

**Source: Department of Justice Canada, Criminal Law Review --  
*Mental Disorder Project, Project Final Report,*  
Reproduced with the permission of the Minister of Public  
Works and Government Services Canada, 2008"**

MENTAL DISORDER PROJECT  
CRIMINAL LAW REVIEW

FINAL REPORT

GILBERT SHARPE  
PROJECT CHIEF

DEPARTMENT OF JUSTICE  
SEPTEMBER 1985

# I N D E X

	PAGE
1. INTRODUCTION	1
2. PSYCHIATRIC REMANDS	8
- Discussion	8
- Purposes	9
- Raising of the Remand Issue	11
- Treatment during the Remand	11
- Place of the Remand	12
- Report to the Court	13
- Duration of Remand	14
- Consent of the Accused to the Remand	15
- Role of the Other Disciplines in the Remand Process	16
- Miscellaneous	17
3. FITNESS TO STAND TRIAL	19
- Discussion	19
- Criteria	19
- Raising of the Fitness Issue	21
- Time at which Trial of the Issue should be directed	21
- Duration of the Delay Pending Trial of the Charge	23
- Nature of the Fitness Hearing	23

	<b>PAGE</b>
<b>4. INSANITY DEFENCE</b>	<b>25</b>
- Discussion	25
- Insanity Test	25
- Nature of the Verdict	26
- Who Should Raise the Issue?	27
- Diminished Responsibility	29
<b>5. AUTOMATISM AND CRIMINAL RESPONSIBILITY</b>	<b>31</b>
- Discussion	31
<b>6. DISPOSITION AND CONTINUING REVIEW</b>	<b>33</b>
- Discussion	33
- Insanity Acquittees	34
- Unfit Accused Persons	35
- Interim Order and Initial Disposition	36
- Establishing an Outer Time Limit Re: Insanity Acquittees	41
- Establishing an Outer Time Limit Re: Persons Found Unfit to Stand Trial	42
- Role of the Lieutenant Governor at Disposition	43
- Burden and Standard of Proof at Disposition	44
- Court Authorization of Treatment at the Initial Disposition Stage	46
- Role of the Board of Review and of the Lieutenant Governor at the Continuing Review Stage	47
- Composition of the Review Boards	49
- Criteria for Release	50
- Options for Review Boards	50

	PAGE
<b>6. DISPOSITION AND CONTINUING REVIEW (CONT'D)</b>	
- Powers of the Review Boards	51
- Procedures Before the Review Boards	52
- Dual Status Offenders	55
<b>7. INTERPROVINCIAL TRANSFERS</b>	57
- Discussion	57
- Purpose(s)	58
- Consent of the Receiving Jurisdiction	58
- Role of the Sending and Receiving Provinces regarding Subsequent Decisions	59
- Management of an Individual who has breached a Condition of a Warrant and who is Apprehended in Another Province	60
<b>8. THE CONVICTED MENTALLY DISORDERED OFFENDER</b>	62
- Hospital Permits (Orders)	65
<b>9. MENTALLY DISORDERED YOUNG OFFENDERS</b>	68
<b>10. STATISTICS</b>	70
<b>11. SUMMARY OF RECOMMENDATIONS</b>	71
<b>12. APPENDICES</b>	
Appendix I - Extracts from the <u>Criminal Code</u>	81
Appendix II - Extract from the <u>Penitentiaries Act</u>	98

	PAGE
<b>APPENDICES (CONT'D)</b>	
Appendix III - Extract from the <u>Young Offenders Act</u>	99
Appendix IV - Extracts from the <u>Charter</u>	100
Appendix V - Extracts from the <u>Canada Evidence Act, 1982 (Bill S-33)</u>	102
Appendix VI - A. Extracts from the <u>Ontario Mental Health Act</u>	103
B. Extracts from the <u>British Columbia Mental Health Act</u>	106

## 1. INTRODUCTION

The law's treatment of so-called mentally disordered offenders has been receiving increasing attention by the courts, mental health associations, law reform commissions and many other groups and individuals over the last decade. The Criminal Code provisions in this area are fraught with ambiguities, inconsistencies, omissions, arbitrariness, and often a general lack of clarity, guidance or direction. Unlike many other areas of criminal law, those involving mental disorder seem inextricably bound up with other disciplines, such as medicine, psychiatry, psychology, social work and hospital administration.

As part of the Criminal Law Review, the Mental Disorder Project began its work in the Fall of 1982. It oversaw both legal and social science research which resulted in the release of a Discussion Paper in late summer, 1983.

The first area that was examined in that Document dealt with remands for psychiatric assessment. Often, the first occasion on which those involved in the administration of the criminal justice system become aware that an individual who is suspected of having committed an offence may be mentally disordered occurs during the arrest process. Most provincial mental health statutes provide a mechanism to permit police officers to take such an apparently mentally disordered individual directly to a psychiatric facility for assessment. In many cases, however, such an individual is arrested and taken to jail, and it only becomes apparent there that the individual may be mentally disordered.

Currently, the Criminal Code contains an elaborate mechanism through which courts are empowered to order that an individual attend or be remanded in custody "for observation." The operation of such provisions, however, is complex. Missing from the Criminal Code is a mechanism to take a mentally disordered prisoner directly to an appropriate psychiatric facility for assessment and possibly for treatment (perhaps even prior to that individual's appearance in court) under circumstances that may not satisfy the criteria necessary for a formal remand order. During the remand process, it is unclear what is expected of hospital staff. Are they to administer treatment to render an apparently unfit person fit to stand trial? Are they to merely "observe" the individual and to prepare a report? Who can see the report? Are they to comment on an appropriate disposition where the individual is found unfit to stand trial? May they provide an opinion as to the mental state of the individual at the time of the offence? Even

where the individual may be fit to stand trial, may they comment on needed treatment following conviction? What role does the consent of the accused play in this process? These are some of the issues that were explored in the "Psychiatric Remands" part of the Discussion Paper.

The second area considered was the matter of "Fitness to Stand Trial." It is usually assumed that the determination of fitness is the primary intent of the remand provisions of the Code. What does fitness mean in this context? What should the criteria be for assessing fitness? What kind of evidence of presumed or apparent unfitness must exist before a trial on the issue of fitness may be ordered? Who must bear the burden of proof? According to what standard?

The third section of that Paper examined "The Defence of Insanity." Although there has been a great amount of jurisprudence on this subject, particularly over the last 15 years, there is still considerable debate as to what the most logical, moral and socially acceptable formulation might be. A number of models have been proposed by law reform commissions, and others are available by example in other jurisdictions. Some of the more important ones were examined. Whatever definition of insanity is ultimately adopted, the operation of the defence will involve a number of thorny procedural and evidentiary questions. In addition to concerns regarding the appropriate test, is the matter of the most suitable form of the verdict.

The fourth section dealt with "Automatism and Criminal Responsibility." A basic question considered in that part of the Discussion Paper is whether automatism should be a separate defence in criminal law and, if so, how the defence should be formulated. The relationship between automatism and the defences of insanity and intoxication were also considered, as were such questions as burden of proof and disposition.

The largest single part of the Document dealt with the "Disposition and Continuing Review" of persons found unfit to stand trial or not guilty by reason of insanity. Currently, when a person is found unfit to stand trial or not guilty of an indictable offence on account of insanity, the court must order custody pending an initial disposition by a lieutenant governor, regardless of the nature of the offence or the dangerousness of the individual. There is currently no opportunity for a hearing to determine the appropriateness of this order. While the lieutenant governor of a province has three options available with regard to the type of disposition that is made, in most instances, it is ordered that such person be kept in safe



custody, rather than be discharged either conditionally or absolutely. There is currently no opportunity for the accused to make any representations to the lieutenant governor and no procedure that must be followed by the lieutenant governor in reaching a decision. It is often the case that the actual decision is delegated to an administrative officer within the government, who may act with very little input as to the most appropriate disposition for the individual.

Under the Criminal Code, review of persons detained pursuant to orders of provincial lieutenant governors is left to the discretion of the provinces. The province may establish a multi-disciplinary board that, once established, must conduct an annual review and advise the lieutenant governor of its recommendations. The lieutenant governor is not obliged to even consider, let alone follow, these recommendations. No procedures are established in the Code for these boards to guide them in the conduct of their reviews. In fact, there are great disparities in the procedures adopted by the different provincial boards.

Only the lieutenant governor of a province can ultimately permit such an individual to enter the community and eventually vacate his or her warrant. Such an individual may, therefore, be subject to indeterminate or indefinite confinement "at the pleasure of the lieutenant governor."

Another area that was examined was that of "Interprovincial Transfers" of persons who are subject to detention under a warrant of the lieutenant governor. It is currently not clear to what extent the views of the receiving province, as distinct from the receiving facility, must be sought prior to the transfer occurring. In addition, the Code does not indicate which province and which board of review and lieutenant governor has continuing jurisdiction over the individual once he or she has been transferred. While the current basis for transfer is the rehabilitation of the individual, there is no scope for that individual to consent to the transfer; nor is it clear whether the receiving province may unilaterally release the individual as part of the rehabilitation process, without the permission of the sending province.

