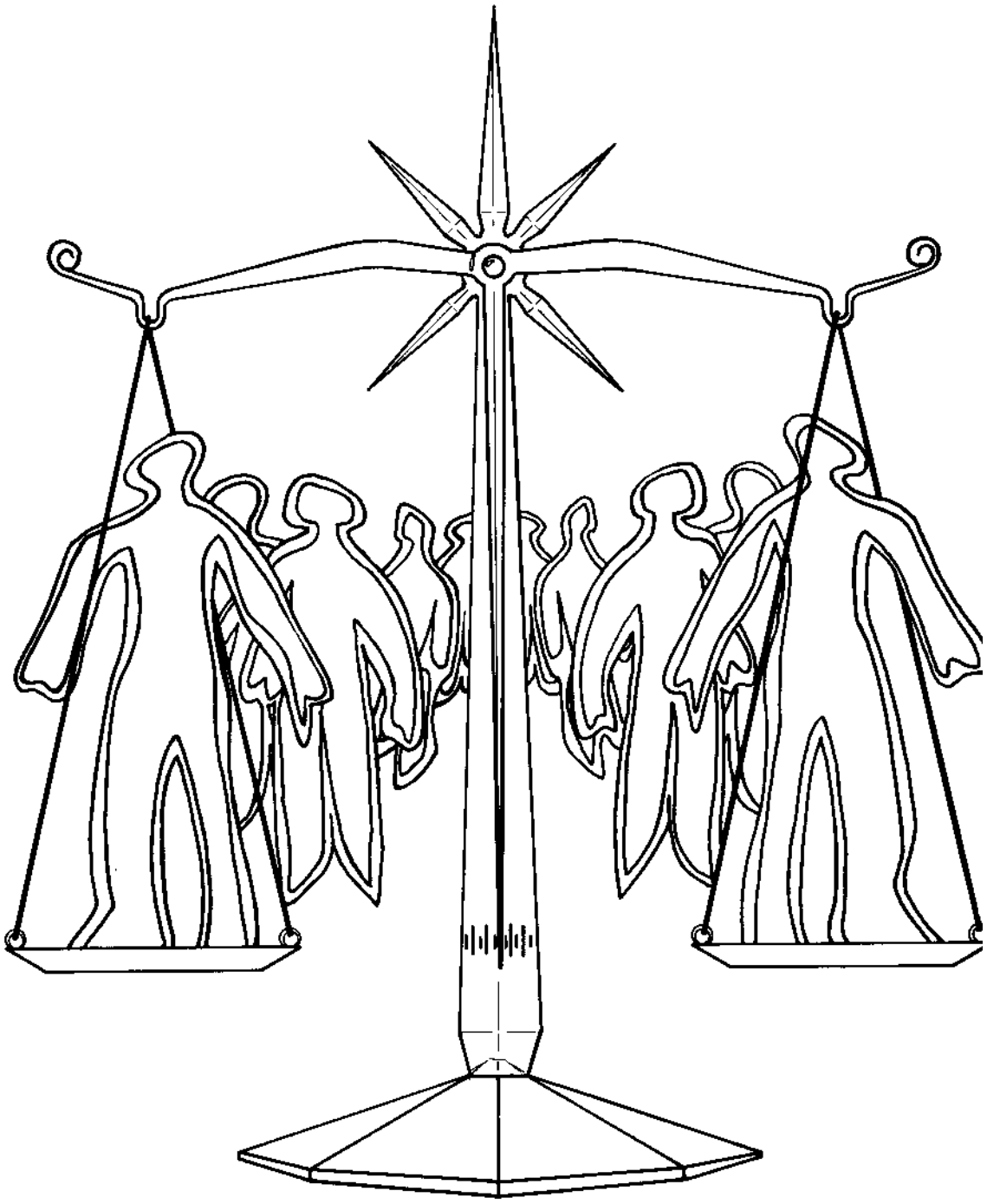
Law Reform Commission of Canada
Commission de réforme du droit du Canada

REPORT

Guidelines

DISPOSITIONS AND SENTENCES IN THE CRIMINAL PROCESS



Certain issues are easier to legislate than to legitimate

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January 1976

The Honourable S. R. Basford,
Minister of Justice,
Ottawa, Ontario

Dear Mr. Minister:

In accordance with the provisions of Section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on dispositions and sentences in the criminal process.

Yours respectfully,

E. Patrick Hartt
Chairman

Antonio Lamer
Vice-Chairman

J. W. Mohr
Commissioner

G. V. La Forest
Commissioner

A REPORT

ON

DISPOSITIONS AND SENTENCES

IN THE

CRIMINAL PROCESS

□

GUIDELINES

Commission

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Preface

It may seem surprising that the Commission's first report in the area of criminal law deals with Dispositions and Sentences, the final results of the criminal process. This, however, is simply a reflection of the approach followed throughout our enquiry which was not so much concerned with the written law as the operation of the law and its consequences in practice. Subsequent reports will deal with our views on other aspects of criminal law and procedure. All these reports are primarily directed towards the development of a coherent criminal justice policy.

It has often been stated before that the nature of such a policy is the hallmark of a civilization. We do not judge other nations by the laws on their statute books but by the law they practice. We must judge ourselves in the same way. This is especially important in the area of criminal law which addresses itself to all citizens and expresses, or at least ought to express, our basic values.

The essential question raised by this report can be stated very simply: How should we treat those who offend against us? In the desire to curb crime it has to be understood at all levels, from the legislative chamber to the street, that the coercive power of the criminal law and its agents and processes have to be used with restraint or they may further injure the social fabric. What is designed to create order may in fact create disorder. What is at heart an expression of responsibility may in fact become an inducement to irresponsibility when rules are used not as guides to resolve problems honestly but as shields against an understanding of the problems that confront us.

The purpose of this report cannot be achieved just by enacting legislative changes; nor can it be implemented by experts and officials alone. It requires extensive community involvement. It is the community from which problems such as crime arise and real solutions can only be found there. The state can only provide a common framework and its agencies, as a public service, can only give assistance in the resolution of problems. This assistance may at points well necessitate the application of force. Force and coercion, however, like any weapon must be handled with care or they will increase frustration and violence. This does not mean softness and complacency. On the contrary, it is softness and complacency if citizens assume that the peace of their community is none of their business and that their only contribution is to complain when things go wrong.

Because so much is expected of the criminal law and its agencies today, we have laid stress on less formal means of conflict resolution where this is possible. A day spent at any police station, any crown attorney's office or any court will clearly illustrate the need for this approach. The full force of the formal process must be reserved for serious cases.

The proposed range of dispositions and sentences is directed primarily towards a resolution of problems caused by an offence. In the past, an overwhelming emphasis was placed on the punishment or treatment of the offender; little attention was paid to the needs of the victim or the community in terms of reparative measures. The assignment of responsibility, which is at the heart of the criminal law, has mainly been directed towards establishing guilt and not towards undoing the harm done. The structure of dispositions and sentences in the report reflect this change of focus. The report attempts to define the kind of responsibility expected from the offender and calls for his active efforts to make reparation in the form of restitution or service or by improving his own behaviour and condition. It also attempts to reserve coercion for those who do not accept their responsibilities or whose behaviour seriously threatens the well-being of the community. We have therefore maintained the sentence of imprisonment, not because we expect that the offender will be reformed by this measure, not because such a measure will necessarily deter others from

committing offences, but because there are cases in which the community has reached the limits of its tolerance. Prisons are places of banishment rather than punishment—but banishment for a time. And therefore, imprisonment too must have its objectives and must provide conditions that permit the offender to show that he can become a responsible citizen. Prisons without meaning and hope can only be breeding grounds for violence.

The report does not deal with the sanction of capital punishment. Much has been said and written on this subject and there is little the Commission can add to the debate. In fact, so much attention is focussed on this sanction that the majority of problems in the administration of criminal justice tends to be neglected. However important the debate may be for the moral tone of this nation, the sanction is of minor importance as a solution to problems of crime. Neither can this sanction be compared with others such as imprisonment since it is final and irrevocable, without hope and future and therefore not subject to policy considerations and objectives after imposition.

Although the report is directed to the Parliament of Canada, it has major implications for the provinces and indeed for all those involved in and concerned with the administration of justice. A report is not an end but a beginning. We sincerely hope that it will be the basis for the formation of a coherent policy of dispositions and sentences in the criminal process. To this end, Parliament and the legislatures can provide leadership but responsibility must be taken by everyone, not only by those engaged in the administration of justice but by the whole community.

I. Preamble

1. Nature of the Report

2. General Principles

1. Nature of the Report

1.1. This report is a summary and consolidation of the work of the Law Reform Commission of Canada on dispositions and sentences. Aspects of this report have been published in working papers and background papers which have had extensive circulation and discussion (Appendix 1).

1.2. The report is based on the assumption that perceptions, attitudes, practices and expectations are the primary forces in shaping our approach to crime; that legislation controls at best the outer limits of this approach. The report is therefore presented as a guideline; only some of its proposals entail legislative change. Many are already part of present day practice although practices differ from place to place and between various agencies and officials.

