

## PRINCIPLES AND OBJECTIVES OF CRIMINAL LAW

Memorandum by  
THE GOVERNMENT OF CANADA

**Introduction**

In August 1982, the Minister of Justice of Canada publicly released a major statement of government policy with respect to Canadian criminal law. This statement, entitled The Criminal Law in Canadian Society, is unique in Canadian experience in setting out an explicit statement of principles on the basis of which criminal law policy is to be pursued in the coming years.

2. More significantly, the statement will serve as a set of guidelines for the massive Criminal Law Review project recently launched by the Federal government, in co-operation with the Provinces.

**The Criminal Law Review : Background**

3. In Canada, constitutional responsibility for criminal justice is divided between the Federal and Provincial governments. The Federal Parliament has the overall jurisdiction to enact legislation with respect to criminal law and procedure and provide for the establishment and maintenance of penitentiaries (where sentences of two years or more are served), while the Federal Government has power to appoint superior and county court judges. The Provincial legislatures, for their part, have jurisdiction over the "administration of justice", and for the establishment and maintenance of prisons (where sentences of less than two years are served). They may also provide for the imposition of punishment to further the enforcement of Provincial law. Provincial Attorneys-General prosecute offences under the federally-enacted Criminal Code.

4. As a result of this constitutional arrangement, the Federal Government and more specifically the Federal Minister of Justice, carries primary responsibility for proposing legislation relating to criminal law.

5. In the past few years, the combined effect of a number of factors convinced both the Federal and Provincial governments that priority had to be given to the complex job of overhauling Canadian criminal law. Canada, like other Western post-industrial nations, has experienced in the past two decades a continued growth in traditional "street" crime, growing public concern about the apparent breakdown in social controls (especially as shown in rising violent crime), the emergence of new forms of sophisticated white collar and organised crime, escalating costs for the criminal justice system and growing doubts about its effectiveness, recurring problems in prisons and penitentiaries, and intensified debates about the proper point of balance between civil liberties and individual rights on the one hand, and powers granted to criminal justice agents to prevent and detect crime on the other hand.

6. In this climate, doubts came increasingly to be raised, not only about specific aspects of the statutes of the criminal justice system, but also about the basic assumptions and orientation of the criminal law as a whole.

7. While these doubts have been brought into sharper focus in the past decade, they represent the culmination of many years of commissions, inquiries and committees which have examined various elements of the Canadian system of justice since Confederation.

8. By 1969, the Report of the Canadian Committee on Corrections (Ouimet Report) felt it necessary to recommend "that the Government of Canada establish in the near future a Committee of Royal Commission to examine the substantive criminal law".

9. In 1970, Parliament responded by enacting legislation establishing the Law Reform Commission of Canada, whose mandate ranged from "the removal of anachronisms and anomalies in the law", to "the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society". The Minister of Justice of the day made the suggestion that "the Commission should have a complete re-writing of the criminal law as

one of its first projects", in light of his view that "the Criminal Code of Canada... is in need of thorough housekeeping, thorough revision not merely in the lawyer's law as it applies to the Criminal Code, but also in many of the Code's social aspects".

10. Over the past nine years, the Commission has published eight formal reports, eighteen working papers and a host of studies with respect to various aspects of substantive criminal law and criminal procedure. Some of this work related to specific and fairly technical matters, while other elements were concerned with basic questions of philosophy and principle.

11. In October 1979, some twenty Federal and Provincial Ministers responsible for the various aspects of the criminal justice system in Canada met in Ottawa and unanimously agreed that the process of reform should be accelerated.

12. As a result of that agreement, a detailed proposal was developed by the Federal and Provincial governments to launch an accelerated review aimed at expediting the enactment of a modern, responsive and effective Canadian criminal law.

#### **The Criminal Law Review : Process**

13. Beginning with recommendations from the Law Reform Commission, the Federal government - in cooperation with the Provinces - will systematically examine all aspects of Canadian criminal law. By the end of 1985, the Law Reform Commission is scheduled to complete work on more than fifty individual projects addressing the substantive and procedural aspects of the law. The Federal government will analyse these findings and present proposals to Parliament in logically-connected policy groupings, to enable the coordinated and timely implementation of the Review process. The Federal Minister of Justice carries overall responsibility for the review.