The current mechanism for interprovincial transfer (based on informal interprovincial agreement) requires that a special warrant be signed by an officer authorized for that purpose by the lieutenant governor of the sending province, such warrant being necessary to effectuate the transfer. This Code provision suggests that the lieutenant governor himself/herself may not have sufficient authority by his or

her own order or warrant to provide for the transfer and to authorize the detention of the transferred individual in the receiving province. One implication of this interpretation would be that an individual who is subject to a "safely keep" warrant of the lieutenant governor of a province and who escapes from that province cannot be arrested in another province because the warrant of the lieutenant governor is only effective in the province where it originated. The potentially disastrous consequences of such an interpretation are obvious. It has been suggested that this is one ambiguity that should be clarified.

Another section dealt with the matter of "The Convicted Mentally Disordered Offender." Currently, s.546 of the Criminal Code permits the lieutenant governor of a province to order that a mentally disordered prisoner in a provincial prison "be removed to a place of safekeeping...." That order may survive the termination of the prisoner's sentence. One difficulty that flows from the restriction of this provision to persons serving sentences in provincial prisons is of particular concern. On occasion, persons who may be mentally disordered and dangerous are released on mandatory supervision from federal penitentiaries. Although in some circumstances provincial civil commitment statutes may be of assistance, the principle behind s.546 and the appropriateness of extending it to mentally disordered prisoners in federal penitentiaries was considered. In this regard, the scope of s.19 of the Penitentiaries Act was reviewed.

One area that was also considered involved the possibility of permitting so-called "hospital orders" for convicted offenders. While this subject may have been more appropriately dealt with as part of the sentencing paper, it was decided to consider it under the topic of mental disorder because it does involve a direct disposition to a psychiatric facility where the specific criteria are satisfied. Hospital orders are employed in Great Britain. Indeed, there is some evidence to indicate that because of the hospital order option (and possibly also because of the defence of diminished responsibility) very few persons are currently found insane or unfit to stand trial in Britain. Briefly, this option would extend the range of alternatives available to a trial judge following conviction. For an individual whose current mental disorder was not sufficiently serious to prohibit him or her from effectively participating in the trial process, or to give rise to a successful defence of insanity, there may be cases where a hospital order would be more appropriate than a prison sentence. For example, where evidence demonstrates that the offender would likely benefit from treatment in a psychiat-

ric facility and might significantly deteriorate if sent to prison (and where probation would not be appropriate), it may be argued that the court should have the option of sentencing him or her to a term in an appropriate psychiatric hospital that is willing to receive him or her.

The final matter that is considered in the paper deals with "The Mentally Disordered Young Offender." Insane or unfit young people who commit "criminal" acts have generally been dealt with in a similar fashion to adults. While the number of young persons placed on warrants of the lieutenant governor is relatively small, there are many who feel that greater protections and provisions, tailored to the special needs of young people, should be developed for mentally disordered young offenders.

A guiding force for the Criminal Law Review is the Government of Canada publication, The Criminal Law in Canadian Society (CLCS). While the Law Reform Commission of Canada's 1976 Report to Parliament on Mental Disorder in the Criminal Process is a most helpful guide in directing appropriate alternatives for consideration in this area, the CLCS document establishes a blueprint from which much of the philosophy behind the discussion in this paper flows. Therefore, it may be useful at the outset to review some of its guiding principles.

The central principle set out in the CLCS document is that the criminal law should be used with restraint. The least restrictive form of intervention necessitated in the circumstances should be used. The CLCS document discusses at length the need for an appropriate balance "between individual liberties and the provision of adequate powers for the state to allow for effective crime prevention and control...."

There is a recurring reference through the CLCS document to the need for procedural safeguards to ensure that individual rights are protected against unwarranted intrusion by the state. While it may be argued that there is no need to define all of the above rights in the Code, one must be mindful of an important guiding principle of the CLCS document that "where 'liberty' is at risk, statutory definition of one's rights is fundamental and necessary". Additional support for an inclusion of procedural protections may be found in the CLCS document's reference to such important existing principles as "the right to a fair hearing before an independent and impartial adjudicator...."

The CLCS document establishes as another guiding principle the notion that persons found guilty of similar offences should receive similar sentences, where the relevant circumstances are similar. This concept should also be applied to the disposition of persons found unfit to stand trial or not guilty by reason of insanity.

Another extremely important consideration in the Criminal Law Review has been the Canadian Charter of Rights and Freedoms. As the CLCS document points out:

"[I]mplementation of the principles and rights enshrined in the Canadian Charter of Rights and Freedoms is of special importance. Certain aspects of the law may require amendment to comply with the Charter, and examination of both substantive and procedural components of the existing law has already begun. In addition, it will be a continuing duty to scrutinize proposals for changes to the law in order to ensure compliance with the Charter."

Of particular significance to the mental disorder area of the criminal law are those provisions of the Charter dealing with fundamental justice (s.7), arbitrary detention (s.9), cruel and unusual treatment (s.12), and equality before the law (s.15(1)).

In the interest of promoting objective discussion, the Discussion Paper made no recommendations. It set out the major issues, alternatives, and advantages and disadvantages to those alternatives.

Following the publication and distribution of the Discussion Paper, extensive consultations were conducted with provincial governments, with provincial mental health review boards that advise lieutenant governors and with major national and provincial organizations and associations having an interest in the law and mental disorder. Much useful feedback was obtained from these consultations.

It was recognized by those consulted that the Federal Government has an important, continuing role in this area as part of its responsibility in regard to crime prevention and the protection of the public.

The consultations revealed that many individuals and groups would support greater clarification in the Code in such potentially contentious areas as regulating the giving of psychiatric treatment on remands, and specifying that the

Crown has a role in raising fitness and insanity so long as the Disposition and Review aspects of the process were substantially altered to provide a system that diminishes opportunities for arbitrariness and increases sensitivity towards, and is more responsive to, the particular needs and circumstances of the individual.

In the consultations many felt that it was important to introduce the Code amendments with a Preamble to the Bill, similar to the approach taken in the The Criminal Law Reform Act, 1984 (Bill C-19), setting out a statement of such guiding principles as the use of the least restrictive alternative in the circumstances (cf. the CLCS document as summarized on pp. 7-12 inclusive of the Discussion Paper).

Following the consultations on the Discussion Paper, the Mental Disorder Project published a Draft Report in May, 1984. The Draft Report (which for the sake of brevity did not repeat all the options set out in the Discussion Paper) discussed the problems and main options and considerations in the light of what was learned from the consultations. It also offered recommendations for dealing with the problems except in those circumstances where more work appeared to be necessary. The Draft Report was widely distributed among interested groups and individuals and was the main agenda item at the 10th International Congress on Law and Psychiatry held in June, 1984, and at the annual meeting of the Lieutenant Governors' Advisory Review Boards in October, 1984. In all, approximately twenty formal responses to the Draft Report were received, as well as a number of informal ones. All of those comments have been carefully considered in the preparation of the Final Report of the Mental Disorder Project, and a number of amendments have been made to the text and recommendations as found in the Draft Report. In the view of the members of the Mental Disorder Project, its Final Report is the better for the thoughtful comments and criticisms received through the consultation process.

## 2. PSYCHIATRIC REMANDS

### Discussion

The mental state of an accused person may be relevant to various issues that may arise in the course of a criminal trial. The Criminal Code currently contains several near-identical provisions which authorize the "observation" of persons thought to be suffering from mental disorder, such observation orders being colloquially referred to as "psychiatric remands". These provisions contain a mechanism through which courts are empowered to order that an individual attend or be remanded in custody "for observation". The operation of such provisions, however, is complex. Missing from the Criminal Code is a mechanism to take a mentally disordered accused person directly to an appropriate psychiatric facility for assessment and possibly for treatment (perhaps even prior to that individual's appearance in court) under circumstances that may not satisfy the criteria necessary for a formal remand order.

During the remand process, it is also unclear what is expected of hospital staff. For example, are they to administer treatment to render an apparently unfit person fit to stand trial? Are they to merely "observe" the individual and to prepare a report? Who can see the report? Are they to comment on an appropriate disposition, should the individual be found unfit to stand trial? May they provide an opinion as to the mental state of the individual at the time of the offence? Even where the individual may be fit to stand trial, may they comment on needed treatment following conviction? What role does the consent of the accused play in this process? Who should be permitted to seek the accused person's remand?

To sum up, the Criminal Code is not explicit about the purposes served by psychiatric remands. Although there are several possible purposes for which they may be used, there would appear to be a need for explicit authority for, and limits on the use of psychiatric remands in criminal proceedings.

Additionally, the Code is not sufficiently clear as to when remands should be authorized; the place to which persons should be remanded; who should be permitted to seek the remand; and the evidence that is required by the court.

