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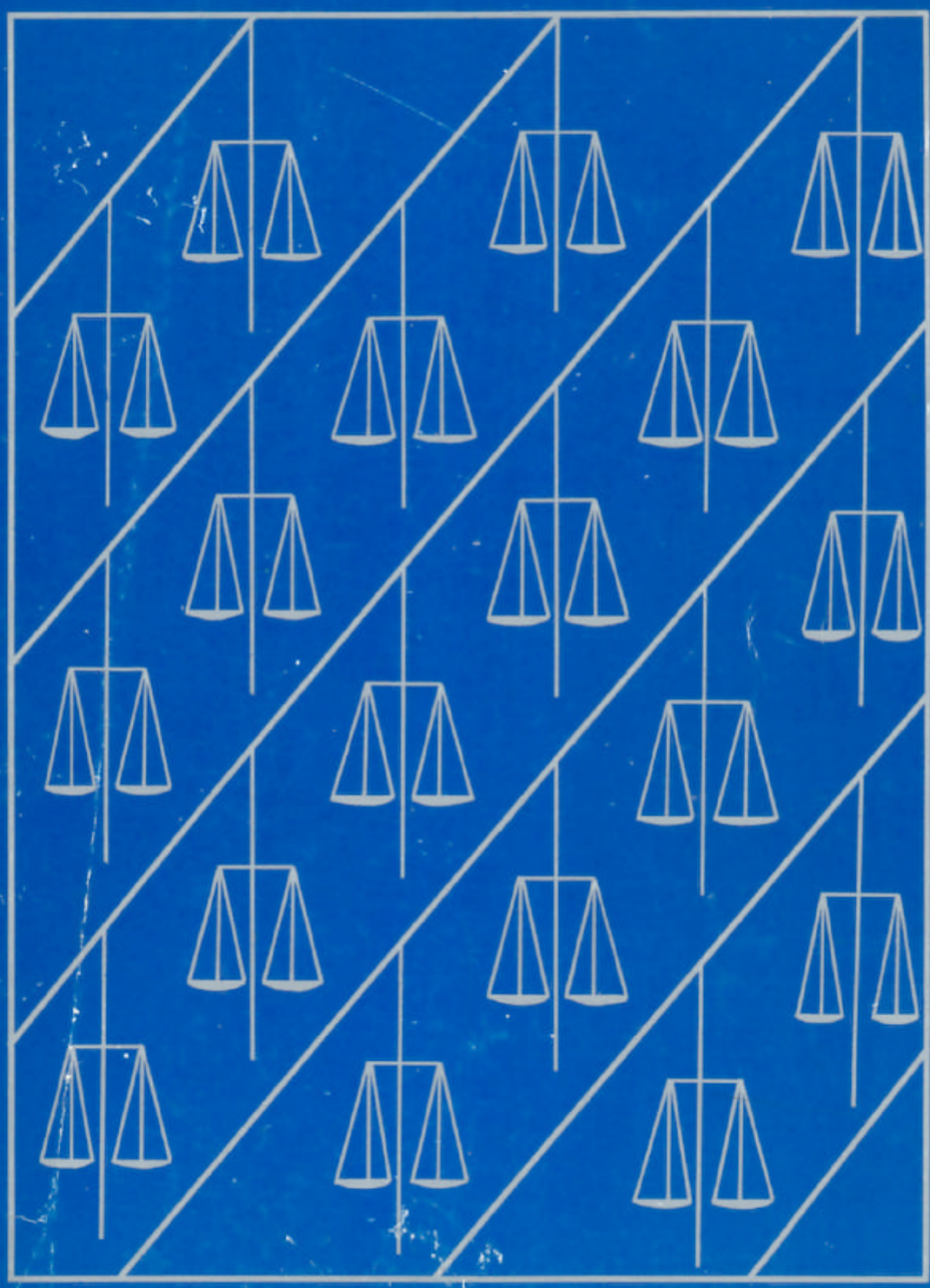

Report of the Standing Committee on Justice and Solicitor General on its review of sentencing, conditional release and related aspects of corrections.

DAVID DAUBNEY, M.P.
Chairman

CANADA

TAKING RESPONSIBILITY

Report of the Standing Committee
on Justice and Solicitor General
on its Review of Sentencing,
Conditional Release and Related
Aspects of Corrections

DAVID DAUBNEY, M.P.,
Chairman

August 1988

HOUSE OF COMMONS

Issue No. 65

Tuesday, August 16, 1988
Wednesday, August 17, 1988

Chairman: David Daubney

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Fascicule nº 65

Le mardi 16 août 1988
Le mercredi 17 août 1988

Président: David Daubney

Minutes of Proceedings and Evidence of the Standing Committee on

Justice and Solicitor General

Procès-verbaux et témoignages du Comité permanent de la

Justice et du Solliciteur général

RESPECTING:

In accordance with its mandate under Standing Order 96(2), consideration of its inquiry into sentencing, conditional release and related aspects of the correctional system

INCLUDING:

The Sixth Report to the House

CONCERNANT:

Conformément à son mandat en vertu de l'article 96(2) du Règlement, étude de la détermination de la peine, de la mise en liberté sous condition et des aspects connexes du système correctionnel

Y COMPRIS:

Le Sixième Rapport à la Chambre

Second Session of the Thirty-third Parliament, 1986-87-88

Deuxième session de la trente-troisième législature, 1986-1987-1988

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JUSTICE AND SOLICITOR GENERAL

has the honour to present its

SIXTH REPORT

In accordance with its mandate under Standing Order 96(2) and its Terms of Reference dated November 3, 1987 concerning a review of sentencing, conditional release and related aspects of corrections, the Standing Committee on Justice and Solicitor General has adopted the following report and urges the Government to consider the advisability of implementing the recommendations contained herein.

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CHAPTER ONE

INTRODUCTION

A. Background

The House of Commons Standing Committee on Justice and Solicitor General began its review of sentencing, conditional release and related aspects of the correctional system in the spring of 1987, about the time the national debate on capital punishment was coming to an end. Many of the issues raised in the House of Commons and across the country during that debate went beyond the question of capital punishment. They demonstrated that public confidence in many aspects of our criminal justice system had seriously eroded in recent years. Many Canadians now feel that they are not being fully protected and that crime is out of control. The Committee believes that this public perception, whether well-founded or not, must be addressed and the issues raised by it must also be faced. The Committee undertook this study partly as a result of this sense of public unease.

Shortly before the Committee began its review, three events occurred which provided a focus for the study. In July 1985, Celia Ruygrok, a night supervisor at a community residential centre in Ottawa, was murdered by a resident who was on parole for an earlier non-capital murder conviction. (In the spring of 1987, a Coroner's Inquest into this murder drew a number of conclusions and made recommendations dealing with issues of sentencing, conditional release, information-sharing and co-ordination among different components of the criminal justice system. These recommendations were largely adopted by a Task Force set up to advise the Solicitor General on the policy implications of the Ruygrok Inquest.) In the spring of 1987, the Canadian Sentencing Commission released its Report, after several years of intensive study and consultation. About the same time, the Correctional Law Review released its working paper, *Conditional Release*.

The Committee's Terms of Reference[1], adopted in the fall of 1987, refer directly to these three events as a way of targeting, but not limiting, the Committee's review of sentencing, conditional release and related aspects of the correctional system.

The Committee received hundreds of briefs and expressions of opinion from many members of the public and representatives of all participants in the criminal justice system. It heard from lawyers, inmates, victims, helping professionals, parole officers, unions, correctional staff, judges, academics and many other interested Canadians.[2] It held public hearings and *in camera* meetings across the country as well as in Ottawa. It visited institutions and met with people working directly in the conditional release system. Many witnesses before the Committee not only addressed the issues raised in its Terms of Reference, but also ranged well beyond them at times with their insights and experiences.