1.3. Criminal law and procedure is predominantly a matter of federal jurisdiction; the administration of justice is predominantly a provincial matter. Police forces, which play an important role in the administration of justice, are largely organized on the municipal level. Differences in dealing with crime may legitimately reflect the variety of cultural and social conditions in the country; but they may also reflect differences in basic assumptions concerning aims, purposes and limitations of the criminal law and its processes.

1.4. Traditionally, the focus in this area has been on sentencing by the courts. The place and nature of judicial sentences can, however, only be understood in the light of dispositions preceding trial as well as subsequent dispositions. There are many points of decision in the criminal process, some of which have had low visibility quite out of proportion to their importance. Before trial there are decisions by citizens to call the police, by the police to lay charges, by the prosecution to proceed and in which way; following sentencing, important decisions are made by probation officers, prison officials and parole boards. There is often confusion both by individuals and agencies in this process concerning their roles and mutual expectations.

1.5. The report attempts primarily to present a coherent philosophy and a framework within which dispositions can be made and evaluated. It also provides guidelines for specific decision points. The report is based on the same principles as our other reports in the area of criminal law.

1.6. The work on this report and the preparatory studies was severely handicapped by the absence of a useful statistical information system in the administration of justice. Neither the Canadian public nor legislators have an appropriate account of the quantity and quality of crime; nor do officials in the process have sufficient feedback on the nature and consequences of their actions. Effectiveness and ineffectiveness, matters of grave public concern, can rarely be traced to their sources. This state of affairs severely limits the formation of a rational policy and appropriate resource allocations.

2. General Principles

2.1. The criminal law and its process should be used with restraint; the criminal law constitutes an articulation of core values in society and the criminal process, especially in its dispositions and sentences, should demonstrate and support those core values.

2.2. Intervention in troublesome occurrences in society through the use of criminal law should be proportionate to the severity of the harm done.

2.3. Those charged with solving problems produced by crime should be under an onus to select the most efficacious means to restore the peace and should account for their actions at each stage, rather than proceeding automatically from complaint to arrest to charge, trial, conviction and sentence.

2.4. Dispositions and sentences in the criminal process should promote a sense of responsibility on the part of the offender and enable him to understand his actions in relation to the victim and society.

2.5. The offender, with the assistance of defence counsel should be under an obligation to prepare submissions for disposition and sentence.

2.6. In arriving at a disposition other means of dispute settlement such as mediation and arbitration should be used wherever possible. The traditional adversary process should be reserved for the trial.

2.7. The determination of dispositions and sentences is not adversary in nature and rules of procedure and evidence therefore will differ from those applying to the trial. They must however ensure fundamental principles of fairness and justice.

2.8. To a greater or lesser extent all dispositions and sentences serve to denounce and stigmatize; but the negative effects of denunciation and stigmatization through the criminal process are such that they must be exercised with restraint.

2.9. Dispositions and sentences should reflect an understanding that the criminal event occurred within a social context. Reconciliation of the offender and victim within society is an important goal of the criminal process.

2.10. Reconciliation normally should contemplate repairing the harm done. Thus, in so far as possible, use should be made of such positive sanctions as restitution, apologies, and work or community service.

2.11. Whenever negative sanctions have to be applied, they should be used with restraint and justification. Sanctions that do not meet with the agreement of the offender must be expressed as a sentence of the court.

II. Range of Dispositions

3. The Community: Crime Prevention

4. The Police: Screening and Caution

5. The Prosecution: Pre-trial Settlement

6. The Court: Dismissal, Acquittal and Discharge

3. The Community: Crime Prevention

3.1 Dealing with trouble and resolving conflict without resort to the criminal process or other formal processes should continue to be the norm.

3.2. Police, social services, and other community agencies should be encouraged to assist individuals, the family, the school and other associations in resolving trouble and conflict without resorting to formal processes.

3.3. Community services and agencies should be used by the police, crown prosecutors, the courts and correctional officials to a much greater extent in providing conciliation, supervision, care and other services needed in the disposition or sentence of a case.

3.4. Provision should be made for the setting up in all communities of citizen's justice councils with jurisdiction to facilitate the use of community resources in crime prevention and in dispositions and sentences.

4. The Police: Screening and Caution

4.1. Police authorities should develop and publish policies and criteria governing the exercise of discretion in the disposition of cases by the police whether this be by way of charge or some alternative disposition. Such policies should be developed in consultation with citizens broadly representative of the community and subject to direction by the appropriate minister.

4.2. In dealing with trouble or criminal events the police should screen out, according to stated policies, those cases or events that can be given a non-criminal disposition, including resolution by the interested parties or referral to community services and agencies.

4.3. In appropriate cases the police may dispose of a case by issuing a caution or warning.

4.4. Alternatively, the police may decide to direct the case into the criminal process by laying an information before a justice.

4.5. Dispositions should be in accordance with express policy of the police department which should give guidelines for the use of discretion and encourage the screening out of cases from the criminal process in accordance with criteria identifying various situations including the following:

(a) family disputes;

(b) incidents involving a pre-existing relationship between victim and offender;

(c) misuse of alcohol or drugs;

(d) incidents revealing a disturbed mental state or a marked physical disability;

(e) incidents involving juveniles or the elderly;

(f) nuisance-type offences.

4.6. Criteria to be developed in conjunction with a policy to screen cases out of the criminal justice system may include the following:

(a) the victim and offender are agreeable to having the case disposed of without charging and conviction;

(b) the offence is not so serious having regard to local community standards, as to warrant charging;

(c) a non-charging alternative is likely to be at least as effective as resort to the criminal process in resolving the trouble or conflict;

(d) the resources necessary to handle the case at the community level are available in the community;

(e) the impact of arrest, charging or conviction on the accused and his family is likely to be excessive in regard to the harm done.

4.7. In cases in which the police proceed to charge, they should assist the prosecutors in determining what further action would be indicated.

5. The Prosecution: Pre-trial Settlement

5.1. Crown prosecutors should exercise discretion in the selection of cases for pre-trial settlement or prosecution in accordance with express policies and criteria.

5.2. Such policies should be developed by the appropriate ministers in consultation with citizens broadly representative of the community and be complementary to screening policies and criteria developed by police.

5.3. Policy directives should encourage the screening out of cases from the criminal process, where feasible and identify situations similar to those under 4.5.

5.4. Criteria should be developed in conjunction with a policy to screen cases out of the criminal justice system similar to those under 4.6.

5.5. Where a charge is laid, the crown prosecutor may refer the case to a community agency or resource person for pre-trial settlement and advise the Justice before whom the information was sworn accordingly.

5.6. Once a case has reached the stage of court appearance, disposition other than a termination of the prosecution should require judicial approval.

5.7. Pre-trial settlements should be made in accordance with express criteria which may include the following:

(a) the circumstances of the event are not serious enough to warrant prosecution, although the evidence would support a prosecution;

(b) the circumstances show a prior relationship between the victim and the offender;

(c) the facts of the case are not substantially in dispute;

(d) the offender and victim voluntarily accept the offered pre-trial settlement as an alternative to prosecution and trial;

(e) the needs and interests of society, the offender and the victim can be better served through a pre-trial settlement than through conviction and sentence;

(f) trial and conviction may cause undue harm to the victim or offender or otherwise result in unreasonable social costs.

5.8. No sanction may be imposed upon an offender without his consent in non-judicial methods of disposition.

5.9. Records of pre-trial settlements should be kept to ensure visibility and accountability.

6. The Court: Dismissal, Acquittal and Discharge

6.1. When proceedings have commenced, the court may dismiss the charge where the prosecution requests a withdrawal or presents no evidence.

6.2. Having heard the evidence of the prosecution and the defence, the court may:

(a) acquit the accused;

(b) discharge the accused absolutely or conditionally;

(c) convict the accused and impose a sentence.

6.3. The effect of *absolute discharge* is to avoid a criminal conviction. The purpose of this is to reduce the negative after-effects of a conviction. The person for whom the court prescribes an absolute discharge does not have any condition or promise to carry out.

6.4. This sanction may be used by the court when it is of the opinion that the trial itself has had a sufficient impact, and that more severe sanctions would cause unwarranted hardship. The court may also prescribe this procedure if, after the circumstances and the nature of the offence have been considered, it is of the opinion that some other action should have been taken with regard to the accused at the pre-trial stage.

6.5. *Conditional discharge* would have the same effect as absolute discharge if the person for whom the court prescribed this sanction complied with the conditions required by the court. The court may impose any reasonable condition included in the range of sentences except imprisonment.

6.6. The court may impose a conditional discharge when it is of the opinion that:

(a) taking into consideration the circumstances and nature of the offence, there should have been a pre-trial settlement including restitution for the victim and other conditions favourable to conciliation;

(b) any other more severe sanction would cause unnecessary social costs and hardship.

6.7. If the offender deliberately refuses to comply with the prescribed conditions the court may convict the accused and impose any other sanction it deems appropriate in the circumstances for the original offence.

III. Range of Sentences

7. Good Conduct Order
8. Reporting Order
9. Residence Order
10. Performance Order
11. Community Service Order
12. Restitution and Compensation Orders
13. Fines
14. Imprisonment
15. Hospital Order

7. Good Conduct Order

7.1. The court may require a promise to keep the peace for a period of not more than twelve months, with or without conditions.

