



ARCHIVED - Archiving Content

Archived Content

Information identified as archived is provided for reference, research or recordkeeping purposes. It is not subject to the Government of Canada Web Standards and has not been altered or updated since it was archived. Please contact us to request a format other than those available.

ARCHIVÉE - Contenu archivé

Contenu archivé

L'information dont il est indiqué qu'elle est archivée est fournie à des fins de référence, de recherche ou de tenue de documents. Elle n'est pas assujettie aux normes Web du gouvernement du Canada et elle n'a pas été modifiée ou mise à jour depuis son archivage. Pour obtenir cette information dans un autre format, veuillez communiquer avec nous.

This document is archival in nature and is intended for those who wish to consult archival documents made available from the collection of Public Safety Canada.

Some of these documents are available in only one official language. Translation, to be provided by Public Safety Canada, is available upon request.

Le présent document a une valeur archivistique et fait partie des documents d'archives rendus disponibles par Sécurité publique Canada à ceux qui souhaitent consulter ces documents issus de sa collection.

Certains de ces documents ne sont disponibles que dans une langue officielle. Sécurité publique Canada fournira une traduction sur demande.



Solicitor General
Canada

Ministry
Secretariat

Solliciteur général
Canada

Secrétariat
du Ministère

POWERS AND RESPONSIBILITIES OF CORRECTIONAL STAFF

Correctional Law Review
Working Paper No. 6

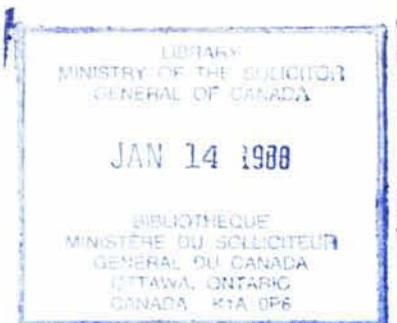
Canada

Powers and Responsibilities of Correctional Staff

Responsabilités du personnel correctionnel

KE
9410
C61
no. 6

KE
9410
C61
no.6



POWERS AND RESPONSIBILITIES OF CORRECTIONAL STAFF

**Correctional Law Review
Working Paper No. 6
October 1987**

Copyright of this document does not belong to the Crown.
Proper authorization must be obtained from the author for
any intended use.

Les droits d'auteur du présent document n'appartiennent
pas à l'État. Toute utilisation du contenu du présent
document doit être approuvée préalablement par l'auteur.

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

CORRECTIONAL LAW REVIEW

Working Group:	Alison MacPhail Gordon Parry Karen Wiseman Robert Cormier Howard Bebbington	Chair National Parole Board Correctional Service of Canada Secretariat of the Ministry of the Solicitor General Department of Justice
Project Team:	Alison MacPhail Joan Nuffield Paula Kingston Helen Barkley Marlene Koehler	Co-ordinator
Principal Researcher:	Helen Barkley	

PREFACE

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

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

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

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

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

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

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

Please send all comments to:

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

EXECUTIVE SUMMARY

INTRODUCTION

Recognizes the central role of staff in the achievement of both short-term security goals (prevention of escapes and maintaining order and safety in institutions) and the long-term goal of the re-integration of offenders into society. The normal day-to-day operations of an institution proceed on a consensual basis, but in certain circumstances staff may require powers to enable them to meet security needs.

The introduction also recognizes the shared interest that staff and inmates have in a safe, secure environment and the close connection between staff powers and individual rights. It sets out the principles which should be relied upon in defining staff powers.

PART I

Examines the mandate of the correctional agency and the duties and responsibilities currently imposed on staff by law. It then reiterates the statement of purpose for corrections developed in the Correctional Philosophy Working Paper and seeks to determine the activities staff must perform in order to achieve this purpose. The paper focuses upon the tasks carried out by correctional/living unit officers, who have the most direct contact with inmates, and who are the staff primarily responsible for the security of institutions. This part emphasizes the complexity of the correctional officer role, and then goes on to discuss certain tasks which may require the use of a staff power or the use of force.

PART II

Examines the current rules authorizing staff powers, which include specific provisions on search and dissociation in the Penitentiary Service Regulations, and the more general

provisions of the Criminal Code conferring peace officer powers on members of the correctional agency who are designated peace officers. Concerns about the general granting of peace officer powers in the penitentiary setting are raised. After considering the unique mandate of corrections, this part concludes that the current method of providing powers to staff through the granting of peace officer status should be reconsidered. It is in the interests of staff, inmates and the system as a whole that correctional legislation clearly provide necessary staff powers and any limits on them.

PART III

Discusses the use of force by correctional staff by examining the current rules relating to all public officials, and then exploring situations unique to the institutional setting - prevention of escapes, major disturbances, and enforcement of prison rules. Specific provisions regarding the use of force are recommended, both in regard to the circumstances which justify the use of force and how much force may be used. Post-incident reporting procedures are also proposed.

The related issue of protections for bona fide mistakes of correctional staff in their use of force and staff powers is also discussed in this part. It is concluded that the content of the present law is appropriate, but that for the sake of clarity, certainty and accessibility, the protections should be set out in correctional legislation.

PART IV

Examines accountability of staff, particularly in relation to the use of force and staff powers. It discusses current internal mechanisms such as administrative directives, Inspector General's Branch, Code of Conduct, and Inmate Grievance Procedure. External means of accountability include the Correctional Investigator's Office and the courts. The concept of a public Complaints Review Committee is explored and a proposal is made for the incorporation of parts of the model in an expanded mandate for the Correctional Investigator.

CONCLUSION

Reiterates the importance of correctional staff in carrying out the mandate of the correctional agency and working towards the overall purpose of corrections - that of contributing to the maintenance of a just, peaceful and safe society.

TABLE OF CONTENTS

	<u>page</u>
PREFACE	i
EXECUTIVE SUMMARY	iii
INTRODUCTION	1
PART I THE MANDATE OF THE CORRECTIONAL AGENCY	7
PART II AUTHORIZATION OF STAFF POWERS	13
PART III THE USE OF FORCE AND PROTECTIONS FOR STAFF	18
Self Defence	20
Defence of Property	21
Advancement of Justice	21
a) Prevention of Escapes	24
b) Major Disturbances	25
c) Enforcement of Prison Rules	26
Provisions Regarding Use of Force	27
Protections	30
Provisions Regarding Staff Protections	34
PART IV ACCOUNTABILITY	35
Internal Administrative Procedures	36
Inspector General	36
Code of Conduct and Staff Discipline System	37
Inmate Grievance Procedure	37
The Courts	38
Complaint Review Committee	39
Correctional Investigator	41
Provisions Regarding Correctional Investigator	42
CONCLUSION	43

	<u>page</u>
ENDNOTES	44
Appendix A: List of Working Papers of the Correctional Law Review	46
Appendix B: Position Descriptions for Correctional Officer and Living Unit Officer	47
Appendix C: Staff Powers - <u>Penitentiary Service Regulations</u>	52
Appendix D: Peace Officer Powers and Protections - <u>Criminal Code</u>	54
Appendix E: Summary of Recommendations	66

POWERS AND RESPONSIBILITIES OF CORRECTIONAL STAFF

INTRODUCTION

The Correctional Law Review has as its purpose the review of current legislation governing corrections, and the development of new legislation which in form and substance reflects Canadian correctional philosophy and facilitates the attainment of correctional goals and objectives. Such legislation should be clear and unambiguous, give appropriate guidance to staff, and be perceived as fair and reasonable by all concerned. The interests of the public, correctional administrators and staff, and offenders must all be taken into account. In this paper, issues that arise in relation to the powers of staff working in the federal correctional system are addressed.

It is well recognized that correctional staff wish to work in an environment that is as safe as possible and to avoid unnecessary confrontations with inmates. Staff prefer that their routine, daily interaction with inmates be cooperative rather than filled with hostility and distrust. Indeed, both staff and inmates need and desire personal safety, a decent environment in which to live and work, reasonable and respectful treatment by others, and a less tension-filled atmosphere. These practical and personal concerns are thoroughly consistent with public protection, safety, security and control.

In this regard, it has been pointed out that the security, control and public protection provided by prisons cannot be achieved simply through the use of locks, walls, fences, bars, gates or electronic surveillance - these are only tools. The principal way in which security, control and public protection are provided is by correctional staff interacting in constructive ways with the people they supervise.¹

In practice, institutions run essentially on a consensual basis most of the time - inmates know the rules and will generally abide by them. Inmates go peacefully and voluntarily to work, participate in educational or recreational

programs and return voluntarily to their cells at night. Staff for the most part need only give general or specific direction to inmates to ensure that rules are obeyed. However situations do occur where staff may require exceptional powers in order to meet the security needs of the institution - force may be required to prevent assaults on other inmates or staff; staff may need to search for weapons or drugs; a violent inmate may need to be dissociated from the rest of the prison population; or force may be necessary to prevent an escape from the institution.

At the same time, the long-term goal of the re-integration of offenders into society must not be forgotten. As discussed in previous working papers, in order to achieve this goal, offenders should be treated in a humane and fair way which recognizes their rights and freedoms while still permitting correctional authorities to maintain security and control. If the correctional system hopes to engender in offenders a respect for other people and property in Canadian society, it should strive to achieve an environment that operates through clear rules, structured decision-making, and fair treatment. Particularly important is the role played by staff in applying the rules and in their general demeanour towards inmates.

This paper will discuss the role of staff in the federal correctional system by first looking at the overall mandate of the correctional agency and then turning to the actual activities performed by staff in order to achieve that mandate. The discussion centres mainly on the role of the correctional/living unit officer, due to the importance of that position in maintaining the security of the institution, providing basic services to inmates and having the most direct contact with them.

Next the paper discusses the nature of staff powers and the central issue of whether correctional staff need peace officer status, or whether specific powers and protections should be set out in correctional legislation. For the purposes of this paper, the word "power" is being used not in a broad sense but in the more narrow legal sense of a specially created exception to the normal law applying to individuals. This exception enables an official such as a

staff member to do something, such as search a person, that an individual is normally forbidden to do by the civil or criminal law. Because powers allow officials to do what is usually prohibited, they conflict with important individual rights ordinarily protected by law such as the right to security of the person, privacy, and so on, and should therefore be carefully scrutinized.

The question of the appropriateness of staff powers in this context implies two things: that the powers granted to staff are sufficient and necessary to the performance of their duties (and thus the achievement of their mandate), and that the powers are consistent with the principles underlying our criminal justice system. These principles are expressed in the Charter, in The Criminal Law in Canada Society (CLICS) and in our proposed statement of purpose and principles for corrections.

The underlying theme of restraint in the CLICS document is of particular relevance to staff powers. The doctrine of restraint in the use of the criminal law and in the criminal justice system implies that an offender should be incarcerated in the least restrictive environment possible, and that state intervention, such as in regard to staff powers, should only be authorized to the degree necessary. In addition, CLICS recognizes the need to explicitly and clearly define necessary peace officer powers in law.

Our statement of purpose and principles of corrections is also relevant. One aspect of the statement of purpose - providing the degree of custody or control necessary to contain the risk presented by the offender - recognizes the short-term security concerns in the correctional setting and the need to prevent escapes, control contraband and ensure the safety of staff and inmates. These elements of the purpose may, in certain instances, require the use of staff powers. Other aspects of the purpose of corrections discussed above, - namely, encouraging offenders to prepare for eventual release and successful re-integration into society, and providing a safe and healthful environment to offenders which is conducive to this goal - recognize the long-term goals of the system, and that society's long-term interests would be best protected if the correctional system

has the effect of influencing offenders to begin or resume law-abiding lives. Staff have a critical role to play in this regard, and in regard to the attainment of the correctional system's overall purpose and objectives. To this end, and as suggested above, clear rules, structured decision-making and an atmosphere of fairness and openness will all be important.

