

"Source: Department of Justice Canada, Criminal law Review – *Mental Disorder Project Discussion Paper*, September 1983. Reproduced with the permission of the Minister of Public Works and Government Services Canada, 2007."

Chapter 8

THE CONVICTED MENTALLY DISORDERED OFFENDER

THE CONVICTED MENTALLY DISORDERED OFFENDER

INTRODUCTION

This part of the paper concerns itself generally with the problems associated with the mentally disordered offender subsequent to his or her conviction, and with proposed alternative solutions to those problems. Accordingly, the issues of how the mentally disordered offender should be sentenced and dealt with if and when he or she is placed in a prison setting are considered. Dangerous Offenders (as defined under Part XXI of the Criminal Code) are being dealt with in another part of the Criminal Law Review and are not within the scope of this paper.

In its 1976 Report to Parliament on Mental Disorder in the Criminal Process, the Law Reform Commission of Canada has specified certain principles which it feels should underlie a general approach to sentencing the mentally disordered offender. In the Commission's view:

- (a) Rehabilitation and treatment play an important but secondary role in sentencing the mentally disordered offender; the primary concern should be the determination of a sentence that is just and fair in the circumstances. Protection of society is the major concern in this regard.
- (b) "[T]he perceived need for treatment must not affect the length of the sentence."
- (c) "Treatment administered within the context of the sentence pronounced by the court must be consented to by the offender. (This is a contentious issue. As the Commission has noted, "Some feel that society is justified in imposing any treatment on offenders if it will reduce the possibility of further criminality....Others take the view that involuntary treatment of individuals in the criminal process is an unwarranted interference with basic individual rights...")."

Debate as to the precise incidence of mental disorder in prison has continued for some time. Clearly, much of the confusion and disagreement has resulted from problems of definition. There is little agreement among mental health professionals as to what constitutes a "mentally disordered offender" requiring treatment. Some argue that personality or character disorders come within the category. The American Bar Association, on the other hand, argues that

only the "severely mentally ill" offender should be considered for treatment. In either case, it is safe to say that there are at least some mentally disordered offenders requiring treatment in every major prison. Defining precisely who these people are is not within the scope of this part of the paper.

The existence of mental disorder in prisons may be attributable to any one of at least three factors, or to a combination thereof:

(a) The naturally occurring incidence of mental disorder

Statistics Canada (1981) estimates that 10% to 30% of the Canadian population, depending on one's definition, is experiencing some form of mental disorder. The base rate of mental disorder, the onset of mental disorder at a developmental period coinciding with the age at which people are at risk for crime, and the sheer volume of incarcerated individuals dictates that a sizeable number of offenders will develop a major psychiatric disorder during their incarceration.

(b) The effect of stress and environmental conditions on mental health

The prison environment has traditionally been seen as excessively stressful for most offenders. Prison violence, an austere physical surrounding, overcrowding, restriction of movement, the trauma of the judicial process and family/community separation may all affect the incarcerated offender in a deleterious manner.

(c) The less than complete screening of mental disorder at the court level

There are several mental health "filter" mechanisms currently in place within our judicial system. While on remand for observation, for example, an accused may be certified if he or she meets the criteria of the relevant provincial mental health legislation. Alternatively, an accused may be found unfit to stand trial or not guilty of an indictable offence by reason of insanity, and detained subject to the possibility of being placed under an LGW. Clearly, however, not all mentally disordered offenders are diverted from the correctional system. Present "filter" mechanisms, even if uniformly applied, are neither capable of fulfilling such a function, nor designed to do so.

In addition, it is a common practice for both the prosecution and defence to consider the severity of the charges and anticipated sentence contemporaneously with the mental health status of the accused. The possibility of lengthy detention under an LGW is an obvious deterrent for the raising of an insanity defence; other, less drastic defences may therefore be raised by mentally disordered persons accused of less serious offences. Conviction of such persons may result in incarceration.

ISSUES

Issue 1

What provision should be made concerning the disposition of criminally responsible but mentally disordered offenders?

Discussion

The plight of the mentally disordered person involved in the criminal process is that the criminal law is concerned not with mental disorder per se, nor with its treatment, but with its legal consequences. Accordingly, it is often the case that an accused is charged, brought to trial, convicted and sentenced to imprisonment notwithstanding that he or she is known to be mentally disordered. Conversely, if the accused is acquitted, he or she is free to go and the criminal law has no further interest in the accused or his or her mental health. Perhaps the criminal law should re-orient its concerns in regard to the mentally disordered offender, particularly in view of Principle (g)(iii) of the Statement of Purpose and Principles in the CLCS document. That principle states that "wherever possible and appropriate, the criminal justice system should also promote and provide for...opportunities aimed at the personal reformation of the offender and his reintegration into the community."

There are no special sentences in the Criminal Code for mentally disordered offenders, aside perhaps from the Dangerous Offender provisions in Part XXI (which, it should be noted, apply to offenders who are not necessarily mentally disordered). A trial judge does have the option under the Criminal Code of remanding an offender for psychiatric examination before imposing sentence, and some provinces provide alternative remand procedures in their mental health legislation. But while the law is clear that a judge has an obligation to consider all relevant psychiatric data in pronouncing sentence, it is vague or silent as to the most appropriate response pursuant to that consideration.

A sentencing judge may often realize that a particular offender suffers from mental disorder (it being one of many factors that he or she is obliged to consider in making a disposition); under present law, however, there exists no specific power to "sentence" to a psychiatric facility.

Some of the options currently available to judges when sentencing offenders with an apparent mental disorder are as follows:

(a) Fine

This form of penalty has on occasion been employed as a method of dealing with mentally disordered persons convicted of relatively minor offences. The purpose behind a fine is to punish rather than treat. The appropriateness of using the fine as a means of dealing with disordered offenders may be questioned by some. Arguably, it should be used only in tandem with more treatment-oriented sanctions.

(b) Probation

Probation may be imposed following the imposition of imprisonment, conditional discharge or a suspended sentence. In the case of a mentally disordered offender, the usual conditions attached are psychiatric treatment on an out-patient basis or an order to follow a particular treatment programme.

For the most part, conditions of probation are unrestricted under the Criminal Code. Various problems may arise as a result of making psychiatric treatment a condition of probation, however. First, there may be serious ethical questions involved in coerced treatment. Can an offender who has been coerced into treatment ever be said to have given his or her voluntary consent? Second, there is the practical problem that may arise under a probation order for treatment where no psychiatric institution will accept the offender as a patient. A third problem, again practical, may arise where the psychiatrist whose report formed the basis for the probation order is not the psychiatrist to whom the offender is eventually referred for treatment; the latter psychiatrist may disagree with the need for or the nature of treatment. Finally, there is the shortage of appropriate treatment facilities. Parole officers supervising released offenders have often expressed frustration over inadequate post-release treatment programmes for the mentally disordered ex-inmate.

(c) Imprisonment

Prison sentences, unaccompanied by any particular recommendation for treatment, are frequently given to offenders whom the courts consider to be mentally disordered. Some feel, particularly in the case of the young, dangerous offender with a personality disorder, that lengthy incarceration will have some rehabilitative effect. On the other hand, the Ouimet Committee has argued that "a person who has received a very long definite sentence, say 20 years, may in fact be more dangerous at the expiration of his sentence and return to freedom than when he was sentenced."

Alternatively, judges often imprison mentally disordered offenders whom they feel require treatment, and at the same time recommend that they receive treatment, either through prison facilities or through transfer to a mental health institution. However, the judge's recommendation is in no way binding; it offers no assurance that the offender will receive the treatment he or she requires. The fact that psychiatric facilities at Canadian prisons are seriously inadequate does nothing to help this situation.

One of the primary objects of the criminal law is the protection of society. Imprisonment provides such protection, at least in the short term. A secondary object, which imprisonment probably does not provide, is rehabilitation. But where is the protection for the future if there is no rehabilitation? The use of prison sentences when dealing with mentally disordered offenders is therefore questionable.

Finally, what some might regard as the failure of existing laws to guide judges sufficiently in sentencing mentally disordered offenders may lead to problems in practice. Depending on their individual philosophies, different judges may respond in different manners when sentencing offenders with roughly equivalent mental disorders. Any inconsistency in this regard may have potential consequences vis à vis s.15(1) of the Canadian Charter of Rights and Freedoms. The Statement of Purpose and Principles in the CLCS document states that: "persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar..." (Principle (h)) and that "in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls..." (Principle (j)).

The essential purpose here is to identify alternatives that could be made available to judges when sentencing mentally disordered offenders. The need for a more multi-faceted approach is implied by the Law Reform Commission of Canada in recommendations 29 and 30 of their 1976 Report.

Generally speaking, it may be appropriate to provide guidelines for judges in a revised Code in order to minimize the possibility of arbitrariness and disparity inherent in wide discretion. Greater emphasis, for example, might be placed on non-custodial alternatives. This would be consistent with Principle (i) of the Statement of Purpose and Principles in the CLCS document, which suggests that "in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances..." (emphasis added).

Alternative I

Empower judges to transfer mentally disordered offenders to the civil system for assessment with a view to civil commitment.

Considerations

A mentally disordered individual who has committed a relatively minor offence for which punishment or treatment in a penal context would do little may be a suitable candidate for diversion into the civil system. While pretrial diversion of mentally disordered offenders for the purposes of civil commitment is a fact in practice, perhaps more formalized procedures for diversion should be available at the sentencing stage.

However, there are some serious practical problems that must be addressed. First, the civil system may not be appropriate for most offenders who, although mentally disordered, remain criminally responsible and are therefore accountable to the criminal system for their acts. Second, although in the criminal system a mentally disordered offender can be detained in hospital for treatment without being committed, the civil system requires that he or she first meet its standards of commitment. Difficulties may therefore arise with the offender who is criminally responsible but who, upon transfer to the civil system, is not found to be civilly committable. Another problem may arise in the case of the disordered offender who recovers shortly after his or her transfer to the civil system. Should he or she be transferred back to the criminal justice system for resentencing?

Alternative II

Expand and modify the existing practice of making psychiatric treatment a condition of probation.

Considerations

Psychiatric treatment is often a proper condition of probation; its use could be expanded to be consistent with a more non-custodial approach to the sentencing of mentally disordered offenders. The Law Reform Commission of Canada has recommended in its Report to Parliament on Dispositions and Sentencing in the Criminal Process that broader probationary conditions could form part of a Good Conduct Order, a Report Order, a Performance Order or a Residence Order.

While the present provisions regarding probation orders allow considerable flexibility, they may not always ensure public safety or the proper treatment of the mentally disordered offender. The Law Reform Commission has recommended that conditions of psychiatric treatment only be imposed when:

- "(1) the offender understands the kind of program to be followed,
- (2) he consents to the program, and
- (3) the psychiatric or counselling services have agreed to accept the offender for treatment."

Availability of treatment may also be a problem where the treating psychiatrist disagrees with the assessing psychiatrist's view as to the treatability of a mentally disordered offender. This problem could be resolved by the court's ensuring that both psychiatrists come from the same institution, or satisfying itself that the particular form of treatment ordered is in fact available. Perhaps there should also exist a mechanism to ensure that the treatment ordered is given.

The lack of adequate facilities is a more basic problem. One option might be to direct offenders to follow probationary treatment programmes at court-related facilities (e.g., expanded versions of the existing Family Court Clinics). The Forensic Psychiatric Services Commission in British Columbia might be used as a model. It is a centralized facility mandated to provide services to courts, probation departments, parole authorities, local detention facilities, etc. The functions of the B.C.

Commission are set out in more detail in s.4 of that province's Forensic Psychiatry Act which charges the Commission with providing expert forensic psychiatric evidence, psychiatric assessment and care, and in-patient and out-patient treatment. Referrals to the Commission may be for pre-trial, pre-sentence, and post-sentence assessments, or for treatment. Treatment as a condition of probation falls within the Commission's mandate. Although there has been some debate as to the proper role of treatment at the Commission's facilities, and although it was always intended that the Commission would supplement rather than replace "outside" facilities, it is clear that the concept does have the advantage of providing reliability and uniformity of service, which would not otherwise exist.

Alternative III

Expand and modify the existing practice of recommending psychiatric treatment at a penal institution during imprisonment.

Considerations

In cases where a term of imprisonment is warranted for a mentally disordered offender, some have argued that the sentencing judge should have a larger role in ensuring that any treatment the judge finds to be necessary is received. A prison-based order for psychiatric treatment is one way to ensure that the penal institution is obliged to treat the offender during his or her term.

The concept is not without difficulty, however. First, there is the problem of expanding psychiatric facilities in prisons. Second, there may be a tendency for some judges to allow the need for psychiatric treatment to increase the length of a sentence from that which would otherwise be imposed. This contradicts one of the Law Reform Commission of Canada's recommendations. Third, it has been argued that the simultaneous combination of punishment with treatment within a penal institution is counterproductive in terms of rehabilitation.

Alternative IV

Empower judges to order that a term of imprisonment be spent in whole or in part in a psychiatric facility.

Considerations

Canadian courts are presently powerless to sentence mentally disordered offenders directly to treatment facilities. At most, judges may sentence to prison with a recommendation for treatment there, or for subsequent transfer to an outside facility.

Hospital orders may be considered appropriate in instances where the offender suffers from a disorder too serious to be the subject of a community-based order, yet is not so dangerous as to require incarceration in prison. Proponents argue that such orders ensure that an offender avoids the deteriorating influences of simple incarceration, and receives the treatment he or she requires. Treatment, rather than punishment, is the object. However, the hospital order, while simple in concept, may have complex ramifications. From a practical standpoint, the number of changes its implementation would entail, coupled with the present general shortage of psychiatric facilities, make the hospital order an ambitious proposal. It also constitutes a radical reallocation of power in the criminal justice system, in that the court determines the actual place or type of facility where the offender is to be treated, a matter presently within the province of the corrections departments.

The concept of a hospital order was first introduced under the English Mental Health Act 1959. (The Mental Health (Amendment) Act 1982 sets out considerable changes to take effect in September, 1983). Section 60 of that statute sets out the criteria for the making of a hospital order by a court in regard to a mentally disordered person who has been convicted of an offence punishable by imprisonment. The court must be satisfied on the evidence of two medical practitioners that the offender's mental disorder is of a nature or degree that makes it appropriate for him or her to receive hospital treatment and, where the offender is suffering from mental impairment or psychopathic disorder, that treatment is likely to benefit him or her. The court has no jurisdiction to make a hospital order unless it is satisfied that arrangements have been made for the admission of the offender to the hospital within twenty-eight days of the date the order is made. Certain courts may even make a hospital order without first convicting an accused person if satisfied both that he or she suffers from mental illness or severe mental impairment, and that he or she did the act charged.

Section 65 of the Act provides that in certain instances, a court has the power to restrict discharge from the hospital.

Where a hospital order is made and it appears to the court (having regard to the nature of the offence, the antecedents of the offender and the risk of his or her committing further offences if released) that it is necessary for the protection of the public so to do, the court may further order that the offender be subject to special restrictions (e.g., no application for discharge will be permitted; a leave of absence, transfer or discharge may only be granted with the consent of the Home Secretary).

It should be noted that, unless a restriction order is made, where an offender is admitted pursuant to a hospital order, he or she is (with some exceptions) generally treated as if he or she had been admitted for treatment on an involuntary basis.

On the whole, hospital orders have provided mentally disordered offenders in England with better access to treatment. The English experience has not been entirely satisfactory, however. Many criticisms have been made, such as the following:

- (a) English facilities were at first simply not able to respond to the demand resulting from hospital orders.
- (b) Notwithstanding the availability of restriction orders, security has proved to be a problem at many English hospitals. This is probably the result of a lack of communication between court and hospital authorities, and an inability to satisfactorily assess an offender's dangerousness.
- (c) Although an English judge must be satisfied that arrangements have been made for admission of an offender to a hospital, "those identified with [Canadian] mental health facilities were particularly concerned that a court should appear to have the right to order admission to and restrict discharge from hospital. It was felt that hospital officials should be able to determine who, based upon appropriate admission criteria, would be admitted to and discharged from psychiatric facilities..." (Quimet Report).
- (d) The question of consent to treatment was not clearly dealt with in the 1959 Act, leading to the ethical and practical questions associated with this concern.
- (e) Under the English hospital order system, detention is largely indeterminate.

The Ouimet Committee responded to some of these concerns by devising the concept of a "hospital permit."

Under this proposal, the court would be empowered only to authorize treatment, subject to agreement of the hospital to admit. It was felt that the appropriate criteria for the hospital to use with respect to admission and discharge would be those applicable to civil commitment as contained in provincial mental health legislation. It was also envisaged that in the case of offenders sentenced to prison, court-authorized hospital permits could be used to "permit the offender to enter a hospital for treatment and to provide that time spent in hospital should count towards sentence" (Ouimet Report).

In 1976, the Law Reform Commission of Canada recommended the utilization of a variation of the hospital order. Consent (on the part of both the offender and the treating institution) lies at the heart of its proposal. The proposal's main points may be summarized as follows:

- (a) A hospital order may be made for a fixed term in lieu of imprisonment.
- (b) The sentencing judge should first remand the offender to a psychiatric institution to determine whether the offender is suffering from a psychiatric disorder that is susceptible to treatment.
- (c) The judge should further determine that there exists an institution able and willing to provide treatment.
- (d) The order should only be made with the consent of the offender and the agreement of the psychiatric institution.
- (e) Release procedures should be governed by the same principles and criteria as ordinary sentences.
- (f) The offender or the institution may ask either the court or a board that transfer be effected to the correctional system.
- (g) The offender should be entitled to parole.
- (h) The offender would be deemed to be serving his or her sentence for the purposes of escape, or being unlawfully at large.
- (i) A hospital order should be appealable in the same manner as any other sentence.

Although the Law Reform Commission has addressed some of the English problems, there remain some concerns with its proposals in particular and with the concept of hospital orders in general. For example:

- (a) There is uncertainty as to what type of mental disorder should be the subject of a hospital order. The Law Reform Commission prefers "a psychiatric disorder that is susceptible to treatment..." but this might include alcoholism, addiction or even (according to some) psychopathy. The English Mental Health Act 1959 stipulates "mental illness, psychopathic disorder, mental impairment or severe mental impairment." The Ouimet Committee, on the other hand, preferred the standard for eligibility to be the same as that for provincial civil commitment.
- (b) A hospital order is a sentence of custody and a sentence of treatment. There are conflicting interests on the part of the court and the treating psychiatrist as to who should determine the specific terms of treatment (i.e., whether custody should be "open" or "secure", "in-patient" or "out-patient", etc.) English-type restriction orders, for example, may conflict with the psychiatrist's plans for treatment.
- (c) Psychiatrists are unanimous in the view that no treatment should be ordered without the consent of the psychiatric facility.
- (d) Again, because of the great differences in psychiatric opinion and theoretical approach, it is possible that psychopaths (generally accepted as being untreatable) will be assessed as treatable and be admitted to psychiatric hospitals. This may lead to a misuse of available therapeutic resources. Amendments to the English legislation have responded to this concern by stipulating that before making a hospital order, the court having evidence of this form of disorder must also have evidence that treatment is likely to alleviate or prevent a deterioration of the offender's condition.
- (e) Availability of appropriate treatment facilities is currently a problem in any event. In some parts of Canada, the required psychiatric facilities are nonexistent. In order to accommodate a hospital order system, therefore, new facilities would have to be built, and old ones modified for security purposes. The question of whether such a system warrants the cost that would be involved must be considered.

- (f) More generally, hospital orders were conceived of at a time of optimism with regard to the attainable results of psychiatric treatment. It has been argued that psychiatric procedures have since largely failed to live up to their initial promise. Labouring under false assumptions, judges may over-utilize the hospital order, and deplete therapeutic resources.
- (g) It may be argued that offenders who have been found to be criminally responsible, regardless of whether they suffer from mental disorder, should be punished rather than treated.
- (h) While there are difficulties with regard to the ordering of compulsory treatment, there are also difficulties with a requirement for the consent of the offender to treatment under a hospital order. Some argue that there will be a problem in determining whether mentally disordered offenders are sufficiently mentally competent to give voluntary consent; others counter that if they have been found criminally responsible for their acts, they should also be capable of consenting. Still others argue that society, in the interest of its protection, may have the right to treat disordered offenders compulsorily. Perhaps only certain classes of offenders should be subject to compulsory treatment. The problem is one of balancing competing interests. In this regard, principle (a) of the Statement of Purpose and Principles in the CLCS document should be kept in mind. It requires that "the criminal law should be employed...in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose...."
- (i) As with the present transfer system, the financial and jurisdictional difficulties of assigning offenders (via federal hospital orders) to provincial mental hospitals would remain.
- (j) If, through reform, prison-hospital transfers can be achieved quickly and efficiently, is the hospital order system really necessary?

There are possible variations to the hospital order concept that merit attention. One is a bifurcated system whereby the judge sets the maximum period of custodial sentence, and another body determines where and how a mentally disordered offender should commence his or her treatment. Another is the example provided by the state of Washington. Legislation in that state allows the court to divert offenders (the programme is aimed at sexual offenders) on

their consent from the correctional system to special treatment centres. The offenders remain in the care of these centres until treatment is complete and they are capable of being released on probation. However, offenders are returned to court where a judge (not the hospital) decides whether they should be released on probation once treatment is complete. This system gives the court the discretion to isolate the offender from the criminal justice system in a treatment setting by allowing judges to, in effect, make probation orders similar to hospital orders with the condition that the offender accept treatment at the hospital.