14. The process will take the form of three separate but complementary phases with respect to the 50 projects involved :

Phase I (research and recommendation) is basically the responsibility of the Law Reform Commission of Canada. For each topic, the Law Reform Commission will produce two major publications: a working paper which identifies issues and explores options, and a final report which makes recommendations. Appropriate consultation is undertaken during this phase with Federal and Provincial government departments, the judiciary, the Bar and other groups and individuals.

Phase II (governmental consideration) involves formal examination of the recommendations by the appropriate Federal departments (principally the Department of Justice and the Ministry of the Solicitor-General), in terms not only of legal implications of these recommendations but also in terms of overall Federal policy and Federal-Provincial considerations. The federal government also formally consults provincial governments and other groups during this phase. As a result of this process of examination and consultation, Cabinet is approached with recommendations regarding legislative and/or administrative action. In order to expedite the Review, provision is made for incremental implementation as work is completed on discrete areas of the law, as opposed to implementation only when all aspects of the Review have been completed.

Phase III (implementation) consists of Parliamentary consideration of legislative proposals or administrative changes requiring budgetary allocation, and executive implementation of changes. Parliamentary consideration carries the possibility of further public consultation before Committees, when appropriate.

#### **The Criminal Law In Canadian Society**

15. In approving the Criminal Law Review, Cabinet instructed the Minister of Justice to submit a statement of principles and objectives which would serve to give overall guidance to the Review process, as it moves to consider the myriad of more specific issues that must be addressed in the context of the individual projects.

16. The Criminal Law in Canadian Society was prepared in response to that decision, and is aimed at accomplishing three major goals:

- (a) to give Canadians a summary outline of the context in which criminal law policy should be viewed;
- (b) to articulate a statement of the appropriate scope, purpose and principles of criminal law, on the basis of a discussion of its basic nature and philosophical underpinnings; and
- (c) to give an indication of the general implications of endorsing the statement of scope, purpose and principles, in order to provide guidance for the more specific decisions that must be taken as the Review process evolves.

17. In essence, the general theme of the document can be seen as an endorsement of the fundamental approach to criminal law adopted by the Law Reform Commission and the Canadian Committee on Corrections (Ouimet Committee). This approach calls for restraint to be employed in the use of criminal law and the criminal justice system, on the basis of a conception of the criminal law as the ultimate point along the spectrum of society's informal and formal methods of dealing with conduct.

18. Issued at the outset of the complex Review process, The Criminal Law in Canadian Society is intended to focus discussion and debate by offering a framework of general principles to which reference can be made.

19. Annex A is a five page Executive Summary of the document. More information about the review may be obtained from :

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CANADA K1A 0H8

ANNEX A

## THE CRIMINAL LAW IN CANADIAN SOCIETY

### Executive Summary

Part I outlines the background of the Criminal Law Review and identifies the aims of this paper, which are to :

1. Provide Canadians with a summary outline of the context in which criminal law policy should be viewed;
2. Articulate a statement of the appropriate scope, purpose and principles of criminal law, on the basis of a discussion of its basic nature and philosophical underpinnings; and
3. Give an indication of the general implications of endorsing the statement of scope, purpose and principles, in order to provide guidance for the more specific decisions that must be taken as the Review process evolves.

Part II analytically discusses crime trends, various explanations offered for the phenomenon of crime, and the policy response made to crime by governments over the past several decades.