Twenty-five issues were considered in the larger document which comprehensively considered all aspects of psychiatric remands, but only those dealing with:

- Purposes;
- Raising of the remand issue;
- Treatment during the remand;
- Place of the remand;
- Report to the court;
- Duration of the Remand;
- Consent of the accused to the remand; and
- Role of other disciplines in the remand process;

will be considered here.

### Purposes

A significant number of purposes or grounds for which psychiatric remands could be ordered were considered by the Mental Disorder Project and were reviewed throughout consultations.

Currently, there is no provision in the Code expressly authorizing remand for the purpose of determining mental status at the time of the offence. Such determinations are, however, often made during remand on the question of fitness. This provision would permit the court to remand an accused in the absence of current mental disorder to determine whether an ongoing mental disorder giving rise to a section 16 issue was prevalent at the time the offence was committed.

When the court makes a finding that the accused is not guilty of an indictable offence on account of insanity, or that the accused is unfit to stand trial, the judge must order the accused to be held in custody until the pleasure of the lieutenant governor is known. There is currently no formalized structure to enable the lieutenant governor to gain evidence which would assist with an appropriate disposition order. If, as we suggest later, the court makes the initial disposition in lieu of the lieutenant governor, it would be useful to have the ability to remand an individual to obtain specific data regarding the most appropriate disposition where a psychiatric disorder has been identified. This would necessitate a second remand where the information obtained on the "fitness" or "insanity" remand was not sufficient to assist in making a disposition decision.

Many who were consulted supported the view that the Code should provide clear statutory authority for the purpose of assessing the accused person's mental condition in cases where it may be relevant to one or all of the following:

- (a) to determine the fitness of the accused to stand trial;
- (b) to determine the accused's mental state at the time of the alleged offence;
- (c) to determine the appropriate disposition where the accused has been found
  - unfit to stand trial
  - not guilty (not responsible) by reason of insanity (mental disorder) [see recommendations 19 and 20]
  - guilty, but apparently suffering from a mental disorder that may require treatment under a hospital order.

There was very little support for extending the purposes for remand to include gathering information to assist in determining:

- the question of bail;
- the question of whether the accused is a "dangerous offender" for the purpose of Part XXI of the Code;
- the accused's capacity to make an oath;
- the accused's credibility as a witness or a deponent; and
- the question of whether withdrawal of the charges is appropriate.

Essentially, there appeared to be substantial consensus that the only purposes which should be codified are those dealing with fitness, insanity, and disposition.

It was also suggested that regulations under the Code include appropriate forms, setting out the different purposes of such remands so the judges could simply check the appropriate box.

1. **IT IS RECOMMENDED THAT THE CRIMINAL CODE PROVIDE STATUTORY AUTHORITY TO SEEK REMANDS FOR THE PURPOSES OF DETERMINING: THE FITNESS OF THE ACCUSED TO STAND TRIAL; THE ACCUSED'S MENTAL STATE AT THE TIME OF THE ALLEGED OFFENCE; AND THE APPROPRIATE DISPOSITION WHERE THE ACCUSED HAS BEEN FOUND UNFIT TO STAND TRIAL, NOT GUILTY (NOT RESPONSIBLE) BY REASON OF INSANITY (MENTAL DISORDER) OR**



**GUILTY BUT APPARENTLY REQUIRING HOSPITAL CARE FOR A MENTAL DISORDER. IT IS ALSO RECOMMENDED THAT APPROPRIATE FORMS BE PROVIDED TO EXPEDITE THE PROCEDURE.**

### Raising of the Remand Issue

Currently, there is no express provision specifying those persons who may seek the remand of the accused. The case-law suggests, however, that the remand may be sought by the accused, by the Crown, or by the court itself.

Generally, views pertaining to who should be allowed to raise the issue of psychiatric remand were mixed, depending on the group with whom the consultation was held.

While most Crowns felt that the court, Crown, or defence should all be allowed to raise the issue, some defence counsel expressed the view that it would be advantageous to provide for an opportunity to hold a hearing as to whether there should be a remand where the Crown seeks the remand. However, so long as appropriate protections are legislated as conditions precedent to the remand, it may not be necessary to hold a hearing in all cases (e.g., Recommendation # 7).

- 2. IT IS RECOMMENDED THAT THE CRIMINAL CODE PROVIDE THAT THE CROWN, DEFENCE OR THE COURT ITSELF SHOULD BE ABLE TO SEEK A PSYCHIATRIC REMAND, BUT THAT THE CROWN BE ABLE TO DO SO ONLY IN RELATION TO PROCEEDINGS BY WAY OF INDICTMENT.**

### Treatment during the Remand

Under the present system, the matter of treatment is governed by the common law and the provisions of provincial statutes. Because the persons being dealt with have entered the mental health stream through the criminal justice system, however, the question naturally arises as to whether all aspects of the manner in which they are dealt with should not be regulated in the Criminal Code. Also, in some provinces, provincial legislation may not go far enough since it may not permit the compulsory treatment of persons on remand under the Code. Some argued, however, that there is no reason why persons sent for assessment by the court should be in a position different from that of ordinary psychiatric patients as regards the general requirement for voluntary, informed consent, where they are mentally competent to provide it.

The issue as to whether treatment should be rendered throughout the course of a psychiatric remand was generally supported where fitness is to be achieved, regardless of whether the

accused consents. While some expressed concern about the right of the accused to refuse treatment, it was noted that many of these individuals are not mentally competent to consent to necessary treatment and they usually do not have a legal guardian who can provide such consent.\*

It was the majority view that if the court is permitted to authorize treatment, then procedural safeguards should be set out to avoid inappropriate use of such treatment provisions. Protections such as those set out in section 35 of the Ontario Mental Health Act might be considered here. It may be appropriate to consider, as one of these safeguards, placing some restriction on the kind of treatment that can be authorized, e.g., prohibiting the use of electroconvulsive shock therapy.\*\*

On consultation, most were of the opinion that the court should be able to authorize treatment under special circumstances.

3. IT IS RECOMMENDED THAT THE CRIMINAL CODE PROVIDE THE COURT WITH THE AUTHORITY TO PERMIT TREATMENT, UNDER SPECIAL CIRCUMSTANCES, AND ONLY IN "FITNESS" CASES, REGARDLESS OF WHETHER THE ACCUSED CONSENTS, FOLLOWING ASSESSMENT BY A PHYSICIAN WHICH INDICATES THAT SUCH TREATMENT WILL LIKELY RENDER THE ACCUSED FIT TO STAND TRIAL WITHIN THE FORMAL REMAND PERIOD AND THAT WITHOUT SUCH TREATMENT THE ACCUSED IS LIKELY TO REMAIN NOT FIT TO STAND TRIAL. THE ACCUSED MAY, HOWEVER, CHALLENGE SUCH AN APPLICATION AND CALL INDEPENDENT MEDICAL EVIDENCE ON THE ISSUE.

### Place of the Remand

Under current Criminal Code provisions, the court may order the accused to attend for observation "at a place or before a person specified in the order...." When remanded in custody,

---

\*The 1979 study paper "Consent to Medical Care", of the Protection of Life Project of the Law Reform Commission of Canada should be considered on the general topic of consent to treatment.

\*\*The issue of authorizing treatment is more fully discussed on pp. 38-40 of the Discussion Paper.

the accused may be placed in "such custody as the [justice, court, judge, magistrate, etc.] directs...." Presumably, therefore, the place of observation may be anywhere from a psychiatric facility to a jail or prison. Although the remand may now be non-custodial, it would be consistent with the least restrictive alternative principle set out in the Criminal Law in Canadian Society to specify that the psychiatric remand must be non-custodial unless the accused consents to remand in custody, or there are strong reasons for keeping the accused in custody. This issue will have to be resolved in the context of bail.

In order to make clear provision in this regard,

**4. IT IS RECOMMENDED THAT THE CRIMINAL CODE SPECIFY THAT PSYCHIATRIC REMANDS BE NON-CUSTODIAL UNLESS:**

- (a) the accused consents to a remand in custody;
- (b) the accused is otherwise required to be detained in custody; or
- (c) the court is satisfied that detention of the accused is necessary for purposes of a proper assessment of the accused's mental condition, or because evidence indicates that bail should be refused in this case.

**Report to the Court**

Although the current general practice is for both Crown and defence to receive copies of a mental status report following a remand, there is no Code provision that requires such reports to be provided. It may be essential for counsel to have this material to prepare for the trial of the issues of fitness to stand trial, insanity at the time of the offence, or disposition.

Although it may be argued that the prosecution should not have automatic access to a report that may, in addition to containing information relevant to the issues of fitness or insanity, contain information that directly or indirectly incriminates the accused, it was noted that this difficulty may be alleviated to a great extent by the limited "psychiatric privilege" created by s. 165 of Bill S-33. Another kind of approach to the "privilege" issue may be seen in s.29(6) and (7) of the Ontario Mental Health Act and

s.13(6)(b) of the Young Offenders Act, which provide for an exception to full disclosure where medical evidence indicates that the accused (or a third person) may be harmed by the disclosure.