Our discussion of staff powers takes place in the context of other projects examining various aspects of powers of peace officers and other officials. The Police Powers Project of the Criminal Law Review is particularly concerned with the question of the attachment of the full range of police powers to peace officers, whereby anyone so designated (such as a correctional staff member) is given all of the powers of a peace officer. An ancillary concern of that project is the propriety of police officers having powers outside the realm of criminal law enforcement, for instance, in regard to regulatory matters.

Another project, called Federal Law Enforcement Under Review (FLEUR), has been examining the federal law enforcement system to develop proposals to ensure that enforcement agents of the federal government possess powers appropriate to the effective discharge of their law enforcement responsibilities. It should be noted that correctional staff were not included in that review as they did not fit within the project's definition of law enforcement activity:

activity which goes beyond routine monitoring and inspection or the application of administrative sanctions, to include a range of police-like functions such as patrol, traffic law enforcement and the investigation of suspected offences which could lead to criminal prosecution under the Criminal Code or other federal statute.

In addition, studies and reports of the Law Reform Commission of Canada have criticized the remarkable proliferation of powers granted under federal statutes and have stressed the need for review of federal legislation.

It is important to note that correctional staff powers are examined in certain respects in Working Paper No. 5 of the Correctional Law Review, entitled Correctional Authority and Inmate Rights. Because powers such as search and seizure conflict with important individual rights of inmates such as the right to security of the person, privacy, the right to be secure against unreasonable search or seizure, and so on, they are dealt with in the discussion of inmate rights. In association with the work in the present paper, specific procedures to govern areas such as search and dissociation of inmates were developed in Working Paper No. 5 to provide guidance to staff. The proposals were formulated as statutory provisions in order to generate discussion about what legislative provisions might look like, what degree of specificity is appropriate and what impact the proposals might have on operations. Developing these procedures involved the careful balancing of individual rights of the inmate with legitimate security concerns of the institution, such as controlling contraband, preventing escapes, and maintaining order. The procedures are designed to provide staff with the powers necessary to carry out their duties, while restricting rights to the minimum extent necessary.

In defining staff powers we were guided by the following principles, which are consistent with principles developed by the FLEUR Project, as well as with CLICS and our own proposed statement of correctional philosophy:

1. Staff powers should be granted by law and should be clearly defined.
2. The purpose for which the power is granted should be clear and the power authorized should be necessary to the fulfillment of the agency's mandate.
3. In determining the appropriate staff powers for the correctional setting, the interests of staff, offenders and the public should be balanced.
4. To reduce potential arbitrariness and ensure fair treatment of individuals under sentence, controls on the use of staff powers should be established.

5. Physical force should only be used where there exists an immediate threat to personal safety, or the security of the institution or community, and there is no reasonable alternative available to ensure a safe environment. When force must be used, only the minimum amount necessary shall be used.

The working paper on Correctional Authority and Inmate Rights sets out specific procedures, based on these principles, to govern use of staff powers in certain situations. The present paper goes beyond specific procedures by examining general, yet critical, questions which relate to correctional staff powers. One important question concerns the general granting of powers. Another area of concern is the use of force: under what circumstances can force be used in exercising staff powers, and how much or what degree of force can be used? A further question to be considered is the degree to which the law should provide protection to staff in the exercise of their powers. Finally, the paper will discuss accountability mechanisms to ensure that safeguards and means of review are available in cases where abuse of staff powers is alleged.

PART I: THE MANDATE OF THE CORRECTIONAL AGENCY

Although the mandate of the Correctional Service of Canada is not specified in statute, certain duties and responsibilities of staff are specified in the Penitentiary Service Regulations. Section 3 stipulates the duty of each member of the Service:

It is the duty of every member to give effect, to the best of his ability, to the laws relating to the administration of penitentiaries in Canada and to use his best endeavours to achieve the purposes and objectives of the Service, namely, the custody, control, correctional training and rehabilitation of persons who are sentenced or committed to penitentiary.

Section 5(1) sets out the responsibilities of the institutional head:

The institutional head is responsible for the direction of his staff, the organization, safety and security of his institution and the correctional training of all inmates confined therein.

Furthermore, s.37 stipulates that "it is the duty of the institutional head to take all reasonable steps to ensure the safe custody of inmates committed to his care."

The Report on the Statement of CSC Values², released in November of 1984, proposed the following as a mission statement for the Correctional Service of Canada:

The Correctional Service of Canada, as part of the criminal justice system, contributes to the protection of society by exercising safe, secure and humane control of offenders while helping them become law-abiding citizens.

This mission statement and the guiding principles also proposed in the Report are reflected in CSC policy and are incorporated in the revised Commissioner's Directives.

The importance of a comprehensive statement of purpose for Canadian corrections was discussed in two Correctional Law Review Working Papers, Correctional Philosophy and

A Framework for the Correctional Law Review. Our proposed statement of purpose is as follows:

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

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

Given this statement of purpose, we now need to determine the activities which must be carried out by staff in order to fulfill the overall goal of contributing to the maintenance of a just, peaceful and safe society.

As in any community, there are numerous and diverse activities carried out every day in Canadian penal institutions, such as providing meals to inmates, supervising recreation, locking cells and administering psychological tests. There are a variety of staff performing these activities - the correctional officer who plays a central role in the security of the institution, treatment staff, recreation officers, food services staff, classification staff, health care officers, work supervisors, social development staff, and several levels of management staff. In the community are parole officers who supervise offenders on conditional release, do

community investigations and perform community development and public education functions.

Because correctional/living unit officers have the most direct contact with inmates and are the staff primarily responsible for the security of institutions, an examination of the variety of tasks carried out by them is undertaken below.

The current job descriptions for a correctional officer, maximum security institution (CX-COF-2), and a living unit officer (CX-LUF-1), who performs many of the security functions at most minimum and medium security institutions, are reproduced in Appendix B. The duties of a correctional officer are aimed at ensuring the security of the institution by maintaining surveillance over inmates by observing the activities of inmates from a security post or by periodic rounds of cells, by counting inmates at specific times and places, and by searching inmates for possession of contraband such as knives, firearms and drugs. Secondly, the correctional officer controls the movement of inmates and others by locking and unlocking doors, by counting and escorting inmates, inspecting inmate passes, screening and searching all vehicles and drivers entering prison premises and identifying and registering visitors. Another duty is to ensure the cleanliness and security of the assigned post by inspecting the area for cleanliness and repairs, supervising the cleaning of cells and kitchens, examining furniture, personal effects, windows and locks for evidence of contraband, destruction, or attempts to escape, checking for potential fire and safety hazards, ensuring that emergency equipment such as fire sirens, firearms and gas equipment are in good working condition, and by controlling the issue and return of firearms. Other duties include such activities as supervising bathing, dressing, and meals of inmates in segregation, admission and pre-release areas.

In living unit institutions, correctional officers are responsible for perimeter security, and central controls, and staff the institution at night, but have little contact with inmates. Living unit officers serve a control and supervision function by searching inmates, cells and rooms, counting inmates, regulating individual and group movement, gathering

and reporting information, and supervising inmate activities such as recreation.

The living unit officer role has an additional component - that of providing casework services to inmates. The living unit officer is required to establish effective interpersonal relationships to promote resocialization, act as referral agent for all requests, obtain detailed knowledge of inmates, participate in the analysis, planning and evaluation of individual cases, counsel inmates, and escort inmates in the community in preparation for release. Thus the living unit officer role combines two sets of goals - that of providing for the immediate security of the institution and all persons within it, and the long-term goal of the re-integration of inmates.

There is inherent conflict in living unit officers assuming a "treatment" role as well as a "custody" role. On the one hand, the living unit officer has come to be seen as a central and critical influence on the inmate by providing an example of effective leadership, and positive attitude, and by working as a personal counselor. On the other hand, the living unit officer is seen as the "heavy", the individual who enforces the rules of the institution, conducts searches, and who may be called upon to use force to maintain order. This inherent conflict in the living unit officer role reflects the complexity of corrections as a whole (an area which was addressed in the first two working papers). The Working Group believes that the complexity of corrections will always present some difficulties for staff, but that these difficulties can be diminished by a clear statement of correctional philosophy in legislation, clearly established role definitions and clear rules to structure discretion in decision-making processes.

Any discussion of staff roles must also be informed by the realities of prison life. Correctional officers are daily faced with a dangerous and frustrating job. The very nature of a penitentiary leads to tensions not usually found in the outside community. Large numbers of people, many of whom may be prone to violence or anger, are locked up in close quarters hour after hour with inadequate diversion and limited privacy. In prison problems such as personal

enmities, grudges and theft of property become magnified because of the closed nature of the institution. Correctional officers are often on the receiving end of inmates' frustrations and must be able to respond appropriately to all sorts of potentially dangerous situations.

For the purposes of our discussion, activities carried out by correctional staff can be divided into two general categories: a) providing for the security of the institution (including the safe custody of inmates); and b) the provision of services and programs to inmates. The provision of services and programs proceeds on a cooperative basis and does not require the use of force or exceptional powers for the effective delivery of the services. For example, inmates receive medical treatment, go out on temporary absence and participate in educational or recreational programs on a voluntary basis.

On the other hand, many of the security functions routinely performed by correctional and living unit officers may require the use of force or a staff power for their effective performance. These include such tasks as responding to unusual behaviour patterns, controlling inmate movement, protecting other staff, visitors and inmates, controlling visitors, maintaining internal security checkpoints, escorting inmates within the institution and in the community, initiating dissociation procedures, and using appropriate restraint equipment. All of these tasks could require the use of force under certain circumstances, although in the vast majority of situations, this will not be necessary. Nonetheless, staff must have the authority to use force in those unusual situations where an inmate's behaviour threatens the order of the institution or the safe custody of other inmates.

This section has reviewed the mandate of the correctional agency and highlighted many of the tasks which staff are called upon to perform in fulfillment of this mandate. Because of their central role in carrying out the security goals of the institution, we discussed the many-faceted duties of correctional/living unit officers, including listing a series of tasks for which exceptional powers may be

needed. We will now review the current rules authorizing staff powers and highlight some of the problems which exist with the present scheme.

PART II: AUTHORIZATION OF STAFF POWERS

At present, correctional staff powers are derived from two sources - the Penitentiary Act and Regulations, and the Criminal Code. The Penitentiary Act and Regulations provide a degree of direction in certain areas; for example, there is authority to search and to dissociate inmates. These provisions are reproduced in Appendix C. (These areas, together with a number of other significant areas, are discussed in detail in Working Paper No. 5 on Correctional Authority and Inmate Rights.)

At the same time, designated penitentiary staff acquire an array of exceptional powers by virtue of their inclusion as peace officers in Section 2 of the Criminal Code:

"peace officer" includes a member of the Correctional Service of Canada who is designated as a peace officer pursuant to the Penitentiary Act, and a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison other than a penitentiary as defined in the Penitentiary Act.

Section 10 of the Penitentiary Act further provides that:

The Commissioner may in writing designate any member or class of members of the Service to be a peace officer and a member so designated has all the powers, authority, protection and privileges that a peace officer has by law.

These provisions (recently amended by an Act to amend the Parole Act, Penitentiary Act, Prisons & Reformatories Act and the Criminal Code, S.C. 1986, c. 43) now permit correctional management to specify which correctional staff will have peace officer status. Currently the classes of members proposed for peace officer status are all employees in institutional settings, all operational officers in parole offices, Regional Deputy Commissioners and certain Headquarters staff.

However, the recent amendment does not address the basic issue surrounding peace officer status - is the general

granting of an array of exceptional powers appropriate for correctional staff, who have a unique mandate, or should necessary powers be specified in correctional legislation?

