareness of inmates' rights paralleled a growing movement, which was particularly strong in the United States, for the extension of legal rights to a broad spectrum of groups in society such as racial minorities, children, women and the handicapped.[13] It came to be recognized that prisons operated as autonomous systems insulated from public scrutiny and external review and that this lack of public visibility made it impossible for prisoners to assert their claims on their own behalf.[14] Strong and persistent activist groups were formed to challenge the status quo.[15] Reminiscent of John Howard's model of outside inspection,[16] public scrutiny and judicial intervention came to be regarded as effective ways of controlling abuses of power behind prison walls.

It has also been suggested that the gradual acceptance of the rehabilitative ideal within corrections as a primary goal of correctional institutions was one of the most important factors which set the stage for the growth of judicial scrutiny of penitentiary operations.[17] Despite the drawbacks of the rehabilitative model, it was reasoned that since most inmates are expected to be eventually released into society, they should learn to respect authority and to participate in the democratic control of that authority by being able to challenge what may appear to be unfair or arbitrary exercises of power by prison officials.

Apart from these explanations, the shift in judicial attitudes may be looked upon as a practical consequence of the significant and radical developments which occurred in the sphere of administrative law generally. The recognition in England of a duty of procedural fairness in administrative matters opened the door to permit judicial review of decisions which could not be properly characterized as either judicial or quasi-judicial.[18]

The notion was transported to Canada and first appeared in a dissenting judgement of Dickson J. in Howarth v. National Parole

Board.[19] In that case, Dickson J. stated, inter alia, that an administrative decision must be made "judicially" where the decision has a serious impact on the person involved.

> "It is not necessary that a body should be a court of law... before it falls under a duty to act judicially.
> ...
> Generally speaking if 'rights' are affected by the order or decision... the function will be classified as judicial or quasi-judicial and this is particularly so when the exercise of administrative power seriously encroaches on property rights or the enjoyment of personal liberty."[20]

However, before the duty to act fairly[21] could be extended to federal boards and tribunals involved in the administration of Canadian penitentiaries, a major stumbling block had to be overcome - namely, a determination of the proper forum for seeking judicial review of the decisions of these bodies. The Federal Court Act,[22] it was found, provided little guidance. Section 18 of that Act confers jurisdiction upon the Trial Division of the Federal Court to review certain decisions of a federal board. Section 28, on the other hand, provides that:

> 28.(1) Notwithstanding s.18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal...

The confusing issue of the appropriate forum was resolved in the case of Martineau, an inmate at Matsqui Institution, who sought judicial review of a decision of a prison disciplinary board which convicted him after hearing certain evidence in the inmate's absence.

It was the landmark decision of Martineau (No. 2)[23] that ultimately resolved the dilemma by ruling that decisions of federal boards and tribunals not required by law to be made on a judicial or quasi-judicial basis are subject to review by way of

prerogative writs by the Trial Division of the Federal Court. In imposing a general duty of fairness, falling short of the full rules of natural justice, on decision-making in the administrative sphere, the Supreme Court of Canada imposed the rule of law within prison walls.

> "[T]he application of a duty of fairness with procedural content does not depend upon proof of a judicial or quasi-judicial function. Even though the function is analytically administrative, Courts may intervene in a suitable case.
>
> In the case at bar, the Disciplinary Board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. Moreover, the board's decision has the effect of depriving an individual of his liberty by committing him to a 'prison within a prison'. In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls."[24]

The significance of the Martineau (No.2) decision is far-reaching. Basically, it operated to open administrative decisions of federal bodies to judicial review. The characterization of a decision as judicial, quasi-judicial or administrative became a determinant not of whether procedural safeguards applied and whether relief was available, but of the extent to which procedural protections applied and what the proper forum for seeking a remedy would be. As a result, it may be concluded that the concept of fairness is a fluid one; the requirements of the duty to act fairly will vary depending on the circumstances of a particular case. As one author has explained:

> "The decision... introduced a spectrum approach... from the full panoply of protection downward... The challenge introduced by Martineau (No. 2) is to determine where in that spectrum a given decision lies".[25]

It is evident from this whole discussion that Canadian courts, responding to the various factors described above, were beginning to show a marked shift from the "hands-off" to the "hands-on" approach in dealing with inmate rights even prior to the Charter.

It is not yet entirely clear from the case law what effect judicial interpretation of the Charter will have on corrections. Although any conclusions are still largely speculative at this stage, there have been some interesting developments.[26]

In many corrections cases at the lower court level the relationship between section 7 and the duty to act fairly has been the subject of extensive, though conflicting, judicial comment. Section 7 guarantees to everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". In Re Cadeddu and the Queen,[27] for example, Potts J. held that the requirements of section 7 are more onerous than the common law duty of fairness. In that case, the applicant was not entitled to a hearing before his parole was revoked, under the rules of fairness, since the relevant legislation implicitly disentitled him to a hearing in the circumstances. However, since the rights guaranteed under section 7 prevail over legislation, Potts J. went on to hold that in order to comply with the Charter requirements of fundamental justice, an in-person hearing was called for.

> "Considering that the rights protected by s.7 are the most important of all those enumerated in the Charter, that deprivation of those rights has the most severe consequences upon an individual, and that the Charter establishes a constitutionally mandated enclave for the protection of rights, into which government intrudes at its peril, I am of the view that the applicant could not be lawfully deprived of his liberty without being given the opportunity for an in-person hearing before his parole was revoked...
>
> Although nothing in the common law or in federal or provincial legislation required the board to grant a hearing - or, for that matter, forbade the board to do so - I am of the opinion that the Charter dictates that such an opportunity be given."[28]

In sum, the Cadeddu decision supports the proposition that the principles of fundamental justice may afford a remedy under section 7 in cases where the operation of the common law duty to act fairly would not have afforded a remedy.

Similarly, in Re Swan and the Queen[29] a case dealing with a post-revocation hearing in regard to parole, McEachern C.J.S.C. suggested that the rules of fundamental justice require more than fairness. Noting that section 7 of the Charter had not, at that time, been analyzed by an appellate Court, McEachern C.J.S.C. stated that section 7 appears "...to tilt the scales strongly towards the requirements of natural justice rather than just procedural fairness."[30] Several other judicial statements support natural justice as the standard under section 7.[31]

On the other hand, however, a number of courts have propounded the contrary view that section 7 does not demand a higher standard of conduct with respect to administrative bodies than does the common law duty of fairness.[32]

The decision of the Supreme Court of Canada in an immigration case, Singh et al v. Minister of Employment and Immigration et al.,[33] which was the first decision at this level to deal with the meaning and application of section 7, has shed some light on this area. While the Court did not seize the opportunity to clarify exactly what the principles of fundamental justice require, the decision does seem to support the view that the requirements of section 7 of the Charter exceed those imposed by the common law fairness doctrine. The Court adopted the position that the principles of fundamental justice include, at a minimum, procedural fairness and stated that procedural fairness demands different things in different contexts. The significance of the Singh decision is the implication that section 7 may impose a higher standard than that required by the duty to act fairly.

In another recent case, the Supreme Court provided further direction. Reference re Section 94(2) of the Motor Vehicle Act[34] dealt with the scope of the words "principles of fundamental justice". Undertaking a purposive analysis designed to ascertain the purpose of the section 7 guarantee and the interests it was meant to protect, Lamer, J., did not clarify what the principles of fundamental justice require, but came to the following conclusions:

> The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

He objected to an interpretation simply equating "fundamental justice" with "natural justice", and went on to say that the principles of fundamental justice are not limited to procedural guarantees, nor can they be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7. Although this case does not involve corrections directly, it paves the way for a broad approach by the Courts in future cases concerning "fairness" and offenders.

The role of the courts in requiring that certain restrictions be placed on the penitentiaries' ultimate carceral power was reflected in the simultaneous treatment of three cases by the Supreme Court of Canada in December, 1985: Morin v. National Special Handling Unit Review Committee et al; R v. Miller; and Cardinal et al v. Director of Kent Institution.[35] The Court dealt with largely procedural questions relating to inmates' access to the habeas corpus remedy in a manner which reaffirms recognition of inmate rights, in this case of rights to "residual liberty" in regard to placing inmates in administrative segregation and special handling units. Characterizing such practices as creating "a prison within a prison", the Court held that even though inmates have a limited right to liberty, they must be treated fairly in regard to any limitations on the liberty they retain as members of the general prison population.

Emerging from this examination of the impact of the courts on corrections is the fact that the courts now seem willing to scrutinize the administration and practices of penitentiaries. Even prior to the Charter, the courts played an important role in recognizing and legitimizing the rights of inmates. At this stage, it appears that the power of the courts has been strengthened under the Charter and that their efforts to provide procedural protections and substantive content to the rights of offenders continue.

International Law

Canada has entered into a variety of obligations under international law to maintain standards with respect to the criminal justice system.

Foremost amongst these are Canada's obligations under United Nations treaties. Not only is Canada subject to the provisions of the UN Charter and the Universal Declaration of Human Rights, it is also signatory to the International Covenant on Civil and Political Rights and its Optional Protocol, and the International Covenant on Economic, Social and Cultural Rights.

Specific provisions of the Civil and Political Rights Covenant relate to prisoners and penitentiaries. All persons deprived of their liberty are to be treated with humanity and with respect for the inherent dignity of the human person. The individual's right to be protected against torture, or cruel, inhuman or degrading treatment or punishment is upheld. It is also stipulated that the penitentiary system shall provide for treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation. Other provisions state that no one shall be subjected to arbitrary or unlawful interference with their privacy.

In addition to being party to these treaties, Canada has also endorsed the United Nations Standard Minimum Rules for the Treatment of Offenders. The obligations that are imposed as a result of international law on Canada, where treaties are not self-executing, will be considered in the next chapter, which deals with "factors shaping the form and content of legislation".

Legislation

Currently there are several federal statutes dealing with the field of corrections - the Penitentiary Act, the Parole Act, the Prisons and Reformatories Act, the Transfer of Offenders Act and the Criminal Code. The following is a brief description of these pieces of legislation.