**5. IT IS RECOMMENDED THAT THE CRIMINAL CODE PROVIDE THAT NOTWITHSTANDING CONFIDENTIALITY REQUIREMENTS, A REPORT BE PROVIDED TO THE COURT WHICH IN TURN SHALL PROVIDE IT TO BOTH CROWN AND DEFENCE.**

### Duration of the Remand

While no minimum period is stipulated, all Criminal Code provisions that allow for remand in custody for observation specify that such remand may normally only be "for a period not exceeding thirty days...." The issue of duration is important for several reasons. While the current provisions are flexible in that they provide inter alia for custodial remands for up to 30 days (or even 60 days in exceptional circumstances) and specify no minimum remand period (thus allowing for very short remands, where appropriate), in practice, the maximum period is often ordered, whether it is required or not. The result may be unnecessary detention. Conversely, there may be instances in which a longer remand than that which is currently provided for may be appropriate, although this need may not become apparent until the thirty day remand is about to expire.

During the consultations, views regarding length of the remand were mixed. Some were of the view that the issue as to the duration of the remand was directly related to that of the purpose for the remand. For example, where the purpose is to determine fitness, in most cases a remand of three clear days is adequate and should be the maximum unless the prosecutor and the accused agree to an initial remand for a longer period. This brief assessment should be permissible even without the production of medical evidence indicating reason to believe that the accused is mentally ill. Where the purpose relates to achieving fitness, however, then it may be necessary to provide for a longer period, since this may involve a course of treatment, although some argued that this really constitutes a form of disposition. Moreover, in some circumstances it may be necessary to keep the accused in hospital until the day of trial to ensure that he or she remains fit. The Code requires amendment so that express authority to keep the accused in hospital until trial is possible.

6. IT IS RECOMMENDED THAT THE REMAND BE ONLY FOR THAT TIME NECESSARY TO ACHIEVE THE PURPOSE, WITH 30 DAYS REPRESENTING THE MAXIMUM.
7. IT IS RECOMMENDED THAT, IN THE ABSENCE OF AN AGREEMENT TO THE CONTRARY BETWEEN THE PROSECUTOR AND THE ACCUSED, A REMAND FOR THE PURPOSE OF DETERMINING FITNESS TO STAND TRIAL SHOULD BE NO LONGER THAN THREE CLEAR DAYS, AND THAT THERE SHOULD BE NO REQUIREMENT OF MEDICAL EVIDENCE OF MENTAL ILLNESS AS A CONDITION OF THIS THREE-DAY REMAND.
8. IT IS RECOMMENDED THAT WHERE THE DEFENCE OR THE CROWN SUBMITS THAT A PERIOD OF REMAND LONGER THAN THE USUAL 30 DAYS IS REQUIRED, THE CRIMINAL CODE SHOULD PROVIDE FOR THE COURT, JUSTICE OR MAGISTRATE TO AUTHORIZE ONE 30 DAY EXTENSION.
9. IT IS RECOMMENDED THAT THE CRIMINAL CODE PROVIDE EXPRESS AUTHORITY TO KEEP THE ACCUSED IN HOSPITAL UNTIL TRIAL WHERE THERE ARE REASONABLE GROUNDS TO BELIEVE THAT HE OR SHE HAS BECOME FIT BUT MAY BECOME UNFIT AGAIN IF RETURNED TO JAIL.

#### Consent of the Accused to the Remand

Under the present Criminal Code provisions, there is no requirement for the consent of the accused to a psychiatric remand. Since all that is currently being expressly authorized is "observation" (as contrasted with treatment or examination), it is arguable that consent is a non-issue. Even if examination and treatment were expressly authorized, as the law prohibits the conviction of persons who are currently unfit to stand trial or who were insane at the time of the offence, the accused should not be able to prevent the court from making this determination.

It was generally agreed by the majority of those consulted that this is a valid position. By providing for non-consensual remands, this would protect the accused person's right not to be tried while unfit.

10. IT IS RECOMMENDED THAT THE STATUS QUO BE MAINTAINED IN THAT THE CONSENT OF ACCUSED PERSONS NOT BE A PREREQUISITE TO THE ORDERING OF PSYCHIATRIC REMANDS.

### Role of Other Disciplines in the Remand Process

Assuming that the examination/assessment of an accused is permitted, what provision should be made with regard to the kind of evidence necessary to order the remand and with regard to those persons authorized to conduct the examination/assessment?

The Code usually requires the evidence of a medical practitioner before ordering a 30 day remand. The current Code provisions are silent regarding who may conduct the assessment and therefore allow for flexibility in this regard. However, practice usually indicates that only physicians and psychiatrists are directly responsible for such assessments. Specifying those persons authorized to conduct the examination/assessment might promote uniformity in the quality of the examination assessment and would limit the category of professionals allowed to conduct examinations/assessments of accuseds on remand. Further, it has been argued that matters such as diagnosis and treatment can only be accurately determined by a physician. Psychiatrists, with whom consultations were conducted were of the view that since many psychiatric illnesses may have both a psychological and a physiological etiology, a physician's input is essential in the assessment phase. They argued that only physicians can accurately diagnose mental illness and detect underlying physical ailments. In addition, they indicated that accurate prognosis requires the skills of physicians. They also advised that it may well result in a waste of valuable resources to permit a remand or an ultimate disposition based on the evidence of someone other than a physician when the disposition is to a hospital where a physician's input may then be obtained for the first time.

This issue has been of considerable concern to non-medical disciplines, particularly to clinical psychologists, who are of the view that the kind of assessment required for psychiatric remand and during the remand is such that it does not necessarily require the expertise of the medical profession. In many such assessments on remand today, clinical psychologists are directly involved, although the final report to the court is usually signed by a physician.

Many skilled mental health professionals who are not physicians indicated, that they in fact possess the abilities required to perform such assessments and that a physician is usually involved as part of the team in any event and that requiring medical input in the Code does not fairly reflect the realities of the assessment process. They argued that should psychiatric input be required, then such input could be obtained on a consultation basis. Moreover, they argued that courts have generally had little difficulty qualifying

experts, and where medical evidence is required it can be insisted upon in individual cases. They pointed out that most physicians who are not psychiatrists have generally fewer skills than non-physician mental health professionals regarding the performance of such assessments and that requiring a physician's input in the Code makes little sense. They further indicated that there is generally a paucity of physicians or psychiatrists in Canada who are in fact qualified to conduct such assessments. Furthermore, fewer medical students are choosing forensic psychiatry as a speciality, and it was suggested that retaining or expanding the Code provisions in regard to the role of physicians would not realistically prepare for the future.

11. IT IS RECOMMENDED THAT THE CRIMINAL CODE NOT REFER TO THE KIND OF EVIDENCE REQUIRED BY THE COURT BUT MERELY INDICATE THAT, BASED ON THE EVIDENCE OBTAINED DURING THE BRIEF ASSESSMENT, THE COURT MUST HAVE REASONABLE GROUNDS TO BELIEVE THAT THE MENTAL STATE OF THE ACCUSED IS SUCH THAT A REMAND IS NECESSARY. THE COURT, WITH INPUT FROM THE PARTIES, WILL THEN DECIDE UPON THE BEST EVIDENCE NECESSARY FOR IT TO REACH A DECISION TO ORDER A REMAND AND ON DECISIONS INVOLVING FITNESS, INSANITY AND DISPOSITION.
12. IT IS RECOMMENDED THAT THE STATUS QUO BE MAINTAINED IN THAT THE CRIMINAL CODE REMAIN SILENT AS TO WHO CAN CONDUCT THE EXAMINATION/ASSESSMENT, THEREBY PERMITTING THE COURT TO ACCEPT WHATEVER EVIDENCE IT DEEMS APPROPRIATE.

### Miscellaneous

Other suggestions were made during the consultations and were accepted as appropriate. These include specifying in the regulations under the Code appropriate notice provisions re remand hearings, and locating the remand provisions in the area of the Code dealing with specific issues where remand for mental disorder may be appropriate, rather than appearing together in one section.

In addition there was general support for inclusion in the Canada Evidence Act of provisions relating to disclosures made against interest. It is important to foster full co-operation on the part of persons remanded so that the treatment team can effectively assess and treat individuals. Defence counsel sometimes advise their clients not to co-operate during a psychiatric remand because of the absence of legislative protections. Most defence counsel and a number of

psychiatrists and psychologists were of the view that s. 165 of Bill S-33, the proposed new Canada Evidence Act, does not provide adequate protection to overcome this reluctance to cooperate.

In the light of these concerns,

13. IT IS RECOMMENDED THAT THE PRIVILEGE PROPOSED BY SECTION 165 OF BILL S-33 BE EXPANDED TO PROTECT THE ACCUSED AGAINST THE USE IN COURT OF STATEMENTS MADE BY HIM AS PART OF A COURT-ORDERED MENTAL EXAMINATION, OBSERVATION OR ASSESSMENT TO A DULY QUALIFIED MEDICAL PRACTITIONER OR CLINICAL PSYCHOLOGIST (OR SOMEONE WORKING UNDER THEIR DIRECTION), EXCEPT WHERE THE PROPOSED USE IS IN RELATION TO (a) THE ISSUE OF THE FITNESS TO STAND TRIAL, (b) AN ISSUE OF SANITY OR MENTAL CONDITION RAISED BY THE ACCUSED; (c) AN ALLEGATION THAT THE ACCUSED MADE A PREVIOUS INCONSISTENT STATEMENT; OR (d) A CHARGE OF PERJURY.