There are over 75 Criminal Code provisions, summarized in Appendix D³, which specify peace officer powers and protections and which automatically attach to peace officers. These powers were developed to facilitate enforcement of the criminal law in the community. They consist of powers to search and seize, wire-tap, arrest, and so on, all of which are necessary in order to investigate and prosecute criminal offences.

Different considerations apply in a correctional setting, where activities are geared towards preventing escapes, curbing violence and maintaining order in the penitentiary. What is necessary to the fulfillment of security goals in an institution will not necessarily coincide with peace officer powers found in the Criminal Code. Not only does the general granting of peace officer powers geared towards the role of the police result in corrections staff receiving powers that they do not need in carrying out their duties, but more importantly, it also means that in certain instances powers that they do need are not adequately authorized.

For example, the powers of arrest and release have very little application in the correctional context. Offenders are already being detained in a secure environment so there is no need for a further power to detain. If criminal charges are alleged, the service of process on the accused inmate would be sufficient. Since CSC policy on criminal offences⁴ is to have local enforcement agencies investigate and lay charges for serious offences, while minor offences are dealt with through the internal disciplinary process, there appears to be little need for this police power.

On the other hand, correctional staff do need the power to remove inmates to dissociation cells in certain circumstances, and reasonable use of force would be justified if necessary to carry out such authorized conduct. The appropriate authority does not flow from peace officer status, however, and must be specifically provided for in correctional legislation.

Another situation which must be considered is the arrest of visitors or staff suspected of committing an offence. Even without peace officer status, correctional officers could make arrests as ordinary citizens, where they find someone committing an indictable offence (s.449(1) Criminal Code). An ordinary citizen must, however, deliver the accused to a peace officer forthwith (s. 449(3)).

In practice, however, correctional staff do not engage in such law enforcement activities. Where correctional staff believe a visitor or other staff member has committed an offence, the local police will be summoned, who will then consider whether to lay charges or arrest the suspect. This distinction between the role of the correctional staff member and that of police officer is appropriate and should be maintained.

One situation where correctional officers might wish to arrest is where an escaped inmate is discovered in the community. However, the criminal offence of being unlawfully at large (s.133) is an indictable offence and a continuing one, for which any person may arrest without warrant if he or she finds someone committing the offence. Peace officer status is thus not necessary for correctional staff to arrest an escaped or escaping inmate.

Peace officer status (or other statutory authorization) is necessary to effect an arrest with a warrant. The one situation where correctional personnel may need a similar power to apprehend is where a parole officer suspends parole and wishes to apprehend the offender. However the suggestion that parole officers execute their own suspension warrants has been met with strong opposition within the Correctional Service since 1977 when the Parole and Penitentiary Services were integrated. Parole officers have always maintained that peace officer powers are incompatible with their most important role of assisting in the rehabilitation of the offender, and indeed this is not currently part of their function. There does not appear to be any pressing need to have parole officers execute their own suspension warrants, and this task may be more appropriately done by an agency charged with general law enforcement duties in the community.

The breathalyzer provisions in the Criminal Code (s.234-237), whereby a peace officer may require a driver to provide a breath sample, also seem inappropriate to the role of correctional staff. With the relatively infrequent exception of inmates driving farm or other institutional vehicles on penitentiary property, the only driving an offender is likely to do would be either on an unescorted temporary absence or parole and the enforcement of the criminal law in the community is already carried out by the local police force.

On the other hand, in certain circumstances corrections staff do need powers such as the power to demand a urine sample, which does not flow from peace officer status and the powers specified in the Criminal Code. This power must be specifically granted in correctional legislation.

Corrections staff need the power to search inmates and their cells on a controlled but regular basis. Yet the present search authorizations in the Criminal Code and the Penitentiary Service Regulations are inadequate in a number of ways. The provisions in the Criminal Code are directed at police investigations and are governed by the criminal law standard that requires reasonable grounds to believe an offence has been committed. In the corrections context, by contrast, necessary search powers are often more in the nature of an inspection or on-going monitoring of inmates in order to deter as well as detect illegal conduct. The criminal law standard would not enable such searches to be carried out because they are not related to the commission of a criminal offence. The Penitentiary Service Regulations provide in s.41(2) for a search power "where a member considers such action reasonable to detect the presence of contraband or to maintain the good order of an institution". As discussed in the working paper on Correctional Authority and Inmate Rights, this test is vague, ambiguous, does not provide sufficient guidance to staff, and may not be consistent with the Charter. More detailed provisions were therefore proposed in that paper.

Recognizing the difference between the duties of the police and of corrections staff points to the need for different powers to be clearly and adequately authorized for corrections staff. In summary, after considering the unique

mandate of the correctional agency, we conclude that the current method of providing powers to correctional staff through the granting of peace officer status should be reconsidered for a number of reasons.

First, in certain circumstances the powers that a corrections staff member may need to carry out his or her duties are either not authorized or not sufficiently set out in law. The general granting of law enforcement powers and the lack of comprehensive provisions in corrections legislation result in confusion as to whether a power is available, or how much force staff members may use in certain situations without opening themselves up to civil or criminal liability.

Second, the automatic conferral of expansive law enforcement powers upon corrections staff means that staff are provided with a wide range of powers that are inappropriate in a correctional setting, where their role is markedly different from that of a police officer in the wider community. This tends to lead to confusion on the part of staff as to their real duties and real role.

Finally, any psychological comfort which a staff member may lose with removal of peace officer status and the general granting of powers must be weighed against the advantage brought to correctional staff by having the powers that they need authorized, and the limit and extent of their powers clearly set out in law and easily accessible and understandable to them. The extent of staff powers is a matter which has serious consequences for staff members and the present problems in the law are not conducive to either a fair or effective correctional system. It is in the interests of staff, inmates and the system as a whole that correctional legislation clearly provide necessary staff powers and any limits on them. By doing so, the important, unique and difficult role of staff members is recognized and clarified.

PART III: THE USE OF FORCE AND PROTECTIONS FOR STAFF

As was discussed above, institutional operations and processes generally proceed on a consensual basis - inmates know the basic rules set down for their activities, and usually obey them. However, where exceptional powers must be used - for example, to search inmates suspected of possessing contraband, or to dissociate an inmate for disruptive behaviour - questions arise both in regard to the circumstances which justify the use of force and how much force may be used. In this section we seek to develop legal guidelines for the use of force, including deadly force, within a correctional institution.

Although the use of force by one individual against another is generally prohibited by both criminal law (assault, murder, etc.) and civil law (trespass to the person, assault, battery), its use is authorized for certain officials in carrying out their duties. This authorization in turn provides protection to officials should unlawful conduct be alleged. The persons subject to the use of force are also protected by the limits and procedures provided to define when and how it is permissible for force to be applied.

The central issues for corrections are to determine the circumstances under which the use of force should be authorized, the degree of force which is appropriate in different circumstances, and the extent to which staff should be protected from sanctions for making bona fide mistakes in the use of force. In addressing these issues it is necessary to examine the present standards governing use of force set out in the Criminal Code, and to consider whether these standards are appropriate in the corrections context or whether there is a need for applicable provisions in correctional legislation.

The present authorizations for the use of force and the protections given to officials are found in the Criminal Code and are reproduced in Appendix D. Section 25(1) sets out the general rule:

25(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer,
or,
- (d) by virtue of his office,

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

This section applies to every person (private person, public officer or peace officer) who is required or authorized by law to do something in the administration or enforcement of the law. Thus, correctional staff are included not because of their peace officer status, but by virtue of their office. Staff members relying on this section must act on reasonable and probable grounds (an objective test), and if they do, are justified in using necessary force in exercising their powers. Excessive force is punished by the ordinary rules of criminal liability:

26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

The courts looked at the purpose of s.25(1) in the case of Eccles v. Bourque:

... Whenever the Code confers a power to do a specific thing, s.25 does not confer a power to do any and everything that may assist or advance the exercise of the power. The purpose of s.25(1) is twofold: it absolves of blame anyone who does something that he is required or authorized by law to do, and it empowers such person to use as much force as is necessary for the purpose of doing it.⁵

The interpretation of the phrase "required or authorized by law" in s.25 was considered in the case of R. v. Berrie.⁶ In that case, line correctional officers were charged with assault after they had grabbed, handcuffed and forcibly shaved an inmate upon his refusal to obey their lawful order to shave. The accused officers relied upon s.25(1) of the Criminal Code, and argued that they used necessary force to

carry out the administration and enforcement of the Penitentiary Act, its Regulations, orders and directives. The court rejected this argument and noted that the accused guards were neither required nor authorized by law to shave the inmate, although the inmate was required to obey their lawful order. Since he would not, their only recourse was to charge him with a disciplinary offence under the Regulations. Although the use of force was not reasonable in forcing the inmate to shave, reasonable force could have been used to dissociate the inmate to await a disciplinary hearing.

With respect to the circumstances under which force can be used, the Criminal Code provisions embody the principle of necessity - that force may only be used where authorized and where no alternative means are available. There exist in our correctional system a number of incentives or sanctions for failure to comply with institutional regulations - loss of or failure to earn remission, loss of privileges, imposition of fines. Thus, for example, if inmates refuse to leave their cells one morning, staff members would have a number of alternative ways to deal with the situation, but forcibly removing inmates from their cells would not be one of them, because less intrusive means exist to deal with this situation.

Three justifications for the use of force are generally recognized: self-defence, defence of property and the advancement of justice. Although we are mainly concerned with the third justification, self-defence and defence of property will also apply in the prison context.

Self-Defence

The general rule on self-defence is contained in s.37 of the Criminal Code and states that unlawful force can be repelled by force which is necessary and proportionate in the circumstances. The rule includes not only defending oneself from assault but also "any one under his protection". Deadly force is also justified where the victim has a reasonable apprehension of death or serious injury and there are reasonable and probable grounds to believe there is no other way to preserve oneself. Whether the force used in self-defence is

excessive, and therefore unlawful, is a question of fact, and the courts will take into account all the circumstances. However, as has been noted in a number of cases, "a defending person cannot be expected to weigh to a nicety the exact measure of necessary defensive action."⁷

Defence of Property

The justification of defence of property is governed by ss.38-42 of the Criminal Code. Essentially it allows persons in peaceable possession of moveable property or real property to defend it against trespassers, as long as they use no more force than necessary. In the case of moveable property the possessor may not cause bodily harm to the trespasser. The Law Reform Commission recommends a simplification of the wording of the provisions and a restriction in all cases prohibiting the use of force likely to cause bodily harm.⁸ Although these general provisions could be applied to inmates with respect to their personal possessions, authority to use force to prevent destruction of government property must be justified as being necessary for the advancement of justice, as discussed below.

Advancement of Justice

The use of force for law enforcement is justified by the fact that the official is promoting a value explicitly recognized by law - by performing the duty imposed on him or her by law. As the Law Reform Commission notes, "the main problem in this context, then, concerns the drawing of the appropriate line between justifiable and unjustifiable use of force."⁹ It states that the present law is more complex than it needs to be and is contained in an undue number of sections. It recommends a general section on law enforcement which incorporates the objective standard of reasonableness and the principle of necessity. It also recommends a specific provision for the use of force in preventing escape from prison:

- 16(1) Subject to the provisions of this section, every one required or authorized by law to do anything in the administration or enforcement of the law is, if acting on reasonable grounds, justified in

doing it and in using no more force than necessary for that purpose.