The Penitentiary Act deals with a variety of matters, many of an organizational nature such as the establishment of the correctional service, the agency head, national and regional headquarters. Other matters in the Penitentiary Act include federal/provincial transfer agreements (s. 15), the right to earn remission (s. 24), and powers of correctional officers (s. 10). Subordinate legislation, in the form of regulations, is authorized under s. 29 of the Act:

> 29.(1) The Governor in Council may make regulations
>
> (a) for the organization, training, discipline, efficiency, administration and good government of the Service;
>
> (b) for the custody, treatment, training, employment and discipline of inmates;
>
> (b.1) prescribing the compensation that may be paid pursuant to section 28.1 and the manner of its payment;
>
> (b.2) defining the term "spouse" and the expression "dependent child" for the purpose of section 28.1;
>
> (b.3) for the collection, administration and distribution of estates of deceased inmates; and
>
> (c) generally, for carrying into effect the purpose and provisions of this Act.
>
> (2) The Governor in Council may, in any regulations made under subsection (1) other than paragraph (b) thereof, provide for a fine not exceeding five hundred dollars or imprisonment for a term not exceeding six months, or both, to be imposed upon summary conviction for the violation of any such regulation.

The Penitentiary Service Regulations enacted under section 29 deal with a number of organizational matters such as the duties of institutional heads (s. 5), and authority to delegate routine matters. The right of inmates to adequate food and clothing (s. 15) and the provision of essential medical and dental care (s. 16) are found in the regulations. The creation of inmate

offences and penalties, and the disciplinary process are in regulations. Section 3 of the regulations outlines the duty of every member of the Service to use his best endeavours to achieve the purpose and objectives of the Service, namely "the custody, control, correctional training and rehabilitation of persons who are sentenced or committed in penitentiary." This is the only statement of mandate of corrections and it is remarkable that, vague as it is, it appears in a regulation instead of a statute.

Similarly the Parole Act provides for the organizational structure of the National Parole Board (including number of members, provision for regional panels, agency head), powers of the Board (s. 6), and the duty to review every penitentiary inmate for parole (s. 8), authorizes the establishment of provincial parole boards, and provides for mandatory supervision (s. 15). Section 9 authorizes the making of regulations by Governor in Council. This section is very specific, and outlines the exact subject matter which Cabinet may prescribe (for example, prescribing the minimum number of members to vote on a case). The Parole Regulations contain very detailed rules on a wide range of topics. The Regulations, rather than the statute, contain rules concerning eligibility for parole, including the time an inmate must spend in custody before being eligible. As well, they provide for the right to assistance at hearings (s. 20.1), the right to information upon which the Board will base its decisions (s. 17), and the right to reasons for parole decision, (s. 19). This detailed regulation-making power is in sharp contrast to the extremely broad power in s. 29 of the Penitentiary Act.

The Prisons & Reformatories Act governs certain aspects of incarceration in provincial institutions of persons serving sentences for offences against federal statutes. It covers such areas as the granting of remission, temporary absences, and authority for transfers of inmates between provinces.

The Act has undergone extensive revisions in recent years. The trend has been to remove unnecessary detail to permit provincial governments greater control over correctional operations. At the same time, consistency in certain key areas, such as the granting of remission, is maintained.

The Transfer of Offenders Act establishes the eligibility of Canadian offenders imprisoned in a foreign state with which Canada has a treaty to be transferred to Canada to serve the remainder of their sentence in a Canadian prison or penitentiary. There is also provision for the transfer to Canada of Canadian offenders on parole or probation in a foreign state.

Foreign nationals incarcerated in Canada may be transferred to their homeland if the conditions in the Act are met, and if they are from a country with which Canada has a treaty for the transfer of offenders. Regulations under this Act may be made by the Governor in Council to prescribe the form and manner of application for transfer, and for factors which the Minister shall take into consideration in making a decision.

Criminal Code provisions which directly affect corrections include s.659 (sentences of two years or more to be served in penitentiary), s.660 (sentence to be served according to rules governing the institution), s.674 (prohibiting parole consideration for cases of life imprisonment until expiration of specified number of years of imprisonment), and s.695.1 (review of dangerous offenders for parole). Section 2(b) of the Code specifies that a "peace officer" includes "a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison" (prison is defined as including a penitentiary). Thus any consideration of the powers and responsibilities of correctional staff will involve an analysis of the many other provisions relating to peace officers found in the Criminal Code.

Commissioner's Directives (and other administrative directives)

As noted above, under s. 29 of the Penitentiary Act, the Governor in Council is given wide power to make regulations. As well, s. 29 (3) states:

> Subject to this Act and any regulations made under subsection (1), the Commissioner may make rules, to be known as Commissioner's directives, for the organization and good government of the Service, and for the custody, treatment, training, employment and discipline of inmates and the good government of penitentiaries.

In addition, the Penitentiary Service Regulations authorize the making of the following rules: s. 7, Divisional Staff Instructions, to set out the procedures by which policy is to be given effect; s. 8, Standing Orders; and s. 9, Routine Orders. The former are issued from National Headquarters, while the latter two may be issued by an institutional head. The exact legal nature of the Commissioner's Directives was explored by the Supreme Court of Canada in the case of Martineau (No. 1),[36] which held that they do not have the force of law. After affirming that the Penitentiary Service Regulations were law, Pigeon, J., went on to say,

> I do not think the same can be said of the directives. It is significant that there is no provision for penalty and while they are authorized by statute, they are clearly of an administrative, not a legislative nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity. I have no doubt that he would have the power of doing it by virtue of his authority without express legislative enactment. It appears to me that s. 29(3) is to be considered in the same way as many other provisions of an administrative nature dealing with departments of the administration which merely spell out administrative authority that would exist even if not explicitly provided by statute.
> In my opinion it is important to distinguish between duties imposed on public employees by statutes or regulations having force of law and obligations prescribed by virtue of their condition of public employees. The members of a disciplinary board are not high public officers but ordinarily civil servants. The Commissioner's directives are no more than directives as to the manner of carrying out their duties in the administration of the institution where they are employed.[37]

An important issue that arises with respect to these directives is the remedy available for their breach. At present, under the authority of the Martineau (No. 1) decision, there is no legal or judicial remedy, as the directives are not law. The offender therefore must seek a non-legal remedy through the internal grievance procedure which provides the primary internal means of redress for the broad range of complaints that arise out of institutional life. Complaints are common in regard to correspondence, visits, staff performance, inmate pay and contraband. There is also an internal mechanism available to

enable the processing of claims against the Crown for loss of property or to compensate for injury. The Correctional Investigator, an ombudsman-like official for federal penitentiaries, plays a critical role in investigating complaints that have not found adequate internal redress. The Canadian Human Rights Commission, the Commissioner of Official Languages, and the Information and Privacy Commissioners, as well as the officials with whom inmates are entitled to correspond in confidence, such as the Solicitor-General, and members of Parliament, all may supply some redress by investigating issues and advising on matters within their mandates.

Standards

Another form of non-legally binding rules is found in sets of standards developed by groups such as the American Correctional Association and the Canadian Criminal Justice Association. The approach taken is to describe the level of service to be provided by the correctional system and procedures to be followed to meet the objectives. Flexibility for variation among correctional authorities in setting the actual levels of service is allowed, as long as these are specified in the written policy and procedures. Compliance with the standards is verified by an accreditation team, a body independent from the organization being accredited.

As well, there exist many internal sets of standards in one form or another. For example, the CSC Policy and Procedure Manual, the NPB Policy and Procedure Manual, Offender Programs Case Management Manual and the British Columbia Manual of Standards, are management tools designed to ensure a consistent level of service throughout a system.

Problems With The Existing Legislative Scheme

The foregoing discussion surveyed the rules, emanating from a variety of sources,which govern corrections. For the purposes of the Correctional Law Review, the most important of these is correctional legislation (which includes regulations). An assessment of the major problems and concerns relating to the

existing legislative base for corrections is a necessary step in developing proposals for change. Many such problems were originally set out in a paper entitled "Proposal on Developing a New 'Corrections Act'", prepared by CSC in 1980, and bear repeating here.

Specific sections or provisions of the Acts and Regulations have been identified as obsolete, imprecise, or operationally difficult[38]. Many of these could be simply remedied by specific amendments to delete, clarify, or adjust, etc. More important, however, are a number of general deficiencies that underlie and go beyond many of the specific problems. A thorough, coordinated and comprehensive revision of the Penitentiary Act and other pieces of legislation is necessary to deal with these problems:

a) **Ad Hoc Development**

The present Penitentiary Act represents the accumulation of incremental changes to a piece of legislation whose basic form and content were first adopted in 1868. Since that time the Act has evolved by way of a continuing process of ad hoc amendments and several major revisions, the last being in 1977.

This essentially incrementalist approach has failed to deal with changes that would be desirable and beneficial but which were not perceived as immediately necessary. Furthermore this approach has failed to deal with generic problems and weaknesses that are reflected pervasively throughout the Act and/or related legislation, and which require generalized revision of the structure and content of relevant legislation. The total effect of these features is to leave the impression that the Act is outdated, confusing, and often inadequately related to current realities.[39] More specific instances of these problems are set out in the following discussion.

b) **Philosophy**

Many of the problems associated with the present Penitentiary Act stem from the fact that it contains no statement of principles or philosophy to guide its interpretation and application. Nor is it likely or apparent that a consistent philosophy has been implicitly incorporated in the legislation over its lengthy

evolution. It is even less clear that any common set of principles apply to the various pieces of legislation pertaining to corrections, to guide and coordinate their combined effect. This is true of most Canadian legislation. However recent criminal justice statutes such as the Young Offenders Act, and the Access to information and Privacy Acts, have included such statements.

c) Relevance to Recent Developments

Growth, change and innovation in federal corrections since the enactment of the Parole Act (1958) have been massive. The size, organization and activities of federal correctional services are far different and more complex than they were less than 20 years ago. There is a need for legislation to reflect the broader range of correctional functions and services that today exist, to define the more complex set of interrelated responsibilities, authorities and relationships that have developed, and to regulate many aspects of this more sophisticated reality than was envisaged by earlier legislation.

The two major pieces of legislation that presently govern the NPB and CSC (the Parole Act and Penitentiary Act) reflect the interdependency of the agencies themselves. Each Act contains provisions that are binding on both organizations and in a number of instances one Act depends on the other for definition of terms and statements of authority. For example, the powers and duties of the Parole Board with regard to unescorted temporary absences are outlined in sections 26(1) and 26(2) of the Penitentiary Act (although this will be changed if Bill C-68, presently before the House, becomes law). In all cases where individuals return to custody upon parole or mandatory supervision revocation, in addition to new sentences regard must be had to both the Penitentiary Act and the Parole Act in order to determine the length of time that must be served.

The interrelationship between these two pieces of legislation has apparently grown largely out of necessity as the roles and responsibilities of the two organizations have changed and especially with the moving of what was the National Parole Service from NPB to CSC. However neither Act has been

comprehensively revised to reflect the changing roles of either organization nor the altered relationship between them. At the core of each Act remains the now-outdated assumption that its purpose is to give direction and authority to a single organizational entity. Consequently these two Acts, whether considered separately or in combination, fail to set out the distinct roles and jurisdiction of each agency and the intricate relationship between them.