The Committee's work has been inspired by several witnesses. For example, Gerald Ruygrok, the father of the halfway house worker murdered in Ottawa, has shown how one may come to terms with a personal tragedy with dignity and by becoming personally involved in criminal justice issues as a community volunteer. (Coincidentally, one witness, whose husband was murdered by an offender, is also a volunteer in corrections.) Andrejs Berzins, Q.C., the Crown Attorney who conducted the Ruygrok Inquest, cautioned the Committee against taking information at face value and urged it to go beyond generalities to seek out the front-line workers in the criminal justice system — people who can tell what really happens every day. Spurred on by Gerald Ruygrok's example, and by the pain of all victims who have appeared before it, the Committee has adhered as closely as possible to the urgings of the Crown Attorney.

B. Framing the Issues

The issues the Committee has set out to address are difficult, complex and interrelated. They are difficult because they deal with basic philosophical questions. Is it the purpose of sentencing to exact retribution for the breach of fundamental rules and norms? Should sentencing be attempting to rehabilitate offenders? Should it be inspired by a philosophy of just deserts? How should victims' needs and interests be addressed? Assuming agreement can be reached on the basic philosophical questions, the means must still be considered for them to be attained in practical, day-to-day terms: incarceration, community service orders, treatment, restitution and compensation to victims.

One of the major problems which must be faced directly in addressing these general philosophical questions and the specific issues that grow out of them is the level of serious public concern which sometimes amounts to

fear and panic. The high degree of public outrage expressed earlier this year indicates the degree of fear felt by many Canadians at the failings of the criminal justice system. In Toronto, Melvin Stanton, an offender nearing the end of his sentence who was permitted to serve an unescorted temporary absence at a halfway house, brutally raped and murdered Tema Conter; in Brampton, Ontario, an offender with an extensive psychiatric and violent criminal history has been charged with the murder of eleven-year-old Christopher Stephenson; in British Columbia, Alan Foster, a paroled lifer, committed suicide after murdering his wife, her daughter and the daughter's friend.

Many Canadians get much of their information about crime from American sources; yet our crime rates and the rate of violence are lower than those in the United States. Prior to the events described above, it might have been argued that public fear of crime could be discounted by contending that Canadians are reacting to spill-over from the American media, or by saying that the media do not report accurately and completely on the criminal justice system — they tend to focus on spectacular violent crimes and lenient sentences. Finally, public fear may also be challenged by saying that Canadians do not know about or understand the workings of the criminal justice system. Recent research shows that the more Canadians know about a particular criminal case, the more likely they are to propose a sentence very much like that of the sentencing judge.

Discounting fears does not dispel them, however. At present, public confidence in the criminal justice system is very fragile. Any reform of the criminal justice system — whether of sentencing, conditional release or related aspects of the correctional system — must address public perceptions directly and seek to restore public confidence in its efficacy. The challenge, then, is twofold: to address the Canadian situation as it actually is and to deal with the perceptions Canadians have of it.

The Committee is convinced that the criminal justice system must be explained to Canadians by means of public education and that the community must be given opportunities to be more involved at all levels. Reforms must address real weaknesses in the system. However, they must also recognize that public concern and the lack of confidence in the system is one of those weaknesses.

In the Committee's view, there appear to be several points of principle relating to the criminal justice system about which there is general

concurrence. First, the protection of society is a goal of criminal justice on which everyone agrees. Opinion divides on the methods of achieving this goal. Some propose more crime prevention strategies; others suggest sentencing reforms (such as reducing unwarranted disparity in sentencing, or giving longer sentences); still others recommend more effective alternatives to incarceration (both at the sentencing and release stages), etc. Although all share a belief in the principle of social protection, there are many ways to achieve it.

Agreement also exists on the concept of offender accountability — that is, if one breaks the law, one must accept responsibility for the action. Opinions differ on the methods of assuring offender accountability — by more or less punishment, by compensation and restitution to the victim, by offender reconciliation with the victim and community, and/or by opportunities for rehabilitation. Again, the principle of holding offenders accountable is shared by all, but there may be many ways to achieve it.

There is also concurrence on the principle of using alternatives to incarceration for non-violent offenders or offences. Differences of opinion occur in attempting to determine who are non-violent offenders and how best to deal with them (to minimize their likelihood of re-offending).

Dissidence occurs when specific issues are considered. For example, the issue of sentencing begs a number of questions. Are sentences too disparate? Are sentencing disparities necessarily undesirable? Are sentences adversely affected by the presence of conditional release and remission? Is this desirable? Is the so-called "truth in sentencing" approach (i.e., precluding conditional release in the early parts of the sentence) the way to go? Are there sufficient and effective alternatives to incarceration? Should sentencing guidelines be adopted? If so, should they be mandatory, presumptive or advisory? What types of aggravating and mitigating factors should be attached to such sentencing guidelines? What impact would sentencing guidelines have on the criminal justice and correctional systems? How can victims and members of the community be given opportunities to feel a greater stake in the sentencing process?

The issue of conditional release raises other questions. Should it be retained in any or all of its forms? Is it possible to assess adequately the risk of re-offending, particularly by those likely to do so in a violent way? Are offenders being effectively reintegrated into society? Should certain types of offenders not be eligible for early conditional release? Are inmates being

adequately prepared for conditional release? Are the methods used to determine eligibility for conditional release effective and fair? Does the public understand and have confidence in the way conditional release now functions? What is the role of halfway houses in the conditional release system — is there adequate community involvement? Are there certain types of offenders who should not be sent to halfway houses? If so, how should they ultimately be safely reintegrated into society?

A number of other questions underlie these issues. How can the participation of victims in sentencing and conditional release be improved? Is there adequate staff training and program evaluation in the criminal justice system? Do the various components of the criminal justice system mesh well together or are there gaps? How can Canadians become more involved in all parts of the criminal justice system?

These are just some of the scores of questions, upon which there is great divergence of opinion, that the Committee has struggled to address. While complete answers have not been found to all questions, this report attempts to set a direction for reaching positive conclusions. The Committee hopes that its report and recommendations will, if accepted and implemented by government, improve our system of sentencing and conditional release, and reassure Canadians that the operation of these components of the criminal justice system contributes to public security.

The Committee adopted the following principles as the basis of its recommendations:

(1) There must be greater community involvement and understanding at the successive stages of sentencing, corrections and conditional release.

(2) Sentencing, correctional and releasing authorities must be accountable to the community for addressing the relevant needs and interests of victims, offenders and the community.

(3) Sentencing, corrections and conditional release should have reparation and reconciliation built into them — a harm has been done and should be repaired (the victim's loss must be redressed), and most offenders will be (ultimately) reintegrated into the community.

(4) **Sentencing, correctional and releasing authorities must provide opportunities for offenders to accept and demonstrate responsibility for their criminal behaviour and its consequences.**

(5) **Opportunities must be provided for victims to participate more meaningfully in the criminal justice system through the provision of:**

  (a) **full access to information about all stages;**

  (b) **opportunities to participate at appropriate stages of decision-making in the criminal justice system; and**

  (c) **opportunities to participate in appropriate correctional processes.**

(6) **Educational, vocational, treatment and aftercare services must be improved and accorded greater resources at the successive stages of sentencing, corrections, and conditional release, to ensure that offenders are effectively reintegrated into the community either as an alternative to incarceration or after incarceration.**

(7) **Sentencing and conditional release must function with public visibility and accountability in such a way as to contribute to the protection of society.**

(8) **To ensure sentencing disparities are not (and are not perceived to be) unwarranted, sentencing should be structured in some manner with adequate, appropriate provisions for the consideration of aggravating and mitigating factors in specific cases, and with the requirement that reasons be given in all cases.**

(9) **Carceral sentences should be used with restraint; there must be a greater use of community alternatives to incarceration where appropriate, particularly in cases not involving violence or recidivism.**

(10) Conditional release in some form should be retained with adequate safeguards to ensure that those who benefit from it have earned that privilege and that they do not constitute an undue risk to the community.

(11) All participants in the criminal justice system must put greater emphasis on public education.