7.2. The court may require this promise where it feels that the circumstances and nature of the offence are such that absolute or conditional discharge is inappropriate, but that imposing a conviction and promise to keep the peace resolves the issue and satisfies the public interest.

7.3. Where a person who has signed such a promise commits another offence during the period stipulated in the order, the court may take into consideration that there has been a breach of the order in determining the sanction to be imposed with respect to the new offence.

8. Reporting Order

8.1. The court may require an undertaking from the offender to report to a person appointed by the court at regular designated intervals.

8.2. The court may impose this undertaking where the circumstances and nature of the offence are such that it feels that a certain amount of supervision and the limitation of freedom within a given area are necessary in the public interest, but the person convicted does not need assistance or rehabilitation services. A reporting order may be imposed in addition to a restitution or other order.

8.3. If the person undertaking a promise to report is wilfully in breach of the order, the court may impose any other sanction for the original offence it considers appropriate in the circumstances.

9. Residence Order

9.1. The court may require that the offender enter into an undertaking to live in a given residence for a specified period, in addition to or in place of any other sanction. This residence may be the offender's customary residence, any other residence or hostel but not a prison or other penal establishment. The court may also require that the person not leave a given area without permission.

9.2. The court may prescribe this sanction where it is convinced, after taking into account the nature and circumstances of the offender's needs, that it is essential to impose this type of supervision and restriction of liberty on him.

9.3. Where the offender does not comply with the conditions of the order, wholly or in part, the court may impose any other sanction it considers appropriate for the original offence.

10. Performance Order

10.1. The court may require from the offender an undertaking for a specified period, to perform one or more of the following, in order to improve his condition or to reduce the likelihood of his involvement in further criminal conduct:

(a) take academic or vocational training courses;

(b) participate in counselling sessions;

(c) look for and retain suitable employment;

(d) attend relevant information or training sessions;

(e) eliminate or restrict his involvement in a specified activity or his association with designated individuals or groups;

(f) meet any other reasonable condition that the court and the offender consider appropriate.

10.2. The court may impose this sanction if the nature and circumstances of the offence can justify a certain amount of restraint, and if the offender needs and accepts this kind of service or constraint.

10.3. Before imposing an order for a performance contract the court:

(a) may require a pre-sentence report;

(b) should consider any sentencing plan put forward by the offender and his counsel;

(c) should require assurance that the community services or agencies contemplated by the order are willing and able to assist the offender.

10.4. The court may order that a probation officer act as co-ordinator between the offender and the person or organization undertaking to offer services to the offender. The probation officer should help the offender to comply with the conditions of the order and should notify the court if the offender fails to meet the conditions of the order or if the community services required by the order are not made available. As a general rule, the probation officer should not himself provide services to the offender, except for the support and assistance necessary to enable him to comply with the conditions of the order.

10.5. Where the offender does not comply with the conditions of the order, wholly or in part, the court may impose any other appropriate sanction for the original offence.

11. Community Service Order

11.1. The court may require the offender to carry out work or perform some service for the benefit of the community over a fixed period of hours. Generally, this work should be done during the offender's free time.

11.2. The object of community service is to:

(a) achieve reconciliation between the community and the offender by repairing directly or indirectly the harm done;

(b) take the place of a fine, either wholly or in part;

(c) apply a positive form of censure to an offence, even though the offence has not caused any direct form of damage.

11.3. The clerk of the court should keep an up-to-date list of work or services to be performed for the community or for non-profit organizations, and notify the court of cases in which recognizances for community services have not been complied with. Citizen's justice councils should identify community needs and make appropriate arrangements for the fulfillment of community service orders.

11.4. Where a person fails to comply with his promise to perform community services, the court may impose any other appropriate sanction for the original offence.

12. Restitution and Compensation Orders

12.1. Restitution is an undertaking on the part of the offender to pay back, so far as he is able, for the injury suffered by the victim. The restitution may be in symbolic form, by apologies, for example, or the payment of a sum of money, or work done for the benefit of the victim.

12.2. The court should give priority to this sanction where the offence involves a victim, and where restitution as a provision of conditional discharge is not appropriate.

12.3. Where the type of damage inflicted on the victim, or the financial situation of the accused, shows that restitution by way of service or work for the benefit of the victim is appropriate, the court may require this with the consent of the victim.

12.4. Where the court decides that monetary restitution is appropriate, it must specify the amount and method of payment according to the financial resources and obligations of the accused.

12.5. Where a violent offence has been committed, or where there has been an illegal entry into a private home or a theft from an individual, the court may issue a compensation order, payable by the government:

(a) where the offender cannot make restitution to the victim within a reasonable length of time; or

(b) for that part of the damage for which no restitution would otherwise be paid by the offender.

In the first case, the court shall require the offender to reimburse the government, taking into account his financial resources and ability to meet these obligations.

12.6. If the offender wilfully refuses to comply with the promise to pay restitution, the court may impose any other sanction for the original offence it considers appropriate.

13. Fines

13.1. Where a restitution order would be inappropriate, or where the offence is detrimental to society in general rather than to an individual, the court may impose a fine. When the nature and circumstances of the offences so require, the court may also impose a fine in addition to any other sanction. Imprisonment, however, should not be an option to a fine as an original sentence.

13.2. Any fine of $50.00 or more should be stated in terms of a day-fine. (A day-fine is a portion of the offender's income). Where the court hands down a sentence of day-fines, a court official should investigate the offender's financial situation in order to determine the amount of the fine.

13.3. All fines, in so far as possible, should be paid forthwith. If the offender does not have the required amount at hand, a court official should, after consultation with the offender, establish a reasonable time for payment and allow fines to be paid in instalments.

13.4. Where the offender has not paid the fine within the time required, the court official should demand that the offender establish his inability to pay and the court official should determine whether the time should be extended or the matter referred to court.

13.5. If it is determined that the offender is unable to pay the fine imposed, the judge may vary the amount of the fine to be paid,

forgive any further payment, or vary the sanction imposed to require the offender to carry out some form of work or impose any sanction other than imprisonment.

13.6. Where the accused is able to pay, and his failure to pay is deliberate, or where the accused does not succeed in showing that he is unable to pay, the judge may order attachment of wages or property or impose a prison sentence for wilful default.

14. Imprisonment

14.1. Imprisonment is an exceptional sanction that should be used only:

(a) to protect society by separating offenders who are a serious threat to the lives and personal security of members of the community; or

(b) to denounce behaviour that society considers to be highly reprehensible, and which constitutes a serious violation of basic values; or

(c) to coerce offenders who wilfully refuse to submit to other sanctions.

14.2. Rehabilitation does not justify resort to imprisonment. Once sentenced, however, the offender should be given the benefit of social and health services similar to those available to a free citizen.

14.3. The court should resort to imprisonment only if it is certain that a less severe sanction cannot achieve the objective set out by the legislator.

14.4. Criteria

(a) the court should not impose a sentence of imprisonment in order to separate the offender unless:

1. the offender has committed a serious offence endangering the life or personal security of others; and

2. the likelihood that the offender will commit another crime that will very seriously endanger the life or personal security of others in the near future clearly indicates that imprisonment is the only available sanction that can adequately promote the general feeling of personal security.

(b) The court should not use imprisonment as a means of denouncing unlawful behaviour, except where it is convinced that no other sanction is sufficiently strong to underline the seriousness of the harm done. In determining this the court should consider:

1. the nature, seriousness and circumstances of the offence;

2. the social reprobation associated with the offence.

(c) The court should only impose a prison sentence in cases of wilful default where the offender has wilfully refused to pay a fine or restitution to the victim, or to submit to any other measure that does not deprive him of his freedom, and it has been demonstrated to the satisfaction of the court that the only solution is a short prison sentence.

14.5. Where a prison sentence is imposed, the court should explicitly state and record the purpose of the sentence and the reasons for the sentence.

14.6. Duration of imprisonment

In determining the length of the prison term the court should consider the nature of the offence, the circumstances under which the offence was committed and the intended objectives of the imprisonment.

(a) A prison sentence for the purpose of protecting society by separation should not be for more than twenty years;

(b) A prison sentence for the purpose of denunciation should not be for longer than three years except in cases of combined or cumulative sentences, or where legislation specifies otherwise.

(c) A prison sentence imposed as a last resort in cases of wilful refusal should not exceed six months, except in the case of combined or cumulative sentences.

14.7. Combined or cumulative sentences

Where the offender has committed several offences in the course of various criminal activities, the court may, in exceptional cases, impose a combined sentence that may be longer than the maximum sentence provided for a simple offence.

(a) Where the offender has committed several serious offences endangering the life and personal security of others, and where the court believes that imprisonment is the only sanction that will protect society, the court may, in exceptional cases, impose a combined sentence the duration of which is equal to the sum of the individual sentences for each offence. However, the cumulative sanction should not exceed twice the maximum provided for the most serious offence or twenty years whichever is less.

(b) Where the offender has committed several offences which society considers highly reprehensible, and where the court believes that imprisonment is the only way to denounce this behaviour, the court may, in exceptional cases, impose a combined sentence the duration of which is equal to the sum of the individual sentences for each offence. This cumulative sentence should not be greater than twice the maximum provided for the most serious offence or six years, whichever is less.