- (2) Without restricting the generality of subsection (1), everyone is justified in
 - a) effecting lawful arrest,
 - b) preventing offences endangering life, bodily integrity, property or state security, and
 - c) using no more force than necessary for these purposes.
- (3) Every one required or authorized by law to execute a process or carry out a sentence is, if acting in good faith, justified under this section despite defect or lack of jurisdiction concerning such process or sentence.
- (4) No one is justified by this section in using force which he knows is likely to cause serious bodily harm except when necessary
 - a) to protect himself or those under his protection from death or bodily harm,
 - b) to prevent the commission of an offence likely to cause immediate and serious injury,
 - c) to overcome resistance to arrest, or to prevent escape by flight from arrest, for an offence endangering life, bodily integrity or state security, or
 - d) to prevent the escape of, or to recapture, a person believed to be lawfully detained or imprisoned for an offence endangering life, bodily integrity or state security.¹⁰

The Criminal Code authorizes only the minimum force necessary to achieve the given purpose. Generally, the criminal law requires that the force used be proportional to the harm to be avoided. In the correctional context this might well be illustrated by inmates who cause extensive property damage in their cells - the use of deadly force would clearly be a disproportionate response to this behaviour.

One final element to be considered in the use of force is the immediacy of the threat - for example, a hostage-taking incident poses a very grave threat of harm to the hostages, but an initial response of deadly force may not be justified, when a lesser measure such as negotiation or the use of gas may prevent further harm.

Therefore in determining the appropriate provisions for the use of force in the correctional context we will be guided by the principles of necessity, restraint, proportionality and immediacy of the threat.

In accordance with these principles, and in line with the goal of providing guidance to staff in carrying out their duties, clear provisions regarding the use of force should be set out in legislation. This would include definitions of deadly and non-deadly force and the circumstances under which each could be used. The purposes for which force may be used should be set out, and these purposes should relate to the security and order of the institution (or community). Staff should only be authorized to use the minimum force necessary to achieve their objectives. Controls such as prior authorization (for example, by the institutional head prior to the use of gas, or the use of deadly force in a hostage-taking incident), and full reporting after the use of force, are also required. Our 5th principle deals directly with physical force:

Physical force should only be used where there exists an immediate threat to personal safety, or the security of the institution or community, and there is no reasonable alternative available to ensure a safe environment. When force must be used, only the minimum amount necessary shall be used.

The following rule is proposed as a general rule to govern the use of force in the correctional system:

All correctional staff who are required or authorized by law to do anything in the administration or enforcement of the law are justified in doing it and using no more force than necessary for that purpose, where they act on reasonable grounds and where no reasonable alternative exists to ensure the security of the institution or the safety of inmates or other persons.

This general rule must be read in conjunction with other, more specific provisions regarding use of force in corrections. Special consideration must be given to three situations which do not normally occur in the community - preven-

tion of escapes, regaining control of an institution after a major disturbance, and enforcement of prison rules.

a) Prevention of Escapes

One of the clearest and most important duties of corrections staff is to prevent escapes. However, the justification for use of deadly force to prevent escapes raises complex questions.¹¹ Most case law dealing with the degree of force that is justified in preventing escapes from custody is based on principles developed in cases of escape from a police officer immediately following an arrest. Yet there is a difference between flight from arrest and flight from institutional custody that points to the need for different rules. In a flight from arrest, the arresting officer generally knows the crime for which the arrest is being made and can act accordingly. The corrections staff member may or may not know the dangerousness of the particular person whose escape is being prevented - indeed the identity of the person fleeing the institution may not be known. The doctrine of restraint means that the law ought not to authorize deadly force to prevent the escape of an individual whose offence and case history do not give an indication of violence or dangerousness. On the other hand, corrections staff cannot be expected to make instant identifications prior to taking preventive action.

The nature of the institution from which the offender is escaping is of some assistance here. According to the scheme used for classification of inmates, those considered likely to escape and to be dangerous if they do so are placed in the highest security levels. It would, therefore, be reasonable to have a presumption that an inmate escaping from a high-level security institution is dangerous; however, if the staff member knows that the particular person escaping is someone other than a dangerous inmate, deadly force would not be justified. On the other hand, in a medium or minimum security institution the presumption would operate the other way and deadly force would not be justified unless the staff member believes on reasonable grounds that the person escaping is dangerous.

It is important to also keep in mind the other condition: that there are reasonable grounds to believe that no less intrusive measure would be effective. Situations where deadly force is used to prevent an escape would be extremely limited, even where the escape is from a maximum security institution. If a staff member in one of the perimeter towers observes an inmate climbing over a wall or fence, there will usually be enough time to radio the perimeter vehicle or officers with guard dogs, and catch the inmate before he leaves institutional property. Non-deadly devices such as stun guns and chemical agents should be considered as alternatives to the use of firearms to assist in the prevention of escapes.

American models suggest that deadly force is justified to prevent escapes from institutions primarily used for the custody of persons convicted of felonies, or where it is necessary to prevent the commission of a felony, including escape.¹² However in at least one case¹³ the U.S. Court of Appeals declared a statute authorizing deadly force against fleeing felons to be unconstitutional as applied to non-violent fleeing felons.

In conclusion, the doctrine of restraint implies that in Canada, deadly force should only be authorized to prevent escapes from high-level security institutions, and only if the officer believes on reasonable grounds that no less intrusive measure will prevent the escape.

b) Major Disturbances

With respect to major disturbances, provision should be made for reasonable negotiation attempts and the use of non-deadly force prior to the use of deadly force, in accordance with the doctrine of restraint. At the same time, correctional staff clearly need authority to deal swiftly and appropriately with dangerous or volatile situations.

Although there are provisions in the Criminal Code governing unlawful assemblies and riots, again these are not entirely appropriate in the correctional setting. For example, commanding a group of inmates in the name of Her Majesty to disperse, and giving them 30 minutes to do so is clearly not

appropriate in the closed confines of an institution. Staff require authority to take immediate action to ensure the security of the institution.

At the same time, it would be desirable to ensure that prior authorization from a superior officer is received before using force likely to cause bodily harm. Authorization from the institutional head, and where possible the Deputy Commissioner of the region, before deadly force is used is consistent with a desire to ensure that such important decisions are taken in as considered a fashion as may be possible, given the constraints of a dangerous and possibly life threatening situation. Provisions specific to major disturbances would of course operate in conjunction with provisions authorizing force, including deadly force, in self-defence or to prevent harm to or the death of others.

c) Enforcement of Prison Rules

Maintaining discipline within an institution may in certain situations require the use of force. However, it is important to recognize the difference between use of force to force an inmate to obey an order and use of force to dissociate an inmate who refuses to discontinue unlawful conduct. It is in the latter situation that force may be justified, subject to authorization in law to dissociate. Dealing in this way with an inmate found violating a rule or refusing to obey a lawful order is similar to arresting a person believed to have committed an offence or who refuses to discontinue unlawful conduct.

As a general rule, physical force should not be used to require obedience to a rule or regulation of an institution. As previously noted, in R. v. Berrie¹⁴ correctional officers were convicted of assault when they grabbed and handcuffed an inmate and attempted to shave him against his will when he refused to obey their order to shave. The court held that the officers were not required or authorized by law to shave him although the inmate was under a duty to obey. The proper course would have been to charge the inmate with a disciplinary offence. The use of force in these circumstances was unreasonable to enforce a regulation of the institution.

On the other hand, corrections staff members are authorized by law to exercise certain powers, and they are justified in using reasonable force where necessary to exercise their powers. Thus any powers that may require the use of force should be specified in law. This approach provides guidance to staff and at the same time is consistent with s.1 of the Charter which states that limitations on fundamental rights (such as security of the person) must be "prescribed by law". Use of force where no alternatives exist should be authorized in legislation. For other institutional rules, compliance should be sought through incentives and disincentives such as inmate pay, remission, warnings, loss of privileges, or resort to the inmate disciplinary process.

The following provisions are proposed for inclusion in correctional legislation:

Use of Force

Objective

1. To maintain a safe and secure environment in institutions by the use of minimum force, where necessary.

Definitions

2. "Deadly force" is force which is intended or is likely to cause death or serious bodily injury.

"High-level security institution" is one in which a criterion for inmate placement is that an inmate must be judged to pose a significant risk of escape and of violent behaviour if at large.

"Major disturbance" is a situation where the day-to-day activity of the institution is disrupted to a significant degree by inmate violence or extensive property damage, and necessitates the placing of inmates in lock-up conditions.

"Non-deadly force" is force which is neither intended nor likely to cause death or serious bodily injury.

General Rule

3. Subject to the provisions of this part, all correctional staff who are required or authorized by law to do anything in

the administration or enforcement of the law are justified in doing it and using no more force than necessary for that purpose, where they act on reasonable grounds and where no reasonable alternative exists to ensure the security of the institution or the safety of inmates or other persons.

Deadly Force

4. Deadly force may only be used as a last resort and then only in the following circumstances:

- a) to prevent escape from a high-level security institution where the staff member believes on reasonable grounds that no less intrusive measure will prevent the escape;
- b) where the staff member believes on reasonable grounds that deadly force is necessary to prevent an act which would likely result in death or severe bodily injury to one's self or to another person; or
- c) upon the authorization of the institutional head, deadly force may be used to end a hostage-taking situation or major disturbance, where attempts at negotiation and the use of non-deadly force have failed to end the disturbance.

5. Wherever possible, the Deputy Commissioner of the region should be consulted prior to the authorization of the use of deadly force.

6. When deadly force is used, the following steps shall be undertaken:

- a) an immediate notification of its use shall be given to the Deputy Commissioner of the region and the police department having jurisdiction in the area;
- b) all injured persons shall immediately be given a medical examination and, where necessary, treatment; and
- c) a report written by the staff member(s) using the deadly force shall be filed with the above-noted officials. Such reports shall include:

- i) an account of the events leading to the use of deadly force,
- ii) a precise description of the incident and the reasons for employing the deadly force,
- iii) a description of any weapons and the manner in which they were used,
- iv) a description of the injuries suffered, if any, and the treatment given, and
- v) a list of all participants and witnesses to the incident.

Non-Deadly Force

7. Non-deadly force may only be used where there exists an immediate threat to the institution or community, and there is no reasonable alternative available to ensure a safe environment. In every case, no more force than necessary shall be used.

8. Non-deadly force may only be used in the following circumstances:

- a) prior to the use of deadly force in situations justifying the use of deadly force;
- b) to prevent escapes;
- c) in defending one's self, other staff, and other inmates against physical assault;
- d) to prevent or quell a disturbance;
- e) to prevent serious damage to property; or
- f) to enforce institutional regulations where the staff member believes on reasonable grounds that the act threatens the safety or security of the institution.

9. Wherever possible, the institutional head should be consulted prior to the use of non-deadly force.

10. After the use of non-deadly force, the following steps shall be undertaken:

- a) a notification of the use of force shall be given to the institutional head;
- b) all injured persons shall immediately be given a medical examination and if necessary, treatment;
- c) a report written by the staff member who employed the non-deadly force shall be filed with the Deputy Commissioner of the region. Such report shall include:
 - i) an account of the events leading to the use of non-deadly force,
 - ii) a precise description of the incident, and the reasons for employing the force,
 - iii) a description of the weapons used, if any, and the manner in which they were used,
 - iv) a description of the injuries suffered, if any, and the treatment given, and
 - v) a list of all participants and witnesses to the incident.

Protections

One of the most difficult issues surrounding the use of force is the extent to which public officers such as corrections staff members should be protected for bona fide mistakes.