C. Structure of the Report

As the Committee considers that all components of the criminal justice system must strive to increase public education about criminal justice processes and issues, Chapter Two discusses a Canadian study of public attitudes towards sentencing and identifies other areas of misunderstanding which contribute to lack of public confidence in the criminal justice system. Similarly, as a means of reinforcing its view that criminal justice reforms must take place in a context responsive to victims and the community, the Committee has devoted Chapter Three to a discussion of the needs and interests of victims, which for too long have been neglected by the criminal justice system.

Chapters Four to Seven review the recent history of proposed sentencing reforms in Canada and present the Committee's proposals for sentencing reform. Chapters Eight to Ten identify the present forms of conditional release, review the recent history of proposed reforms, and explain how the release process functions. Chapters Eleven to Thirteen describe the Committee's proposals for conditional release reform. Chapters Fourteen to Sixteen outline the Committee's proposals for correctional program reform with particular emphasis on Native and women offenders.

Notes

(1) See Appendix A.

(2) A list of witnesses who appeared before the Committee can be found at Appendix C. A list of submissions sent to the Committee can be found at Appendix D.

CHAPTER TWO

PUBLIC ATTITUDES

In recent years there has been a decline in public confidence in the criminal justice system in general, and the sentencing, correctional and conditional release processes in particular. Public attitudes toward the criminal justice system, as well as to other aspects of Canadian society, are influenced, and at times reinforced, by the all-pervasive presence of the mass media. People's understanding of sentencing and conditional release practices is largely based on what is contained in the media. Not everyone has regular contact with the criminal justice system.

One of the essential issues that must be assessed in any attempt at criminal justice reform is the impact of media coverage and other information on public attitudes. Where these attitudes appear to be the result of incomplete or inaccurate information, strategies for change must not be confined to legislative reform.

The Committee heard from Dr. Anthony Doob and Dr. Julian Roberts with respect to their study of public attitudes based on Gallup polls conducted in 1982, 1983, 1985 and 1986. The study concludes that Canadian views concerning sentencing are not as harsh as they might seem to be. This study was referred to by many witnesses and the Committee believes it is important to the development of Canadian public policy in the criminal justice field. A summary of the results of this study precedes a discussion of its policy implications and the Committee's recommendation.

A. Severity of Sentence

A substantial majority of Canadians polled believed that sentences were not severe enough, particularly those for violent sex crimes and for drunk driving offences. Yet, while hardly any people polled believed sentences were too severe generally, almost one-fifth and one-half of the respondents thought sentences for Native Canadians and poor people, respectively, were too harsh. In addition, most favoured spending money on developing sanctions other than imprisonment.

These apparent contradictions may be explained in a number of ways. The researchers proposed two: the desire for harsher sentences may not be strongly held; or, alternatively, people may have been thinking about quite different things when they responded to the two questions.

B. Knowledge of Crime

The views of most Canadians appear to bear little resemblance to the facts of (official) crime. Almost three-quarters of people polled substantially overestimated the amount of crime involving violence. Similarly, they overestimated the likelihood of recidivism for violent offenders. In 1982, most thought that murder had increased since the abolition of capital punishment, although this was not the case. In addition, Canadians were found to have little knowledge of statutory maximum penalties, of which offences had minimum penalties, nor of actual levels of penalties imposed by the courts. Finally, they perceived parole boards to be releasing more inmates than, in fact, was the case. Thus, it may be said, Canadians have a distorted view of crime and it is reasonable to question their calls for greater harshness in sentencing.

C. Use of Incarceration

Those who think sentences are too lenient are more likely to be thinking of violent or repeat offenders than are those who think sentences are appropriate or too harsh. It seems that punishments are not perceived to fit the crime.

For minor offences, imprisonment was not seen as a useful way to protect the public, although for serious offences a significant minority of Canadians called for greater use of incarceration. Few approved of the use of incarceration for first offenders who break and enter a dwelling (the most serious property offence). When the option of a community service order was suggested to people polled, the majority selected that choice in most cases rather than probation, fine or imprisonment. (Those initially proposing imprisonment were somewhat less likely than others to opt for a reparative sanction "in most cases", although few of them opposed its use.)

Doob and Roberts conclude that Canadians' views of appropriate penalties for at least some crimes are not strongly held. While calling for increased use of incarceration, in response to one question, those polled

selected imprisonment to a much lesser extent than other available sentencing options in response to another question. Moreover, most Canadians do not look exclusively to the sentencing process to solve the problems of crime (almost half of those polled suggested reducing unemployment). Those who viewed sentences as too lenient were more likely to see harsher sentences as the most appropriate punishment, but this was not seen as the best way of controlling crime.

D. Sources of Information About Sentencing

The vast majority of Canadians receive information about sentencing from the media, particularly television. Single case information appears to have more impact on them than statistical information. Most respondents recalled a sentence which was too lenient — often it involved homicide or sexual assault.

A Canadian Sentencing Commission study of over 800 sentencing stories in newspapers found over one half of them dealt with violence — one quarter with homicide. (These, of course, represent only a tiny portion of offences before the courts.) No reasons for the particular sentence were reported in most cases, making it difficult for the public to evaluate the judges' reasons in these important cases.

Doob and Roberts found that opinions varied as to appropriate sentences, depending on the type and extent of the account of a particular sentencing hearing. In one study, respondents felt a particular sentence was too lenient based on the newspaper account and too harsh based on court-based information made available to them. Both the offender and the offence were seen as "worse" by those whose source of information was the newspaper. It would appear, then, that people react not only to the actual sentence, but also to the context in which the sentence is placed.

E. Conclusion — Policy Implications

The Canadian public has a complex view of sentencing. Canadians seem to react with severity when asked simple questions about sentencing, especially involving violent offenders. They respond in quite a sensitive way when provided with more complete information and asked questions about sentencing in a more appropriate way.

While policymakers and politicians are wise to heed public opinion, they must be particularly cautious in the criminal justice field about acting on an inadequate or incomplete interpretation of public opinion. Ultimately, the evolution of sound government policy — one that has broad public support — is dependent on an informed public.

The laws and practices related to sentencing and conditional release are not simple — they are both complex and interrelated. News reporting, particularly on radio and television, is compressed. There is not enough time to provide sufficient detail and background about offenders and the criminal justice laws or practices which apply to them. It is not surprising, then, that the public may be confused about how the criminal justice system operates.

Recommendation 1

The Committee recommends that all federal participants in the criminal justice system (Department of Justice, the RCMP, the Correctional Service of Canada, the National Parole Board, and the Ministry Secretariat of the Solicitor General of Canada) make public education about the operation of the criminal justice system, including the myths and realities which surround it, a high priority through:

(a) the effective use of their own communication capacities (print, radio, video and TV); and

(b) their financial and other support of the voluntary sector, so that citizens in local communities may be more actively engaged in activities which increase their understanding of the criminal justice system.

CHAPTER THREE

THE NEEDS AND INTERESTS OF VICTIMS

In modern times, the role of the victim has declined to the point where some victims feel the criminal justice system has no real interest in them. Initially victimized by the offender, many have subsequently felt victimized by "the system" — the very agencies from which they expect support, compassion and action. Since the 1970s, interest in the role of the victim has increased. Many factors — often complex and interrelated — contributed to this development. Victims in Canada and elsewhere, and the groups they have organized, have brought public and political attention to the failings of our criminal justice system.

A. What Canadian Victimologists Have to Say

The Committee had the benefit of the insights of two prominent Canadian victimologists, Dr. Irvin Waller and Dr. Micheline Baril. Following is a summary of their written and oral submissions to the Committee.

1. Victims' Interests

It is victims who suffer as a result of crime. Their personal interests are affected by sentencing and related decisions; thus their views should be considered. The prevailing notion that a crime is against the state fails to recognize the victim's suffering and feelings of injustice.

The degree of trauma the victim suffers depends on the nature of the crime and the extent to which he or she can tolerate post-traumatic stress. The victim is likely to suffer "secondary victimization" in the criminal justice system, unless his or her needs are attended to.