(c) Where the offender has wilfully refused to comply with several different orders for fines, restitution to several victims, or other sanctions that do not deprive him of his freedom, the court may impose a combined prison term not exceeding one year.

14.8. General principles—conditions of imprisonment

(a) The conditions under which a prison sentence is served, including conditions of release, should be in accordance with the objectives of the sentence.

(b) So far as possible, conditions of imprisonment should approximate conditions in society generally. However, imprisonment for the purpose of separation may require restrictive conditions and controls that differ from those of a sentence for the purpose of denunciation or wilful default.

(c) Persons in prison should, so far as possible, carry out the duties and obligations expected of any other citizen.

(d) So far as possible, offenders in prison should have similar opportunities for work, earning wages, and access to needed social, health and other services as those available to citizens not under restraint.

(e) Within the penal institution, participation in recreational, socio-cultural or therapeutic programs should be on a voluntary basis, as it is for citizens outside the institution.

14.9. Jurisdiction

(a) Where the objective of a prison sentence is to separate the offender from the rest of society, a Sentence Supervision Board (see S. 21) should supervise the carrying out of the sentence.

The Board should have power to formulate policy respecting levels of restriction, to review certain decisions affecting imprisonment and release, and to make the initial decision in serious cases affecting breach of prison regulations. The sentencing court, in cases where it so directs, should have final jurisdiction over conditions of imprisonment for a specified period not exceeding the maximum provided for denunciation cases.

(b) A prison sentence intended as a form of denunciation although subject to the general supervision by the Sentence Supervision Board, should be under the ultimate control of the court, which may reconsider any important changes in the conditions of the offender.

(c) The same applies to sentences in cases of wilful refusal.

14.10. Reduction of Levels of Restriction

(a) *Separation of the offender*

1. Where the object of imprisonment is separation, the transition from greater to lesser restrictions of liberty should be carried out in stages under the direction of the Sentence Supervision Board.
2. Passage from one stage to another should depend on the absence of criminal behaviour and the extent to which the conditions of the current stage are fulfilled. A decision to permit less restrictive conditions and greater access to the community should be based on the offender's conduct and not on abstract predictions of risk.
3. Temporary absence should be the first stage in the transition from deprivation of liberty to restriction of liberty. An inmate who handles his first temporary absence successfully should be granted additional absences at regular intervals.

   At the second stage the inmate may take courses, work or seek employment in the community during the day, and return in the evening to a minimum security institution, a residential centre in the community or elsewhere, under specific conditions restricting his liberty.

   The final stage should consist of release into the community with a minimum of restriction, but with assistance and supervision.
4. All inmates should be considered for this last stage after they have served two-thirds of their sentence.
5. Any person who has been conditionally released into the community and met the conditions of his release for a two-year period should no longer be subject to supervision unless the Sentence Supervision Board finds that this is still necessary.
6. Upon application of the offender, the court may terminate a sentence of imprisonment where the offender has lived in the community and met the

conditions of his release over a reasonable period of time, and the court is of the opinion that it would be in the public interest to terminate the sentence.

(b) *Denunciation*

1. Where the court's objective is to denounce, there should not be a gradual transition from deprivation to restriction of liberty.
2. All offenders serving a sentence intended only for the purpose of denunciation, however, should be granted leaves of absence for specific lengths of time in order to maintain or re-establish links with relatives and the community.
3. For humanitarian reasons, and upon application, the court may authorize the release of an offender or may terminate such a sentence where it is of the opinion that it would be in the public interest to do so. The court may also consider an application by the offender to be permitted to serve the last third of his sentence in the community.

(c) *Wilful default*

1. Where the court imposes a prison sentence in cases of wilful default, the offender must serve the whole sentence in a penal institution.
2. All inmates serving such a sentence of more than three months' duration should be granted periodic leaves of absence.
3. Such a prison sentence may be terminated where the offender pays the amount of the fine or restitution or expresses his willingness to comply with the original order.

15. Hospital Order

15.1. After imposing a sentence of imprisonment, a court may order that a portion of the sentence be served in a medical

facility for the purpose of providing treatment needed by the offender.

15.2. In no case should the term of treatment exceed the length of the sentence imposed, or a sentence of imprisonment be imposed for reasons of treatment, nor should the length of the sentence be affected by the offender's need for treatment.

15.3. Before imposing such an order the court should:

(a) remand the accused for a suitable psychiatric or other examination;

(b) obtain the consent of the receiving medical facility to admit the offender for the purpose of treatment;

(c) obtain from the offender his informed consent to the suggested treatment at the medical facility;

(d) satisfy itself that the proposed treatment program is humane and respects the basic dignity of the individual.

15.4. Release procedures generally should be governed by the same principles and criteria as govern ordinary prison sentences and be under the general supervision of the Sentence Supervision Board.

15.5. An offender may withdraw his consent to treatment and request the Sentence Supervision Board to authorize his release from the medical facility upon such terms and conditions, including transfer to a prison institution, as the Board sees fit. Conversely, the hospital authorities may advise the Sentence Supervision Board that they are not able to offer further treatment to which the offender is likely to respond, and request that the offender be released or transferred.

15.6. Where the offender has received maximum benefit from treatment within the hospital facility but is still under sentence, the Sentence Supervision Board should consider and may recommend release under supervision in the community rather than transfer to a prison institution.

Summary Table
of
Dispositions and Sentences

RANGE OF DISPOSITIONS AND SENTENCES

DISPOSITIONS:

Section In Text	Form	Nature	Rationale
3	*Community:* Crime Prevention	Individuals, families, schools, places of work and communities deal with problems informally, without recourse to the criminal process.	Greater satisfaction results if parties are permitted to settle their own problems, rather than have authorities impose a solution. A sense of responsibility develops when problems are faced by the parties directly concerned within the context of direct relationships. Resort to the criminal process is costly and produces negative effects which at times outweigh the severity of the initial problem.
4	*Police:* Screening	Police consider or investigate an incident and decide not to direct it into the criminal process, but to exercise a non-criminal alternative, or, not to pursue the matter further.	The criminal process should be used only as a last resort. Unless alternative dispositions have failed in a particular case in the past, or alternative disposition or resources are not appropriate or acceptable, the criminal process should not be used.
	Caution	Police investigate and decide that a caution or warning is all that is necessary. The caution may be oral or written; in any case it is entered as a disposition.	The caution is widely used in cases of juveniles and less frequently in cases of adults. The police decide that no particular good would be served by invoking the criminal process; nor does the criminal incident disclose the need for conciliation or settlement services. This caution is not to be confused with the police caution used in questioning suspects and taking statements.
5	*The Prosecutor:* Pre-Trial Settlement	The crown prosecutor screens the charges laid and selects those cases that may properly be referred out of the criminal process for a settlement procedure.	The denunciation and stigma attached to being charged are sufficient under the circumstances; in keeping with the principle of using the minimal sanction the case is suitable for a settlement procedure.
	Withdrawal	Before process is issued the Crown may withdraw the charges and inform the Justice of the Peace accordingly. After issuing of process, the Crown may withdraw the charges with the permission of the court.	Procedural.

DISPOSITIONS—*Concluded*

Section In Text	Form	Nature	Rationale
	Stay of Proceedings	In exceptional cases, at any stage before judgment, the Attorney-General may enter a stay of proceedings not subject to judicial control.	Procedural.
6	*The Court:* Dismissal	When proceedings have commenced, the court may dismiss the charge where the prosecution requests a withdrawal or presents no evidence.	Procedural.
	Acquittal	Where the court finds the accused not guilty of the offence charged, it will acquit the accused.	Self-evident.
	Absolute Discharge	No conviction; no conditions.	The circumstances of the offence do not warrant any denunciation and assignment of responsibility beyond the trial itself.
	Conditional Discharge	No conviction; possible conditions include obligation to keep the peace; to be of good behaviour; to make restitution.	Beyond the denunciation and assignment of responsibility by the trial, the offender deserves no further denunciation providing he demonstrates his willingness to restore the harm he has done and behave himself.

SENTENCES:

7	Good Conduct Order	Conviction; conditions attached to the order should be those which assure that the offender keep the peace.	The circumstances of the offence show that more than a conditional discharge is required, but the public interest does not require more than a conviction with the limited restriction to keep the peace.
8	Reporting Order	Conviction; conditions of the order require reporting to a designated person for control purposes.	This is a control and preventive measure to keep a check on the offender's conduct.
9	Residence Order	Conviction; condition: to live at a designated residence or in a given area.	Substantial curtailment of liberty is warranted by the offence, and the offender is in need of control, supervision or support.
10	Performance Contract	Conviction; offender agrees to undertake to meet such conditions and goals re training, treatment, work, counselling or education as are needed and agreed upon; to report to a designated person.	The offence requires restraint on the offender's liberty; the offender is in need of and willing to undertake a specific program to upgrade his social and economic skills.