Issue 2

What disposition should be made of an offender who has been sentenced to imprisonment and who is subsequently found to be mentally disordered?

Discussion

An offender may be found to be suffering from a mental disorder while in prison for a number of reasons. His or her disorder may have gone undetected through the entire criminal process and only come to light after a period of time in prison. He or she may only have developed a mental disorder after having been convicted and sentenced to prison. Or he or she may have had a disorder that was detected at some phase of the criminal process, but was not severe enough to prevent his or her trial, conviction, and sentencing (i.e., it did not affect his or her fitness to stand trial or negate his or her criminal responsibility). Even assuming the existence of a form of hospital order that would eliminate this last source of mental disorder in prisons, the issue of disposition of the mentally disordered prison inmate requiring treatment remains important.

Current procedures allow for inmates with suspected mental disorders to be evaluated by the correctional system and, where appropriate, treated at psychiatric facilities within the prison. However, as has already been noted, the adequacy of such facilities is doubtful. As a result, treatment in the psychiatric wards of prisons is limited. As offenders who go unassessed and untreated will likely pose problems in the community when they are released, the Parole Board is properly concerned that it have in its possession all relevant information, including evidence of mental disorder.

Inmates whose disorders are detected (particularly those with acute mental disorders and those considered to require

ongoing psychiatric consultation or treatment) will often be transferred outside to an appropriate mental health facility. The mechanics of such a transfer can be achieved in one of four manners.

- (a) The transfer of mentally disordered inmates housed in federal penitentiaries can be made to Regional Psychiatric Centres (RPCs). This is a relatively simple transfer procedure which involves little delay; RPCs are administered by Correctional Services Canada as any other penitentiary.

RPCs were constructed in the 1970's with a view to relieving the burden from penitentiaries (which were incapable of providing adequate psychiatric treatment) and from provincial mental hospitals (which were unable or unwilling to provide adequate treatment and/or security). However, there are problems. First, in some provinces, the RPCs are a duplication of services already provided in the province. Second, as only three of the anticipated five regions now have RPCs, mentally disordered inmates from two regions often either do not benefit or must travel a long distance from home and family. Third, there is some dispute as to the proper role of RPCs. The Centres view themselves as being primarily treatment-oriented, but the penitentiaries would prefer to see them act as secure hospital units that would accept the transfers of difficult but "untreatable" inmates with personality disorders.

- (b) The transfer of penitentiary inmates to provincial mental hospitals can be effected under s. 19 of the Penitentiary Act. It provides as follows:

"19.(1) The Minister may, with the approval of the Governor in Council, enter into an agreement with the government of any province to provide for the custody, in a mental hospital or other appropriate institution operated by the province, of persons who, having been sentenced or committed to penitentiary, are found to be mentally ill or mentally defective at any time during confinement in penitentiary."

This provision, however, has been employed only sparingly. The primary problem is one of jurisdiction: federal inmates requiring provincial mental health services. Historically, the provinces have been reluctant to accept mentally disordered persons from the criminal justice system into their civil facilities. Today, while formal or informal agreements are in place under s. 19, the practical difficulties of arranging for transfers remain enormous. Some of these are as follows:

- (i) The provinces have inadequate forensic psychiatric facilities, in terms of both of treatment and security.
- (ii) The provinces were overburdened with their traditional civil mental health responsibilities.
- (iii) There is a perceived danger to civil programmes and patients.
- (iv) There is an inability to reach agreement on mutually acceptable per diem rates and other cost-related factors.
- (v) There is confusion as to whether certifiability should be the standard for provincial acceptance during the term of imprisonment and, if not, as to whether and when civil commitment should be sought prior to scheduled release.

As a result, penitentiary-to-hospital transfers are not common. While Regional Psychiatric Centres represent a partial solution, the needs of many mentally disordered inmates still are not being met.

- (c) The transfer of inmates in provincial prisons to provincial mental hospitals can be effected pursuant to the relevant mental health or corrections legislation in each province.
- (d) The transfer of inmates in provincial prisons to provincial mental hospitals can also be effected through the use of a lieutenant governor's warrant (LGW), pursuant to s.546 of the Criminal Code. That provision states:

"546.(1) The lieutenant governor of a province may, upon evidence satisfactory to him that a person who is insane, mentally ill, mentally deficient or feeble-minded is serving a sentence in a prison in that province, order that the person be removed to a place of safe-keeping to be named in the order."

Arguments in favour of this transfer procedure -- efficiency, convenience and protection of society -- are weak. It is almost never used, and there is a consensus that it should be abolished. The Law Reform Commission, in its 1976 Report, has recommended its repeal for several reasons. Arguably, it is redundant, its objects already being attained through provincial legislation. Moreover, there is no legislative guidance as to the procedures to be followed by the lieutenant governor. Because the LGW is an executive order, it is virtually non-reviewable. Further, the duration of the detention is indeterminate. While the lieutenant governor may, under s.547 of the Code, appoint a board of review to hold periodic reviews of such persons, he or she is under no obligation either to do so or to accept its recommendations. As a result, a prisoner serving a relatively short term for a minor offence who develops a mental disorder requiring treatment could be placed under a s. 546 LGW and be detained for a lengthy period of time despite the fact that he or she may never meet civil commitment criteria. (Note that the non-reviewability and indeterminacy aspects of the LGW procedure may violate ss.7 and 9 of the Charter of Rights and Freedoms).

Generally speaking, the various procedures for the transfer of mentally disordered inmates have lead to a problem of disparate practices across Canada. For example, a mentally disordered person convicted of a relatively minor offence in one province may be detained pursuant to an LGW, while an equivalent person in another province may be released. The possibility of such disparate treatment may have implications vis à vis s. 15(1) of the Charter, and the Statement of Purpose and Principles (principles (h) and (j)) in the CLCS document (previously discussed).

Alternative I

Expand or establish adequate psychiatric facilities within penal institutions.

Considerations

This proposal has the advantage of eliminating the need for transfer and all its attendant problems. When an inmate (federal or provincial) is suspected of having a mental disorder, only in-house administrative procedures would be necessary to place him or her in the psychiatric ward of the particular prison involved. Included in this proposal might be an expanded version of the Regional Psychiatric Centre concept.

The difficulties in such a proposal have already been canvassed. Prison psychiatric facilities would have to be enlarged. But the primary role of prisons is to provide secure custody; mental hospitals best provide treatment for chronic cases. In addition, such a decentralized system might duplicate services elsewhere and might be inefficient, in terms of both cost and effectiveness. The tendency for the corrections and treatment sectors of a prison to pursue their own disciplines might inevitably lead to two institutions within the same walls, necessitating some form of transfer procedure.

Alternative II

Provide for a modified version of executive order for transfer from a penal institution to a mental hospital.

Considerations

Currently, s.546 may be used only with respect to provincial prisoners. While expansion of the provision to allow for the transfer of federal prisoners would have certain advantages, it might create jurisdictional problems. The s.546 LGW is a form of (delegated) executive order, but there is widespread support for abolition even in its present form. Alternatively, the lieutenant governor-in-council (cabinet) could direct the transfers of mentally disordered offenders. Such option would ensure political accountability. However, the more contentious aspects of the existing LGW procedure, particularly indeterminacy and non-reviewability must be addressed.

In England, the Mental Health Act 1959, as amended, employs the concept of executive-ordered transfer by empowering the Home Secretary to direct appropriate transfers. Section 72 provides that where the Home Secretary is satisfied on the basis of the reports of at least two medical practitioners that an offender is suffering from a mental disorder (the criteria being the same as those for a judge making a hospital order), he or she may direct the transfer of the

offender to a specified hospital. This direction will thereafter have a similar effect to that of a hospital order. Furthermore, s. 75 authorizes the Home Secretary, when notified by the "responsible medical officer" that the patient no longer requires treatment or that no effective treatment for his or her disorder can be given, to return the patient to prison or to discharge the patient. Any direction restricting discharge ceases to have effect on the expiration of the sentence.

United States federal law, on the other hand, stipulates that a board of examiners for each federal correctional institution shall examine an inmate alleged inter alia to be "insane," and report to the Attorney General. The Attorney General may then direct that the prisoner be transferred to a federal mental hospital "to be kept until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence." The "board of examiners" appears to have the same role as the "board of review" constituted under s. 547 of the Criminal Code.

Both the English and U.S. Federal jurisdictions prescribe that the mentally disordered inmate may be detained for treatment only during the period of his or her sentence. Presumably, civil commitment is the option thereafter. However, the discretion apparently afforded the executive in each case indicates that there may be difficulty in reviewing executive decisions to transfer during the period of the sentence.

Alternative III

Provide for proceedings before a court to authorize transfer from a penal institution to a mental hospital.

Considerations

This proposal has the advantage of (a) clearly allowing for reviewability of decisions made, and (b) not being susceptible to political considerations. Further, decisions concerning individual liberties and protection of the public may be considered more properly in the domain of the court.

Arguably, however, the courts may be ill-equipped to handle this type of proceeding as efficiently as a specialized board. The court system, already clogged, may not be able to assume this additional role.

One variation of a court-ordered transfer may be used at the time of disposition of the "hospital permit" envisaged by the Ouimet Committee. In effect, such disposition amounts to court authorization in the first instance of potential future transfers of mentally disordered inmates; it obviates the need for a return to the court (or other authority) for any subsequent authorization for transfer.

Alternative IV

Provide for proceedings before an administrative tribunal to authorize transfer from a prison to a mental hospital.

Considerations

A tribunal would have the advantages of reviewability and efficiency (as a result of its familiarity with the issues). If procedural protections are not as stringent as those provided by the courts, however, an administrative board may not be suitable to adjudicate matters as important as the disposition of mentally disordered offenders.

One proposal for such a board has been prepared by an Alberta organization and submitted to the Task Force to Review The Alberta Mental Health Act (October 1982). It envisions such a board being composed of members of the judiciary and the Health, Corrections and Attorney General's departments. The board would act as a coordinating body to facilitate requests for appropriate mental health intervention, and to order transfer to treatment programmes. In addition, the board would act to safeguard the rights of the mentally disordered inmate and to ensure that treatment programmes were made available.

Finally, there are several areas of general concern that must be considered, whatever form of transfer procedure is utilized.

First, it may be that the authority ordering the transfer should have standards and principles to guide it as to when and in what circumstances transfer of mentally disordered inmates should be authorized. The views of the affected parties -- the inmate, the correctional facility, and the mental health facility -- may all be relevant in this regard. The American Bar Association in its draft Criminal Justice Mental Health Standards (April, 1983) has set forth its views as to what these principles should be. They may be summarized as follows:

- (a) Voluntary Transfer - Where the inmate desires treatment and both the correctional and mental health facilities believe such treatment is warranted, the inmate should be transferred upon endorsement by the proposed authorities. According to the commentary, "The purpose of this provision is to avoid the time, expense and trauma of judicial commitment procedures when all parties agree that the prisoner needs treatment in a mental health facility."
- (b) Court-ordered Transfer - Where the inmate desires treatment, and the correctional facility believes such treatment is required but the mental health facility is unwilling to accept the inmate, then the correctional facility should be able to petition before the proper authority for a transfer order. This provision is intended to provide a means for resolution of disputes between correctional and mental health facilities where negotiations between them break down.
- (c) Involuntary Transfer - Where correction officials believe an inmate requires treatment and the inmate objects to such treatment, involuntary transfer proceedings should be initiated before the proper authority. This provision would give the inmate most of the rights normally enjoyed by the subjects of American commitment procedures, including due process protection. (Alternatively, this transfer could be effected through civil commitment).
- (d) Emergency Transfer - If the need for emergency intervention arises with respect to any inmate, correctional authorities should be able to authorize the immediate transfer of such person to a suitable mental health facility. This procedure would be subject to a hearing to review the transfer within a reasonable time after it has been effected.

Second, there is the issue of consent to treatment, which is a concern not limited to transfer procedures.

A third area of general concern that pervades the matter of prison-hospital transfers is jurisdiction. The difficulties in attempting to arrange for cooperation between the federal (and provincial) corrections system and the provincial mental health systems have been considerable. Barring radical changes in the infrastructure, the only solution appears to be to improve the provisions allowing for agreements between the relevant authorities. In its 1969 Report, the Ouimet Committee recommended that "statutes providing the authority for transfer from correctional facilities be amended so as to allow transfer to take place immediately

upon the basis of local negotiation." Agencies such as the British Columbia Psychiatric Forensic Services Commission, previously discussed, may have a valuable role to play in this regard.

A fourth concern relates to the need for national uniformity of legislation and procedures in the area of transfer (see recommendation 31 in the Law Reform Commission of Canada's 1976 Report). This may be necessary to eliminate jurisdictional problems, to streamline procedures (e.g., to eliminate the redundant LGW provision) and to conform to the equality of treatment principle generally.

Issue 3

What provision should be made for periodic review of the detention of mentally disordered offenders transferred to mental health facilities?

Discussion

Since review is accorded civilly committed patients, it is arguable that those detained pursuant to the criminal system should have an equivalent right. A properly implemented review procedure is compatible with efficient use of resources; it helps to ensure that mentally disordered offenders are returned to correctional facilities as soon as they are "well" or deemed no longer treatable.

The release of provincial prisoners transferred to mental hospitals via an LGW under s. 546(1) of the Criminal Code is governed by s. 546(3). That section provides for the return to prison of a prisoner who is liable to further custody and the discharge of one who is not, where the lieutenant governor is satisfied of the individual's recovery from insanity, mental illness, mental deficiency or feeble-mindedness. Section 546(4) goes on to provide that "Where the lieutenant governor is satisfied that a person to whom subsection (2) applies has partially recovered, he may, where the person is not liable to further custody in prison, order that the person shall be subject to the direction of the minister of health for the province, or such other person as the lieutenant governor may designate, and the minister of health or other person designated may make any order or direction in respect of the custody and care of the person that he considers proper." This is clearly a very broad discretion to confer on largely unspecified individuals. Arguably, some thought should be given to the question of whether this provision should be retained,

repealed, or amended in some way so as to specify more clearly the persons who may be designated by the lieutenant governor and to structure their discretion to improve accountability.

Obviously, without some help, the lieutenant governor is in no position to decide what should be done with a particular prisoner; for this reason s. 547 of the Criminal Code provides for the appointment of a board of review to supply advice. As mentioned earlier in this paper, however, the appointment of a board is not mandatory. If appointed, the board must review the cases of s. 546 (and other) LGWs within six months of the date the transfer was ordered and at least once in every subsequent twelve month period. A report is required in each case and the lieutenant governor will usually (but need not) adopt its recommendations.

With respect to review of the detention of federal penitentiary inmates transferred to provincial mental hospitals, there is no provision equivalent to s. 547 of the Code.

The question as to what type of body should be the reviewing authority may, arguably, be answered by reference to the type of body that made the original decision to transfer, although the two need not necessarily be the same. (For example, an administrative board could periodically review hospital detention originally ordered by the executive).

Alternative I

Provide for a modified version of executive review.

Considerations

Currently, the lieutenant governor decides when an offender will be returned from a mental health facility. His or her decision is essentially non-reviewable. Since the lieutenant governor may not be able to perform this role alone, he or she may require a board of review to provide advice. While such advice is usually followed, political factors may affect the lieutenant governor's ultimate decision. These aspects of executive review should, arguably, be removed.

Alternative II

Provide for regular review proceedings before a court.

Considerations

This proposal has advantages and disadvantages similar to those discussed under court-ordered transfers.

Alternative III

Provide for regular review proceedings before an administrative board.

Considerations

A board of review could review its own decisions to transfer or those of the court or the executive, and has the advantage of continuing familiarity and expertise. It could be a decision-making (as opposed to an advisory) body. There remains the question, however, of whether the boards should be federally constituted, or provincially constituted (by delegation) according to a standard structure and procedure.

Regardless of what form of reviewing body is decided upon, several matters of general concern should be considered. First, it is arguable that the body should be standardized (in terms of its existence and its procedural operation) everywhere in Canada. Second, there is the question of whether reviews should take place automatically or be dependent upon application. Third, there is the question of whether reviewing bodies should also be empowered to review matters touching on the manner of an offender's hospital detention, such as treatment and imposition or removal of liberty restrictions. Fourth, the same jurisdictional problems that trouble the initial transfer procedures will have to be considered in this context. Finally, it is arguable that (as with the transfer-ordering body) the reviewing body should be given standards and principles applicable to the issues of when and in what circumstances an individual should be returned to the transferring penal institution or released altogether.

Chapter 9

THE MENTALLY DISORDERED YOUNG OFFENDER

THE MENTALLY DISORDERED YOUNG OFFENDER

INTRODUCTION

The special needs and circumstances of mentally disordered young offenders are recognized by both the criminal law and the mental health process. It follows then that an examination of the criminal law as it affects mentally disordered persons must devote special attention to the issues raised where the person involved is a young person.

The distinct, (but not wholly separate) problem of applying criminal law where an accused or convicted young person may be mentally disordered suggests that the process of consultation on this issue be similarly distinct, but not wholly separate. This part of the paper considers the particular problems associated with the criminally involved and mentally disordered young person.

CURRENT STATUS OF JUVENILE JUSTICE LEGISLATION

In 1908, a fundamental reform in the Canadian criminal law regarding young people was introduced: the Juvenile Delinquents Act. For seventy-five years this legislation has directed the application of the law where children have been involved in criminal and seriously unacceptable behaviour. In recent decades, however, dissatisfaction with the general philosophy and the particular provisions of the Act have prompted a major reform of juvenile justice.

In 1982, the Young Offenders Act (An Act respecting young offenders and to repeal the Juvenile Delinquents Act) was passed but, until the new legislation is proclaimed in force, the Juvenile Delinquents Act will continue to govern the administration of juvenile justice. The proclamation of the Young Offenders Act will introduce significant reforms such that the experience of the past cannot be considered a reliable indicator of the issues to be contended with in the future. Thus, it is a necessary first step in considering the issues surrounding mentally disordered young offenders here to examine the nature of the reforms to be implemented.

CURRENT PROVISIONS: THE JUVENILE DELINQUENTS ACT

The Juvenile Delinquents Act (1908), while not speaking specifically to the issue of mental disorder per se, contains a number of general provisions affecting the response of juvenile justice to the question of mental disorder:

- (a) The administration of the Act is guided by the "interpretive" provisions set out in the statute. Section 38 provides:

"This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."

The predominant philosophy that has guided the administration of juvenile justice is one firmly rooted in the principle of parens patriae. In practice, this has meant that the court has exercised broad discretionary powers to respond "in the best interests of the child." Underlying this principle and general practice is a tacit assumption that the child is not capable of responsibility.

- (b) The Act provides that no one younger than 7 years may be dealt with as a "juvenile," while providing that provinces may set the upper age at under 16, 17 or 18. (Current ages under the Juvenile Delinquents Act are as follows: Under 16 - Alberta, New Brunswick, Nova Scotia, Ontario, P.E.I., Saskatchewan, Northwest and Yukon Territories, Under 17 - British Columbia, Newfoundland; Under 18 - Manitoba, Quebec).
- (c) The Act does not demand strict adherence to the procedural standards of the ordinary criminal courts. According to s.17(2) "No adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child."

- (d) Once a child has been adjudged a "juvenile delinquent," the court is empowered to deal with that person in any manner permitted by the Act until he or she has reached the age of 21 (s.20(3)). In other words, a finding of delinquency results automatically in an indeterminate disposition. The exception to the above authorizes provinces to assume jurisdiction over any child who, having been found delinquent, has been committed to care or an industrial training school. This provision, perhaps more than any other, gives concrete expression to the parens patriae assumptions. It also has very significant policy implications in that it places authority for the ultimate disposition of children involved in serious delinquency in an administrative rather than a judicial forum.
- (e) The "condition" of delinquency under the Act may arise from violation of "any provision of the Criminal Code or of any federal or provincial statute, or of any by-law or ordinance of any municipality ...," from "sexual immorality or any similar form of vice..." or from being "liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute...."

A number of points with respect to procedures within the Juvenile Delinquents Act that affect mental disorder issues are worth noting:

- (a) The Act makes no specific reference to the question of mental disorder. Section 5(1) of the Juvenile Delinquents Act adopts the summary conviction procedures of the Code. Section 738 of the Code provides for assessment remands and a voir dire on the issue of fitness; this section also adopts the provisions of s.543 which include detention to await the pleasure of the lieutenant governor.
- (b) Where a person is found to have been insane at the time of the offence, a judge can do no more than acquit completely, with a recommendation for treatment.
- (c) Children of 14 years and older can be transferred to adult court. Thus, under extreme circumstances, children have been subjected to the full provisions of the Criminal Code pertaining to mental disorder.

- (d) The administration of juvenile justice has permitted "informal" resolutions of alleged offences not having serious import. Thus, it appears that many situations involving mental disorder have been dealt with by way of provincial mental health legislation or non-judicial proceedings.