There are five main things necessary to allow victims to restore their sense of worth and get on with their lives:

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

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

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

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

(5) *Effective protection* from re-victimization or retaliation is crucial to alleviate the victim's feelings of vulnerability. This is particularly important where victims know, or have a continuing relationship with, the offender. Victims also express concerns about the protection of other members of the community.

Waller identified two generally accepted principles of natural justice which may be said to apply to victims' personal interests in criminal procedure: the duty to give persons specially affected by the decision a reasonable opportunity to present their cases; and the duty to listen fairly to both sides and to reach a decision untainted by bias.

The following are the issues that most directly affect victims of crime:

- notification of dates, time and place of significant hearings where reparation is being sought or where the release of the accused could affect their safety or depreciate the seriousness of the offence;

- access to information about the workings of the criminal justice system, particularly as it affects victims;

- an opportunity to be present at hearings and observe justice being done;

- an opportunity to tell the court directly about the harm done, to ask for restitution, and to express concerns about the release of the offender;

- explicit criteria for decisions taken by the court and reasons for the decisions; and

- recourse (e.g., appeal) where proper procedures are not followed.

2. Victim Impact Statements

Documents submitted by Waller provide an overview of developments in other jurisdictions. A summary of those most relevant to Canada appears below.

a. The United States

Grassroots victim groups have become increasingly well-organized in recent years. Recognition of the role of the victim at sentencing has been gained in many jurisdictions. Such participation influences sentencing decisions — sometimes making the sentence harsher, sometimes more lenient. More than 34 states and the U.S. federal legislative process require courts to consider victim impact statements. In some jurisdictions, judges must give reasons if restitution is not ordered. The U.S. Presidential Task Force on Victims of Crime (1983) recommended a constitutional amendment to give victims "in every criminal prosecution the right to be heard at all critical stages of judicial proceedings". Guidelines and training programs have been developed for judges, including Recommended Judicial Practices regarding the fair treatment of victims and witnesses and victim participation.

California was the first state to have systematically prepared victim impact statements (1974). Studies seem to suggest that:

- victims are generally more satisfied with the way their cases are handled when they are informed and have access to a caring listener;

- victims prefer to receive restitution rather than have the offender sentenced to prison; and

- victims related to offenders tend to seek mitigated sentences.

District Attorneys' offices in *Massachusetts* have victim assistance workers who explain the criminal justice process to the victim and prepare the written part of the victim impact statements.

In *Minnesota*, victims have been largely ignored in the sentencing guideline system which was introduced to reduce disparity of prison sentences greater than one year. Victim impact statements seem to influence judges to reduce sentences but not to increase them as the severity of the offence is considered to have been taken into account in establishing the "grid". Victims are permitted to express an opinion as to the appropriate sentence and to speak at the hearing.

The mitigating and aggravating factors recommended for departing from the proposed *New York State* sentencing guidelines permitted increasing sentences beyond the proposed "grid" where the foreseeable consequences of the crime were likely to be more painful to the victim than usual. A New York Crime Victim Board survey of other jurisdictions using victim impact statements concluded that they led to an increase in the use of restitution.

The use of victim impact statements in *South Carolina* seems to have increased sentences where the victims are surviving family members of slain victims and decreased them where the victim and offender know each other. The dramatic increase in prison population is considered to be attributable to a harsher prosecutorial policy, rather than to victim participation in sentencing.

b. France

Victims may join their civil action against the offender to the state's criminal action as the "partie civile". Victims are able to present views on prosecution, have access to the investigative file, and speak to sentence when requesting restitution. Legal aid is available to victims.

c. An Approach to Victim Impact Statements

The U.S. Model Statute on Victim Impact Statements lists the following purposes of sentencing: protection of the public, restitution to the crime victim and his or her family, and just punishment for the harm inflicted. Waller suggests the following purpose: protection of the public and the promotion of respect for the law through the imposition of sentences that are "just" for the victim, offender, and community. The principles should reflect the foreseeable consequences to the victim, and the possibility for redress and reconciliation.

Waller also identifies:

- the obligation of the court to consider victim impact statements regarding the impact of the crime, the victim's concerns for safety, and his or her opinion on reparations (substantiated by receipts);
- the offender's right of cross-examination on victim impact statements regarding reparations;
- the opportunity for the victim to be heard at sentencing regarding the victim impact statement, prior to the accused;
- the obligation of the court to give reasons for the sentence; and
- the desirability of enforcing restitution orders in the same way as fines.

Waller proposes that victim impact statements be prepared immediately after the crime and updated prior to sentencing. Police and prosecutors should consult with victims during plea negotiations and victims

should have the right to express to the judge their viewpoints about an appropriate charge when dissatisfied with the plea consultation. An aggravating factor to be considered at sentencing should be the likelihood of the offender returning to threaten the victim.

Baril points out that victim impact statements have two main objectives: one is to give the victim a role in the criminal justice process; the other, to make sure the court has complete information about the circumstances surrounding the crime and its impact on the victim. Her experience is that very few victims actually want to express an opinion about the sentence itself. The preliminary research results from an evaluation of the Montreal victim impact statement pilot project showed very little evidence of revenge-seeking. What Baril expects to result from more widespread use of victim impact statements is more orders restricting certain offenders' movements in areas frequented by their victims and more reparative sanctions.

3. Recommendations Made to the Canadian Sentencing Commission Regarding the Victim's Role in Sentencing and Related Processes

In a paper prepared for the Sentencing Commission (and recently published by the Department of Justice), Waller recommended four areas for improvement in the role of the victim in sentencing [some of which are now addressed in Bill C-89]: redress from the offender (restitution), provision of information by the police, unimpeded and expeditious access to justice, and protection from further victimization.

Judges, he says, should be required by the *Criminal Code* to order restitution unless reasons why it is inappropriate to do so are given. The prosecutor would introduce a written report on the extent of the damage done to the victim and the victim would have a right to present additional information if necessary. Complex cases could be referred to the civil courts.

He proposes that police provide victims with information and explanations about the criminal justice process, including the right to participate in the sentencing process and to have claims for restitution considered, and about victim compensation or other assistance programs.

Victims' needs should be respected when victims are witnesses. They may require separate waiting areas and consideration with respect to the

scheduling of hearings. The victim should be given an opportunity to be present and heard whenever the victim's interests will be affected by a court decision. Prosecutors could present to the court a statement of the victim's views on the issues. In some instances a separate lawyer should be provided.

In Israel and some American jurisdictions evidence procedures have been modified to permit video-taped and commissioned evidence to reduce the number of times a victim may have to give evidence or to avoid a traumatized victim having to face an accused from whom she or he fears retaliation. [Canada has recently modified evidence procedures for children who are victims of sexual abuse.]

4. Approaches to Crime Prevention

Crime victims want to avoid further victimization of any sort; they want to live in a safer and more peaceful society. The issue is: What crime prevention strategies work best?

Waller argues that doing more of the same (more police, more prisons, etc.) has no effect on crime. The exceptions to this are saturating an area with police (a police officer on every corner reduces crime) and targeting special groups of offenders, particularly those not used to being arrested (spouse abusers, drinking and driving offenders, etc.), which have some effect on crime. Intersectoral approaches (e.g., where police and social services collaborate) seem to have the potential to affect crime.

Police-based crime prevention programs aimed at reducing opportunities for crime (Neighbourhood Watch, Stoplift, and Block Parents) may improve the public's image of the police but have not shown significant reductions in crime (at least, not beyond the short term). However, systematic responses have had very positive effects on crime. Surveillance and "eyes on the street" approaches have the potential to affect crime.

Waller suggests that primary prevention (housing, education, equal rights, etc.) which is not directed at specific social problems has unclear effects on crime. He argues that secondary social prevention which targets those groups that are at risk has enormous potential.