### 3. FITNESS TO STAND TRIAL

#### Discussion

It is generally accepted that a defendant should not go to trial if, due to mental disability, he or she is unable to understand the criminal proceeding or is unable to participate in his or her defence. The mental state of an accused may be relevant to a number of issues that may arise in the course of a criminal trial.

It is usually assumed that the determination of fitness is the primary intent of the remand provisions of the Code. What does fitness mean in this context? What should the criteria be for assessing fitness? What kind of evidence of presumed or apparent unfitness must exist before a trial on the issue of fitness may be ordered? Who should bear the burden of proof? According to what standard?

The most significant criticism of the current fitness provisions concerns the fact that an accused may be found unfit and be subjected to the possibility of indefinite confinement without the Crown having made out a prima facie case of guilt. The potential for unfairness is of greatest concern when such an accused person suffers from a chronic condition, such as mental retardation, that is likely to render him or her permanently unfit to stand trial.

#### Criteria

The Law Reform Commission of Canada recognized that there has been some confusion in regard to the purpose of the fitness rule. In the Commission's view, the purpose of the fitness rule is to promote fairness to accused persons by protecting their right to defend themselves, and by ensuring that they are appropriate subjects for criminal proceedings (Recommendation #9). The Commission suggested that the procedure for determining fitness should be formulated so as to be in accord with this interpretation. However, the meaning of the word "fairness" in our present context is susceptible of conflicting interpretations, depending on whether one views it as "fairer" to err on the side of fitness or unfitness.

#### i) "Insanity"

Under the present law, unfitness must be due to "insanity," a vague and undefined concept. The trend in Canadian jurisprudence has been to restrict the application of the word "insanity" to mental disorder. Mental retardation has been held to fall within the definition of "insanity" for the purpose of

the Code's fitness provisions. However, our courts seem most frequently to have included psychotic disorders within its meaning. This is not to say, however, that psychotic accused persons are invariably found unfit when the issue is tried. As the wording of the Code provisions suggests, a finding of unfitness requires the "insanity" to have rendered the individual incapable of "conducting his defence."

14. IT IS RECOMMENDED THAT THE TERM "MENTAL DISORDER" (DEFINED AS A DISEASE OR DISABILITY OF THE MIND) BE SUBSTITUTED FOR THE TERM "INSANITY" WITH REGARD TO FITNESS.

ii) "Unfitness"

The Code does not define what abilities are necessary in order for one to conduct one's defence, resulting in a lack of uniformity in the approaches taken in the case law. In addition, the Code's failure to specify the criteria on which fitness is to be judged makes assessment difficult for mental health professionals and contributes to the conflicts in psychiatric opinion that may discredit psychiatric evidence. In light of the extreme vagueness of the Code's current concept of fitness, it is possible that the present provisions might be attacked under s. 7 of the Charter of Rights and Freedoms, which guarantees that "Everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice."

During our consultations, some were of the view that generally it would be appropriate to articulate more clearly the criteria for fitness. Others felt that if we limited the criteria to a strict set of questions, this could result in insufficient flexibility. There was significant support amongst psychiatrists for codification, using a modified version of the Law Reform Commission's recommendations that were set out as one of the alternatives in the Discussion Paper (Recommendation #13). On the basis of the opinions expressed by the majority of our consultants,

15. IT IS RECOMMENDED THAT THE CRIMINAL CODE PROVIDE THAT A PERSON IS UNFIT TO STAND TRIAL WHERE BECAUSE OF MENTAL DISORDER HE IS INCAPABLE (1) OF UNDERSTANDING THE NATURE OR OBJECT OF THE PROCEEDINGS AGAINST HIM; (2) OF UNDERSTANDING THE POSSIBLE CONSEQUENCES OF THE PROCEEDINGS, OR (3) OF COMMUNICATING WITH COUNSEL. THE COURT SHOULD, HOWEVER, RETAIN SOME DISCRETIONARY POWER TO FIND AN ACCUSED UNFIT TO STAND TRIAL FOR OTHER REASONS ATTRIBUTABLE TO MENTAL DISORDER.

### Raising of the Fitness Issue

The Criminal Code is silent as to who may raise the issue of fitness. It is, therefore, generally assumed that the issue may be raised by the defence, the Crown or by the court itself.

On consultation, views were mixed in regard to this issue. It was suggested by some defence counsel that the Crown should not be able to raise the issue for it may tempt the Crown to prove unfitness rather than proving its case, where the former is easier than the latter. It was suggested that procedural safeguards should exist if the Crown is to be allowed to raise the issue.

Crowns, on the other hand, were of the strong view that there is an obligation on everyone (i.e., Crown, defence, judge) to put into issue the matter of fitness as soon as it appears.

Allowing the issue of fitness to be raised by the Crown, the defence or the court (Law Reform Commission of Canada Recommendation #15), would also be consistent with the right of accused persons not to be convicted without a fair trial (cf. s. 2(e) of the Bill of Rights and s. 7 of the Charter), for in many instances the unrepresented accused may be too disordered to raise the issue for himself or herself.

16. **IT IS RECOMMENDED THAT THE CRIMINAL CODE SPECIFY THAT THE ISSUE OF FITNESS MAY BE RAISED BY THE CROWN, BY THE DEFENCE OR BY THE COURT.**

### Time at which Trial of the Issue should be Directed

It has been argued that fairness to the accused demands that the issue of fitness be considered at the earliest possible stage of the proceedings in order that an unfit accused person not be subjected to any part of the criminal trial. On the other hand, it has also been argued that fairness to the accused demands that he or she not be subjected to a trial on the issue of fitness unless the Crown has established a prima facie case of guilt, and there is not a defense to the charge on the evidence.

The most significant criticism of the current fitness provisions is that relating to finding someone unfit and possibly subjecting them to indefinite confinement without the Crown having first made out a prima facie case of guilt. This was also of concern to the Law Reform Commission of Canada (Recommendation #18).

Some advised that for indictable offences, the fitness issue should not be capable of being raised until after the preliminary inquiry. It was suggested that with regard to summary conviction offences, there should be a more stringent requirement that all of the evidence be in before the fitness issue can be considered. (It was suggested that not very many cases would be involved here.) It was also proposed that either one could proceed with the trial in all cases and establish the issue of guilt first, or one could deal with the fitness issue as soon as it arises and the matter of fairness could be dealt with at the disposition stage of persons found unfit by putting an upper time limit on the order that is roughly equivalent to the probable sentence that the person would have received had they been convicted.

Counsel representing factually unfit accused persons could act in their perceived best interests, similar to legal representation of children.

During our consultations, some defence counsel as well as representatives of the Canadian Association for the Mentally Retarded supported making provision in the Code to require delaying the raising of the fitness issue until the Crown makes out a prima facie case of guilt (or proves "probable cause"). Crowns, however, indicated that this could result in their having to try the case twice. Also, even some defence counsel were concerned as to how they would take instruction from a factually unfit client and where that mentally ill client would be held during the several months it might take to obtain a court date. A number of defence counsel felt that it would be unrealistic to defer the fitness issue until the Crown puts in its case. They indicated that they cannot effectively challenge the Crown's case without input from their client. This latter view was supported by representatives from provincial Departments of the Attorney General who recommended that delay of the fitness issue should be left to the discretion of the court, judge or magistrate so that each case can be considered on its own merits. In addition, many felt that even after a remand for fitness, the Court should retain a discretion to delay trying the fitness issue until the Crown makes out a prima facie case of guilt.

17. **IT IS RECOMMENDED THAT THE STATUS QUO BE MAINTAINED WHEREBY THE COURT, JUDGE OR MAGISTRATE HAS, AT ANY POINT IN THE PROCEEDINGS, THE DISCRETION TO DELAY CONSIDERING THE FITNESS ISSUE UNTIL THE CROWN ESTABLISHES A PRIMA FACIE CASE OF GUILT.**

### Duration of the Delay Pending Trial of the Charge

Although the matter of the disposition of the unfit accused person is more comprehensively addressed in the part of the paper dealing with Disposition and Continuing Review, the duration that an unfit accused person remains on a warrant is of particular concern to some individuals, particularly with regard to accuseds who are expected to remain unfit for an extended period of time, e.g., the mentally retarded. (Some felt that a special exception should be created for this group).

One option suggested was that there be ongoing consideration as to whether the outstanding charges should remain in effect where there is prolonged unfitness. From a practical point of view, it was pointed out that often where an individual has been unfit over a prolonged period of time necessary evidence may no longer be available.

It was suggested that after two years (and yearly thereafter), the Crown (or the Attorney General) should be required to provide a deposition to the court that a "good" case against the accused still exists.