NEW PROVISIONS: THE YOUNG OFFENDERS ACT

With the proclamation of the Young Offenders Act, a number of general provisions having consequences for mentally disordered young persons will take effect:

- (a) The principles governing juvenile justice will be amended in fundamental ways. These principles are discussed below under the heading "Philosophy of the Young Offenders Act."
- (b) The minimum age of criminal responsibility will be raised from 7 to 12 years. Consequently, all persons under 12 years of age and involved in "criminal" behaviour will be subject to provincial statutes.
- (c) The "maximum" age (effective April, 1985) will be uniform throughout Canada: under the age of 18 (s.2). As a result, the number of cases dealt with in 10 of 12 jurisdictions may increase in size, with immediate consequences for justice and mental health resources.
- (d) The new legislation restricts itself to offences created by federal law, most notably the Criminal Code and the two drug control statutes. In other words, it is concerned exclusively with criminal offences rather than with regulatory or "status" offences.
- (e) Full natural justice provisions, enhanced by special safeguards to ensure these rights, are guaranteed by the Act.
- (f) All dispositions will be determinate and young offenders will remain under the jurisdiction of the youth court. Thus, the characteristic features of dispositions under the Juvenile Delinquents Act (i.e., indeterminate length and potential for the assumption of jurisdiction by provincial authorities) will be struck down.

- (g) Numerous provisions have been included with respect to custody, such as the creation of two levels ("open" and "secure"), the requirement that the youth court designate the level, specific conditions for committals to secure custody, and so on.
- (h) The rights of appeal closely parallel those granted by the Criminal Code.

In addition to making these general provisions, the Young Offenders Act makes specific provision for mentally disordered young persons alleged to have committed or who have been convicted of offences:

- (a) The Young Offenders Act, pursuant to ss. 13(7) and 13(8), adopts the provisions of the Criminal Code regarding the issue of fitness. Where insanity at the time of the commission of the offence is at issue, the insanity provisions of the Code are incorporated by virtue of ss. 51 and 52 of the Young Offenders Act. These provisions in the Act were included not because of any ultimate confidence in the provisions of the Criminal Code but in anticipation of its review with respect to mental disorder.

In addition to adopting the Criminal Code provisions regarding "fitness" and insanity, the Young Offenders Act incorporates special provisions pertaining to young people who are suffering from a mental disability. While these provisions are not limited to the narrow issues of fitness and insanity, they are nevertheless relevant:

- (i) Section 13 of the Act provides the youth court with the opportunity to obtain medical and psychological reports at crucial stages of judicial proceedings.
- (ii) The range of dispositions available to the youth court includes a "treatment order." Under this provision, a young person may be detained in a hospital or other treatment facility, provided both the young person and the facility consent. Out-patient treatment would remain accessible through probation orders.
- (iii) Finally, the Young Offenders Act provides for the review of dispositions by the youth court to ensure that they remain meaningful and appropriate. These

provisions have implications for those situations where a mentally disordered young person's condition improves or deteriorates during the course of a disposition.

Each of these provisions, general and specific, have yet to be tested in practice and against the conclusions of the larger review of criminal law affecting the mentally disordered. Their present form, by intent, is subject to the conclusions drawn during this process.

PHILOSOPHY OF THE YOUNG OFFENDERS ACT

The foregoing summary of the basic provisions of the Juvenile Delinquents Act and the Young Offenders Act is in itself indicative of the evolution of values and attitudes that has occurred between 1908 and the present. Reflecting this evolution, and inspired by a growing knowledge of human behaviour generally and the moral and psychological development of children in particular, the Young Offenders Act is based on a new set of assumptions. These assumptions and the principles flowing from them are set out in the Act's Declaration of Principle. They establish the parameters within which any discussion of mentally disordered young persons should occur. (For the Declaration of Principle, see the appendix to this paper).

(a) Age and Criminal Responsibility

Age has long been a factor in establishing the legal capacity of a person to form the necessary criminal intent. The Juvenile Delinquents Act, as suggested above, assumes tacitly that a "child" is not generally possessed of criminal capacity and, accordingly, is not generally responsible. In practice, the criminal law has set out two fundamentally distinct stages of human development: childhood and adulthood. In this century, a third stage has been recognized: adolescence. This crucial phase is generally characterized as a period of transition during which the capacity to be responsible is gained although the necessary skills and opportunities to fully discharge that responsibility may not be available.

The Young Offenders Act gives recognition to this assumption by acknowledging that a young person is in a state of transition and capable of independent thought and responsibility. This refinement, which affects young persons between the ages of 12 and 17 years inclusive, finds its expression in four principles: responsibility, accountability, protection of society, and special needs.

The Juvenile Delinquents Act is believed to insufficiently emphasize the concepts of personal responsibility and protection of society, thereby failing to adequately reflect the interests and beliefs of contemporary society. By contrast, the Young Offenders Act, in its Declaration of Principle, states unequivocally that young persons who commit offences can and should bear responsibility for their illegal actions and that society must be afforded protection from illegal behaviour. These principles are at the core of the new legislation and are crucial factors in the discussion of mental disorder.

While the capacity of young persons to accept responsibility for their behaviour is recognized, so are the limits of that capacity. As adolescence is a stage of development characterized by progressive levels of independence and maturity, the principle of responsibility is tempered under the Act by that of mitigated accountability. This principle holds that young persons should not, generally speaking, be held accountable in the same manner as adults.

A further principle, related to the assumptions surrounding the relationship between age and responsibility, concerns the special needs of young persons. As s. 3(1)(c) of the Act states: "young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance...."

While the concepts of responsibility and public protection are common to both the juvenile and adult criminal justice systems, the emphasis on the special needs of young offenders as a class is unique. In the adult system, special needs are recognized only in individual cases where fitness and similar issues arise. Acknowledging the circumstances of adolescence, the Act avoids a strict imposition of the ordinary priorities of criminal justice. In its principles and provisions, the necessity of balancing the rigours of accountability against the need for help and support is given expression. The expanded emphasis on medical and psychological assessments and the extensive review process are but two illustrations of this emphasis.

The application of these principles poses a particular challenge where an alleged young offender may suffer from a mental disorder. While the principle of protection of society justifies (and in many instances demands) intervention, the appropriate method of intervention is by no means clear. Where a young person is found responsible for an illegal act and suffers from a mental disorder that does not call his or her fitness into question, the recognition of "special needs" would seem to dictate a judicial response that gives priority to a disposition emphasizing mental health care over denunciatory or reparative options.

It is important to recognize that the selection of a disposition that gives priority to special needs is not necessarily in conflict with the concept that a young person should bear responsibility for his or her behaviour. The concept of responsibility clearly includes an obligation to oneself and others to conform to society's norms. This obligation (and the right of society to protection) may well be satisfied by a disposition that gives priority to treatment.

(b) Relationship of State and Citizen

No longer can the relationship of state and citizen in the context of criminal justice for young persons be defined exclusively by the concept of parens patriae. Canadian society has experienced a general trend away from reliance on this concept. This development is evident in the Young Offenders Act wherein the role of the state is defined in terms of the reciprocal rights and responsibilities of both the state and the individual, rather than simply in terms of the state as surrogate parent. The impact of this assumption is evident in the simultaneous acknowledgement of society's right to protection from illegal behaviour and its responsibility to prevent crime. Its influence is also evident in the Act's assertion of young peoples' rights as well as their responsibilities.

The Act provides that "young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights..." (s. 3(1)(e))." Thus, an alleged young offender has:

- (i) the right to counsel;
- (ii) the right to be heard and to participate in proceedings;

- (iii) special guarantees of rights and freedoms that are consistent with the assumption discussed earlier regarding age and criminal responsibility (it is as a result of the person's age and level of development that such special measures are required);
- (iv) the right to be informed of rights and freedoms where these may be affected by the Act; and
- (v) the right to the least possible interference with freedom consistent with the protection of society and having regard to the needs of young persons and the interests of their families.

In addition, it is recognized that the state cannot routinely usurp the rights and responsibilities of parents merely because of a young person's illegal behaviour; nor can it assume that such behaviour is per se evidence of parental neglect or inadequacy. Accordingly, it is stated in the Declaration of Principle: "parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate" (s. 3(1)(h)).

The assumption that the role of the state is to be defined in terms of the rights and responsibilities of both the state and the individual has particular significance where a young person in conflict with the law suffers from a mental disorder. The Act goes beyond an entrenchment of rights for young persons equal to those of adults and provides additional rights related to the level of development and maturity of young persons.

Accordingly, if the justice system is to be resorted to in dealing with mentally disordered young persons, it must ensure that their rights are adequately protected. Moreover, the right to the least possible interference with freedom, in conjunction with the principle that dictates that a young person should remain in the care of his or her family wherever possible, impose an obligation on the juvenile justice system to consider and to explore alternate ways of dealing with mentally disordered young people.

(c) Criminal Law to be Used with Restraint

A third and equally fundamental difference between the Young Offenders Act and the Juvenile Delinquents Act is the former's assumption that the criminal law must be used with restraint. As recognized in The Criminal Law in Canadian Society, our formal criminal justice system should be seen to represent only one element, albeit a major one, of a complex and broadly-based response to crime. The best illustration of this concept of restraint is the greatly reduced jurisdiction of the Act with respect to both persons and offences as outlined above. The Juvenile Delinquents Act permitted interventions through the criminal court that were motivated more by "conditions" (which may include mental disorder) than by evidence of criminal behaviour. The Act's philosophy, and the informality it encourages, have meant that mentally disabled young people whose criminal acts would under usual circumstances warrant only minimal intervention, could be subjected to extensive interference with their freedom through labelling them "delinquent." Intervention under the Young Offenders Act is only justified where there exists clear evidence of criminal behaviour. Moreover, recourse to the most restrictive form of intervention -- custodial dispositions -- is statutorily limited to serious offenders and offences.

Consistent with the assumption of restraint in the use of criminal interventions, the Young Offenders Act clearly advocates alternatives to the formal court process. This thrust would seem to have particular significance in situations involving mentally disordered young people who are not deemed "dangerous" and for whom court intervention is not necessary to protect society. Informal diversion has been, and should continue to be, a preferred option where mental health interventions would appear more appropriate.

(d) Role of Community

Another assumption which distinguishes the approaches pursued by the existing and new legislation concerns the added emphasis in the Young Offenders Act on the role played by the community. Under the Young Offenders Act, three principles flow from the assumption that community and social institutions have demonstrated a capacity to resolve issues that are deemed criminal, and that they will continue and

will expand upon that capacity. They are: (1) minimal interference; (2) the responsibility of society for crime prevention; and (3) the encouragement of non-judicial options. The Act contains several provisions that give positive effect to these principles. In summary:

- (i) A broad range of community-based dispositions are established to enable the young offender to assume responsibility and to be dealt with within the community.
- (ii) The instances when secure custody may be used are limited.
- (iii) A decision respecting custody must be made by a youth court judge in open court where the parties will have the opportunity to make representations and to challenge the evidence.

FUNDAMENTAL POLICY OPTIONS

In the process of determining the most appropriate response to the questions raised where the problems of criminal law and mentally disordered young persons intersect, four fundamental options are available. They are as follows:

(a) Total separation of criminal and mental health issues for young persons

Under such circumstances, the needs of the young offender who suffers from a mental disorder would be given clear priority and child welfare or mental health proceedings would take precedence over criminal proceedings.

This option reflects the "special needs" of young persons recognized in the Young Offenders Act and respects the parens patriae ideals which have been given implicit (if limited) recognition in criminal law and some mental health statutes. On the other hand, it may not adequately address the legitimate right of society to protection from illegal behaviour.

(b) Adoption of all of the Criminal Code provisions affecting the mentally disordered

It may be concluded that the Criminal Code provisions resulting from this review will be found acceptable, even desirable, for young people. Those provisions

will, after all, balance the legitimate goals of criminal law and those of mental health processes which focus upon the individual needs of the person suffering from mental disorder. As a result, the rights of society and the "special needs" of young persons might be adequately dealt with through Criminal Code provisions that may currently be considered inappropriate for young people.

- (c) Adopt, through amendments to the Young Offenders Act, provisions specific to young people

It may be found that the circumstances of mentally disordered young people are sufficiently distinct from those of adults that separate provisions are warranted. Such a distinction is, in part, explicit in both the Juvenile Delinquents Act and the Young Offenders Act. The Declaration of Principle (s.3) of the new statute, in concert with the principles and practices of the mental health process affecting young people, suggest that such an option should be seriously considered.

- (d) Adopt an approach that modifies the provisions of the Criminal Code to accomodate young people

The fourth and final alternative is a melding of general provisions incorporated in the Criminal Code with modifications, as required, in the Young Offenders Act. Such a "mixed" system would have the advantages of minimizing procedural and conceptual variations between the ordinary and the youth courts, while assuring an appropriate response to young people in the process of assuming the responsibilities of adult status.

Each of these "policy options" needs to be analyzed and assessed in light of:

- (a) responses to the mentally disordered in the ordinary criminal law defined through the current review process;
- (b) the priority given to, and the nature of, the special circumstances affecting young people;
- (c) the capacity of the nation's mental health processes to respond to the issues at hand; and
- (d) the assessment of the issues associated with the criminal involvement of mentally disordered young people.

ISSUES

Other parts of this consultation paper identify the variety of issues that must be examined in developing responses to the mentally disordered adult involved in the criminal process. It is necessary, however, to conduct a similarly thorough examination of those same issues where the individuals involved are young people/adolescents.

Insanity: The definitions and assumptions made in respect of insanity in the case of adults may not be appropriate to young people. Indeed, the issues are complicated by adolescents' levels of maturity. Young people may experience distinct problems or respond in significantly different ways. This may be cause either to broaden or to narrow the test for insanity.

Fitness: In addition to affecting capacity to commit an offence, age may also be relevant to the question of fitness to stand trial. While the Young Offenders Act recognizes the responsibility of young people for their illegal behaviour, it also recognizes their varying stages of development and maturity. These factors may pose unique problems in relation to the question of fitness to stand trial. Consequently, the circumstances under which a young person's fitness might be questioned, the process whereby that question is resolved and the consequences of a finding of "unfitness" should be examined anew.

Remand Procedures: The Young Offenders Act has made provision for "remand for examination" which varies from those provisions employed for adults. It ought to be determined whether the Y.O.A provisions are adequate, a conclusion that will depend upon the responses to the questions raised under the headings of "Fitness" and "Insanity."

As regards the matter of appropriate procedures for remand, questions such as timing and duration may be less important than those that can be raised in relation to the definition of "qualified person" and whether or not specialized facilities and resources are required.

Disposition: Where an individual is found to be "unfit" or "not guilty on account of insanity," it is imperative that alternatives to the Code provisions for adults be explored. While the Act's restrictions in terms of duration of disposition, limits on custody, and requirements for consent for treatment may indeed offer viable solutions, their inadequacy is apparent where dangerousness and untreatability are at issue.

The Juvenile Delinquents Act (s.20) may have facilitated resolution of such issues by permitting transfer of jurisdiction to provincial authority. This option will, however, no longer be available as the youth court is to retain jurisdiction. Options are also required where a young person serving a disposition subsequently develops a mental disorder.

The need for a range of dispositional alternatives raises significant issues in relation to the resources available for mentally disordered young people.

Review: Judicial review of ordinary dispositions is provided for in the Juvenile Delinquents Act and is specifically detailed in the Young Offenders Act. It must be determined whether these new provisions are appropriate for mentally disordered young persons, or whether further refinements are required. In addition, if extraordinary dispositions are to be available in situations where young people are found "unfit" or "not guilty on account of insanity," it seems particularly important that young people have recourse to appropriate review procedures. Similarly, where protection of society becomes an issue or consent to or participation in a treatment programme is revoked (where consent is considered relevant), the review process must have the ability to take appropriate action.

Consent: The question of consent permeates all the mental disorder issues. Age factors, in addition to questions of competence, result in even more complex issues than is the case for adults.

Other Issues: A variety of other issues are readily identifiable and are demanding of specific examination. Some of these are common to the adult system, others arise from the particular philosophy and provisions of the Young Offenders Act. Earned destruction of records, for example, is a specific objective of the new Act that may not be equally desirable within a mental health context. The ability of provinces to arrange for transfers between jurisdictions for correctional purposes may not adequately respond to the needs of young people or to the ability of provincial services to provide for such needs.

Another issue that requires examination is the use of the term "qualified person" in s.13 of the Young Offenders Act. The use of the term "psychological" in this section may be construed by some as restricting non-medical assessments to psychologists licensed or registered under provincial legislation that regulates psychological practice generally. One means of remedying this apparent difficulty may be to delete the word "psychological"

before the words "examinations or assessments." Other matters for possible discussion under this section include the question of whether the youth court should be able to refer the young person to a place as well as to a specific qualified person, and whether the consent of the qualified person to the examination or assessment should be relevant.

Issues may arise in the context of treatment orders under ss. 20(1)(i) and 22. For example, should the duration of these orders be stipulated? Can consent for treatment once given be withdrawn?

Questions may arise in the area concerning the destruction of records provisions (ss.43,45, and 46), insofar as these may conflict with provincial legislation regarding retention of medical and other treatment records. It may be questioned, moreover, whether a definition of "record" would be appropriate here.

CONCLUSION

The questions that arise when criminal justice and mental health issues interact are often remarkable in their complexity. Even though age may not create different degrees of complexity, it is clear that the specific character of the issues involved indicates that two distinct (although not separate) problems are presented: one involving adults; the other involving young people.

In recognition of the distinctiveness of the problems and the separate criminal process established for young people, review of the responses of the criminal law to mentally disordered young offenders has been distinguished but not severed from the review of the Criminal Code provisions. As indicated at the outset, this section of the paper serves to draw attention to the particular issue of the mentally disordered young offender and permits an initial consideration of certain questions that may be posed in the context of the overall review.

APPENDICES

APPENDIX I

REFERENCES

Specific reference has been made to the following cases, books, reports, articles and papers in various parts of this paper:

CASES

Re Abel et al. and Director, Penetanguishene Mental Health Centre;

Re Abel et al. and Advisory Review Board et al. (1979), 24 O.R. (2d) 279 (Div. Ct.); aff'd (1981), 56 C.C.C. (2d) 153 (C.A.).

Bratty v. A.G. Northern Ireland, [1961] 3 All E.R. 523 (H.L.).

Crane v. D.P.P., [1921] 2 A.C. 299 (H.L.).

Davis v. United States (1895), 160 U.S. 469 (U.S.S.C.).

Durham v. United States (1954) 214 F. 2d 862 (D.C. Cir.).

Dusky v. United States (1960), 362 U.S. 402 (U.S.S.C.)

Egglestone and Mousseau v. Advisory Review Board, June 24, 1983, unreported (Ont. Div. Ct.).

Frendak v. United States (1979), 408 A. 2d 364 (D.C.C.A.).

Graat v. The Queen (1983), 31 C.R. (3d) 289 (S.C.C.).

Jackson v. Indiana (1972), 406 U.S. 715 (U.S.S.C.).
Jones v. United States, June 29, 1983, not yet reported (U.S.S.C.).

Kjeldsen v. The Queen (1981), 64 C.C.C. (2d) 161 (S.C.C.).

M'Naghten's Case (1843), 10 Cl. & Fin. 200, 8 E.R. 718.

R. v. Abbey (1982), 68 C.C.C. (2d) 394 (S.C.C.)

R. v. Conkie, [1978] 3 W.W.R. 493 (Alta. S.C.A.D.).

R. v. Deacon, April 1, 1982, unreported (B.C. Prov. Ct.).

R. v. Dickie (No. 2) (1982), 67 C.C.C. (2d) 218 (Ont. C.A.); rev'd (1982), 63 C.C.C. 151 (Ont. H.C.)

- R. v. Kieling, March 24, 1982, unreported (Ont. Co. Ct.), rev'd June 29, 1982, unreported (Ont. C.A.)
- R. v. Lappin (1978), 40 C.R.N.S. 77 (Ont. C.A.).
- R. v. MacLeod (1980), 52 C.C.C. (2d) 193 (B.C.C.A.).
- R. v. Price, [1963] 2 Q.B. 1.
- R. v. Rabey (1977), 37 C.C.C. (2d) 461 (Ont. C.A.); aff'd [1980] 2 S.C.R. 513.
- R. Rafuse (1980), 53 C.C.C. (2d) 161 (B.C.C.A.).
- R. v. Saxell (1980), 59 C.C.C. (2d) 176 (Ont. C.A.).
- R. v. Simpson (1977), 35 C.C.C. (2d) 337 (Ont. C.A.).
- R. v. Smith (1968), 5 C.R.N.S. 162 (Ont. H.C.).
- Revelle v. The Queen, [1981] 1 S.C.R. 576.
- Schwartz v. The Queen (1976), 34 C.R.N.S. 138 (S.C.C.).
- United States v. Brawner (1972), 471 F. 2d 969 (D.C. Cir.).
- United States v. Chandler (1968), 393 F. 2d 920 (4th Cir.).
- Wilband v. The Queen, [1967] S.C.R. 14.
- Woolmington v. D.P.P., [1935] A.C. 462 (H.L.)
- R. v. Kieling, March 24, 1982, unreported (Ont. Co. Ct.), rev'd June 29, 1982, unreported (Ont. C.A.).
- X v. The United Kingdom, Oct. 24, 1981 (European Court of Human Rights).

BOOKS AND REPORTS

American Bar Association Standing Committee on Association Standards for Criminal Justice, Manuscript Draft Criminal Justice Mental Health Standards (Washington: American Bar Association, 1983).

American Bar Association, Provisional Criminal Justice Mental Health Standards (Washington: American Bar Association, 1982).