Federal and provincial operations in the field of corrections have become increasingly interdependent in recent years without the development of a corresponding framework of legislation.

At the present time provisions are contained in the Penitentiary Act, the Parole Act, and Prisons and Reformatories Act which have an impact on the other jurisdiction or which must be read together to gain a full understanding[40]. In other cases the law is simply silent on activities that could be seen as intrusions into the other jurisdiction's area of authority[41].

Considering the interdependence of the two systems in certain respects, federal-provincial interactions would be facilitated by greater precision in defining respective areas of jurisdiction and providing enabling and regulating authority for activities that intrude into or overlap with the other jurisdiction.

The preceeding discussion has addressed mainly operational and organizational requirements that would be facilitated through a comprehensively revised legislative scheme. It points out the need for legislation to keep pace with developments. Even more important in this regard is the need to take into account any developments in the law or the wider justice system which have an impact on corrections. The most significant of these is, of course, the Charter.

Correctional legislation has not as yet been comprehensively revised or restructured since the enactment of the Charter or to keep pace with developments in administrative law, such as the common law duty of fairness. Even though Commissioner's Directives and Standing Orders have been reviewed and to some

extent revised in light of the Charter, the impact of the Charter goes much deeper and may require fundamental restructuring of the legislative scheme and a reorientation of its substance to be consistent with Charter demands. In other areas, where there may not be a Charter right affected, there is nonetheless a need for clearly articulated legal rules to set out the scope of the right or privilege involved. These matters will be discussed further in the following section.

PART II: FACTORS SHAPING THE FORM AND CONTENT OF LEGISLATION

This part of the paper examines the constitutional and other aspects of our system that play a major role in shaping the form and content of a legislative scheme to govern corrections. There are two aspects of Canadian constitutional law that bear upon both the form and content of correctional legislation: 1) the Canadian Charter of Rights and Freedoms, and 2) the constitutional split in jurisdiction between the federal and provincial governments. Also having an impact are the obligations that Canada has assumed under international law in regard to corrections. These aspects were all discussed in the previous section in regard to the present framework of rules governing corrections, and shortcomings in the present legislative scheme were pointed out. In this section, we will consider the impact of these factors in developing a new legislative scheme. In addition, the development of a statement of philosophy for the correctional system will be discussed.

The Charter

As a constitutional document, the Charter has an impact on both the form and content of legislation. In order to appreciate the degree of protection given to rights by their inclusion in the Charter of Rights and Freedoms, it is necessary to consider entrenchment, enforcement and limitation of Charter rights.

The Charter 'entrenches' rights; it cannot be amended by the ordinary legislative process, but only by the process of constitutional amendment.

The Charter takes precedence over all existing as well as future laws. Sub-section 52(1) of the Constitution Act 1982 states that "the Constitution of Canada [which includes the Charter] is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". This gives a court the power to disregard any statute which it finds to be inconsistent with the Charter. No special authority is needed for this mode of enforcement; it follows from the fact that the inconsistent law is of no force or effect.

The Charter does more than permit courts to limit or declare inoperative legislation that infringes or denies Charter rights. Equally important is the provision creating a remedy for breach of the Charter by actions of individual state officials such as correctional staff. Sub-section 24(1) authorizes "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied" to "apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstance". This implies that anyone who establishes that his rights or freedoms have been infringed or denied has by that fact alone made out a cause of action entitling him to an "appropriate and just remedy".

The Charter contains some significant limitations through the override clause of section 33 and the limitation clause of section 1. The section 33 override clause expressly permits the federal Parliament or a provincial Legislature to exempt a statute from compliance with certain provisions of the Charter. It is anticipated that due to political considerations the override clause will rarely be used.

Section 1 of the Charter enables Parliament or a Legislature to enact a law which has the effect of limiting one of the guaranteed rights or freedoms. However, the government must prove that any limitation is a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society".

The Supreme Court of Canada, in a major case arising under the Narcotic Control Act, has established a strict test to be met before Charter rights may be limited.[42] It sets out two central criteria which must be satisfied to establish that a limit is reasonable and justified under section 1. First, the objective to be served by any measure limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. Second, the party invoking section 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test which involves 3 components: 1) the measures must be fair and not arbitrary, carefully designed to achieve the objective and rationally

connected to it, 2) the means should impair the right in question as little as possible, and 3) there must be a proportionality between the effects of the limiting measure and the objective - the more severe the negative effects of a measure, the more important the objective must be. The test in section 1 is extremely important in corrections, where it may be necessary to argue that even though as a general rule inmates retain rights, a certain constitutional right must be limited under section 1. It is in applying the section 1 test that such serious factors as security and good order of the institution will be balanced against the guarantee of Charter rights.

The section 1 limitation clause has a major impact on not only the substance, but the form of a legislative scheme as well. Under the existing scheme, various constitutional rights are limited by Commissioner's Directives, which would not be, according to recent interpretations of the Charter, "prescribed by law"[43]. To accord with section 1, any limitations on Charter rights must not only be justifiable by the government but must be contained in statute or regulation, and not in directives. In any event, there are strong policy reasons to limit Charter rights only through the democratic process of law-making rather than in policy directives.

We emphasize again that one of the main tasks of the Correctional Law Review is to ensure that all correctional legislation and practice conforms with the Charter. Because the Charter is drafted in general, abstract terms, legislation plays a crucial role in articulating and clarifying Charter rights in the correctional context. Questions concerning procedural fairness, conditions of confinement and criteria for decision-making will all be affected by the Charter. For a host of reasons which will be discussed further in relation to codification, Parliament is in a better position to deal with these questions in the context of a fundamental review of correctional law than are the courts, which operate on a case-by-case basis.

Federal-Provincial Split in Jurisdiction

Another aspect of constitutional law which has a major impact on corrections is the present jurisdictional split between the

federal and provincial governments.

The Correctional Law Review Working Group is mindful that the constitutional split in responsibility limits the scope of federal legislative power and necessitates close cooperation between the federal and provincial governments in any discussions on matters which may have an impact on both the federal and provincial systems. We recognize that even changes in federal legislation which purport to be restricted to penitentiaries may nonetheless have an impact on provincial jurisdictions by virtue of s.15 of the Charter or simply through public pressure to make similar changes.

International Law Obligations

In addition to the constitutional factors, there also exist aspects of international law which affect the form and content of the legal framework. The previous chapter outlined various substantive provisions of international treaties which Canada must comply with.

One of the most important of these treaties, the International Covenant on Civil and Political Rights, obliges Canada "to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the present Covenant, without distinction of any kind" (Article 2(1)).

In Canada treaties are not self-executing; the general rule is that international law has no application unless incorporated into Canadian domestic law. The Supreme Court of Canada has maintained that there are no domestic, internal consequences of an international convention or treaty unless they arise from implementing legislation giving the convention legal effect within Canada[44].

Despite this, it appears that in order to fulfill obligations under the Covenant it is not necessary to incorporate the Covenant directly into the constitution or laws of the ratifying state[45]. All that Article 2 of the Covenant requires of a State Party in this regard is the following:

> (2) Where not already provided for by existing legislative or other measures,...to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> (3) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...[and] [t]o ensure that the competent authorities shall enforce such remedies when granted.

Accordingly, even though it is not necessary that every single right and freedom set out in the Covenant be specified in the law or constitution, Canada is nonetheless obliged to give effect to the rights and provide effective remedies.

In addition, Canada has endorsed the UN Standard Minimum Rules for Prisoners (SMR). They are in the form of recommendations and therefore are not binding in international law. In a recent report[46], it was determined that CSC met the spirit, if not the letter, of all but three of the Rules; these were SMR 9(1)(single occupancy), SMR 11(a) (natural light requirements) and SMR 77(1)(compulsory education of illiterates and young offenders). Some current CSC practices exceed the requirements of the Rules, and some Rules are outdated. Nonetheless, Canada has reiterated its commitment to the Rules. The implementing procedures for the rules call for all States whose standards fall short to adopt them. Most notably, they call for the "embodiment" of the rules in legislation and regulation. Questions arise as to whether this requires enactment of the rules en bloc or whether it is sufficient if they are enacted amongst various pieces of corrections legislation. The main concern is, however, to make sure that the substance of the Rules are incorporated in statute or regulations.

The Correctional Law Review, in its work on inmate rights and remedies, must ensure that the form and content of correctional legislation complies with Canada's international obligations.

Philosophy of Corrections

One of the main tasks of the Correctional Law Review is the development of legislation which reflects the philosophy of corrections in Canada. In order to do this, we must be clear about what the purpose and principles of corrections are. The starting point of this discussion will be the purposes and principles identified by the Criminal Law Review in regard to the criminal justice system that are intended to guide the review process as a whole.

a) Purpose and Principles of the Criminal Justice System

A series of studies carried out over the past several decades have pointed to the need for a unified statement of philosophy for the Canadian criminal justice system. As stated in the Report of the Canadian Committee on Corrections (the Ouimet Report) in 1967,[47] correctional services must be seen as an integral part of the total system of criminal justice and their aims should be consistent with and supportive of the aims of the law enforcement agencies and the courts. The Ouimet Report stressed the need for a shared general philosophy to enable the criminal justice system to meet its demands. The Criminal Law Review has responded to the recommendations of the Ouimet Report and other studies by articulating a "comprehensive justice policy" that sets out its views of the philosophical underpinnings of criminal law policy. This is contained in The Criminal Law in Canadian Society (CLICS), issued by the Criminal Law Review. CLICS provides a basic framework of principles within which more specific issues, such as those of correctional law and policy, may be addressed and assessed.

According to CLICS, the purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.

The purpose of the criminal law is to be achieved in accordance with the Charter and with a set of principles applicable to the criminal justice system as a whole.

b) Purpose and Principles of the Correctional System

Guided by the general statement in CLICS, a more specific statement of correctional philosophy has been developed for the Correctional Law Review. The statement was devised through the process set in motion by the Project's First Consultation Paper, and is the subject of an in-depth examination in the first Working Paper of the Correctional Law Review, which was devoted to the philosophy of corrections. Two basic questions which were addressed are: what is the correctional system supposed to accomplish, and, how do we, as a modern society, want to go about it.