It was also suggested that in cases where an individual remains unfit for two or three years (or for a period roughly equivalent to probable sentence on conviction), the order should terminate and the individual should be diverted into the civil system. This may be inappropriate if the individual does not meet the civil committal standards or if the charges are of a serious nature. Thus, a maximum period of time would be established, with the court having the discretion to set lesser time limits on the disposition order based on the circumstances. The review board would ultimately have the authority only up to this limit set by the court, after which civil commitment would be the only mechanism for holding the individual, as the charges would be stayed or withdrawn.

Another option of placing an outer time limit only in those cases where the charges do not involve violence or the threat of violence was also considered.

This matter will be more fully explored in the section dealing with Disposition and Continuing Review.

### Nature of the Fitness Hearing

The consensus view on consultation was that the fitness hearing should remain relatively informal, with no express burdens and standards of proof. This model is likely to be more acceptable if the disposition stage is made fairer and

more sensitive to the particular needs of individuals. Thus, placing the onus on the Crown to prove fitness even where the defence puts the matter in issue may be inappropriate where the defence raises the issue and precludes the Crown from satisfying its burden by not co-operating with the Crown psychiatrist(s) on the remand. The result may be inappropriate determinations of unfitness. However, where the accused was in hospital following a finding of unfitness and the hospital indicates that the accused is now fit, then the onus could be on the Crown in all cases to prove fitness as it will have evidence available in that regard. It was generally recognized that the current presumption of competence (fitness) to stand trial should not be reversed as proposed in s. 13 of Bill S-33.

18. IT IS RECOMMENDED THAT S.13 OF BILL S-33 BE AMENDED TO PLACE THE ONUS ON THE PERSON WHO RAISES THE ISSUE TO PROVE UNFITNESS ON A BALANCE OF PROBABILITIES: HOWEVER, WHERE THE ACCUSED HAS BEEN FOUND UNFIT AND SUBSEQUENTLY BROUGHT BACK TO THE COURT, THE CROWN SHOULD BEAR THE ONUS OF PROVING ON THE BALANCE OF PROBABILITIES THAT THE ACCUSED IS NOW FIT TO STAND TRIAL.

In regard to whether expert evidence should be required at the fitness hearing, the majority of those consulted supported the status quo whereby there is no express requirement for expert evidence, which would maintain the present flexibility of the proceedings.

19. IT IS RECOMMENDED THAT THE STATUS QUO BE MAINTAINED IN THAT THE CRIMINAL CODE REMAIN SILENT REGARDING PROCEDURES FOR TRYING THE FITNESS ISSUE, AND THE NEED FOR EXPERT EVIDENCE.

#### 4. INSANITY DEFENCE

##### Discussion

Although there has been a great amount of jurisprudence on this subject, particularly over the last 15 years, there is still considerable debate as to what the most logical, moral and socially acceptable formulation might be.

In substance, we still have the 1892 insanity defence. The various insanity options that have been tried or recommended since then were examined in the Discussion Paper and were considered throughout the consultations in an effort to find the best solution for today's world.

##### Insanity Test

During the consultations, a number of people questioned whether it really matters all that much as to what the precise wording of the insanity test is. Some claimed that there is little difference in result in using various insanity tests, and that jurors largely ignore the precise wording of the test and simply apply their own intuitive standards. What evidence there is points to the conclusion that the test is not very relevant to the result. Data indicate, for example, that when the District of Columbia switched from a strict M'Naghten test to a liberal Durham test there was not a significant increase in the percentage of insanity acquittals and that this increase was more likely attributable to the widening of the scope of admissible psychiatric evidence that accompanied the new test, rather than to the scope of the test itself.

As to the specific formulation, some psychiatrists expressed support of the ALI model described in the Discussion Paper, which reads as follows:

"Provide that 'a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law'.

Provide as well that the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal and otherwise anti-social conduct (ALI Model Penal Code s.4.01)'."

Some psychiatrists also suggested that the definition of disease of the mind should be narrowed, while broadening the current interpretation of knowledge of wrongfulness to include "appreciation of moral wrongfulness".

There was significant support for a combination of Alternatives I and II of the Law Reform Commission formulation presented as Alternatives VII and VIII in the Discussion Paper. Such a combination might read as follows:

Every one is exempt from criminal responsibility for their conduct if it is proved that as a result of mental disorder (defined as a disease or disability of the mind) he lacked substantial capacity to appreciate the nature, consequences or unlawfulness of such conduct.

Psychopathy could be specifically excluded if this approach is considered appropriate.

It was suggested that even if significant reform is not considered at this time, at the very least, the Code should be amended so as to remove such antiquated terms as "natural imbecility".

The above reflects that views were quite diverse on this issue. During our consultations, many groups made strong representation that further review is necessary.

In view of the disparity of views, and the fact that there is no clear evidence that a change in the legal definition would have any significant beneficial effect,

**20. IT IS RECOMMENDED THAT FOR THE TIME BEING THE CURRENT INSANITY TEST BE RETAINED AND MODERNIZED, REMOVING THE PHRASE "IN A STATE OF NATURAL IMBECILITY OR HAS DISEASE OF THE MIND" AND SUBSTITUTING THEREFOR "SUFFERS FROM A MENTAL DISORDER", DEFINED AS A "DISEASE OR DISABILITY OF THE MIND".**

### Nature of the Verdict

There was some support for changing the verdict to "guilty but insane", "guilty but mentally ill", or "guilty but not punishable by reason of mental disorder". Some representatives of the Attorneys General indicated that such a change would engender greater public respect for the justice system. It was also argued that the Federal Government has no authority over persons once they are found not guilty, even by reason of insanity, and that there was thus an important constitutional reason to change the nature of the verdict so as to justify the continuing federal legislative jurisdiction over those who successfully plead insanity.



However, many other persons consulted expressed concern at moving in this direction because they felt that if someone meets the insanity test, and is thus truly not responsible for his acts, the term "guilty" is not appropriate.

A compromise view was that the verdict should recognize that the accused committed the act but find that he was "not responsible by reason of mental disorder". It was pointed out that the notion of responsibility as a condition for the imposition of criminal sanctions is supported by both the Law Reform Commission (Recommendations #8 and #12) and by the Government's policy statement, The Criminal Law in Canadian Society. Moreover, it was suggested by some psychiatrists that such a verdict might help in the treatment process by focussing on the fact that the accused did a very serious act. The present verdict of "not guilty" allows the insane accused to practice self-deception and convince themselves that they had done nothing wrong. While the majority of those who expressed an opinion preferred the compromise proposal, the members of the Project were themselves equally divided on the question. Thus, it was decided to put forward two alternative recommendations:

21. IT IS RECOMMENDED THAT WHERE THE ACCUSED IS FOUND TO HAVE COMMITTED THE OFFENCE WHILE MENTALLY DISORDERED, THE VERDICT TAKE THE FOLLOWING FORM

ALTERNATIVE I

THE ACCUSED IS NOT GUILTY BY REASON OF MENTAL DISORDER.

ALTERNATIVE II

THE ACCUSED COMMITTED THE ACT THAT FORMS THE BASIS OF THE CHARGE BUT IS NOT CRIMINALLY RESPONSIBLE BY REASON OF MENTAL DISORDER.

Who Should Raise the Issue?

Insanity, when used as an excusing condition for criminal liability, is usually referred to as a "defence". Originally, it was only raised by the accused, and only in the most serious of cases, since the consequence of a finding of not guilty by reason of insanity was (and still is) indefinite confinement at the pleasure of the lieutenant governor (and that usually meant for the rest of one's natural life). Today confinement is not mandatory, though it is still resorted to in most cases, and it is still indefinite, though the average stay is actually in terms of years rather than for life.

If the accused raises the issue of insanity, the Crown, of course, has the right to introduce psychiatric evidence to rebut that claim. But the Crown also has the right to introduce evidence to try to prove insanity if the accused puts his or her mental state in issue, for example, by arguing automatism or no mens rea, but denying insanity. This is the law in England as well as in Canada. But in England, unlike Canada, until the accused puts his or her state of mind in issue, the prosecution is precluded from introducing evidence to establish a "defence" of insanity.

In Canada, if evidence of insanity emerges during the trial, though neither the accused nor the Crown is alleging insanity, the judge must leave the issue of insanity with the jury. The trial judge also has the power to reject a plea of guilty if the Crown contends that the accused was insane at the time of the offence.

The issue as to whether the prosecution should be entitled to introduce evidence for the purpose of establishing the insanity "defence" when the accused has not put his or her mental state in issue and does not want it put in issue was considered in the Discussion Paper and was discussed extensively during the consultations.

Defence counsel felt that the Crown should not be able to raise the issue, or, if permitted to do so, at the very least it should first be required to make out a prima facie case on the merits. The following factors should then be taken into account by the court in determining whether to permit the Crown to put the accused's sanity in issue: the cogency of the evidence of mental disorder; the seriousness of the offence; the dangerousness of the accused; and whether the admission of evidence on insanity would prejudice a viable defence such as self-defence or accident.