American Law Institute, Model Penal Code (Proposed Official Draft) (Philadelphia: American Law Institute, 1962).

Atkin, Hon. Lord, Report of the Committee as to the existing law, practice and procedure relating to Criminal Trials in which the plea of Insanity as a defence is raised (London: H.M.S.O., 1923).

Brakel, S.J., and Rock, R.S., The Mentally Disabled and the Law (Chicago: University of Chicago Press, 1971).

Butler, Hon. Lord, Report of the Committee on Mentally Abnormal Offenders (London: H.M.S.O., 1975).

Criminal Law Revision Committee, Eleventh Report: Evidence (London: H.M.S.O., 1972).

Criminal Law Revision Committee, Fourteenth Report: Offences against the Person (London: H.M.S.O., 1980)

Cross, Sir R., Evidence, 5th ed. (London: Butterworths, 1979).

Federal/Provincial Task Force on Uniform Rules of Evidence, Report (Toronto: Carswell, 1982).

Fingarette, H., The Meaning of Criminal Insanity (Berkeley: University of California Press, 1972).

Goldstein, A.S., The Insanity Defense (New Haven: Yale University Press, 1967).

Government of Canada, The Criminal Law in Canadian Society (Ottawa: Government of Canada, 1982).

- Hart, H.L.A. Punishment and Responsibility (Oxford: Clarendon, 1968).
- Huckabee, H.M., Lawyers, Psychiatrists and Criminal Law: Cooperation or Chaos? (Springfield, Ill., Charles C. Thomas, 1980).
- Law Reform Commission of Canada, Report to Parliament on Mental Disorder in the Criminal Process (Ottawa: Minister of Supply and Services, Canada 1977).
- Law Reform Commission of Canada, Criminal Law: The General Part: Liability and Defences (Ottawa: Minister of Supply and Services Canada, 1982).
- Law Reform Commission of Canada, A report on Dispositions and Sentences in the Criminal Process (Ottawa: Information Canada, 1976)
- McRuer, Hon. Mr. Justice J.C., Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (Hull: Queen's Printer, 1956).
- Morris, G.H., The Insanity Defense: A Blueprint for Legislative Reform (Toronto: Lexington, 1975).
- Quimet, Hon. Mr. Justice R., Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections (Ottawa: Information Canada, 1969).
- Packer, H.L., The Limits of the Criminal Sanction (Stanford: Stanford University Press, 1968).
- Royal Commission on Capital Punishment, Report, (London, H.M.S.O., 1953).
- Schiffer, M.E., Mental Disorder and the Criminal Trial Process (Toronto: Butterworths, 1978).
- Simon, R., The Jury and the Defense of Insanity (Boston: Little Brown, 1967).
- Williams, G., Textbook of Criminal Law (London: Stevens and Sons, 1978).
- Wootton, Lady B., Crime and the Criminal Law (London: Stevens and Sons, 1963).

ARTICLES AND PAPERS

- Arboleda - Florez, J., Gupta, K., and Alcock, A., "A Two-year Review of the Court Examinations," (1975), 20 Can. Psych. Assoc. J. 469.
- Bull, H. "Fitness to Stand Trial," (1965-66), 8 Crim. L.Q. 290.
- Diamond, B.L., "From Durham to Brawner, A Futile Journey," [1973] Wash. U.L.Q. 109.
- Eaves, D., Roesch, R., Glackman, W. and Vallance, S., "Attitudes of the Legal Profession to the Law Reform Commission Recommendations on Fitness to Stand Trial", (1981-82), 24 Crim. L.Q. 233.
- Goldstein, J., and Katz, J. "Abolish the 'Insanity Defence' -- Why Not?" (1963), 72 Yale L. J. 853.
- Kunjukrishnan, R., "Ten Year Survey of Pretrial Examinations in Saskatchewan, "(1979), 24 Can. J. Psychiatry 638.
- Lindsay, P.S., "Fitness to Stand Trial in Canada: An Overview in Light of the Recommendations of the Law Reform Commission of Canada," (1976-77), 19 Crim. L. Q. 303.
- Manson, A.S., "Fit to be Tried: Unravelling the Knots," (1982), 7 Queen's L.J. 305.
- McIntyre, "Review of Literature for Studies Related to the Use of the Defense of Not Guilty by Reason of Insanity," American Bar Foundation Memorandum, August, 1982.
- Pasewark, R.A., "Insanity Plea: A Review of the Research Literature," (1981), 9 J. of Psych. and Law 357.
- Petrila, J., "The Insanity Defense and Other Mental Health Dispositions in Missouri," (1982), 5 Int. J. Law and Psychiatry 81.
- Pollack, S. "Principles of Forensic Psychiatry for Psychiatric-legal Opinion-making" in 1971 Legal Medicine Manual.

- Quinsey, V.L., "The Long-Term Management of the Mentally Abnormal Offender," in S.J. Hucker, C.D. Webster and M.H. Ben - Aron, eds., Mental Disorder and Criminal Responsibility. (Toronto: Butterworths, 1981).
- Roesch, R., Eaves, D., Glackman, W., Jackson, M.A., Sollner, R., and Webster, C.D., "Preliminary Observations on the Reliability of the Fitness (To Stand Trial) Interview Test: A study of Four Professions' Ratings of Videotaped Fitness Interviews," December, 1982 (unpublished).
- Schwartz, B.R., "Should Juries Be Informed of the Consequences of the Insanity Verdict?" (1980), 8 J. Psychiatry and Law 167.
- Webster, C.D., Menzies, R.J., Butler B.T., and Turner, R.E., "The Outcome of Brief and Inpatient Forensic Psychiatric Assessment: Six Canadian Cities," C.D. Webster, R.J. Menzies and M.A. Jackson, Clinical Assessment Before Trial (Toronto: Butterworths, 1982).
- Wexler, S., "Discretion: The Unacknowledged Side of Law," (1975), 25 U. Toronto L.J. 120.

APPENDIX II

SUMMARY OF AMERICAN STUDY

Following is a summary of a study ("the study") of the Criminal Law/Mental Health aspects of American jurisprudence in selected jurisdictions designed to assist in the analysis and development of public policy options with regard to the Mental Disorder Project of the Department of Justice.

This study considers the law and experiences with it in selected American jurisdictions (1) on current tests for insanity and fitness to stand trial; (2) on disposition of persons found not guilty by reason of insanity or not fit to stand trial; (3) on due process of the law for such persons; and (4) on the standard of dangerousness applied in such dispositions.

The study contains the results of an investigation of these areas based on statutory provisions, case law and practices in selected jurisdictions.

The study is concerned primarily with recent or proposed statutory changes in the jurisdictions selected. The major focus of the study is on the disposition of persons found not guilty by reason of insanity ("NGRI") or found not fit to stand trial ("NFST").

The seven states reviewed were Idaho, Massachusetts, Michigan, Missouri, New York, Oregon and Virginia. Supplemental information was collected for Illinois and Maryland. These states were selected on the basis of the following criteria: (a) insanity test used; (b) allocation of burden of proof and quantum of proof; (c) whether the state also has a "guilty but mentally ill" standard, and (d) whether the state legislature has considered, during the past three years, insanity defence revisions.

As a result of the Hinckley verdict, there is nationwide public interest and concern in the United States (of particular interest to state legislatures) about the adequacy of current laws and practices. There has been renewed activity in research, analysis and proposals for change. Professional organizations such as the American Bar Association and the American Psychiatric Association have recently adopted policy positions on the insanity defence. In 1983, the

National Mental Health Association sponsored the National Commission on the Insanity Defense, held hearings and issued a report.

The Insanity Test

The American Bar Association ("ABA") approved in principle a defence of non-responsibility for crime that focuses solely on whether the defendant, as a result of mental disease or defect, is unable to appreciate the wrongfulness of his or her conduct at the time of the offence. Thus, the ABA standard eliminates the "irresistible impulse" test and other volitional or control aspects of expert testimony.

The American Psychiatric Association ("APA") policy statement suggests that any revision of insanity defence standards should indicate that the mental disorders potentially leading to exculpation must be serious (e.g., psychoses). The APA (like the ABA) also supports a standard of non-responsibility by reason of insanity if it is shown that, as a result of mental disease or mental retardation, the defendant was unable to appreciate the wrongfulness of his or her conduct at the time of the offense.

Insanity Defence Language

From the analysis of responses to telephone interviews, it is clear that the particular wording or form of the insanity test has no significant impact on the frequency or the success of pleas.

On review, the literature supports the findings compiled through these telephone responses. For example, the findings of Pasewark and Craig in analyzing the impact of the test language on NGRI adjudication came to the same conclusion. Their report, in pertinent part, reads as follows:

"Factors other than the language of the rule appear to be more influential in the NGRI (decision) than the language in the particular rule governing the insanity defense."

As a result, it is recommended that more emphasis be placed on considering policy alternatives in the disposition of NGRI acquittees than on considering language alternatives in the drafting of the insanity test.

Proposed Changes in State Legislation

There was much reported activity in state legislatures during 1982-83 in studying and revising current state insanity defence laws.

Significant reported developments in the selected jurisdictions include the following:

- Idaho: Effective July 1, 1982, insanity was abolished as an affirmative defence. (Note: Montana is the only other state to abolish the defence).
- Virginia: A special Task Force on the Insanity Defence appointed by the Virginia General Assembly recommended major changes, including elimination of the volitional impairment component (i.e., the "irresistible impulse" test) of the defence.

Recommended statutory language would require that:

"as a result of mental disease or mental retardation, [the defendant] was unable to appreciate the wrongfulness of his [or her] conduct at the time of the offense."

- Massachusetts: Two separate sets of legislative proposals were introduced in the 1983 Massachusetts General Assembly, including (in one proposal) the establishment of a "guilty but mentally ill" ("GBMI") verdict.
- Michigan: Michigan is one of eight states using the GBMI verdict, established in 1975. Michigan also uses the more traditional defence of NGRI. A recently published study in Michigan concluded that:

"to the extent the GBMI verdict was intended to decrease NGRI acquittals, it failed.... Over 60% of these defendants found GBMI have come through plea bargains and another 20% have come from bench trials. The real impact of the GBMI verdict may be [at] the post conviction stage rather than at trial."

(Note: Although the GBMI verdict has received some popular support in recent years, its adoption is opposed by the ABA, the APA and the National Commission on the Insanity Defence).

- Maryland: A Governor's Task Force has been set up to study the insanity defence system.
- Missouri and Oregon: Legislation has been introduced in both states to change the existing laws on the insanity defence.

Federal Jurisdiction

The U.S. Department of Justice ("Department") has recommended abolition of the insanity defence if constitutionally permissible. There is no federal law on involuntary commitment. The Department supports enactment of legislation permitting federal judges to order that dangerous, insane defendants be committed. Several bills proposed in Congress are briefly reviewed in the study.

Disposition Options

The disposition of persons found NFST or NGRI varies considerably among the jurisdictions surveyed. In some states (e.g., Missouri) disposition of NFST and NGRI persons is a matter for criminal courts, while in other states (e.g., Massachusetts, Michigan, New York, Virginia) management of such cases involves aspects of both criminal and civil law.

Special statutory provisions that treat insanity acquittees in a substantially different manner from persons whose civil commitment is proposed raise serious constitutional and public policy questions, (although the impact of the recent Jones decision in the United States Supreme Court may somewhat alter this view). To be acceptable, such laws must afford the individual due process, and deviations from ordinary civil commitment procedures must not violate the equal protection provisions (14th Amendment) of the United States Constitution. The constitutional mandates are based on the public policy objective of fair and uniform treatment for insanity acquittees.

Under the various state statutes, in most cases, persons found NGRI, after acquittal, are involuntarily committed for some period of time to a facility for the mentally ill. In testimony before the National Commission on the Reform of the Insanity Defense, the Deputy Chief Counsel for Litigation in New York testified that: "In my opinion, disposition is the single most complicated issue you must face, and the question of whether or not to preserve the defense is simple in comparison."

The study reviews the dispositional machinery (primarily) for persons found NGRI in the selected jurisdictions, concentrating on Oregon, New York, Michigan and Maryland. It illustrates the apparently successful operation of the management systems in Oregon and Maryland. The Oregon Psychiatric Security Review Board ("Board") was established in 1977 and was reauthorized in 1981 by the Oregon Legislature.* After extensive review and evaluation of its operation by a special task force established by the Board, it continues to receive widespread support. The Board has three basic goals that are established by statute:

- (1) to protect society from people who have committed crimes, have been found not responsible, are mentally ill, and are dangerous to others;
- (2) to promote the welfare of persons found not responsible for their criminal conduct because of mental disease or defect; and
- (3) to otherwise promote the interests of justice.

Assistant United States Attorney Jeffrey Rogers, former chairman of the (Oregon) Board, commented on current perceptions of the Board's operation in the disposition of persons found NGRI as follows:

1. The Board is unique. There is no similar mechanism in the United States.
2. The Board has great powers to supervise persons and to revoke conditional release -- even so, the American Civil Liberties Union and all other significant groups support the Board.
3. Persons found NGRI like the Board's approach because they are receiving treatment, they are treated fairly and are released to community settings.
4. The present law [and Board system] has "struck the right balance" so that defendants, the ACLU, the public defender's office and the state attorney general's office all support the system.

* See Appendix III for the Legislation

Testimony presented before the National Commission on the Insanity Defense by Dr. Stuart Silver, Director of the Clifton T. Perkins Hospital Centre in Maryland, provides encouraging information about the three-tier conditional release program for NGRI acquittees in Maryland. Highlights of his testimony are as follows:

"1. Our experience so far suggests that insanity acquittees, upon their release, do not create, in general, significant legal problems for the community, and that community safety is adequately protected by the management system that we have.

2. By and large, whatever the nuances of the wording of the insanity plea are, [when testimony is presented] the juries apply fairly common sense standards to these things.

3. It is our experience that recidivism is more of a [perceived] problem [than a real] problem with this group of patients [acquittees].

4. At Perkins, we essentially have a three-tier decisional process, perhaps even four-tier:

- movement towards greater responsibility and greater liberty requires agreement between the patient and his therapist;
- their decision has to receive approval of the treatment team or hospital unit;
- the hospital staff and the director must authorize movement;
- if the move is to be outside the service area of the hospital, the court must be notified, and in the case of a release, the court must sign an order;
- if [our] state's attorney requests (or if the court orders) a hearing, it is held and expert testimony can be presented."

When the staff is ready to discharge the patient, it petitions the court for a conditional discharge. The court specifies the conditions of discharge. Under Maryland law, the conditional discharge can remain in effect for up to five years. At any point during the hospitalization or conditional discharge, the patient can petition the court for complete discharge or for modification of the conditions.

Due Process

Movements to establish and to more clearly define the substantive and procedural rights of patients have gained momentum and widespread attention over the past two decades in the United States. The rights of patients are often codified in state statutes and are often the subject of court interpretation.

An example of an apparently effective system for the protection of patients' rights is the Department of Mental Health run by Michigan's Office of Recipient Rights ("Office") which was mandated through recodification of the relevant Michigan statutes (see M.C.L. Section 330.1001-330.2106, effective August, 1975).

According to Mr. Coyl, Director of the Office, 1866 complaints among 6400 in- and out-patients were resolved during its first 17 months of operation. Of these 1866 resolved complaints in the 23 institutions in the state, Coyl reports that 572 (31%) resulted in remedial action by institution directors. Nineteen (out of 572) appealed to the Office of Recipient Rights and two further appealed to the Director of the Department of Mental Health.

One of the important elements of Michigan's Recipient Rights System is the accountability of its institutional rights advisors. Although initially accountable to the directors of the mental health institutions, rights advisors now report directly to the Office of Recipient Rights. Coyl emphasized that the office works effectively and interfaces the Michigan patient rights system with the courts, the bar association, other professional associations, the office of the Attorney General and employee organizations.

Due Process and the Therapeutic Relationship

One of the most important aspects of applying due process requirements to the decision-making process is its effect on the quality of the therapeutic relationship between therapist and patient. Based on interviews conducted in the study, it is clear that the application of due process requirements is not generally disruptive and in some cases even produced a therapeutic value to the patient.

A treating physician at Oregon State Hospital, for example, reported that when due process rights were initially introduced, they "bothered" him. He felt

that due process puts the therapist "in an awkward situation in a Board hearing. Yet in retrospect, there have been very few instances when due process rights have been a debilitating factor in the therapeutic relationship."

Dangerousness

The criteria for dangerousness were reviewed as they appeared in state statutes (in the selected jurisdictions).

Several areas of inquiry were pursued, including whether statutorily-stated dangerousness criteria in the selected jurisdictions were similar to abstract "subjective" criteria, (i.e., similar to Canada's "public interest" test) or to more explicit "objective" criteria.

All of the states use some form of dangerousness test and none use subjective language, such as is found in Canada. In some states, evidence of a recent overt act is required. In others, it is not. Retention of dangerous persons in Massachusetts is based on a determination that failure to hospitalize "would create a likelihood of serious harm by reason of mental illness". This phrase is defined with great precision and clarity to require evidence of serious harm of a physical kind. In the state of New York, a "dangerous mental disorder" is defined as a mental illness that causes the patient to be "a physical danger to himself or [to] others."

The issue of whether psychiatric testimony on "dangerousness" is mandated by statute was also investigated and key individuals spoke to the study team as to whether such a mandate would be necessary and/or advisable. They also commented on the future of the dangerousness criteria.

Psychiatric testimony on dangerousness may be mandated by statute or ordered by the court in its discretion. Such testimony might be required at several stages of the disposition proceedings after a person was acquitted by reason of insanity or in connection with the management of persons found unfit to stand trial.

In both insanity and unfitness proceedings, the predictability of future dangerous behaviour is the central issue and is discussed in the literature.

As Steadman appropriately notes, detention of dangerous persons is really a product of the state's right to protect its citizens. The question arises as to how often the state can be justified in identifying persons as dangerous who will not actually display the predicted behaviour in order to protect society from those who will. According to Steadman, "The essence of dangerousness is that it is a perception and a prediction." According to Steadman and Morrissey, it is useful to emphasize that what remains unresolved is the core social policy issues: (1) the use of dangerousness as an involuntary commitment standard; (2) the appropriate role of psychiatrists, mental health professionals and the courts in making such predictions; and (3) the appropriate balance of individual and community rights.

There was general (but varied) support for the necessity and advisability of psychiatric testimony among the respondents to the interviews.

Attorney Hyde (Missouri) advanced a view that represents one (possibly prevailing) position in the United States. He told this study that "psychiatric testimony concerning dangerousness may leave a lot to be desired in terms of reliability and validity, but in my opinion it is both necessary and advisable. When an individual has committed a dangerous violent act and has been acquitted on grounds of insanity, the public has a right to expect that [he/she] will not be released... into society until there has been some reasonable [indication] that [he/she] is no longer mentally ill and dangerous. Even [as] an educated guess, psychiatrists must attempt to assess dangerousness in proceedings to determine whether or not the individual [may] be released."

Recommendations

The study makes the following recommendations:

- (1) While careful attention should be given to the development of criteria for the insanity defense, it should be recognized that the particular wording or format of the test may have little effect on jury decisions regarding acquittal. Thus, heavy reliance on test language designed to promote public safety should be avoided.

- (2) The major emphasis in reform should be on disposition. A system such as that of the Oregon Psychiatric Review Board should be carefully examined with a view to possibly merging Oregon's law and procedures with the Canadian experience, while incorporating appropriate refinements and improvements.
- (3) Experience in the selected jurisdictions indicates that increased due process rights for insanity acquittees and other mentally disabled persons can promote the interests of the individual as well as potentially enhance therapeutic relationships and promote justice. Careful consideration should therefore be given to developing a full battery of due process guarantees for persons found not guilty by reason of insanity and persons found not fit to stand trial, consistent with the Canadian constitution and with Provincial legislation.
- (4) The consequences flowing from determinations of a person's potential for dangerous behavior have a profound impact on the overall management of the person in the criminal/mental disability system. Efforts to expand the classification by using more subjective criteria will undoubtedly result in more types of behavior being included within the definition. Prediction of future violent dangerous behavior as well as judicial reliance on expert testimony continues to pose significant difficulty for the courts. Careful consideration should therefore be given to formulation of the dangerousness test within the management system.
- (5) Because statutory definitions of mental disease or defect vary, consideration should be given to adopting a general definition that includes serious mental abnormality (e.g., psychoses).