The statement of purpose and principles for corrections arrived at in the first Working Paper is as follows:

> The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:
>
> a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;
>
> b) providing the degree of custody or control necessary to contain the risk presented by the offender;
>
> c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;
>
> d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;
>
> e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society;

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

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

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

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

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

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

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

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

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

It is important to remember that one of the primary goals of the Correctional Law Review is the development of legislation which reflects a consistent philosophy of corrections. This philosophy must accord with a unified statement of philosophy for the criminal justice system as a whole. It also must serve to meet the problems which have been attributed, in every recent report and study, to the lack of a consistent philosophy of corrections. The question of how best to achieve this, that is, whether legislation should contain an explicit statement of philosophy, as well as principles and objectives, will be examined in the discussion of codification.

PART III: MEETING THE GOALS OF THE CORRECTIONAL LAW REVIEW

Previous sections have examined the context in which the Correctional Law Review is being carried out, including constitutional and other factors affecting the form and content of legislation. We will now move to the next step of considering the legislative framework which will allow the Correctional Law Review to best meet its goals. In this section we shall focus on two goals and how to achieve them: first, how to develop correctional legislation that best promotes voluntary compliance with its provisions and aids in the resolution of conflicting interests; and second, how to arrive at legislation that furthers fair and effective correctional decision-making.

Promoting Voluntary Compliance

In developing a legislative scheme that promotes compliance with its provisions we will be viewing corrections as not only a "system" as such, but also as groups of people within it and affected by it. Corrections is, after all, a human enterprise.[48] The interests of offenders, correctional staff and management, and members of the public, must all be taken into account. Only a legislative scheme that operates to protect the interests of all these people will be fair or effective. Such a scheme must not come from abstract notions of justice alone, but from a careful consideration of the rights, interests and concerns of all participants as well. We will first deal with each group separately, followed by a consideration of the areas where their interests conflict, and more importantly, the points where the various interests converge.

a) Offenders

In considering the rights and interests of offenders, who for purposes of our discussion are persons undergoing sentences of incarceration, the first questions are to what extent their rights differ from the rights of other citizens and, if they do differ in what respects.

The obvious distinction is in relation to liberty; incarceration necessarily results in loss or restrictions on the offender's

right to liberty. However, in all other respects the offender has a right to live as full and normal a life as is compatible with incarceration. Indeed, the offender acquires rights through loss of liberty and dependence on the state, such as the right to be provided with the basic amenities of life, including adequate food, clothing, and accommodation.

This situation derives from the fundamental precept that inmates are sent to prison as punishment, not for punishment. This precept has been accepted in almost every Western democracy and is recognized as a fundamental starting point by the Correctional Law Review. It requires a justice system within the institution that ensures that an inmate's rights will be respected. Such a system would operate to protect the inmate if he is denied his rights, as well as deal with the transgressor. As well, it would provide a rational basis for ordering the prison community according to rules which take into account inmate interests and which are known to all in advance. This system would be manifested by fair and impartial procedures that must be strictly observed, would proceed from rules that cannot be avoided at will, and would treat all who are subject to it equally. In essence, such a system would ensure that the rule of law would prevail inside the institution.

This type of system was recommended by the Parliamentary Sub-Committee on the Penitentiary System in Canada in 1977. As stated in its Report,[49] "justice for inmates is a personal right and also an essential condition of an inmate's socialization and personal reformation. Justice implies both respect for the persons and property of others and fairness in treatment."

Such a system has advantages for everyone involved. Failure to provide a just system to protect inmates' rights increases the tensions of prison life. An inmate who is sent to prison for breaking the law can only resent finding himself in a closed society ruled not by law, but by discretionary power which may be wielded arbitrarily. The ensuing tension could create an atmosphere of mistrust, which could lead to violence, and which is contrary not only to the interests of inmates, but to staff, management and the larger community as well.

Related to this is the interest that an inmate has in seeing that he does not leave prison with fewer skills or in a worse psychological state than when he entered it. In addition, he may legitimately have an interest in improving his educational and vocational skills, getting appropriate medical and psychiatric care, maintaining and improving family relationships and so on. Opportunities must be available for an inmate to meet these goals in the general interest of the rehabilitation of the individual and the benefit it would bring the community.

b) Correctional Staff

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

The job of a correctional staff member is a difficult one, often exacerbated by a misunderstanding of their concerns on the part of inmates, management, and the public. It is important that persons with this job not be seen only as "guards" but as members of an important social service demanding ability, appropriate training, and good teamwork. This is especially important today, when many correctional staff, such as parole officers, have a dual role to play in relation to inmates. Staff are often expected to function as counsellors as well as police. Conflicts which arise as a result must be recognized and dealt with. It is important that conditions of service that will attract and retain the best qualified persons be implemented. As well, all staff should have access to continuous support and training programs.

Correctional staff perform a job which is characterized by constant fear of making a mistake which may result in an escape, or some form of violence. This situation leads to an inclination to solve inmate-staff problems through increased security measures rather than through more individualized problem-solving techniques.[50]

"Security" has been described as the ultimate weapon to be used by the staff to demonstrate that they are the final masters, in physical terms. It has also been noted that correctional officers perceive the increased freedom and new programs for inmates as not only eroding their power but also as causing a deterioration in security.

There is no doubt that security is a legitimate concern of staff and the institution, and that it must be a top priority in operating an effective system. Along the same line, it is also important to recognize that proper safeguards must exist to allow a correctional official to perform his functions safely. In addition, however, there is a need for re-orientation in the training of correctional staff. Staff should be trained to solve problems in constructive ways to enable them to deal humanely with staff-inmate and inmate-inmate problems. This could be aided by an increased emphasis during training on the objectives of the correctional system and of the role of staff in achieving these objectives. The view that "good programs are good security"[51] should guide staff in their work.

Another issue of primary concern to correctional staff concerns their powers. The powers of correctional staff are by their nature defined in relation to the rights of inmates. For example, the powers available to a correctional official to conduct body searches of inmates must be balanced with the inmates' rights to privacy and to be secure against unreasonable search or seizure.

It is essential that correctional officials be granted sufficient power and authority to enable them to perform their function, but it is also important to correctional officials that the limit and extent of their powers be clearly set out in law and easily accessible and understandable to them. Otherwise if they overstep their powers they may leave themselves open to civil suits or criminal charges.

Under current law, the primary source of powers, privileges and protections for correctional officials is the Criminal Code which contains over 75 provisions that bestow powers upon "peace

officers". As a result of the definition of "peace officer" in s. 2 of the Code, the full range of police powers are bestowed on "a warden, deputy warden, instructor, keeper, goaler, guard, and any other officer or permanent employee of a prison".

This automatic attachment of expansive law enforcement powers upon correctional officials should be re-examined, especially in light of the principle of restraint adopted in CLICS. Even more critical is the confusing state of the law in regard to how much power an official can use in a particular situation. As a result of the vague or general language used in the Criminal Code, this type of question can only be answered by an ex-post facto judicial determination.

For example, the degree of force which may be used is basically that which is "reasonable in the circumstances". What may be regarded as reasonable in one situation, may not be reasonable in another. Lawyers and the courts may take months to decide the legality of an action which the staff-member had only minutes, or even seconds, to decide upon. The extent of an official's powers is a matter which has serious consequences for both the official and the inmates, and the present uncertainty in the law is not conducive to a fair or effective correctional system. It is in the interests of both correctional officials and inmates that the law be clear and accessible in regard to powers.

c) The Public

No correctional system can succeed without the understanding of and participation by the public, nor without meeting the public's concerns and expectations. Most members of the public rely on the capacity of the criminal justice system to protect them and their property, and regard the system as contributing to a just, peaceful, and safe society. Moreover, the public is interested in knowing that the resources it contributes are being well-spent and are achieving the desired results.

"Protection of society" as a goal of the correctional system can be achieved in two ways. In the short term, a safe, secure prison system protects society by separating out dangerous

inmates while they are serving their sentences. However, society's long-term interests would be best protected if the correctional system has the effect of influencing offenders to begin or resume law-abiding lives.

Most inmates are not considered dangerous, although recent studies have discovered that the public over-estimate the percentage of offenders who commit violent crimes. However, poor prison conditions can build up resentment and frustrations which could make normally non-violent inmates violent, and those already dangerous, more so. The view has been expressed that "the best protection society has is for those who offend to come out of prison, not as a greater danger to the community, but as law abiding, productive and tax-paying instead of tax-draining."[52] Society as a whole has a great interest not only in the workings of the penitentiaries but in the successful reintegration of the inmate into the community upon his release. The correctional system can benefit greatly from community involvement. Members of society should be encouraged to participate in volunteer activities as members of Citizen Advisory Committees, and through parole or probation.

Although society has general interests shared by all its members, it also has various groups with special interests which must be taken into account. These groups range from law enforcement officials to victims of crime.

Police and other law enforcement officials have a need for powers and protections which will enable them to deal with situations which may represent a threat to the community, such as the escape of a dangerous inmate. After-care agencies need the resources to enable them to assist the offender to successfully reintegrate into the community.

Special attention should be paid to victims of crime. The interests and concerns of this group have for too long been ignored by the criminal justice system. Their situation, however, is improving with the trend towards increased interest in the victim. Fresh consideration of the role of the victim has resulted in criminal justice initiatives such as a Federal -

Provincial Task Force and proposals in Bill C - 18 which encourage the victim's active participation at trial and put a high priority in sentencing on restitution and compensation for victims. At the corrections stage, victims have expressed an interest in having an input in decisions, especially those concerning such things as release, which may directly affect their interests. They also wish to ensure that if they disclose information they will be protected from danger or retaliation from an inmate who,for example, has been denied parole. These and other concerns of victims and other members of the community will be discussed in more detail in a paper dealing with issues related to victims and corrections.

d) Resolving Conflicting and Converging Interests

Emerging from this examination of rights and interests is the realization that, although each group involved in the corrections system has distinct concerns which must be addressed, and even though the roles of staff and offenders are in many ways inherently conflicting, there are many areas where their interests overlap and converge. For instance, both inmates and guards, who spend a great deal of time together in the penitentiary, have an interest in a safe institution where their concerns are taken into account and where they have an impact,where appropriate, on the operation of the institution.

We must seek ways to provide a safe, predictable environment which do not promote one set of interests at the expense of another. It is contrary to the interests of all concerned, however, to overlook the fact that the prison, by definition, is a very special type of social environment, marked by significant power imbalances in the relationship between guards and inmates. It is this power dynamic which is at the crux of the day-to-day life of the institution. Any review of the correctional system must recognize that without addressing this power imbalance, any reforms, rather than being meaningful, may amount to little more than window-dressing. Because of this underlying power-dynamic, legal reform in one area may merely result in problems surfacing in another. This point has been made in reference to the procedural safeguards which have been attached to disciplinary

proceedings over the past few years. It has been suggested that the advances made on this front have meant that coercive power rather than having been eliminated, has moved and is surfacing in other areas which have not as yet been subjected to any appreciable degree of judicial or other scrutiny.[53]

This discussion points to the importance of two factors: the shared interest amongst both guards and inmates in a secure, smooth-running institution which is able to meet their concerns, and the power imbalance inherent in the present system which allows coercive power to be directed at inmates in such a way that frustrations manifest themselves in hostility and violence.