SENTENCES—*Concluded*

Section In Text	Form	Nature	Rationale
11	Community Service Order	Conviction; agrees to undertake specified tasks for specified number of hours in leisure time.	The offence has been of harm to community generally or the offender is unable to pay fine or make restitution but willing to do work at specified tasks, to the satisfaction of a designated person.
12	Restitution and Compensation Order	Conviction; the offender undertakes to pay restitution to the victim, within the possibility of his means and in accord with the harm done.	The seriousness of the offence would be depreciated were a conviction not entered; offender does not need supervision, control or rehabilitative service but is willing to make restitution to the victim. This does not preclude restitution as a condition of other sanctions.
13	Fines	Conviction; payment of money to the public treasure based on the offender's ability to make such payment and the seriousness of the offence.	The harm done is prejudicial to society generally. The offender does not require isolation, services, or supervision. May be imposed in addition to restitution.
14	Imprisonment	Separation; subject to such conditions and releases as are determined through policy set by the Sentence Supervision Board and applied by the prison authorities; the last one-third to be spent in the community under supervision unless there are strong counter indications. The court may maintain jurisdiction over initial part.	The offence is a serious one making separation of the offender from the rest of society necessary. In addition the Crown has shown that the offender is likely to commit further serious acts of violence in the near future if he is not isolated and subjected to control and supervision.
		Denunciation; conditions of the sentence while directed through the Sentence Supervision Board are subject to court control.	The offence is serious and the community would not accept a sentence other than imprisonment as a sufficiently strong statement about the wrongfulness of the offence although the offender is no longer a threat to the community.
		Wilful default.	To be used only where the offender wilfully refuses to pay a fine or fulfil other non-custodial conditions of sentence and no other sanction remains.
15	Hospital Order	Conviction; sentence of Imprisonment to be served in full or in part in a designated hospital.	Offender is in need of treatment, is willing to accept treatment and this treatment can best be provided at a specific hospital.

V. The Sentencing Process

16. Sentencing Proceedings
17. Imposition of Sentence
18. Pre-Sentence Reports
19. The Sentencing Record
20. Duties of Counsel
21. The Sentence Supervision Board
22. Development of Sentencing Criteria

16. Sentencing Proceedings

16.1. As soon as practicable after the determination of responsibility, a hearing should be held at which the sentencing court should:

(a) ask for submissions by the parties on the facts relevant to the sentence;

(b) hear argument by counsel for the defence on sentencing alternatives relevant to the facts of the case;

(c) give the accused an opportunity to speak to sentence;

(d) consider submissions concerning sentencing practices and the effectiveness of sentences.

16.2. Sentencing proceedings should not be adversary in nature. Rules of procedure and evidence designed for the determination of responsibility for a crime should only apply to the extent to which they ensure a fair hearing of the issues.

16.3. Submissions on sentencing should, however, be presented in open court with full rights of confrontation, cross-examination and representation by counsel.

16.4. The role of the judge will be a more active one than during the trial, since he will have to consider and weigh interests beyond those of the parties.

17. Imposition of Sentence

17.1. Following a finding of responsibility the trial judge may:

(a) abstain from entering a conviction and order an absolute discharge or conditional discharge; or

(b) enter a conviction and impose sentence.

17.2. When sentence is imposed, the court should:

(a) make specific findings on all issues of fact relevant to the sentencing decision;

(b) make the required findings on a preponderance of the evidence;

(c) state in the presence of the offender the reasons for selecting the particular sentence or disposition, and the precise terms of the sentence.

17.3. In cases of multiple offences, the Crown should:

(a) consolidate all outstanding convictions for sentencing at one time;

(b) dispose of all outstanding charges against a convicted offender by trial and consolidate them for sentencing;

(c) proceed with charges filed after sentencing and consolidate them for a new sentence.

Any sentence imposed on an offender already under sentence for another offence should be integrated with the prior sentence.

18. Pre-Sentence Reports

18.1. Courts may request pre-sentence reports in any given case as well as reports showing the offender's mental, emotional and physical condition. However, before imposing a sentence of imprisonment, a pre-sentence report should be mandatory.

18.2. Pre-sentence reports and other reports in aid of sentencing and dispositions are not public records. They should, however, be available to the courts for the purpose of assisting in sentencing or to persons or agencies having a legitimate professional interest in the disposition or sentence such as correctional officials, volunteers, or research staff attempting to evaluate the effectiveness of sentences. The reports should be available to the parties.

18.3. Fundamental fairness demands full disclosure of the contents of the reports to the accused or his counsel in open court.

At the discretion of the court, however, certain information, especially of a personal nature such as contained in psychiatric reports may be withheld: the fact that it is withheld should be made known to the accused or his lawyer.

18.4. Where the court chooses not to disclose certain portions of a report it should give reasons for doing so on one or the other of the following grounds:

(a) the suppressed material was not relevant to a proper sentence;

(b) diagnostic opinion might seriously disrupt a rehabilitative program;

(c) disclosure would be prejudicial to the security of other persons or the offender himself.

18.5. The pre-sentence and other reports are not meant to be social histories; nor should they repeat information already available from police records. They may contain the offender's explanation of the offence and its background, but ordinarily this should be supplied by counsel for the defence.

18.6. Among other things, the report should contain a summary of services available in the community from which the offender might benefit, information on the victim's needs, his attitude to the offence and a summary of the offender's current economic and social circumstances in the community.

18.7. The report should not ordinarily propose a sentencing plan to the court. This should primarily be the responsibility of the court and the parties.

19. The Sentencing Record

19.1. A record of sentencing proceedings should be made and preserved so that it can be reduced to writing if required. A record should include:

(a) a verbatim account of the sentencing proceeding including a record of any statements made by the offender, counsel for the defence, or the Crown prosecutor, together with any testimony by witnesses on matters rele-

vant to the sentence and statements made by the court in explanation of the sentence;

(b) copies of the pre-sentence report and other reports or documents available to the court as an aid in passing sentence. Reasons for non-disclosure of any part of the report should be included in the record.

19.2. The court should transfer a copy of the sentencing record to correctional authorities as required.

20. Duties of Counsel

20.1 Counsel for defence and prosecution have an obligation to identify appropriate cases for screening out of the criminal process and to inform the victim and offender about alternative dispositions open to them on their consent.

20.2. Both counsel have an obligation to work with citizen's justice councils, police and the court to develop effective community involvement in dispositions and sentences.

20.3. Counsel for defence and prosecution have an obligation to consider the interests of the victim and in appropriate circumstances reconciliation of offender and victim.

20.4. As officers of the court, both counsel have a duty to recognize the public interest in a just sentence and their submissions should assist the court in finding appropriate measures to neutralize the harm caused by offensive behaviour.

20.5. Before recommending a sentence of imprisonment the Crown prosecutor should give timely notice to the offender and his lawyer; and, except in so far as the judge may upon written reasons withhold disclosure of certain parts of reports or other evidence, all of the evidence to be relied upon for the proposed imprisonment must be disclosed and presented at the sentencing proceeding. The offender should be at liberty to present an alternative sentencing plan.

20.6. Where pre-sentence or other reports are presented counsel should examine the basis of the reports and assist the court in their application to a suitable disposition.

20.7. Not only should defence counsel be familiar with law and practice respecting sentencing and dispositions, they should inform the offender of these and their possible consequences.

20.8. Defence counsel should assist the offender in drawing up a sentencing plan, included in which is a consideration of the victim, and present this to the court by way of assistance at the time of sentence. Where imprisonment is imposed the offender may request a Hospital Order as part of the sentencing proposal.

21. The Sentence Supervision Board

Sentences of imprisonment have traditionally been expressed by the courts in terms of time periods. The nature of imprisonment was partly determined by statute such as the two year dividing line between federal and provincial systems, partly by administrative direction, buildings and programs and partly in recent history by the Parole Board. A great deal of uncertainty has developed concerning the nature of a prison sentence and the authority for specifying conditions.

The sentencing court can and should clearly pronounce length of sentence and specify the purpose and initial condition. As explained in section 14, the court should also maintain ultimate control over sentences for denunciation and wilful default. It may also retain jurisdiction over a part of the separation sentence. It is unrealistic, however, to expect the court to remain involved in all subsequent decisions determining the amount of restrictions to be placed on offenders. Conditions now vary from maximum security to community release centres and leaves of absence; day parole and full parole have made the prison sentence a matter of relative restriction rather than absolute isolation. Release from prison is, therefore, no longer one single decision such as underlies the concept of parole. Prison, itself, is in fact no longer one specific place. A series of important decisions have to be made throughout the course of the sentence.

21.1. The purpose of the sentence as expressed by the court should itself not be subject to what can be interpreted as subsequent

changes, except by way of appeal. A Sentence Supervision Board should be vested with authority to carry out the sentence of the court and to make decisions necessary for meeting the purpose of the sentence.

21.2. The Sentence Supervision Board should replace the present Parole Board.

Members should be appointed for a reasonable term at the pleasure of the Governor-General. The Board should be constituted in a way that permits it to make decisions on a regional basis.

21.3. This Board should have, among others, the following duties:

(a) consult with prison officials, courts and police and formulate and publish policies and criteria affecting conditions of imprisonment and release;

(b) automatically or upon request review important decisions relating to conditions of imprisonment and release;

(c) hear serious charges and determine the process for such charges against prisoners arising under prison regulations.

21.4. The Sentence Supervision Board should develop and publish its rules of practice, make decisions in accordance with the rules of fundamental fairness, and respect the principles of equity and justice.

