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Chapter 5

AUTOMATISM AND CRIMINAL RESPONSIBILITY

AUTOMATISM AND CRIMINAL RESPONSIBILITY

INTRODUCTION

The defence of automatism is related to but separate from the defence of insanity. Ritchie J., in delivering the majority judgment of the Supreme Court of Canada in Rabey v. The Queen defined it as follows:

"Automatism is a term used to describe unconscious, involuntary behaviour, the state of a person who, though capable of action, is not conscious of what he is doing. It means an unconscious involuntary act, where the mind does not go with what is being done."

Canadian decisions have recognized that a state of non-insane automatism may follow from the following circumstances: a physical blow, physical ailments such as a stroke, hypoglycaemia, sleepwalking, involuntary intoxication or psychological factors such as a severe psychological blow.

In Rabey, the majority severely restricted the instances in which unconscious, involuntary conduct induced by psychological factors or blows will constitute a defence of automatism rather than insanity. The court broadly defined the term "disease of the mind" and restricted any unconscious, involuntary behaviour induced by a disease of the mind to the defence of insanity. Any malfunctioning of the mind which results in unconscious, involuntary conduct will be classified as a disease of the mind if its source is primarily some internal, subjective condition or weakness in the accused's psychological or emotional make-up and is not the transient effect of some specific external factor such as concussion or drugs.

The court held that the common emotional stresses of life do not constitute an external cause of an accused's "dissociative state" such as to give rise to the defence of automatism. Dissociative states arising from emotional shocks will, at best, constitute automatism only when the event giving rise to the emotional shock is so extraordinary that it might reasonably be assumed that an average, normal person would be similarly affected.

In Rabey, the court held that the accused's dissociative state, if proven, constituted a disease of the mind and thus the proper defence was insanity, not automatism. Likewise, in the cases of MacLeod, Rafuse, and Revelle, the courts

have held that "dissociative states", arising from psychological factors such as grief and mourning, anxiety and insults as to sexual capabilities, constitute diseases of the mind and thereby give rise to the defence of insanity.

The significant distinction between automatism and insanity lies in their different consequences: automatism results in an outright acquittal, while insanity results in a special verdict, followed by the possibility of indefinite confinement.

There are contrasting approaches in law and medicine to the subject of automatism. The law tends to assume that one is either conscious or unconscious. Medicine, on the other hand, prefers to speak of various levels of consciousness which have been identified by one Canadian psychiatrist as follows: full awareness, clouded consciousness, delirium, stupor and coma.

In the legal context "automatism" has come to mean any abnormal state of consciousness which negates mens rea but falls short of insanity.

In the medical context "automatism" has been defined in a number of ways. It has been equated, somewhat incorrectly, with amnesia. Automatism has also been defined in relation to the three consecutive processes of the memory: registration, retention and recall. Psychogenic automatism arises when the registration process of the memory is impaired. Organic automatism impairs both registration and recall. Hysterical amnesia which impairs recall of events is not automatism because it is a conscious suppression of unpleasant memories. Automatism has also been defined in terms of its origin. Organic automatism may arise from toxic substances in the blood or from epilepsy, cerebral concussion or hypoglycaemia. Psychogenic automatism may arise in cases of hypnosis, stress or strain, somnambulism, fugues (wandering states) and multiple personality.

The foregoing raises several areas of concern. The gradation of consciousness offered by psychiatrists is as arbitrary as the law's simplistic conscious/unconscious distinction.

The courts have expressed concern for testing the veracity of an automatism defence. As Mr. Justice Dickson stated in the Rabey case:

"Automatism as a defence is easily feigned. It is said the credibility of our criminal justice system will be

severely strained if a person who has committed a violent act is allowed an absolute acquittal on a plea of automatism arising from a psychological blow."

To avoid this problem Dickson suggested that evidence of unconsciousness should be supported by expert medical evidence that the accused did not feign memory loss and was not suffering from a disease of the mind.

The courts have also criticized the practice of asking the psychiatrist whether the accused was in a state of automatism at the time of the offence. This, they suggest, is a legal question to be determined by the trier of fact.

The objectivity of the psychiatrist's opinion has also been a subject of concern. Glanville Williams notes that some psychiatrists act as character witnesses for the patient/accused whereas others avoid taking any definitive stance on the accused's mental condition. Williams suggests that the proper task of the mental expert is to "diagnose the defendant's condition and to say what danger there is of a recurrence of the deed and what is the hope of medical treatment."

ISSUES

Issue 1

Should automatism be a defence?

Discussion

A person's ability to know or to reason right from wrong and the opportunity to choose one or the other provides the moral foundation for imposing criminal responsibility and punishment. It is proper and just to hold a person criminally responsible if he or she knowingly chooses to engage in conduct that is a crime, provided there is no lawful exemption, justification or excuse for such conduct. Criminal responsibility is clearly based on a theory of free will, not determinism. The two main legal components of criminal responsibility, actus reus and mens rea reflect this theory. The expression "knowingly chooses" encapsulates both the cognitive and volitional elements of criminal responsibility.

Issue 2

Assuming there is to be a defence of automatism in criminal law, how should it be defined?

Discussion

The Rabey definition of automatism links consciousness with voluntariness whereas the English authorities have distinguished the two as separate ways for automatism to arise.

Canadian judicial authorities define automatism as essentially unconscious behaviour. One may argue that reflex and convulsive movements must be distinguished from the seemingly purposeful and complex actions of a sleepwalker or a person in a dissociative state. Failure to make this distinction in defining automatism will detract from the precision of the term. The Law Reform Commission of Canada adopts the definition of Hall and Holmes of reflex actions as non-acts. The Commission uses unconsciousness as the sole criterion for defining automatism and suggests that non-acts do not amount to "conduct" and should be excluded from criminal liability.

Alternative 1

Define automatism in terms of involuntary conduct only.

Considerations

It is arguable that volition is wide enough to encompass the notion of consciousness, but the converse is not true. If a person is unconscious, his or her conduct while in that state is not "willed" movement and thus it is not voluntary. However, involuntary conduct such as a reflex reaction may occur while the actor is totally conscious.

The Rabey case confirmed that an act attaches criminal liability only if it is voluntary. An accused's actions which occurred while he or she was in a state of unconsciousness are by definition involuntary (i.e. they are not "willed" actions). It is arguably unnecessary, therefore, to expressly include the notion of unconsciousness in the definition of automatism.

In considering the dual criteria of voluntariness and consciousness, an additional distinction should be noted.

An act is voluntary if it is willed. The consequences of that act need not be foreseen. On the other hand, the requirement of consciousness extends to both the act and its consequences. This awareness of act and consequences is the essence of mens rea. If the accused is aware of the act, but not its consequences, there is no mens rea. For this reason consciousness is more readily associated with mens rea whereas voluntariness is associated with actus reus.

Alternative II

Define automatism in terms of conscious conduct only.

Considerations

As discussed earlier, the consciousness criterion is an inadequate expression of the voluntariness requirement. It excludes acts of individuals in altered states which may, nonetheless, be willed and includes involuntary conduct i.e. spasms or reflex actions in conscious individuals. One writer suggests that defining automatism in terms of consciousness may be confusing since it is also the yardstick of mens rea which implies fault.

Issue 3

Assuming there is to be a defence of automatism in criminal law, should the defence negate actus reus or mens rea, or both?

Discussion

The question of whether lack of consciousness relates to mens rea or to actus reus or both was left unanswered by the Rabey case.

If automatism is defined in terms of voluntariness alone it follows that automatism negates actus reus which encompasses a voluntary act. If automatism continues to be defined as an absence of consciousness alone, confusion will continue as to whether this lack of consciousness not only negates mens rea but also actus reus. It should be noted that an involuntary act will almost always be coincidental with no mens rea. This is not to suggest that involuntariness only negates actus reus. It may negate both. What is being asserted is that involuntariness always negates actus reus, whether or not mens rea is a necessary condition for conviction.

Issue 4

Assuming there is to be a defence of automatism in criminal law, what should be the relationship between that defence and the defence of insanity?

Discussion

If the involuntary conduct of automatism results from intoxication or insanity, automatism cannot be relied upon as a defence. It seems the law prefers the disposition (and the burden of proof in insanity cases) consequent on an insanity or intoxication defence to that which results when automatism is relied upon. This approach necessitates distinguishing between automatism caused by insanity and automatism caused otherwise.

Insanity, as defined in section 16 of the Criminal Code, involves inter alia "a disease of the mind" which renders a person incapable of appreciating the nature and quality of an act or of knowing that it is wrong. The Rabey case established that it is for the judge, as a question of law, to decide what constitutes a "disease of the mind" but that it is for the trier of fact to determine whether such a disease exists in a given case.

In Rabey the Supreme Court of Canada adopted Mr. Justice Martin's definition of a "disease of the mind". In distinguishing between insanity and non-insane automatism he relied upon the notion of transient disturbances of consciousness or transient malfunctioning of the mind caused by specific external factors as the components of non-insane automatism. He described insanity as a malfunction of the mind arising from some cause which is internal to the accused.

However, realizing that this generalized statement improperly excluded some "disease of the mind" conditions he acknowledged that particular transient mental disturbances "must be decided on a case-by-case basis." This acknowledgement, which was quoted with approval by the majority of the Supreme Court, suggests that the distinction is really a matter of pragmatism and policy, rather than a matter of general principle or strict medical opinion.

If the distinction is mainly a matter of pragmatism and policy, then the clearest legislative approach is to classify known conditions and leave the classification of new conditions to the courts. Hence, a legislative definition of "disease of the mind" would specifically exclude transient malfunctioning of the mind caused by

external factors. On the other hand, "disease of the mind" would be defined as including any illness, disorder or abnormal condition which impairs the human mind and its functioning, except transient malfunctioning of the mind from external causes. In particular, the legislative definition of "disease of the mind" would specifically include conditions such as brain tumors, arteriosclerosis, psychomotor epilepsy, and dissociative states caused by the ordinary stresses, anxieties and disappointments of life.

One criticism of the external cause approach to defining automatism illustrated by the Rabey case is that it embraces medical conditions which are not truly external causes. Perhaps these may be dealt with as exceptions to a causation model.

A more serious criticism of the test in Rabey is its adoption of an objective standard in regard to psychological blow automatism. Mr. Justice Dickson, in dissent, states that to specify an objective test for psychological blow automatism is incongruous with the subjective tests of other types of automatism and also with the concept of mens rea.

Alternative I

Adopt an objective test of foreseeability for the defence of automatism (The Law Reform Commission).

Considerations

This approach takes the objective standard far beyond Rabey by imposing such a standard for all external factors.

Proponents of using the objective test of foreseeability in psychological shock cases argue its veracity is borne out by the likelihood of recurrence. Unfortunately, likely recurrence is not supported by statistical data and is tied to the precarious task of predicting future behaviour.

An alternative to the subjective/objective test is to assign a wide definition to "disease of the mind" and a narrow test for automatism. The arguments advanced in favour of this approach are as follows:

- (i) Automatism can too easily be feigned because (a) dissociative states are not fully understood, (b) medical evidence on whether dissociation exists and whether it is a disease of the mind will normally be conflicting or contradictory, and (c) the symptoms of a dissociative state are very close to the symptoms of an extreme state of rage and thus it is hard to distinguish between the two.

- (ii) The possibility of feigning a defence of automatism will undermine public confidence in the criminal justice system and will spawn a flood of similar allegations.
- (iii) It will be very difficult for the Crown to prove beyond a reasonable doubt that the accused's act was conscious and voluntary if the accused is allowed to plead his or her particular vulnerability to a dissociative state.

In regard to feigning automatism, the clinical literature reveals various methods for weeding out malingerers, including polygraph examinations, sodium amytal interviews, hypnosis, repeated psychiatric examination, and familiarity with clinical symptoms of automatism. The floodgates argument may be unrealistic particularly if allegations of automatism must be verified by medical evidence. Finally, the problem of proof (if subjective, internal, psychological factors contributing to dissociation are taken into account) is no different than proof of other subjective mental states such as intent and recklessness. Courts infer intent, or consciousness or voluntariness, from all the surrounding circumstances. Arguably, therefore, none of the above arguments is a compelling reason for rejecting the subjective test.

Alternative II

- (1) Define automatism simply as the absence of voluntary conduct even where the conduct is caused by insanity. Automatism resulting from fault on the part of the accused (for example, self-induced intoxication) would be dealt with by a separate provision, discussed later.
- (2) Enact a flexible range of dispositions for the judge to make following an acquittal by reason of automatism.

Considerations

This approach would simplify the law without reducing the protection of the public from future acts of violence.

However, failure to distinguish, for example, between automatism caused by a major psychotic reaction and automatism caused by a blow on the head or accidental over-injection of insulin may frustrate public expectation that insane acts will be labelled as such.

The above alternative would not eliminate the insanity defence. In the majority of insanity cases the accused's conduct is conscious and voluntary though produced by delusions or irrational motivations. Only when insanity causes unconscious or involuntary conduct would automatism arise as a separate defence.

Alternative III

- (1) Enact a flexible range of dispositions.
- (2) Make automatism a separate defence only if it is not caused by insanity, intoxication or fault on the part of the accused.
- (3) Use a wide definition of "disease of the mind" but for greater clarity designate certain conditions as constituting either insanity or automatism.

Considerations

Recommendations for designation of conditions such as somnambulism, epilepsy, hypoglycaemia, dissociative states caused by psychological blows, stress or anxiety, could be made after an interdisciplinary team of experts have studied each condition and recommended its classification as insanity or automatism.

Under this approach, "disease of the mind" might be defined as follows:

Any illness, disorder or abnormal condition which impairs the human mind and its functioning, whether organic or functional, curable or incurable, recurring or non-recurring, including the following conditions [as recommended by the interdisciplinary team]...but not transient malfunctioning of the mind from causes such as concussion, drugs [fill in the other conditions recommended by the interdisciplinary team]... and other similar conditions.

Issue 5

Assuming there is to be a defence of automatism in criminal law, what should be the relationship between it and the defence of intoxication?

Discussion

In Canada, self-induced or voluntary intoxication is a defence to "specific intent" crimes but not "general intent" crimes. The rule has been criticized as illogical and arbitrary. It is based on the policy that to exculpate a person who voluntarily induces a state of intoxication would compromise the law's deterrent effect. Since most specific intent crimes include a lesser general intent crime, the rule usually results in a conviction for the latter.

In some instances intoxication impairs perception so as to negate specific intent. In other instances intoxication may be so severe so as to render the accused's conduct involuntary or unconscious. If the accused were able to rely upon the defence of automatism an absolute acquittal would result. This exemption would negate the social policy behind the intoxication defence. The law has remedied this gap by declaring that if the accused's involuntary conduct stems from voluntary intoxication he may rely on the intoxication defence but not on automatism.

The Law Reform Commission has provided two options to the present relationship between automatism and voluntary intoxication. The first is a modification of the present law. The second is to allow intoxication as a defence to all crimes and to create a new defence of criminal intoxication.

Issue 6

Assuming there is to be a defence of automatism in criminal law, should that defence be available even where the state of automatism arose through the fault of the accused?

Discussion

Current case law holds that automatism is no defence in itself (at least with respect to some types of offences) where such state has foreseeably resulted from something the accused did (e.g., taking alcohol while on medication after being warned not to) or omitted to do (e.g., failing to have regular meals while taking insulin).

Alternative I

Provide that the defence of automatism is not available where the dissociative state foreseeably arose through the fault of the accused (Law Reform Commission, Dickson J. in Rabey).

Considerations

This approach is premised on the assumption that the moral culpability involved in inducing oneself into an unconscious state is sufficient to negate the defence of automatism.

The Law Reform Commission as well as the dissenting judgment of Dickson J. in Rabey both contend that fault is an absolute bar to the defence of automatism. The fault contemplated includes self-induced intoxication, negligence and loss of temper.

Several comments may be made with regard to the Commission's proposal:

- (1) There is an inconsistency in result between the Commission's intoxication and automatism proposals. If a person is charged with a specific intent offence and is unconscious due to self-induced intoxication the intoxication defence affords him or her an acquittal. However, if the unconsciousness is due to other types of fault (i.e., failure to take insulin) there is no defence of automatism and the intoxication defence does not apply.
- (2) The Commission uses the word "unforeseeable" rather than "reasonably unforeseeable."
- (3) The Commission does not clarify whether the test of "unforeseeable" is an objective or subjective test.
- (4) Does the requirement of unforeseeability relate only to the possible unconscious state or to the specific type of offence which might occur?

Alternative II

Make the relationship between automatism and fault dependent on the type of offence involved.

Considerations

Options for dealing with the problem of automatism and fault will be dealt with in relation to the three broad categories of offences: offences requiring mens rea; offences requiring negligence; and offences of absolute liability. The following arguments may be made:

- (1) Absolute Liability Offence. Since foresight of the harm is not required in absolute liability

offences, the voluntariness requirement is met by the wilful act or omission inducing the state of unconsciousness.

- (2) Criminal Negligence Offence. In criminal negligence offences liability attaches when the actions of the accused generate harm which a reasonable person would have foreseen whether or not the accused did so. Application of this objective test imposes liability on the accused even where the final act causing the harm was involuntary.
- (3) Mens Rea Offence. In mens rea offences, the harm must be foreseen by the accused. If the accused induced an involuntary state with the intent of committing a crime (a highly unlikely scenario), he or she can be convicted of an intentional crime even though the final act is committed involuntarily. Likewise, if the accused foresaw the likelihood of the very harm which occurred, but nonetheless ran the risk of rendering him- herself unconscious, then he or she can be convicted of an offence where recklessness is the requisite mens rea. He or she should not, however, be convicted of a special intent offence.

To impose liability where automatism incapacitates the accused from forming the requisite mental element violates the concept of mens rea. However, the presence of fault may be recognized either by convicting the accused of a lesser, included offence requiring a lesser mental element, where applicable, or by convicting him or her of a new offence of negligence for the culpable automatism.

In situations where no conviction for a lesser, included offence is appropriate, conviction for the offence of criminal negligence causing bodily harm may be possible. For instances where bodily harm is not involved, a new offence of criminal negligence causing a criminal harm might be enacted.

Alternative III

Adopt a "constructive mens rea" approach.

Considerations

This approach may relate to involuntary conduct due to intoxication or other types of fault (i.e. the reckless insulin user). The rationalization of this approach, which is found in the American Model Penal Code, follows the

assertion that voluntarily inducing a state of intoxication or incapacity in oneself is of sufficient moral turpitude to attract liability for consequential harm. The approach also recognizes the social dangers of proscribing culpability by voluntary intoxication as well as the practical difficulty of litigating the foresight of a particular accused at a given time.

Alternative IV

Provide that automatism is a defence to the offence but let the element of fault render the accused guilty of a new negligence offence.

Considerations

This approach could be adopted for both automatism and intoxication. The incapacitation of the accused is recognized by providing a defence to the main offence. However, the fault of inducing the incapacitation is addressed by rendering him or her liable to a lesser, new offence of negligence. One argument against this option is that self-induced intoxication or automatism involves sufficient culpable behaviour to attract criminal responsibility for the full offence.

Alternative V

Create a separate offence of "criminal automatism" in cases where automatism has arisen from the fault of the accused.

Considerations

Several commentators have suggested the creation of an offence of being "drunk and dangerous" or, as the Law Reform Commission alternative proposal suggests, an offence of "criminal intoxication." A wider offence of "criminal intoxication or automatism" for both intoxication and automatism due to fault could also be enacted. This approach raises several issues such as the test of dangerousness, the requisite mental element, the effect of a conviction under this option would have on general intent offences and the appropriate penalty to be imposed.

Issue 7

Assuming there is to be a defence of automatism in criminal law, what is the appropriate burden of proof to establish such a defence?

Discussion

The Rabey case establishes that the defence of automatism, unlike that of insanity, does not involve a reversal of the onus of proof. The defence may raise a doubt as to whether the offence was committed voluntarily either by cross-examining Crown witnesses or by calling evidence. The courts have recently suggested that where the accused testifies, his or her evidence must be supported by medical or scientific evidence in order to substantiate a defence of automatism.

Issue 8

Assuming there is to be a defence of automatism in criminal law, what should be the result of a successful automatism defence?

Discussion

The present distinction between insanity and non-insane automatism is somewhat arbitrary. In the Rabey case Mr. Justice Dickson suggested that the likelihood of recurrence of a particular mental state in an accused is one factor in determining whether the accused is suffering from a disease of the mind. Another factor is whether or not he or she should be committed to a hospital for treatment and detention.

It can be argued that these considerations relate to appropriate dispositions rather than to the issue of criminal responsibility which encompasses general principles of blameworthiness. At present, the difference between an insanity verdict and an automatism verdict is that the former will probably result in confinement in an institution for the criminally insane. However, this is not invariably so as section 545(2) of the Criminal Code permits the lieutenant governor to make an order for discharge where it would be in the best interests both of the accused and the public.

Alternative I

Provide for outright acquittal in all cases of automatism ("sane" or "insane").

Considerations

The acquittal of an accused who is thought to be dangerous does not preclude the prosecutor, police, judge or any other citizen from instituting civil commitment proceedings pursuant to relevant provincial statutes.

Alternative II

Provide for a special verdict of "not responsible by reason of automatism."

Considerations

As in the case of insanity, there would be a range of dispositional options available including an absolute discharge, a conditional discharge, confinement, etc.

Chapter 6

DISPOSITION AND CONTINUING REVIEW
OF UNFIT AND INSANE ACCUSED PERSONS

DISPOSITION AND CONTINUING REVIEW
OF UNFIT AND INSANE ACCUSED PERSONS

THE CRIMINAL COMMITMENT SYSTEM
AS IT RELATES TO DISPOSITION

Introduction

This section focuses on those accused persons who have been found not guilty by reason of insanity or not fit to stand trial. It is divided into two parts. The first will examine the question of the initial disposition. The second will look at the review process that follows disposition. As much as possible, consideration of the issues and related alternatives in each area will be kept separate.

Currently, under the Criminal Code, persons found unfit to stand trial and persons found not guilty of indictable offences on account of insanity fall within the jurisdiction of the provincial lieutenant governor. Pursuant to s.542(2), once an accused is acquitted of an indictable offence by reason of insanity, the court that held the trial must immediately order that the accused "be kept in strict custody in the place and in the manner that the court, judge or magistrate directs, until the pleasure of the lieutenant governor of the province is known" (emphasis added).

For accused persons found unfit to stand trial, the requirements are similar, but the language is somewhat different. Here, pursuant to s.543(6) of the Code, once an accused is found to be unfit to stand trial the court that held the fitness hearing must order that the accused "be kept in custody until the pleasure of the lieutenant governor of the province is known..." (emphasis added).