Longitudinal studies now show that persistent and serious offenders tend to differ from other persons in many ways, such as the care and consistency in their upbringing, housing situation and education. Caring and

consistent parenting can be promoted, particularly among single, teenage mothers through:

- increased child care;
- job creation; and
- parent skill training in the home,

all of which reduce the stresses on mothers which may lead to violence. Waller presented other examples of targeted secondary prevention to the Committee. He proposed that locally-based approaches to crime prevention emphasizing socio-economic programs focused on secondary prevention hold potential for crime reduction. He discussed the local crime prevention councils operating in 400 French cities.

B. The Present Canadian Situation — Bill C-89

Recently passed amendments to the *Criminal Code* (Bill C-89) will allow the court to consider at the time of sentencing a victim impact statement outlining the extent of the harm done to, or loss suffered by, the victim. Under the new sections 662(1.1) and 662(2), the statement will be in writing and subject to the normal rules of evidence. Until now, there has been no uniformity in the preparation or reception of victim impact statements. Nor is it known what impact they have on the sentencing process and/or on the attitudes of victims. (Recently completed evaluations of victim impact statement pilot projects in six Canadian cities are expected to be released soon by the Department of Justice.)

Other provisions of Bill C-89 facilitate the return before trial of recovered property, which might otherwise be detained by the police throughout court proceedings. This should ease a major aggravation to victims of property offences where the property has been recovered.

Clause 6, which expands and strengthens the restitution provisions of the *Code*, is the core of the amendments. It repeals the requirement that the victim apply for restitution. The new section 653 of the *Code* requires the court to consider restitution in cases involving damage, loss or destruction of property, and money lost or spent because of bodily injuries resulting from another's crime. Where these property or personal damages are readily ascertainable, the court will be required to assess the loss incurred by the victim (the new section 655 establishes a procedure for so doing) and the

offender's ability to pay — both at the time of sentencing and in the future. The offender may be required to disclose details of her or his finances for the purposes of preparing a report. An order of restitution will be given priority of enforcement over other monetary sanctions such as fines.

The court would be able to extend the order to pay restitution, vary the time of payments, or impose new conditions if the offender has a reasonable excuse for failure to pay as ordered. (There is no provision for reducing the amount of restitution to be made.) If the offender does not have a reasonable excuse, the court could impose a prison term (from which there appears to be no right of appeal) and/or facilitate civil enforcement.

Under the amendments, a court sentencing an offender convicted (or discharged under section 662.1) of an offence under the *Criminal Code*, Part III or IV of the *Food and Drug Act*, or the *Narcotic Control Act*, would generally impose a victim fine surcharge. (The amount of the surcharge would not exceed 15 percent of any fine that is imposed, or where no fine is imposed, $10,000. A court may decide not to impose the surcharge where to do so would cause "undue hardship", but the reasons for this decision must be given in writing or entered into the record of proceedings.) The proceeds from the victim fine surcharge are to be used for victim services.

Finally, the amendments provide some protection against publicity to victims. Under the previous law, a ban on the publication of the identity of the victim could only be ordered where the accused was charged with the offences of incest, gross indecency or sexual assault. The amendments extend the discretionary and mandatory bans to cases involving extortion and sexual offences and to witnesses testifying in the prosecution of these offences.

C. The Committee's Response

1. Bill C-89

Many members of the Committee also sat on the Legislative Committee on Bill C-89. **In the Committee's view, proclamation of Bill C-89 will go a long way towards making the criminal trial and sentencing process more responsive to the needs of victims. The provisions related to the submission of victim impact statements and the enhancement of restitution respond directly to the principles adopted by the Committee in Chapter One of this report.**

Bill C-89 was originally welcomed and supported in principle by all parties. Some have suggested that it does not go far enough — that it should include a statement of principles, and that it should be mandatory for police to inform victims of their rights to restitution/compensation, to prepare a victim impact statement for the court, and to be kept informed about the status of the investigation and court proceedings. The major criticism of Bill C-89 was that the proceeds of the victim fine surcharge are to be turned over to the provinces without any guarantee that these funds actually will be used to provide victims with more and better services, and that non-residents of a province will also be eligible for services. Waller recommended that Bill C-89 be amended to provide, in the proposed section 655.9(4) of the *Criminal Code*, that:

- surcharge revenues not be used to supplement money that the provinces [/territories] have already committed to victim assistance;

- provinces establish a more comprehensive network of victim services available to non-residents and residents alike; and

- surcharge revenues be used in a manner consistent with a statement of principles agreed upon by the federal and provincial [/territorial] governments.

In the Committee's view, these concerns can be addressed without legislation.

The Committee recognizes that, although there are increasing numbers of victims' compensation programs and victim services across Canada, the value of benefits available under them, as well as the scope and availability of services, varies from one province to another. However, the Minister of Justice has advised the Committee that federal-provincial discussions are contributing to the development of national standards, and that the Ministers responsible for criminal justice have now reached agreement on a policy statement of principles.

2. The Provision of Information to Victims

Almost all studies of victims highlight victims' informational concerns as their highest priority. **In the Committee's view, participants in all stages of**

the criminal justice system must respond to this need. Victims have questions about the criminal process and the offender. Not only must suitable print and audio-visual materials be readily available to victims, victims must be treated courteously and compassionately by all participants in the system.

At present there is no uniformity about the provision of information or even any agreement about which component of the system should hold that responsibility — in some cases the information is provided by police, in others by Crown attorneys; in many cases, no information is provided.

Keeping victims informed about the status of their cases at pre-trial and trial stages of the criminal justice process, and providing victims with information about particular offenders throughout their involvement with criminal justice systems (including corrections), prevent the sense of being further injured by the process and may contribute to victims' capacities to put the crime behind them. Victims may need information about the offence, the offender, and criminal justice processes in order to make sense of what has happened to them and to re-establish control over their lives. Moreover, it is believed that they will experience the administration of justice in a more personal and favourable way where suitable and timely information is provided. Such notification should help alleviate the confusion and alienation victims may feel and encourage victim cooperation in prosecution.

The Correctional Law Review Working Group, in its Working Paper *Victims and Corrections*, noted that, while there has been an improvement in the provision of information to victims concerning the trial process, early access to correctional information is still a problem. The working group also identified a number of options for improving the distribution of general correctional information to victims. **The Committee prefers the option whereby pamphlets which are already being distributed by the police, would contain a reference as to where the victim may obtain information about corrections. This could be supplemented by the availability of more detailed information at police stations, Crown attorneys' offices, and at court houses.**

In considering what access victims might be given to case-specific information concerning federally-sentenced offenders, the Correctional Law Review Working Group identified four principles to be considered:

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

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

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

- where there is such a connection, the victim's "need to know" should be balanced against the possibility that release of the information would subject the offender or another person to harm or expose anyone unfairly, would disrupt the offender's program or reintegration, or would disclose information which was given with a reasonable expectation that it would be held in confidence (pp. 16-17).

In the Committee's view, the third principle would be strengthened if it were worded in such a way as to recognize the role that information about the offender, and his or her acknowledgement of the harm done, may play in contributing to the victim's emotional recovery from the effects of the crime (as described at the beginning of this Chapter). If we fail to recognize this legitimate need, it is likely that the offender's right to privacy will tip the scale against the victim in his or her pursuit of information. **In this context, the Committee believes that, in many cases, close family members of deceased or seriously injured victims may also have case-specific informational needs similar to direct victims of serious crimes.**

The Working Paper also considered how victims might be kept apprised of various correctional or release decisions concerning an offender. **The Committee favours a "form" approach whereby a form completed by the victim requesting certain types of information as it becomes available could be appended to the Crown's file and then be forwarded to the appropriate correctional authority.** As it is likely that only a few victims will want to continue to have access to information about an offender beyond the sentencing stage, it should not be difficult to respond to such requests.

The Committee believes that access to appropriate information in a supportive criminal justice environment is vital to greater victim satisfaction with sentencing and correctional processes. In many cases, information will be all that victims require. In other cases, suitable information may provide a foundation for other meaningful and responsible involvement.