The Canadian experience is seen as similar to that of most western democracies, with respect to :

- . the vastly expanded scope of "criminal law", taken in its broad sense, that has accompanied growth in public sector involvement in the economic and social spheres;
- . the large growth in crime, especially in the last two decades, as the post-war baby boom passed through adolescence into early adulthood;

- . the dedication of increasingly large amounts of public sector resources to criminal justice system activities, especially police;
- . the existence of conflicting pressures to further expand resources to offer protection on the one hand, and to tighten up or re-allocate resources in view of financial constraints and doubts about the efficacy of traditional justice system activities on the other hand;
- . the trend to rely much less on imprisonment as the primary sanction for many forms of non-violent property crimes, while maintaining or increasing the severity of sentences for offenders involved in crimes of violence;
- . the propensity of the Canadian justice system to respond to crime by a greater overall use of imprisonment compared to the justice systems of many similar countries; and
- . the growing recognition of the interrelatedness of the criminal law and the various components that constitute the criminal justice system, combined with continued or increased sensitivity to issues of intergovernmental jurisdiction .

Many of these factors will continue to influence the general shape of future events.

Part III identifies seven major concerns that encompass the wide range of specific criticisms, problems and complaints with respect to criminal law and the criminal justice system. These concerns involve :

1. The effectiveness of the criminal law in combatting crime and correcting offenders;
2. Enhancing the effectiveness of preventive measures and alternative measures less coercive and intrusive than the criminal law;
3. The proper role of the victim in the criminal law, and the victim's needs and treatment in the criminal justice system;
4. The balance between powers granted to criminal justice agents and the rights and liberties of individuals;
5. Accountability in the exercise of discretion and in the use of public resources to achieve objectives;
6. Sentencing and post-sentencing processes; and
7. The proper scope of the criminal law, the proper purpose of the criminal law, and the distinctions that should be made between the criminal law and other types of law or social measures.

Part IV addresses the underlying question of the proper scope, purpose and objectives of the criminal law, by distinguishing four subsidiary issues:

1. With respect to the purpose of the criminal law, the paper concludes that:
  - . the criminal law and the criminal justice system must pursue two major sets of purposes - "justice" and "security";
  - . criminal sanctions, whether justified in terms of utilitarian or retributive aims, are primarily punitive in nature, and are understood as such both by society and by those on whom they are imposed;
  - . acceptance of retributive justifications for punishment implies neither rejection of utilitarian justifications for punishment, nor the acceptance of harsh, cruel or vindictive forms or levels of punishment. Indeed, the retributive approach acts as a brake, in setting a maximum permissible limit on punishment that might otherwise be subject to no such limit in its pursuit of various utilitarian goals such as deterrence, incapacitation, or even rehabilitation. This distinguishes the concept of retribution from that of vengeance; and

- . the necessity of pursuing these twin, and sometimes-conflicting, purposes requires an approach to be developed for defining the proper point of balance.
2. With respect to the proper scope of criminal law, the paper concludes that:
    - . it makes sense to distinguish between the criminal law and other forms of social control;
    - . the major criterion for determining what conduct merits response from the criminal law is whether the conduct causes or threatens serious harm to individuals or society; and
    - . any such "criteria" are in reality only guidelines, because their necessarily general level of abstraction always leaves room for interpretation, and because the judgment of Parliament on what conduct is to be treated as criminal cannot be bound by anything other than constitutional limits.
  3. With respect to the concepts of responsibility and blame, the paper concludes that:
    - . it is vital to retain a standard of responsibility and fault in the criminal law because of the impact of the criminal process and criminal sanctions.
    - . it is important to define clearly the standard of responsibility required by each criminal offence; and
    - . it is not desirable to confine the criminal law to acts committed by individuals against other individuals; rather, it is advisable to provide for the liability of organizations, and individuals acting within organizations, where serious harm to an individual or to the general good is caused or threatened.
  4. With respect to the limits on the powers and sanctions of criminal law, the paper concludes that:
    - . the principles of justice, necessity and economy should be considered in determining the means that may legitimately be employed by the criminal law and the criminal justice system to effect its ends;
    - . justice may require the criminal law to respond to some conduct -anything less would be inappropriate;
    - . the substantive and procedural limiting principles well known to criminal law act as restraints on the extent to which the law and the system may legitimately pursue the "security" objectives;
    - . it is unjust to go beyond the minimum intervention necessary for an adequate and appropriate response to be made to criminal conduct -both from a utilitarian and a retributive perspective; and
    - . the tension that results between the justice and security objectives requires the criminal law to strike a delicate balance.