Taking these two factors into account implies that an institutional environment which is humane and operable for both guards and inmates may be a matter of devising rules that facilitate and encourage voluntary compliance. Recent studies have shown that the great majority of people will comply with rules which they perceive to be fair, if given the opportunity.[54] Therefore, priority ought to be given, in devising rules governing the institution, to compliance enhancement techniques emphasizing participation and cooperation rather than confrontation.

The first step in facilitating compliance is enhancing the perceived fairness of a rule or decision. This is based on the simple fact that people are more likely to accept constraints or restrictions if they perceive them to be fair. The perceived fairness can be enhanced in a number of ways. The most important is through participation in development of rules or sharing in decision-making by people affected. The more directly involved people are, the more commitment they have to a rule, the fairer they will perceive it to be, and the more willing to comply with it. As a consequence the involvement of both correctional staff and inmates in the development of new correctional legislation is critical if that legislation is to receive their general support.

The Correctional Law Review Working Group recognizes the importance of soliciting the views of staff and inmates

through consultations, and taking them into account during the course of the Review. Equally important, the legislative scheme should support the on-going active involvement of staff and inmates in various day-to-day matters which affect them.

Obviously, security and other concerns of a penitentiary limit the areas in which inmates may participate in developing rules and making decisions. Yet there still remain areas where their input would be meaningful and effective, such as in matters concerning inmates' daily lives, like food, clothing and exercise. Another area where input is essential is inmate grievance procedures. Studies have shown that participation by inmates in devising and maintaining inmate grievance procedures is essential to their success.[55]

A recent CSC study is of the view that offenders are so much a part of the correctional system that it is irresponsible not to include them in certain decision-making processes.[56] Moreover, it recognizes that respect for human dignity requires that offenders be listened to.

Though input and participation are crucial, there are other important factors as well. One is acknowledgement by people affected of the value or necessity of the rule, another is that the rule must be sensitive to the circumstances and interests of those affected by it. Equally important, the rule must be clear and applied fairly. A vague, arbitrary or unrealistic rule will be perceived as unfair. A large degree of non-compliance with rules stems from an incomplete or mistaken understanding of the rule. Similarly, ignorance of a rule will obviously not increase compliance. In addition, a rule that is not applied fairly will contribute to dissatisfaction and a reluctance to comply.

A system which depends on participation and cooperation is not only more fair, but more effective as well. This has a great impact on cost-effectiveness, a consideration of great significance in an era of rising costs and diminishing resources.

Furthering Fair and Effective Decision-Making

a) Discretion and Accountability

Advancing fair and effective correctional decision-making is a major goal of the Correctional Law Review. One of the most influential factors to be taken into account in meeting this goal is that in our system, correctional officials and parole boards are given considerable discretion and decision-making power. They decide on a wide variety of issues ranging from security classification, institutional placement, program assignment, whether to recommend parole, whether to institute disciplinary proceedings, to whether to allow a particular visit. These are all examples of situations where enormous discretion is conferred on officials in matters which have a significant impact on inmates.

A certain level of discretion is generally considered desirable in allowing officials the degree of flexibility necessary to respond to the widely varying circumstances of individual cases. However, serious concerns have been expressed about the lack of accountability or controls associated with much of the discretion in our corrections system, and the unintended and undesirable consequences which arise as a result.

The Criminal Law in Canadian Society discusses some of the complex and inter-related concerns about discretion. One of the most obvious concerns is disparity in the exercise of discretion. By "disparity" is meant unexplainable or unjustified variation in the treatment of similar inmates in similar circumstances, caused by decisions made on the basis of unknown, indiscernible or indefensible considerations. A further concern about discretion is its lack of visibility and consequent resistance to public scrutiny and accountability. Moreover, while the law requires various procedural safeguards for certain important decisions, little exists in the way of guidelines or criteria to govern the use of discretion in arriving at a substantive decision. Further concerns exist because corrections officials possess a vast range of powers that are not adequately set out in law. This implies a potential for abuse in procedures governing such areas as search of inmates and in relation to use of force.

In short, the Correctional Law Review is striving to promote fair and effective correctional decision-making, and the Working Group is of the view that in order to do this, the vast amount of discretion in our system must be closely examined in all its phases. The real dilemma over discretion stems from the fact that discretion may be seen at the same time as harmful and helpful. In the former case, discretion is regarded as a threat to individual rights; in the latter, as the necessary means to achieve humaneness and flexibility. The task we are faced with is not to choose between one approach or the other but to establish an appropriate balance between discretionary power on the one hand and formal rules on the other to ensure that discretion can operate according to clearly stated principles and objectives, with the least degree of abuse and the greatest possible degree of accountability.[57]

A balanced approach to discretion recognizes the essential role it plays in our corrections system and that the answer is not to eliminate discretion, but, rather to attempt to confine and structure discretionary power.[58] What is necessary is the development of imaginative techniques which will place restraints on such power without destroying the flexibility, adaptability, responsiveness and individualized decision-making which discretion makes possible.[59]

The principal question here is: How can the exercise of discretionary power be structured so that the decisions of correctional staff and administrators and parole board members which affect individuals will achieve a higher quality? The first step in arriving at an answer is to look at the source of much of the uncontrolled discretion in our system.

b) Need for a Statement of Philosophy, Principles and Objectives

The high level of individual discretion that exists within the corrections system has been attributed to the lack of a clearly - defined consensus about the purpose of corrections.
At a conference sponsored by the NPB to deal specifically with the question of discretion in the correctional system, the most commonly heard explanation for the problems associated with discretion was not the existence of discretionary power <u>per se</u>,

nor the absence of rules and regulations, but rather the lack of clear purpose or mission within the corrections system.[60] The lack of a commonly understood purpose, it was maintained, results in the exercise of discretionary power on the basis of personal values, public opinion and system-serving goals rather than legitimate and clearly established principles.

It seems clear, therefore, that in order to structure discretion to avoid such arbitrary decision-making, it is necessary that the philosophy of corrections be clearly understood by everyone involved and that the responsibilities of the corrections system be carried out in a coordinated way through services based on common principles.[61]

This view has received strong support in recent studies and reports. The Vantour Report stated that all members of CSC need a conscious commitment to a singular goal, and a clear statement of purpose as to the Service's "mission".[62] This view was shared in the Carson Committee Report [63] and the Ingstrup Report,[64] which maintained that "mutually agreed upon objectives and priorities must be defined and stated as clearly as possible to ensure understanding, obligation and commitment".

The Correctional Law Review Working Group agrees that it is necessary to be clear about the purpose of corrections, and about the objectives of particular functions or activities of agencies. A clear statement of philosophy would contribute to the use of discretionary powers according to legitimate and clearly established principles, rather than according to the unguided and potentially arbitrary feelings of an individual decision-maker.

Accepting the need for a clear statement of philosophy is, however, only the first step. This approach raises a further issue for the Correctional Law Review: the role of law, or, more specifically, legal rules in structuring discretion and meeting the other goals of the Review. Essentially the question is 'how much should be included in law, or even more specifically, set out in legislation?'. There are several approaches to be considered, ranging from an exhaustive, detailed code of legal rules to a legislative framework emphasizing an explicit statement of philosophy. The following chapter will examine these approaches to codification and their implications.

PART IV: APPROACHES TO CODIFICATION

In its most general sense, codification is the "systematic collection or formulation of law, reducing it from a disparate mass into an accessible statement which is given legislative authority."[65]

Much confusion has surrounded the concept of codification. To some, it is the compilation or rearrangement of disparate laws and regulations, such as our current Criminal Code. In the case of civil law countries, codification usually denotes a basic piece of legislation, and ideally an exclusive source of law. In its narrowest sense, this tradition does not allow the judiciary to go back to pre-existing or independent bodies of unwritten law; resolution of issues is accomplished by reasoning by analogy from other provisions of the Code.

In its 1976 publication, Criminal Law - Towards a Codification, the Law Reform Commission of Canada put forward a concept of codification incorporating both traditions. It views codification as a process of making a comprehensive statute on a given matter according to predetermined principles of a formal and substantive nature.

In dealing with codification in the case of the criminal law, the Law Reform Commission viewed as a first priority a statement of principles. It states:

> The Code should derive the principles of criminal law from a broad and coherent policy on crime articulated by the government. This policy should in turn reflect a genuine criminal philosophy, one that is based on the acceptance of certain social or personal values. Only in this way can the legislature avoid trailing passively in the wake of changing values and provide leadership in the promotion of the general welfare and the self-fulfillment of the individual.
>
> It follows that the first step in drafting a Criminal Code is to discover those social and moral principles from which a framework of a philosophy of penal law can be constructed. The next step is to bridge the gap between these principles and reality. Finally, the principles must be ordered and formulated taking into account their internal logic and interdependence.[66]

Although the Law Reform Commission's study deals with the whole criminal law, its model for codification can be applied to corrections. Correctional law should articulate and take into account our correctional philosophy: what is corrections supposed to do with an individual sentenced to a term of incarceration? It is our view that including in legislation a statement of philosophy upon which the legal rules are based will make the law more understandable, will structure discretion, and promote fair and effective correctional decision-making. Following logically from the principles are the rules, which are designed to apply in particular situations. The Law Reform Commission defines a rule as a norm which, under prescribed circumstances, creates rights or duties or perhaps decides how an institution will function.[67]

For example, if one of our principles is that offenders are to be accorded humane treatment in our institutions, then flowing from this would be a rule providing for adequate food and clothing. Similarly, adopting the principle that, "The basic programs and services that society offers its members should, subject to reasonable economic and security constraints, be made available to persons under correctional supervision or control", would mean developing rules governing the provision of medical, psychiatric and dental care, legal services, and educational opportunities.

If the rules do not provide for a specific situation, then in attempting to deal with it, a decision-maker would be guided by the principle that an offender is entitled to basic programs available in our society.