Generally, public officers are protected from criminal and civil liability for the use of force as long as they do not use excessive force, and their actions are taken upon reasonable and probable grounds. The amount of force deemed necessary in a certain situation will be judged objectively (i.e. based on what the reasonable person would have done in the same situation). This is so even if the particular individual might have been stopped with somewhat less force, due to some vulnerability not apparent to the officer. The courts have also stated that what is reasonable will depend on the

circumstances as they existed when the force was used (i.e. not with the benefit of hindsight), and keeping in mind that the officer could not be expected to measure the force used with exactitude.¹⁵

Generally, the criminal law provides a defence for a mistake of fact which, if true, would excuse the accused from criminal responsibility. However there are certain qualifications on a mistake that will excuse an offence. In all cases the mistake must be innocent - the accused must believe that he or she is not committing a wrongful act. The mistake must also be honest - one that is actually made by the accused. In most cases the mistake must also be reasonable - one that a reasonable person in the accused's position would make.¹⁶

The Criminal Code contains some provisions to protect public officers in certain situations. Section 25(2) excuses a person executing process or carrying out a sentence, notwithstanding that the process or sentence is defective. The officer must, however, act in good faith. The Law Reform Commission recommends the retention of this provision "because persons acting in good faith for the purpose of law enforcement should not be required to "second guess" the validity of court orders or set themselves up as informal courts of appeal."¹⁷

Section 28 of the Code protects public officers from criminal responsibility where a mistake is made in the identity of the accused:

- 28(1) Where a person who is authorized to execute a warrant to arrest believes, in good faith and on reasonable and probable grounds, that the person whom he arrests is the person named in the warrant, he is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant.
- (2) Where a person is authorized to execute a warrant to arrest,
 - a) everyone who being called upon to assist him, believes that the person in whose arrest he is called upon to assist is the person named in the warrant, and

b) every keeper of a prison who is required to receive and detain a person who he believes has been arrested under the warrant,

is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant.

In the correctional context, should a staff member be protected where he assaults a visitor, believing that visitor to be an inmate trying to escape? Another difficult situation would be the application of force on an inmate who appears to be choking another, but where in fact they were just "rough-housing". What about the use of deadly force to stop an assault by an inmate on a correctional staff member, which results in the death of an innocent inmate or other bystander? Are the present Criminal Code provisions adequate to deal with such interactions?

Most of the case law on this subject has dealt with the civil liability of police officers in the use of deadly force to arrest. Generally the issue has been whether or not excessive force has been used or whether the officer was acting in the execution of his duty. Where officers were gaining in their pursuit of a fleeing suspect¹⁸, or where the suspect was shot after being struck twice in the head with a gun¹⁹, the courts found the officers liable, because the escape could have been prevented by other reasonable and less violent means. Section 25 of the Code can, however, relieve officers of liability in respect of the accidental shooting of an innocent bystander where they are executing their duty under s.25(4) without negligence²⁰. Another case held that police officers were negligent and used excessive force where a fleeing armed robber jumped on a school bus. Police and suspects exchanged shots and a child on the bus was killed. In holding the police negligent, the court stated there was no justification for using firearms in such close proximity to children.²¹

Is peace officer status necessary to invoke the Criminal Code protections? The general protection concerning advancement of justice (s.25(1) of the Criminal Code) applies to anyone who has a legal duty to perform. So too does the provision

protecting officials if the process or sentence is defective. Section 25(4) however authorizes only peace officers to use deadly force to effect an arrest of a fleeing suspect, but only where the escape cannot be prevented by reasonable means in a less violent manner. Do correctional staff need this kind of authorization/protection in carrying out their mandate? If a criminal offence occurs in an institution, the local law enforcement agency is called in to investigate and lay criminal charges where appropriate. In any event, staff would be protected by our proposed provision specifically authorizing use of deadly and non-deadly force to prevent escapes.

The common law defence of mistake of fact applies to all persons and its availability will depend on the particular circumstances - was the mistake innocent, honest and reasonable in the circumstances? The correctional context does not appear to require additional provisions, although the context will of course be relevant to the reasonableness of the mistake.

The principles underlying the present Criminal Code provisions regarding the excessive use of force appear appropriate - public officers are liable for excessive force used in the performance of their duties. This will be judged by the court asking two questions - was the force necessary or could the objective be achieved with a lesser degree of force? and secondly, was it reasonable to pursue the objective with the amount of force used, even though no lesser amount would have sufficed? In answering these two questions the court will look at all the circumstances and will evaluate conduct in light of the conditions of prison life. Given the countless number of situations which might involve the use of force in a penitentiary setting, it seems unrealistic to try to legislate detailed rules as to what constitutes excessive force in a particular situation.

However, even though the current law on protections appears appropriate to the correctional setting, the Working Group believes for reasons of clarity, certainty, and accessibility that these protections should be stated in correctional legislation. The following is proposed:

Staff Protections

Objective

1. To ensure that correctional staff are adequately protected from criminal and civil liability when performing their duties in a reasonable manner.

Minimum and Necessary Force

2. Correctional staff are protected from criminal and civil liability in the use of authorized force in performance of their duties under correctional legislation.

Excessive and Negligent Use of Force

3. Nothing in this Act excuses criminal or civil liability for the excessive or negligent use of force by a staff member.

Mistake

4. Where a correctional staff member, acting in good faith, receives or detains a person pursuant to a warrant of committal, that member is protected from criminal and civil liability in respect thereof, notwithstanding any defect or lack of jurisdiction with respect to the warrant, or that the person detained is not the person named in the warrant.

PART IV: ACCOUNTABILITY

The need to ensure accountability of state officials such as police officers and correctional staff members cannot be over-estimated. This is reflected in CLICS, most notably in the following two principles:

- (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.

It is obvious that state officials must act in accordance with the Charter, and within the bounds of applicable legislation and case-law. There is also a need for extra-legal accountability mechanisms which operate outside of the system of judges and courtrooms.

Virtually all police agencies are subject to various forms of extra-legal accountability. Most police officers are subject to a code of discipline contained in their governing legislation. In addition, most departments have developed specific guidelines which are aimed at internal accountability. Augmenting this are public complaint bureaux set up to allow a more impartial examination of public complaints about the police. Such extra-legal accountability mechanisms are designed not only to ensure order and discipline within the police department concerned, but also to protect both the public in general and the interests of the complainant.

The need for accountability in the correctional system recognized in CLICS is expressed as well in several principles developed in the Correctional Philosophy working paper, particularly:

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

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

This Part will discuss the accountability mechanisms currently in place with respect to actions of penitentiary staff, and explore a proposal for an independent Complaints Review Committee.

Internal Administrative Procedures

Under s.6 of the Penitentiary Regulations,

It is the duty of every member of the Service to familiarize himself with the Act, Regulations and the directives that are issued, from time to time, under the Act.

The Commissioner's Directives prescribe the policy and the procedures for all areas of operations in the institution. In many areas the directives are quite specific with respect to the procedure to be followed, and set out the consequences (legal or otherwise) for failure to follow the prescribed procedures.

Inspector General

The Inspector General and staff have a mandate to conduct internal reviews, audits, inquiries and investigations. This Branch conducts independent internal audits, both financial and management. The purpose of these systematic reviews is to advise management of the efficiency and effectiveness of internal management practices. Until 1986 the other main function of the Office of the Inspector General was to conduct special inquiries at the request of the Solicitor General or Commissioner of Corrections. Generally the Inspector General would be asked to conduct a special inquiry where there had been a serious security incident involving an inmate or allegations of improper treatment or conduct by a staff member. Since 1986, the special inquiries function has been delegated to the regional offices of CSC. Although this move is itself under review, the findings of special inquiries have been used primarily as management information, and have only rarely been used as the basis for disciplinary action.

Code of Conduct and Staff Discipline System

This document outlines the appropriate conduct for correctional employees and gives the disciplinary consequences for misconduct. For our purposes there are two major infractions of interest - neglecting one's duty or refusing to take action as a peace officer, and using excessive force or more force than necessary to carry out one's legal duties. The disciplinary penalty for these infractions is suspension without pay or discharge. For the minor infraction of "failing to conform to or apply any Commissioner's Directive, Divisional Instruction, Standing Order or other directive as it relates to his/her duty", a written reprimand or suspension without pay is prescribed.

The staff discipline process for the Correctional Service of Canada is the same procedure which applies to all federal public servants. Upon allegations of misconduct by a staff member, the manager responsible informs the employee of the allegation and that he or she will be investigating the matter. The employee is given an opportunity to get union representation and to respond to the allegations. The manager then decides on any disciplinary action to be taken.

Staff are protected by a grievance procedure, which entails four levels of response (Assistant or Deputy Warden, Warden, Regional Deputy Commissioner, and Commissioner). If the subject of the grievance is the interpretation of an article in the collective agreement, or entails a disciplinary penalty (fine, suspension or discharge), the grievance can be referred to arbitration by the Public Service Staff Relations Board. Thus, employees have a number of protections against arbitrary disciplinary action by management.

Inmate Grievance Procedure

The inmate grievance procedure allows inmates to submit grievances concerning any problems they have experienced while confined which are within the jurisdiction of the Commissioner of Corrections. As a matter of policy, however, any elements of an inmate grievance which could result in discipline of a staff member are removed from the inmate grievance procedure and go directly to the responsible

manager. Because allegations of abuse of staff powers or misuse of force, if true, would likely result in disciplinary action, the inmate grievance procedure is rarely appropriate. However, grievances are a useful tool to encourage compliance with correctional policy. Suggestions for improvements to the inmate grievance system are made in the Correctional Authority and Inmate Rights Working Paper and include final resolution of grievances by an independent arbiter.

The above mechanisms have several purposes - to ensure that the organization is functioning efficiently, to provide for an independent official to audit and investigate unusual incidents, and to ensure that those who have been delegated power can account for the discharge of the authority conferred. These mechanisms should protect both inmates and staff by recognizing abuses of power, and taking corrective action to deter further abuses. However one of the problems associated with these kinds of controls is that they are internal, and thus are closed to public scrutiny. There are however, other mechanisms in place which provide some public scrutiny.

The Courts

As discussed in the Correctional Authority and Inmate Rights Working Paper, judicial remedies are available to ensure the legal rights of inmates. Our judicial system offers what no internal accountability mechanism can - true independence of the decision-maker and the public forum of the courtroom.

Current CSC policy is that if there are indications of excessive force used against an inmate, the institutional head must notify the local Crown prosecutor or police force. The Crown prosecutor can then decide whether to lay criminal charges against the staff member (e.g. assault, criminal negligence causing death, wounding). Serious abuses of staff powers must be censured in an open public forum and criminal sanctions imposed (e.g. probation, fine, imprisonment) in order to make it clear to all concerned that our correctional system is subject to the rule of law and that misuse of physical force is not acceptable in our prisons.

Inmates may also use the civil court system to get compensation for any damages suffered due to staff misuse of exceptional powers - any permanent or temporary physical injury, mental distress, or property damage.

However the judicial process (especially for civil suits) is often expensive and time consuming. Often by the time judgement is rendered, the inmate will have been released. More immediate solutions to complaints about staff misconduct are needed, but also solutions which involve an independent investigator and arbiter of the complaint to ensure fair treatment to both staff and inmates.

Complaint Review Committee

The institution of a public complaints bureau, similar to those found in some police departments, was explored in a study done for the Correctional Service of Canada in 1984.²² (The concept of civilian review boards to control the discretionary powers of police was introduced in 1931, and the first board was created in Washington in 1948. In Canada boards were established in Montreal in 1978, and in 1981 in Toronto). Currently, amendments to the RCMP Act are being implemented which include the establishment of both an External Review Committee to deal with employee grievances, and a Public Complaints Commission to review complaints by the public of alleged misconduct of RCMP officers.

The proposal suggested for corrections involves legislating the duties of all correctional employees (Part I) and providing for a Complaint Review Committee to handle inmate or public complaints concerning alleged staff misconduct (Part II). The system would function within the present framework of the collective agreement, staff disciplinary process and employee grievance procedure.

The study notes that in terms of the power which goes along with their position, CSC staff are more akin to police officers than other public servants - they are in a position of authority over inmates and have extensive powers which can be abused. Their positions of authority are on-going, and thus may foster hostility and conflicts by their very nature. The system proposed is aimed at informing staff

members of their duties, asserting the authority of the supervisors, and stressing the protection of inmates' dignity and rights and the settlement of their justified complaints. The study notes that the credibility of a complaint handling system depends on its impartiality, in both fact and appearance.