21.5. In particular, the Board should have power:

(a) to refuse a first temporary absence at the prescribed time or any other temporary absence provided by regulations;

(b) to refuse to permit a prisoner to begin the next stage at the prescribed time;

(c) to grant additional temporary absences to prisoners who request them or to shorten or disregard a stage, in compliance with the criteria stated in the regulations;

(d) to impose special conditions of personal restraint at any stage where the offender does not accept them voluntarily;

(e) to revert prisoners to a former stage through revocation of day release, community supervision, or through transfer to maximum security conditions;

(f) to serve as a disciplinary court for serious violations of regulations, or for offences that entail severe punishment such as solitary confinement for a period exceeding one week, or fines or compensation involving large sums of money. In the case of serious offences violating the criminal law, the prisoner should be prosecuted in court.

21.6. The decisions of the Board should be subject to review by the superior courts in cases where final approval is not retained by the sentencing court.

22. Development of Sentencing Criteria

22.1. In all courts where more than one judge sit regularly at the same place, and wherever else it is feasible, it is desirable that sentencing councils or meetings of sentencing judges be held prior to the imposition of sentence in such cases as the judges may determine. The meeting should be preceded by distribution of the pre-sentence report and any other relevant and documentary sentencing information to each of the judges who will participate. The purpose of the meeting should be to discuss the appropriate disposition of the accused persons then awaiting sentence and to assist the judge who will impose the sentence in reaching a decision. Choice of the sentence should, nevertheless, remain the responsibility of the judge who will actually impose it.

22.2. The Chief Justice of a court should convene sentencing judges from time to time in institutes or seminars to discuss problems relating to sentencing. The particular goal of such proceedings should be to develop criteria for the imposition of sentences, to provide a forum in which newer judges can discuss problems with more experienced judges, and to inform all sentencing judges of current information and developments in sentencing. Prosecutors, defence counsel, appeal court judges, and correction officials should be encouraged to participate in such proceedings in order that judges and others may develop a better understanding of their respective roles in the sentencing process.

22.3. In addition to regular sentencing institutes, the Chief Justice should institute a program for the formal orientation of new judges. This should include familiarization with current research

related to sentencing, the purposes of sentencing and dispositions, current sentencing practices, social and community services available to the sentencing judge, and facilities to which an offender may be committed.

22.4. Provision should be made for regular visits by every sentencing judge to the custodial and non-custodial facilities in his region. Such visits should include familiarization with the process by which an offender is admitted to an institution, the conditions that affect his sentence, and release procedures.

V. Recommendations for Policy Formation and Implementation

Commentary

R.1. Information and Education

R.2. Administration

R.3. Legislation

Outline of Legislative Changes

Commentary

The report has been developed on the basis of working papers, background papers, consultation and feedback. It therefore represents as a whole a framework for the development of a policy in the area of dispositions and sentences. This chapter is an outline of the conditions necessary for the implementation of the philosophy, spirit and thrust of the report and considers its impact on practices in the criminal justice system. These practices are determined to a large degree by information, administration and finally legislation.

The report is clearly evolutionary and not revolutionary. It provides a framework for evaluation and for incremental changes of present practices. Implementation must therefore be seen as a process of education and must permit participation of all those active and interested in the administration of criminal justice in Canada. This can no longer be a matter for experts alone. Nor can it be a matter, at least at this time, for rigid formulation.

Great stress is laid in the report as well as in the recommendations on the change of actual practices rather than just legislative changes. Practices cannot be specified in detail but have to be worked out and tested in real life situations. We have attempted to conduct and to encourage pilot projects as one of the means to measure the effects of change. We strongly advise that this approach be continued in implementation and extended even to legislative changes, some of which could also be tested for a given period of time in a given area.

Recommendations are usually directed to a body with powers of implementation. Although various segments of criminal justice in Canada are subject to various jurisdictions, problems in criminal justice need a concerted effort crossing jurisdictional boundaries. The report is submitted to the Parliament of Canada because the Commission is its creation but it clearly has implications for the other jurisdictions. We hope and urge that the Parliament of Canada will provide for coordination and initiative of the many efforts necessary, some of which are already in the process of implementa-

tion. Since the administration of justice is largely a provincial matter, a great deal will depend on the co-operation of the provinces and since the thrust of this report is towards community based sanctions, there is also a significant role for local governments. Redistribution of responsibilities will invariably raise questions concerning the redistribution of resources.

R.1. Information and Education

R.1.1. The state of statistics and information on the nature of crime and the administration of justice in Canada is simply deplorable. There is a clear agreement on this situation even by those charged with the collection and dissemination of data. Dispositions and sentences are especially vulnerable, since these now depend largely on beliefs in what are effective measures against criminal acts. The public, legislators, administrators and judges are largely at the mercy of hunches in assessing the total picture of crime, and are forced to rely on their personal or work experience. There are a great number of myths and misunderstandings in areas such as bail, leniency in sentencing and release on parole. Even where data are available they are not published in a form or with sufficient speed to check assumptions, mitigate exaggerations, or even more important, indicate pressure points and identify reasons for crises.

Basic to any rational development therefore is an information system that:

(a) informs the public in a comprehensive and comprehensible way of the state of crime and measures against it;

(b) informs officials and decision makers of the cumulative effects of their actions, the practice of others and the needs for planning and development;

(c) informs legislators of results and deficiencies in legislative provisions and resource allocations.

We recommend:

(a) a major reorganization of present methods of collecting and disseminating criminal justice data by Statistics Canada;

(b) the development of provincial statistics and accounts in this area;

(c) the development of local accounts of crime that inform the citizen of his safety and his possible contribution to crime prevention;

(d) that the federal government take responsibility for a national reporting system concerning the administration of justice and assist in the development and coordination of information systems on other levels of government.

R.1.2. Lack of information is matched by a lack of efforts in the area of education. The major role of criminal law and the criminal process is an educative one. This role cannot be fulfilled if the citizen is not aware of his rights and responsibilities and the nature and purpose of a legal system, its institutions and processes.

We recommend:

(a) the development of the study of law and legal institutions as part of school curricula and the application and demonstration of legal procedures in the classroom setting. This is particularly important in the area of criminal law and its demands on citizenship. Since attitudes are formed early, especially through exposure to television, an understanding of the real nature of crime and its effects and consequences must begin early;

(b) the development of legal materials and information accessible to the public through libraries and adult education institutions;

(c) that, although education is largely a provincial matter, the federal government develop educational materials in this area, provide for consultation and support pilot projects.

R.1.3. In addition to educational measures for the public there is an urgent need to provide opportunities for policemen, Crown attorneys, judges and correctional administrators to familiarize themselves with changing conditions and practices in making dispositions and imposing sentences. There is very little training for some of these groups in the first place; even those who

have had professional training and experience in law or other disciplines, may have had very little exposure to criminal law and its processes. Changes in legislation and forms of practice which now occur frequently are not matched by educational efforts to interpret those changes to those who must administer them. It is beyond the scope of this report to point out the basic educational and training needs. The implementations of our proposals with its stress on changes in attitudes and practice and its call for ongoing innovation depends, however, on the development and support of continuing education. Various provinces and associations have made valuable beginnings in this area.

We recommend that in the context of continuing education, consideration be given to the establishment of a national criminal justice institute with facilities and resources for a flexible program of training, interaction and national policy formation. This institute should have only a small permanent administrative staff. It should not be conceived primarily as a teaching institution but as a college with a broad base, drawing its members from other educational institutions and practice. It should not be defined specifically for one group such as judges, Crown attorneys, police and correction officials but have a basis in issue oriented programs. It should, however, have the material and human resources to support educational efforts of special groups and in turn ask for a contribution to policy formation and program evaluation. This recommendation will, however, not meet the needs for basic training for specific groups.

R.2. Administration

R.2.1. There are basic problems arising from the division of legislative and administrative powers in the area of criminal justice which have a specific impact on dispositions and sentences. Policing, prosecution, and imprisonment may occur on two or three jurisdictional levels. Although the outer limits of discretion as well as regional and systemic variations must be controlled by legislation, the report has major implications for policy formation within these limits. It calls for a number of innovations in the community, in policing, prosecution, and in the administration of courts and sentences.

R.2.2. The Community

Crime prevention, whether in its primary form of preventing criminal acts from occurring, in its secondary form of minimizing and repairing harm or in its tertiary form of re-integrating the offender, demands a community base. The choice of a given disposition or sentence depends to a large extent on what is available in a community and what the community is prepared to cope with.

We recommend: the setting up of citizens' justice councils in all communities: to facilitate dispositions which involve mediation and arbitration; to identify community needs that permit the useful application of community service orders; and to assist in those aspects of other sentences which call for support of the victim and the re-integration of the offender into the community. Although these councils should be set up on a local level, they will need organizational assistance from the provinces and federal assistance in terms of information sharing and piloting of new approaches.

R.2.3. The Police

The police has a major function in disposition-making through the use of discretion. The report calls for a recognition of this function and its embodiment in policy guidelines so that discretion can be exercised in a fair and equitable manner. The recognition and visibility of this function should also assist in the re-definition of the police as primarily a peace keeping body and only secondarily a law enforcement one; this fact is recognized in most police Acts but tends to be easily forgotten.