However, Crowns in particular, but also some psychiatrists and government representatives, (but not defence counsel) supported the view that the Crown should be able to raise the issue of insanity. It was the view of some Crowns that information obtained on remand or elsewhere relevant to the issue should be brought to the attention of all parties as soon as possible so that anyone, including the court, can raise the matter of insanity, where appropriate. (Representatives of one province indicated that because of the role of the police in the system who identify problems of mental illness early on, the "defence" of insanity is almost always raised by the Crown in their province.) Some Crowns felt that there is no problem with the Crown raising the defence because the determination of insanity (or unfitness) is, in their view, not really an adversarial matter and someone who is factually insane should not be held responsible.

22. IT IS RECOMMENDED THAT THE CRIMINAL CODE PROVIDE FOR EITHER THE CROWN, THE DEFENCE OR THE COURT TO RAISE THE ISSUE OF INSANITY, BUT WHERE THE CROWN PROPOSES TO RAISE IT, THE COURT IN DECIDING WHETHER TO PERMIT THE CROWN TO RAISE IT WOULD TAKE INTO ACCOUNT THE FOLLOWING FACTORS: THE COGENCY OF THE EVIDENCE OF MENTAL DISORDER; THE SERIOUSNESS OF THE OFFENCE; THE DANGEROUSNESS OF THE ACCUSED; AND WHETHER THE ADMISSION OF EVIDENCE ON INSANITY WOULD PREJUDICE A VIABLE DEFENCE SUCH AS SELF-DEFENCE OR ACCIDENT .

While the issue arose as to whether the burden should be shifted to the Crown once the defence leads some evidence of insanity such that the Crown would then have the onus of establishing sanity on a preponderance of the evidence, the American study commissioned by this project of certain States that operate in this fashion demonstrated dissatisfaction because of the great difficulty often faced by the State to prove that the accused is not insane when the accused raises the defence and then refuses to cooperate with the State psychiatrists (cf. the Hinckley case).

Our Canadian consultations revealed a consensus in favour of retaining the status quo whereby he who raises insanity must prove it, and the majority favoured the balance of probabilities standard even where the issue is raised by the Crown.

It was also agreed that the procedure regarding the issue of insanity should remain as informal as possible.

23. IT IS RECOMMENDED THAT THE STATUS QUO BE MAINTAINED IN REGARD TO THE NATURE OF THE TRIAL OF THE INSANITY ISSUE, WITH THE BURDEN RESTING ON THE PARTY THAT RAISES THE ISSUE TO PROVE IT ON BALANCE OF PROBABILITIES; HOWEVER, THERE SHOULD BE NO OTHER EXPRESS PROCEDURES AND NO RESTRICTIONS PLACED ON THE NATURE OR SOURCE OF EXPERT EVIDENCE THAT CAN BE PRESENTED.

#### Diminished Responsibility

There was a very general discussion during our consultations on the issue of diminished responsibility. There was some support for having this principle articulated in the Code.

It was proposed that if the diminished responsibility test were codified, it could supplement the insanity test as follows:

- (1) Everyone is partially excused from criminal responsibility for his conduct if it is proved that as a result of mental disorder (defined as a disease or disability of the mind), he lacked substantial capacity to appreciate the nature, consequences or wrongfulness of such conduct.
- (2) Everyone partially excused under subsection (1) of this section shall be convicted of the offence in a diminished degree [or in the second degree] and shall be subject to the same range of punishments as is applicable in respect of persons who are convicted of an attempt to commit the offence.

The proposal would result in a reduction in the level or degree of offence. This form of diminished responsibility does not exist in the United States and only exists in England with regard to murder (reduced to manslaughter) and in Canada with regard to murder (reduced to infanticide pursuant to s. 216 of the Criminal Code, or to manslaughter by reason of provocation pursuant to s. 215). It has been suggested that a combination of the options available in England of diminished responsibility and hospital orders has resulted in the insanity defence being raised in relatively few cases in recent years.

Some of those who indicated support for this concept suggested that it should only apply to major offences as is the case in Great Britain. Others queried how diminished responsibility might operate in relation to the matter of mens rea.

There was some concern that because the British system (and society) is so different from ours, there would be great danger in adopting their diminished responsibility concept as is. In addition, although the Code makes some provision as noted above, the concept has not been generally formalized in this jurisdiction and may therefore create considerable problems should it be adopted without further study and consultation.

The majority with whom we consulted who commented on this matter were of the opinion that much more work is required in terms of both research and consultation before the concept of "diminished responsibility" can be formalized as part of the Criminal Code.

24. IT IS RECOMMENDED THAT ALTHOUGH ULTIMATE ADOPTION OF THE CONCEPT IS A WORTHWHILE GOAL, ADDITIONAL RESEARCH AND CONSULTATION SHOULD BE CONDUCTED PRIOR TO FORMALLY ADOPTING BROAD-BASED DIMINISHED RESPONSIBILITY PROVISIONS FOR THE CRIMINAL CODE.

## 5. AUTOMATISM AND CRIMINAL RESPONSIBILITY

### Discussion

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

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

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

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

Some have suggested that the gradation of consciousness offered by psychiatrists is as arbitrary as the law's simplistic conscious/unconscious distinction.

The courts have expressed concern about their ability to test the veracity of an automatism defence. As Dickson J. stated in the Rabey case:

"Automatism as a defence is easily feigned. It is said the credibility of our criminal justice system will be severely strained if a person who has committed a violent act is allowed an absolute acquittal on a plea of automatism arising from a psychological blow."

Other criticisms have resulted in a careful delineation by the courts of the kind and manner in which expert evidence is presented on this issue.

Although issues pertaining to Automatism and Criminal Responsibility were considered as part of the review and were comprehensively presented in the Discussion Paper, this area did not emerge as a significant one and thus was not discussed to any great extent throughout the consultations.

25. IT IS RECOMMENDED THAT THE STATUS QUO BE MAINTAINED WITH RESPECT TO AUTOMATISM.

## **6. DISPOSITION AND CONTINUING REVIEW**

### **Discussion**

The largest single part of the Discussion Paper dealt with the Disposition and Continuing Review of persons found unfit to stand trial or not guilty by reason of insanity. When a person is found unfit to stand trial or not guilty of an indictable offence on account of insanity, the court must order custody pending an initial disposition by a lieutenant governor, regardless of the nature of the offence or the dangerousness of the individual. There is currently no opportunity for a hearing to determine the appropriateness of this order. While the lieutenant governor of a province has three options available with regard to the type of disposition that is made, in most instances it is ordered that the person be kept in safe custody rather than be discharged either conditionally or absolutely. There is currently no opportunity for the accused to make any representations to the lieutenant governor and no procedure that must be followed by the lieutenant governor in reaching a decision.

One of the recurring themes of the Criminal Law in Canadian Society (CLCS) document is that the least restrictive form of intervention necessitated in the circumstances should be used, and that one must always be mindful of the doctrine of restraint. The principle of using the least intrusive or restrictive mechanism necessary in the circumstances is of particular importance when one considers the matter of the disposition of persons found not guilty by reason of insanity or unfit to stand trial. For example, this principle may necessitate that the Code require the presentation of evidence before an impartial trier of fact, with full substantive and procedural protections, to the effect that an individual found insane or unfit is both mentally disordered and dangerous to others, before an order for confinement can be made on initial disposition. This principle may be reflected procedurally by requiring that the prosecution retain the burden of proving, beyond a reasonable doubt, that there is a need for the initial confinement of such an individual. However, the CLCS document suggests that this "does not preclude exceptional instances where the onus of proof is shifted from the prosecution to the defence." Thus, where persons found insane or unfit have been proven to be mentally disordered and dangerous (and, therefore, in need of confinement), it may be appropriate to consider shifting the onus of proof to the individual at the review stage to establish that he or she is no longer dangerous to society. To leave such a burden on the prosecution or on the institution holding the individual at the review stage may be inappropriate; the task of establishing the continuing dangerousness of a person whose confinement may have been the major factor in preventing dangerous behaviour might be a difficult one.

Under the Criminal Code, the review of persons detained pursuant to orders of provincial lieutenant governors is left to the discretion of the provinces. The province may establish a multi-disciplinary board that, once established, must conduct an annual review and advise the lieutenant of its recommendation. The lieutenant governor is not obliged to even consider, let alone follow, these recommendations. No procedures are established in the Code to guide these boards in the conduct of their reviews. In fact, there are great disparities in the procedures adopted by the different provincial boards.

Only the lieutenant governor of a province can ultimately permit such an individual to enter the community and eventually vacate his or her warrant. Such an individual may, therefore, be subject to indeterminate or indefinite confinement "at the pleasure of the lieutenant governor".

Forty issues were considered that have relevance to the matter of disposition and continuing review. These included such fundamental matters as a consideration of alternatives to the present criminal justice commitment system; whether to continue the role of the lieutenant governor in the process; whether to develop a separate system of criminal committal and review for persons found unfit from those found insane; and such specific matters as the establishment of procedures to guide the review boards that are in keeping with the Charter concept of "fundamental justice".