Recommendation 2

The Committee recommends that all participants in the criminal justice process give high priority to the provision of general and appropriate case-specific information to victims and their families.

Recommendation 3

The Committee recommends that, at a minimum, general information include the victim's right to seek compensation and restitution, the right to submit a victim impact statement and the right to be kept informed about various pre-trial, trial, and post-trial proceedings. Basic information should identify who is responsible for providing it and where further information may be obtained.

Recommendation 4

The Committee recommends that the provision of case-specific information to victims and, in appropriate cases, to their close family members be facilitated by the use of a form on which the victim may check off the various kinds of information he or she would like to receive. Such forms should be appended to Crown attorneys' files and subsequently forwarded to correctional authorities.

3. Making Maximum Use of Victim Impact Statements

a. At Plea and Sentencing

The submission of a victim impact statement ensures that the sentencing judge has sufficient information about the impact of the crime on the victim (physical and emotional pain suffered, loss of wages or property, damage sustained, and other expenses incurred as a result of the crime) to determine a fair and proper sentence. Judges should consider all relevant information about both offenders and victims in order to reach a "just" sentence. In some cases, judges are provided with relatively extensive information about the offender (through pre-sentence reports or representations by defence counsel), but less accurate or less up-to-date information about the impact of the crime on the victim. This is particularly so where the offender pleads guilty or negotiates a guilty plea to a lesser

charge (in such cases, only a simple summary of the facts may be presented to the judge).

Some victims feel that they ought to be consulted by Crown attorneys about plea bargaining and sentencing recommendations. When the Crown accepts a guilty plea to a charge which is likely to result in a lesser sentence than that for which the offender was originally charged, chances are the victim may feel the offender got something he or she shouldn't have and the victim may feel further victimized by the criminal justice system. This appears particularly unjust when the Crown attorney is unfamiliar with some of the facts.

Some of victims' "feelings" may be addressed by attending better to the informational needs of victims. Others assert, however, that providing victims with an opportunity to be heard at plea and sentencing is helpful in the process of recovery from victimization. In such cases, mere information may not be enough; greater participation may be required.

The Canadian Sentencing Commission rejected the concept of victims becoming independent parties in plea negotiations, but suggested that there was considerable room for improving the flow of information between Crown counsel and the victim during plea negotiations. It recommended that prosecutorial authorities develop national guidelines directing Crown counsel to keep victims fully informed of plea negotiations (and sentencing proceedings) and to represent their views, and that, prior to acceptance of a plea, Crown counsel be required to receive and consider a statement of the facts of the offence and its impact upon the victim (Rec. 13.1 and 13.2).

The victim's opinion about an appropriate sentence may be particularly important where the offender and victim are known to, or closely associated with, one another and there is reason to believe the offender may pose a continuing threat to that victim, although not to anyone else. In such a case, it is important that the victim have an opportunity (on the record) to recommend conditions of probation or release which would limit the offender's access to the neighbourhoods where the victim lives and works. The Committee believes such recommendations could be incorporated in victim impact statements.

b. Use of Victim Impact Statements (and Other Sentencing Information) by Correctional Authorities

In addition to providing valuable information to sentencing judges and releasing authorities, victim impact statements are of importance also to offenders themselves and to members of correctional staff who work with them.

Victim impact statements, together with other sentencing information, should be forwarded to correctional authorities in order to assist them in making the most sensible case management decisions about offenders. They should also be used to assist case management workers and others working closely with offenders in helping the offenders come to terms with their offences and to acknowledge responsibility for them, where they have not already done so.

Paradoxically, correctional systems often have great difficulty obtaining from courts what would appear to be the most basic information about offenders and their offences. Proceedings on sentencing (which may include the gist of a victim impact statement) are not generally transcribed unless there is an appeal. Yet it is unlikely that a full and proper administration of the sentence can take place without a clear understanding of the offence which occurred and the purpose of the sentence.

As a result of several murders committed in recent years by federal offenders on conditional release, greater efforts are now made by federal correctional authorities to obtain sentencing information and reasons, where they exist. (In addition, of course, victims may always make written submissions directly to correctional and release authorities about individual offenders.) It is not clear what sentencing information, if any, probation officers and provincial institutions receive where pre-sentence reports have not been prepared. The Canadian Sentencing Commission recommended that judges provide written reasons in some circumstances and that a transcript of the sentencing judgement be made available to the authorities involved in the administration of the sentence (Rec. 11.1 and 12.3).

The Committee believes that the routine transcription of the proceedings of sentencing hearings and the transmission to correctional authorities of such transcripts and exhibits filed would assist correctional authorities in placement and program decisions, as well as pre-release

planning. (Such a recommendation is made in Chapter Eleven.) **Equally important, it would enhance the capacity of both custodial and community correctional authorities to engage offenders in meaningful discussions about the nature and consequences of their offences, steps which might be taken to acknowledge responsibility and to make amends for the behaviour, and opportunities the offender might take advantage of in order to prevent a recurrence of the criminal conduct.**

How victim impact statements might be used in the parole process is discussed in Chapter Eleven.

CHAPTER FOUR

THE RECENT HISTORY OF SENTENCING REFORM IN CANADA

No basic changes in sentencing philosophy or the structure of sentencing set out in our *Criminal Code* have been made since the late nineteenth century. In fact, Canadian criminal legislation has been criticized frequently for its lack of sentencing goals and principles. Legislative changes in Canadian criminal law have characteristically been *ad hoc* and short-term in nature.

This chapter examines some of the proposals for law reform relating to sentencing that have been made over the years. They constitute the backdrop against which the Committee makes its recommendations.

A. Ouimet Report

Established in June 1965 by Order-in-Council to study "the broad field of corrections, in its widest sense, from the initial investigation of an offence through to the discharge of a prisoner...", the Canadian Committee on Corrections, under the Chairmanship of Mr. Justice Roger Ouimet, presented its comprehensive report to the Solicitor General in March 1969. The Committee started from the basic premise that the proper function of the criminal justice system is to protect society from crime in a manner commanding public support, while at the same time avoiding needless injury to the offender. The Committee indicated that there was a need for an overall sentencing policy. It proposed to:

> ... segregate the dangerous, deter and restrain the rationally motivated professional criminal, deal as constructively as possible with every offender as the circumstances of the case permit, release the harmless, imprison the casual offender not committed to a criminal career only where no other disposition is appropriate. In every disposition, the possibility of rehabilitation should be taken into account.[1]

The Committee observed that the best long-term protection of society is secured by the ultimate rehabilitation of the sentenced individual.

The Ouimet Committee expressed the view that sentences of imprisonment should be resorted to only where the protection of society clearly requires the imposition of such a penalty. Long terms of imprisonment should be imposed only in special circumstances. The Committee recommended that the *Criminal Code* be amended to authorize the courts to deal with a person without imposing a sentence of imprisonment, unless the nature of the crime and the offender make imprisonment necessary because the offender may repeat the crime during the non-carceral sentence, because some correctional treatment of the offender in confinement is required or because a lesser sentence would depreciate the seriousness of the crime. It also recommended that dangerous offender legislation be introduced to provide for indeterminate sentences (with regular assessments and Parole Board reviews to ensure that offenders who are no longer dangerous are released).

The Ouimet Committee felt it might be difficult to eliminate entirely the disparity in sentences — at the least, however, the sentencing authority should give reasons for imposing a particular sentence. The Committee concluded that sentences should be individualized and that a range of alternatives should be made available to the sentencing judge: absolute discharge, with or without conditions; probation; fines; suspended sentence; restitution, reparation or compensation to the victim; confinement (weekend detention, night detention with programs of compulsory or voluntary work in the community, or full-time detention in reform institutions or penitentiaries or other places of segregation).