The study proposed that a Complaint Review Committee be established in each of CSC's five regions. The Committee would be composed of a Chairperson, three residents of the region who are not members of the Service or a police force, and three employees of CSC from that region. Any person with a complaint about the conduct of an employee should have the right to file a complaint with the Committee. The complaint would have to be filed within 90 days of the incident and include the time, place and any witnesses to the incident. The employee would be informed of the complaint. The Committee would not normally hear witnesses or allow representations.

The Committee could reject the complaint where it believes the complainant does not have a valid case or where it is made in bad faith, or is not within its jurisdiction. The rejection would be forwarded to the complainant and employee with brief reasons. Complaints which are not rejected would then either be forwarded to the employee's director for internal investigation, or to the Correctional Investigator for formal investigation.

Once the director's or Correctional Investigator's report is received, the Committee could request further information, reject the complaint if unjustified, or, if justified, forward the case to the appropriate authority to impose the disciplinary action recommended by the Committee. The Committee could recommend the following disciplinary actions - verbal warning, written reprimand, suspension without pay for no more than 60 days, or dismissal. Once disciplinary action is taken by the supervisor against the employee, the current employee grievance mechanism would apply.

The Committee would also have authority to reject a complaint as unjustified, or to forward to the employee written observations aimed at preventing a breach of discipline. It

could also make general recommendations to the Commissioner or Minister concerning improvements to the complaint process.

The Working Group agrees with the Study's discussion of the need for accountability mechanisms. However it is not persuaded of the utility of yet another supervisory body. Inmate grievances about staff will be directed to the institutional head who will deal with them through the normal staff discipline process outlined above. Inmates are of course entitled to report allegations of abuse to the police. Finally, inmates who are unhappy with the institutional head's disposition of a complaint against staff may take their complaint directly to the Correctional Investigator.

Correctional Investigator

This official is appointed pursuant to Part II of the Inquiries Act to investigate on his or her own initiative, on request from the Solicitor General, or on complaint from penitentiary inmates, and report upon problems of inmates coming under the responsibility of the Solicitor General of Canada. The Correctional Investigator submits an annual report to the Solicitor General with recommendations for change. This report is tabled in Parliament. In 1984-85 only 26 complaints (less than 2%) dealt with the use of force, and only 92 (less than 6%) dealt directly with complaints about staff.²³

Under the Inquiries Act, the Correctional Investigator and staff are authorized to enter and remain in any public office or institution, to examine all papers, records and books pertinent to the inquiry, to summon any person and require that person to give evidence under oath, and to issue subpoenae commanding anyone to appear and testify, or to produce any document relevant to the inquiry.

The Correctional Investigator already has a broad mandate to investigate and report on problems of inmates, including complaints regarding staff and complaints about the use of force. Proposed legislative provisions to govern the Office of the Correctional Investigator are set out in the Correctional Authority and Inmate Rights Working Paper.

It is the opinion of the Working Group that legislation should also include the power to make recommendations to the institutional head as to appropriate disciplinary action. The institutional head would then have a short time (for example, 10 days) to institute disciplinary proceedings or inform the Correctional Investigator of his or her reasons for not doing so. The Correctional Investigator would also be empowered to recommend changes in procedures aimed at preventing abuses of staff powers in the future.

The additional provisions might read as follows:

Correctional Investigator

1. Where the Correctional Investigator conducts an investigation into a complaint about the conduct of a staff member and is of the view that the complaint is justified, the Correctional Investigator may
 - a) recommend to the institutional head that appropriate disciplinary action be taken; and
 - b) recommend changes in procedures aimed at preventing similar abuses in the future.

2. Where the Correctional Investigator makes a recommendation to an institutional head with respect to disciplinary action, the appropriate disciplinary proceedings should be instituted within ten days of the receipt of the recommendation, or the Correctional Investigator is to be informed of the reasons why no action is being taken.

Although the Working Group is of the view that effective accountability mechanisms must be available to ensure recourse in the event of staff misconduct, the focus of this paper has been the development of rules to delineate staff powers, and the use of force and protections for staff. Consistent with the approach taken in the Framework paper, it is our view that clarity of purpose, together with a clear articulation of staff roles, powers and responsibilities, will engender voluntary compliance with not only the letter but also the spirit of any new correctional legislation.

CONCLUSION

The role played by correctional staff is crucial to the achievement of the mandate of the correctional agency - that of contributing to a just, peaceful and safe society by providing a safe, secure and healthful environment on a day-to-day basis and by promoting the successful re-integration of offenders into society. In order to achieve the purpose of corrections, staff need clear direction and guidance concerning the overall mandate of the agency and their specific roles in achieving the mandate.

The reader has been presented in this paper with a set of proposals designed to provide this direction. The proposals were formulated as legislative provisions in order to generate discussion about what degree of specificity is appropriate in correctional legislation and what impact such proposals might have on operations. The Working Group wishes to receive responses to these proposals, as well as any comments on other issues you may consider relevant to staff powers.

ENDNOTES

1. Discussed in Gilbert, M.J. and Riddell, A. Skills for Achieving Security, Control and Public Protection, in Correctional officers: Power, Pressure and Responsibility, American Correctional Association, 1983, p. 33, and in Report of the Advisory Committee to the Solicitor General of Canada on the Management of Correctional Institutions, November 1984, (Carson Committee Report).
2. O. Ingstrup (Chair.) 1984. The Report of the Task Force on Mission and Organizational Development: "The Statement of CSC Values".
3. The Police Powers Project has outlined the sections of the Criminal Code which detail peace officer powers and protections in Definition of Police Officer/Peace Officer, October, 1984. See Appendix D.
4. This policy is outlined in Commissioner's Directive 581, "Violations of the Law by Inmates".
5. (1974), 19 C.C.C. (2d) 129, (S.C.C.).
6. (1975), 24 C.C.C. (2d) 66 (B.C. Prov. Ct.).
7. R. v. Bottrell (1981), 60 C.C.C. (2d) 211 (B.C.C.A.).
8. Law Reform Commission of Canada, Criminal Law, The General Part - Liability and Defences (1982).
9. Ibid, at 111.
10. Ibid, at 113-114.
11. Discussed in more detail in "The Legal Status of Prisoners: Standard with Commentary" in The American Criminal Law Review, Vol. 14, No. 3, Winter 1977.
12. American Correctional Association, Model Correctional Rules and Regulations, 1979.
13. Mattis v. Schnarr (1976), 547 F. (2d) 1007.
14. Supra, footnote 6.
15. Supra, footnote 7.
16. Supra, footnote 8, at 72.
17. Ibid, at 117.

18. Woodward v. Begbie et. al. (1961), 132 C.C.C. 145.
19. Vigneth v. Bond [1928] 37 Man. L.R. 435.
20. Poupart v. LaFortune [1974] 41 D.L.R. (3d) 720.
21. Sa c. P.G. du Qué. [1981] C.S. 81.
22. See Ouellette, Yves, Regulating the Conduct of Officers and Employees of the Correctional Service of Canada, and Regulations Respecting the Conduct and Discipline of Employees in the Correctional Service of Canada and the Handling of Inmate Complaints, unpublished, April 1984.

Appendix A

**LIST OF PROPOSED WORKING PAPERS
OF THE CORRECTIONAL LAW REVIEW**

Correctional Philosophy

A Framework for the Correctional Law Review

Conditional Release

Victims and Corrections

Correctional Authority and Inmate Rights

Powers and Responsibilities of Correctional Staff

Native Offenders

Mentally Disordered Offenders

Sentence Computation

The Relationship between Federal and
Provincial Correctional Jurisdictions

International Transfer of Offenders

Appendix B

**CORRECTIONAL SERVICE OF CANADA
STANDARD POSITION DESCRIPTION**

Job Title: Correctional Officer
Maximum Security Institution

Level: CX-COF 2

SUMMARY

Under the supervision of a senior custodial officer, maintains surveillance over the inmates at a post such as a cell block, yard, dome, cage, tower or recreational area; controls the movement of inmates and other persons in institutional areas and to and from the institution; ensures the cleanliness and security of the post; and performs other duties.

DUTIES

Maintains surveillance over the inmates during a shift of custodial duty at a post such as a cell block, kitchen, yard, dome, cage, tower, or recreational area in a maximum security institution operating its custodial staff on a squad system with scheduled rotation of shifts and posts,

- by closely observing activities of inmates when making periodic rounds of cells or standing watch on armed cage or tower duty to ensure discipline and detect suspicious or unusual behaviour,

- by counting the inmates, as required by the standing orders of the institution, at specific times and places, to account for their presence or absence, and recording and reporting the count to the superior officer,

- by searching inmates at specific times or for particular reasons to ensure that they are not in possession of contraband such as knives, firearms, drugs, brew or its ingredients, and

- by observing the dress and behaviour of inmates, taking corrective action in routine cases, and reporting on unusual behaviour or infractions of rules.

Controls the movement of inmates and other persons in institutional areas and to and from the institution,

- by unlocking and locking cell doors and barriers to permit inmates and staff to move in and out as authorized,

Appendix B

- by assembling, counting and escorting a group of inmates proceeding on meal, sick, dental, work, exercise, church and recreational parade,

- by acting as special escort for a prisoner being admitted, released or transferred, or reporting for interview or treatment in another area,

- by inspecting inmate passes, ensuring legitimacy of staff visits, and identifying and registering persons seeking admittance at the front entrance,

- by accompanying maintenance men to the work area, and

- by screening and searching all vehicles, trucks, cars and drivers entering or leaving the prison premises.

Ensures the cleanliness and security of the post,

- by inspecting the area for orderliness, cleanliness and needed repairs,

- by issuing supplies and supervising regular cleaning by inmates of such areas as cells and kitchens,

- by examining furniture, bedding, mattresses, personal effects, floors, windows, ventilators, bars and locks for evidence of contraband, tampering, destruction or attempts at escape,

- by checking for potential fire and safety hazards,

- by cleaning and guarding the key room, controlling the issue of keys, testing the fire siren, ensuring that emergency firearms, ammunition, gas equipment and night emergency lights are in good working condition and available, and

- by cleaning armoury and weapons, taking daily inventory, controlling the issue and return of arms as specified in standing orders.

Performs other duties, when posted to dissociation, admission and pre-release areas, such as overseeing bathing and dressing of inmates, carrying in meals, giving medication, noting scars, tattoos or other distinguishing marks and listing articles of clothing and personal effects on admission, and preventing inmate contacts on pre-release to prevent passage of messages and letters.

Appendix B

Job Title: Living Unit Officer
Medium Security Institution

Level: CX-LUF 1

SUMMARY

Under the supervision of the Living Unit Supervisor and the functional supervision of the Living Unit Development Officer for case management activities, maintains control and supervision of inmates and the security of the living unit and the institution; performs a variety of casework services relating to those inmates assigned specifically to his caseload; participates as an active member of the Living Unit Team in the operation of a program directed towards the positive correctional control of inmates and performs other related duties as required.

DUTIES

Maintains control and supervision of inmates and the security of the living unit and institution by:

- conducting regular checks to ensure that doors, barriers, keys and other security equipment are in good order and are safeguarded;
- operating security and communications equipment;
- searching inmates, cells, rooms and other areas to prevent possession or passage of contraband;
- counting inmates formally and informally at various times and regulating individual and group movement;
- reporting breaches of discipline;
- observing inmates' activities and intervening in an appropriate manner when necessary;
- supervising inmate activities in the unit and institution such as recreation programs and special events;
- maintaining good housekeeping standards including the reporting and/or correcting of fire and safety hazards;
- maintaining the security of information gained in the course of carrying out the duties of this position;

Appendix B

- participating in an active Preventive Security Program involving recognition skills, information gathering, correlation and reporting;

- communicating information regarding the security of the unit and institution to Living Unit Team members and other appropriate institutional staff members;

- recording and/or reporting security-related information as specified in standing orders and other directives.