CRIMES AND PUNISHMENTS

OREGON REVISED STATUTES

TITLE 16

CRIMES AND PUNISHMENTS

Chapter 161

General Provisions

RESPONSIBILITY

- 161.290 Incapacity due to immaturity
- 161.295 Effect of mental disease or defect
- 161.300 Evidence of disease or defect admissible as to intent
- 161.305 Disease or defect as affirmative defense
- 161.309 Notice prerequisite to defense; content
- 161.315 Right of state to obtain mental examination of defendant; limitations
- 161.319 Form of verdict on acquittal on grounds of disease or defect
- 161.325 Entry of order finding defendant not responsible on grounds of disease or defect; order to include whether victim wants notice of hearings or release of defendant
- 161.326 Commission of crime by person under board jurisdiction; notice to victim
- 161.327 Order giving jurisdiction to Psychiatric Security Review Board; court to commit or conditionally release defendant; notice to board; appeal
- 161.328 Commitment to state mental hospital; standard of proof; duration of commitment
- 161.329 Order of discharge
- 161.332 Definition of conditional release
- 161.336 Conditional release by Psychiatric Security Review Board; supervision by board; termination or modification of conditional release; hearing required
- 161.341 Order of commitment; application for discharge or conditional release; release plan
- 161.346 Hearings on discharge, conditional release, commitment or modification; psychiatric reports; notice of hearing; hearing rights

- 161.351 Discharge of person under jurisdiction of Psychiatric Security Review Board; burden of proof; periodic review of status
- 161.360 Mental disease or defect excluding fitness to proceed
- 161.365 Procedure for determining issue of fitness to proceed
- 161.370 Determination of fitness; effect of finding of unfitness; proceedings if fitness regained; pretrial objections by defense counsel
- 161.385 Psychiatric Security Review Board; compensation; term of office, qualifications, compensation, appointment, confirmation and meetings; judicial review of orders
- 161.387 Board to implement policies; rulemaking; meetings not deliberative under public meeting requirements
- 161.390 Rules for assignment of persons to state mental hospitals; release plan prepared by division
- 161.395 Subpena power of Psychiatric Security Review Board
- 161.400 Leave of absence; notice to board

RESPONSIBILITY

161.290 Incapacity due to immaturity.

(1) A person who is tried as an adult in a court of criminal jurisdiction is not criminally responsible for any conduct which occurred when the person was under 14 years of age.

(2) Incapacity due to immaturity, as defined in subsection (1) of this section, is a defense.

161.295 Effect of mental disease or defect.

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) As used in chapter 743, Oregon Laws 1971, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

161.300 Evidence of disease or defect admissible as to intent.

Evidence that the actor suffered from a mental disease or defect is admissible whenever it is relevant to the issue of whether he did or did not have the intent which is an element of the crime.

161.305 Disease or defect as affirmative defense.
Mental disease or defect excluding responsibility under ORS 161.295 or partial responsibility under ORS 161.300 is an affirmative defense.

161.309 Notice prerequisite to defense; content.

(1) No evidence may be introduced by the defendant on the issue of criminal responsibility as defined in ORS 161.295, unless he gives notice of his intent to do so in the manner provided in subsection (3) of this section.

(2) The defendant may not introduce in his case in chief expert testimony regarding partial responsibility under ORS 161.300 unless he gives notice of his intent to do so in the manner provided in subsection (3) of this section.

(3) A defendant who is required under subsection (1) or (2) of this section to give notice shall file a written notice of his purpose at the time he pleads not

guilty. The defendant may file such notice at any time after he pleads but before trial when just cause for failure to file the notice at the time of making his plea is made to appear to the satisfaction of the court. If the defendant fails to file any such notice, he shall not be entitled to introduce evidence for the establishment of a defense under ORS 161.295 or 161.300 unless the court, in its discretion, permits such evidence to be introduced where just cause for failure to file the notice is made to appear.

161.315 Right of state to obtain mental examination of defendant; limitations.

Upon filing of notice or the introduction of evidence by the defendant as provided in ORS 161.309(3), the state shall have the right to have at least one psychiatrist or licensed psychologist of its selection examine the defendant. The state shall file notice with the court of its intention to have the defendant examined. Upon filing of the notice, the court, in its discretion, may order the defendant examined. Upon filing of the notice, the court, in its discretion, may order the defendant committed to a state institution or any other suitable facility for observation and examination as it may designate for a period not to exceed 30 days. If the defendant objects to the examiner chosen by the state, the court for good cause shown may direct the state to select a different examiner.

161.319 Form of verdict on acquittal on grounds of disease or defect.

When the defendant is found not responsible due to mental disease or defect, as defined in ORS 161.295, the verdict and judgment shall so state.

161.325 Entry of order finding defendant not responsible on grounds of disease or defect; order to include whether victim wants notice of hearings or release of defendant.

(1) After entry of judgment of not responsible due to mental disease or defect, the court shall, on the basis of the evidence given at the trial or at a separate hearing, if requested by either party, make an order as provided in ORS 161.327 or 161.329 whichever is appropriate.

(2) If the court makes an order as provided in ORS 161.327, it shall also:

- (a) Determine on the record what offense the person would have been convicted of had the person been found responsible, and
- (b) Make specific findings on whether there is a victim of the crime for which the defendant has been found "not responsible" and if so, whether the victim wishes to be notified, under ORS 161.326(2), of any Psychiatric Security Review Board hearings concerning the defendant and of any conditional release, discharge or escape of the defendant.

(3) The court shall include any such findings in its order.

161.326 Commission of crime by person under board jurisdiction; notice to victim.

(1) Whenever a person already under the board's jurisdiction commits a new crime, the court or the board shall make the findings described in ORS 161.325(2).

(2) If the trial court or the board determines that a victim desires notification as described in ORS 161.325(2), the board shall make a reasonable effort to notify the victim of board hearings, conditional release, discharge or escape.

161.327 Order giving jurisdiction to Psychiatric Security Review Board; court to commit or conditionally release defendant; notice to board; appeal.

(1) Following the entry of a judgment pursuant to ORS 161.319 and the dispositional determination under ORS 161.325, if the court finds that the person would have been guilty of a felony, or of a misdemeanor during the criminal episode in the course of which the person caused physical injury or risk of physical injury to another, and if the court finds by a preponderance of the evidence that the person is affected by mental disease or defect and presents a substantial danger to others requiring commitment to a state mental hospital designated by the Mental Health Division or conditional release, the court shall order the person placed under the jurisdiction of the Psychiatric Security Review Board for care and treatment. The period of jurisdiction of the board shall be equal to the maximum sentence the court finds the person could have received had the person been found responsible.

(2) The court shall determine whether the person should be committed to a state hospital designated by the Mental Health Division or conditionally released pending any hearing before the board as follows:

- (a) If the court finds that the person presents a substantial danger to others and is not a proper subject for conditional release, the court shall order the person committed to a state hospital designated by the Mental Health Division for custody, care and treatment pending hearing before the board in accordance with ORS 161.341 to 161.351.
- (b) If the court finds that the person presents a substantial danger to others but that the person can be adequately controlled with supervision and treatment if conditionally released and that necessary supervision and treatment are available, the court may order the person conditionally released, subject to those supervisory orders of the court as are in the best interests of justice, the protection of society and the welfare of the person. The court shall designate a person or state, county or local agency to supervise the person upon release, subject to those conditions as the court directs in the order for conditional release. Prior to the designation, the court shall notify the person or agency to whom conditional release is contemplated and provide the person or agency an opportunity to be heard before the court. After receiving an order entered under this paragraph, the person or agency designated shall assume supervision of the person pursuant to the direction of the Psychiatric Security Review Board. The person or agency designated as supervisor shall be required to report in writing no less than once per month to the board concerning the supervised person's compliance with the conditions of release.

(3) For purposes of this section, a person affected by a mental disease or defect in a state of remission is considered to have a mental disease or defect requiring supervision when the disease may, with reasonable medical probability, occasionally become active and, when active, render the person a danger to others.

(4) In determining whether a person should be conditionally released the court may order evaluations, examinations and compliance as provided in ORS 161.336(4) and 161.346(2).

(5) In determining whether a person should be committed to a state hospital or conditionally released the court shall have as its primary concern the protection of society.

(6) Upon placing a person on conditional release the court shall notify the board in writing of the court's conditional release order, the supervisor appointed, and all other conditions of release, and the person shall be on conditional release pending hearing before the board in accordance with ORS 161.336 to 161.351. Upon compliance with this subsection and subsections (1) and (2) of this section the court's jurisdiction over the person is terminated and the board assumes jurisdiction over the person.

(7) An order of the court under this section is a final order appealable by the person found not responsible in accordance with ORS 19.010(4). The person shall be entitled on appeal to suitable counsel possessing skills and experience commensurate with the nature and complexity of the case. If the person is indigent, suitable counsel shall be appointed in the manner provided in ORS 138.500(1), and the compensation for counsel and costs and expenses of the person necessary to the appeal shall be determined, allowed and paid as provided in ORS 138.500.

(8) Upon placing a person under the jurisdiction of the board the court shall notify the person of the right to appeal and the right to a hearing before the board in accordance with ORS 161.336(7) and 161.341(4).

161.328 Commitment to state mental hospital; standard of proof; duration of commitment.

(1) Following the entry of a judgment pursuant to ORS 161.319 and the dispositional determination under ORS 161.325, if the court finds that the person would have been guilty of a misdemeanor during a criminal episode in the course of which the person did not cause physical injury or risk of physical injury to another, and if the court finds by a preponderance of the evidence that the person is affected by mental disease or defect and presents a substantial danger to others requiring commitment to a state mental hospital designated by the Mental Health Division or conditional

release, the court shall make disposition of the person as provided in ORS 426.130(2) and (3) and pursuant to procedures set forth in ORS 426.135 to 426.150, 426.170, 426.223 to 426.297 and 426.301 to 426.395, except as provided in subsections (2) and (3) of this section.

(2) The standard of proof in all proceedings pursuant to this section shall be based upon a preponderance of the evidence.

(3) The period of jurisdiction of the court and any commitment pursuant to this section shall be no longer than the maximum sentence the court finds the person could have received had the person been found responsible.

161.329 Order of discharge

Following the entry of a judgment pursuant to ORS 161.319 and the dispositional determination under ORS 161.325, if the court finds that the person is no longer affected by mental disease or defect, or, if so affected, no longer presents a substantial danger to others and is not in need of care, supervision or treatment, the court shall order the person discharged from custody.

161.332 Definition of conditional release.

As used in ORS 137.540, 161.315 to 161.351, 161.385 to 161.395, 192.690 and 428.210, "conditional release" includes, but is not limited to, the monitoring of mental and physical health treatment.

161.336 Conditional release by Psychiatric Security Review Board; supervision by board; termination or modification of conditional release; hearing required.

(1) If the board determines that the person presents a substantial danger to others but can be adequately controlled with supervision and treatment and if conditionally released and that necessary supervision and treatment are available, the board may order the person conditionally released, subject to those supervisory orders of the board as are in the best interests of justice, the protection of society and the welfare of the person. The board may designate any person or state, county or local agency the board considers capable of supervising the person upon release, subject to those conditions as the board directs in the order for conditional release. Prior to the designation, the board shall notify the person or agency to whom conditional release is contemplated and

provide the person or agency an opportunity to be heard before the board. After perceiving an order entered under this section, the person or agency designated shall assume supervision of the person pursuant to the direction of the board.

(2) Conditions of release contained in orders entered under this section may be modified from time to time and conditional releases may be terminated by order of the board as provided in ORS 161.351.

(3) For purposes of this section, a person affected by a mental disease or defect in a state of remission is considered to have a mental disease or defect requiring supervision when the disease may, with reasonable medical probability, occasionally become active and, when active, render the person a danger to others. The person may be continued on conditional release by the board as provided in this section.

- (4) (a) As a condition of release, the board may require the person to report to any state or local mental health facility for evaluation. Whenever medical, psychiatric or psychological treatment is recommended, the board may order the person, as a condition of release, to cooperate with and accept the treatment from the facility.
- (b) The facility to which the person has been referred for evaluation shall perform the evaluation and submit a written report of its findings to the board. If the facility finds that treatment of the person is appropriate, it shall include its recommendations for treatment in the report to the board.
- (c) Whenever treatment is provided by the facility, it shall furnish reports to the board on a regular basis concerning the progress of the person.
- (d) Copies of all reports submitted to the board pursuant to this section shall be furnished to the person and the person's counsel. The confidentiality of these reports shall be determined pursuant to ORS 192.500.
- (e) The facility shall comply with any other conditions of release prescribed by order of the board.

(5) If at any time while the person is under the jurisdiction of the board it appears to the board or its chairman that the person has violated the terms of the conditional release or that the mental health of the individual has changed, the board or its chairman may order the person returned to a state hospital designated by the Mental Health Division for evaluation or treatment. A written order of the board, or its chairman on behalf of the board, is sufficient warrant for any law enforcement officer to take into custody such person and transport the person accordingly. A sheriff, municipal police officer, constable, parole or probation officer, prison official or other peace officer shall execute the order. Within 20 days of a revocation of a conditional release, the board shall conduct a hearing. Notice of the time and place of the hearing shall be given to the person, the attorney representing the person and the Attorney General. The board may continue the person on conditional release or, if it finds by a preponderance of the evidence that the person is affected by mental disease or defect and presents a substantial danger to others and cannot be adequately controlled if conditional release is continued, it may order the person committed to a state hospital designated by the Mental Health Division. The state must prove by a preponderance of the evidence the person's unfitness for conditional release. A person in custody pursuant to this subsection shall have the same rights as any person appearing before the board pursuant to ORS 161.346.

(6) The community mental health program director, the director of the facility providing treatment to a person on conditional release, any peace officer or any person responsible for the supervision of a person on conditional release may take a person on conditional release into custody request that the person be taken into custody if there is reasonable cause to believe the person is a substantial danger to others because of mental disease or defect and that the person is in need of immediate care, custody or treatment. Any person taken into custody pursuant to this subsection shall immediately be transported to a state hospital designated by the Mental Health Division. A person taken into custody under this subsection shall have the same rights as any person appearing before the board pursuant to ORS 161.346.

(7) (a) Any person conditionally released under this section may apply to the board for discharge from or modification of an order of

conditional release on the ground that the person is no longer affected by mental disease or defect or, if still so affected, no longer presents a substantial danger to others and no longer requires supervision, medication, care or treatment. Notice of the hearing on an application for discharge or modification of an order of conditional release shall be made to the Attorney General. The applicant, at the hearing pursuant to this subsection, must prove by a preponderance of the evidence the applicant's fitness for discharge or modification of the order of conditional release. Applications by the person for discharge or modification of conditional release shall not be filed more often than once every six months.

(b) Upon application by any person or agency responsible for supervision or treatment pursuant to an order of conditional release, the board shall conduct a hearing to determine if the conditions of release shall be continued, modified or terminated. The application shall be accompanied by a report setting forth the facts supporting the application.

(8) The total period of conditional release and commitment ordered pursuant to this section shall not exceed the maximum sentence the person could have received had the person been found responsible.

(9) The board shall maintain and keep current the medical, social and criminal history of all persons committed to its jurisdiction. The confidentiality of records maintained by the board shall be determined pursuant to ORS 192.500.

(10) In determining whether a person should be committed to a state hospital, conditionally released or discharged, the board shall have as its primary concern the protection of society.

161.341 Order of commitment; application for discharge or conditional release; release plan.

(1) If the board finds, upon its initial hearing, that the person presents a substantial danger to others and is not a proper subject for conditional release, the board shall order the person committed to, or retained in, a state hospital designated by the Mental Health

Division for custody, care and treatment. The period of commitment ordered by the board shall not exceed the maximum sentence the person could have received had the person been found responsible.

(2) If at any time after the commitment of a person to a state hospital designated by the Mental Health Division under this section, the superintendent of the hospital is of the opinion that the person is no longer affected by mental disease or defect, or, if so affected, no longer presents a substantial danger to others or that the person continues to be affected by mental disorder or defect and continues to be a danger to others, but that the person can be controlled with proper care, medication, supervision and treatment if conditionally released, the superintendent shall apply to the board for an order of discharge or conditional release. The application shall be accompanied by a report setting forth the facts supporting the opinion of the superintendent. If the application is for conditional release, the application must also be accompanied by a verified conditional release plan. The board shall hold a hearing on the application within 60 days of its receipt. Not less than 30 days prior to the hearing before the board, copies of the report shall be sent to the Attorney General.

(3) The attorney representing the state may choose a psychiatrist or licensed psychologist to examine the person prior to the initial or any later decision by the board on discharge or conditional release. The results of the examination shall be in writing and filed with the board, and shall include, but need not be limited to, an opinion as to the mental condition of the person, whether the person presents a substantial danger to others and whether the person could be adequately controlled with treatment as a condition of release.

(4) Any person who has been committed to a state hospital designated by the Mental Health Division for custody, care and treatment or another person acting on the person's behalf may apply to the board for an order of discharge or conditional release upon the grounds:

- (a) That the person is no longer affected by mental disease or defect;
- (b) If so affected, that the person no longer presents a substantial danger to others; or

(c) That the person continues to be affected by a mental disease or defect and would continue to be a danger to others without treatment, but that the person can be adequately controlled and given proper care and treatment if placed on conditional release.

(5) When application is made under subsection (4) of this section, the board shall require a report from the superintendent of the hospital which shall be prepared and transmitted as provided in subsection (2) of this section. The applicant must prove by a preponderance of the evidence the applicant's fitness for discharge under the standards of subsection (4) of this section. Applications for discharge or conditional release under subsection (4) of this section shall not be filed more often than once every six months commencing with the date of the initial board hearing.

(6) The board is not required to hold a hearing on a first application under subsection (4) of this section any sooner than 90 days after the initial hearing. However, hearings resulting from any subsequent requests shall be held within 60 days of the filing of the application.

(7) (a) In no case shall any person committed by the court under ORS 161.327 to a state hospital designated by the Mental Health Division be held in the hospital for more than 90 days from the date of the court's commitment order without an initial hearing before the board to determine whether the person should be conditionally released or discharged.

(b) In no case shall a person be held pursuant to this section for a period of time exceeding two years without a hearing before the board to determine whether the person should be conditionally released or discharged.

161.346 Hearings on discharge, conditional release, commitment or modification; psychiatric reports; notice of hearing; hearing rights.

(1) The board shall conduct hearings upon any application for discharge, conditional release, commitment or modification filed pursuant to ORS 161.336, 161.341 or 161.351 and as otherwise required by ORS 161.336 to 161.351 and shall make findings on the issues before it which may include:

- (a) If the board finds that the person is no longer affected by mental illness or defect, or if so affected, no longer presents a substantial danger to others, the board shall order the person discharged from commitment or from conditional release.
 - (b) If the board finds that the person is still affected by a mental disease or defect and is a substantial danger to others, but can be controlled adequately if conditionally released with treatment as a condition of release, the board shall order the person conditionally released as provided in ORS 161.336.
 - (c) If the board finds that the person has not recovered from the mental disease or defect and is a substantial danger to others and cannot adequately be controlled if conditionally released on supervision, the board shall order the person committed to, or retained in, a state hospital designated by the Mental Health Division for care, custody and treatment.
- (2) At any time, the board may appoint a psychiatrist or licensed psychologist to examine the person and to submit a report to the board. Reports filed with the board pursuant to the examination shall include, but need not be limited to, an opinion as to the mental condition of the person and whether the person presents a substantial danger to others, and whether the person could be adequately controlled with treatment as a condition of release. To facilitate the examination of the person, the board may order the person placed in the temporary custody of any state hospital or other suitable facility.
- (3) The board may make the determination regarding discharge or conditional release based upon the written reports submitted pursuant to this section. If any member of the board desires further information from the examining psychiatrist or licensed psychologist who submitted the report, these persons shall be summoned by the board to give testimony. The board shall consider all evidence available to it which is material, relevant and reliable regarding the issues before the board. Such evidence may include but is not limited to the record of trial, the information supplied by the attorney representing the state or by any other interested party, including the person, and

information concerning the person's mental condition and the entire psychiatric and criminal history of the person. All evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible at hearings. Testimony shall be taken upon oath or affirmation of the witness from whom received. The officer presiding at the hearing shall administer oaths or affirmations to witnesses.

(4) The board shall furnish to the person about whom the hearing is being conducted, the attorney representing the person and the Attorney General written notice of any hearing pending under this section within a reasonable time prior to the hearing. The notice shall include:

- (a) The time, place and location of the hearing.
- (b) The nature of the hearing and the specific action for which a hearing has been requested, the issues to be considered at the hearing and a reference to the particular sections of the statutes and rules involved.
- (c) A statement of the authority and jurisdiction under which the hearing is to be held;
- (d) A statement of all rights under subsection (6) of this section.

(5) Prior to the commencement of a hearing, the board or presiding officer shall inform each party as provided in ORS 183.413(2).

(6) At the hearing, the person about whom the hearing is being held shall have the right:

- (a) To appear at all proceedings held pursuant to this section, except board deliberations.
- (b) To cross-examine all witnesses appearing to testify at the hearing.
- (c) To subpoena witnesses and documents as provided in ORS 161.395.
- (d) To be represented by suitable legal counsel possessing skills and experience commensurate with the nature and complexity of the case, to consult with counsel prior to the hearing and, if indigent, to have suitable counsel provided without cost.

- (e) To examine all information, documents and reports which the board considers. If then available to the board, the information, documents and reports shall be disclosed to the person so as to allow examination prior to the hearing.
- (7) A record shall be kept of all hearings before the board, except board deliberations.
- (8) Upon request of any party before the board, or on its own motion, the board may continue a hearing for a reasonable period not to exceed 60 days to obtain additional information or testimony or for other good cause shown.
- (9) Within 15 days following the conclusion of the hearing, the board shall provide to the person, the attorney representing the person, the Attorney General and the attorney representing the state, written notice of the board's decision.
- (10) The burden of proof on all issues at hearings of the board shall be by a preponderance of the evidence.
- (11) If the board determines that the person about whom the hearing is being held is indigent, the board shall appoint suitable counsel to represent the person. The board shall determine and allow, as provided in ORS 135.055, the compensation for counsel appointed by it and the reasonable expenses of the person in respect to the hearing. The compensation and expenses so allowed shall be paid, upon order by the board, by the state from funds available for the purpose.
- (12) The Attorney General shall furnish notice of any pending contested hearing before the board to the district attorney and the court or department of the county from which the person was committed. The Attorney General shall represent the state at contested hearings before the board unless the district attorney of the county from which the person was committed elects to represent the state. The district attorney of the county from which the person was committed shall cooperate with the Attorney General in securing the material necessary for presenting a contested hearing before the board. If the district attorney elects to represent the state, the district attorney shall give timely written notice of such election to the Attorney General, the board and the attorney representing the person.