We recommend: that ministers responsible for policing charge their police commissions with the development of policy guidelines on the appropriate use of discretion. These guidelines should provide the framework for the development of specific instructions by police departments in relation to actual community resources. There is a role for the federal government in assisting in the development of model schemes.

R.2.4. The Prosecution

The prosecution does not only have a processing but also a screening function. There is a wide area of discretion in the charg-

ing process and pre-trial practices which has led to real if ill-defined concerns such as "plea bargaining." As in the case of the police, Crown discretion should be fully recognized and made visible.

We recommend:

(a) that the prosecution should be involved in the charging process. The office, status and function of the Justice of the Peace (which varies widely) needs re-examination;
(b) that the Attorneys General of the provinces and territories develop and publish policy guidelines for charging, pre-trial settlements and the conduct of prosecutions;
(c) that the office of the Crown attorney be provided with assistance to deal with pre-trial settlements and contacts with community resources.

R.2.5. The Courts

At the sentencing stage, the judge needs information over and above the evidence provided for the purpose of trial. Although the accused with the assistance of counsel should make submissions as to sentence and although the prosecution should make its own assessment for sentence known to the court, the judge must assure himself that the measures expressed in a sentence achieve the desired result. The court should have access to independent reports concerning the condition of the offender and the availability and nature of community and correctional services.

Before assuming office, judges should be required to undergo an orientation period to familiarize themselves with sentencing practices and the nature of services and institutions. They also have to remain aware of the nature of custodial and non-custodial facilities to which they commit offenders.

The expansion of the criminal justice system has occurred mainly in the area of police and corrections. Courts now account for only about ten per cent of criminal justice expenditures. We consider this to be an unhealthy imbalance. Although the question of re-organization of the courts and their services goes beyond the framework of this report, it must be stressed that the courts cannot adequately develop and carry out a sentencing policy such as outlined in this report. The requirements of justice must not be sub-

ordinated to those of policing or corrections. The criminal courts are, however, almost entirely dependent on those two services for information for the purpose of sentencing as well as the follow-up of sentence orders discussed in R.2.

We recommend:

(a) that the court be provided with its own service for the purpose of pre-sentence investigation;

(b) that judges appointed to sit in criminal cases be required to undergo a period of orientation in sentencing practices and in observing sentencing facilities;

(c) that the chief judge of each court convene periodic sentencing seminars and institutes;

(d) that judges make periodic visits to agencies and institutions to which they commit offenders;

(e) that judges be provided with sabbatical leaves to study in-depth matters relating to their duties, including the changes occurring in the community and in correctional practices, to develop innovative means for improving sentencing.

R.2.6. Administration of Sentences

Most of the sentencing options specified in the report require the court to continue its jurisdiction until completion of the sentence. The court should be assisted in this function by administrative staff and a service such as the present probation service. Orders such as good conduct orders, reporting orders and residence orders may be specified for a time and supervision of these orders may be performed by any member of the community so designated by the court. In orders such as restitution, community service and performance contracts, the court may specify conditions whose fulfilment would constitute completion of the sentence. These arrangements must be supervised and their completion, failure or variation should be subject to determination by the court.

Under a system of day-fines, fines have to be calculated on the basis of the offender's income. If time is given for payment, such payment has to be supervised and, in case of failure, the court

should determine whether it is wilful or results from inability to pay and vary the sentence accordingly. The court needs assistance in this task.

In sentences of imprisonment, the report recommends that the court specify reasons if a sentence of imprisonment is imposed. Imprisonment for wilful default of fines or other orders should be subject to the jurisdiction of the court until fines are paid or other conditions fulfilled or the sentence has run its course. Imprisonment for the purpose of denunciation should be under the jurisdiction of the courts and the courts will have to approve any variations of the sentence. Imprisonment for the purpose of separation, because it is predicated on the fact that the offender is a danger to the security of others, should be under the jurisdiction of the Sentence Supervision Board, except for that portion for which the court has specifically retained jurisdiction.

We recommend:

(a) that the court should have its own service for the exploration and follow-up of community based sentences. This service should also be charged with returning the offender to court in cases of non-fulfilment of conditions and with assisting the court in arriving at a determination of the reasons for non-fulfilment;

(b) the creation of a Sentence Supervision Board with jurisdiction over prison sentences of separation. The Board would regulate the conditions of restriction of liberty throughout the sentence, determine the progress of the offender through the various stages of restraint, determine the consequences of serious breaches of administrative regulations by the offender and make determinations on contested administrative decisions. The Board would replace the present Parole Board. Its membership could be similar to that of the Parole Board with the addition of members trained and experienced in legal decision making. Members should be appointed by the Governor General in Council for specified terms and should serve on a regional basis;

(c) that the two-year split in sentences of imprisonment between federal and provincial authorities be reconsid-

ered. (This recommendation has been a consistent feature of any report of this nature in the past). The division between federal and provincial custodial institutions, if maintained, should be along functional lines, as follows:

(i) sentences for wilful default should be under provincial jurisdiction since they are closely linked to community based sentences and constitute a last resort in those sentences;

(ii) sentences of separation because of the special conditions and their lengths should be under federal jurisdiction;

(iii) sentences of denunciation may be split on a time basis if the present situation prevails or may be left to the discretion of the court or placed under federal jurisdiction since this sentence would apply to offences which seriously undermine core values even though dangerousness may not be a factor.

(d) that the government of Canada enter into consultation and negotiation with the provinces to determine a realignment of institutional jurisdictions.

R.3. Legislation

At present, provisions governing dispositions and sentences appear not only in the Criminal Code of Canada but also in other federal statutes such as the *Penitentiary Act*, the *Prisons and Reformatories Act*, the *Parole Act* and provincial statutes governing legal and correctional services and institutions. Before giving an outline of legislative changes needed for the full implementation of this report, we should repeat, however, that many aspects of the report do not depend on legislative changes but on changes in attitudes and practices. Even where legislative changes are necessary, they must be based on a commitment to a coherent philosophy and policy. We believe that the report presents a framework for policy development and once such a policy is adopted by Parliament, a concerted effort can be made to translate this policy into legislative provisions.

We recommend:

(a) that the sentencing provisions in the Criminal Code of Canada be consolidated and redrafted according to the guidelines presented in this report. This may represent the first stage towards a Sentencing Code which sets out the principles and policy of dispositions and sentences in the criminal process as well as providing statutory provisions for sentence determination;

(b) that the government of Canada enter into consultation and negotiation with the provinces, through the Uniformity Commissioners, to determine specific changes in federal as well as provincial legislation with due consideration for the financial implication of any shift in function;

(c) that the government of Canada consider this Report in relation to the present plans for a Federal Corrections Agency to develop a legislative framework for the division of responsibility between the corrections administration and the proposed Sentence Supervision Board; that for this purpose the present Parole Board become involved much earlier in the development of sentencing plans, especially for serious cases, in preparation for the establishment of a Sentence Supervision Board;

(d) that the Parliament of Canada consider new legislative proposals affecting dispositions and sentences in the light of this report and determine whether such proposals are in accord with a consistent sentencing policy.

Outline of Legislative Changes

The following is an outline of the type of legislative changes that are either necessary or desirable to implement the proposals made in Parts II, III and IV of the Report.

The numbering and headings below correspond to those in the body of the Report.

II. Range of Dispositions

3. The Community: Crime Prevention

While legislation is not required to implement these proposals, federal and provincial enabling legislation, supplemented by agreements relating to shared cost, would facilitate and encourage the establishment and functioning of Citizens' Justice Councils.

4. The Police: Screening and Caution

While legislation is not necessary to implement these proposals, legislation along the following lines is advisable:

- The Code and provincial legislation relating to the police should specifically recognize the existence of police discretion in responding to crime, including the power to take no action, to issue a caution or a warning, or to screen cases for non-prosecutorial methods of disposition. The legislation could also require the police authorities to make and publish guidelines for the exercise of discretion.
- The Code and/or the *Canada Evidence Act* should be amended to ensure that information supplied and admissions made by the accused in the course of discussions concerning a pre-trial settlement cannot be used against him subsequently in judicial proceedings. Our proposed Code of Evidence contains such provisions.

5. The Prosecution: Pre-Trial Settlement

The present law permits pre-trial settlements, but to implement the proposals in the Report the following legislation should be enacted:

- The Code and provincial legislation relating to Crown prosecutors should specifically recognize that Crown prosecutors have discretionary powers to decide whether to prosecute a case or to seek a non-prosecutorial method of disposition, such as a pre-trial settlement.
- To facilitate the exercise of this discretion, the Code rules governing procedure before Court appearance should be amended to require the police to convey promptly to the Crown all relevant information once the police have decided

to lay a charge, and to empower the Crown for the purpose of seeking a non-prosecutorial method of disposition to withdraw charges laid by the police. Where charges are withdrawn by the Crown prior to court appearance the Justice before whom the information was sworn should be notified accordingly.

- The Code should specify that any disposition after court appearance, other than a simple termination of a prosecution, requires judicial approval.
- The Code should provide for the formal recording of the terms of a pre-trial settlement, and specify under what circumstances and within what period of time a case, once diverted for settlement by the police or the Crown, can be brought to court for prosecution.
- The Code and/or the *Canada Evidence Act* should be amended to ensure that information supplied and admissions made by the accused in the course of discussions concerning a pre-trial settlement cannot be used against him subsequently in judicial proceedings. Our proposed Code of Evidence contains such provisions.