Performs a variety of casework services relating to those inmates specifically assigned to his caseload by:

- establishing effective interpersonal relationships as a means of positively influencing the inmate's resocialization process;

- participating in an orientation process for all new inmates;

- acting as the inmate's initial contact for all requests or problems;

- assessing individual situations to either take appropriate action or make necessary referrals;

- obtaining detailed knowledge of individual inmates through a system of file review, observation and exchange of information with instructors and supervisors;

- working closely with his Living Unit Development Officer in all areas of casework management to foster a team approach designed to meet inmate needs;

- participating as a permanent member in case management teams to assist in the analysis, planning, monitoring and evaluation of all individual cases as specified in the Case Management Manual;

- writing accurate, complete and timely reports as specified in the Case Management Manual and other directives and compiling up-to-date records;

- counselling inmates to avail themselves of opportunities to address their personal needs;

- assisting inmates to reach program goals;

- escorting inmates on temporary leave of absence to visit families, agencies, potential employers, etc., in preparation for eventual release;

Appendix B

- meeting with agencies, inmates' families and friends, potential employers, etc., to advise of inmates' plans and progress within the bounds of confidentiality.

Participates as an active member of the Living Unit Team in the operation of a program directed towards the positive correctional management of inmates by:

- attending and participating in Living Unit Team Meetings to develop and implement effective unit policy and procedures;

- participating with other Team members and inmates in the planning, implementation and supervision of activities or special projects for the unit and the institution;

- communicating effectively with other institutional staff ensuring that standards set by the unit and the institution are met;

- establishing active and effective relations with inmates to encourage self-improvement, self-understanding and self-respect;

- representing Team views and recommendations at various institutional boards and meetings dealing with such matters as earned remission, work placements, cells changes, planning and evaluation;

- participating as a member of the Adjustment Committee within the unit;

- attending and taking an active part in meetings and group discussions held within the unit;

- supporting and assisting outside individuals or groups who are engaged in activities programmed for inmates;

- training new officers.

Performs other duties as required:

- supervising the living unit in the absence of the supervisor;

- supervising work details in the unit;

- keeping abreast of current literature and new developments in the correctional field, including routine orders, standing orders, divisional instructions, commissioner's directives;

- participating in/or conducting inquiries.

Appendix C

PRESENT STAFF POWERS

Penitentiary Service Regulations:

40(1) Where the institutional head is satisfied that

- (a) for the maintenance of good order and discipline in the institution, or
 - (b) in the best interests of an inmate it is necessary or desirable that the inmate should be kept from associating with other inmates, he may order the inmate to be dissociated accordingly, but the case of every inmate so dissociated shall be considered, not less than once each month, by the Classification Board for the purpose of recommending to the institutional head whether or not the inmate should return to association with other inmates.
- (2) An inmate who has been dissociated is not considered under punishment unless he has been sentenced as such and he shall not be deprived or any of his privileges and amenities by reason thereof, except those privileges and amenities that
- (a) can only be enjoyed in association with other inmates, or
 - (b) cannot reasonably be granted regard to the limitations of the dissociation area and the necessity for the effective operation thereof.

41(1) Everyone who

- (a) delivers or attempts to deliver contraband to an inmate,
- (b) receives or attempts to receive contraband from an inmate,
- (c) trespasses upon penitentiary lands, or
- (d) assists any person to do anything mentioned in paragraphs (a), (b) or (c),

is guilty of an offence punishable on summary conviction and is liable to imprisonment for six months or to a fine of \$500, or both.

Appendix C

- 41(2) Subject to subsection (3), any member may search
- (a) any visitor, where there is reason to believe that the visitor has contraband in his possession, and if the visitor refuses to be searched he shall be refused admission to or escorted from the institution;
 - (b) any other member or members, where the institutional head has reason to believe that a member or members has or have contraband in his or their possession;
 - (c) any inmate or inmates, where a member considers such action reasonable to detect the presence of contraband or to maintain good order of an institution; and
 - (d) any vehicle on institutional property where there is reason to believe that such a search is necessary in order to detect the presence of contraband or to maintain good order of the institution.
- (3) No female person shall be searched pursuant to subsection (2) except by a female person.
- (4) There shall be a sign posted at the entrance to an institution, in a conspicuous position, to give warning that all vehicles and persons on institution property are subject to search.

Appendix D

PEACE OFFICER POWERS & PROTECTIONS

Criminal Code: references, updated as necessary, summarized by the Police Powers Project (of the Criminal Law Review) and extracted from its unpublished discussion paper entitled "Definition of Police Officer/Peace Officer" (Ottawa: Department of Justice, 1984)

1. Arrest and Release

a) Powers

Section

- 450(1) Power of peace officer to arrest without warrant.
- 450(2) Circumstances in which a peace officer should not effect an arrest without warrant against a person.
- 451 Circumstances in which a peace officer should issue an appearance notice to a person whom he did not arrest in accordance with the provisions of section 450(2).
- 452 Release from custody by peace officer in situation of arrest without warrant for summary conviction offence, hybrid offence or offence falling within the absolute jurisdiction of a magistrate.
- 448 An officer in charge is defined as the officer for the time being in command of the police force responsible for the lock-up or a peace officer designated by him who is in charge of such place.
- 453 Release from custody by officer in charge in cases of arrest without warrant.
- 453.1 Release from custody by officer in charge in cases of arrest with warrant and conditions for release.
- 454(1) The power of a peace officer or officer in charge to release a person detained in custody conditionally or unconditionally.
- 455.5(2) Service of a summons shall be made by a peace officer.
- 456.2 An arrest warrant is directed to the peace officer within the territorial jurisdiction of the justice, court or judge by whom it is issued.

Appendix D

Section

- 456.3 Execution of arrest warrant by peace officers.
- 458(2) A peace officer can arrest without warrant a person who has violated a summons, appearance notice, undertaking or recognizance or committed an indictable offence after having received a summons, appearance notice or entering into an undertaking or recognizance.
- 459(6) A peace officer can arrest without warrant a person who has violated or is about to violate an undertaking or recognizance which he or she has entered into after a 90-day review or a 30-day review pursuant to section 459 of the Code.
- 461(2) An endorsement upon an arrest warrant by a justice from another territorial jurisdiction is sufficient authority to the peace officer to whom it was originally directed and to all peace officers within the territorial jurisdiction of the endorsing justice to execute the warrant and take the accused before the justice who issued the warrant or another justice for the same territorial division.
- 545(4) When an accused is found to be insane pursuant to Part XVII, and discharged on conditions by order of the Lieutenant Governor, a peace officer may arrest a person without warrant if on reasonable and probable grounds he believes the person has violated any condition of his discharge.
- 632(1) A peace officer can arrest with warrant a person, bound by a recognizance to give evidence, who has absconded or is about to abscond.
- 700(2) When an order is made by the Court, relieving a surety of his obligations to an accused person and a warrant of committal is accordingly obtained, a peace officer or the surety can arrest that person.

b) Duties

Section

- 452 Duty of peace officer in respect of the release of persons arrested without warrant for certain classes of offences.

Appendix D

Section

- 454(1) Duty of peace officer to bring detained person before a justice to be dealt with according to law within 24 hours or as soon as possible.
- 545(5) Duty of peace officer to bring a person arrested without warrant pursuant to section 545(4) before a justice within the prescribed time (this concerns the person, discharged on conditions, who had been detained by reason of insanity).

c) Special Protection and Immunity

Section

- 25(4) A peace officer, proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant (and everyone assisting the peace officer), is justified in using as much force as necessary to prevent the escape by flight of the person, unless the escape can be prevented by reasonable means in a less violent manner.
- 28 A person authorized to execute a warrant for arrest, and everyone called upon to assist him/her, who believe in good faith and on reasonable and probable grounds that the person whom he arrests is the person named in the warrant, is protected from criminal responsibility to the same extent as if the arrested person were the person named in the warrant.
- 450(3)(a) A peace officer who arrests a person without warrant is deemed to be acting lawfully and in the execution of his/her duties for the purposes of any proceedings under the Criminal Code or under any other Act of Parliament.
- 452(3)(a) The peace officer having arrested a person without warrant who does not release the person from custody as soon as practicable shall be deemed to be acting lawfully and in the execution of his/her duty for the purposes of any proceedings under the Criminal Code or under any other Act of Parliament.
- 454(4)(a) A peace officer who does not release a person, arrested without warrant as a person about to commit an indictable offence, within the time period prescribed in the section for taking the

Appendix D

person before a justice, shall be deemed to be acting lawfully and in the execution of his/her duty for the purposes of any proceedings under the Criminal Code or under any other Act of Parliament.

d) Miscellaneous

Section

- 449(3) A person who is not a peace officer who makes an arrest must turn over the arrested person forthwith to a peace officer.
- 453(1) Release from custody by officer in charge of persons arrested without warrant by peace officer or delivered to peace officer pursuant to section 449(3).
- 453.3(5) The manner of proof of the issuance of an appearance notice by a peace officer.
- 455.5 The service by a peace officer and manner of proof of the issuance of a summons.
- 457(4) A condition for release on judicial interim release could be an obligation to report to a peace officer.
- 526(3) A person released after arrest on a bench warrant pursuant to section 526(1) could be required as a condition of release to report to a peace officer.

2. Breach of Peace

a) Powers

Section

- 31(1) A peace officer can arrest a person committing a breach of the peace or anyone he/she believes on reasonable and probable grounds is about to join in or renew a breach of the peace.
- 31(2) A peace officer is justified in receiving into custody any person given into his/her charge for having breached the peace.

Appendix D

Section

- 32(1) A peace officer is justified in using or ordering the use of as much force as on reasonable and probable grounds he/she believes necessary to suppress a riot and not excessive.

b) Duties

Section

- 33 Duty of peace officer, after a section 68 proclamation is made or an offence under section 69 is committed, to disperse or arrest persons who do not comply with the proclamation.

c) Special Protection and Immunity

Section

- 32(1) A peace officer is justified in using or authorizing the use of force to suppress a riot and which force is not excessive having regard to the danger to be apprehended from the continuance of the riot.
- 32(4) Before it is possible to secure the attendance of the peace officer, anyone is justified in using as much force as he/she believes on good faith and on reasonable grounds is necessary to suppress a riot and is not excessive having regard to the danger to be apprehended from the continuance of the riot.
- 32(2) No civil or criminal proceedings lie against a peace officer (or a person assisting a peace officer) in respect of any death or injury caused by the peace officer (or the person assisting) in dispersing or arresting persons after a proclamation under section 68 has been effected.

d) Miscellaneous

Section

- 30 A person is justified in intervening to prevent the continuation or recurrence of a disturbance of the peace and giving over to the custody of a peace officer an individual detained by him/her for breach of the peace.

Appendix D

3. Search and Seizure

a) General Powers

Section

- 443(1) A peace officer can apply for and execute a search warrant.
- 443(4) A peace officer can execute a search warrant in a territorial division other than that in which it was obtained after an endorsement procedure has been carried out.

b) Specialized Search Provisions

Section

- 181(1) A peace officer has powers of search under warrant of gaming and bawdy-houses.
- 181(2) A peace officer has power to take into custody any person whom he finds keeping a common gaming house or any person found therein.
- 299(3) A peace officer can enter any place to find lumber owned by a person and bearing a registered trade mark of that person when the lumber is detained without the consent of the owner.
- 420(2) A peace officer can seize and detain counterfeit money, counterfeit tokens of value, and machines, engines, tools, instruments for use in making counterfeit money or tokens.