The Ouimet Committee made the following statement as a general guide for applying sentencing alternatives:

> The primary purpose of sentencing is the protection of society. Deterrence, both general and particular, through knowledge of penalties consequent upon prohibited acts; rehabilitation of the individual offender into a law-abiding citizen; confinement of the dangerous offender as long as he [or she] is dangerous, are major means of accomplishing this purpose. Use of these means should, however, be devoid of any connotation of vengeance or retribution.[2]

For there to be a rational and consistent sentencing policy, the Committee concluded that a number of deficiencies needed to be corrected. These were:

(1) the lack of readily available information about existing sentencing alternatives and services and facilities to implement sentencing dispositions;

(2) the lack of comprehensive information about the character and background of the offender; and

(3) the lack of information about the reasons for imposing certain sentences.

The report urged the federal government to prepare (in conjunction with the provinces) and issue a guide to dispositions, which would be made available to all in the correctional system and which would contain the information identified above as then lacking. The Committee recommended that fines only be imposed after a means study of the offender had been done; that, except for murder, minimum sentences of imprisonment be repealed; and that whenever there was to be a sentence of imprisonment, it be preceded by a pre-disposition report on the offender and accompanied by a statement of the reasons for such imprisonment.

B. Hugessen Report

Established in June 1972 by the Solicitor General of Canada, the Task Force on the Release of Inmates, under the Chairmanship of the Honourable Mr. Justice James K. Hugessen, released its report in November 1972. While the focus of the report was on the release of inmates, it contained an Appendix which described "A Proposal for Statutorily Fixed Sentences". The main recommendation was the abolition of fixed-term sentencing to penitentiaries and the adoption of statutorily fixed maximum sentences (for sentences of two years or more) with no discretion in the sentencing court to fix minimum terms.

Under these proposals, a judge would have three sentencing options after conviction of an offender:

- non-custodial sanctions (including semi-custodial sanctions such as probation and residency at a halfway house);

- short-term determinate custodial sentences of less than two years to be fixed by the court; or

- penitentiary sentences, the maximum length of which would be statutorily determined (three, five or ten years, or life).

In the case of penitentiary sentences, institutional authorities would make recommendations, within one to three months after sentence, in most cases, to a regional or local board about the proposed minimum length and place of incarceration based on the program, educational and other needs of the offender and the degree of custodial risk the offender poses. Each case would be reviewed at least annually at which time the board might reduce (or, exceptionally, increase) the minimum term. After serving the minimum term, offenders would be released on parole with supervision for a fixed term of approximately 18 months. Offenders would be discharged from parole about one year after discharge from supervision. (This proposal is similar to a form of indeterminate sentencing used in some American jurisdictions.)

C. Goldenberg Report

Pursuant to a motion in October 1971, the Standing Senate Committee on Legal and Constitutional Affairs, under the Chairmanship of Senator Carl Goldenberg, tabled its report on parole in 1974. In Chapter III, it reviewed the conflicts between parole and sentencing.

In contrast with the Hugessen Report, the Senate Report recommended that the present role of the courts in sentencing be maintained, although it noted the desirability of reducing the wide discretion of judges. Cautioning that redesigning parole should be accompanied by "an overhaul of sentencing", it suggested that sentencing guidelines be incorporated into the *Criminal Code.* Furthermore, it recommended that the indeterminate sentences provided for at that time in the *Prisons and Reformatories Act* be abolished except for dangerous offenders.

The Senate Committee was of the view that imprisonment should not be used unless the judge was satisfied that it was necessary for the protection of the public on at least one of three grounds. The Committee also identified 12 factors which, among others, should influence the court in the exercise of its discretion in deciding to withhold a sentence of imprisonment. In addition, it noted that the U.S. Model Sentencing Act procedure for sentencing hearings could usefully be incorporated into the *Criminal Code.*

The Senate Committee concurred with the Ouimet Committee in condemning the intrusion of sentencing courts into parole by adding probation terms to prison sentences of less than two years. It recommended the repeal of this provision in the *Criminal Code.* In addition, it

recommended that the Code be amended to provide for a limit on the cumulation of consecutive sentences.

D. Law Reform Commission of Canada Report

The Law Reform Commission of Canada published a report on dispositions and sentencing in 1976. It started from the basic premise that the coercive powers of the criminal law and its agents must be used in such a way as not to further damage the social fabric. Based on this general principle, the Commission enunciated a number of other criteria and guidelines.

Some of the other principles underlying the Commission's approach were:

(1) The criminal process should be used with restraint;

(2) Intervention via the criminal law should be proportionate to the harm done;

(3) The most effective means for restoring peace should be selected: those responsible for such decisions should be accountable for them;

(4) Sentences should encourage a sense of responsibility on the part of the offender and enable that person to understand the impact of his [or her] actions on the victim and society;

(5) Mediation and arbitration are preferable ways of arriving at a proper disposition or sentence; and

(6) Reconciliation of victim and offender, including reparation of the damage done, are desirable.

The Commission also indicated that, in its view, mechanisms other than the criminal justice system should be used wherever possible to deal with criminal acts. This could be done by mediation, arbitration or diversion. If a case proceeds to trial, and a conviction is entered, the court should order an absolute or conditional discharge wherever possible. In the Commission's view, this would especially be the case if the offender and the offence should have been dealt with at the pre-trial stage or if any more severe sanction would cause unnecessary social costs and hardships.

The Commission then set out in its report a range of sentences:

(1) Good Conduct Order: the offender would be required to keep the peace for not more than 12 months — to be imposed where an absolute or conditional discharge would not be adequate.

(2) Reporting Order: the offender would be required to report to a person, named by the court, at designated times — to be imposed where the court feels that certain limitations on liberty and some supervision of the offender may be necessary.

(3) Residence Order: the offender would be required to reside in a particular place for a determinate period of time — to be imposed where the court feels that this type of limitation needs to be imposed on the offender.

(4) Performance Order: the offender would be required to undertake educational, training or employment activities to reduce the likelihood of continued criminal activities.

(5) Community Service Order: the offender would be required to perform a fixed number of hours of community service during free time — the purposes are to take the place of a fine, to censure the criminal act and to reconcile the offender with the community.

(6) Restitution and Compensation Order: the offender would be required to reimburse the victim as far as possible for the damage.

(7) Fine: the offender would be required to pay a fine where the offence is detrimental to society as a whole or restitution is inappropriate.

(8) Imprisonment: this exceptional sanction would be used only to protect society by separating offenders who constitute serious threats to life and personal security, to denounce behaviour society considers a serious violation of basic values or to coerce offenders refusing to submit to other sanctions. Imprisonment is not justified by rehabilitation but, once

sentenced, an offender should benefit from social and health services. Courts should only resort to imprisonment if less severe sanctions are unlikely to succeed. The length of imprisonment should be determined in light of the nature of the offence, the circumstances in which it was committed and the objectives of imprisonment. A prison sentence to protect society by separation should not exceed 20 years. A prison sentence for the purpose of denunciation should not exceed three years. A prison sentence imposed because of wilful disregard of other sanctions should not exceed six months.

(9) Hospital Order: where the offender is in need of medical treatment, a court should be able to order that a term of imprisonment be served in part in a medical facility.

The Commission recommended that judges should develop sentencing criteria and should meet periodically to ensure that they are being properly applied or to change them if such is deemed to be necessary. Finally, the commission recommended that the Guidelines outlined in its report be incorporated into the *Criminal Code*.

E. The Criminal Law Review

The Criminal Law Review process was initiated by the Government of Canada in 1981 in recognition of the need for a comprehensive review of the criminal law and the development of integrated proposals for change which were consistent with a criminal justice policy. The Sentencing Project, one of 50 individual projects, was launched in 1982 and was one of the first areas of priority identified by the Review.

1. *The Criminal Law in Canadian Society*

Published in 1982 by the Department of Justice, *The Criminal Law in Canadian Society* sets out the policy of the Government of Canada with respect to the fundamental purpose and principles of the criminal law. It forms the framework for the ongoing work of the Criminal Law Review, including the Sentencing Project and Correctional Law Review Project (discussed later in this chapter).