161.351 Discharge of person under jurisdiction of Psychiatric Security Review Board; burden of proof; periodic review of status.

(1) Any person placed under the jurisdiction of the Psychiatric Security Review Board pursuant to ORS 161.336 or 161.341 shall be discharged at such time as the board, upon a hearing, shall find by a preponderance of the evidence that the person is no longer affected by mental disease or defect or, if so affected, no longer presents a substantial danger to others which requires regular medical care, medication, supervision or treatment.

(2) For purposes of this section, a person affected by a mental disease or defect in a state of remission is considered to have a mental disease or defect. A person whose mental disease or defect may, with reasonable medical probability, occasionally become active and when it becomes active will render the person a danger to others, shall not be discharged. The state has the burden of proving by a preponderance of the evidence that the person continues to be affected by mental disease or defect and continues to be a substantial danger to others. The person shall continue under such supervision and treatment as the board deems necessary to protect the person and others.

(3) Any person who has been placed under the jurisdiction of the board and who has spent five years on conditional release or a total of five years in hospital and on conditional release shall be brought before the board for hearing within 30 days of the expiration of the five-year period. The board shall review the person's status and determine whether the person should be discharged from the jurisdiction of the board.

161.360 Mental disease or defect excluding fitness to proceed.

(1) If, before or during the trial in any criminal case, the court has reason to doubt the defendant's fitness to proceed by reason of incompetence, the court may order an examination in the manner provided in ORS 161.365.

(2) A defendant may be found incompetent if, as a result of mental disease or defect, he is unable:

- (a) To understand the nature of the proceedings against him; or

- (b) To assist and cooperate with his counsel; or
- (c) To participate in his defense.

161.365 Procedure for determining issue of fitness to proceed.

(1) Whenever the court has reason to doubt the defendant's fitness to proceed by reason of incompetence as defined in ORS 161.360, the court may call to its assistance in reaching its decision any witness and may appoint a psychiatrist to examine the defendant and advise the court.

(2) If the court determines the assistance of a psychiatrist would be helpful, the court may order the defendant to be committed to a state mental hospital designated by the Mental Health Division for the purpose of an examination for a period not exceeding 30 days. The report of each examination shall include, but is not necessarily limited to, the following:

- (a) A description of the nature of the examination;
- (b) A statement of the mental condition of the defendant; and
- (c) If the defendant suffers from a mental disease or defect, an opinion as to whether the defendant is incompetent within the definition set out in ORS 161.360.

(3) Except where the defendant and the court both request to the contrary, the report shall not contain any findings or conclusions as to whether the defendant as a result of mental disease or defect was responsible for the criminal act charged.

(4) If the examination by the psychiatrist cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect affecting competency to proceed.

(5) The report of the examination shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the district attorney and to counsel for defendant.

(6) When the court has ordered a psychiatric examination, a justice's court shall order the county to pay, and a circuit or district court shall order the state to pay from funds available for the purpose:

- (a) A reasonable fee if the examination of the defendant is conducted by a psychiatrist in private practice; and
- (b) All costs including transportation of the defendant if the examination is conducted by a psychiatrist in the employ of the Mental Health Division or a community mental health program established under ORS 430.610 to 430.670.

161.370 Determination of fitness; effect of finding unfitness; proceedings if fitness regained; pretrial objections by defense counsel.

(1) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed by a psychiatrist under ORS 161.365, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the party who contests the finding thereof shall have the right to summon and to cross-examine the psychiatrist or psychiatrists who submitted the report and to offer evidence upon the issue. Other evidence regarding the defendant's fitness to proceed may be introduced by either party.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (5) of this section, and the court shall commit him to the custody of the superintendent of a state mental hospital designated by the Mental Health Division or shall release him on supervision for so long as such unfitness shall endure. The court may release the defendant on supervision if it determines that care other than commitment for incompetency to stand trial would better serve the defendant and the community. It may place conditions which it deems appropriate on the release, including the requirement that the defendant regularly report to the Mental Health Division or a community mental health program for examination to determine if the defendant has regained his competency to stand trial. When the court, on its own motion or

upon the application of the superintendent of the hospital in which the defendant is committed, a person examining the defendant as a condition of his release on supervision, or either party, determines, after a hearing, if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment or release of the defendant on supervision that it would be unjust to resume the criminal proceeding, the court on motion of either party may dismiss the charge and may order the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070 to 426.170.

(3) Notwithstanding subsection (2) of this section, a defendant who remains committed under this section to the custody of a state mental hospital designated by the Mental Health Division for a period of time equal to the maximum term of the sentence which could be imposed if the defendant were convicted of the offense with which he is charged or five years, whichever is less, shall be discharged at the end of the period. The superintendent of the hospital in which the defendant is committed shall notify the committing court of the expiration of the period at least 30 days prior to the date of expiration. The notice shall include an opinion as to whether the defendant is still incompetent within the definition set forth in ORS 161.360. Upon receipt of the notice, the court shall dismiss the charge and shall order the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070 to 426.170.

(4) If the defendant regains fitness to proceed, the term of any sentence received by the defendant for conviction of the crime charged shall be reduced by the amount of time the defendant was committed under this section to the custody of a state mental hospital designated by the Mental Health Division.

(5) The fact that the defendant is unfit to proceed does not preclude any objection through counsel and without the personal participation of the defendant on the grounds that the indictment is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon any other ground at the discretion of the court which the court deems susceptible of fair determination prior to trial.

161.385 Psychiatric Security Review Board; composition, term of office, qualifications, compensation, appointment, confirmation and meetings; judicial review of orders.

(1) There is hereby created a Psychiatric Security Review Board consisting of five members appointed by the Governor and subject to confirmation by the Senate under section 4, Article III of the Oregon Constitution.

(2) The membership of the board shall not include any district attorney, deputy district attorney or public defender, but, the membership shall be composed of:

- (a) A psychiatrist experienced in the criminal justice system and not otherwise employed on a full-time basis by the Mental Health Division or a community mental health program;
- (b) A licensed psychologist experienced in the criminal justice system and not otherwise employed on a full-time basis by the Mental Health Division or a community mental health program;
- (c) A member with substantial experience in the processes of parole and probation;
- (d) A member of the general public; and
- (e) A lawyer with substantial experience in criminal trial practice.

(3) The term of office of each member is four years. The Governor at any time may remove any member for inefficiency, neglect of duty or malfeasance in office. Before the expiration of the term of a member, the Governor shall appoint a successor whose term begins July 1 next following. A member is eligible for reappointment. If there is a vacancy for any cause, the Governor shall make an appointment to become immediately effective for the unexpired term.

(4) Notwithstanding the term of office specified by subsection (3) of this section, of the members first appointed to the board:

- (a) One shall serve for a term ending June 30, 1979.

- (b) Two shall serve for terms ending June 30, 1980.
 - (c) Two shall serve for terms ending June 30, 1981.
- (5) A member of the board not otherwise employed full time by the state, shall be paid on a per diem basis an amount equal to four percent of the gross monthly salary of a member of the State Board of Parole for each day during which the member is engaged in the performance of official duties, including necessary travel time. In addition, subject to ORS 292.250 regulating travel and other expenses of state officers and employes, the member shall be reimbursed for actual and necessary travel and other expenses incurred in the performance of official duties.
- (6) Subject to any applicable provision of the State Personnel Relations Law, the board may hire employees to aid it in performing its duties under ORS 137.540, 161.315 to 161.351, 161.385 to 161.395, 192.690 and 428.210.
- (7) (a) The board shall select one of its members as chairperson to serve for a one-year term with such duties and powers as the board determines.
- (b) A majority of the voting members of the board constitutes a quorum for the transaction of business.
- (8) The board shall meet at least twice every month, unless the chairperson determines that there is not sufficient business before the board to warrant a meeting at the scheduled time. The board shall also meet at other times and places specified by the call of the chairperson or of a majority of the members of the board.
- (9) (a) When a person over whom the board exercises its jurisdiction is adversely affected or aggrieved by a final order of the board, the person is entitled to judicial review of the final order. The person shall be entitled on judicial review to suitable counsel possessing skills and experience commensurate with the nature and complexity of the case. If the person is indigent, suitable counsel shall be appointed by the reviewing court in

the manner provided in ORS 138.500(1). If the person is indigent, the reviewing court shall determine and allow, as provided in ORS 138.500, the cost of briefs, any other expenses of the person necessary to the review and compensation for counsel appointed for the person. The costs, expenses and compensation so allowed shall be paid as provided in ORS 138.500.

- (b) The order and the proceedings underlying the order are subject to review by the Court of Appeals upon petition to that court filed within 60 days of the order for which review is sought. The board shall submit to the court the record of the proceeding or, if the person agrees, a shortened record. The record may include a certified true copy of a tape recording of the proceedings at a hearing in accordance with ORS 161.346. A copy of the record transmitted shall be delivered to the person by the board.
- (c) The court may affirm, reverse or remand the order on the same basis as provided in ORS 183.482(8).
- (d) The filing of the petition shall not stay the board's order, but the board or the Court of Appeals may order a stay upon application of such terms as are deemed proper.

161.387 Board to implement policies; rulemaking; meetings not deliberative under public meeting requirements.

(1) The Psychiatric Security Review Board, by rule pursuant to ORS 183.325 to 183.410 and not inconsistent with law, may implement its policies and set out its procedure and practice requirements and may promulgate such interpretive rules as the board deems necessary or appropriate to carry out its statutory responsibilities.

(2) Administrative meetings of the board and the evidentiary phase of board hearings are not deliberations for the purposes of ORS 192.690.

161.390 Rules for assignments of persons to state mental hospitals; release plan prepared by division.

(1) The Mental Health Division shall promulgate rules for the assignment of persons to state mental hospitals under ORS 161.341, 161.365 and 161.370 and for

establishing standards for evaluation and treatment of persons committed to a state hospital designated by the division or ordered to a community mental health program under ORS 137.540, 161.315 to 161.351, 192.690 and 428.210.

(2) Whenever the Psychiatric Security Review Board requires the preparation of a pre-discharge or preconditional release plan before a hearing or as a condition of granting discharge or conditional release for a person committed under ORS 161.327 or 161.341 to a state hospital for custody, care and treatment, the Mental Health Division is responsible for and shall prepare the plan.

(3) In carrying out a conditional release plan prepared under subsection (2) of this section, the Mental Health Division may contract with a community mental health program, other public agency or private corporation or an individual to provide supervision and treatment for the conditionally released person.

161.395 Subpena power of Psychiatric Security Review Board.

(1) Upon request of any party to a hearing before the board, the board or its designated representatives shall issue, or the board on its own motion may issue, subpoenas requiring the attendance and testimony of witnesses.

(2) Upon request of any party to the hearing before the board and upon a proper showing of the general relevance and reasonable scope of the documentary or physical evidence sought, the board or its designated representative shall issue, or the board on its own motion may issue, subpoenas duces tecum.

(3) Witnesses appearing under subpoenas, other than the parties or state officers or employees, shall receive fees and mileage as prescribed by law for witnesses in civil actions. If the board or its designated representative certifies that the testimony of a witness was relevant and material, any person who has paid fees and mileage to that witness shall be reimbursed by the board.

(4) If any person fails to comply with a subpoena issued under subsections (1) or (2) of this section or any party or witness refuses to testify regarding any matter on which he may be lawfully interrogated, the judge of the circuit court of any county, on the application of the board or its designated representative or

of the party requesting the issuance of the subpoena, shall compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued by the court.

(5) If any person, agency or facility fails to comply with an order of the board issued pursuant to subsection (2) of this section, the judge of a circuit court of any county, on application of the board or its designated representative, shall compel obedience by proceedings for contempt as in the case of disobedience of the requirements of an order issued by the court. Contempt for disobedience of any order of the board shall be punishable by a fine of \$100.

161.400 Leave of absence; notice to board.

If, at any time after the commitment of a person to a state hospital under ORS 161.341(1), the superintendent of the hospital is of the opinion that a leave of absence from the hospital would be therapeutic for the person and that such leave would pose no substantial danger to others, the superintendent may authorize such leave for up to 48 hours in accordance with rules adopted by the Psychiatric Security Review Board. However, the superintendent, before authorizing the leave of absence, shall first notify the board for the purposes of ORS 161.326(2).

APPENDIX IV

SECTIONS EXTRACTED FROM THE CRIMINAL CODE

**INSANITY - When insane delusions -
Presumption of insanity.**

16.(1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.

(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.

(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

**POWERS OF JUSTICE - Remand for observation -
Direct issue to be tried - Section 543 applicable.**

465.(1) A justice acting under this Part may

(c) by order in writing

(i) direct an accused to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or

(ii) remand an accused to such custody as the justice directs for observation for a period not exceeding thirty days, where in his opinion, supported by the evidence or where the prosecutor and the accused consent,

by the report in writing of at least one duly qualified medical practitioner, there is reason to believe that

(iii) the accused may be mentally ill, or

(iv) the balance of the mind of the accused may be disturbed, where the accused is a female person charged with an offence arising out of the death of her newly-born child;

465.(2) Notwithstanding paragraph (1)(c), a justice acting under this part may remand an accused in accordance with that paragraph

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the accused and give evidence or submit a report; and

(b) for a period of more than thirty days but not exceeding sixty days where he is satisfied that observation for such a period is required in all the circumstances of the case and his opinion is supported by the evidence or, where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified medical practitioner.

465.(3) Where, as a result of observations made pursuant to an order issued under paragraph (1)(c), it appears to a justice that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, the justice shall direct that an issue be tried whether the accused is then, on account of insanity, unfit to conduct his defence at the preliminary inquiry.

465.(4) Where the justice directs the trial of an issue under subsection (3), he shall proceed in accordance with section 543 in so far as that section may be applied.

**INSANITY OF ACCUSED WHEN OFFENCE COMMITTED -
Custody after finding.**

542.(1) Where, upon the trial of an accused who is charged with an indictable offence, evidence is given that the accused was insane at the time the offence was committed and the accused is acquitted

(a) the jury, or

(b) the judge or magistrate, where there is no jury, shall find whether the accused was insane at the time the offence was committed and shall declare whether he is acquitted on account of insanity.

542.(2) Where the accused is found to have been insane at the time the offence was committed, the court, judge or magistrate before whom the trial was held shall order that he 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.

INSANITY AT THE TIME OF TRIAL - Direction or remand for observation - Idem - Court shall assign counsel - Trial of issue - If sane, Trial proceeds - If insane, order for custody - Where accused acquitted - Subsequent trial.

543.(1) A court, judge or magistrate may, at any time before verdict, where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, direct that an issue be tried whether the accused is then, on account of insanity, unfit to stand his trial.

543.(2) A court, judge or magistrate may, at any time before verdict or sentence, when of the opinion, supported by the evidence or, where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified medical practitioner, that there is reason to believe that

(a) an accused is mentally ill, or

(b) the balance of the mind of an accused is disturbed where the accused is a female person charged with an offence arising out of the death of her newly-born child,

by order in writing

(c) direct the accused to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or

(d) remand the accused to such custody as the court, judge or magistrate directs for observation for a period not exceeding thirty days.

(2.1) Notwithstanding subsection (2), a court, judge or magistrate may remand an accused in accordance with that subsection

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the accused and give evidence or submit a report; and

(b) for a period or more than thirty days but not exceeding sixty days where he is satisfied that observation for such a period is required in all the circumstances of the case and his opinion is supported by the evidence, or, where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified medical practitioner.

(3) Where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, the

court, judge or magistrate shall, if the accused is not represented by counsel, assign counsel to act on behalf of the accused.

(4) For the purposes of subsection (1), the following provisions apply, namely,

(a) where the issue arises before the close of the case of the prosecution, the court, judge or magistrate may postpone directing the trial of the issue until any time up to the opening of the case for the defence;

(b) where the trial is held or is to be held before a court composed of a judge and jury,

(i) if the judge directs the issue to be tried before the accused is given in charge to a jury for trial on the indictment, it shall be tried by twelve jurors, or in the Yukon Territory and the Northwest Territories, by six jurors, and

(ii) if the judge directs the issue to be tried after the accused has been given in charge to a jury for trial on the indictment, the jury shall be sworn to try that issue in addition to the issue on which they are already sworn; and

(c) where the trial is held before a judge or magistrate, he shall try the issue and render a verdict.

(5) Where the verdict is that the accused is not unfit on account of insanity to stand his trial, the arraignment or the trial shall proceed as if no such issue had been directed.

(6) Where the verdict is that the accused is unfit on account of insanity to stand his trial, the court, judge or magistrate shall order that the accused be kept in custody until the pleasure of the lieutenant

governor of the province is known, and any plea that has been pleaded shall be set aside and the jury shall be discharged.

(7) Where the court, judge or magistrate has postponed directing the trial of the issue pursuant to paragraph (4)(a) and the accused is acquitted at the close of the case for the prosecution, the issue shall not be tried.

(8) No proceeding pursuant to this section shall prevent the accused from being tried subsequently on the indictment unless the trial of the issue was postponed pursuant to paragraph (4)(a) and the accused was acquitted at the close of the case for the prosecution.

INSANITY OF ACCUSED TO BE DISCHARGED FOR WANT OF PROSECUTION

544. Where an accused who is charged with an indictable offence is brought before a court, judge or magistrate to be discharged for want of prosecution and the accused appears to be insane, the court, judge or magistrate shall proceed in accordance with section 543 in so far as that section may be applied.

SUPERVISION OF INSANE PERSONS - Warrant for transfer - Transfer of accused - Arrest of accused - Taking before a justice - Order of justice

545.(1) Where an accused who is, pursuant to this Part, found to be insane, the lieutenant governor of the province in which he is detained 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.

(2) An accused to whom paragraph (1)(a) applies may, by warrant signed by an officer authorized for that purpose by the lieutenant governor of the province in which he is detained, be transferred for the purposes of his rehabilitation to any other place in Canada specified in the warrant with the consent of the person in charge of such place.

(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).

(4) A peace officer who has reasonable and probable grounds to believe that an accused to whom paragraph (1)(b) applies has violated any condition prescribed in the order for his discharge may arrest the accused without warrant.

(5) Where an accused has been arrested pursuant to subsection (4), he shall be dealt with in accordance with the following provisions:

(a) where a justice having jurisdiction in the territorial division in which the accused has been arrested is available within a period of twenty-four hours after the arrest of the accused by a peace officer, the accused shall be taken before a justice without unreasonable delay and in any event within that period; and

(b) where a justice having jurisdiction in the territorial division in which the accused has been arrested is not available within a period of twenty-four hours after the arrest of the accused by a peace officer, the accused shall be taken before a justice as soon as possible.

(6) A justice before whom an accused is taken pursuant to subsection (5) may make any order that to him seems desirable in the circumstances respecting the detention of the accused pending a decision of the lieutenant governor of the province referred to in subsection (1) and shall cause notice of such order to be given to that lieutenant governor.

PRISONER MENTALLY ILL - Custody in safe-keeping - Order for imprisonment or discharge - Order for transfer to custody of minister of health - "Prison".

546.(1) The lieutenant governor of a province may, upon evidence satisfactory to him that a person who is insane, mentally ill, mentally deficient or feeble-minded is serving a sentence in prison in that province, order that the person be removed to a place of safe-keeping to be named in the order.

(2) A person who is removed to a place of safe-keeping under an order made pursuant to subsection (1) shall, subject to subsections (3) and (4), be kept in that place or in any other place of safe-keeping in which, from time to time, he may be ordered by the lieutenant governor to be kept.

(3) Where the lieutenant governor is satisfied that a person to whom subsection (2) applies has recovered, he may order that the person

(a) be returned to the prison from which he was removed pursuant to subsection (1), if he is liable to further custody in prison, or

(b) be discharged, if he is not liable to further custody in prison.

(4) Where the lieutenant governor is satisfied that a person to whom subsection (2) applies has partially recovered, he may, where the person is liable to further custody in prison, order that the person shall be subject to the direction of the minister of health for the province, or such other person as the lieutenant governor may designate, and the minister of health or other person designated may make any order or direction in respect to the custody and care of the person that he considers proper.

(5) In this section, "prison" means a prison other than a penitentiary, and includes a reformatory school or industrial school.

APPOINTMENT OF BOARD OF REVIEW - Constitution of board - Idem - Quorum - Periodic review and report to be made on case of each person in custody - Review and report to be made when requested by lieutenant governor - Powers.

547.(1) The lieutenant governor of a province may appoint 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 section 545 or subsection 546(1) or (2).

(2) The board referred to in subsection (1) shall consist of not less than three and not more than five members of whom one member shall be designated chairman by the members of the board, if no chairman has been designated by the lieutenant governor.

(3) At least two members of the board shall be duly qualified psychiatrists entitled to engage in the practice of medicine under the laws of the province for which the board is appointed, and at least one member of the board shall be a member of the bar of the province.