There is no legislative guidance as to why the language differs in ss. 543(2) and 543(6), or as to what the difference is between "strict custody in the place and in the manner" and simple "custody." One interpretation may be that the court has broader discretion in formulating an appropriate disposition for insanity acquittees, and that such disposition might include placement in a psychiatric facility. Arguably, the options open to the court with respect to persons found unfit to stand trial are not nearly as broad; for this group of accused persons, custody in jail appears to be the only option.

Currently, the court order for either situation is simply an interim one pending the imposition of an initial disposition by the lieutenant governor of the province. Because the Code specifies no time period within which

the lieutenant governor must act, the interim court order for custody could theoretically continue indefinitely.

Putting aside the above considerations for a moment, there are two threshold questions that must be answered. The first is whether there should be a system under the Criminal Code for rehabilitating mentally disordered persons who have been in contact with the criminal process. Assuming there is to be such a system, the second question to be answered is whether it should apply to all insanity acquittees and to all unfit accused persons.

ISSUES

Issue 1

Should provision be made in the Criminal Code for a system that allows for the rehabilitation of mentally disordered persons who have been found insane at the time of the offence?

Discussion

Currently, all provinces have provincial mental health legislation providing for the civil commitment and treatment of mentally disordered persons. The Criminal Code provides for "commitment" of persons found to have been insane at the time of an indictable offence. It may be argued that provincial civil commitment mechanisms are adequate for dealing with the disposition of mentally disordered accused persons.

Alternative I

Provide that the disposition of insanity acquittees be left to provincial civil commitment mechanisms.

Considerations

Recommendation 12 of the Law Reform Commission's Report on Mental Disorder in the Criminal Process (1976) states: "The verdict 'not guilty by reason of insanity', if maintained, should be considered a real acquittal, subject only to a mandatory post-acquittal hearing to determine whether the individual should be committed to an institution under provincial legislation" (emphasis added). Furthermore, Recommendation 25 states: "Section

542 of the Code dealing with the disposition of the accused found not guilty by reason of insanity should be amended to provide only for a mandatory post-acquittal hearing to determine whether there are grounds to detain the accused under the provisions of the relevant provincial mental health legislation.**

This alternative would be consistent with such recommendations. It would also be consistent with the concepts of mens rea and criminal responsibility; accused persons who have been adjudged to have been insane at the time that an offence was committed and have therefore been absolved of legal responsibility associated with that crime would, like any acquitted person, no longer be within the purview of the criminal justice system.

The goals underlying the disposition of mentally disordered accused persons (i.e., rehabilitation, protection) are closely related to those underlying the disposition of mentally disordered persons who have not been involved with the criminal process. There may, therefore, be no need for a distinct criminal commitment system. It may be easier, less cumbersome and less costly to allow the existing provincial mental health system to deal with all mentally disordered accused persons rather than to maintain a parallel system under the federal law.

On the other hand, while an insanity acquittee may have been absolved of criminal responsibility, antisocial behaviour will have been established. It is arguable that the insanity acquittee is therefore different from other mentally disordered persons at large, and that this difference justifies maintaining a federal commitment system. In addition, insanity acquittees may be inconsistently dealt with; commitment criteria and procedures may vary from one province to another. An insanity acquittee who might be involuntarily confined in one province might not be similarly confined in another (thus, there may be s. 15(1) Charter implications). In some provinces, moreover, the facilities to which civilly committed individuals are sent may not be sufficiently secure for safe custody of mentally disordered offenders.

*As noted in the recommendations, an insanity acquittee would be subject to a post-acquittal or civil commitment hearing. However, a "hearing" per se is not generally held under provincial legislation. Rather, the decision is an informal one made by a physician. The convening of such a hearing might therefore require the introduction of new provincial legal machinery.

Alternative II

Provide for a separate commitment system under the Criminal Code.

Considerations

This alternative may be supported by the argument that although an insanity acquittee may have been absolved of criminal responsibility, antisocial behaviour will have been established; the insanity acquittee is therefore different from other mentally disordered persons at large. As already noted, this difference may justify maintaining a federal commitment system. This alternative would also provide a consistent and uniform approach for dealing with all insanity acquittees. One set of standards and procedures would apply.

It may be argued, however, that since a well-functioning and specialized system for the civil commitment of mentally disordered persons already exists in each province, it is an unnecessary expenditure of time, human resources and money to manage a parallel federal system. Arguably, moreover, federal standards may not effectively respond to local values and attitudes regarding commitment of mentally disordered persons.

Issue 2

Should provision be made in the Criminal Code for a system that allows for the rehabilitation of mentally disordered persons who have been found unfit to stand trial?

Discussion

As with persons found not guilty of indictable offences by reason of insanity, persons found unfit to stand trial may be made the subject of "commitment" under the Criminal Code. Is there a better approach?

Alternative I

Provide that the disposition of unfit accused persons be left to provincial civil commitment mechanisms.

Considerations

While an unfit accused has been charged with a criminal offence, he or she has not yet been convicted of that offence. This alternative would be consistent with the view that such an individual is not a criminal, and therefore should not be dealt with pursuant to the Criminal Code. (This view may be especially appropriate where the Crown has not yet made out a prima facie case). It might be particularly appropriate where the offence charged is minor or non-violent in nature, or where the accused is unlikely to ever become fit to stand trial (e.g., where the individual is severely mentally retarded). It may also be argued that since provincial mechanisms for dealing with mentally disordered persons are already in place, they need not be duplicated in the Code.

On the other hand, the aims of committing an unfit accused to a mental health facility may be different from those applicable where a mentally disordered person who has not been charged with a criminal offence is concerned. Arguably, this fact justifies the existence of a different commitment mechanism. Moreover, the protection of society may require greater emphasis when a disposition is being formulated for mentally disordered persons. Also, because these individuals are still before the courts awaiting trial, it is arguable that the Criminal Code should provide for a disposition that will effectively monitor their progress.

Alternative II

Provide for a separate commitment system under the Criminal Code.

Considerations

While an unfit accused person may not yet have been convicted of the offence charged, he or she has entered the criminal justice system because he or she is suspected of having committed an offence. This "criminal law" component, when considered along with the objective of achieving fitness, may justify the existence of a separate disposition mechanism. This mechanism would provide uniform standards and procedures appropriate for dealing with persons who will ultimately be required to stand trial, and would make available the treatment necessary to render the accused fit to stand trial. Arguably, it would also provide greater protection to the public.

On the other hand, where a well-functioning and specialized system for the civil commitment of mentally disordered persons already exists, it may be an unnecessary expenditure of time, human resources and money to provide for a parallel federal system.

Issue 3

Assuming there is a separate system under the Criminal Code, should it apply to all insanity acquittees?

Discussion

At present under the Code, only those accused persons who have been acquitted of indictable offences by reason of insanity are subject to detention to await the pleasure of the lieutenant governor. Once an accused is acquitted of a summary conviction offence by reason of insanity, he or she is not subject to detention and the possibility of an LGW. Such individuals are automatically released subject to possible civil commitment under provincial legislation where the relevant criteria are met. Note, however, that all unfit accused persons, regardless of the classification of the offence with which they have been charged, are subjected to detention to await the pleasure of the lieutenant governor.

Indictable offences are generally more serious than summary conviction offences. It is arguable that accused persons who have been found not guilty of summary conviction offences should not remain within the jurisdiction of the criminal justice system. Since summary conviction offences are generally less serious offences, public safety may not be as significant an issue.

It could be argued, however, that all individuals who commit criminal offences should be dealt with consistently. Moreover, although indictable offences are thought to be more serious than summary conviction offences, these categories may be misleading. For example, fraud is an indictable offence, while common assault is a summary conviction offence. It might be argued that mentally disordered persons who have committed common assault are more dangerous to the public than are those who have committed fraud.

Alternative I

Provide that only persons found not guilty of offences involving violence against another person (whether summary or indictable) by reason of insanity shall be subject to the disposition system under the Code.

Considerations

One of the main factors justifying federal provisions may be the protection of society from dangerous persons in a consistent, uniform manner. If so, a categorization based on a violence/non-violence distinction might more realistically protect society from persons who have committed violent offences.

On the other hand, it may be argued that a federal rehabilitative process will ensure the protection of the public from some persons who have committed non-violent offences.

Alternative II

Provide that all insanity acquittees shall be automatically subject to the same disposition system.

Considerations

This approach would avoid the possibility that cases requiring commitment would be missed, thereby possibly jeopardizing public safety and the protection and treatment of the individual. Moreover, if a fair and flexible system involving procedural protections and creative disposition options is adopted, it should be able to deal adequately with a large range of cases. If, however, the criminal rehabilitative system is unfair or inflexible, subjecting all insanity acquittees to this system would be unjust. -

Issue 4

Assuming there is a separate system under the Criminal Code, should it apply to all unfit accused persons?

Discussion

As mentioned earlier, all unfit accused persons, regardless of the classification of the offence with which they have been charged, are subjected to detention to await the pleasure of the lieutenant governor. The main objective with regard to the unfit accused is rehabilitation, i.e., providing treatment so that the individual may become fit to stand trial. Again, however, public protection is also on issue.

Alternative I

Provide that only unfit accused persons charged with indictable offences should be subject to the disposition system under the Code.

Considerations

Since summary conviction offences are generally less serious, public safety may not be as significant an issue. Automatic subjection to criminal rehabilitation machinery may therefore not be demanded. Where appropriate, the unfit individual could either be committed civilly or released into the community to be brought back for trial if and when he or she becomes fit.

On the other hand, it could be argued that all individuals charged with criminal offences should be subject to a uniform rehabilitation system aimed at rendering them fit to stand their trial.

The considerations presented for Alternative I under Issue 2 might apply here as well.

Alternative II

Provide that only unfit accused persons charged with offences involving violence against another person should be subject to the disposition system under the Code.

Considerations

As mentioned earlier, one of the main factors which may justify a separate system under the Code is the protection of society from dangerous persons. It could be argued that a categorization based on a violence/non-violence distinction might more realistically protect society from persons who may have committed violent offences.

Under this approach, the unfit accused charged with a non-violent offence could either be committed civilly where appropriate, or be released into the community, to be brought back for trial if and when he or she becomes fit.

On the other hand, this alternative does not ensure that all individuals charged with criminal offences would be subject to a uniform criminal rehabilitation system aimed at rendering them fit to stand trial. Nor does it deal with the argument that the public should be assured protection from some persons charged with non-violent offences through a federal rehabilitative process (or that at least the person should be brought to the attention of mental health professionals so that commitment processes might be considered or voluntary services offered).

UNDERLYING ASSUMPTIONS RELATING TO A CRIMINAL COMMITMENT SYSTEM

The preceding section of this part of the paper dealt with the question of whether the Criminal Code should make provision for a criminal commitment system. The following is based on the assumption that a criminal commitment system will be retained for at least some persons found insane at the time of the offence or found unfit to stand trial. Prior to examining alternatives that deal with disposition and release, a number of underlying assumptions on which these alternatives are grounded should be presented. These are as follows:

- (a) The main purposes of disposition will be the protection of society and the treatment and rehabilitation of the accused person.
- (b) There will be criteria for determining which persons fall into the two groups (i.e., insane or unfit).
- (c) The range of available dispositions will include confinement and release (conditionally or unconditionally).
- (d) Criteria will be proposed in the selection of an appropriate disposition. These criteria will have regard to: (1) the seriousness of the offence charged; (2) the present dangerousness of the accused; (3) the severity of the mental disorder; and (4) the current need for treatment.

- (e) Selection of the appropriate disposition alternative will be based on the "least restrictive alternative" or "least intrusive alternative" principle. This means that in each case a disposition will be chosen that is least restrictive of an individual's freedom, while still satisfying the goals of protection of society and treatment and rehabilitation of the person.
- (f) A system will be available whereby the decision-makers' accountability is clearly defined.

Issue 5

Should confinement of the insanity acquittee or unfit accused pending initial disposition be mandatory?

Discussion

The willingness of the public to support (or at least accept) the insanity defence may depend on the reassurance that persons who have committed acts of violence will not be automatically freed to return to society. While consideration should be given to public policy interests of this kind, special statutory provisions that treat insanity acquittees in a substantially different manner from those confined under civil commitment laws could raise constitutional questions and social policy concerns. To be acceptable, such laws must not offend the equal protection provision of the Charter of Rights.

As already noted, the current provisions require confinement pending a decision by the lieutenant governor (except in the case of persons found not guilty of summary conviction offences on account of insanity). Public attitudes have historically favoured confinement in a mental hospital or similar facility. The incentive for such a placement has often been the confinement itself rather than the treatment that will follow. It is suspected that one purpose served by automatic confinement is to discourage fraudulent pleas of insanity.

Automatic confinement of the insanity acquittee, however, may fail to take into account possible changes in the individual's mental condition from the time of the commission of the act to the time of the verdict. In the United

States, long-term automatic commitment has been held to violate the Bill of Rights. Since similar provisions exist in the Charter of Rights, similar problems may arise.

The present approach under the Code may be the simplest and most expeditious approach. It is arguable that since the interim order is intended to last only a short period, the court should not be required to consider options to confinement. Weighing of such options would occur at the stage of initial disposition or shortly thereafter and could therefore result in duplication. Also, although the court would have held a trial or fitness hearing, the evidence adduced there may not be relevant to disposition. The court might not, therefore, have sufficient evidence at its disposal from which to meaningfully choose an appropriate disposition option.

On the other hand, although the interim order is intended to last only a short period, there may be instances where it in fact lasts longer. It may be that pre-disposition reports and other evidence will need to be prepared prior to the ultimate disposition decision, thus requiring longer interim placement. Where this is the case, it may be appropriate for the court to address the issue of what setting or situation (i.e., confinement vs. non-confinement) would be most conducive to the preparation of this material. For example, for an unfit accused person charged with a relatively minor offence, a community placement with out-patient assessment might be the most appropriate setting in which to assess how the accused would function in the community.

In addition, a mandatory confinement order could result in the confinement of individuals who are not dangerous. This would not be in accordance with the "least restrictive alternative" principle. Further, this approach could infringe the Charter prohibition against arbitrary detention (s.9) and possibly the provision against cruel and unusual treatment (s.12) where a non-dangerous individual is confined simply because there is no other (less restrictive) option available to the court. Finally, mandatory confinement may be unnecessarily costly.

Alternative I

Provide for a range of interim order options, including custody, strict custody, conditional discharge, etc.

Considerations

This approach would likely avoid any problems under ss. 9 and 12 of the Charter. Furthermore, since interim confinement may continue over a long period, it would be fairer to make the most appropriate disposition possible at this stage. It might also be advisable to require the court to address the issue of what kind of setting would be best suited to enable assessment of the individual in preparation for the initial disposition. This approach gives substance to the "least restrictive alternative" principle, and may be more cost efficient than mandatory confinement.

On the other hand, as noted earlier, it may be impractical to require that the court weigh options at this early stage, particularly as the exercise will have to be repeated at the initial disposition stage. Again, the court may not have sufficient evidence before it on which to base an informed choice. There is also the argument that an order lasting such a short period does not merit a "mini-hearing" to determine its appropriateness. Moreover, this approach might not ensure protection of the public, since the individual would not be automatically confined.

If provision is made for a range of alternatives regarding placement at the interim order stage, it is arguable that they should be the same for both insanity acquittees and unfit accused persons.

While there are a great many options that could theoretically be considered here, many of these are perhaps more suitable for consideration at the initial disposition stage, provided they are considered at that stage.

"Strict Custody in the place and in the manner that the court directs" (status quo for insanity acquittees).

This approach requires confinement and allows the court to formulate the terms of the confinement order to accommodate different situations. It helps ensure that the public is protected and that the individual will be available for a disposition-related assessment (and for the disposition hearing, where one is held).

It is unclear, however, how the phrase "strict custody" should be interpreted. It may be argued that this term limits the confinement to a maximum security facility. With such an interpretation, some of the apparent flexibility available to the court through such an approach would be lost. Also, this interpretation may result in

the confining of non-dangerous individuals for whom a less restrictive alternative might be more suitable. The Charter provision prohibiting arbitrary detention may apply in such cases (s.9). For those individuals who could be managed in a less restrictive setting, this approach could also be unnecessarily expensive.

In those provinces without secure mental health facilities, the only practical response to such a provision would likely be confinement in a jail.

"Custody" (status quo for unfit accused persons).

The term "custody" may be broad enough to allow for a variety of confinement orders, including orders for confinement in maximum, medium and minimum security facilities. Assuming the right setting were ordered, it would ensure the protection of the public. The term could, however, be narrowly interpreted to mean jail.

Although they will not be discussed in detail, there are variations of the custodial model. For example, the term "confinement" could be substituted for "custody." Although it may be argued that this term is less vague than custody, the same problems would likely apply.

The Code could provide for confinement in a hospital or jail. However, some provinces may not have hospitals capable of properly restraining dangerous individuals. If confinement in jail were the only option, this might be inappropriate for those individuals requiring treatment for a serious mental disorder.

If custody or confinement were the only alternative, it is likely that some non-dangerous individuals and some individuals that would be best treated as out-patients would be unnecessarily confined.

Conditional Discharge

This approach would involve the making of a non-custodial order with terms and conditions attached aimed at accomplishing the goals of the interim order. An individual could, for example, be ordered to attend for treatment or assessment as an out-patient pending initial disposition.

Having this option available at the interim order stage would give substance to the "least restrictive alternative" principle. It would also allow for substantial cost savings, since non-custodial services are generally less expensive than custodial ones. As long as a custodial option remains available to the court, the

safety of the public could be protected where necessary. Such option could also be selected in cases where there is concern that the individual might disappear if released.

Issue 6

Assuming a range of options will be available for interim orders, what criteria should guide the court in selecting the appropriate option?

Discussion

The "least restrictive alternative" principle and the goals of rehabilitation and public protection require the Code to provide clear, precise criteria. Broad, vague criteria that allow maximum discretion may permit public policy considerations and subjective values to unduly influence the decision-making process and may create inconsistency in decisions. They might also be open to attack under ss. 7,9 or 15(1) of the Charter.

Alternative I

Provide that the interest of the public and the best interest of the accused must be considered.

Considerations

Since the court is accustomed to dealing with public interest concerns, such criteria may not present much difficulty. Furthermore, such criteria are consistent with those used by boards of review (where established), which have indicated that they do not have much difficulty dealing with the concept of "the interest of the public" and/or that of the individual.

It may be argued, however, that the expressions "the interest of the public" and "the best interest of the accused" are open to a number of different interpretations and therefore trigger the kinds of concerns raised in the discussion above.

Alternative II

Provide that current mental disorder and dangerousness must be considered.

Considerations

These criteria are similar to civil commitment standards used in a number of provinces. They provide guidance on specific areas to be considered and weighed by the decision-maker. To the extent that dangerousness cannot be accurately predicted, however, inclusion of this criterion may be problematic.

Clarification of the term "dangerousness" might be required. It might be defined as the imminent risk of causing serious bodily harm to others. Even as so defined, however, the term may be subject to the same problems associated with predictability of dangerousness generally.

Alternative III

Provide that other factors must be considered, such as: the availability of treatment; the availability of treatment beds; the wishes of the accused; the seriousness of the offence; the likelihood of the person being available for disposition, etc.

Considerations

All of the above factors might be relevant to the question of what the most appropriate interim order should be. More will be said about these factors infra when initial disposition and review are discussed.

Issue 7

How should the interim order decision be made?

Discussion

At present, no special hearing is required prior to the making of an interim order. It may be argued that without a hearing there is no adequate basis on which to make an informed decision.

Alternative I

Provide that the court has the discretion to determine the mechanism necessary to gather evidence.

Considerations

Arguably, it is only in some cases that the hearing of oral submissions made by the prosecution or the accused would be necessary; in other cases, it might be appropriate for the court to base its order solely on evidence that was presented at trial. This approach would provide the decision-maker with the flexibility to adapt practices to the demands of individual cases. It would also allow the court to make expeditious decisions without wasting valuable court time for what is only an interim decision.

While this approach may be of specific benefit to the decision-maker, however, it would not ensure input from all concerned parties on the specific issue of the interim order. There is therefore the risk that the decision may not result in the use of the most appropriate alternative.

Alternative II

Require that a full court hearing be held prior to the making of an interim order.

Considerations

This approach would help ensure that the most appropriate interim order is chosen. It would allow for the greatest consideration of both the liberty rights of the individual and public safety. On the other hand, it would be costly and time-consuming. The whole process might have to be repeated very shortly thereafter at the initial disposition stage.

INITIAL DISPOSITION

Issue 8

What options should be available to the decision-maker on initial disposition?

Discussion

The initial disposition of persons found unfit to stand trial or not guilty of indictable offences by reason of insanity is determined by the lieutenant governor of the province where the accused is held. Pursuant to s.545(1) of the Code, "the lieutenant governor may...make an order

(a) for the safe custody of the accused in a place and manner directed by him, or (b) if in his opinion it would be in the best interest of the accused and not contrary to the interest of the public, for the discharge of the accused either absolutely or subject to such conditions as he prescribes."

There is no other legislative guidance as to when a custody order is more appropriate than a discharge, or when a conditional discharge is preferable to an absolute discharge. Furthermore, when a conditional discharge is being considered, there is no guidance as to what sort of conditions may be attached. In practice, the disposition usually selected by the lieutenant governor is a "safe custody" order.

The mechanism for making an initial disposition is the imposition of an order (warrant) of the lieutenant governor (LGW). Once such a warrant is in place, it is for an indeterminate period. Only the lieutenant governor (or lieutenant governor-in-council) may vary the terms of or vacate the warrant. He or she is not under any obligation to do so.

The current procedure ensures the protection of society, and in theory provides a certain degree of flexibility. Practice, however, has demonstrated that "safe custody" is a vague term that may require clarification before flexibility ought to be associated with it. It is not clear, for example, what level of security the detaining facility must provide.

It would seem to be relevant that the facility charged with the responsibility of confinement be given clear direction regarding detention. Some jurisdictions consider it within their purview to direct the type of security that must be imposed. Terms such as "maximum" and "medium" security are sometimes found in warrants of the lieutenant governor. There is often little, if any, clarification of these terms. This results in varying interpretations. For example, in some circumstances, an insanity acquittee or unfit accused person may be directed to be held in "medium security" at night and be permitted to work in the community during the day.

It is also not clear in the current provisions what the "manner" of custody that may be directed by the lieutenant governor refers to. Does it permit precise direction relating to restraint and/or treatment measures?

There are a number of other expressions that could be used as alternatives to the status quo, such as: "safe custody," alone; "strict custody" in the place and in the manner that the decision-maker directs (the status quo for interim disposition orders for insanity acquittees); "strict custody" alone; "custody in the place and in the manner that the decision-maker directs"; "custody" (status quo for interim disposition for unfit accused persons); "confinement" alone; "confinement in a hospital" (or other treatment facility)": confinement in a hospital in the manner that the decision-maker directs"; "confinement in jail"; "confinement in a jail in the manner that the decision-maker directs"; and so on. Allowing the decision-maker to specify the manner of detention may place unwarranted restrictions on the individual and on any psychiatric facility to which he or she may be directed for rehabilitation. Also, the current approach may result in confinement of non-dangerous people for whom a less restrictive disposition would be more appropriate.