The concept of codification has often been criticized as being too rigid, on the grounds that if you place all rules in legislation, this leaves no room for discretion on the part of correctional authorities to deal with emergency situations or new situations, and also robs the courts of judicial discretion. But, as the Law Reform Commission points out, one could never design a complete code to provide for all situations which may arise:

> Codification is not a formal unity of all legal rules. Its purpose is achieved if it expresses in clear terms the general rules and the basic distinctive principles of [criminal law] philosophy. The Code should contain guiding principles for both judges and lawyers. It need not solve each case specifically.[68]

This approach to codification allows for structured discretion within the correctional system, as well as for the judiciary who will be called upon to interpret legislation and the concepts embodied therein. But the exercise of discretion would be guided by stated objectives and principles in the legislation, thus providing consistency, accountability and more understanding of the decisions made.

In a general sense there are two other advantages to be gained from this approach to codification - that of accessibility and certainty. Accessibility implies two things - a) that the law can be found easily and b) that it is understandable to ordinary citizens. The principles and general legal rules would be part of the code, and the more detailed rules would flow logically from these principles in a rational, coherent manner, thus increasing accessibility and understanding.

With respect to understanding the law, certainly written law is a much better starting point for the lay person than trying to determine the significance of the numerous court decisions. On this point, the Law Reform Commissions states:

> laws are more accessible to lay people if they are recognized in a logical coherent way with a clear statement of principles on which they are based.[69]

Thus, if we put in legislation the principle that "any punishment or loss of liberty that results from an offender's violation of institutional rules and/or release conditions must be made by an impartial tribunal" then it follows that a set of procedures must be established for impartial disciplinary and parole boards. The principle would embody the rationale for the more detailed rules flowing from it, rendering the rules more understandable and the administrators more accountable.

Another concern which must be addressed is language and structure. Legislation is generally only fully intelligible to

those who are legally trained, and even then statutory interpretation is the subject of much litigation. As our objective is to make correctional law understandable to all, then the language used must be as straightforward as possible, with common meanings of words being employed.

Codification could also provide more certainty in the law. A statement in legislation of the exact powers and duties of correctional officers (instead of the current reference to peace officer status in s.10 of the Penitentiary Act), would provide more guidance to officers in the exercise of their discretion and promote a more secure environment where respective rights and duties are understood by all. Similarly a definition of "essential medical care" which sets out guidelines for the determination of what is essential, would give more certainty to the law.

Different approaches to codification may be shown by using inmate grievance procedures as an example. As it stands, grievance procedures are not now provided for in law, although it is generally accepted that such procedures are an essential feature of a modern correctional system. Options that might be pursued include 1) detailed legislation setting out all operational details and criteria for evaluation, 2) legislation prescribing only that a procedure exist, with no further details, or 3) legislation embodying general principles and objectives leaving operational details to be included in regulation or policy directives.

The first option of a detailed approach would mean that all the details of procedural requirements and roles of the participants would be set out in legislation much as in the current Commissioner's Directives governing grievances. The advantage of this option is its apparent certainty. The problem, however, is that this option is more likely to foster only minimum compliance by those who may feel overdirected and powerless. The net result could be that personal initiative may be seen to be pre-empted and a sense of personal responsibility diminished. As a result there may be compliance with stated procedures, without any real progress in the fundamental goal of speedy and efficient problem solving.

The involvement of the administration, staff and inmates in the design of the procedure (tailoring of the procedure to the particular institution) and a carefully monitored implementation period are features identified by studies with a successful grievance process. A statute with too much detail appears incompatible with this flexible approach.

The second option is to provide only for the existence of the grievance procedure, leaving all procedures and details to the discretion of the administration. The advantage of this option is the flexibility given to correctional authorities to make changes in policy and priorities. However, this same flexibility may be its prime disadvantage.

Studies have shown that features such as external independent review, written responses and opportunities for inmate participation are essential if grievance procedures are to be a credible and fair means of resolving inmate complaints. If serious consideration is being given to the proposition that grievance procedures can and should serve as an effective supplement to judicial recourse, we must recognize the importance of those features which promote credibility and supply procedural protection by providing for them in law.

The third option combines the advantages of each of the previous options. By legislating the principles, objectives and essential requirements but leaving the details to the initiative of those who must account for the efficacy of the system, both the interests of fairness and of institutional initiative and responsibility are served. This would allow the institution to develop the approach most suitable to its needs but would enable a court to determine whether an internal procedure was providing consistent and adequate means of redress by reference to the guidelines contained in the legislation.

Our conclusion, in regard to codification, is that an overly detailed code will not achieve our goals. Corrections is a complex field, characterized by decisions involving mixed objectives. We recognize that a significant degree of discretion is not only inevitable but desirable, and that legislation can

seldom identify either the exact nature of a problem or its precise cure. Therefore, rather than developing an exhaustive code of detailed legal rules to govern conduct in every situation, we are of the view that our goals would be better met by including in legislation a statement of correctional philosophy from which legal and policy rules are derived and which will guide their application and interpretation. This approach to codification will mean being explicit in the legislation in regard to philosophy of corrections, as well as objectives of all major agency functions and activities such as parole, remission, classification and placement. It also means that the rest of the legislation, including regulations, must be framed to be consistent with the stated principles and objectives. Policy will be developed by the correctional agencies themselves to reflect the stated philosophy.

This approach raises several important questions in regard to a legal framework which will now be addressed: first, which matters should be included in legislation, regulation, or policy; and second, how will our approach to codification affect the amount of litigation.

Statute, Regulation or Policy?

In considering the question of which matters should be included in statute, regulation or policy, we shall first look at whether there are any rules or general principles that determine whether a matter is dealt with in either a statute or regulation. At the federal level, the power to legislate belongs exclusively to Parliament. It has a wide discretion in the forms in which it expresses its will - it can legislate in great detail (e.g. Income Tax Act) or can merely outline the broad purposes of the legislation (e.g. War Measures Act). Parliament also may delegate power to the Governor in Council. The main purpose of this delegation is to prevent Parliament from being drowned in a myriad of detail. Another important purpose is the relative ease with which regulations may be changed, thus making them a much more suitable vehicle for matters which are likely to change over time, such as fees. The process by which statutes and regulations become law is set out in Appendix A.

From a study of the current correctional legislation it is clear that matters such as the establishment of the correctional authority, certain powers and duties of staff, and certain rights and responsibilities of inmates are specified in law. However no clear pattern emerges as to what should be specified in statute, as opposed to regulation, nor a consistent framework in which to deal with the various subject areas. Similarly, there does not appear to be any indication as to why the delegation of the legislative power to Cabinet is broad in the Penitentiary Act, and narrow in the Parole Act.

It appears that there are no precise criteria upon which to base the decision to place matters in statute or regulation. The matters dealt with by regulation must be authorized by the statute, and usually include the formulation of subordinate provisions of a technical or administrative character. Thus, one writer has concluded that generality is the hallmark of the statute law, whereas matters of a more technical nature belong in regulation.[70] Another reason given for the delegation of the legislation-making function is that it allows departments to act quickly and deal with emergencies more expeditiously than Parliament.[71] Certainly the process of regulation-making is much speedier than amendments to statute, and thus matters subject to change over time are often better placed in regulation.

This type of convenience is not the only consideration, however. The essential features of a correctional system should be approved by Parliament to ensure as much public input and scrutiny as possible. The correctional system should reflect societal values with respect to the relative importance of protection of the community and restrictions on the liberty of individuals. As well, the public through Parliament should approve the critical aspects of a system which has such a great impact on individual rights.

It is therefore our view that, in addition to the establishment of the correctional agencies and authority for their functions, as well as staff powers, new correctional legislation should also contain a statement of philosophy, specific objectives for each correctional program or activity, the principle features of each such program or activity, and should articulate individual rights in the correctional context and provide for their protection.

Regulations would complement and particularize the statute; they would flesh out the details of many of the statutory provisions, and deal with matters which might be expected to change over time.

A related question that arises is which matters should be included in regulations and which in policy directives or guidelines? In order to answer this question, it is necessary to consider the legal status of directives, such as the Commissioner's Directives, under our present system. As pointed out in the first section of this paper, the Supreme Court of Canada, in the case of Martineau (No.1), held that Commissioner's Directives, though authorized under statute, are clearly of an administrative, rather than a legislative nature, and as such do not have the force of law. Despite a strong dissent by Laskin, Chief Justice at the time, the majority judgement characterized these directives as basically internal rules of management in respect of which no duty of compliance can be enforced by inmates.[72]

Accepting the ruling of the Supreme Court of Canada in Martineau (No.1), the main distinction between the two types of rules is their legal nature; rules in statutes and regulations are legally binding and must be complied with in all cases, but rules in policy directives are not legally enforceable at the instance of an inmate. There are a great many Commissioner's Directives which inmates are expected to observe, but they cannot in turn rely on the Directives to establish any rights for them in the obligations they impose on staff. However, inmates may resort to the internal grievance procedure (set out in the Commissioner's Directives) in an effort to secure compliance.

Another major difference between rules in statutes and regulations and those in Commissioner's Directives is found in the process by which they are made. It is evident from Appendix A, which sets out the process in each case, that Commissioner's Directives are made internally, that is within CSC, with no outside input or scrutiny. This is in sharp contrast to the scrutiny and input required in the case of a statute, and to a lesser extent, regulations. As a result of the difference in process, policy directives are much more flexible; they are internally made and can be changed much more readily than either a statute or regulation.

These two characteristics of policy directives, that is, their non-binding and flexible nature, indicate that they are most appropriate for internal management matters. In fact, according to Martineau, Commissioner's Directives are no more than directions to employees as to the manner of carrying out their duties in the administration of the institution in which they are employed.

Accepting this approach means that the Commissioner's Directives would be reserved for operational policy, for example, instructing employees in how to carry out their jobs or with details of operations and procedures. They should not be the sole authority in matters directly affecting inmate rights although they can appropriately govern the way in which the institution gives effect to these rights. This approach would allow administrators the necessary flexibility to operate the institution, with the added advantage of having rules dealing with inmate rights in a legally binding form rather than a non-legally binding policy directive.[73]

This latter point is of critical importance not only in terms of protecting inmate rights, but also in making any limitations on individual rights which may be justified in the corrections context. In terms of limitations on constitutional rights, as noted previously, the Charter states in its section 1 limitation clause that any limitations must not only be reasonable and demonstrably justified in a free and democratic society, but prescribed by law as well.

This phrase has been interpreted to mean that the limitation must be laid down by a rule of law in a positive fashion and not by mere implication.[74]

> It is clear that statutory law, regulations and even common law limitations may be permitted. But the limit, to be acceptable, must have legal force. This is to ensure that it has been established democratically through the legislative process or judicially through the operation of precedent over the years. This requirement underscores the seriousness with which courts will view any interference with the fundamental freedoms.[75]

This issue is obviously one of critical importance for the whole area of offender rights and remedies. The Working Paper on Offender Rights will deal with it in greater detail. The paper will also consider the implications of placing guidelines that directly affect inmates rights, now found in the Commissioner's Directives, in the statute or regulations.[76] It will further deal with implications of establishing policy directives pursuant to statutory authority from the perspective of offender rights and remedies.