4. Wiretap

a) Powers

Section

- 178.12(1) An application for an authorization for an interception of private communications must be accompanied by an affidavit of a peace officer or public officer deposing to the matters prescribed.
- 178.13(3) Application for renewal of authorization for purpose of interception of private communication

Appendix D

Section

must be accompanied by an affidavit of either a peace officer or a public officer deposing to the matters prescribed.

178.15(1) In situations of urgency, peace officers specially designated by the Solicitor General of Canada or the Attorney General of a province can make an application to a judge for authorization to intercept private communications (without requirements of section 178.12).

178.2(2)(e) The disclosure of Intercepted private communications to peace officers in the interests of the administration of justice does not constitute an offence.

178.23(5) An application to delay notice to a person subject to interception of private communications is accompanied by an affidavit of a peace officer or public officer deposing to the matters prescribed.

b) Miscellaneous

Section

178.22(k) The annual report to Parliament must record the number of persons arrested whose identity became known to a peace officer by reason of interception of private communications.

5. Firearms

a) Powers

Section

90(1)(b) A peace officer or a public officer of a class prescribed by regulations can have in his/her possession a restricted or prohibited weapon for purposes of employment.

96(1)(b) A peace officer or a public officer of a class prescribed by regulations can import or otherwise acquire possession of any weapon, component or part of weapon in the course of duties or employment.

Appendix D

Section

- 98(4) A peace officer can apply to a magistrate for an order prohibiting a particular person from possessing a firearm, ammunition, or explosive substance when he has reasonable grounds to believe that the possession is not desirable in the interest of the safety of any person.
- 99(1) A peace officer can search without warrant a person, vehicle or place (not a dwelling place) and seize anything in relation to the offence when he/she on reasonable and probable grounds believes an offence in respect of a prohibited weapon, restricted weapon, firearm or ammunition, has been or is being committed.
- 100(1) A peace officer can seize restricted weapons from possession of a person when there is non-production of a registration certificate or permit.
- A peace officer can seize a firearm from a person under the age of 16 years who does not produce a permit.
- A peace officer can seize a prohibited weapon from any person.
- 101(2) A peace officer can without warrant search for and seize any firearm, offensive weapon in the possession of a person when the peace officer is satisfied that the possession is not in the interests of the safety of that person or any other person.

b) Duties

Section

- 100(2) Duty of peace officer to return a restricted weapon or a firearm in certain circumstances.
- 100(3) Duty of peace officer to bring restricted weapon or firearm before magistrate in circumstances when it is not returned to the owner.

c) Special Protection and Immunity

Section

- 76.3 A peace officer engaged in the execution of his/her duty does not commit an offence by taking on board a civil aircraft an offensive weapon or an

Appendix D

explosive substance without the consent of the owner or operator of the aircraft.

d) Miscellaneous

Section

- 102(1) A person has an obligation to turn over a restricted or prohibited weapon which he/she finds to a peace officer or report such a finding to a peace officer.
- 102(2) A person has an obligation to report a stolen or mislaid restricted weapon to a peace officer or to the local registrar of firearms.
- 103(2) Persons carrying out certain types of prescribed businesses shall report to a peace officer or local firearms registrar any loss, destruction or theft of a firearm or restricted weapon and any theft of ammunition.
- 106.5(4) Failure to deliver up a permit, registration certificate, firearms acquisition certificate, etc. to a peace officer or local registrar of firearms, or firearms officer after an order made suspending or revoking a person's use of a firearm constitutes an offence.

6. Breathalyzer

a) Powers

Section

- 234.1(1) A peace officer can demand a sample of breath for purposes of roadside breath analysis from the person driving or having care or control of a motor vehicle, vessel or aircraft.
- 235(1) A peace officer can demand a sample of breath for purposes of breathalyzer analysis from the person driving or who has care or control of a motor vehicle, vessel or aircraft.

Appendix D

b) Miscellaneous

Section

241(3) Evidence of a failure to comply with the demand by a peace officer for samples of breath is admissible and the court can draw an adverse inference from such evidence in a prosecution pursuant to section 238 of the Code.

7. Process

a) Powers

Section

629(1) Peace Officers are required to serve subpoenas (reference made to section 455.5).

455.1 Restoration of property to a complainant, when the property is before the court or has been detained, shall be executed by peace officers.

8. General Protections and Immunities

a) Powers

Section

25(1) A peace officer (as well as other persons designated in the subsection), who is required or authorized by law to do anything in the administration or enforcement of the law is justified in doing what he is required or authorized to do and in using as much force as is necessary, if he acts on reasonable and probable grounds.

S. 25(2) A person required or authorized by law to execute process or carry out a sentence, or any person assisting him, is justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective, if he acts in good faith.

S. 25(3) Subject to section 25(4), a person required or authorized by law to do anything in the administration or enforcement of the law can use force intended or which is likely to cause death or grievous bodily harm only when he believes on

Appendix D

Section

reasonable and probable grounds that it is necessary for the purpose of preserving himself or anyone under his protection from death or grievous bodily harm.

- S. 27(a) Everyone is justified in using as much force as is reasonably necessary to prevent the commission of an offence for which an offender could be arrested without warrant and which offence would be likely to cause immediate and serious injury to the person or to property belonging to anyone.
- S. 27(b) Everyone is justified in using as much force as is reasonably necessary to prevent anything being done that on reasonable and probable grounds he believes if it were done would be an offence likely to cause immediate and serious injury to the person or to the property of anyone.

9. Offences Relating to Peace Officers

Section

- 118(a) Resists or wilfully obstructs peace officer in the execution of his duty.
- 118(b) Omits without reasonable excuse to assist peace officer in the execution of his duty in arresting a person or in preserving the peace.
- 119 Personation of a peace officer.
- 128 Public mischief (with intent to mislead causing a peace officer to enter upon an investigation).
- 180(1)(a) Obstruction or delaying of peace officer in the execution of a warrant in respect of a disorderly house.
- 214(4) Classification of murder as first degree when victim is a police officer, warden, instructor, keeper, guard or permanent employee of a prison, etc. (the term peace officer is not mentioned).
- 246(1)(a) Assault of a peace officer in the execution of his duties.

Appendix D

Section

285 Theft by bailee of anything under lawful seizure by
a peace officer.

Appendix E

SUMMARY OF RECOMMENDATIONS

I Principles established in the Correctional Authority and Inmate Rights Working Paper:

1. Staff powers should be granted by law and should be clearly defined.
2. The purpose for which the power is granted should be clear and the power authorized should be necessary to the fulfillment of the agency's mandate.
3. In determining the appropriate staff powers for the correctional setting, the interests of staff, offenders and the public should be balanced.
4. To reduce potential arbitrariness and ensure fair treatment of individuals under sentence, controls on the use of staff powers should be established.
5. Physical force should only be used where there exists an immediate threat to personal safety, or the security of the institution or community, and there is no reasonable alternative available to ensure a safe environment. When force must be used, only the minimum amount necessary shall be used.

The following provisions are proposed for inclusion in correctional legislation:

II Use of Force

Objective

1. To maintain a safe and secure environment in institutions by the use of minimum force, where necessary.

Appendix E

Definitions

2. "Deadly force" is force which is intended or is likely to cause death or serious bodily injury.

"High-level security institution" is one in which a criterion for inmate placement is that an inmate must be judged to pose a significant risk of escape and of violent behaviour if at large.

"Major disturbance" is a situation where the day-to-day activity of the institution is disrupted to a significant degree by inmate violence or extensive property damage, and necessitates the placing of inmates in lock-up conditions.

"Non-deadly force" is force which is neither intended nor likely to cause death or serious bodily injury.

General Rule

3. Subject to the provisions of this part, all correctional staff who are required or authorized by law to do anything in the administration or enforcement of the law are justified in doing it and using no more force than necessary for that purpose, where they act on reasonable grounds and where no reasonable alternative exists to ensure the security of the institution or the safety of inmates or other persons.

Deadly Force

4. Deadly force may only be used as a last resort and then only in the following circumstances:

- a) to prevent escape from a high-level security institution where the staff member believes on reasonable grounds that no less intrusive measure will prevent the escape;
- b) where the staff member believes on reasonable grounds that deadly force is necessary to prevent an act which would likely result in death or severe bodily injury to one's self or to another person; or
- c) upon the authorization of the institutional head, deadly force may be used to end a hostage-taking situation or

Appendix E

major disturbance, where attempts at negotiation and the use of non-deadly force have failed to end the disturbance.

5. Wherever possible, the Deputy Commissioner of the Region should be consulted prior to the authorization of the use of deadly force.

6. When deadly force is used, the following steps shall be undertaken:

- a) an immediate notification of its use shall be given to the Deputy Commissioner of the region and the police department having jurisdiction in the area;
- b) all injured persons shall immediately be given a medical examination and, where necessary, treatment; and
- c) a report written by the staff member(s) using the deadly force shall be filed with the above-noted officials. Such reports shall include:
 - i) an account of the events leading to the use of deadly force,
 - ii) a precise description of the incident and the reasons for employing the deadly force,
 - iii) a description of any weapons and the manner in which they were used,
 - iv) a description of the injuries suffered, if any, and the treatment given, and
 - v) a list of all participants and witnesses to the incident.

Non-Deadly Force

7. Non-deadly force may only be used where there exists an immediate threat to the institution or community, and there

Appendix E

is no reasonable alternative available to ensure a safe environment. In every case, no more force than necessary shall be used.

8. Non-deadly force may only be used in the following circumstances:

- a) prior to the use of deadly force in situations justifying the use of deadly force;
- b) to prevent escapes;
- c) in defending one's self, other staff, and other inmates against physical assault;
- d) to prevent or quell a disturbance;
- e) to prevent serious damage to property; or
- f) to enforce institutional regulations where the staff member believes on reasonable grounds that the act threatens the safety or security of the institution.

9. Wherever possible, the institutional head should be consulted prior to the use of non-deadly force.

10. After the use of non-deadly force, the following steps shall be undertaken:

- a) a notification of the use of force shall be given to the institutional head;
- b) all injured persons shall immediately be given a medical examination and if necessary, treatment;
- c) a report written by the staff member who employed the non-deadly force shall be filed with the Deputy Commissioner of the region. Such report shall include:

Appendix E

- i) an account of the events leading to the use of non-deadly force,
- ii) a precise description of the incident, and the reasons for employing the force,
- iii) a description of the weapons used, if any, and the manner in which they were used,
- iv) a description of the injuries suffered, if any, and the treatment given, and
- v) a list of all participants and witnesses to the incident.

III Staff Protections

Objective

1. To ensure that correctional staff are adequately protected from criminal and civil liability when performing their duties in a reasonable manner.

Minimum and Necessary Force

2. Correctional staff are protected from criminal and civil liability in the use of authorized force in performance of their duties under correctional legislation.

Excessive and Negligent Use of Force

3. Nothing in this Act excuses criminal or civil liability for the excessive or negligent use of force by a staff member.

Mistake

4. Where a correctional staff member, acting in good faith, receives or detains a person pursuant to a warrant of committal, that member is protected from criminal and civil liability in respect thereof, notwithstanding any defect or lack of jurisdiction with respect to the warrant, or that the person detained is not the person named in the warrant.

Appendix E

IV Correctional Investigator

1. Where the Correctional Investigator conducts an investigation into a complaint about the conduct of a staff member and is of the view that the complaint is justified, the Correctional Investigator may

- a) recommend to the institutional head that appropriate disciplinary action be taken; and
- b) recommend changes in procedures aimed at preventing similar abuses in the future.

2. Where the Correctional Investigator makes a recommendation to an institutional head with respect to disciplinary action, the appropriate disciplinary proceedings should be instituted within ten days of the receipt of the recommendation, or the Correctional Investigator is to be informed of the reasons why no action is being taken.