These alternative terms have their limitations, some of which were discussed above under interim orders pending initial disposition. It is possible that if the decision-maker is provided with a range of options with no requirement that the least restrictive one appropriate be selected, the decision-maker will invariably opt for the most restrictive one. This may be particularly likely in circumstances where there is not an opportunity for the initial decision-maker to obtain extensive information about the accused, either through a hearing or through other means. Unnecessarily adopting the most restrictive option would most probably result in confining some non-dangerous individuals for whom a less restrictive setting would be more appropriate, which would be contrary to the underlying philosophy of the Criminal Code Review and would be wasteful from a cost standpoint. It might also have Charter of Rights implications.

The absolute and conditional discharge provisions of the current legislation allow for a non-custodial disposition with such terms and conditions (if any) as would assist in accomplishing the goals of the initial disposition. For example, the individual could be ordered to attend a psychiatric facility for treatment as an out-patient and be required to report at regular intervals. Such an approach may be particularly appropriate for individuals who are not dangerous. As the Law Reform Commission has argued, "A finding of unfitness should not always lead to detention...." The absolute discharge provision would be appropriate inter alia in the case of a non-dangerous insanity acquittee who is no longer mentally disordered.

It might also be appropriate in the case of an unfit accused, charged with a non-violent offence, who is unlikely to ever become fit (e.g., a severely retarded person); arguably, such person should be discharged and cared for through provincial mental health services. On the other hand, it may be argued that public safety requires that mentally disordered accused persons or insanity acquittees not be discharged absolutely without having first been monitored for a determinate period of time. If there is no disposition hearing or any appropriate opportunity for the decision-maker to obtain the necessary information, the drastic alternative of absolute discharge may be seen as a danger to public safety.

Note:

The alternatives set out on the following pages are not necessarily mutually exclusive. Any single option or combination could be used. In addition, some of these alternatives may only be practical where the same body decides on both the interim order and the initial disposition. For example, if the court were to make both decisions, the authority to order a psychiatric assessment at the interim order stage would be helpful to provide the court with information which would assist the initial disposition decision. Should the status quo be retained, however, an alternative allowing for the ordering of a psychiatric assessment would be complex to implement.

Alternative I

Maintain the current options, but provide that the least restrictive alternative must be used unless there is evidence supporting a more restrictive alternative.

Considerations

This alternative is consistent with the general aims of the Criminal Code Review. It might also help to ensure that sufficient evidence is available on which to base a disposition decision. Without a provision requiring that certain information be furnished to the decision-maker prior to such a disposition, however, it could place public safety at serious risk.

Alternative II

Provide for absolute discharge, coupled with an order that the individual attend to be assessed for the purpose of possible commitment under provincial mental health legislation.

Considerations

As noted in the discussion for interim orders, Recommendations 12 and 25 of the Law Reform Commission's 1976 Report indicate that the verdict "not guilty on account of insanity" should be a real acquittal, subject only to a mandatory post-acquittal hearing to determine whether the individual should be committed to an institution under provincial mental health legislation. This approach would be consistent with those recommendations.

This alternative would protect the public to a large extent and would help ensure that persons in need of treatment receive it. Where the individual is not dangerous or does not otherwise meet the provincial civil commitment criteria, but is mentally ill, he or she will have been brought to the attention of mental health professionals who can offer psychiatric treatment on a voluntary basis. However, to the extent that such individuals would be treated differently in different provinces on account of variations in civil commitment criteria, s. 15(1) of the Charter of Rights may be offended.

Alternative III

Provide for psychiatric assessment to be ordered.

Considerations

Currently, immediately following a finding of not guilty on account of insanity (in the case of indictable offences) or not fit to stand trial, the court must order confinement. Given that the only option is confinement, there does not appear to be a reason to provide opportunity for input to the court on the matter of appropriate disposition. Although the initial disposition decision by the lieutenant governor does provide a range of options, from safe custody to conditional or absolute discharge, there is no mechanism in the Code to obtain appropriate information and assessment reports as to the most appropriate disposition decision at that stage.

This approach combines a number of others that have already been discussed. It addresses the question of whether, as a term of the disposition, the initial decision-maker, e.g., the lieutenant governor, should be empowered to order that an individual attend (on either a custodial or non-custodial basis) for assessment in preparation for the initial disposition decision. This kind of order could be combined with one or more of the foregoing options. For example, an individual could be confined in hospital for just so long as is necessary for him or her to be assessed and for a pre-disposition report to be prepared. Once the report was completed, the individual could be discharged on conditions pending the actual date of the initial disposition hearing (where one is to be held) or the initial disposition decision (where a hearing is not to be held).

Although this is somewhat analogous to the remand process, it is discussed at this stage because it could be considered a viable option forming part of the initial disposition process.

Because this approach could be used to permit detention in hospital without a hearing for only that period required in order for a psychiatric assessment to be made prior to the initial disposition decision or hearing, it is consistent with the "least restrictive alternative" philosophy. It also allows the decision-maker for initial disposition to make whatever assessment order is required to assist in the making of an appropriate initial disposition decision (particularly where such an assessment has not already been conducted). Furthermore, this approach allows for updating of assessments. For insanity acquittees, for example, previous psychiatric assessments would probably have focused on the mental status of the accused at the time of the offence. If no recent assessment has been made regarding the individual's current mental status, then the initial disposition decision may require recent evidence. This reasoning may also apply in the case of the unfit accused, where a more recent psychiatric assessment is desired. A previous assessment prepared for a fitness hearing would have focused on the substantive issue of the accused person's mental competence to stand trial, rather than on issues specifically relevant to disposition.

Alternative IV

Provide the initial decision-maker with the authority to order restraint or compulsory treatment.

Considerations

Restraint

It may be argued that there is merit in adding a "restraint" authority to the current custodial authority in the Code. While at common law there is presently a responsibility in detention facilities to ensure that individuals and others are protected from the violent outbursts of patients, residents and inmates (and these facilities are expected to take reasonable measures to control violent behaviour), mental health professionals may feel more comfortable if clear legislative language giving them such authority (particularly where drugs are used for restraint) were provided.

When remands to determine fitness to stand trial were considered, we reviewed: (a) the question of whether the consent of the accused should be relevant; and (b) whether the assessing facility and its staff should have the authority to provide treatment to render the individual fit. If the goal is to allow the accused to proceed to trial as early as possible, and if the accused can be rendered "chemically fit" during the remand process, some might view compulsory treatment as justifiable. If so, such reasoning might also be invoked at the interim disposition or initial disposition stage. Making an order for treatment as part of the assessment at the interim order stage, pending the disposition decision, may avoid the need to make an initial disposition decision since the accused may be ready for trial before that time.

Insofar as it may be possible to render the accused chemically fit in order to enable that person to return to trial as soon as possible, providing authority to order treatment as part of the initial disposition decision (particularly where the accused is to be ordered to a hospital), may be practical and expeditious. This may be particularly true where the accused's condition is amenable to treatment. In fact, some provinces have adopted a compulsory treatment approach for the involuntary psychiatric patient. Mental health professionals often argue that they are operating health care facilities and not jails. (They feel that where persons who are required to be detained and have a treatable mental illness refuse treatment, it would be a waste of valuable health care resources and time not to provide it). They view their responsibility or mandate to attempt to rehabilitate such individuals to render these persons safe for release back into the community. On the other hand, others argue that forcing treatment on mentally competent individuals under any circumstances is unwarranted. In addition some forms

of psychiatric treatment (for example, psychosurgery) may be considered "cruel and unusual" within the meaning of s.12 of the Charter of Rights. Allowing compulsory treatment may ignore the right of mentally competent individuals to refuse treatment. Although some accused persons who are found not fit to stand trial will likely be mentally incompetent to consent to treatment, there will also be others who will be competent to make a treatment decision. Arguably, even where such individuals are not competent, the usual rules and procedures for obtaining substitute consent from a next-of-kin should be part of any such provision.

Issue 9

What factors should be considered in deciding on initial disposition?

Discussion

Currently, the only criteria considered by the lieutenant governor (as the initial decision-maker) when he or she considers a conditional or absolute discharge within the meaning of s.545(1)(b) of the Code, are "the best interest of the accused..." and "the interest of the public...." The Code does not specify any criteria for the making of a "safe custody" order. Below are listed a number of specific criteria which might be suitable for consideration in connection with such disposition options as confinement, conditional discharge and absolute release.

Criteria for Confinement

Requiring more specific criteria to be satisfied before unfit accused persons and insanity acquittees could be confined would be analogous to the approach used for civil commitment under provincial mental health statutes. One possible criterion that could be borrowed from such provincial legislation might be "current dangerousness." The notion of dangerousness has various aspects. For example, it might be expressed inter alia in terms of "safety risk to self." Although such a criterion would help protect the individual who may be suicidal or incapable of looking after him-or herself, however, it could be argued that criminal legislation is not the most appropriate means of confining people for their own safety and well-being. Criteria relating to dangerousness to others might be expressed in terms of: "safety risk to

others"; "risk of serious bodily harm to others"; "dangerousness to others"; "the public interest"; "security of the public"; and so on.

It is difficult to determine what is meant by the current concept of public interest if not the notion of public security or protection from the accused. It would therefore seem appropriate to more clearly specify what was intended. Such clarification may result in greater application of the concept of using the "least restrictive alternative" necessary. It may also help prevent a successful attack under ss. 7 or 9 of the Charter of Rights. As noted previously, the concept of dangerousness does present certain problems. Some of these problems may be alleviated by the use of more specific, precise criteria that do not involve the historic notion of parens patriae. An approach focusing on dangerousness as a confinement prerequisite is also more consistent with the principle of adopting the least intrusive or restrictive approach. Consistent with a desire for greater precision and for adoption of the "least restrictive alternative," it might be appropriate to consider what criteria should give rise to confinement of the individual in a hospital setting. One criterion might be "current mental illness" or "mental disorder." (As discussed in the previous sections, the definition of mental illness or disorder is critical throughout this process. A fairly narrow definition might be "disease of the mind." A broader definition, on the other hand, might include "disability of the mind" as well). Use of this criterion would help ensure that mentally disordered accused persons would have treatment made available to them and that those who are not mentally disordered would not be placed in hospital or given treatment unnecessarily. An obvious benefit would be the conservation of both human and financial resources. Failure to consider mental disorder as a factor could result in an attack under ss. 7,9,11(e), 12 or 15(1) of the Charter of Rights.

Additional criteria for confinement in hospital might include the following: whether the individual's mental disorder is amenable to treatment; whether treatment is available; whether beds are available for in-hospital care; and whether the mentally disordered person consents to the treatment/placement being recommended (this could be a critical issue; where the accused is competent to give or withhold consent to treatment, it may be a waste of time and resources to make a disposition that involves treatment unless the accused intends to cooperate or unless authority exists for the compulsory treatment of such a person).

If confinement in jail is an available option on initial disposition, appropriate and cost-effective criteria might include dangerousness coupled with: lack of sufficient secure treatment facilities; untreatable mental disorder; lack of mental disorder; or refusal to consent to treatment.

Criteria for Conditional Release

If conditional release is to be an option on initial disposition, lack of dangerousness might be an obvious prerequisite for its use. There is, however, a considerable problem in predicting dangerousness in many cases. If lack of dangerousness were to automatically result in release, moreover, some non-dangerous individuals for whom confinement might be the most appropriate setting from a treatment standpoint would not be dealt with in the most effective way possible.

Another prerequisite for conditional (as opposed to absolute) release might be presence of a current mental illness or disorder. Such a criterion would help to ensure that accused persons who still need treatment have as a condition of their release a requirement for mandatory attendance for treatment on an out-patient basis.

Other criteria that might be considered are: the likelihood that the current mental disorder will respond to treatment, the availability of necessary treatment and the consent of the individual (where he or she is mentally competent).

Criteria for Absolute Release

One approach to consider would be to require that persons be released absolutely unless it is established that they are dangerous and/or suffering from a treatable mental disorder. If not, it may be argued that absolute discharge would be required by the "least restrictive alternative" principle. The public may, however, be reluctant to support an approach that would place the burden on the Crown to show why detention is necessary.

Issue 10

Who should make the initial disposition of insanity acquittees and unfit accused persons?

Discussion

Currently, the initial disposition is a federal power delegated to the lieutenant governor of each province. As already indicated, each lieutenant governor executes a document containing either an order for the safe custody of the accused in a place and manner directed by him or her, or an order for the absolute or conditional discharge of the individual.

The decision as to who should make the initial disposition will have an impact on the issue of procedure. For example, if the initial disposition is made by a court, it would follow that relatively formal, adversarial procedures would apply. If, on the other hand, an administrative tribunal is used, some flexibility in procedures would be available. If the status quo is maintained and the lieutenant governor of each province continues to make the decision, there is little scope for directing the manner in which he or she should make that initial disposition decision. This approach would maintain a tradition of Crown prerogative, whereby the Crown, as parens patriae, exercises a protective role over certain members of society. Such an approach has proven to be expedient, relatively inexpensive, and is viewed by many as effective and desirable. It may be argued, however, that since the role of the executive is generally to address broader issues of social policy, it may not be appropriate to require the executive to make decisions affecting individuals. A specialized body might better develop the expertise and have more time and resources available to make appropriate initial dispositions.

Historically, there has been little scope or opportunity for the lieutenant governor to provide the time and resources necessary to approach decisions on a case-by-case basis. Current practice indicates that the individual about whom the decision is being made usually has no opportunity to provide input. Moreover, the actual decision-making as to initial disposition is often delegated to members of the staff of a provincial government. Without procedural safeguards, this approach could result in uneven, inconsistent and unpredictable decisions, and could be subject to a Charter attack on the basis of arbitrariness (s.9). In addition, this approach does not ensure accountability.

Alternative 1

Provide that the decision shall be made by the lieutenant governor-in-council.

Considerations

This alternative would maintain the tradition of Crown prerogative but help ensure political accountability. It is relatively expedient and inexpensive, and has been used in some provinces to provide ongoing review of persons confined under LGWs.

In addition to being subject to many of the disadvantages discussed above for the lieutenant governor alone, however, a decision at this level may be subject to social and political considerations that might unduly affect the rights of the individual. Moreover, provincial cabinets may not have the specialized resources necessary for the task. Establishment of a specialized body to advise the executive may be seen as cumbersome and expensive. It is possible that decisions would be made by the advisory body and simply be rubber stamped by the executive. Practice has demonstrated that where the executive chooses not to follow the advice of the advisory body, this usually results in the imposition of greater security, which may result in some instances in a denial of individual rights.

Alternative II

Provide that the court shall make the decision about initial disposition (Law Reform Commission of Canada).

Considerations

The court is the traditional body for determining other dispositions (e.g., sentencing). It may therefore be in the best position to make this decision as well. In addition, the court is the traditional body in our legal system for defending individual rights and freedoms and for protecting the public. Since a disposition decision entails the application of legal criteria to factual situations, a court may be the most suitable body for this task. Moreover, the procedural protections provided by the courts would help ensure consistent, predictable and fair decisions. Because courts are expert at weighing evidence they would provide a check against the unfettered authority of expert witnesses, e.g., psychiatrists. Court proceedings would also help ensure accountability; they are open, and their decisions are subject to appeal and review. Furthermore, courts provide impartiality insofar as they are not susceptible to social and policy considerations. They enjoy public acceptance and legitimacy as decision-makers. The system is therefore likely to gain a high degree of public respect if the

initial disposition is made by a court. As the Law Reform Commission of Canada has further noted, the court that holds the fitness hearing or trial would already be well informed of the facts and circumstances of the accused. It would likely be able to quickly and efficiently conduct a disposition hearing without the delay involved in bringing the proceedings before another body.

This approach would, however, increase the burden on our already overburdened courts. Further, some professional groups feel that disposition is essentially a clinical decision for which lawyers and judges should not be the main decision-makers. In addition, this approach does not assure input from a specialized body that would provide appropriate expertise in this area. Moreover, there might be the concern that evidence required by the judge at the fitness hearing or the trial might be prejudicial to the individual on the disposition hearing.

Alternative III

Provide that an administrative tribunal shall make the decision about initial disposition.

Considerations

Tribunals are usually established in areas that are technical or specialized and where caseloads are heavy. They may allow for wide scope and flexibility as regards their membership, function and operation. They may be composed of members who combine experience and skill from various disciplines. A tribunal is not usually bound by the same degree of procedural formality as a court and may, therefore, be in a better position to formulate more diverse and creative dispositions in a form that may be amenable and acceptable to participation by more non-legally trained persons. While tribunal recommendations or decisions may not be subject to appeal, accountability may be achieved through judicial review. The use of tribunals could achieve a large measure of privacy in those cases where it is considered necessary.

On the other hand, a tribunal may be an unsuitable body to adjudicate on matters where individual liberty and constitutional rights are in issue. Although procedural protections can be built in, tribunals usually do not provide as stringent a protection as courts. Although accountability would appear to be provided for through the mechanism of judicial review, courts have demonstrated a

reluctance to review tribunals on substantive issues. Furthermore, tribunals are ordinarily not subject to scrutiny by the press or by the public.

If a tribunal were to be the decision-making body, there are a number of models that could be considered. For example, the tribunal could consist entirely of mental health professionals. This approach, however, would not ensure involvement of legal and public policy components. Similarly, a tribunal consisting entirely of lawyers and judges would not enable mental health professionals to be decision-makers (although they could be present as consultants to the tribunal). Finally, an entirely lay tribunal which draws on appropriate medical and legal input where required (in the form of consultants) could be established. Such a model might not, however, have the necessary input from mental health and legal professionals to both deal with complex technical psychiatric matters and provide uniformity in procedure. Furthermore, lay individuals who are not generally called upon to weigh expert evidence without direction from a judge might have considerable difficulty making the kinds of decisions involved.

Arguably, a mixed tribunal consisting of psychiatrists, lawyers and lay persons might be the best approach. This model has been used successfully in the mental health field for civil commitment reviews and is the status quo under the Criminal Code (s.547) for boards of review.

Issue 11

How many bodies should be involved in the initial disposition decision?

Discussion

Section 547(1) of the Criminal Code provides that the lieutenant governor of each province may establish a board to review the case of every person in custody in a place in that province by virtue of an order made pursuant to ss.545, 546(1) or 546(2). The function of such a board is to assist in the decision as to whether a given warrant should be vacated or continued. The review system involves a two step process. The board of review investigates and makes recommendations to the lieutenant governor (Lieutenant Governor-in-Council in Ontario) who then finalizes the decision. The executive usually follows the recommendation of the board, although it is not obliged to do so. Review of initial dispositions is a task that is

currently split between the lieutenant governor (who makes the ultimate decision) and an administrative tribunal (which makes recommendations only). Such an approach could be considered for deciding on initial disposition.

Placing the initial disposition decision in the hands of one body is clearly the least expensive and least time-consuming alternative. If two bodies were to be used at this stage, the result might often be delays in making the initial disposition. In such case, the interim order decision made immediately after the finding of insanity or unfitness might assume greater importance. Even if it were required that the decision be made by two bodies, it is possible that the actual decision would be made by one body only, with the other "rubber-stamping" it.

On the other hand, adoption of the two-tier approach at the initial disposition stage would be relatively easy; it could simply entail extending the role of existing boards of review. This approach would take advantage of the available expertise of these boards. It would enhance accountability by allowing the ultimate decision to be made by a second body. If, however, the first body has the necessary expertise to make an effective decision, and the second body merely "rubber-stamps" its recommendation, requiring that a second body be involved might be an unnecessarily expensive, cumbersome and time-consuming approach.

Issue 12

Should the decision-maker be required to hold a hearing prior to rendering a decision on initial disposition?

Discussion

At present, under the Code, the lieutenant governor makes the initial disposition without being required either to hold a hearing or to follow any other formal procedure. A continuation of this approach would permit the decision to be informal and administrative. These attributes might be particularly appropriate in those jurisdictions where funds and facilities are severely limited, and where decisions need to be made quickly and efficiently.

On the other hand, the lieutenant governor's discretion allows for little input from the individual. This may offend the Charter of Rights (see ss. 7 and 9). It may

also result in uneven and inconsistent decisions both within a province and across the country. It also does little to ensure accountability.

Alternative 1

Provide for a full court-like hearing (Law Reform Commission of Canada).

Considerations

This approach may be feasible if either a court or an administrative tribunal were selected as the initial decision-maker. It would be consistent with the manner in which convicted criminals are sentenced and might in fact be required under the equality provision of the Charter of Rights (s.15(1)). A full hearing would reduce the risk of arbitrariness and may effectively respond to the criticisms of many, including defence counsel, that the current procedure for initial disposition is unfair.

A full hearing would help ensure that the decision-maker has the maximum amount of information available before making a decision. It would be more consistent with the Charter of Rights which may require some form of hearing (s.7), and would enhance public respect for the administration of criminal justice. In addition, by providing an opportunity for the individual to participate in the initial disposition decision, it may enhance the willingness of the individual to participate in a treatment programme.

On the other hand, it may be argued that hearings do not necessarily make for better dispositional decisions. This approach may result in a more legalistic, cumbersome and costly process. Furthermore, if the criteria governing initial disposition decisions are broad, and based primarily on social policy considerations, it may be more appropriate for the decision-maker to follow an informal rather than judicial process in making its decision. From a logical standpoint, it may seem paradoxical to convene a judicial proceeding and expect an individual already adjudged unfit to stand trial to participate effectively in that process in a meaningful way.

Alternative II

Provide for a hearing at the discretion of the decision-maker.

Considerations

Under this alternative, the decision-maker could decide whether to hold a hearing; if one is to be held, he or she could decide how formal or informal that process should be. This could include a decision on whether to have verbal or written submissions. Such an approach would provide maximum flexibility and would leave the decision concerning the form of a hearing (if any) to the body responsible for the final decision. This approach, however, could result in inconsistent decisions for similar cases. Insofar as there is no specific provision for input from the individual, concerns dealing with risk of arbitrariness and the result of inappropriate and possibly unfair decisions might still arise. This approach may also be open to attack under the Charter of Rights (ss. 7, 9 and 15(1)), and may be contrary to the concept that the criminal law should operate uniformly across Canada.

Issue 13

Should the decision-making body be required to follow formalized procedures?

Discussion

Once it is decided what type of body should make the initial disposition decision, the issue as to how the decision is to be made should be addressed. Currently, there are no formal rules structuring the decision-making of the lieutenant governor. This may be the most appropriate approach where there is a large social policy component to the decision. It is certainly an expedient approach. It is not overly cumbersome, time-consuming or expensive. Formalized procedures would be inconsistent with the idea of maintaining the executive as decision-maker, and with initial disposition criteria that involve the application of broad principles of social policy.