(4) Three members of the board of review, at least one of whom is a psychiatrist described in subsection (3) and one of whom is a member of the bar of the province, constitute a quorum of the board.

(5) The board shall review the case of every person referred to in subsection (1)

(a) not later than six months after the making of the order referred to in that subsection relating to that person, and

(b) at least once in every twelve month period following the review required pursuant to paragraph (a) so long as the person remains in custody under the order,

and forthwith after each review the board shall report to the lieutenant governor setting out fully the results of such review and stating

(c) where the person in custody was found unfit on account of insanity to stand his trial, whether, in the opinion of the board, the person has recovered sufficiently to stand his trial,

(d) where the person in custody was found not guilty on account of insanity, whether, in the opinion of the board, that person 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,

(e) where the person in custody was removed from a prison pursuant to subsection 546(1), whether, in the opinion of the board, that person has recovered or partially recovered, or,

(f) 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.

(6) In addition to any review required to be made under subsection (5), the board shall review any case referred to in subsection (1) when requested to do so by the lieutenant governor and shall forthwith after such review report to the lieutenant governor in accordance with subsection (5).

(7) For the purposes of a review under this section, the chairman of the board has all the powers that are conferred by sections 4 and 5 of the Inquiries Act on commissioners appointed under Part I of that Act.

ACCUSED TO BE PRESENT - Exceptions - To make defence.

577.(2) The court may

(c) cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is, on account of insanity, unfit to stand his trial where it is satisfied that failure to do so might have an adverse effect on the mental health of the accused.

DIRECTION OR REMAND FOR OBSERVATION

608.2(1) A judge of the court of appeal may, by order in writing,

(a) direct an appellant to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or

(b) remand an appellant to such custody as the judge directs for observation for a period not exceeding thirty days,

where, in his opinion, supported by the evidence or, where the appellant and the respondent consent, by the report in writing, of at least one duly qualified medical practitioner, there is reason to believe that

(c) the appellant may be mentally ill, or

(d) the balance of the mind of the appellant is disturbed, where the appellant is a female person charged with an offence arising out of the death of her newly-born child.

(2) Notwithstanding subsection (1), a judge of the court of appeal may remand an appellant in accordance therewith

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the accused and give evidence or submit a report; and

(b) for a period of more than thirty days but not exceeding sixty days where he is satisfied that observation for such a period is required in all the circumstances of the case and his opinion is supported by the evidence or, where the appellant and the respondent consent, by the report in writing, of at least one duly qualified medical practitioner.

POWERS - Order to be made - Substituting verdict - Appeal from acquittal - New trial under Part XVI - Where appeal against verdict of insanity allowed - Appeal court may set aside verdict of insanity and direct acquittal - Additional powers.

613.(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

- (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
- (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a), or
- (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

(c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion as to the effect of a special verdict, and may order the conclusion to be recorded that appears to the court to be required by the verdict, and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court;

(d) may set aside a conviction and find the appellant not guilty on account of insanity and order the appellant to be kept in safe custody to await the pleasure of the lieutenant governor where it is of the opinion that, although the appellant committed the act or made the omission charged against him, he was insane at the time the act was committed or the omission was made, so that he was not criminally responsible for his conduct; or

(e) may set aside the conviction and find the appellant unfit, on account of insanity, to stand his trial and order the appellant to be kept in safe custody to await the pleasure of the lieutenant governor.

DIRECTION OR REMAND FOR OBSERVATION - Idem.

691.(1) A court to which an application is made under this Part may, by order in writing,

(a) direct the offender in relation to whom the application is made to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or

(b) remand the offender in such custody as the court directs, for a period not exceeding thirty days, for observation,

where in its opinion, supported by the evidence of, or where the prosecutor and the offender consent, supported by the report in writing of, at least one duly qualified medical practitioner, there is reason to believe that evidence might be obtained as a result of such observation that would be relevant to the application.

(2) Notwithstanding subsection (1), a court to which an application is made under this Part may remand the offender to which that application relates in accordance with that subsection

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the offender and give evidence or submit a report and;

(b) for a period of more than thirty but not more than sixty days where it is satisfied that observation for such a period is required in all the circumstances of the case and its opinion is supported by the evidence of, or where the prosecutor and the offender consent, by the report in writing of, at least one duly qualified medical practitioner.

ADJOURNMENT - Non-appearance of defendant - Consent of Attorney General required - Non-appearance of prosecutor - Direction or remand for observation - Idem - Court may order trial of issue - Section 543 applicable.

738.(5) Notwithstanding subsection (1), the summary conviction court may, at any time before convicting a defendant or making an order against him or dismissing the information, as the case may be, when of the opinion, supported by the evidence, or, where the prosecutor and defendant consent, by the report in writing, of at least duly one qualified medical practitioner, that there is reason to believe that the defendant is mentally ill, by order in writing,

(a) direct the defendant to attend, at a place or before a person specified in the order and within a time specified therein, for observation; or

(b) remand the defendant to such custody as the court directs for observation for a period not exceeding thirty days.

738.(6) Notwithstanding subsection (5), a summary conviction court may remand the defendant in accordance therewith

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the accused and give evidence or submit a report; and

(b) for a period of more than thirty days but not exceeding sixty days where it is satisfied that observation for such a period is required in all the circumstances of the case and that opinion is supported by the evidence or, where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified medical practitioner.

738.(7) Where, as a result of observations made pursuant to an order issued under subsection (5), it appears to a summary conviction court that there is sufficient reason to doubt that a defendant is, on account of insanity, capable of conducting his defence, the summary conviction court shall direct that an issue be tried as to whether the defendant is then, on account of insanity, unfit to stand his trial.

738.(8) Where a summary conviction court directs the trial of an issue under subsection (7), it shall proceed in accordance with section 543 in so far as that section may be applied.

SECTIONS EXTRACTED FROM THE CHARTER

GUARANTEE OF RIGHTS AND FREEDOMS

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

FUNDAMENTAL FREEDOMS

2. Everyone has the following fundamental freedoms:

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;

MOBILITY RIGHTS

6.(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right:

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

LEGAL RIGHTS

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

- (b) to retain and instruct counsel without delay and to be informed of that right;

11. Any person charged with an offence has the right
- (b) to be tried within a reasonable time;
 - (e) not to be denied reasonable bail without just cause;
 - (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

EQUALITY RIGHTS

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

ENFORCEMENT

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

APPENDIX VI

SECTIONS EXTRACTED FROM
THE YOUNG OFFENDERS ACT

DECLARATION OF PRINCIPLE

Policy for Canada with Respect to young offenders.

3. (1) It is hereby recognized and declared that

(a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

(b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;

(c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

(d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;

(e) young persons have rights and freedoms in their own right, including those stated in the **Canadian Bill of Rights and Freedoms** or in the **Canadian Bill of Rights**, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;

(f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;

(g) young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are; and

(h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.

Act to be be liberally construed.

(2) This Act shall be liberally construed to the end of that young persons will be dealt with in accordance with the principles set out in subsection (1).

MEDICAL AND PSYCHOLOGICAL REPORTS

Medical or psychological examination.

13. (1) For the purpose of

(a) considering an application under section 16,

(b) determining whether to direct than issue be tried whether a young person is, on account of insanity, unfit to stand trial, or

(c) making or reviewing disposition under this Act, a youth court may, at any stage of proceedings against a young person,

(d) with the consent of the young person and the prosecutor, or

(e) on its own motion or on the application of either the young person or the prosecutor, where the court has reasonable grounds to believe that the young person may be suffering

from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or mental retardation and where the court believes a medical, psychological or psychiatric report in respect of the young person might be helpful in making any decision pursuant to this Act,

by order require that the young person be examined by a qualified person and that the person who conducts the examination report the results thereof in writing to the court.

Examination for fitness to stand trial.

(2) Where a youth court makes an order for an examination under subsection (1) for the purpose of determining whether to direct that an issue be tried whether a young person is, on account of insanity, unfit to stand trial, the examination shall be carried out by a qualified medical practitioner.

Custody for examination.

(3) For the purpose of an examination under this section, a youth court may remand the young person who is to be examined to such custody as it directs for a period not exceeding eight days or, where it is satisfied that observation is required for a longer period to complete an examination or assessment and its opinion is supported by the evidence of, or a report in writing of, at least one qualified person, for a longer period not exceeding thirty days.

Disclosure of report.

(4) Where a youth receives a report made in respect of a young person pursuant to subsection (1),

(a) the court shall, subject to subsection (6), cause a copy of the report to be given to

(i) the young person,

(ii) a parent of the young person, if the parent is in attendance at the proceedings against the young person, and

(iii) counsel, if any, representing the young person

(iv) the prosecutor, and

(b) the court may cause a copy of the report to be given to a parent of the young person not in attendance at the proceedings against the young person if the parent is, in the opinion of the court, taking an active interest in the proceedings.

Cross-examination.

(5) Where a report is made in respect of a young person pursuant to subsection (1), the young person, his counsel or the adult assisting him pursuant to subsection 11(7) and the prosecutor shall, subject to subsection (6), on application to the youth court, be given an opportunity to cross-examine the person who made the report.

Report may be withheld from young person, parents or prosecutor.

(6) A youth court may withhold the whole or any part of a report made in respect of a young person pursuant to subsection (1) from

(a) a private prosecutor where disclosure of the report or part thereof, in the opinion of the court, is not necessary for the prosecution of the case and might be prejudicial to the young person; or

(b) the young person, his parents or a private prosecutor where the person who made the report states in writing that disclosure of the report or part thereof would be likely to be detrimental to the treatment or recovery of the young person or would be likely to result in bodily harm to, or be detrimental to the mental condition of, a third party.

Insanity at time of proceedings.

(7) A youth court may, at any time before the adjudication in respect of a young person charged with an offence, where it appears that there is sufficient reason to doubt that the young person is,

on account of insanity, capable of conducting his defence, direct that an issue be tried as to whether the young person is then on account of insanity unfit to stand trial.

Section 543 of Criminal Code to apply.

(8) Where a youth court directs the trial of an issue under subsection (7), it shall proceed in accordance with 543 of the Criminal Code in so far as that section may be applied.

Report to be part of record.

(9) A report made pursuant to subsection (1) shall form part of the record of the case in respect of which it was requested.

Disclosure by qualified person.

(10) Notwithstanding any other provision of this Act, a qualified person who is of the opinion that a young person held in detention or committed to custody is likely to endanger his own life or safety or to endanger the life of, or cause bodily harm to, another person may immediately so advise any person who has the care and custody of the young person whether or not the same information is contained in a report made pursuant to subsection (1).

Definition of "qualified person".

(11) In this section, "qualified person" means a person duly qualified by provincial law to practice medicine or psychiatry or to carry out psychological examinations or assessments, as the circumstances require, or, where no such law exists, a person who is, in the opinion of the youth court, so qualified, and includes a person or a person within a class of persons designated by the Lieutenant Governor in Council of a province or his delegate.

Form of order.

(12) An order under subsection (1) may be in Form 5.

DISPOSITIONS

Dispositions that may be made.

20. (1) Where a youth court finds a young person guilty of an offence, it shall consider any pre-disposition report required by the court, any representations made by the parties to the proceeding or their counsel or agents and by the parents of the young person and any other relevant information before the court, and the court shall then make any one of the following dispositions, or any number thereof that are not inconsistent with each other:

(a) by order direct that the young person be discharged absolutely, if the court considers it to be in the best interests of the young person and not contrary to the public interest;

(b) impose on the young person a fine not exceeding one thousand dollars to be paid at such time and on such term as the court may fix;

(c) order the young person to pay to any other person at such time and on such terms as the court may fix an amount by way of compensation for loss of or damage to property, for loss of income or support or for special damages for special injury arising from the commission of the offence where the value thereof is readily ascertainable, but no order shall be made for general damages;

(d) order the young person to make restitution to any other person of any property obtained by the young person as a result of the commission of the offence within such time as the court may fix, if the property is owned by that other person or was, at the time of the offence, in his lawful possession;

(e) if any property obtained as a result of the commission of the offence has been sold to an innocent purchaser, where restitution of the property to its owner or any other person has been made or ordered, order the young person to pay the purchaser, at such time and on such terms as the court may fix, an amount not exceeding the amount paid by the purchaser for the property;

(f) subject to section 21, order the young person to compensate any person in kind or by way of personal services at such time and on such terms as the court may fix for any loss, damage or injury suffered by that person in respect of which an order may be made under paragraph (c) or (e);

(g) subject to section 21, order the young person to perform a community service at such time and on such terms as the court may fix;

(h) make any order of prohibition, seizure or forfeiture that may be imposed under any Act of Parliament or any regulation made thereunder where an accused is found guilty or convicted of that offence;

(i) subject to section 22, by order direct that the young person be detained for treatment, subject to such conditions as the court considers appropriate, in a hospital or other place where treatment is available, where a report has been made in respect of the young person pursuant to subsection 13(1) that recommends that the young person undergo treatment for a condition referred in paragraph 13(1)(e);

(j) place the young person on probation in accordance with section 23 for a specified period not exceeding two years;

(k) subject to section 24, commit the young person to custody, to be served continuously or intermittently, for a specified period not exceeding

(i) two years from the date of committal, or

(ii) where the young person is found guilty for an offence for which the punishment provided by the Criminal Code or any other Act of Parliament is imprisonment for life, three years from the date of committal, and

(l) impose on the young person such other reasonable and ancillary conditions as it deems advisable and in the best interest of the young person and the public.

Coming into force of disposition.

(2) A disposition made under this section shall come into force on the date on which it is made or on such later date as the youth court specifies therein.

Duration of disposition.

(3) No disposition made under this section, except an order made under paragraph(l)(h) or (k), shall continue in force for more than two years, and where the youth court makes more than one disposition at the same time in respect of the same offence, the combined duration of the dispositions, except in respect of an order made under paragraph (l)(h) or (k), shall not exceed two years.

Combined duration of dispositions.

(4) Where more than one disposition is made under this section in respect of a young person with respect to different offences, the continuous combined duration of those dispositions shall not exceed three years.

Disposition continues when adult.

(5) A disposition made under this section shall continue in effect, in accordance with the terms thereof, after the young person against whom it is made becomes an adult.

Reasons for the disposition.

(6) Where a youth court makes a disposition under this section, it shall state its reason therefor in the record of the case and shall

(a) provide or cause to be provided a copy of the disposition, and

(b) on request, provide or cause to be provided a transcript or copy of the reasons for the disposition

to the young person in respect of whom the disposition was made, his counsel, his parents, the provincial director, where the provincial director has an interest in the disposition, the prosecutor, and, in the case of a custodial disposition made under paragraph (l)(k), the review board, if any has been established or designated.

Limitation on punishment.

(7) No disposition shall be made in respect of a young person under this section that results in a punishment that is greater than the maximum punishment that would be applicable to an adult who has committed the same offence.

Application of Part XX of the Criminal Code.

(8) Part XX of the Criminal Code does not apply in respect of proceedings under this Act except for sections 683, 685 and 686 and subsections 655(2) to (5) and 662.1(2), which provisions apply with such modifications as the circumstances require.

Section 722 of the Criminal Code does not apply.

(9) Section 722 of the Criminal Code does not apply in respect of proceedings under this Act.

Forms.

(10) A disposition made under this section, other than a probation order may be in Form 7.

Form of Probation order.

(11) A probation order made under this section may be in Form 8 and the youth court shall specify in the order the period for which it is to remain in force.

Consent for treatment order.

22. (1) No order may be made under paragraph 20(1)(i) unless the youth court has secured the consent of the young person, the parents of the young person and the hospital or other place where the young person is to be detained for treatment.

Where consent of parent dispensed with.

(2) The youth court may dispense with the consent of a parent required under subsection (1) if it appears that the parent is not available or if the parent is not, in the opinion of the court, taking an active interest in the proceedings.

Definitions.

24. (1) In this section, "open custody" means custody in

(a) a community residential centre, group home, child care institution, or forest or wilderness camp, or

(b) any other like place or facility

designated by the Lieutenant Governor in Council of a province or his delegate as a place of open custody for the purposes of this Act, and includes a place or facility within a class of such places or facilities so designated;

"secure custody" means custody in a place or facility designated by the Lieutenant Governor in Council of a province for the secure containment or restraint of young persons, and includes a place or facility within a class of such places or facilities so designated.

Order of committal to specify type of custody.

(2) Where the youth court commits a young person to custody under paragraph 20(1)(k), it shall specify in the order of committal whether the custody is to be open custody or secure custody.

Conditions for secure custody.

(3) Subject to subsection (4), no young person who is found guilty of an offence shall be committed to secure custody unless the young person was, at the time the offence was committed, fourteen years of age or more and unless

(a) the offence is one for which an adult would be liable to imprisonment for five years or more;

(b) the offence is an offence under section 132 (prison breach) or subsection 133(1) (escape or being at large without excuse) of the Criminal Code or an attempt to commit such offence; or

(c) the offence is an indictable offence and the young person was;

- (i) within twelve months prior to the commission of the offence found guilty of an offence for which an adult would be liable to imprisonment for five years or more, or adjudged to have committed a delinquency under the Juvenile Delinquents Act in respect of such offence, or
 - (ii) at any time prior to the commission of the offence committed to secure custody with respect to a previous offence, or committed to custody in a place or facility for the secure containment or restraint of a child, within the meaning of the Juvenile Delinquents Act, with respect to a delinquency under that Act.
- (4) A young person who is found guilty of an offence and who was, at the time the offence was committed, under the age of fourteen years may be committed to secure custody if
- (a) the offence is one for which the adult would be liable to life imprisonment;
 - (b) the offence is one for which an adult would be liable to imprisonment for five years or more and the young person was at any time prior to the commission of the offence found guilty of an offence for which an adult would be liable to imprisonment for five years or more or adjudged to have committed a delinquency under the Juvenile Delinquents Act in respect of such offence; or
 - (c) the young person is found guilty of an offence under section 132 (prison breach) or subsection 133(1) (escape or being at large without excuse) of the Criminal Code to attempt such offence.
- (5) The youth shall commit a young person to secure custody unless the court considers a committal to secure custody to be necessary for the protection of society having regard for the seriousness of the

offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person.

Place of custody.

(6) A young person who is committed to custody shall be placed in open custody or secure custody, as specified in the order of committal, at such place or facility as the provincial director or his delegate may specify and may, during the period of custody be transferred by the provincial director or his delegate from one place or facility of open custody to another or from one place or facility of secure custody to another.

Transfer from secure custody to open custody.

(7) The provincial director or his delegate, may with the written authorization of the youth court, transfer a young person from a place or facility of secure custody to a place or facility of open custody.

Transfer from open custody to secure custody.

(8) Subject to subsection (9), no young person who is committed to open custody may be transferred to a place or facility of secure custody except in accordance with section 33.

(9) The provincial director or his delegate may transfer a young person from a place or facility of open custody to a place or facility of secure custody for a period not exceeding fifteen days if the young person escapes or attempts to escape lawful custody or is, in the opinion of the director or his delegate, guilty of serious misconduct.

Young person to be held separate from adults.

(10) Subject to this section, a young person who is committed to custody under paragraph 20(1)(k) shall be held separate and apart from any adult who is charged with or convicted of an offence against any law of Canada or a province.

Pre-disposition report.

(11) Before making an order of committal to custody under paragraph 20(1)(k), the youth court shall consider a pre-disposition report.

Committal to custody deemed continuous.

(12) A young person who is committed to custody under paragraph 20(1)(k) shall be deemed to be committed to continuous custody unless the youth court specifies otherwise.

Availability of place of intermittent custody.

(13) Before making an order of committal to intermittent custody under paragraph 20(1)(k), the youth court shall require the prosecutor to make available to the court for its consideration a report of the provincial director or his delegate as to the availability of a place of custody in which an order of intermittent custody can be enforced and, where the report discloses that no such place of custody is available, the court shall not make such an order.

Transfer to adult facility.

(14) Where a young person is committed to custody under paragraph 20(1)(k), the youth court may, on application of the provincial director or his delegate made at any time after the youth person attains the age of eighteen years, after affording the young person an opportunity to be heard, authorize the provincial director or his delegate to direct that the young person serve his disposition or the remaining portion thereof in a provincial correctional facility for adults, if the court considers it to be in the best interests of the young person or in the public interest, but in any such event the provisions of this Act shall continue to apply in respect of that person.

Where disposition and sentence concurrent.

(15) Where a young person is committed to custody under paragraph 20(1)(k) and is concurrently under sentence of imprisonment imposed in ordinary court, that person may serve his disposition and sentence, or any portions thereof, in a provincial correctional facility for adults or in a place of custody for young persons.

Warrant of Committal.

(16) Where a young person is committed to custody under paragraph 20(1)(k), the youth court shall issue or cause to be issued a warrant of committal, which may be in form 10.

Transfer of disposition.

25. (1) Where a non-custodial disposition has been made in respect of a young person and the young person or a parent with whom he resides is or becomes a resident of a territorial division outside the jurisdiction of the youth court that made the disposition, whether in the same or in another province, a youth court judge in the territorial division which the disposition was made may, on the application of the Attorney General or his agent or on the application of the young person or his parent with the consent of the Attorney General or his agent, transfer the disposition and such portion of the record of the case as is appropriate to a youth court in the other territorial division, and all subsequent proceedings relating to the case shall thereafter be carried out and enforced by that court.