In summary, the criminal law has the positive objectives of contributing to the promotion of a just, peaceful and safe society: "justice" and "security" objectives. Its role in pursuing the "security" objectives is limited by application of the principles of justice, necessity and economy - principles which reflect the concept of criminal law as society's ultimate recourse along the spectrum of informal and formal means for influencing and responding to conduct. These principles restrict the appropriate scope of the criminal law to conduct which is culpable, seriously harmful, and generally conceived of as deserving of punishment. They restrict the appropriate form and amount of powers and sanctions by virtue of well-recognized legal rights, largely of a procedural nature; and by the presumption against any intrusion into individual rights and freedoms, unless a burden of proof can be discharged by the state which demonstrates on reasonable factual grounds that such intrusion is necessary. Furthermore, the intrusion must not exceed the minimum necessary and adequate in the circumstances.

## **Statement of Purpose and Principles**

### Recognizing that :

In the Charter of Rights and Freedoms, Canada has guaranteed certain rights and freedoms consonant with the rule of law and with principles of justice fundamental to a free and democratic society;

Canada has, in addition, undertaken international obligations to maintain certain standards with respect to its criminal justice system;

The criminal law is necessary for the protection of the public and the establishment and maintenance of social order;

The criminal law potentially involves many of the most serious forms of interference by the state with individual rights and freedoms; and

Criminal law policy should be based on a clear appreciation of the fundamental purpose and principles for the criminal law;

It is appropriate to set forth a statement of purpose and principles for the criminal law in Canada.

### Purpose of the Criminal Law

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

### **Principles to be Applied in Achieving this Purpose**

The purpose of the criminal law should be achieved through means consonant with the rights set forth in the Canadian Charter of Rights and Freedoms, and in accordance with the following principles:

- (a) the criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose;
- (b) the criminal law should clearly and accessibly set forth:
  - (i) the nature of conduct declared criminal;
  - (ii) the responsibility required to be proven for a finding of criminal liability;
- (c) the criminal law should also clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process;
- (d) unless otherwise provided by Parliament, the burden of proving every material element of a crime should be on the prosecution, which burden should not be discharged by anything less than proof beyond a reasonable doubt;
- (e) the criminal law should provide and clearly define powers necessary to facilitate the conduct of criminal investigations and the arrest and detention of offenders, without unreasonably or arbitrarily interfering with individual rights and freedoms;
- (f) the criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others;
- (g) wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for :
  - (i) opportunities for the reconciliation of the victim, community, and offender;
  - (ii) redress or recompense for the harm done to the victim of the offence;
  - (iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community;

- (h) persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar;
- (i) in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances;
- (j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;
- (k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure;
- (l) wherever possible and appropriate, opportunities should be provided for lay participation in the criminal justice process and the determination of community interests.

Part V explains some of the implications of the proposed statement of objectives and principles, taking each of the elements of the statement in turn. The specific recommendation of the Law Reform Commission of Canada that a clear distinction be drawn between "real" crimes and other offences is endorsed in principle in the policy statement. The need is identified, in this context, to direct attention to a number of issues not explicitly addressed by the Law Reform Commission, in order to achieve the most effective and appropriate distinction in light of concerns about practical matters of administration, enforcement, and statutory location. Since approximately 300 Federal statutes create offences, only a small proportion of which would be seen as "real" crimes, the implementation of this recommendation will have to be undertaken on an incremental and long-term basis, primarily through consideration by individual departments of the particular statutes they administer.

Part VI summarises and concludes the paper by reiterating the importance of employing the concept of restraint in addressing the specific criminal law issues to be addressed over the next several years by the Criminal Law Review. The ability to conclude the overall process with a criminal law that is credible, effective and reflective of the interests and values of Canadians requires the understanding and support of the public at large. For this reason, comment and reaction to the concepts put forward in this paper is invited.