However, it may be argued that a lack of formality will result in: lack of uniformity; subjectivity; unevenness; lack of predictability across the country; arbitrariness; and, possibly, unfairness. Informal procedures may therefore be more prone to attack under the Charter. Accountability is also not assured since court review of a procedurally loose system may be difficult.

Alternative

Provide for a formalized procedure, with such ingredients as: notice; the right to counsel; the right of access to documents before the decision-maker; the right of access to provincial hospital files; the right to call and cross-examine witnesses, the right to obtain an independent psychiatric assessment; the recording of the proceedings, etc.

Considerations

Formalized procedures would respond to those concerns raised in the discussion above. However, they would be inconsistent with the idea of maintaining the executive as decision-maker, and with initial disposition criteria that involve the application of broad principles of social policy.

Issue 14

What provision should be made regarding procedural requirements relating to the initial disposition?*

Discussion

As indicated above, currently the interim order by the court pending the initial disposition by the lieutenant governor is not really a decision by that decision-making body, the court is required to confine all persons acquitted of indictable offences on account of insanity and all unfit accused persons. There is also no provision for procedures that should be followed by the lieutenant governor in making the initial disposition decision.

*Note: In the section considering the review process, the role of boards of review will be examined. Where a board of review has been appointed, it is required to review each case on a regular basis. In fact, most such boards do hold some kind of hearing. Therefore, under the current provisions, it is more appropriate to consider the ingredients of natural justice in a specific fashion when the review process is examined. Thus, for both the interim order and the initial disposition parts of this paper, only those procedural matters that seem particularly relevant at that stage of the proceedings are discussed. Should a more formalized structure be implemented, then those procedures which will be discussed under the section dealing with reviews would be relevant here as well.

Below are three examples of the types of procedural requirements that may be suitable for inclusion at this stage. They are not necessarily mutually exclusive. A fuller discussion of procedural requirements appears infra in the "Reviews" section. Some of the alternatives discussed there might be appropriate here as well.

Alternative I

Provide for notice.

Considerations

If the status quo is maintained (i.e., the lieutenant governor makes the decision) notice to the individual of the commencement of the initial disposition process would not be appropriate. However, the absence of notice diminishes the opportunity that the person might have to participate in the decision-making process and to provide input. This could result in an attack under the fundamental justice section of the Charter of Rights (s.7).

If provision were made for an initial disposition hearing, it would be important to provide the individual with notice. Such notice might include a formal statement of the facts to be alleged during the hearing. This would provide the individual with notice of the basis for the case that he or she must meet and, therefore, would afford a greater degree of fairness. In addition, it would require the Crown to consider the evidence regarding appropriate disposition well before he or she gets to the disposition hearing. It might also facilitate the possibility of reaching a negotiated compromise early in the process.

On the other hand, the more formal the hearing process and notice requirements, the more legalistic or technically-oriented the process becomes. It may be argued that the issues at an initial disposition hearing would not lend themselves to easy articulation and formal pleadings; they do not relate so much to specific episodes or events as to the person's behaviour and the probability of successful treatment and rehabilitation.

Alternative II

Provide for the right to counsel.

Considerations

Traditionally, the right to counsel has been considered an essential component of natural justice. To the extent that a more formalized hearing process may be incorporated into the initial disposition decision, the need for counsel may increase. Currently there is no right to counsel since (a) the court initially has no option but to order confinement, and (b) there is no formalized process set out for the initial decision-making by the lieutenant governor.

Since confinement will likely remain as one of the options available to the initial decision-maker, it is arguable that there should be a right to counsel. Such a right may be required under the Charter (ss.7, 10(b)).

The presence of counsel would help ensure that all available and relevant information is presented to the decision-maker, increasing the likelihood that the most appropriate decision will be made. Moreover, counsel would assist in the orderly assembly and presentation of evidence, and could help his or her client participate more effectively in the hearing process. It may be particularly unfair to expect individuals who may be seriously mentally disordered to prepare and present their own cases. The right to counsel exists at other stages of the criminal process. Denial of such right at this stage of the proceedings may offend the equality provision of the Charter of Rights (s. 15(1)).

The effectiveness of counsel representing a seriously mentally disordered client (who may not be able to give instructions) may be questionable. It might also be argued that lawyers should not participate in a decision that is considered by some to be primarily a medical one. The right to counsel may tend to make the process more complex, technical, lengthy and costly.

It is also necessary to consider whether the court should be required to appoint counsel for an individual who refuses or neglects to retain counsel, and whether the state should pay for counsel where the accused is unable to do so.

Alternative III

Provide for the right of access to documents and hospital files, witnesses, independent psychiatric assessments, transcripts, etc.

Considerations

In order to effectively argue his or her case on disposition, the unfit accused or insanity acquittee (or counsel) may require a certain amount of information and a number of procedural rights. More will be said on this subject infra in the section on "Reviews."

Issue 15

What provision should be made regarding burden of proof at the interim order and/or initial disposition stage?

Discussion

Burden of proof is relevant only where the decision-maker has a discretion, and usually only where there is an opportunity for a hearing.

At present, since the court is required to make a custody order at the interim order stage, and since there is no hearing at the initial disposition stage, the issue of burden of proof does not arise. However, if either the interim order or initial disposition were to be made by a judicial or a quasi-judicial body, choosing from a range of options, the issue would have to be addressed.

On one hand, the "least restrictive alternative" principle may generally require that the prosecution bear the burden of demonstrating to the decision-maker that any more restrictive form of disposition is preferable to any less restrictive form. This reasoning may be supported by analogy to the judicial interim release (bail) provisions of the Criminal Code, and by reference to ss. 7, 9 and 15(1) of the Charter. On the other hand, where the offence involved is one of violence, there may be justification for placing the burden on the accused to demonstrate why any less restrictive form of disposition is preferable to any more restrictive form. This approach would help ensure protection of the public; however, requiring an accused to prove that he or she is not dangerous, not mentally disordered, etc. may impose considerable hardship and run contrary to the Charter (particularly if no right to counsel is guaranteed). Making no provision as to burden of proof might be appropriate if the disposition criteria are to be vague, broad and social policy-oriented (e.g., "the public interest"). Such approach, however, may also entail Charter problems (i.e., under ss. 7, 9 and 15(1)).

Alternative I

Provide that the burden of proving the existence of the requisite criteria for any disposition proposed by the Crown be borne by the Crown.

Considerations

This would be consistent with the principle that a person should not have his or her liberty infringed by the state unless it can prove that the infringement is justified.

It is likely that this burden would not be difficult to discharge. Where, for example, dangerousness is a criterion, the Crown would have recent evidence readily available relating to the offence.

On the other hand, it may be that where no recent overt evidence of behaviour required to be established by the Crown is available, the practical result may be that the majority of insanity acquittees and unfit accused persons will not be confined. This could pose a danger to the public in some cases.

Alternative II

Provide that the burden of proving the existence of the requisite criteria for any disposition proposed by the insanity acquittee or the unfit accused person be borne by that person, or that such person must disprove the criteria relating to the disposition proposed by the Crown.

Considerations

Arguably, this option presents the strongest guarantee of public protection. The likelihood would be that a large number of insanity acquittees or unfit accused persons would be confined so that any dangerous individual would be kept away from the public. In addition, if the standard of proof is fairly light (for example, the need to present "some evidence" justifying non-confinement), then placing the burden on the individual may not be unfairly onerous.

However, if the criteria include components like "mental disorder," "dangerousness," "need for treatment," etc. this option may require that the individual prove a negative. He or she would have to demonstrate that he or

she is not mentally disordered, that he or she is not dangerous or that he or she is not in need of treatment. Moreover, placing this onus on the insanity acquittee or the unfit accused person may reflect the premise that such persons are either dangerous as a rule, or in need of custodial treatment. Such an onus might violate the Charter of Rights guarantees of fundamental justice (s.7), freedom from arbitrary detention (s.9), and equality before the law (s.15(1)). It may also be unreasonable and unfair for is mentally retarded or low functioning individuals, particularly where such individuals are not guaranteed a right to counsel. This would be particularly relevant for persons found unfit to stand trial, even where counsel is available. Without the benefit of instruction, it may be particularly inappropriate to require counsel to make out a case for non-confinement.

Alternative III

Do not provide for a burden of proof.

Considerations

This approach would likely result in a less formal, non-adversarial hearing, and may result in fewer technical aspects to the decision-making process. It may be particularly appropriate where the disposition criteria are vague, broad and social policy-oriented (e.g., "public interest").

On the other hand, if the initial disposition is to be made by a court, it would be unusual not to require a burden of proof. Furthermore, the decision-maker may set his or her own rules (expressed or unarticulated) if there is no burden of proof. This may lead to a lack of uniformity in initial dispositions across Canada, which may be unfair to insanity acquittees and unfit accused persons, and may be potentially violative of the Charter guarantee of equality before the law (s.15(1)). Also, if the disposition criteria are fairly specific (e.g., "mental disorder" and/or "dangerousness to others"), it may be more appropriate to have a burden of proof articulated.

Issue 16

Assuming there is to be a burden of proof at the interim order and/or initial disposition stage, what provision should be made with regard to the standard of proof?

Discussion

How persuasively should the party on whom the burden of proof rests be required to prove his or her case in order to succeed?

The alternatives discussed below include: proof beyond a reasonable doubt; and proof on a balance of probabilities basis. Other intermediate possibilities might include proof by "clear and convincing evidence" and proof to the "satisfaction" of the decision-maker.

Alternative I

Require proof beyond a reasonable doubt.

Considerations

Where the burden of proof is on the Crown, this standard would provide maximum protection of an individual's liberty. It would also likely be acceptable under the provisions of the Charter. This standard would be particularly appropriate if the decision-maker is the court, which is accustomed to making decisions based on a reasonable doubt standard. It might be most suitable if the disposition criteria are clearly defined and factually-oriented, since specific facts lend themselves most readily to proof beyond a reasonable doubt. This standard however, might not be appropriate if the decision-maker remains the lieutenant governor, or if the criteria for confinement are vague or extremely broad (e.g., "the public interest").

If the burden of proof is on the insanity acquittee or unfit accused to justify a less intrusive disposition, the effect of this standard would likely be to compel confinement in most cases. It could undermine the usefulness of a hearing, and raise Charter problems (i.e., under ss. 7, 9 and 15(1)).

Alternative II

Require proof on a balance of probabilities basis.

Considerations

This is the standard of proof usually required in civil cases. It is easier to meet than the previous alternative. A party has proven his or her case on a balance of

probabilities when he or she convinces the decision-maker that it is "more likely than not" that the facts are as he or she asserts.

Such a standard may be suitable for disposition criteria that are both narrow and fact-oriented, as well as those that are broader, more vague and policy-oriented.

This standard is well-rooted in Canadian law, and therefore would be relatively easy to implement. It represents a fairly flexible standard that may be suitable regardless of the decision-making body, provided that such body is required to conduct some sort of hearing. In the area of psychiatry, where few issues are "black and white", this standard may be most appropriate. Use of this standard would help characterize the disposition proceedings as different from the ordinary criminal trial.

On the other hand, where the burden is on the insanity acquittee or unfit accused, it may still be difficult for him or her to prove his or her non-dangerousness (where dangerousness is a criterion). Again, use of this standard may have the practical effect of confining virtually all insanity acquittees and unfit accused persons.

Alternative III

Make no provision for a standard.

Considerations

The comments provided for Alternative III above under the burden of proof issue would apply for this alternative dealing with standard of proof.

Other Related Alternatives

There are other alternatives that could be considered. Not all of these alternatives are familiar in Canada; some are applied in the United States in one form or another. One alternative would be to require evidence giving rise to a reasonable doubt. This is more lenient than two of the approaches considered above, i.e., proof beyond a reasonable doubt and proof on a balance of probabilities basis. Here the law could presume a fact unless the party bearing the burden of proof can present evidence giving rise to a reasonable doubt about the truth of the fact in issue. For example, the law might presume that an insanity acquittee or an unfit accused is dangerous but

then allow the individual to rebut this presumption. He or she would merely have to show that there is a reasonable doubt as to his or her dangerousness.

Another possible standard (used in the United States) is proof by clear and convincing evidence. By this standard, a party would be required to prove his or her case persuasively, though not beyond a reasonable doubt.

Another option would be to require an amount of evidence satisfactory to the decision-maker. By this option, the decision-maker would determine how much evidence is needed to establish a proposition. This is the present "standard of proof" required under s. 546(1) of the Criminal Code, under which the lieutenant governor is empowered to order that a mentally disordered provincial prison inmate be transferred to a psychiatric facility; "satisfactory" supporting evidence is required. There are other such examples in the Criminal Code and under provincial mental health legislation.

Issue 17

Should provisions be made for appeal from the initial disposition decision?

Discussion

Currently, there is no opportunity to appeal the decision of the lieutenant governor. Maintaining the status quo, saves both time and expense. This approach may also be most suitable if the initial criteria are broad, policy-oriented or discretionary, since an appellate court may not be capable of providing a meaningful review of the initial disposition decision except where the discretion has not been properly exercised. The insanity acquittee or unfit accused person would still have access to a court review through such prerogative remedies as habeas corpus and certiorari, and through the Charter of Rights. Providing separate appeal rights might be seen as undue legality. It might also delay commencement of needed treatment, and raises the issue as to where the individual should be until the appeal is disposed of.

On the other hand, it could be argued that a right of appeal is an essential ingredient of natural justice. Because other accused persons have the opportunity to appeal from their respective dispositions, it may be necessary to demonstrate some reasonable or compelling

justification for this denial of equal treatment for unfit accused persons or insanity acquittees in order to prevent a successful Charter attack under s.15(1).

Alternative

Provide for an opportunity to appeal the initial disposition decision.

Considerations

This approach would provide a safeguard against incorrect or improper decisions by the initial decision-maker and would enhance accountability. An opportunity for appeal might result in a fairer system and might enhance the appearance of fairness, which may be particularly important in light of the criticism that has been directed at the present system.

Although, as indicated above, prerogative remedies afford an individual an opportunity to seek court review (as does s.24(1) of the Charter) it may be preferable to have Code provisions that set out a coherent procedure for an appeal process, rather than leaving the development of such procedure to the courts on a case-by-case basis. Judicial review may not in itself afford sufficient protection, since it does not necessarily require the factual basis for the decision to be examined. In addition, an opportunity to appeal may be required by the Charter guarantees of fundamental justice (s.7) and equal protection and equal benefit of the law (s.15(1)). If the initial disposition criteria are well-defined and relatively specific, an appellate court would be well suited to review the disposition decision.

Issue 18

Should the decision-maker be under a duty to render a decision regarding initial disposition within a specified period of time?

Discussion

At present, the lieutenant governor is not under a duty to make an initial disposition decision within any particular time-frame. This fact provides the decision-maker with complete flexibility to make the decision whenever it is most practical and convenient. Arguably, the

decision-maker is in the best position to decide how long it takes to reach a decision regarding an initial disposition. It should be noted that courts are usually under no duty to render a decision within a specific time-frame.

The absence of a time requirement, however, might result in inordinate delays; such delays could have prejudicial effects on the individuals involved. Failure to provide a time limit could also result in the unequal treatment of different insanity acquittees and unfit accused persons, possibly for arbitrary or unjustified reasons. This could pose problems under the Charter's fundamental justice (s.7), equal protection (s.15(1)), and arbitrary detention (s.9) provisions.

There is precedent for requiring a decision-maker to render a decision within a statutorily prescribed time limit under various statutes. For example, an Ontario Human Rights Code provision imposes a time limit within which a Board of Inquiry is required to render a decision regarding a human rights case tried before the Board. (See as well Ontario's Mental Health Act, ss. 33, 34 and the regulations thereunder).

Alternative I

Require that the decision must be rendered within a specific time period.

Considerations

The comments included in the discussion above apply here, but there are several points that bear emphasizing. Once a decision is made to specify a time period, it is necessary to determine what would be an appropriate time-frame. In general, the greater the time limit that is imposed, the greater the flexibility for the decision-maker and the greater the hardship and inconvenience, respectively, to the insanity acquittee or unfit accused person, and to persons (e.g., mental health professionals) who are required to develop and implement a treatment programme.

Alternative II

Provide that the decision must be made "within a reasonable time after a hearing is held."

Considerations

While the term "reasonable" is so vague that it may leave the parties concerned uncertain as to their respective rights and duties, this approach would provide the flexibility that may be required by the decision-maker in more complex cases. In addition, it recognizes the potential difficulty in fixing a time period that would be fair both to the individual and to the decision-maker.

Issue 19

What "investigative" powers should the decision-maker have?

Discussion

This issue would only be appropriate for consideration if the initial decision-maker were to be a body or official other than a court, since the courts are already vested with certain powers of this nature. "Investigative" powers might include: the power to compel the production of evidence (viva voce and documentary); the power to administer oaths and affirmations; the power to provide the protection of the Evidence Acts; and the power to enforce the foregoing powers. This issue is dealt with more comprehensively in the following section dealing with the review process.

REVIEWS

Introduction

As noted in the foregoing section, the decision by the lieutenant governor pursuant to s.545 of the Criminal Code provides for either continued confinement in a place and manner that he or she chooses, or for release -- either conditional or absolute. The choice of initial disposition is in the complete discretion of the lieutenant governor and there is little legislative guidance as to the selection of any option. As also indicated, in practice the decision is often delegated to a member of the staff of a provincial ministry or department. That person may have access to some information from the court or from treatment facilities, but there is rarely any input from the individual. Essentially, the decision is often purely an administrative one.

It is necessary to address the issue of whether and how initial dispositions should be subject to future modification. This section of the paper will consider alternatives and related procedures for review of the initial disposition order. The process will be referred to as a "review" and the order resulting from the review process will be referred to as a "subsequent" disposition.

At present, once an initial disposition has been made and an insanity acquittee or unfit accused person has become subject to an initial lieutenant governor's warrant (LGW) the duration of the warrant is indeterminate. Any modification to it can be made only by the relevant provincial lieutenant governor.

Under the Criminal Code, the lieutenant governor is under no duty to review the case of an LGW, and there is no legislative guidance as to when the case should be reviewed or what procedures should be followed. If it is decided to review the case, the Code does not require that the individual be given notice of the review. No hearing or other opportunity for the individual to make submissions is required. Even if the lieutenant governor reviews the case and determines that the initial disposition is no longer appropriate, he or she is under no duty to modify the terms of the original warrant. Additionally, there is no requirement to notify the individual of the decision about modification (if any) and there is no requirement to give reasons for the decision. When reviewing a case, the lieutenant governor may rely on any evidence or information that he or she chooses, no matter how reliable. The lieutenant governor's discretion is virtually unfettered and absolute. This discretion, of course, might be subject to the duty of fairness, which would require at least that the lieutenant governor give notice of the fact that the case is under review and provide an opportunity to make submissions and possibly to be heard.

Pursuant to s.547(1) of the Code, the lieutenant governor of a province may appoint a board to conduct reviews of every person in custody under a lieutenant governor's warrant (LGW) and to make recommendations regarding subsequent disposition to the lieutenant governor. The lieutenant governor is under no obligation to appoint such a board. The Code provides no guidance or criteria for deciding whether to appoint a board. Once appointed, the board of review is composed of a combination of doctors, lawyers and others. If appointed, it has an obligation to review the case of every LGW detained in custody. Pursuant to s.547(5) of the Code, a board (once created) must review the case of each detained LGW subject not

later than six months after the making of the initial disposition order, and then at least once a year thereafter so long as the person remains in custody. As well, by s.547(6) the board must review any case when requested to do so by the lieutenant governor. The board of review has no jurisdiction to review the case of LGW subjects who have been released absolutely or on condition pursuant to s.545(1)(b) of the Code. (Ontario's Advisory Review Board, appointed under the provincial Mental Health Act, may review only the cases of LGW subjects detained in "psychiatric facilities" designated as such under the Mental Health Act).* After each review, the board must report to the lieutenant governor, setting out the results of each review. Where the LGW subject is an insanity acquittee, the board must report whether that person "has recovered" and, if so, whether it is "in the interest of the public and of that person for the lieutenant governor to order that he be discharged absolutely or subject to such conditions as the lieutenant governor may prescribe...." Where the person in custody has been found to be unfit to stand trial, the board must state whether that person "has recovered sufficiently to stand his trial...." As well (for both insanity acquittees and unfit accused persons) s.547(5)(f) of the Code provides that the board may make "any recommendations that it considers desirable "in the interests of recovery of the person to whom such review relates and that are not contrary to the public interest." There is no legislative requirement that the lieutenant governor consider the report of the board or that he or she follow its recommendations. Further, there is little legislative guidance structuring the actual decision by the lieutenant governor.

In each province, an advisory body has been created, though not necessarily under the Code. In practice, a system has evolved whereby each "order" or "case" or "warrant" is reviewed yearly and, where appropriate, the terms of the warrant are varied (often in the direction of "loosening") so that an individual can be gradually reintegrated into the community before a warrant is actually vacated. Under such an approach, the individual may still be technically "in secure custody" under a

*In Ontario, a review board was established under the Mental Health Act prior to the enactment in 1969 of s.547 of the Code. After 1969, the Ontario Board was left in place; it makes recommendations to the Lieutenant Governor-in-Council. The establishment of boards was intended to assist in the regular monitoring of LGW cases so that warrants could be vacated once the goals of rehabilitation had been attained.

"safely keep" warrant rather than discharged on condition. This practice of "loosening warrants" appears to have been adopted in some provinces for two reasons. First, if the individual is technically in custody, he or she may be monitored through a review system that only applies to persons who are in custody. Second, if an individual being gradually reintegrated into the community needs to again be confined, this may be done administratively under the existing warrant without having to act under s.545 to impose a new warrant. At present, there is no clear statutory authority in the Code for this practice of "loosening" or "tightening" of warrants, nor for the delegation of authority to hospital personnel to permit greater or lesser freedom -- a practice used in some provinces.

The vacating of a warrant can only be ordered by the lieutenant governor of the province (Lieutenant Governor-in-Council in Ontario). Practice indicates that the lieutenant governor will usually rely on the recommendations of the board of review, although he or she is not obliged to do so. Once a warrant is vacated, the insanity acquittee is discharged. He or she may still be rehabilitated pursuant to provincial mental health statutes, however. If the unfit accused's warrant is vacated, he or she will normally be returned for trial, although it is not clear whether the warrant must be vacated in order for such a person to be returned for trial.

Although a board of review is required to review an individual's case, it is not required to convene a hearing (formal or informal) as part of the review process. Further, as already noted, there is no requirement for notice to the individual. The recent case of Re McCann and the Queen suggests that the duty of fairness requires that a board of review afford the individual some form of notice and a hearing before it can recommend that the lieutenant governor impose conditions more restrictive of the person's liberty than the terms in force as set out in the existing order.