For the purposes of the present paper, we can conclude that in developing a legislative framework, matters to be dealt with in the directives as opposed to statute or regulation should be of an operational policy nature involving the day to day activities of employees in carrying out their duties, and should not directly affect inmate rights. Obviously, most activities and duties of penitentiary staff affect inmates. What we are saying, however, is that the directives should not have the authority to limit inmate rights, nor should they be the sole source of inmate rights since they are not legally binding or enforceable. Issues concerning redress to an inmate who feels he has been adversely affected by a directive will be explored further in the Offender Rights and Remedies Working Paper.

Effect on Litigation

The final question to be dealt with is whether our legislative framework will increase the amount of litigation. Concern has arisen, based on U.S. experience, that inmates will be streaming into the courts in record numbers to have disputes, no matter how minor, settled.

The response of the Correctional Law Review Working Group to this concern is that our approach of a system of legal rules based on a statement of philosophy should limit potential litigation, rather than increase it. In general, it may be said that the courts are used for two basic purposes; to interpret and articulate the scope of constitutional and other provisions and, to settle disputes between parties. Obviously, this is a very simplified description and, in practice, the two purposes overlap in many cases. Yet, for our purposes, considering each separately may be useful. In regard to use of the courts to interpret the scope of rights, it appears that increased litigation in the American system is most prevalent in states that have not adopted a comprehensive legislative scheme. Resort to the courts is most often made on constitutional grounds, in the absence of legislation, rather than in regard to legislative provisions.[77] With the advent of the Charter, it may be assumed that litigation will increase if Charter rights and limits on them are not articulated in clear terms in correctional legislation. A comprehensive legislative scheme such as we are proposing, that is fair and effective because it takes into account the interests of all participants in the system, is intended to eliminate a great deal of the need for resort to the courts.

When it comes to settling disputes, our legislative scheme would rely on adequate means of redress through appropriate judicial remedies as well as through more informal procedures that will satisfy the need for impartial review and effective dispute resolution. Providing effective internal redress through inmate grievance procedures will enable the development of just solutions without unnecessary resort to the courts. With non-judicial remedies, administrators are left with a role to

initiate solutions and exercise their expertise; and staff and inmates have an opportunity to participate in creating and maintaining solutions.

We recognize, of course, that judicial intervention has played and continues to play an important role. It has legitimized both the concept that inmates retain rights, and the role of outside inspection and scrutiny. With the Charter, the courts have assumed even greater power and importance. Our view is, however, that the courts should be relied on as a last resort, rather than a first measure. The point which we wish to stress is that by developing new correctional legislation we have an opportunity to shape correctional policy and practice for the future. For the reasons discussed in this paper, such an approach is vastly preferable to a future of incremental - and potentially inconsistent - change forced upon the correctional system by the courts. This approach allows the correctional system, taking account of the views of all concerned, to meet its goals. The proposed legislation, fashioned to promote voluntary compliance, would seek to structure rather than eliminate discretion while ensuring at the same time that inmate rights, constitutional and otherwise, are protected. It is important to remember that the legislation would not only articulate the meaning of Charter rights in the correctional context, but would also set out in clear terms the scope of other rights and duties.

In short, legislation can be developed in a way which does justice to all participants, in an effort to improve their collective enterprise. Litigation, in contrast, results in a win or loss for one side or the other. The outcome is rarely viewed as an improvement for everyone, and in fact often maximizes polarity.[78] In considering long-term solutions, our approach is to avoid the need for resort to the courts by developing rules that recognize yet control discretion in response to principles that are understandable to inmates, prison staff and administrators, and the public. The combination of effective grievance procedures and a reasonable, balanced system of legal rules should reduce resort to the courts while providing for "justice within the walls".

CONCLUSION

The main task of the Correctional Law Review is advancing legislation for the federal correctional system that meets the following goals: (i) reflects the philosophy of Canadian corrections, (ii) establishes the correctional agencies in law and provides clear and specific authority for their functions and activities; and (iii) facilitates the attainment of correctional goals and objectives through the establishment of certain correctional principles in law.

Factors which affect the form and content of such legislation were examined in this paper. It is our view that legislation that is most suitable for our purposes would contain an express statement of philosophy, would clearly establish the agencies and authority for their functions, as well as clearly state the objectives of each specific agency function and activity, and the principle features of each function or activity, and would provide for rights of inmates and any limitations on rights. Details of the legislative provisions would be set out in the form of regulations. The operational policy of the agencies would be contained in policy directives.

Every effort is to be made to ensure that the content of correctional legislation, regulations and directives is consistent with the Charter, with the philosophy of Canadian corrections, and with Canada's obligations under international law.

By taking into account the interests of all those affected by correctional legislation, voluntary compliance with the legislation should be promoted. And by recognizing the important role that discretion plays in corrections, this approach to legislation should allow discretionary power to be exercised in a more accountable manner in a way that promotes good correctional decision-making while respecting the dignity and fair treatment of inmates.

The resulting legislative scheme should be clear and unambiguous, facilitate operations, and give guidance to correctional staff. Clarity of purpose, objectives, and operations should permit inmates and the public, as well as judges, to better understand the "meaning" of a sentence of imprisonment in Canada.

END-NOTES

1. For example, the Canadian Bill of Rights and the Canada Elections Act.

2. Constitution Act, 1867, s. 91(27). It is worth noting the suggestion of constitutional experts such as Peter Hogg that jurisdiction over release should go with jurisdiction over corrections, i.e. as a matter of where the sentence is served. See, in this regard, McKend v. The Queen (1977) 35 C.C.C.(2d) 286 (Fed Ct.).

3. The Canadian Charter of Rights and Freedoms has become part of the constitution of Canada by virtue of the enactment of the Canada Act, 1982. This Act includes as a schedule the Constitution Act, 1982, Part 1 of which (ss. 1-34) consists of the Charter.

4. For an in-depth analysis see Michael Jackson, Prisoners of Isolation: Solitary Confinement in Canada (University of Toronto Press, Toronto, 1983), p.82 et seq.

5. F. O'Connor and L. Wright, "Mirror, Mirror on the Prison Wall!" (1984) 26 Crim. L.Q. 318.

6. MacGuigan, M. (Chair). 1977. Report to Parliament, Sub-Committee on the Penitentiary System in Canada.

7. Ibid, p.86, para. 416.

8. Ruffin v. Commonwealth, 62 Va. 790 (1871), cited in Jackson, supra, note 4, at p.82.

9. Jackson, supra, note 4, at p.82.

10. One of the earliest cases was R. v. Miller and Cockriell (1975), 24 C.C.C.(2d)401(B.C.C.A.), citing with approval the American approach in Furman v. Georgia, 92 S.Ct. 2726(1972).

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

12. McCann v. The Queen (1976), 29 C.C.C.(2d) 377. This case forms the centre-piece of Michael Jackson's study of solitary confinement in Canada, supra, note 4.

13. See James Jacobs, Stateville: The Penitentiary in Mass Society (Chicago: University of Chicago Press, 1977).

14. Ron Price "Bringing the Rule of Law to Corrections" in G. Zellick (ed.) Prisoners' Rights (Toronto: University of Toronto Press, 1978).

15. Tamy Landau, "Due Process, Legalism and Inmates' Rights: A Cautionary Note" (1984), 6 Can. Crim. Forum 151, at p.153.

16. John Howard, The State of the Prisons in England and Wales (first published in 1777).

17. Landau, supra, note 15. See also D. Fogel, "The Justice Model for Corrections" in J. Freeman (ed.) Prisons Past and Future (London: Heinemann Books, 1978) and J. Jacobs, "The Prisoners Rights Movement and Its' Impacts, 1960-80" (1980), 2 Crime and Justice 429.

18. Ridge v. Baldwin, (1964) A.C. 40 (H.L.) and Bates v. Lord Hailsham of St. Marylebone, (1972) 1 W.L.R. 1373.

19. (1976) 1 S.C.R. 453.

20. Ibid., at pp. 458, 468.

21 First officially recognized in Canada in Re Nicholson and Haldiman-Norfolk Regional Board of Commissioners of Police (1978), 88 D.L.R.(3d)671 (S.C.C.).

22. R.S.C. 1970, 2nd Supp. c.10.

23. Martineau v. Matsqui Institution Disciplinary Board (No. 2), (1979) 106 D.L.R.(3d)385 (S.C.C.).

24. Ibid., p.405, per Dickson, J.

25. O'Connor and Wright, supra, note 5, at pp. 322-23.

26. See A. Wayne MacKay, "Fairness After the Charter", (1985) 10 Queen's L.J. 263; Fergus O'Connor, "The Impact of the Canadian Charter of Rights and Freedoms on Parole in Canada", (1985) 10 Queen's L.J. 336, Allan Manson, "Administrative Law Developments in the Prison and Parole Contexts" (1984), 5 Admin. L.R. 150, and "The Duty to Act Fairly" prepared for the National Parole Board, 1984.

27. (1982), 4 C.C.C. (2d)97(Ont. H.C.J.).

28. Ibid., at p. 109.

29. (1983), 7 C.C.C.(3d)130(B.C.S.C.).

30. Ibid., at p. 141.

31. See, e.g., R. v. Sibley (1982), 4 C.R.R. 166 (N.S. Co. Ct.) at p.168; Re Jamieson and The Queen (1982), 70 C.C.C. (2d) 430 (Que. S.C.) at p.438; R. v Holman (1982), 28 C.R. (3d) 378 (B.C.S.C.), at p.389

32. See, e.g., Re Chester (1984), 40 C.R.(3d)146 (Ont. H.C.J.) where Holland J. stated at p.177: "[T]he protection given to a person... is the right to procedural fairness whether it be considered under the common law, the Bill of Rights or the Charter. Each affords the same measure".

33. (1985), 58 N.R.1(S.C.C.).

34. Judgement rendered December 17, 1985 (not yet reported).

35. Judgements rendered December 19, 1985 (not yet reported).

36. Martineau v. Matsqui Inmate Disciplinary Board (No.1) (1977), 33 C.C.C.(2d)366(S.C.C.).

37. Ibid., p. 374.

38. These are set out in the Appendix to "Proposal on Developing a New Corrections Act", prepared by CSC in 1980.

39. The confusion generated by this piece-meal approach to correctional legislation has not gone unnoticed by the courts. See, for example, Re Dean and the Queen, (1977), 34 C.C.C.(2d)217, at 218.