6. The Court: Dismissal, Acquittal and Discharge

No legislation is required with respect to the court's power to acquit on the merits.

The Court's power to dismiss a charge upon the Crown's request for a withdrawal or for the Crown's failure to present evidence and the effect of such dismissal on subsequent proceedings should be clarified by Code rules governing these matters.

With respect to absolute and conditional discharges, the following amendments to the Criminal Code are indicated:

- Restrictions on the use of discharges in relation to an accused, other than a corporation, should be removed from section 662.1(1).
- Section 666 should be repealed. Where an accused is discharged upon the conditions prescribed in a probation order the wilful failure or refusal to comply with the order should

not amount to an offence unless such breach of the order constitutes an offence under the general law. Proof that the accused has breached a condition of the discharge should be sufficient to give the court jurisdiction to exercise the powers conferred by sections 662.1(4) and 664(4).

III. Range of Sentences

7. Good Conduct Order
8. Reporting Order
9. Residence Order
10. Performance Order
11. Community Service Order
12. Restitution and Compensation Orders

With some modifications these sentences are now possible as conditions of probation orders under section 663. The scheme we propose would preserve many features of the present system and change others. The legislative framework which we suggest for these sentences is as follows:

- The Code should recognize these orders as separate sentences so as to emphasize that each may serve a distinct, specified purpose.
- Where consistent in purpose, the accused may be subject to two or more of these orders as well as to some other type of sentence such as a fine.
- Where consistent with the purpose of the order it may be made subject not only to the conditions specified in the Report, but also to any other reasonable condition.
- To emphasize his personal responsibility, the accused should be required to undertake in writing to comply with the order.
- Section 666 should be repealed. Where an accused is bound by one of these orders, the wilful failure or refusal to comply with the order should not amount to an offence unless such breach constitutes an offence under the general law. Proof

that the accused has breached the order should be sufficient to give the court jurisdiction to exercise the powers conferred by sections 662.1(4) and 664(4), including the power to vary the terms of the order or to substitute a different sentence for the order.

- The Code should empower the court to appoint officials to supervise the carrying out of the order and to report to the court cases of default.

12. Restitution and Compensation Orders

~~Existing Code provisions relating~~ to restitution and compensation are not adequate for the purpose of implementing the proposals in the Report. The following legislation is required in addition to that outlined above:

- The Code should recognize restitution as a separate sentence, and not merely as an incidental benefit which may accrue to the victim through some other sentence.
- The Code should require the court to give consideration to this sentence so that priority is given to the interests of the victim.
- The Code should authorize the court to order a wide variety of forms of restitution appropriate to the circumstances of the offence, the offender and the victim. Restitution schemes involving the co-operation of the victim, should be subject to the victim's consent.
- The court, with the assistance of officials appointed by it, should be given the power to supervise and enforce compliance with the order. The victim should not be required to resort to the civil courts to enforce the order.
- Federal and provincial legislation and cost sharing agreements are required to empower the court, in the circumstances specified in the Report, to order the state to pay compensation.

13. Fines

Substantial legislative change is required to implement the Report's proposals on fines:

- The sentence of a fine should be available in all cases; present Code restrictions on the use of fines should be abolished.
- All fines above $50 should be computed on a "day-fine" basis.
- The court should not at the time of imposing a fine impose a term of imprisonment in default of payment.
- An administrative official appointed by the court should be empowered to calculate the "day-fine" unit, determine terms of payment, and investigate cases of default with a view to either extending time for payment or referring the case to court for other action.
- In cases of wilful default the court should after hearing be empowered to order attachment of wages or property, or to impose a prison sentence for default.

14. Imprisonment

To implement the imprisonment proposals in the Report a completely new legislative scheme is required.

Legislation governing the sentence of imprisonment should:

- Provide that imprisonment should be used as the sentence of last resort when no other sentence is appropriate.
- Provide that imprisonment should be imposed only to achieve one of the following three objectives:
  (a) separation of the offender for the protection of society;
  (b) denunciation of highly reprehensible behaviour;
  (c) penalizing those who have wilfully refused to comply with the conditions of other sentences.
- State the circumstances under which each of the three types of imprisonment (separation, denunciation and wilful default) may be imposed, and the maximum duration of each type of imprisonment for single and multiple offences.
- Specify which authority, the court or the Sentence Supervision Board as the case may be, has jurisdiction to super-

vise and review the sentence and the power to decide matters relating to leaves of absence and variations in levels of restriction.

- Require the court to give reasons for imposing a sentence of imprisonment.
- Abolish minimum prison sentences.
- Abolish preventive detention.
- Abolish statutory remission.

The legislation outlined above will require substantial amendment or repeal of existing statutory provisions in the Code, the *Prisons and Reformatories Act*, the *Penitentiary Act*, the *Parole Act* and complementary provincial legislation. Legislation to deal with complementary matters not discussed in the guidelines will also have to be enacted.

15. Hospital Order

Although medical treatment and transfer to hospital of prisoners and remands for medical examination are provided for under existing federal and provincial legislation, there is no provision for a hospital order as a sentence of the court.

Legislation is, therefore, required to implement this proposal.

IV. The Sentencing Process

16. Sentencing Proceedings

These guidelines could be implemented without legislation, but to ensure that sentencing is given proper consideration by the parties and the court, and to ensure that basic rules of fairness are observed; these guidelines on procedure should be put in legislative form in the Code.

17. Imposition of Sentence

In order to provide a uniform procedure applicable to all cases, the Code should be amended:

- To require the court to make specific findings on a preponderance of evidence on all factual issues relevant to sentencing.

- To require the court to state in the presence of the offender the precise terms of the sentence and the reasons for selecting that sentence.
- To require where possible the deferral of sentencing until all outstanding charges against the accused are disposed of, and to require where possible that the sentence cover all outstanding convictions and be integrated with any prior, unfulfilled sentence.

18. Pre-Sentence Reports

Pre-sentence reports may be requested by the court as a sentencing aid under the existing law. To implement the proposals in full, legislation is required:

- To make the receipt of pre-sentence reports mandatory before the court imposes a sentence of imprisonment.
- To provide that, in the discretion of the court, portions of the pre-sentence report may be withheld from the accused on one of the grounds mentioned in the guidelines.

19. The Sentencing Record

Legislation is advisable to ensure that a full record of sentencing proceedings is maintained, and that a copy of the record is transferred to correctional authorities as required.

20. Duties of Counsel

A Code amendment is required to implement the proposal that the prosecutor give timely notice to the defence of his intention to ask for a sentence of imprisonment.

The other proposals can be implemented more effectively through the rules of ethics of the bars than through legislation.

21. The Sentence Supervision Board

New legislation complementary to new legislation on imprisonment is required to:

- Abolish the Parole Board and repeal the *Parole Act*.

- Constitute the Sentence Supervision Board, and specify its powers and duties.
- Develop regulations and procedures for stages of restrictions of freedom and conditions for the progress of offenders from one level to another.
- Redefine the respective functions of federal and provincial penal institutions.
- Make consequential amendments to the Code, *Prisons and Reformatories Act, Penitentiary Act, Criminal Records Act,* and complementary federal and provincial legislation.

22. Development of Sentencing Criteria

Legislation should be enacted as part of the Code to authorize the pre-sentence meetings of judges proposed in 22.1. In the absence of statutory authorization such meetings might be challenged on the ground that they permit the sentencing judge to be influenced by submissions and arguments made in the absence of the parties, in a manner which deprives the parties of a fair hearing and the right of confrontation. Provisions also have to be made to privilege these discussions.

Appendix

A. Contributions

A great number of people and organizations have made an input into this report. An analysis of written presentations and responses has been completed by the Commission and seriously weighed in coming to conclusions in this report. There were also, however, innumerable discussions and meetings in our Working Papers, and organizations such as the John Howard Society and the Canadian Council of Churches have conducted community meetings. Other organizations such as the Canadian Criminology and Corrections Associations and the Canadian Psychiatric Association have established committees to respond to our Working Papers and provided us with a network of consultation. Government departments, in particular the Ministry of the Solicitor General, Statistics Canada and the Department of Justice have given a great deal of assistance and cooperation.

The Commission gratefully acknowledges all these contributions. We would also like to thank former Members of the Commission and our dedicated staff under the outstanding leadership of the Director of the Sentencing and Dispositions Project, Dr. Keith Jobson.

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B. Publications

The report is based on numerous internal and external documents filed in the Archives of the Commission and indicated in our Annual Reports. The following are those that have been published and are available through Information Canada.

Working Papers:

The Principles of Sentencing and Dispositions (#3 — 1974)
Restitution and Compensation (#5 — 1974)
Fines (#6 — 1974)
Diversion (#7 — 1975)
Imprisonment and Release (#11 — 1975)

Background Volumes:

Studies on Sentencing (1974)
Studies on Diversion (The East York Community Law Reform Project) (1975)
Studies on Imprisonment (1976)
Sentencing—Community Participation (1976)

Study Papers:

Native People and the Law (1974)
Decision to be Slightly Free (1976)
Fear of Punishment (1976)