Another matter to consider is the question of access to information. If the board of review chooses in its discretion to hold a hearing, the duty of fairness may require that the board allow the person to have access to medical information presented by the detaining psychiatric facility to the board in connection with the case, except in exceptional circumstances where there is a probability that harm may result from disclosure (see Abel et al. v. Advisory Review Board). Currently, where a board of review has been established, it is required to file a report with recommendations to the lieutenant governor.

The board is not, however, under a duty to disclose the report to the person involved. Included in the report are recommendations by the board of review to the lieutenant governor. These may include recommendations for retaining the existing order; lifting (vacating) the warrant; or "loosening" or "tightening" (i.e., imposing fewer or greater restrictions) the conditions attached to it. While in practice the lieutenant governor usually adopts the recommendations of the board of review, he or she is under no statutory requirement to consider the board's report or to act upon its recommendations.

Issue 20

Should there be periodic reviews of the initial disposition?

Discussion

As indicated in the introduction, where a board of review is appointed, s.547 of the Criminal Code requires review of the case of every person in custody in a place in that province by virtue of an order made under ss.545, 546(1) or 546(2) within six months after the making of that order and at least once a year following that initial review. Prior to 1969, when s.547 of the Code was enacted, there was no formal mechanism in the Code for reviewing the case of LGWs.

Alternative I

Provide no right to a periodic review.

Considerations

This alternative provides the decision-making body with the discretion to conduct reviews on an ad hoc basis, depending on the individual's needs. Unnecessary reviews could be avoided. This would be the most expeditious and inexpensive approach. It might avoid any disruption to therapeutic relationships or to the orderly running of treatment and/or custodial facilities.

On the other hand, this approach may result in the protracted confinement of persons who have never been convicted of an offence. Such confinement might go well past the point when release would have been appropriate.

Arguably, a review process provides an important monitoring function. It helps ensure that treatment plans are relevant and up-to-date, and assists in keeping treatment providers accountable for their actions. Reviews also ensure a check on the correctness of the initial disposition decision. Denial of regular reviews may violate principles of natural justice and fairness, as well as the Charter's guarantee of fundamental justice (s.7) and its prohibition against arbitrary detention (s.9).

Alternative II

Provide for mandatory reviews.

Considerations

Monitoring of disposition through periodic reviews would help ensure that liberty rights are not curtailed any longer than is necessary to achieve the goals of disposition. This approach is consistent with that in other areas of criminal procedure where periodic reviews are guaranteed (e.g.: to accused persons confined without bail awaiting trial; or to convicted offenders through the parole system) and with the periodic review procedures established in most provinces for individuals detained through civil commitment. This approach is also consistent with the principles of natural justice, fairness and the Charter. Also, since periodic reviews may result in earlier release of an individual, there is a potential cost saving to the facility in which the person would have otherwise been confined.

On the other hand, where there is likely to be no change in the status of a person, it may not be necessary to conduct reviews on a regular basis. Mandatory review might result in unnecessary waste of both financial and human resources.

Issue 21

Should periodic reviews be conducted by the same body that made the initial disposition decision?

Alternative I

Provide for reviews to be conducted by the same body.

Considerations

Review by the same body would likely ensure consistent approaches to decision-making for the initial and subsequent disposition. Arguably, the subsequent disposition is really no different in nature from the initial one. The body involved with the initial disposition decision will likely have developed some expertise in this area; it may, therefore, be appropriate to utilize these skills, and not to require that another body be established. Such an approach would avoid duplication and increased costs.

Using the same body that made the initial disposition, however, might not always be appropriate. If, for example, the initial disposition decision is made by a court, requiring a court to also consider subsequent dispositions might place too heavy a burden on an already overburdened system. Moreover, because time will have elapsed and circumstances may well have changed at the review stage, there may not be a need to have the initial body conduct the review.

Alternative II

Provide for reviews to be conducted by a different body.

Considerations

This approach would ensure that each case receives a "fresh" review that is not prejudiced or influenced by the previous decision; such review would be fair and more likely to yield appropriate and objective subsequent decisions. It would also provide a check on the initial disposition decision. If a different set of criteria were employed at this stage, a new body might also be appropriate. For example, if the initial disposition is to be based on narrow, fact-oriented criteria, (such as "mental disorder" and/or "dangerousness"), a court or administrative tribunal might be the most appropriate body to make the initial disposition decision. If, however, the subsequent disposition criteria are broad and policy-oriented (e.g., involving "the public interest"), it may be appropriate to confer the subsequent disposition power on another body, (e.g., a cabinet minister or the lieutenant governor) who is used to considering criteria of this kind.

Issue 22

What body should conduct the review?

Discussion

The discussion under the initial disposition section dealt with alternatives with regard to the body that should make the initial disposition decision. The choices set out in that section (i.e., the executive, the courts or an administrative tribunal) may also apply for review.

Currently, the Code provides for a combination of two of these alternatives. In all cases, the final decision is up to the lieutenant governor of a province. As already indicated, where a lieutenant governor appoints a board, such board conducts a review and advises the lieutenant governor of its recommendations. Boards are generally composed of lawyers, psychiatrists and lay people.

Alternative I

Provide for the review to be conducted by the executive.

(a) Lieutenant Governor

As noted for initial disposition, this approach would maintain a tradition of Crown prerogative whereby the Crown, as parens patriae, exercises a protective role over certain members of society. This is an expedient and relatively inexpensive approach.

However, the executive may not be able to provide the time and resources necessary to approach decisions on a case-by-case basis. Where boards of review are appointed, it is often argued that the executive does not in reality make the decision, but that it is made by the "advisory" body. Were the executive to make an effort to review each case, it is unlikely that the individual about whom the decision is being made would have an opportunity to provide input. In addition, since the role of the executive is generally to address broader issues of social policy, decisions affecting the individual may ultimately be of secondary importance.

(b) Lieutenant Governor-in-Council

While this approach has the same advantages and disadvantages as those described for the lieutenant governor

alone, it has the added advantage of ensuring political accountability. This may, however, be subject to social and political considerations, which may result in undue infringement on of individual liberty.

Neither of the the above two alternatives ensures legal accountability to the same extent that a court or quasi-judicial tribunal might.

Alternative II

Provide that the review be conducted by a court.

Considerations

This alternative is consistent with the Law Reform Commission of Canada recommendation that where an unfit accused has been ordered to be hospitalized, the disposition should be reviewed by the court. Recommendation 22 in the Law Reform Commission's 1976 Report states: "A finding of unfitness should not always lead to detention and the Code should provide the trial judge with a range of possible orders, including:... (3) an order for mandatory hospitalization for a period of up to six months. If at the end of the maximum time set by the order the accused is still unfit, the disposition should be reviewed by the court."

A subsequent disposition decision on review is consistent with the kind of disposition decision usually made by the court (e.g., on sentencing). It is arguable that this is the most appropriate alternative since the court is the traditional body in our legal system for protecting individual rights and freedoms as well as the interests of the public. In addition, since a decision on review entails the application of legal criteria to factual situations, courts may be the most competent body to perform this task. Courts could provide procedural protections that would ensure consistent, predictable and fair decisions. They could also provide a check against the unfettered authority of experts through impartial and experienced weighing of the evidence. Courts are designed not to be susceptible to political considerations; they enjoy public acceptance and legitimacy as decision-makers. Court reviews would gain a high degree of public support and respect.

On the other hand, this approach may not be supported by professional groups who feel that the subsequent decision in this area is essentially a clinical one. To these groups, courts may be overly technical and formal. It may

be that the subject matter requires that review be handled by a specialized body with expertise in this area. Further, while a court may be appropriate on initial disposition when the evidence is "fresh," this may not be the case on review. Moreover, the court system, already over-burdened, may not be able to effectively discharge such an additional role without significant increases in human and financial resources.

Alternative III

Provide that the review be conducted by an administrative tribunal.

Considerations

As noted when initial disposition was discussed, tribunals are usually established in areas that are technical or specialized, and where caseloads are heavy. An administrative tribunal could be composed of a panel of members who combine experience and skill from various disciplines.

As the activity of a tribunal is usually limited to one area in which it tends to become specialized, it can develop a high level of expertise and provide continuity and consistency in decisions. In addition, a tribunal may not necessarily be bound by the same degree of procedural formality as is a court. It may therefore be capable of formulating more diverse and creative subsequent dispositions, and may be more acceptable to non-legally trained participants. Further, tribunals (e.g., parole boards and the current boards of review) are frequently engaged in on-going monitoring.

On the other hand, it could be argued that because the subject matter may involve a restriction of an individual's freedom, the full procedural protections of a court should be available.

Additional considerations might arise depending on the type of tribunal that is considered. For example, the status quo involves a mixture of lawyers, psychiatrists and lay persons. It could be argued that since a number of mental health professionals besides psychiatrists (e.g., psychiatric social workers, clinical psychologists, psychiatric nurses) are also expert in this area, provision should be made to include them. Alternatives similar to those considered under initial disposition (e.g., a tribunal consisting of only mental health professionals, only lawyers or only lay-persons) could be

considered here as well. Since considerations similar to those raised in the initial disposition section may apply here as well, they need not be repeated.

Issue 23

Should more than one body be involved in the review process?

Discussion

This is essentially the status quo. Advisory bodies have been established to conduct hearings and to advise decision-makers (i.e., provincial lieutenant governors). This approach takes advantage of the available expertise of an existing specialized body; at the same time, it enhances accountability by allowing the lieutenant governor (Lieutenant Governor-in-Council in Ontario) to review the recommendation of the advisory body in making the final decision.

It may be argued that if the advisory body is truly specialized, and if accountability can be built into the system in some way (i.e., through the use of procedural protections), then it may not be necessary to require the involvement of a second body. If the second body (e.g., the lieutenant governor) were also required to provide procedural safeguards, the two-tiered approach could become expensive, cumbersome and time-consuming. The use of two bodies is particularly questionable where the likelihood is that the decision will effectively be made by the first body and merely "rubber-stamped" by the second. Splitting up the functions in this way may be non-productive and costly. Where the body conducting the review is a court or tribunal and it is permitted to make the final decision, it would be able to take social policy considerations into account prior to making a decision, and would not be as susceptible to direct political pressure as an executive body might be.

On the other hand, the use of only one body may be of considerable concern if procedural safeguards are lacking. If the body making the final decision remains the lieutenant governor, without a mandated role for a more specialized body, rights of individuals may not be adequately protected. Alternatively, the lieutenant governor may be seen by the public as a necessary check on the authority of the reviewing body and as a safeguard against the release of dangerous persons. The role of the lieutenant governor may serve to emphasize the significance of the process.

At present, as indicated above, the Code permits but does not require the creation of an advisory body. As already stated, failure to make mandatory the creation of a specialized tribunal when the ultimate decision is left with the executive provides no assurance that there will be a regular monitoring of cases; this may result in confinement of persons (who have not been convicted of an offence) well past the point when their release would have been appropriate. Such confinement may violate those Charter provisions ensuring fundamental justice (s.7), equal protection (s.15(1)) and protection against arbitrary detention (s.9).

It may be argued that the optional appointment of a board of review provides flexibility and allows individual jurisdictions to adopt practices that accord with their own needs. Although this flexibility may result in some cost-savings in those jurisdictions that do not consider it necessary to appoint an advisory board, in fact all provinces have created one (though not necessarily under the Criminal Code).

Special Procedural Questions Relating to the Current Two-Tier Approach

(a) Disclosure of Recommendation

Under the present system, where a province establishes a board of review and such board completes a particular review, it is required to "report" to the lieutenant governor, "setting out fully the results of such review." There is no requirement (or authority) for it to disclose its recommendations to the subject of the review.

Some consider the report of this body to be an internal government document forming part of the internal decision-making process. They are of the view that the "report" should be treated as confidential in the same manner as one views a memo written by a policy adviser to the executive of government. On the other hand, others consider this unacceptable. They argue that the subject of the review should have the right to read the recommendations so that he or she can assess the basis of the decision by the lieutenant governor. They consider this to be consistent with the duty of fairness and with principles of natural justice, particularly since important issues of personal freedom are at stake. They point out that this right exists in other areas of the law, (note the right to disclosure of pre-sentence reports) and that such disclosure is essential to any meaningful appeal or review of that decision. They point out that such a decision by the advisory body is usually

ultimately persuasive, and that subjects of review have a right to know what is being recommended so that they may have an opportunity to present a contrary view, with supporting evidence, to the lieutenant governor who is responsible for the final decision.

The view taken by some boards of review is that they do not currently have the authority to provide this information to the individual. In fact, some have argued that disclosure would result in frequent challenges of subsequent disposition decisions by the individual in cases where the ultimate disposition is more restrictive than the one that was recommended by the board of review. Once the individual knows the content of the recommendation, he or she may expect that the final decision will be at least as favourable as the recommendation. In fact, in those instances where the lieutenant governor of a province has chosen to go against the advice of his or her board of review, it has usually been in the direction of providing greater security by making a more restrictive disposition than was recommended by the board.

- (b) Should the lieutenant governor be required to consider the recommendations of the board of review and then be required to render a decision?

The lieutenant governor is currently not under any statutory duty to either consider the report of his or her board of review or to issue a new order or warrant after a report has been filed. There is therefore no guarantee that a case will ever be considered by the lieutenant governor, the only person with the authority to change the terms of the disposition. This could result in confinement long after it is required, which may infringe the principles of natural justice, fairness, and ss.7, 9 and 15(1) of the Charter of Rights.

However, the lieutenant governor currently has maximum flexibility to structure his or her review of cases to meet the circumstances of each case, with virtually no technical formalities restricting him or her.

One could require that the lieutenant governor be under a duty to consider the recommendations of the board of review but not be under a duty to make a decision. Such requirement would ensure the usefulness of the process of developing an advisory report, but would leave the lieutenant governor with maximum flexibility as to the actual disposition decision. Since the lieutenant governor would still not be under any statutory duty to render a decision, he or she would not be exposed to

judicial review; the lieutenant governor may, therefore, be able to impose a form of preventive detention for certain categories of individuals without having to justify his or her decision. However, such an approach would not ensure the lieutenant governor's serious consideration of the report of the board of review. This alternative could not, therefore, be practically enforced. The drawbacks to an unchallengeable policy of preventive detention without substantive foundation are obvious. The lieutenant governor could, in fact, go through the formality of "considering" the report while in actuality giving it little attention. Placing a duty on the lieutenant governor both to consider the report and to render a new decision regarding disposition (even if the decision involves a preservation of the status quo) would ensure that the report is considered. To do less may infringe the principles of natural justice, fairness, and the Charter of Rights.

Requiring the lieutenant governor to both consider the report and make a new decision regarding disposition would ensure genuine and thorough review and would help ensure that insanity acquittees and unfit accused persons are confined only for as long as is necessary to accomplish the goals of confinement and treatment. Consequently, public funds would not be wasted on an unnecessarily long confinement.

On the other hand, this approach may in practice provide no greater protection; it would be difficult (if not impossible) to prove that a case was not given fair consideration, particularly if the recommendations of the board of review were not disclosed to the subject of the review.

Issue 24

Assuming the decision-maker on review is an administrative tribunal, how should the tribunal be established?

Discussion

As already indicated, s.547 of the Code gives the lieutenant governor of each province the discretion to appoint a board of review. Section 547 was enacted in 1969. Prior to that time, there was no provision in the Code for the creation of boards of review. To fill this gap, at least one province (Ontario) appointed a review board on its own prior to 1969 to review LGW cases and to

make recommendations to the Lieutenant Governor-in-Council (who made the final disposition decision). All provinces have now appointed advisory boards, either under the Code or under their own mental health legislation.

It is arguable that the provinces should appoint their own boards since (a) they may be most sensitive to local needs, and (b) they are in the best position to appoint appropriate people. Additionally, the psychiatric facilities to which individuals may be directed are usually under provincial control. Making boards of review a provincial responsibility may therefore be more appropriate.

Alternative I

Provide for a board to be appointed by the federal government under the Criminal Code.

Considerations

This approach would help ensure uniformity in practice and consistency across the country. If reviews are seen as essentially a matter of criminal law, it is arguable that they should be performed by a federally-appointed board.

Such a board may not, however, have first-hand knowledge of the resources available in each province, and may not consist of members sensitive to local needs and local norms. Since the outcome of review may be commitment of persons to provincial facilities, constitutional issues may also arise. Moreover, there may be some concern that the provinces will be required to pay an increased amount for people directed into their system by a federal board.

Alternative II

Provide that boards be appointed by the provinces under provincial mental health legislation.

Considerations

It may be argued that if boards of review are to be the final decision-makers, the best approach would be to terminate the involvement of unfit or insane persons with the criminal process and require a mandatory assessment with a view to civil commitment under the relevant

provincial statutes. The civil commitment mental health review boards could then deal with disordered offenders in the future. On the other hand, since unfit or insane individuals may have committed very serious crimes it is arguable that there should be federal assurance that people initially brought into the system under federal legislation will be monitored on an ongoing basis. Individual provinces could, after all, decide to dismantle their boards.

Issue 25

Should the reviewing body be required to review all cases?

Discussion

Currently, the Code makes provision only for reviews with respect to persons in custody. It is unclear what monitoring is available for those who, on initial disposition, are discharged on condition.

Arguably, only those in custody require review. Restricting review to such persons is certainly less costly and less onerous for the reviewing body than providing review for conditionally discharged persons as well. (It may also be difficult to locate persons who are not in custody). Restricting review to detained persons could, however, result in persons discharged on conditions never being brought to the attention of the reviewing body to have the terms of their initial disposition changed. The purposes of reviews (accountability, monitoring of treatment and progress, effective rehabilitation, etc.) may be equally applicable to persons who are not in custody but are still subject to an initial disposition order. The disparate treatment of detained and conditionally discharged persons may be inherently unfair, and may offend the principles of natural justice and the Charter of Rights (s.15).

Alternative

Provide for review for all persons other than those who have been absolutely discharged.

Considerations

This alternative would ensure that those who remain on a warrant (or any equivalent thereof that may be adopted) but who are not confined will have ongoing review of their situation. Arguably, however, it may be more expedient and appropriate to leave reviews of unconfined persons to the informal administrative process of any facility providing treatment to such persons.

Issue 26

What investigative powers should the reviewing body possess?

Discussion

At present, under the Code, the chairman of the board of review possesses all the powers that are conferred upon commissioners under ss.4 and 5 of the Inquiries Act (Canada). These include the power to summon witnesses; the power to require production of documentary evidence; and the power to administer oaths and affirmations (s.4). They also include the power to enforce the foregoing powers, e.g., through contempt proceedings (s.5). Another power that may be considered is the power to provide the protections of the Canada Evidence Act and the provincial Evidence Acts, so that no evidence provided by a witness would be able to be subsequently used against him or her in any civil or criminal proceeding (other than a prosecution for perjury in the giving of such evidence). It may be that the reviewing body should have greater powers than those that were available to the initial decision-maker. At the time of initial disposition, for example, the decision-maker will have fresh evidence from the trial available. By the time of review, however, updated evidence may be required; this fact may justify the conferring of greater investigative powers on the reviewing body.

The following alternatives regarding investigative powers are not necessarily mutually exclusive.

Alternative I

Provide the power to compel the attendance of witnesses.

Considerations

Because this power is considered appropriate for judicial and quasi-judicial proceedings under the Inquiries Act, it may be appropriate for the reviewing body if the review process is conducted by a judicial or quasi-judicial body. It would assist in the gathering of sufficient information to make appropriate decisions. Arguably, if the treating therapists are compelled to give evidence, there is less likelihood of their being regarded by the unfit accused or insanity acquittee as an adversary; there may, therefore, be less likelihood of the therapeutic relationship being undermined.

Such power could, however, be used to compel the attendance of critical hospital personnel on an ongoing basis. This situation could impair the functioning of the hospital and the treatment of its patients. Moreover, regardless of whether or not the therapists appear of their own volition, the content of their testimony could damage the therapist-patient relationship. This may be particularly true if they are forced to reveal intimate facts and impressions about their patients in the presence of such patients.

Alternative II

Provide the power to compel the production of documents.

Considerations

This power would assist in the making of appropriate decisions based on information sufficient for that purpose. Without such power, some important and relevant material might not be disclosed. If medical reports are subpoenaed, there may be less likelihood that their authors will be seen as adversaries by their patients.

This power could, however, result in the obtaining of hospital files that contain highly sensitive information relating to the patient or to third parties. If the decision-maker is required to disclose such material to the patient, such disclosure might be harmful. Non-disclosure, on the other hand, could result in unfairness; the subject might not know the full case he or she must meet. This could infringe s.7 of the Charter.

If the review criteria are policy-oriented and very broad, (e.g., "the best interest of the public") a subpoena power could be subject to abuse; vast amounts of inappropriate information might be regarded as relevant.

In view of the foregoing considerations, it may be appropriate to consider a variation of this approach, such as: (a) providing the power to compel the production of documents; but (b) giving the reviewing body power to prevent disclosure of all or part of the material that it obtains on the basis that such disclosure might be harmful to the subject of the review or to a third party. Such a power currently exists under the Young Offenders Act and under Ontario's Mental Health Act.

Alternative III

Provide the power to administer oaths and affirmations.

Considerations

This power, if accompanied by an enforcement power such as that under the Inquiries Act, could provide the board with a valuable method for obtaining accurate information. A therapist's testimony under oath might be less potentially destructive of the therapeutic relationship than the less formal divulging of "confidential" information. The power to administer oaths and affirmations might introduce greater formality and credibility to the proceedings, and might better emphasize the importance of the review and the need for frankness and honesty. On the other hand, this power might be inappropriate if the Code continues to permit an informal, conference-like approach.

Alternative IV

Provide the power to provide the protections of the Canada Evidence Act and the provincial Evidence Acts.

Considerations

This power might help to encourage full disclosure by witnesses. It would also be consistent with s.13 of the Charter. Such protection is available even at investigatory hearings such as coroners' inquests. This power might, however, be considered incompatible with a less formal review process, where rules of evidence generally do not apply. Further, it would prevent evidence relevant to other proceedings (against, for example, a hospital) from being available to a patient in pursuing a subsequent claim.

Alternative V

Provide the power to interview or examine the subject of the review prior to the review.

Considerations

This power exists under s.32(5) of the Ontario Mental Health Act, which provides that "the review board or any member thereof may interview a patient or other person in private." It provides the psychiatric board member with an opportunity to form a clinical opinion based on an informal assessment in a more relaxed environment than that available at the hearing. This kind of assessment may be particularly useful where full disclosure does not occur at the hearing itself. It is compatible with an informal, non-adversarial review process and permits useful impressions to be gleaned outside the formality of the review, in a more therapeutic context.