40. For example, Exchange of Service Agreements are authorized in part by s. 15 of the Penitentiary Act and by s. 4 of the Prisons and Reformatories Act, both of which must be read to determine the authority for the Agreement.

41. For example, health care and education.

42. R. v. Oakes, judgement rendered Feb. 28, 1986 (not yet reported), p. 35-45.

43. Discussed, infra, p. 52.

44. Rogers Cable T.V. Ltd. (S.C.C.).

45. Discussed in Mr. Justice W.S. Tarnopolsky, "A comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights" (1983) 8 Queen's Law Journal 211, at 212.

46. Report on the Standard Minimum rules prepared for the Seventh UN Congress in 1985.

47. Ouimet, R. (Chair). 1969. Report of the Canadian Committee on Corrections - Toward Unity: Criminal Justice and Corrections. Ottawa: Information Canada, p.277.

48. This was identified as Basic Principle No.1 in the Report of the Advisary Committee to the Solicitor General of Canada on the Management of Correctional Institutions, November, 1984 (Carson Committee Report). According to the Report, "with 10,569 employees and about 12,000 inmates in custody, there are close to 23,000 human beings in daily direct involvement with the organization. Untold thousands of third parties (spouses, families, volunteers and victims) have an additional stake in the business."

49. Supra, note 6, p.87.

50. Ibid., p.45.

51. Carson Committee Report, supra, note 48, p.16.

52. MacGuigan Report, supra, note 6, p.16.

53. See Landau, supra, note 15, and Richard V. Ericson and Patricia Baranek, The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process (Toronto: University of Toronto Press 1982) p.224-225, and Jackson, supra, note 4, p.240.

54. Dale T. Miller, "Psychological Factors Infuencing Compliance", and Jackson-Smye Inc., "Compliance Behavior and Attitudes" both studies prepared for the Department of Justice, 1985.

55. See Evaluation of the Inmate Grievance Procedure Pilot Project (Saskatchewan Penitentiary), (1979) Ministry of the Solicitor General, Programs Branch.

56. O. Ingstrup (Chair.) 1984. The Report of the Task Force on Mission and Organizational Development: "The Statement of CSC Values".

57. The National Parole Board Report on the Conference on Discretion in the Correctional System, Nov. 17-19, 1981. (1983) Ottawa: Supply and Services, p.3.

58. K.C. Davis, Discretionary Justice; A Preliminary Inquiry (Baton Rouge: Louisiana State University Press, 1969) p.102-103.

59. See J.M. Evans, H.N. Janisch, D.J. Mullan, R.C.B. Risk, Administrative Law: Cases, Text, and Materials(2nd Ed.) (Toronto: Emond Montgomery Publications Ltd., 1984) Ch.13; "Confining and Structuring Discretion".

60. Report on Conference on Discretion, supra, note 57, p.25.

61. This recommendation was made as long ago as 1969 by the Ouimet Commission, supra, note 47, p.284

62. J. Vantour (Chair). Report on Murders and Assaults in the Ontario Region. (1984), Recommendation 1.

63. Supra, note 48.

64. Supra, note 56, 33(3).

65. B. Donald, "Codification in Common Law Systems", 47 A.L.J. 160, at 161.

66. Law Reform Commission of Canada, Criminal Law-Towards a Codification, p.48.

67. Ibid., p.50.

68. Ibid., p.16.

69. Ibid., p.22.

70. D.R. Miers and A.C. Page, Legislation (Maxwell, London, 1982) p.167-8.

71. Levy, "Delegated Legislation and the Standing Joint Committee on Regulations and Other Statutory Instruments" G. Bruce Doern and S. Wilson, Issues in Canadian Public Policy, (Methuen, Toronto, 1974).

72. The decision has been criticized on many grounds. (See in particular, H.N. Janisch, "What is Law?" - Directives of the Commissioner of Penitentiaries and Section 28 of the Federal Court Act - The Tip of the Iceberg of "Administrative Quasi-Legislation" [1977] 55 Can. Bar Rev. 576.) From our point of view, the decision of the Supreme Court of Canada is authoritative on the issue.

73. The need for legally binding rules to increase the accountability of penitentiary authorities was recognized in the Parliamentary Sub-Committee Report in 1977, although their recommendation was that the Commissioner's Directives should be legally binding. This approach was also suggested by J. M. Evans in "Remedies in Administrative Law" in Special Lectures of the Law Society of Upper Canada (1977).

While it recognizes the need for accountability, the Working Group is of the view that having inmate rights dealt with in legislation and regulation, both of which are subject to a more open and democratic law-making process than Commissioner's Directives, would more successfully meet concerns of accountability. In addition, reserving Commissioner's Directives for operational policy in regard to inmate rights and other matters would give the correctional authorities the flexibility necessary in managing an institution.

74. See Federal Republic of Germany v. Rauca, 1 (1982) 30 C.R. (3d)97 (Ont. H.C.J.), affirmed, (1983), 4 C.C.C. (3d)385 (Ontario C.A.) and Le Canadien Newspapers Company Limited and the Queen, (1984), 16 C.C.C.(3d)495 (Man. C.A.).

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

76. Section 29(3) of the Penitentiary Act would have to be narrowed, for one thing.

77. U.S. experience is discussed in Walter S. Tarnopolsky, "The Anticipated Effect of the Canadian Charter of Rights and Freedoms on Discretion in Corrections", in Report on the Conference on Discretion, supra, note 23.

78. These points are forcefully made by Michael Jackson in "Inmates' Rights: the Case Law and its Implications for Prisons and Penitentiaries", in Report on the Conference on Discretion, supra, note 57.

APPENDIX "A"

1) Statute and Regulation: Law Making Process

The following is a brief overview of the process by which statutes and regulations become law. New legislation is often introduced in response to complaints from the public, lawyers, provincial governments, etc. Once a need for new legislation is identified by Cabinet, legislation is drafted and tabled in the House of Commons (first reading). (Legislation may occasionally be tabled in the Senate first, but must then go to the Commons before being passed). This tabling is often accompanied by a press conference, held by the responsible Minister to explain to the public the nature and rationale for the proposed legislation.

At second reading, the Minister responsible outlines the general thrust and policy implications of the proposed legislation in the House of Commons. A debate regarding the principles follows, after which the legislation is forwarded to a Parliamentary Committee for consideration as to detail as well as principle.

At the Committee stage, there is opportunity for public input in the form of expert witnesses or public interest groups. When the Bill returns to the House of Commons there is further debate and the possibility of more public input. The process of three readings and detailed examination by Committee is then repeated by the Senate. The Bill is given Royal Assent by the Governor General, and becomes law on that date or on any later date specified in the Bill.

Regulations, on the other hand, are enacted with much less public scrutiny. Once a need for change is identified (again quite possibly through public input), regulations are drafted in the department responsible and, pursuant to section 3 of the Statutory Instruments Act, are examined by the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice to ensure that they are within the terms of the Act, and do not trespass unduly on existing rights and freedoms, and are drafted in accordance with established standards. They are then discussed and approved by Cabinet. After being enacted, these

regulations must be reviewed by the Standing Joint Committee on Regulations and other Statutory Instruments, (which includes members of both the Senate and House of Commons) which has the particular mandate to ensure that the power to make the regulations is authorized by the statute, and that the regulations comply with the Statutory Instruments Act. Although this Act is a means of safeguarding against abuses of delegated power, it does not permit public input prior to enactment of regulations. There are, however, certain regulations which are published prior to enactment though this is an exception to the normal procedure.

A problem often cited with respect to regulations is their limited accessibility to the public. Section 11 of the Statutory Instruments Act provides for publication of all regulations in the Canada Gazette within 23 days of the registration of the regulation. (Section 11(2) states that the regulation is not invalid, due to non-publication, but that no person can be convicted of a contravention of the unpublished regulation unless reasonable steps were taken to bring the regulation to the person's attention). However, given the thousands of regulations and orders which are published in the Gazette, one can question how accessible regulations really are to members of the public.

2) Process of enacting Administrative Directives

The process of enacting or amending the Commissioner's and other administrative directives is internal to the Correctional Service of Canada and thus does not have the public scrutiny that either legislation or regulations have. Series 000 of the CSC manual deals with the directives program and Divisional Instruction 000--3-01.1 specifies that a draft directive must be developed in consultation with functional managers within the sponsoring branch of CSC, and other branches and divisions. In practice there may also be consultation with regional management; the nature of the consultation is determined by the individual Regional Deputy Commissioner. With respect to changes to Commissioner's Directives, approval must be obtained from national Senior Management Committee members.

Divisional Instructions (which set out the procedure by which policy is to be given effect) are approved by CSC's Legal Services and Regional Executive Officers, or where Divisional Instructions are developed at the same time as related Commissioner's Directives, both are approved by the Senior Management Committee. Regional Instructions (procedure and guidelines for implementing policy, in response to peculiarities specific to the operations of a region) are approved by Regional Senior Management Committee members. Standing Orders (procedures and guidelines peculiar to the specific institution or office) are approved by the local Senior Management Committee members. Routine Orders (weekly orders providing information and direction on specific short-term activities peculiar to the unit) are issued by the officer in charge of the unit, with no additional approval. The directives, instructions and orders come into effect as soon as they are signed, at which point they are distributed internally within the Correctional Service of Canada.

Instruction 000-40-1.1 outlines "Public and Inmate Access to Internal Directives". With respect to the public, this merely provides that requests be referred to Regional Chiefs of Information Access. Access is then regulated by the Access to Information Act.

Community volunteers are to be provided with reasonable access to CSC Manual documents, according to the Divisional Instruction, and at least one complete copy of Commissioner's Directives and Divisional Instructions must be provided in each institutional inmate library for inmate access. (There are some documents exempted for security reasons).

Thus, there is some accessibility of the correctional administrative directives for inmates and the public. Nonetheless one must also consider in practical terms how accessible these directives really are, given that they encompass seven large volumes and there is only one complete copy in most institutions. (In fact, if the Routine and Standing Orders are included, the administrative directives cover 36,000 pages.)

APPENDIX "B"

List of Proposed Working Papers of the Correctional Law Review

Correctional Philosophy

A Framework for the Correctional Law Review

Release and Clemency

Staff Powers and Responsibilities

Sentence Computation

Native Offenders

Offender Rights

Mentally Disordered Offenders

International Transfer of Offenders

Victims and the Correctional Process

The Relationship between Federal and Provincial Correctional Jurisdictions