No transfer outside province before appeal completed.

(2) No disposition may be transferred from one province to another under this section until the time for an appeal against the disposition or the finding on which the disposition was based has expired or until all proceedings in respect of any such appeal have been completed.

Transfer to a province where person is adult.

(3) Where an application is made under subsection (1) to transfer the disposition of a young person to a province in which the young person is an adult, a youth court judge may, with the consent of the Attorney General, transfer the disposition and the record of the case to the youth court in the province to which the transfer is sought, and the youth court to which the case is transferred shall have full jurisdiction in respect of the disposition as if that court had made the disposition, and the person shall be further dealt with in accordance with this Act.

Interprovincial arrangements for probation or custody.

26. (1) Where an appropriate agreement has been made between two provinces, young persons who have been placed on probation or committed to custody in one province under section 20 may be dealt with under the probation order or held in custody in the other province.

Youth court retains jurisdiction.

(2) subject to subsection (3), where a young person is dealt with under a probation order or held in custody pursuant to this section in a province other than that in which the disposition was made, the youth court of the province in which the disposition was made shall, for all purposes of this Act, retain exclusive jurisdiction over the young person as if the young person were dealt with or held within that province, and any warrant or process issued in respect of the young person may be executed or served in any place in Canada outside that province where the disposition was made as if it were executed or served in that province.

Waiver of jurisdiction.

(3) Where a young person is dealt with under a probation order or held in custody pursuant to this section in a province other than that in which the disposition was made, the youth court of the province in which the disposition was made may, with the consent in writing of the Attorney General of that province and the young person, waive its jurisdiction, for the purpose of any proceeding under this Act, to the youth court of the province in which the young person is dealt with or held, in which case the youth court in the province in which the young person is so dealt with or held shall have full jurisdiction in respect of the disposition as if that court had made the disposition.

REVIEW OF DISPOSITIONS

Automatic review of disposition involving custody.

28. (1) Where a young person is committed to custody pursuant to a disposition made in respect of an offence for a period exceeding one year, the provincial director of the province in which the young person is held in custody shall cause the young person to be brought before the youth court forthwith at the end of one year from the date of the most recent disposition made in respect of the offence, and the youth court shall review the disposition.

(2) Where a young person is committed to custody pursuant to dispositions made in respect of more than one offence for a total period exceeding one year, the provincial director of the province in which the young person is held in custody shall cause the

young person to be brought before the youth court forthwith at the end of one year from the date of the earliest disposition made, and the youth court shall review the dispositions.

Optional review of disposition involving custody.

(3) Where a young person is committed to custody pursuant to a disposition made in respect of an offence, the provincial director may, on his own initiative, and shall, on the request of the young person, his parent or the Attorney General or his agent, on any of the grounds set out in subsection (4), cause the young person to be brought before the youth court at any time after six months from the date of the most recent disposition made in respect of the offence or, with leave of a youth court judge, at any earlier time, and, where the youth court is satisfied that there are grounds for the review made under subsection (4), the court shall review the disposition.

Grounds for review under subsection (3).

(4) A disposition made in respect of a young person may be reviewed under subsection(3).

(a) on the ground that the young person has made sufficient progress to justify a change in disposition;

(b) on the ground that the circumstances that led to the committal to custody have changed materially;

(c) on the ground that new services or programs are available that were not available at the time of the disposition; or

(d) on such other grounds as the youth court considers appropriate.

No review where appeal pending.

(5) No review of a disposition in respect of which an appeal has been taken shall be made under this section until all proceedings in respect of any such appeal have been completed.

Youth court may order appearance of young person for review.

(6) Where a provincial director is required under subsections (1) to (3) to cause a young person to be brought before the youth court and fails to do so, the youth court may, on application made by the young person, his parent or the Attorney General or his agent, or on its own motion, order the provincial director to cause the young person to be brought before the youth court.

Progress report.

(7) The youth court shall, before reviewing under this section of disposition made in respect of a young person, require the provincial director to cause to be prepared, and to submit to the youth court, a progress report on the performance of the young person since the disposition took effect.

Additional information in progress report.

(8) A person preparing a progress report in respect of a young person may include in the report such information relating to the personal and family history and present environment of the young person as he considers advisable.

Written or oral report.

(9) A progress report shall be in writing unless it cannot reasonably be committed to writing, in which case it may, with leave of the youth court, be submitted orally in court.

Provisions of subsections 14(4) to (10) to apply.

(10) The provisions of subsections 14(4) to (10) apply, with such modifications as the circumstances require, in respect of progress reports.

Notice of review from provincial director.

(11) Where a disposition made in respect of a young person is to be reviewed under subsection (1) or (2), the provincial director shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent.

Notice of review from person requesting it.

(12) Where a review of a disposition made in respect of a young person is requested under subsection (3), the person requesting the review shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent.

Statement of right to counsel.

(13) Any notice given to a parent under subsection (11) or (12) shall include a statement that the young person whose disposition is to be reviewed has the right to be represented by counsel.

Service and form of notice.

(14) A notice under subsection (11) or (12) may be served personally or may be sent by registered mail and, in the case of a notice to a young person, may be in Form 11 and, in any other case, may be in Form 12.

Notice may be waived.

(15) Any of the persons entitled to notice under subsection (11) or (12) may waive the right to such notice.

Where notice not given.

(16) Where notice under subsection (11) or (12) is not given in accordance with this section, the youth court may

(a) adjourn the proceedings and order that notice be given in such manner and to such person as it directs; or

(b) dispense with the notice where, in the opinion of the court, having regard to the circumstances, notice may be dispensed with.

Decision of the youth court after review.

(17) Where a youth court reviews under this section a disposition made in respect of a young person, it may, after affording the young person, his parents, the Attorney General or his agent and the provincial director or his agent an opportunity to be heard, having regard to the needs of the young person and the interests of society,

(a) confirm the disposition;

(b) where the young person is in secure custody, by order direct that the young person be placed in open custody; or

(c) release the young person from custody and place him on probation in accordance with section 23 for a period not exceeding the remainder of the period for which he was committed in custody.

Form of disposition.

(18) A disposition made under subsection (17) may be in Form 13.

Recommendation of provincial director for probation.

29. (1) Where a young person is held in continuous custody pursuant to a disposition, the provincial director may, if he is satisfied that the needs of the young person and the interests of society would be better served if the young person were released from custody and placed on probation, cause notice in writing to be given to the young person, his parents and the Attorney General or his agent that he recommends that the young person be released from custody and placed on probation and give a copy of the notice to the youth court, and the provincial director shall include in the notice the reasons for his recommendation and the conditions that he would recommend be attached to a probation order.

Application to court for review of recommendation.

(2) A youth court shall, where notice of a review of a disposition made in respect of a young person is given under subsection (1), on the application of the young person, his parents or the Attorney General or his agent made within ten days after service of the notice, forthwith review the disposition.

Subsections 28(5), (7) to (10) and (12) to (18) apply.

(3) Subsections 28(5), (7) to (10) and (12) to (18) apply with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

Where the court does not review the disposition.

(4) A youth court that receives a notice under subsection (1) recommending that a young person be released from custody and placed on probation shall, if no application for review is made under subsection (2),

(a) release the young person and place him on probation in accordance with section 23, in which case the court shall include in the probation order such conditions referred to in that section as it considers advisable having regard to the recommendations of the provincial director, or

(b) where the court deems it advisable, make no direction under this subsection unless the provincial director requests a review under this section.

Where the provincial director requests a review.

(5) Where the provincial director requests a review under paragraph (4)(b),

(a) the provincial director shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent; and

(b) the youth court shall forthwith, after the notice required under paragraph (a) is given, review the disposition.

Form of notice.

(6) A notice given under subsection (1) may be in Form 14.

Review board.

30. (1) Where a review board is established or designated by a province for the purposes of this section, that board shall, subject to this section, carry out in that province the duties and functions of a youth court under sections 28 and 29 other than releasing a young person from custody and placing him on probation.

Other duties of review board.

(2) Subject to this Act, a review board may carry out any duties or functions that are assigned to it by the province that established or designated it.

Notice under section 29.

(3) Where a review board is established or designated by a province for the purposes of this section, the provincial director shall at the same time as any notice is given under subsection 29(1) cause a copy of the notice to be given to the review board.

Notice of decision of review board.

(4) A review board shall cause notice of any decision made by it in respect of a young person pursuant to section 28 or 29 to be given forthwith in writing to the young person, his parents, the Attorney General or his agent and the provincial director, and a copy of the notice to be given to the youth court.

Decision of review board to take effect where no review.

(5) Subject to subsection (6), any decision of a review board under this section shall take effect ten days after the decision is made unless an application for review is made under section 31.

Decision respecting release from custody and probation.

(6) Where a review board decides that a young person should be released from custody and placed on probation, it shall so recommend to the youth court and, if no application for a review of the decision is made under section 31, the youth court shall forthwith on the expiration of the ten day period referred to in subsection (5) release the young person from custody and place him on probation in accordance with section 23, and shall include in the probation order such conditions referred to in that section as the court considers advisable having regard to the recommendations of the review board.

Form of notice of decision of review board.

(7) A notice of a decision of the review board under this section may be in Form 15.

Review by youth court.

31. (1) Where the review board reviews a disposition under section 30, the youth court shall, on the application of the young person in respect of whom the review was made, his parents, the Attorney General or his agent or the provincial director, made within ten days after the decision of the review board is made, forthwith review the decision.

Subsections 28(5), (7) to (10) and (12) to (18) apply.

(2) Subsection 28(5), (7) to (10) and (12) to (18) apply, with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

Review of dispositions not involving custody.

32. (1) Where a youth court has made a disposition in respect of a young person but has not committed him to custody, the youth court shall, on the application of the young person, his parent, the Attorney General or his agent or the provincial director, made at any time after six months from the date of the disposition or, with leave of a youth court judge, at any earlier time, review the disposition if the court is satisfied that there are grounds for a review under subsection (2).

Grounds for review.

(2) A review of a disposition may be made under this section

(a) on the ground that the circumstances that led to the disposition have changed materially;

(b) on the ground that the young person in respect of whom the review is to be made is unable to comply with or is experiencing serious difficulty in complying with the terms of the disposition;

(c) on the ground that the terms of the disposition are adversely affecting the opportunities available to the young person to obtain services, education or employment; or

(d) on such other grounds as the youth court considers appropriate.

Progress report.

(3) The youth court may, before reviewing under this section a disposition made in respect of a young person, require the provincial director to cause to be prepared, and to submit to the youth court, a progress report on the performance of the young person since the disposition took effect.

Subsections 28(8) to (10) apply.

(4) Subsections 28(8) to (10) apply, with such modifications as the circumstances require, in respect of any progress report required under subsection (3).

Subsections 28(5) and (12) to (16) apply.

(5) Subsections 28(5) and (12) to (16) apply, with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

Compelling appearance of young person.

(6) The youth court may, by summons or warrant, compel a young person in respect of whom a review is to be made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

Decision of the youth court after review.

(7) Where a youth court reviews under this section a disposition made in respect of a young person, it may, after affording the young person, his parents, the Attorney General or his agent and the provincial director or his agent an opportunity to be heard,

(a) confirm the disposition;

(b) terminate the disposition and discharge the young person from any further obligation of the disposition; or

(c) vary the disposition or make such new disposition listed in section 20, other than a committal to custody, for such period of time, not exceeding the remainder of the period of the earlier disposition, as the court deems appropriate in the circumstances of the case.

New disposition not to be more onerous.

(8) Subject to subsection (9), where a disposition made in respect of a young person is reviewed under this section, no disposition made under subsection (7) shall, without the consent of the young person, be more onerous than the remaining portion of the disposition reviewed.

Exception.

(9) A youth court may under this section extend the time within which an order to perform personal or community services is to be complied with by a young person where the court is satisfied that the young person requires more time to comply with the order, but in no case shall the extension be for a period time that expires more than twelve months after the date the disposition reviewed would expire.

Form of disposition.

(10) A disposition made under subsection (7) may be in form 13.

Form of summons or warrant.

(11) A summons referred to in subsection (6) may be in Form 16 and a warrant referred to in that subsection may be in Form 17.

Review of disposition where failure to comply.

33. (1) Where a youth court has made a disposition in respect of a young person and the Attorney General or his agent or the provincial director or his delegate lays an information alleging that the informant, on reasonable and probable grounds, believes that the young person has

(a) wilfully failed or refused to comply with the disposition or any term or condition thereof, or

(b) in the case of a committal to custody under paragraph 20(1)(k) escaped or attempted to escape custody,

the youth court shall, on application of the informant made at any time before the expiration of the disposition or within six months thereafter, by summons or warrant, require the young person to appear before the court and shall review the disposition.

Subsections 28(7) to (10) apply.

(2) Subsection 28(7) to (10) apply, with such modifications as the circumstances require, in respect of reviews made under this section.

Notice of review from the provincial director.

(3) Where the provincial director or his delegate applies for a review of a disposition under subsection (1), he shall such cause notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the parents of the young person in respect of whom the disposition was made and to the Attorney General or his agent.

Notice of review from the Attorney General or his agent.

(4) Where the Attorney General or his agent applies for a review of a disposition under subsection (1), the Attorney General or his agent shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the parents of the young person in respect of whom the disposition was made and to the provincial director or his delegate.

Subsections 28(13) to (16) apply.

Subsections 28(13) to (16) apply, with such modifications as the circumstances require, in respect of notices given under subsection (3) or (4).

Decision of the youth court after review.

(6) Where the youth court reviews under this section a disposition made in respect of a young person, it may, subject to subsection (8), after affording the young person, his parents, the Attorney General or his agent and the provincial director or his agent an opportunity to be heard, and if it is satisfied beyond a reasonable doubt that the young person has

(a) wilfully failed or refused to comply with the disposition or any term or condition thereof, or

(b) in the case of a committal to custody under paragraph 20(1)(k), escaped or attempted to escape custody,

vary the disposition or make any new disposition listed in section 20 that the court considers appropriate.

Limitation on custody.

(7) No disposition shall be made under this section committing a young person to custody

(a) for a period in excess of six months, where the disposition under review was not a committal to custody or was a committal to custody that has expired; or

(b) for a period that expires more than six months after the disposition under review was to expire, where the disposition under review was a committal to custody that has not expired.

Postponement of performance of previous dispositions.

(8) Notwithstanding any other provision of this Act, where a young person is committed to custody under this section, the youth court may order that the performance of any other disposition made in respect of the young person be postponed until the expiration of the period of custody.

Prosecution under section 132 or 133 of Criminal Code.

(9) Where a disposition is reviewed under this section on the ground set out in paragraph (1)(b), the young person may not be prosecuted under section 132 or 133 of the Criminal Code for the same act and, where a young person is prosecuted under either of those sections, no review may be made by the youth court under this section by reason of the same act.

Appeals.

(10) An appeal from a disposition of the youth court under this section lies as if the order were a disposition made under section 20 in respect of an offence punishable on summary conviction.

Form of disposition.

(11) A disposition made under subsection (6) may be in Form 13.

Form of summons or warrant.

(12) A summons referred to in subsection (1) may be Form 16 and a warrant referred to in that subsection may be in Form 17.

Form of information.

(13) An information referred to in subsection (1) may be in form 18.

Government and private records

Government Records.

43. (1) A department or agency of any government in Canada may keep records containing information obtained by the department or agency

(a) for the purposes of an investigation of an offence alleged to have been committed by a young person;

(b) for use in proceedings against a young person under this act;

(c) for the purpose of administering a disposition;

(d) For the purpose of considering whether, instead of commencing or continuing judicial proceedings under this Act against a young person, to use alternative measures to deal with the young person; or

(e) as a result of the use of alternative measures to deal with a young person.

Private Records.

(2) Any person or organization may keep records containing information obtained by the person or organization

(a) as a result of the use of alternative measures to deal with a young person alleged to have committed an offence, or

(b) for the purpose of administering or participating in the administration of a disposition.

Record may be made available to specified persons and bodies.

(3) Any record kept pursuant to subsection (1) or (2) may, in the discretion of the department, agency, person or organization keeping the record, be made available for inspection to any person or body referred to in subsections 40(2) or (3) for the purposes and in the circumstances set out in those subsections.

Subsections 40(4) to (8) apply.

(4) Subsections 40(4) to (8) apply, with such modifications as the circumstances require, in respect of records kept pursuant to subsections (1) and (2).

Destruction of records

45. (1) Where a young person is charged with an offence and

(a) is acquitted, or

(b) the charge is dismissed for any reason other than acquittal, withdrawn or stayed and no proceedings are taken against him for a period of three months,

all records kept pursuant to sections 40 to 43 and records taken pursuant to section 44 that relate to the young person in respect of the alleged offence and all copies, prints or negatives of such records shall be destroyed.

(2) Where a young person

(a) has not been charged with or found guilty of an offence under this or any other Act of Parliament or any regulation made thereunder, whether as a young person or an adult,

(i) for a period of two years after all dispositions made in respect of the young person have been completed, where the young person has at any time been found guilty of an offence punishable on summary conviction but has never been convicted of an indictable offence, or

(ii) for a period of five years after all dispositions made in respect of the young person have been completed, where the young person has at any time been convicted of one or more indictable offences, or

(b) has after becoming an adult, been granted a pardon under the Criminal Records Act,

all records kept pursuant to sections 40 to 43 and records taken pursuant to section 44 that relate to the young person and all copies, prints or negatives of such records shall be destroyed.

Copy given for research or statistical purposes.

(3) Subsections (1) and (2) do not apply in respect of any copy of a record or part thereof that is given to any person pursuant to paragraph 40(3)(k), but does apply in respect of copies of fingerprints or photographs given pursuant to that paragraph.

Destruction on acquittal, etc.

(4) Any record that is not destroyed under this section because the young person to whom it relates was charged with an offence during a period referred to in that subsection shall be destroyed forthwith

(a) where the young person is acquitted, on the expiration of the time allowed for the taking of an appeal or, where an appeal is taken, when all proceedings in respect of the appeal have been completed;

(b) where no proceedings are taken against him for a period of six months, on the expiration of the six months; or

(c) where the charge against the young person is dismissed for any reason other than acquittal, withdrawn or stayed and no proceedings are taken against him for a period of six months, on the expiration of the six months.

Young person deemed not to have committed offence.

(5) A young person shall be deemed not to have committed any offence in respect of which records are required to be destroyed under subsection (1), (2) or (4).

Records not to be used.

(6) No record or copy, print or negative thereof that is required under this section to be destroyed may be used for any purpose.

Request for destruction.

(7) Any person who has under his control or in his possession any record that is required under this section to be destroyed and who refused or fails, on a request made by or on behalf of the young person to whom the record relates, to destroy the record commits an offence.

Application to delinquency.

(8) This section applies, with such modifications as the circumstances require, in respect of records relating to the offence on delinquency under the Juvenile Delinquents Act as it read immediately prior to the coming into force of this act.

Offence

Prohibition against possession of records.

46. (1) No person shall knowingly have in his possession any record kept pursuant to sections 40 to 43 or any record taken pursuant to section 44, or any copy, print or negative of any such record, except as authorized or as required by those sections.

Prohibition against disclosure.

(2) Subject to subsection (3), no person shall knowingly

(a) make available for inspection to any person any record referred to in subsection (1), or any copy, print or negative of any such record,

(b) give any person any information contained in any such record, or

(c) give any person a copy of any part of any such record except as authorized or required by sections 40 to 44.

Exception for employees.

(3) Subsection (1) does not apply, in respect of records referred to in that subsection, to any person employed in keeping or maintaining such records, and any person so employed is not restricted from doing anything prohibited under subsection (2) with respect to any other person so employed.

Offence.

(4) Any person who fails to comply with this section or commits an offence under subsection 45(7)

(a) is guilty of an indictable offence and liable to imprisonment for two years; or

(b) is guilty of an offence punishable on summary conviction.

Absolute jurisdiction of magistrate.

(5) The jurisdiction of a magistrate to try an accused is absolute and does not depend on the consent of the accused where the accused is charged with an offence under paragraph (4)(a).

APPLICATION OF THE CRIMINAL CODE

Application of Criminal Code.

51. Except to the extent that they are inconsistent with or excluded by this Act, all the provisions of the Criminal Code apply, with such modifications as the circumstances require, in respect of offences alleged to have been committed by young persons.

PROCEDURE

Part XXIV and summary conviction trial provisions of Criminal Code to apply.

52. (1) Subject to this section and except to the extent that they are inconsistent with this Act,

(a) the provisions of Part XXIV of the Criminal Code, and

(b) any other provisions of the Criminal Code that apply in respect of summary conviction offences and relate to trial proceedings

apply to proceedings under this Act

(c) in respect of a summary conviction offence, and

(d) in respect of an indictable offence as if it were defined in the enactment creating it as a summary conviction offence.

Indictable offences.

(2) For greater certainty and notwithstanding subsection (1) or any other provision of this Act, an indictable offence committed by a young person is for the purposes of this or any other Act, an indictable offence.

Attendance of young person.

(3) Section 577 of the Criminal Code applies in respect of proceedings under this Act, whether the proceedings relate to an indictable offence or an offence punishable on summary conviction.

Limitation period.

(4) In proceedings under this Act, subsection 721(2) of the Criminal Code does not apply in respect of an indictable offence.

Costs.

(5) Section 744 of the Criminal Code does not apply in respect of proceedings under this Act.