It is arguable, however, that this approach is contrary to the concept of natural justice, since it permits the reviewing body to have access to information that is not available to the subject or to his or her counsel. Being examined (without counsel) by someone who will be making important decisions about him or her may place the subject at a disadvantage -- particularly where medication or the subject's mental condition (be it mental disorder or retardation) affects his or her ability to protect his or her interests. allowing decision-makers to act as investigators, and possibly as witnesses as well, may be seen by some as less than ideal. Where a formal hearing is to be held, it is arguable that the prior examination runs the danger of being contrary to the principles of natural justice. A decision-maker who has formed an opinion about the case prior to the hearing may be seen as biased. Prior examination might also be violative of s.7 of the Charter of Rights.

If prior examination of the subject is to be allowed, notice of such examination and the right to cross-examine might be safeguards worthy of consideration. Notice would provide the opportunity for other persons to participate. Cross-examination would ensure that the opinion of the examiner is not necessarily placed before the reviewing body in private and unchallenged. However, this would result in the decision-maker serving in the role of witness at a hearing over which he or she is presiding.

If prior examination were not permitted, psychiatric members of the reviewing body would be able to assist in the interpretation of psychiatric information without taking on what some might see as the conflicting role of assessor or expert witness.

Alternative VI

Provide the reviewing body with the means to enforce its investigative powers.

Considerations

Giving the reviewing body the means to enforce its investigative powers (through contempt proceedings or otherwise) would give substance to the other powers that may be given to the reviewing body. It may be argued, however, that providing the reviewing body with extensive power over treatment or custodial facilities may upset the functioning of such facilities if it is exercised with a heavy hand. In addition, this power may be incompatible with an informal, inquiry-like review process.

Issue 27

How frequently should periodic reviews be held?

Discussion

Currently, s.547(5) of the Code provides that boards of review (where established) must review the case of every person held in custody on an LGW not later than six months after the initial disposition and at least once every year following the initial review. As well, s.547(6) of the Code requires that additional reviews be conducted at the request of the lieutenant governor. It may be appropriate to consider whether a different review schedule should be established for different categories of subjects. If, for example, it were decided that annual review is appropriate for those conditionally discharged, it may be considered appropriate to review those held in custody more frequently. Arguably, unfit persons (who have not yet been found to have committed the offence charged) should be entitled to more frequent review than that received by insanity acquittees.

Alternative I

Provide for annual reviews.

Considerations

Since recovery from mental disorder is often slow, it may be unnecessary and wasteful to require more frequent reviews, particularly if the initial review is conducted within six months of initial disposition. Since reviews may sometimes be seen as interfering with the treatment process within a facility and as being disruptive of hospital routine, this approach might be more conducive to effective therapy than more frequent reviews would be. Where the caseload is heavy, this may be the only practical approach.

In some cases, however, rehabilitation can be quite rapid. A system of frequent reviews might therefore be more desirable. Arguably, it would be fairer to the individual if more regular monitoring of his or her rehabilitative process were provided for. Yearly reviews might not ensure that previously unfit accused persons who have become fit are returned for trial when they are ready. They may not ensure that insanity acquittees are released upon recovery, or that treatment plans are adjusted when they need to be. Yearly reviews might not ensure the accountability of service providers, and might be demoralizing and counterproductive as far as treatment and rehabilitation are concerned.

Alternative II

Provide for reviews to be held at the request of the subject or the institution involved.

Considerations

This alternative would allow institutions to seek changes in the status of persons under their care and/or control when, in their opinion, it is warranted by a change in mental condition. It would allow persons to seek changes in their status when they themselves feel ready for it as well. It would help ensure inter alia that recovered unfit accused persons and insanity acquittees are not detained in custody any longer than they need to be.

This approach might, however, be quite disruptive to the orderly operation of the detaining facility, and would substantially increase costs. If reviews are held too frequently, they may tend to become perfunctory. At a minimum, implementation of this alternative might require that some limit be placed on the number of reviews that may be held within a specified period.

Issue 28

What subsequent disposition options should be available to the reviewing body?

Discussion

While the Code provides specific guidance as to what the report from the reviewing body should contain, it is not clear what subsequent disposition options are available to the lieutenant governor at the stage of review. It is often assumed that the powers in s.545(1) which apply at the stage of initial disposition also exist at the review stage. In some jurisdictions, the lieutenant governor is considered to have the authority to keep a so-called "safely keep warrant" in place, but to delegate a discretion to the administrator of the facility in which a person is being detained to decide whether the person should be allowed out and, if so, on what terms and conditions. In practice, some provincial lieutenant governors often make orders that are quite detailed in this respect.

The following subsequent disposition alternatives are not necessarily mutually exclusive. Some may be appropriate only for insanity acquittees; others may be appropriate only for unfit accused persons.

Alternative I

Provide for a "no change" order.

Considerations

This alternative envisions that if there has been no change in the circumstances (e.g., the mental condition of the individual) the initial disposition or previous order will continue to apply until the next review.

Alternative II

Provide for a "loosening" of custodial conditions with the option to "tighten" the custodial conditions again at any time.

Considerations

This option, currently used in most provinces, would statutorily provide for a change of setting and a "loosening" of security in cases where such a change would assist in the subject's rehabilitation without endangering the public. It would also permit the subject to be released gradually and cautiously. It would maximize the availability of space in secure facilities by permitting the transfer of persons to places with less security in cases where this can be done without jeopardizing either the safety of the public or the treatment of the individual. This approach would also permit an individual to be quickly placed under the custodial conditions that were initially imposed, should this become necessary.

It is arguable, however, that if the effect of this alternative is to give treatment or custodial facilities discretion as to the manner of custody imposed, it might be perceived by the subject as unfair, or perceived by the public as an inappropriate delegation of power that could place them in danger (should a service provider be more concerned with rehabilitation than with the security of the public). If custodial decisions that result from such delegated authority are made arbitrarily or otherwise than "in accordance with the principles of fundamental justice," they may infringe the Charter.

Alternative III

Provide the reviewing body with the authority to order the restraint and/or compulsory treatment of the subject.

Considerations

This alternative was discussed earlier in the context of initial disposition. The same considerations would apply here.

Alternative IV

Provide for conditional discharges.

Considerations

At present, this alternative is clearly available on initial disposition, although it is not clear whether it is also available to the lieutenant governor as a subsequent disposition. It is arguable that this option is more appropriate than simple "loosening" of a "safely keep" warrant. Section 545 of the Code already provides an expedient mechanism for returning an individual who has violated a condition of discharge. Such an alternative would give substance to the "least restrictive alternative" principle, and would provide the reviewing body with the opportunity to make the terms of the order consistent with individual needs and with available resources. Moreover, this provision may result in a cost-saving if non-custodial settings are utilized whenever appropriate. Use of this approach would likely avoid problems under ss.9, 11(e), 12 and 15(1) of the Charter of Rights.

It is arguable, however, that this alternative could place public safety at risk if used inappropriately. If there is no provision for a hearing, this approach may not be appropriate since the reviewing body may not have sufficient information before it on which to base appropriate conditions for discharge.

Where treatment is made a condition of discharge, it may be particularly difficult to enforce unless great care is taken in the wording of the statutory provision that authorizes such condition and/or in the wording of the actual order. For example, an order to "attend for treatment" may not provide the treating facility with the authority to treat a competent individual who refuses to consent. The order might be interpreted as an order simply to attend. If the individual attends but refuses treatment, there might not be authority to force treatment on him or her, although the individual's refusal might be taken as a violation of the order. (See ss.15 and 35 of Ontario's Mental Health Act).

Alternative V

Provide for absolute discharges.

Considerations

This alternative gives substance to the "least restrictive alternative" principle. It may be an appropriate subsequent disposition for non-dangerous persons who do not need treatment, whose condition is not amenable to treatment, or for whom there is no treatment available.

Alternative VI

Provide for return for trial.

Considerations

This alternative would, of course, be appropriate only for unfit accused persons.

Issue 29

What factors should be considered by the reviewing body in deciding on subsequent disposition?

Discussion

Under the Code, a board of review (where appointed) must presently consider whether a detained insanity acquittee "has recovered and, if so, whether in its opinion it is in the interest of the public and of that person for the lieutenant governor to order that he be discharged absolutely or subject to such conditions as the lieutenant governor may prescribe...."Where detained unfit accused persons are concerned, the board of review must consider "whether, in the opinion of the board, that person has recovered sufficiently to stand his trial...."

Below are discussed several factors which might be considered by the reviewing body in deciding on subsequent disposition. They are not necessarily mutually exclusive. Their appropriateness may, moreover, depend on whether the subject of review is an unfit accused or an insanity acquittee.

Alternative I

Provide that the reviewing body shall consider whether the subject has recovered.

Considerations

Inclusion of this factor would help ensure that mentally disordered persons continue to receive treatment and that those who are no longer mentally disordered are not kept in hospital or given treatment unnecessarily. Failure to consider recovery could result in a Charter attack under ss.7, 9, 11(e), 12 or 15(1).

Alternative II

Provide that the reviewing body shall consider whether the subject is in a state of recovery.

Considerations

This concept perhaps more accurately reflects the realities of mental disorder than does Alternative I above. It reflects the fact that recovery from a mental disorder may be a very gradual process.

Alternative III

Provide that the reviewing body shall consider whether the subject is dangerous to others.

Considerations

Various expressions dealing with the concept of dangerousness have been used in a number of provincial civil commitment statutes. Inclusion of dangerousness as a relevant factor would ensure consideration of public protection. It may be argued, however, that dangerousness is not a suitable factor for consideration, since the prediction of dangerousness is very difficult. Prediction may be particularly difficult in cases where there has been no recent overt dangerous behaviour by an individual who has been confined in a protective setting for some time. Further, the term "dangerousness" may not be sufficiently clear on its own and may require more precise definition (e.g., in terms of "serious bodily harm to others," etc.).

Alternative IV

Provide that the reviewing body shall consider whether the subject is dangerous to him- or herself.

Considerations

Currently, the Code provides some recognition of the concept of "the best interest of the accused...." More specific expressions to describe the concept of dangerousness to self may include "safety risk" to self or the risk of "serious bodily harm" to self. Consideration of the subject's dangerousness to him- or herself would help ensure the protection of the individual who may be suicidal or incapable of looking after him- or herself.

If a more paternalistic approach in protecting those who are not overtly dangerous to themselves but who may need some form of care and protection is considered appropriate, then consideration of whether the subject "needs confinement for his or her own well-being" could be required. This phraseology would likely be vague enough to allow potential mental, emotional or financial well-being (in addition to physical well-being) to be taken into account. If more specificity is desired in this area, consideration only of the subject's "risk of suffering serious physical impairment" could be required.

Note that the use of vague, paternalistic concepts for confinement may run contrary to ss.7, 11(e) or 15(1) of the Charter.

Alternative V

Provide that the reviewing body shall consider "the public interest."

Considerations

This is a criterion currently set out in the Code. It is not clear, however, what the expression means. It may be argued that it would be in the public interest to confine all persons who have committed acts under the Code. On the other hand, there would be considerable public expense in adopting this approach. It could therefore be argued that it is only in the public interest to confine those who have committed violent acts and who are still considered dangerous.

The vagueness of the "public interest" concept may give rise to a successful challenge under ss.7, 11(e) or 15(1) of the Charter. A more specific expression embracing what may be intended by the expression "public interest" might be "the security of the public."

Alternative VI

Provide that the reviewing body shall consider the need for treatment.

Considerations

This approach would help ensure that persons who still need treatment continue to receive it and that those who

no longer need treatment are not kept in hospital unnecessarily (and are moved to a more appropriate setting, e.g., jail if the individual is dangerous). Failure to consider the individual's need for treatment may result in attack under ss. 7, 9 11(e), 12 or 15(1) of the Charter.

Alternative VII

Provide that the reviewing body shall consider the availability of treatment.

Considerations

Although the term "available" may be somewhat vague, this approach would help ensure: (a) that persons who still need treatment and for whom treatment is available receive it; and (b) that persons for whom treatment is not available are not kept in hospital unnecessarily. Failure to consider the availability of treatment may result in attack under ss. 7, 9, 11(e) or 12 of the Charter.

Alternative VIII

Provide that the reviewing body shall consider the availability of beds in a treatment facility.

Considerations

This approach would help ensure that individuals for whom treatment is the sole reason for continued detention, but for whom no treatment beds and treatment facilities are available, are not unnecessarily detained.

Alternative IX

Provide that the reviewing body shall consider whether the subject is prepared to consent to treatment.

Considerations

Where the individual is mentally competent to give or withhold consent to treatment, it may be an inappropriate use of time and resources to make a disposition based on the need for treatment unless the individual intends to cooperate. In fact, treatment is often difficult to administer without consent. Failure to consider consent may result in a Charter attack under ss.7, 12 or 15(1).

Where the individual is mentally incompetent (this may be particularly relevant with the unfit accused), it is arguable that enforced treatment or hospitalization may be immoral or unethical in some circumstances (e.g., where the offence involved is minor compared to the severity of treatment contemplated; where the individual is not dangerous; or where the treatment contemplated is experimental in nature). On the other hand, where treatment is absolutely necessary in order to attain the goals of disposition, and where such treatment is available, consent may be considered by some as irrelevant, particularly since it may be more cost-effective to rehabilitate the individual compulsorily and to then release him or her (for trial, or absolutely) than to detain the individual indefinitely.

While the reviewing body may be given the authority to order treatment where it is convinced that treatment is available and will likely improve the mental condition of the individual, it should also be considered whether it is consistent with the "least restrictive alternative" principle to allow the compulsory treatment of an unwilling, mentally competent individual. It is arguable that compulsory treatment may be less restrictive than simple confinement if the results of such treatment lead to release.

Issue 30

What factors should give rise to specific dispositions?

Discussion

Consideration might be given to the idea of specifying the requisite criteria for each possible disposition following review. This approach would structure the exercise of discretion. The approach outlined in Issue 9 above could be applicable here as well.

Issue 31

What procedures should be followed by the reviewing body?

Discussion

As noted in the introduction, the boards of review across Canada have virtually no statutory procedural requirements regulating their reviews. In practice, while some have

adopted fairly strict procedural safeguards, others have fairly loose procedures, following the so-called "inquisitorial" or "conference" approach to reviews.

It is arguable that the lack of statutory procedural requirements permits boards to adapt their procedures to the needs of individual cases. Some may see this approach as the most appropriate one where there is a large social policy component to the decision, particularly where the criteria on review are vague and policy-oriented. This may be the most expedient approach; it may not allow the process to become overly cumbersome, time-consuming or expensive. Mental health professionals who may be required to provide evidence to the board may also feel more comfortable in a less formal environment.

On the other, hand the lack of statutory procedural requirements may conflict with the principles of natural justice and fairness, and with the provisions of ss.7 and 9 of the Charter. It may result in arbitrariness, subjectivity, lack of uniformity, unevenness, and lack of predictability across the country. It may, moreover, be more difficult for a court to review a procedurally loose decision (i.e., to maintain accountability).

Alternative I

Provide for minimal rules of procedure.

Considerations

An approach such as that found in s.32 of Ontario's Mental Health Act could be considered here. Under that section, only certain requirements are set out, leaving considerable discretion to the board as to rules of procedure. Such an approach would permit some structuring of the exercise of discretion and at the same time allow individualization and flexibility.

On the other hand, this approach may not ensure adequate procedural protections. It may offend the principles of natural justice and fairness, and ss.7, 9 and 15(1) of the Charter of Rights. In addition, discretion may still be unfettered, resulting in disparate practices and uneven results.

Alternative II

Provide for formalized procedures.

Considerations

This approach would ensure that the procedures followed by reviewing bodies across the country are uniform and predictable. Procedural rules would help to structure the discretion of reviewing bodies and help ensure that their authority is not exercised unfairly or arbitrarily. They would help to eliminate subjectivity from the decision-making process and encourage the accountability that is essential if the system is to be respected by society. Formal procedural safeguards are usually required for decisions involving deprivation of liberty. If they are absent here the process may infringe ss.7 and 15(1) of the Charter.

On the other hand, formalized procedures may not provide flexibility or the individualized approach necessary for making decisions concerning the future status of insanity acquittees or unfit accused persons. It may be argued that formalized procedures could result in harm to therapist-patient relationships and disrupt the function of hospitals where the clinical staff are required to give evidence and be cross-examined. Furthermore, if the review criteria involve broad principles of social policy, formalized procedures may not assist in producing appropriate decisions.

On the assumption that there will be some degree of formality, the following issues consider the degree of formality that may be appropriate for codification.

Issue 32

Should there be parties to the review proceedings?

Discussion

At present, the review process is usually conducted as an inquiry. Technically, there are no parties. In practice, however, the subject of the review and the administration of the facility treating the individual are often characterized as parties.

It is possible that in a "no party" system opposing views may not be as highly polarized, and treatment and rehabilitation may be less jeopardized. Such a system allows for speedier, less costly and less cumbersome reviews. It may be argued that this is the appropriate approach for clinical decisions of this kind, given that medical issues are traditionally dealt with through a case conference approach.

On the other hand, the designation of parties may be seen as an essential ingredient of natural justice and fairness. Procedural protections such as the right to notice, the right to representation and the right to be heard would result from party status. Such protections might greatly influence the "tone" of the proceedings, and may be seen by many as fairer and more likely to result in appropriate decisions. The absence of parties would be inconsistent with a judicial or quasi-judicial approach to reviews and may offend s.7 of the Charter of Rights.

Alternative

Provide that parties shall be clearly designated.

Considerations

This approach would make clear who has the right to be heard. It would help ensure orderly and thorough presentation of evidence to the reviewing body so that the most appropriate decisions might be reached. Arguably, the designation of parties is much fairer to the subject of the review, given that party status is an essential element of natural justice. Granting party status to the custodial or treatment facility would provide that facility with an opportunity to formally present its views to the reviewing body.

On the other hand, the designation of mental health professionals as parties may impair their relationship with (and ability to treat) their patients. It may also result in longer and more costly proceedings, particularly since parties are usually entitled to counsel.

Issue 33

If parties are designated, who should the parties be?

Note:

The following alternatives are not necessarily mutually exclusive.

Alternative I

Designate the administration of the treating or custodial facility (e.g., psychiatric facility, jail, prison or other care facility) as a party.

Considerations

This approach would guarantee input by the treating or custodial facility that has ongoing contact and responsibility for the person who is the subject of the review. Such facility would probably be in the best position to make reliable submissions regarding subsequent dispositions.

On the other hand, the treating or custodial facility may be perceived as an adversary if it becomes a party. The effect may be to undermine treatment. This approach may therefore be incompatible with one of the main goals of disposition, i.e., rehabilitation. Arguably, the facility's submissions could just as easily be obtained if its representatives participated in the review as witnesses. Limiting the facility's role in this way, however, might preclude representatives of the facility from questioning other expert witnesses at the review proceedings.

Alternative II

Designate the Crown as a party.

Considerations

Involving the State in the review process might help ensure that the interests of the public are fully respected. It would ensure that the spectre of "criminality" is retained, which may or may not be seen as a good thing.

It would certainly be incompatible with the Law Reform Commission of Canada's recommendation that insanity acquittees be subject only to civil commitment (where appropriate) following an insanity verdict.

This approach might receive support from mental health professionals; the Crown would have the responsibility of conducting the proceedings and leading important evidence, leaving the treating therapist to participate as a witness rather than as an adversary. This aspect might help maintain therapeutic relationships.

This approach would, however, place an additional burden (in terms of time, money and resources) on the criminal justice system. It might be more appropriate at this stage to decriminalize the process and to adopt more of a mental health approach.

Alternative III

Designate the attending physician as a party.

Considerations

Specifically indentifying the attending physician as a party could place the physician in an adversarial role, thereby undermining the doctor-patient relationship. Arguably, the evidence of the physician could just as easily be obtained if the physician were to be called as a witness, rather than designated as a party. While the attending physician is probably in the best position to make relevant submissions to the reviewing body, it is arguable that his or her evidence should be presented in a manner that does not undermine treatment and rehabilitation.

Alternative IV

Provide for additional parties to be designated at the discretion of the reviewing body.

Considerations

This alternative would allow some flexibility; the reviewing body could permit appropriate persons to acquire party status where it feels that they could make meaningful contributions to the review proceedings. This approach has been adopted for coroner's inquests. Designation of additional parties could, however, result in a review process that is overly time-consuming, cumbersome and expensive. Moreover, if the criteria for determining when party status is appropriate are not clear, it is possible that inconsistencies, arbitrariness and unfairness could result. This approach might encourage interest groups to seek party status at all reviews as a means of challenging the mental health system.

Issue 34

Should the reviewing body be required to hold a hearing?

Discussion

At present there is no requirement in the Criminal Code for boards of review to hold full-scale hearings.

Consequently, most reviews take the form of relatively informal inquiries rather than adversarial hearings. The present law permits the form of review to remain in the discretion of the reviewing body. Where the reviewing body holds a hearing as part of the review, it has the discretion to determine how formal or informal the process should be, including whether to have verbal or written submissions. This approach permits maximum flexibility and allows the review process to adapt to individual situations. Permitting the review to be an informal, administrative process may be particularly appropriate in jurisdictions where funds and other resources are limited. It allows quick and efficient resolution of the issues. In cases where either psychiatric experts or the government feel detention is needed, despite the fact that it is difficult to justify, confinement can be imposed without fear of having to justify this action at a hearing. In cases where there is bona fide room for debate about the most appropriate disposition, a formal hearing can be held to ensure that all views and evidence are fully presented.

Some might see the present situation as having the potential for arbitrariness, unevenness and inconsistency. In the absence of the basic procedural protections to which those who are confined are usually entitled, the status quo may violate the Charter of Rights provisions relating to fundamental justice, arbitrary detention, and equality before the law (ss.7, 9 and 15(1)). It does not clearly allow the individual to provide input that might facilitate fairer and more appropriate decisions. It does not ensure accountability or provide much scope for appeal or judicial review.

If there is no provision for a hearing, it may be appropriate to specifically permit the individual to make written submissions that must be reviewed by the decision-maker. However, such an approach could have the same drawbacks as those discussed above. Furthermore, written submissions may be inadequate as a means of effectively presenting and reviewing psychiatric evidence. There would be no opportunity for the individual to effectively challenge the merits of opposing views.

Alternative I

Provide that an "inquisitorial" type of hearing shall be held.

Considerations

While a hearing would be required with this alternative, "conference-like" procedures (rather than adversarial procedures) would be followed. Persons participating in such a hearing may feel more relaxed and be more willing to divulge necessary information in an informal setting. It may also be easier to get to the point of issues in dispute more quickly when the proceedings are not encumbered by formalities. This form of hearing would save expense and might cause minimal interference with the therapist-patient relationship. It might also provide an effective means for the individual to present his or her views and to challenge the views of others.