The document presented crime trends, reviewed various explanations offered for the phenomenon of crime and policy responses to crime by

governments, and identified the factors which are likely to continue to influence the general shape of future events in Canada. It identified seven major concerns that encompass the wide range of specific criticisms, problems and complaints with respect to criminal law and the criminal justice system (including the effectiveness of alternatives and corrections, the role and the needs of victims, and sentencing and post-sentencing processes).

The document concluded that the criminal justice system must pursue both "justice" and "security" purposes, that criminal sanctions are understood by the public and offenders to be primarily punitive in nature, that criminal law should be distinguished from other forms of social control by use of the criterion, "conduct which causes or threatens *serious* harm", and that considerations of justice, necessity and economy should determine the means that the criminal justice system may employ to achieve its goals.

This policy recognized that Canada has guaranteed certain rights and freedoms and undertaken international obligations to maintain certain standards. While criminal law is necessary for the protection of the public and the maintenance of social order, it involves many of the most serious forms of interference by the state with individual rights and freedoms.

The Criminal Law in Canadian Society defined the purpose of the criminal law as:

> ...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.

It recommended that this purpose be achieved through means consonant with the Canadian Charter of Rights and Freedoms and in accordance with 12 principles, the following six of which may be said to relate directly or indirectly to sentencing and are relevant to the Committee's study:

> . . .
>
> (f) the criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others;

(g) wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for:

(i) opportunities for the reconciliation of the victim, community, and offender;

(ii) redress or recompense for the harm done to the victim of the offence;

(iii) opportunities aimed at the personal reformation of the offender and his [or her] reintegration into the community;

(h) persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar;

(i) in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances;

(j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;

. . .

(l) wherever possible and appropriate, opportunities should be provided for lay participation in the criminal justice process and the determination of community interests.

2. Bill C-19 and Accompanying Policy Statement on Sentencing

In February 1984, the Government introduced Bill C-19, a package of *Criminal Code* amendments, some of which have now been enacted (in original or revised form) and some of which died on the Order Paper. One section of the package concerned sentencing: those matters related to the purpose of sentencing were referred to the Canadian Sentencing Commission; others related to victims and restitution recently were enacted by Parliament (in modified form) as Bill C-89.

Bill C-19 identified the fundamental purpose of sentencing as protection of the public and identified five strategies by which that might be achieved. It identified the principles by which the court's discretion might be limited: proportionality, consistency, restraint, and limitations on the use of imprisonment. Accompanying the Bill was a policy on sentencing issued by the Department of Justice to set out the context of issues and concerns within which the sentencing provisions of that Bill were developed.

The Sentencing Project drew heavily on the work of the Ouimet Committee, the Law Reform Commission of Canada and other domestic and international sources. Recommended Canadian themes included restraint in the use of criminal sanctions (especially imprisonment); increased use of non-carceral sentencing alternatives; and acceptance of judicial discretion combined with a greater focus on explicit mechanisms to ensure accountability. In contrast, a number of American jurisdictions focused on creating greater uniformity and certainty in sentencing (limiting disparity) and a shift from rehabilitation theory to retribution (or "just deserts").

As identified in *The Criminal Law in Canadian Society*, three major issues have particular application to sentencing: the lack of clearly stated policies or principles in existing law; the presence of apparent or perceived disparity; and the lack of knowledge about the effectiveness of sanctions. Bill C-19 included, for the first time in Canadian legislative history, an explicit statement of the purpose and principles of sentencing and a clear set of procedural and evidentiary provisions to govern the sentencing hearing. It provided a broader and more clearly defined range of sentencing options, reserving imprisonment for cases where non-custodial sanctions are inappropriate. It increased the legitimacy of victim concerns by according wider and higher priority to the use of reparative sanctions and by consolidating and expanding the restitution provisions of the *Criminal Code*.

3. The Canadian Sentencing Commission

Concurrently with the introduction of Bill C-19 in the House of Commons, the government announced the establishment of the Canadian Sentencing Commission to consider and make recommendations upon sentencing guidelines, realigning maximum penalties within the *Criminal Code* in respect of the relative seriousness of offences, proposals to minimize unwarranted sentencing disparity, and mechanisms to provide more complete and accessible sentencing data.

The Canadian Sentencing Commission's report was tabled in Parliament at the end of March 1987. The Commission recommended that Parliament establish in legislation the purpose of sentencing and the principles which would affect the determination of sentences. To address the problem of unwarranted sentencing disparity, it recommended that a permanent sentencing commission be established to develop presumptive sentencing guidelines which would be tabled in Parliament. To provide greater clarity in sentencing, it recommended that parole be abolished and

that maximum and actual sentences be reduced: this, it said, would provide "truth in sentencing" or "real time sentencing", without increasing the prison population. It also recommended that greater use of sentencing alternatives be encouraged. Overall, it recommended that the sentencing system be equitable, clear and predictable, features which it does not have today.

The Sentencing Commission observed that sentencing itself does not resolve the major social problems that cause crime, but so long as such a system exists, the principles of justice and equity must prevail. Because the sentencing process has as its goal the accountability of the offender, rather than punishment *per se*, the least onerous sanction appropriate in the circumstances should be applied. Imprisonment should not be imposed for rehabilitation purposes but should be resorted to only in order to protect the public from violent crimes, where another sanction would not adequately reflect the gravity or repetitive nature of the offence, or where no other sanction would adequately protect the public or the administration of justice.

The Commission recommended that mandatory minimum sentences be abolished because they are inconsistent and unfair — their effect is to restrict the sentencing judge's discretion and to force a specific sentence. (See Chapter Six for further discussion of this.)

The Sentencing Commission identified two problems with maximum sentences — they often do not reasonably correspond with the seriousness of the offences to which they apply and they do not relate to what should happen to someone convicted of the offence. The Commission recommended that there be a 12-year maximum ceiling on sentences, which would apply primarily to violent offences resulting in serious harm to victims — manslaughter, aggravated sexual assault, kidnapping, etc. Nine-year, six-year, three-year, one-year or six-month sentences would apply to other offences, depending on the seriousness of the offences. The Commission ranked the seriousness of each *Criminal Code* offence and assigned each to the appropriate sentence category.

The Commission recommended that indeterminate sentences applicable to dangerous offenders be replaced by enhanced, definite sentences where special circumstances so warrant. Such an enhanced sentence would be available for offences carrying a maximum penalty of 9 or 12 years, when the offence involved serious personal injury committed in brutal circumstances.

To reduce indeterminacy in sentencing, the Commission recommended that parole be abolished and that earned remission amount to no more than 25 percent of the sentence imposed. (These recommendations are described in greater detail later in this report.) The elimination of parole and the reduction of earned remission would have the effect of ensuring that the sentence served approximates more closely the sentence imposed than is now the case.

The effect of all these proposals would be that many offenders would not be imprisoned, and those who were imprisoned would serve shorter, more definite terms and would spend a greater proportion of these sentences than is presently the case in a carceral setting. In the Commission's view all of this would lead to greater certainty in sentencing.

The Commission recommended that the sentencing judge be empowered to determine the security level of the facility in which an offender is to serve a sentence. The Commission recommended that sentencing guidelines be issued — they would be presumptive, not binding. The judge could sentence outside the guidelines if it were appropriate to do so and if reasons were given. The guidelines would also have a non-exhaustive list of aggravating and mitigating factors to be taken into account by the sentencing judge. The Commission recommended that a Permanent Sentencing Commission be established which would work in consultation with a Judicial Advisory Council to develop and monitor sentencing guidelines to be tabled in Parliament.

Community sanctions (any sanctions other than imprisonment) should be more widely used. The Commission recommended that fines be imposed only where it has been determined that the offender has the means to pay — there should be no imprisonment for inability to pay a fine. Restitution should be employed more frequently.

4. Continuing Consultations by the Department of Justice and the Ministry of the Solicitor General

The Department of Justice has been consulting with the provinces and territories, as well as other interested individuals and groups, on the recommendations of the Canadian Sentencing Commission. It is anticipated that a discussion paper on sentencing reform will be forthcoming.