In the absence of procedural rules, however, the hearing would likely take different forms in different cases and in different jurisdictions. As a result, uniformity across Canada would be lacking; there may be a denial of equal protection of the law as required under the Charter of Rights (s.15(1)). In addition, this approach may result in violations of ss.7 and 9 of the Charter. Arguably, it ensures only minimum accountability; it may be difficult to judicially review unstructured proceedings, particularly if there is no requirement for the recording of the proceedings.

Alternative II

Require a hearing and procedures that accord with the principles of natural justice.

Considerations

This approach would be consistent with the Law Reform Commission of Canada's recommendation that the detention of hospitalized unfit accused persons be reviewed by a court. It is arguable that where individual liberty is involved, the detained individual should be granted a hearing with full procedural protections. Such an approach would reduce the risk of arbitrariness, would provide an independent check on the medical profession's influence at review, and would maintain public respect for a decision-making process that may involve involuntary confinement. Giving the subject of the review a full opportunity to participate effectively might make him or her more receptive to rehabilitative treatment. This approach would likely avoid problems under ss.7, 9 and 15(1) of the Charter of Rights. A hearing with full

procedural protections might be particularly appropriate if review is to involve the consideration of clearly defined questions of fact, such as the "existence of a mental disorder" and "current dangerousness."

On the other hand, strict procedural requirements may lead to a more legalistic, cumbersome, and costly review process. As indicated previously, many psychiatric professionals argue that the review decision is essentially a medical issue not suited for a formal, adversarial hearing. Such persons may be reluctant to participate in an adversarial hearing, feeling that this may undermine and jeopardize the therapist-patient relationship. They may be reluctant to devote much of their professional time to preparing for and participating in formal hearings. They may not want to have their opinions subjected to cross-examination, particularly where they are based on clinical judgment (as opposed to objectively verifiable data). In addition, for those who may still be unfit to stand trial, it may be contradictory to convene a quasi-judicial proceeding and expect the subject of the review to be able to participate in a meaningful way.

If the criteria governing decisions on review are very broad and are based primarily on social policy considerations, such as "the public interest," it may be more appropriate for the reviewing body to follow a less adversarial approach. Such an approach might also be most appropriate where the reviewing body is the executive.

Issue 35

Assuming a formal adversarial hearing is required, what procedural features should such hearing have?

Discussion

Various procedural elements associated with formal hearings will now be considered individually. These elements are not mutually exclusive. Most (if not all) of them would be appropriate if the reviewing body is to be a court. Very few would be appropriate if the reviewing body is to be the executive.

Alternative I

Provide for open hearings.

Considerations

It is an important tradition in our legal system that judicial processes be subject to public scrutiny. However, there are some instances (e.g., proceedings under the Juvenile Delinquents Act) where, either because of the nature of the proceedings or in order to protect the individual, proceedings are held in private and publication of identifying data is generally banned.

It is arguable that the subject-matter of the decision in this area is of such a sensitive nature that it should be dealt with in camera to protect the privacy rights of the individual being reviewed and those of other persons, such as family members. On the other hand, in an area where social policy or political concerns may underlie decisions, it may be argued that openness of the proceedings is essential to ensure accountability.

One compromise may be to provide the reviewing body with discretion regarding the openness of proceedings to the public and/or the media. Such discretion might include the power to allow the presence of the public where the subject of the review consents, the power to ban publication, etc.

Alternative II

Provide for notice.

Considerations

"Notice" could be anything from an indication that a review is to be conducted, to a written statement of the proceedings that are planned (including a summary of the position to be advanced by the hospital), to a formal statement of any facts alleged.

If the subject of the review proceedings does not receive notice, his or her effective participation in the proceedings may be diminished. Since notice of proceedings is a traditional right in our legal system, its denial could pose Charter of Rights problems (ss.7, and 15(1)). It is arguable that the individual should have notice not only of the fact that there is to be a review, but of the basis for the case that he or she must meet as well. A formal statement of facts to be presented would facilitate the possibility of reaching a negotiated compromise earlier in the process. On the other hand, it may be argued that the issues on review do not lend themselves to easy articulation in formal pleadings since

they do not relate so much to specific episodes or events as to the individual's behaviour and to the success of treatment and rehabilitation.

Alternative III

Provide for the right of the subject of the review to be present.

Considerations

The attendance of the subject of the review could be provided for as of right; it could be left to the discretion of the reviewing body; or the reviewing body could be given authority to exclude the subject only where it can be demonstrated that the subject's presence would result in harm to him or her or to others. Where the individual is prevented from attending, there could be a provision giving him or her the right to have someone attend on his or her behalf.

Permitting exclusion of the individual when an important legal decision affecting his or her personal liberty is being made may be contrary to general principles of fairness and may run contrary to ss.7 and (possibly) 15(1) of the Charter. Moreover, the subject of the review may be able to make a significant contribution that would be essential to an appropriate decision. Permitting someone to attend on behalf of the subject might not be adequate.

On the other hand, authority to permit exclusion of the individual may allow for a full adjudication on sensitive treatment issues where viva voce evidence may be presented by family members, and where the involvement of the individual could seriously impair the therapist-patient relationship or future relationships between the subject and his or her family. Such a discretion would also allow the reviewing body to exclude acutely disordered individuals who cannot be adequately controlled. Attendance could be the norm except in cases where the party requesting the subject's exclusion can satisfy the reviewing body that attendance would be harmful to the subject or to a third party. If specific criteria for exclusion were established, the discretion of the reviewing body could be controlled; exclusion could be allowed only in cases where attendance would be clearly inappropriate.

Alternative IV

Provide for the right to counsel.

Considerations

Many review subjects may be unable to effectively prepare for and participate in formal proceedings (i.e., because of mental disorder, medication, etc.). If it were decided that a right to counsel is appropriate, then it may be necessary to appoint counsel in every case (at public expense where the individual cannot afford it). Where counsel is appointed, he or she will likely insist on access to all relevant information prior to the hearing so as to be as effective as possible.

The denial of the right to counsel may violate ss.7 and 10(b) of the Charter of Rights. While it may be argued that lawyers would tend to make the process more complex, technical, lengthy, and costly, they would help ensure that all available, relevant information is presented to the reviewing body. Lawyers usually assist in the orderly and thorough assembly and presentation of the evidence. It might be unfair to expect that a person suffering from a serious mental disorder could prepare and present useful information to the reviewing body or participate effectively in the review process without the help of counsel. The right to counsel exists throughout the criminal process. Providing the right to counsel on review would likely enhance both the inherent fairness of the procedure and the public's respect for the proceedings. Although in some instances counsel may have difficulty in taking instructions from the subject, this fact has not prevented counsel from representing children in a competent fashion.

Although there would likely be considerable cost involved in subsidizing counsel in all cases where the subject of review is not able to pay, the right to counsel would arguably provide the best protection for such person's legal rights.

Alternative V

Provide for the right to present evidence and make submissions.

Considerations

Since the decision being made has important liberty implications, natural justice and fairness require that the subject of the review be given the right to present his or her views as fully as possible. Giving all parties, including hospital administration, the opportunity to provide the reviewing body with maximum relevant information can only assist in the making of correct decisions. Even an informal conference approach is consistent with the presentation of evidence and submissions on the part of the relevant parties. The opportunity to present evidence and make submissions exists in other areas of the criminal justice system when disposition decisions are made, (e.g., at the time of sentencing).

Guaranteeing the right to present evidence and make submissions may, however, result in an overly cumbersome and time-consuming review process, particularly where submissions are being made by mentally incompetent individuals. Unless the reviewing body is given a discretion to curtail the presentation of evidence and the making of submissions on the basis of such criteria as relevancy, this approach may result in unnecessary and extraneous information being introduced. However, failure to provide this right could result in attack under ss.7, 9, and 15(1) of the Charter.

Alternative VI

Provide for the right to cross-examine witnesses and other parties.

Considerations

The right to test the accuracy and cogency of evidence by means of cross-examination is a traditional ingredient of natural justice and fairness, and is an essential element of adversarial proceedings. In the context of reviews, it would allow expert opinion to be carefully scrutinized before it is relied upon. (A complementary right to prior disclosure of the names of intended witnesses might also be appropriate here).

It may be argued that cross-examination of therapists can be detrimental to the therapeutic relationship; the patient may come to see the therapist as less than completely confident. Moreover, it may discourage mental health professionals who object to having their opinions

tested in such a forum on a regular basis from working in facilities that treat insanity acquittees and unfit accused persons.

Placing the right to cross-examine within the discretion of the reviewing body might provide maximum flexibility. The reviewing body could weigh the benefits and disadvantages of permitting cross-examination on a case-by-case basis. For example, in cases where the reviewing body is convinced that the cross-examination of a mental health professional is likely to severely undermine the therapeutic relationship and jeopardize rehabilitation, the opportunity to cross-examine could be denied. In cases where the risk of this happening is not as great, however, the requirements of fairness could be given greater weight. Cross-examination could be made a prima facie right. Giving the reviewing body discretion in this area may be one means of checking potential abuses, such as that which may occur where a patient or his or her counsel uses cross-examination as a means of unfairly attacking the attending physician at length. However, unless the criteria for denying the right to cross-examine are clear and precise (with some appeal mechanism available where cross-examination is denied), uneven, arbitrary and unfair practices could result.

Since the right to cross-examine is an essential ingredient of judicial proceedings, denial of this right for any individual may infringe ss.7, 9 or 15(1) of the Charter of Rights. As indicated earlier, the provision of a right (rather than a discretion) would ensure that all available, accurate information is before the decision-maker. While some mental health professionals may feel that their cross-examination may undermine the therapeutic relationship, it may be argued that the opposite would be true; full elucidation of the reasons for continued confinement, for example, might make the subject more cooperative. Cross-examination on all expert evidence presented before the reviewing body would contribute to balanced evidence, elucidate weaknesses in the evidence, and make it easier for the reviewing body to weigh such evidence.

Alternative VII

Provide for the right of access to all material before the reviewing body.

Considerations

Some boards of review have before them such information as: a summary and recommendations from the treating facility; a summary and recommendations from a board member (for example, a psychiatrist who may have examined the subject of the review prior to the review); or even a recommendation from another person, such as a family member. In some cases, the material may have been subpoenaed by the reviewing body. The boards, in making recommendations to lieutenant governors, often rely heavily on this material, yet the subject of the review does not always have access to it.

It is often considered an essential ingredient of our legal system that material on which a decision-maker relies should be disclosed (so that the individual will know the case he or she must meet) and should be subject to challenge by the party that is being affected by the decision. Unless the subject of a review is given the opportunity to examine and to challenge all material before the decision-maker, the decision may be based on inaccurate or incomplete material. Since this is an area in which decisions involve important social policy and liberty interests, it is essential that the process provide for as much accuracy as possible. There are many who feel that decision-makers should never be able to make a decision based in part or in whole on material not available to all of the parties. Disclosure of information that will be considered by the decision-maker is considered basic to our legal tradition and its denial may infringe the principles of natural justice, fairness, and ss.7, 9 and 15(1) of the Charter of Rights.

On the other hand, it may be argued that there are instances in which disclosure could result in harm to the subject or to other persons, jeopardize the therapist-patient relationship, undermine treatment, or infringe the privacy rights of persons who have volunteered information on the understanding that it would be kept in confidence. There is also the concern that since some material is often of a complex and technical nature it could be misunderstood by the individual. There may, however, be ways of dealing with such concerns. The person who prepared the material could explain to the subject any aspect of it that may not be clear to him or her. Alternatively, the reviewing body could have a discretion to withhold disclosure where it is clear that such disclosure would likely be harmful; such discretion could be subject to appeal or review. Perhaps disclosure could be a prima facie right, with non-disclosure permissible only once probable harm to the subject or to a third party has been demonstrated.

Alternative VIII

Provide for the right of access to one's clinical records.

Considerations

There may be instances where the subject (or his or her counsel) is of the view that access to clinical records prepared by a treating facility is essential to proper preparation. There may, for example, be instances where it is suspected that the treating facility has carefully selected aspects of the record that support the disposition favoured by the facility, and has chosen not to place other aspects of the record before the board. Even where a right of access to material before the board is guaranteed, therefore, there may still be instances where a right of access to other relevant information may be considered necessary.

The alternatives here would include: prohibiting access; granting a right of access; providing the reviewing body with a discretion in this regard (the exercise of which might involve providing access to counsel only, on the condition that the information not be disclosed to his or her client); or providing a right of access with the caveat that the person preparing or in control of the information could, on the basis of specific criteria, ask the decision-maker to refuse access to part or all of the information sought.

Once again, there are several arguments that can be made in favour of non-disclosure. A right of access to such clinical opinions as prognosis may be harmful to the therapist-patient relationship and may undermine rehabilitation. The contents of the clinical record may include complex, technical information that may be misinterpreted and may, therefore, ultimately be harmful to the subject. The clinical record is a working document prepared by and belonging to the facility; arguably, it should be used for clinical purposes only. Denying a right of access would ensure the preparation of a complete and frank clinical record; those preparing it would not withhold information in anticipation of possible disclosure through a right of access. Persons might be less likely to work in a hospital setting where there is a right of access by patients to their records and therefore a right to examine staff working documents. A denial of a right of access would ensure the protection of the privacy rights of other individuals, such as family members, who may have provided information that is recorded in the clinical record.

On the other hand, it is the view of many patients and counsel who represent them in hearings of this nature that, owing to the seriousness of the decision being made, the subject of the review should have the right to be apprised of all information relevant to that decision. Otherwise, it is argued, he or she will not be able to properly prepare his or her case; the result will be an incomplete picture presented to the reviewing body. Without complete disclosure in all cases, it is further argued, there is the risk that the facility may select material from the record that supports its position and leave out other relevant material. The denial of a right to full disclosure may infringe s.7 of the Charter of Rights.

One difficulty with giving the reviewing body a discretion regarding access to clinical records is that unless the discretion is exercised judicially (in accordance with clear and precise legislative criteria as to when disclosure is appropriate) practices will likely be uneven, unpredictable and arbitrary, exposing them to Charter attack.

The compromise approach that has been suggested by many, (including the Ontario Royal Commission on the Confidentiality of Health Information) is to provide a general right of access, but to allow the attending physician to refuse disclosure in cases where such disclosure would be harmful. In cases where disclosure is refused, a hearing would be held to determine whether disclosure is appropriate. Arguably, the attending physician is in the best position to assess whether disclosure would be harmful to the individual, to the therapeutic relationship, or to third persons. There would be a built-in check against possible arbitrariness; an independent body would decide, based on clear and precise criteria, whether disclosure is appropriate. The ultimate arbiter could be the reviewing body, a court, or a special officer established to fulfill this function.

The only reported judicial decision dealing with the issue of disclosure at review hearings is the Abel case in Ontario. There, a majority of both the Divisional Court and the Court of Appeal indicated that an initial discretion rests with the hospital regarding whether to disclose part or all of its clinical record. Once the record is turned over to the review board, that board has a discretion as to whether or not to disclose the full contents of the record to the subject of the review, although the "substance" of the case that the subject must meet should be adequately disclosed. This approach has recently been supported in the unreported Egglestone case (Ontario).

Alternative IX

Provide for the right to compel the attendance of witnesses.

Considerations

This alternative goes farther than that discussed earlier regarding submissions and the presentation of evidence. It provides for the right to have persons attend who do not necessarily want to do so. It would permit a patient, for example, to require certain hospital staff to attend a hearing, present evidence, and presumably be subject to cross-examination. It would allow maximum information to be placed before the reviewing body. The right to compel the attendance of witnesses exists in other areas of the law, and may be particularly appropriate where the liberty of an individual is at stake. Its denial may offend the principles of natural justice, fairness, and ss.7 and 15(1) of the Charter of Rights.

On the other hand, the absolute right to compel the attendance of witnesses may be abused. It may be potentially disruptive to the review proceedings, to hospital procedures, to the care of other hospital patients (where critical hospital staff are compelled to attend hearings) and to the treatment and rehabilitation of the subject of the review. Harmful testimony by a staff member whom the patient subpoenaed believing that his or her testimony would be helpful could even conceivably expose the staff member to some danger.

It may be argued that if this right is to be granted, it should be in the discretion of the reviewing body. Discretion would control such potential abuse as the indiscriminate calling of witnesses.

Alternative X

Provide for the right to an independent psychiatric assessment.

Considerations

It has been suggested that it is unfair to have the treating therapist provide the only psychiatric evidence relating to the subject at his or her review. A right to an independent psychiatric evaluation would help ensure that balanced psychiatric evidence is placed before the reviewing body. Where the independent psychiatrist

confirms the view provided by the treating psychiatrist (or that of the board psychiatrist) the reviewing body will be able to reach conclusions with greater certainty. Where the psychiatrists differ in opinion, the reviewing body may be alerted to the complexities of the matter and may more carefully weigh all the evidence. The availability of an independent psychiatric opinion may also avoid the need for extensive cross-examination of the treating mental health professionals.

On the other hand, it may be argued that an independent psychiatric consultation could disrupt the existing therapist-patient relationship, particularly if the independent psychiatrist disagrees with the opinion of the treating psychiatrist. Further, opposing psychiatric views may result in longer, more cumbersome, more costly and more confusing reviews.

Access to an independent assessment could again be left to the discretion of the decision-maker. In cases where independent assessment is not likely to reveal new information but might seriously jeopardize an existing therapeutic relationship, such assessment could be denied. Once again, however, unless the criteria for the exercise of discretion are clear and precise, the result could be inconsistency in practice. Moreover, it may not be until after an independent assessment has been obtained that the reviewing body will be able to assess the utility of this additional information.

An additional issue that requires consideration concerns the payment of the independent psychiatrist. Given that the additional assessment might often be considered necessary only by the patient, it is arguable that the cost should be borne by the patient. However, where the patient is unable to pay for the service, and where a provincial health insurance scheme does not provide for such payment (because it may not be deemed a necessary medical service in the circumstances), there may be need to have an available mechanism whereby payment is made on behalf of the patient. One possibility might be the use of legal aid funds.

Alternative XI

Provide that the reviewing body shall record its proceedings.

Considerations

This procedure would result in greater formality and might help ensure that reviews are carried out in an orderly, consistent manner. It might also cause the participants to be more aware of the seriousness of the proceedings and to carefully consider any evidence they give. Lack of a transcript might make appeal or review difficult; de novo appeals would mean greater cost.

Some persons giving evidence before the reviewing body may be inhibited by the process used to record the proceedings. To the extent, however, that a record is essential to permit an effective appeal, any flexibility may be inconsistent with natural justice, fairness, and ss.7, 9 and 15(1) of the Charter of Rights.

Alternative XII

Provide that written reasons must be given for any decision made following review.

Considerations

Written reasons would permit the subject of the review to know the basis for the decision. Such knowledge might be appreciated by the subject and improve the therapeutic relationship. Without written reasons, the subject of the review would not necessarily know the basis on which the decision was made. He or she might not know, for example, the areas in which improvement was necessary. A requirement for written reasons might ensure a rational and orderly review process, and would enhance accountability. It would make appeal or judicial review a meaningful protection.

Written reasons might not, however, be necessary in straightforward cases (such as that of the chronically unfit person). Here, such a requirement might be regarded as wasteful of time, resources and money. It may, therefore, be argued that any provision for written reasons should be a discretionary one. (The implications of discretionary "rights" have been amply discussed above and need not be restated here). In cases where decisions are based on clinical judgments that are not readily justifiable, the requirement that written reasons be given may result in potentially dangerous individuals being released prematurely because the decision-maker cannot clearly justify a decision to continue confinement. It is

possible that a requirement for written reasons may not be a particularly meaningful one, since the reviewing body may simply take to quoting the statutory criteria in each case.

Alternative XIII

Provide for a right of appeal.

Considerations

The right of appeal may be seen as fundamental to any decision-making system in which the liberty of the subject is involved. It would provide a safeguard against inappropriate decisions and would enhance accountability. In addition, it would enhance the appearance of fairness, which may be particularly important in light of criticisms that have been made regarding the present system. If the review process is performed by a body not expert in law, appellate review will help ensure that any decisions taken conform with the requirements of law. Although some form of judicial review would likely be available in any event through the prerogative remedies, it has been suggested that judicial review does not afford sufficient protection in this area because it does not necessarily allow review of the basis for the facts presented. It may be preferable to have Parliament provide a coherent structure for appeal. If the criteria on review are well-defined and relatively specific, subsequent review by an appeal court would not be particularly problematic. The right to an appeal may be required by ss.7,9, and 15(1) of the Charter of Rights.

On the other hand, some have argued that a right of appeal to the courts could over-legalize what is essentially a psychiatric decision. It could result in many frivolous appeals, considering the mental status of the potential appellants. Particularly where gross personality disorders are concerned, for example, such a right may result in appeals in almost all cases, whether warranted or not. Appeals can be time-consuming and expensive. They may result in delays in proceeding with necessary treatment, may divert the energies of mental health professionals and may disrupt the functioning of treatment facilities. If the disposition criteria are broad, policy-oriented and highly discretionary, an appellate court may not be able to provide a meaningful assessment of the review decision, except insofar as the issue of whether the discretion was exercised properly by the reviewing body is concerned (and there already exists a

mechanism for reviewing this aspect). Furthermore, it may be questioned whether the court is an appropriate body to analyse mental health decisions. "Over-legalizing" the process may inhibit mental health professionals from functioning properly.

Consideration should be given to the question of whether the right to appeal should be automatic or whether leave to appeal should be required. If leave were required, abuse of the appeal process could be prevented to a large extent. Consideration should also be given to the question of what proper grounds for appeal should be. Possible grounds might include: errors of law; errors of fact; errors of mixed law and fact; jurisdictional questions; and so on.

Note:

Provisions similar to those in the Canadian Charter of Rights and Freedoms may be found in the (European) Convention for the Protection of Human Rights and Fundamental Freedoms. They have been interpreted by the European Court of Human Rights to apply to mentally disordered offenders confined to psychiatric hospitals so as to require that the individual be provided with an opportunity to have the grounds and merits of his or her detention reviewed by an independent body, acting judicially, with all of the procedural safeguards that process implies, regardless of whether the decision placing (or any subsequent decision keeping) him or her there was within the discretion of the executive. In X v. The United Kingdom (1981), the remedy of habeas corpus was not considered sufficient to meet this obligation. The Court held as follows:

- (1) "[I]n the instant case, Article 5, s.4 required an appropriate procedure allowing a court to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety."
- (2) "In habeas corpus proceedings,...the court will not be able to review the grounds or merits of a decision taken by an administrative authority to the extent that under the legislation in question these are exclusively a matter for determination by that authority."
- (3) "The habeas corpus proceedings brought by X in 1974 did not therefore secure him the enjoyment of the right guaranteed by Article 5, s.4; this would also have been the case had he made any fresh application at a later date."

- (4) "There is nothing to preclude a specialised body of this kind being considered as a 'court' within the meaning of Article 5, s.4, provided it enjoys the necessary independence and offers sufficient procedural safeguards appropriate to the category of deprivation of liberty being dealt with."
- (5) "Nonetheless, even supposing Mental Health Review Tribunals fulfilled these conditions, they lack the competence to decide 'the lawfulness of [the] detention and to order release if the detention is unlawful, as they have advisory functions only."
- (6) "[A]nyone entitled...to take proceedings to have the lawfulness of his detention speedily decided cannot make effective use of that right unless he is promptly and adequately informed of the facts and legal authority relied on to deprive him of his liberty."
- (7) "[T]he onus was effectively on X to show that the Home Secretary had acted unlawfully in exercising his statutory discretion. However, it is clear from the evidence that lack of information as to the specific reasons for the recall, a matter almost exclusively within the knowledge of the Home Secretary, prevented X's counsel, and thus the Divisional Court, from going deeper into the question...."

Issue 36

What provision should be made with regard to burden and standard of proof on review?

Discussion

The issues of burden of proof and standard of proof have already been discussed in connection with interim orders and initial disposition. Although much of the previous discussion would be applicable here as well, it is worth considering whether special considerations should apply at the review stage. Arguably, for example, if the burden of establishing that an individual should be confined was satisfied by the Crown at the initial disposition stage, the burden of providing that a less restrictive alternative would now be appropriate should rest on the subject of the review. This approach might be particularly appropriate if dangerousness is a factor to be considered on review. If the person has been in a

closed institution for some time and has not had the opportunity to behave dangerously, it might be extremely difficult for the facility to prove that such person continues to be dangerous. By the same token, however, it might be extremely difficult in any circumstances for an individual to prove that he or she is not dangerous. Alternatively, it may be argued that once an individual has been confined for a period of time longer than that which he or she would have spent in prison if convicted of the offence charged, the burden of proving the need for continued confinement should rest on the party seeking such continued confinement (or, at a minimum, if the burden of proof is on the individual the standard of proof should be low).

The main options regarding standard of proof are the balance of probabilities and proof beyond a reasonable doubt. These are discussed under the section dealing with initial disposition.

The issues of burden of proof and standard of proof would likely only arise if there were parties to the proceedings, and if the proceedings were adversarial. At present, since the review process generally takes the form of an inquiry rather than a formal hearing, the questions of burden and standard of proof do not arise.

Issue 37

What provision, if any, should be made concerning the maximum period for which an unfit accused person can be confined under the Criminal Code?

Discussion

In its landmark decision in the case of Jackson v. Indiana, the United States Supreme Court set out certain constitutional requirements regarding the detention of unfit accused persons. It said:

"We hold... that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that

would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."

Several types of provisions have been built into American statutes in an effort to conform to the requirements of this decision. In view of the present uncertainty regarding the interpretation of various sections of our new Charter of Rights and Freedoms (particularly s.7, which requires that everyone has the right not to be deprived of his or her liberty "except in accordance with the principles of fundamental justice") consideration might be given to the idea of doing likewise.

Alternative 1

Provide: (1) that if and when it is determined that the accused is not making further progress toward becoming fit, he or she can no longer be detained under the authority of the Criminal Code solely on account of unfitness; and (2) that in any event, the accused cannot be detained under the authority of the Criminal Code solely on account of unfitness for more than a specified period.

Considerations

This is basically the approach taken in Rule 971.14 of Wisconsin's Court Rules and Procedure. It does not preclude civil commitment of the unfit accused after the maximum period of Criminal Code detention has expired, and would go a long way toward ensuring against attacks based on the Charter (see ss.7,9, and 11(e)).

Numerous variations or refinements of this approach are possible. One might be to specify that the maximum period for which an accused can be detained under the Criminal Code solely on account of unfitness is the potential maximum sentence that the accused could have received if convicted of the offence(s) with which he or she was charged. This method of calculating the maximum period of detention has been adopted by some American states. One might well ask why a person should be detained as a result of the criminal process longer than the maximum period for which he or she could otherwise be detained in theory if convicted. This approach may help avoid an attack under

s.15(1) of the Charter. Note, however, that this approach could still result in longer Criminal Code detention than the accused would in fact have received if he or she had been convicted.

Another variation might be to specify that the maximum period for which an accused can be detained under the authority of the Code solely on account of unfitness "is, in the opinion of the [body that makes the initial disposition], approximately the time he would have spent in prison had he been found guilty...." This is the recommendation of the Law Reform Commission of Canada.

A third variation might be to specify that the maximum period for which an accused can be detained under the authority of the Code solely on account of unfitness is a certain portion of the potential maximum sentence that the accused could have received if convicted of the offence(s) with which he or she was charged. This method of calculating the maximum period of detention has again been adopted by some American states.

A fourth variation (also used in some American states) might be to specify that the maximum period for which an accused can be detained under the authority of the Code solely on account of unfitness is the lesser of: (a) the potential maximum sentence that the accused would have received if convicted of the offence(s) with which he or she is charged; and (b) a designated period of time.

A fifth variation (also used in some American states) might be to adopt one of the above approaches but to allow the maximum period of detention to be extended if progress towards fitness is being made, i.e., if the accused is likely to become fit within the foreseeable future.

A sixth variation (which some American states have employed) might be to refrain from specifying the maximum period for which an accused can be detained under the authority of the Criminal Code solely because of unfitness, other than requiring that the maximum period must not exceed the time necessary to determine if there is a substantial probability that the accused will become fit within the foreseeable future.

Issue 38

What provision, if any, should be made with regard to the disposition of charges against an unfit accused?

Discussion

Section 543(8) of the Criminal Code currently provides that once an accused person has been found unfit "No proceeding pursuant to this section shall prevent the accused from being tried subsequently on the indictment...." Under the present law, however, s.11(b) of the Charter may be used to prevent trial after an unreasonable amount of time has elapsed. Nevertheless, specifically providing a maximum time within which the accused can still be tried might add certainty to the current state of affairs.

Alternative I

If the duration of Criminal Code detention is limited as suggested in Issue 37 above, require that the charge(s) against an unfit accused be dismissed upon the expiry of that detention period.

Considerations

This approach, which adds an element of certainty to the law, has been taken in some American states. It might, however, put the guilty unfit accused in a better position than the guilty fit accused who has been convicted, depending on the period of detention.

Alternative II

If the duration of Criminal Code detention is limited as suggested in Issue 37 above, require that either: (1) the charge(s) against an unfit accused be dismissed upon the expiry of that detention period; or (2) the accused be tried regardless of his or her unfitness.

Considerations

This approach has been recommended by several legal commentators. Some envision special procedures at such trial to counter the accused's unfitness. Although this would give the unfit accused person a chance to have the charges disposed of, however, it runs contrary to the right not to be tried while unfit (see s.2(e) of the Bill of Rights and s.7 of the Charter).

Alternative III

Require that the charge(s) be dismissed if it is determined that the accused is not likely to become fit within the foreseeable future.

Considerations

This approach has been taken in some American states. Again, however, it might put the guilty unfit accused in a better position than the guilty fit accused who has been convicted, depending on the period of the detention.

Alternative IV

Require that the charge(s) be dismissed upon expiry of a certain specified period of time.

Considerations

Numerous possibilities exist for determining what the "specified period of time" should be. It could, for example, be the potential maximum period of detention to which the accused could have been sentenced if he or she had been convicted instead of being found unfit. This approach has been taken in some American states. If the accused has been confined in hospital as the result of the criminal process, such confinement may be seen as analogous to sentence upon conviction. This approach might, however, put the guilty unfit accused who has been released from Criminal Code detention before the maximum time he or she would have to have served in prison if convicted, but who has not been certified, in a better position than the guilty fit accused who has been convicted.

Another possibility might be to make the specified period of time the amount of time the accused would actually have served in prison if, instead of being found unfit, he or she had been convicted and sentenced.

These and other possibilities could be combined with each other and/or with the other alternatives set out under this issue.

Issue 39

What provision, if any, should be made concerning the maximum period for which an insanity acquittee can be confined under the Criminal Code?

Discussion

It may be argued that once a person has been found not guilty of an offence by reason of insanity he or she should not be liable to detention under the authority of the Criminal Code for any period longer than that which he or she would have served in prison following conviction for that offence. Longer detention might be viewed as being contrary to s. 7 of the Charter. Note, however, that in the very recent case of Jones v. United States the United States Supreme Court held that continued detention of an insanity acquittee past the point when he would have been released if convicted of the offence charged did not offend the "due process" clause of the American constitution. The Court distinguished this case from the case of Jackson v. Indiana (see above) on the basis that the public's need for continued protection may be presumed in the case of insanity acquittees; such persons (unlike unfit accused persons) have been proven to have committed criminal acts. It is on this basis that the Ontario Court of Appeal in R. v. Saxell found the provisions of s.542(2) of the Criminal Code not to offend various provisions of the Bill of Rights where insanity acquittees were concerned.

Issue 40

What order should take precedence for "dual status" offenders, i.e., persons under sentence and subject to a dispositional order as a result of having been found not guilty by reason of insanity or unfit to stand trial?

Discussion

On occasion, persons on a LGW commit an offence for which they are convicted and sentenced to a term in prison; or persons serving a sentence may commit an offence for which they are found to have been insane. Failure to clarify which order takes precedence can result in confusion for the treatment facilities, prisons, boards of review, and national and provincial parole boards. In addition, it may result in unfairness to the individual, who may find the parole board deferring to the judgment of the board of review, and vice versa.

Clarification could be in the direction of staying the effect of the disposition resulting from unfitness or insanity (currently an LGW) until the person has been released from prison. At this point the review process applicable to insanity acquitees and unfit accused persons would come into play; an order resulting from such process could then take priority over any conflicting requirements. Another alternative might be to require a prior election by those governments involved as to which process will take precedence.

The relationship between this issue and the issue of hospital orders should be explored.

Chapter 7

INTERPROVINCIAL TRANSFERS

INTERPROVINCIAL TRANSFERS

INTRODUCTION

The transfer from one jurisdiction to another of individuals subject to "safely keep" warrants of the lieutenant governor is not comprehensively dealt with in the Criminal Code. Although there are provisions dealing with such transfers, the Code's failure to address a number of issues has led to a lack of uniformity in practice and some conflict in provincial positions.

At present, it appears from the Code's provisions that interprovincial transfer cannot be made unless: (1) the transfer is necessary for the rehabilitation of the prospective transferee; (2) the person in charge of the receiving facility consents; and (3) an officer authorized for the purpose of signing a warrant and effecting the transfer does so. Current practice suggests that a fourth condition may be the prior authorization of the transfer by the lieutenant governor in the original order made under s.545(1), although such authorization is clearly not in itself sufficient authority for the transfer. While the person in charge of the receiving facility has some say in the matter, there is no provision permitting either the individual being transferred or the receiving province to provide input or to challenge the transfer decision. At present, transfers may be made regardless of the subject's wishes. Where the individual desires treatment in a facility in another province, and it is determined that he or she may benefit from treatment therein (i.e., where such treatment is not available in the sending province), should there exist a right to be transferred?

Once there has been a transfer, the matter of continuing control must then be considered. It is not clear what happens to the individual after he or she is transferred. Is the transferee to be reviewed by the board of review of the receiving province, or by that of the sending province? Clarification on this point is obviously important. Which province should have responsibility for making subsequent orders with respect to the transferee? Who should assume the responsibility of cost for the transfer and for the transferee's continuing care and treatment in the receiving province? Depending on the purpose of the original transfer (e.g., rehabilitation of the individual in a specific facility with treatment not available in the sending jurisdiction), it may be appropriate to consider release or return of the individual

once it is determined by the receiving jurisdiction that such rehabilitation has been achieved. If full responsibility is to be assumed by the receiving province, it is arguable that the receiving province should be able to decide independently on whether to release the person. In many instances, however, release by the receiving province may be objected to by the sending province, which may not want the individual to return to its jurisdiction. Transfer and possible return of an individual may also raise constitutional issues. For example, the provisions of s.7 of the Charter concerning security of the person should be considered.

ISSUES

Issue 1

What provision should be made with regard to the purposes for interprovincial transfers?

Discussion

Section 545(2) of the Criminal Code permits the transfer of an individual held in custody pursuant to s.545(1)(a) "to any other place in Canada..." for the purpose of his or her rehabilitation. The concept of "rehabilitation" is somewhat vague, however, and is therefore subject to various interpretations.

Alternative I

Provide that transfer may be permitted for the purpose of providing treatment that is not available in the sending province.

Considerations

Although it is likely that the current provisions of the Code would allow transfer in circumstances where rehabilitation cannot be effected because appropriate treatment is not available in the sending province, this alternative would clearly articulate "treatment" as a distinct purpose. In addition, it would not require that this purpose be directly linked to any other purpose, e.g., rehabilitation.

Alternative II

Provide that transfer may be made for compassionate reasons.

Considerations

This approach would allow transfers in cases where, for example, the subject wishes to be moved closer to his or her family. Although in many cases transfer for such reasons may fall within the scope of rehabilitation, under this approach it would not be necessary to establish a link between nearness to one's family and rehabilitation.

Alternative III

Provide that transfer may be made for the specific purpose of ensuring that the review mechanism is not unduly influenced by local public sentiment arising from the nature or circumstances of the offence.

Considerations

Section 545(2) may well be broad enough to allow transfer to be made from a jurisdiction in which negative public attitudes exist concerning the individual and where release of such a person, even if he or she is rehabilitated, might therefore be opposed. Under this alternative, however, it would not be necessary to bring such circumstances within the framework of a rehabilitative purpose in order for a transfer to be made. The possibility that release of a rehabilitated individual might be blocked by public opinion would be sufficient to justify the transfer.

Alternative IV

Provide that transfer may be made for security purposes.

Considerations

Although it is likely that the current Code provisions would allow transfer in circumstances where, owing to security problems, rehabilitation cannot be effected within facilities in the province in which the person is being detained, this alternative would not require that a link between the need for security and the individual's rehabilitation be established.

Alternative V

Provide that transfer may be made whenever it is considered by the relevant provincial authority to be expedient.

Considerations

This approach would allow maximum flexibility in the area of provincial discretion. However, the vagueness of this purpose could result in unfair and arbitrary transfers if the subject's consent to the transfer is not relevant.

Issue 2

Should the consent of the receiving jurisdiction be required?

Discussion

The current Criminal Code provisions appear to require the consent of the person in charge of the intended receiving facility only. (In practice, a subsequent order-in-council will likely be passed by the sending province, which will permit the transfer and will specifically designate the place of transfer). They do not specify what consent, if any, should be obtained from officials of the receiving province. Such consent may be relevant in those circumstances where authorities other than those from the facility (e.g., Health or Attorney General officials) assume a role in finalizing the transfer, or where broader issues of public policy may be relevant. Regardless of what other consents may be required, the consent of the receiving facility will likely continue to be important, since that facility must first determine whether its programmes and services would be beneficial to the prospective transferee.

Alternative I

Require the sending province to obtain consent from the person in charge of the receiving facility and from all officials of the receiving province who will be involved with the transfer.

Considerations

This approach would make clear that a transfer can only be initiated when agreement from the receiving province has been obtained. This agreement would include consent from the receiving facility as well as from the lieutenant governor or his or her delegate.

Issue 3

To what extent, if any, should the wishes of the prospective transferee be relevant?

Discussion

As indicated above, the Criminal Code is vague with regard to the criteria that must be satisfied before an inter-provincial transfer can be made. The Code does not, however, make any mention of a requirement for the consent of the prospective transferee. Nor does it appear to give such person the right to be transferred at his or her request.

Alternative I

Provide that no transfer may be made without the consent of the prospective transferee.

Considerations

A prospective transferee may have many reasons for not wishing to be transferred to a facility in another province. He or she may, for example, wish to stay close to friends and family, or may feel satisfied with the treatment he or she is currently receiving. Arguably, if the subject of the proposed transfer violently objects to such a transfer, it will be difficult or impossible to treat him or her in a new environment anyway. On the other hand, it may be argued that where the prospective transferee is mentally incompetent, or where the reason for the transfer is to provide for increased security and to better protect the public, the consent of the individual should be irrelevant. In any case, it may be argued that the prospective transferee, being mentally disordered, is in no position to decide what is in his or her best interests.

Alternative II

Prohibit non-consensual transfers unless the basis for initiating transfer relates to security.

Considerations

This approach would be similar to Alternative I, but would not have the drawback of allowing a potentially dangerous individual to insist that he or she not be transferred to a more secure setting. Conceivably, however, any non-consensual transfer without some form of hearing might be attacked under s.7 of the Charter as being a deprivation of "security of the person" otherwise than "in accordance with the principles of fundamental justice."

Issue 4

What provision (if any) should be made regarding notice to an individual of any proposed transfer?

Discussion

Currently, the Criminal Code makes no provision in this regard. Because interprovincial transfers do not necessarily place greater restrictions on liberty, absence of notice may not be seen as being unduly prejudicial. On the other hand, however, if the prospective transferee's input is considered relevant, notice would allow such person the opportunity to make representations before the decision whether or not to transfer him or her is made.

Issue 5

What provision (if any) should be made regarding the right to appeal or to challenge the transfer decision?

Discussion

Insofar as the transfer of an individual from one jurisdiction to another may significantly affect the future status of that person (specifically in regard to his or her liberty), it is arguable that provision should be made regarding the right to appeal or challenge the transfer decision. The Criminal Code makes no provision in this regard.

The right to appeal would provide a safeguard against inappropriate transfer decisions and would enhance accountability. On the other hand, it may be argued that a right of appeal could over-legalize what is essentially a psychiatric or social policy decision involving the best interests of the individual. In addition, in light of the nature and mental status of the potential appellants, such right may be abused.

Issue 6

What should be the role of the sending and receiving provinces regarding subsequent decisions?

Discussion

The current Criminal Code provisions are unclear as to what should happen to the individual after he or she has been transferred. According to s.545(3), "A warrant mentioned in subsection (2) is sufficient authority for any person who has custody of the accused to deliver the accused to the person in charge of the place specified in the warrant and for such last mentioned person to detain the accused in the manner specified in the order mentioned in subsection (1)" (emphasis added). This provision appears to suggest that the original warrant of the lieutenant governor (not the transferring warrant) of the sending province dictates the manner in which the individual is to be detained in the receiving province. Does this mean that the original LGW remains in force and that the transferee can only be reviewed by the board of review of the sending province? Which lieutenant governor has responsibility for making subsequent orders in regard to the person so transferred?

To date, a number of approaches have been taken. One approach has been for the sending province to retain full jurisdiction; its lieutenant governor makes subsequent orders (based largely on input from the receiving province) regarding the continuing care, detention and treatment of the transferee. Review by the sending province has involved either its board of review or representatives thereof travelling to the receiving province on an annual basis.

Another approach has been for the sending province's board of review to designate the receiving province's board of review as its agent for the purpose of reviewing transferees. Under this approach, one board generally reports to the other, which in turn reports to the sending province's lieutenant governor.

If the purpose of the transfer is rehabilitation, it may be argued that it makes little sense to permit the sending province to retain absolute jurisdiction. The receiving province may spend several years treating the transferee and may ultimately reach the point where it wishes to "loosen" his or her warrant for rehabilitative purposes. If, however, the transferee was involved in a particularly heinous crime, the sending province may choose not to permit the loosening of the warrant. In such a case, the receiving province is placed in the position of being required to "rehabilitate" the transferee without being able to use its own judgment as to how this should be done. This may be particularly frustrating if the receiving province is required to bear the cost of continued custodial care.

Alternative I

Provide that the receiving province shall assume total responsibility for the transferee.

Considerations

Under the current system, such an approach would allow the receiving province to institute its own LGW. On obtaining a copy of the receiving province's warrant, the sending province would be required to vacate (or terminate) its own warrant. From then on the receiving province's board of review would conduct all reviews and the receiving province's lieutenant governor would make all subsequent decisions.

This alternative would address those problems (discussed above) that arise from a joint responsibility approach. It would not, however, provide for the return of the transferee to the sending province upon his or her rehabilitation. Nor would it ensure that the sending province have any input where the question of release (gradual, conditional or otherwise) is considered. Sending provinces may wish to ensure that individuals who may be dangerous are not released and allowed to return. Sending provinces might also be concerned about public reaction.

Alternative II

Provide that the receiving province shall assume total responsibility for the transferee, but permit the sending province to require the receiving province to attach special terms to any conditional or gradual release of such person (e.g., that the individual is not to return to the sending province).

Considerations

This alternative would not entail the problems (discussed above) inherent in a joint responsibility approach, and would alleviate what might be the major drawback of Alternative I. Conceivably, however, preventing a rehabilitated person from returning to the sending province might be subject to attack under s.6(2) of the Charter, which deals with mobility rights.

Alternative III

Require the sending province's consent to any gradual, conditional or absolute release of a transferee who may have been involved in a violent offence.

Considerations

Although this approach would allow the sending province to have continuing input concerning the future status of the transferee, it may be argued that such input could unduly infringe the liberty of such person.

Issue 7

What provision, if any, should be made with regard to the return of transferees?

Discussion

Depending on the original purpose of the interprovincial transfer, it may be appropriate to provide for the return of the transferee to the sending province once the purpose for which he or she was originally transferred has been achieved. The Code is currently silent on this point. Should it be decided to return the individual, procedures similar to those used for the original transfer might be appropriate. Here, consideration might be given to the question of whether the consent of the originating jurisdiction and/or that of the transferee should be required. Other issues discussed in the context of the original transfer may be relevant here as well.

Issue 8

Should the cost of transfer and continued care and treatment be borne by the sending province or by the receiving province?

Discussion

Most provinces currently have an agreement whereby the costs of transferring an individual are borne by the sending province, and all costs thereafter are borne by the receiving province. Resolution of this issue may depend in part on the resolution of other issues, particularly Issue 6 above. As the issue of cost does not fall strictly within the area of criminal law and procedure, we are content to simply raise it as an issue for possible consideration without commenting further at this time.

Issue 9

What provision should be made with regard to the return of an individual who has "eloped" from one province, and is apprehended in another province?

Discussion

The existence of s.545(3) of the Criminal Code seems to imply that an order under s.545(1)(a) is not in itself sufficient authority to detain an individual outside the province in which the order was made. This being so, a problem has arisen in the case of persons subject to an order under s 545(1)(a) who escape to another province. Does the province to which the individual has escaped have the authority to apprehend, detain and return the person? It is questionable whether the "escape from lawful custody" provisions of the Code are appropriate here. It might, therefore, be advisable to consider the possibility of enacting a provision similar to s. 545(4) of the Code which simply allows a peace officer to arrest without warrant someone subject to an order under s.545 (1)(b). Such provision might in fact be made applicable to all persons found at large (inside or outside the province) who have been confined pursuant to any of the mental disorder-related provisions of the Code.