The following discussion is based on the assumption that the criminal justice system will continue to be responsible for insanity acquittees as well as for those found unfit to stand their trial. (The pros and cons of all of the options to the issues are fully set out in the Discussion Paper.)

### Insanity Acquittees

Although issues for insanity acquittees were generally considered together with those pertaining to unfit accused persons, there are some uniquely different considerations for each.

Since insanity acquittees have been absolved of criminal responsibility, it has been argued by some that following an insanity acquittal, the individual should be diverted out of the criminal justice system. Such an approach was recommended by the Law Reform Commission of Canada (Recommendation #12):



"The verdict 'not guilty by reason of insanity', if maintained, should be considered a real acquittal, subject only to a mandatory post-acquittal hearing to determine whether the individual should be committed to an institution under provincial legislation" (emphasis added).

Currently all provinces have provincial mental health legislation providing for the civil commitment of mentally disordered persons. The Criminal Code provides for the "commitment" of persons found to have been insane at the time of an indictable offence. While it may be argued that provincial civil commitment mechanisms are adequate for dealing with the disposition of mentally disordered accused persons, review of this issue revealed that there would be problems with such an approach.

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

However, as such persons have been "finally" dealt with by the courts, there are those who argue that there should be a great emphasis on releasing such persons at a determinate point when federal jurisdiction over them would cease.

### Unfit Accused Persons

As with persons found not guilty of indictable offences by reason of insanity, persons found unfit to stand trial of summary or indictable offences are made the subject of "commitment" under the Criminal Code.

While an unfit accused person may not yet have been convicted of the offence charged, he or she has entered the criminal justice system because he or she is charged with having committed an offence. This "criminal law" component, when considered along with the objective of achieving fitness, may justify the existence of a separate disposition mechanism for such persons. Such a mechanism would provide uniform

standards and procedures appropriate for dealing with persons who will ultimately be required to stand trial, and would make available the treatment necessary to render the accused fit to stand trial. Arguably, it would also provide greater protection to the public.

On the other hand, by providing for a separate commitment system for this group under the Code, such an approach might be inconsistent with the view that such accused individuals are not criminals and therefore should not be dealt with pursuant to the Criminal Code. (This view may be particularly appropriate where the Crown has not yet made out a prima facie case.) It may be particularly inappropriate where the offence charged is minor or non-violent in nature, or where the accused is unlikely ever to become fit to stand trial (e.g., where the individual is severely mentally retarded). It may also be argued that since provincial mechanisms for dealing with mentally disordered persons are already in place, they need not be duplicated in the Code.

However, as such persons have not been "finally" dealt with by the courts, there are those who argue that there should be a greater emphasis in the Code on ensuring that they remain available for ultimate trial using release criteria and procedures similar to those for bail, and that there is a greater justification for the Code to authorize the giving of treatment to such persons regardless of whether or not they consent.

### Interim Order and Initial Disposition

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

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

While confinement of insanity acquittees may receive greater acceptance from the public, such automatic confinement may fail to take into account possible changes in the individual's mental condition from the time of the commission of the act to the time of the verdict. In the United States, long-term automatic commitment has been held to violate the Bill of Rights. Since similar provisions exist in the Charter of Rights, similar problems may arise.

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

On the other hand, although the interim order is intended to last only a short period, there may be instances where it in fact lasts longer. Also, in most instances lieutenant governors make custody decisions because of their inability to gather and weigh evidence at the initial disposition stage.

If the court, rather than the lieutenant governor, decided on initial dispositions, it could gather evidence as required. It may be that pre-disposition reports and other evidence would need to be prepared prior to the ultimate disposition decision. Where this was the case, it might be appropriate for the court to address the issue of what setting or situation (i.e., confinement vs. non-confinement) would be most conducive to the preparation of this material. For example, for an unfit accused person charged with a relatively minor offence, a community placement with out-patient assessment might be the most appropriate setting in which to assess how the accused would function in the community.

During the consultations, the position was generally supported that procedures for the interim order and the initial disposition should be compressed into one process, and that the court should, during a disposition hearing, consider evidence obtained from remand and should have the power to order an additional remand, where necessary, for the purpose of obtaining psychiatric and other evidence relative to the most appropriate disposition. The underlying philosophy would be that the court would consider a range of options, including custody (even in jail, where appropriate, e.g., where the individual is dangerous but no custodial mental health facility exists,

or where his or her mental disorder is not amenable to treatment), conditional discharge, etc. and would select the least intrusive or least restrictive disposition necessary in the circumstances, having regard to the protection of society as well as to the rehabilitation of the individual. At this stage, the court could also set an outer time limit on the confinement of an individual under the Code, where this disposition is selected.

Many of those with whom we consulted criticized the current disposition process whereby the lieutenant governor makes the initial disposition without being required either to hold a hearing or to follow any other formal procedure. While a continuation of this approach would permit the decision to be informal and administrative, the lieutenant governor's discretion does not allow for input from the individual. This may offend the Charter of Rights (ss.7 and 9). It may also result in uneven and inconsistent decisions both within a province and across the country (s.15(1)). It also does little to ensure accountability.

If a court were to decide the matter of disposition, such an approach would be consistent with the manner in which convicted criminals are sentenced. It would provide an opportunity for a court to order pre-disposition reports, analogous to pre-sentence reports, and to obtain any evidence deemed necessary to make an appropriate decision in the circumstances. A court decision would reduce the risk of arbitrariness and may effectively respond to the criticisms of many, particularly defence counsel, that the current procedure for initial disposition is unfair and not sensitive to individual cases. The court's role would be limited to a relatively brief period, following which the review board would assume jurisdiction and make future decisions based on recent evidence regarding the individual. (The role of the review board is discussed more fully in a later part of this paper.)

As indicated earlier, although currently the lieutenant governor has three choices (safely keep, discharge conditionally or absolutely), he invariably orders confinement as he has no real basis upon which to effectively decide otherwise.

Many consulted advised that criteria as well as procedures need to be clarified. Requiring more specific criteria to be satisfied before unfit accused persons and insanity acquittees could be confined would be analogous to the approach used for civil commitment under provincial mental health statutes.

One possible criterion that could be borrowed from such provincial legislation might be current dangerousness. An approach focussing on dangerousness as a confinement prerequisite is more consistent with the principle of adopting

the least intrusive or restrictive approach. It is difficult to determine what is meant by the current concept of public interest if not the notion of public security or protection from the accused. It would therefore seem appropriate to be more specific in this regard, particularly as it is likely that the vagueness of the present standard leaves it open to Charter attack.

Consistent with a desire for greater precision and for adoption of the "least restrictive alternative," it might be appropriate to consider what criteria, in addition to dangerousness, should give rise to confinement of the individual in a hospital setting. One criterion might be "current mental illness" or "mental disorder." Use of this criterion would help ensure that mentally disordered accused persons would have treatment made available to them and that those who are not mentally disordered would not be placed in hospital or given treatment unnecessarily. An obvious benefit would be the conservation of both human and financial resources.

Additional criteria for confinement in hospital might include the following: whether the individual's mental disorder is amenable to treatment; whether treatment is available; whether beds are available for in-hospital care; and whether the mentally disordered person consents to the treatment/placement being recommended, where this is considered relevant.

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

If conditional release is to be an option on initial disposition, lack of dangerousness might be an obvious prerequisite for its use. Another prerequisite might be the presence of a current mental illness or disorder. Such criterion would help to ensure that accused persons who still need treatment have as a condition of their release a requirement for mandatory attendance for treatment on an out-patient basis. Other criteria that might be considered are: the likelihood that the current mental disorder will respond to treatment, the availability of necessary treatment and the consent of the individual (where he or she is mentally competent to consent).

Throughout our consultations, it was emphasized that a court hearing would help ensure that the decision-maker has the maximum amount of information available before making a decision. It would be more consistent with the Charter of Rights which may require some form of hearing (s.7) at this juncture, and would enhance public respect for the administration of criminal justice. In addition, by providing an opportunity

for the individual to participate in the initial disposition decision, it may enhance the willingness of the individual to participate in a treatment program, where such is ordered.

There was much criticism of the current options available to the lieutenant governor on initial disposition. Rather than having to order either custody or discharge, it may be more appropriate to provide for an extensive range of disposition options that relate to the interests of the individual and of society.

On consultation, a few persons expressed concern that a court may inadvertently release dangerous people. They pointed out that the current mandatory confinement order by the court pending a decision by the lieutenant governor assures the protection of society, even though it may result in locking up a few non-dangerous persons. However, such automatic confinement offends such principles as applying the least restrictive and least intrusive alternative and the principles embodied in the Charter, and does not allow for a disposition based on the particular circumstances. While one could operate with presumptions such as where the offence involved violence or the threat of violence the presumption could be in favour of confinement and the onus could be on the accused to rebut the presumption in favour of a less restrictive order (with the reverse being the case for non-violent offences), many expressed the opposite concern, i.e., that a court would likely err on the side of the security of the public, particularly as its order would terminate in three months when a specialized board would take over. Most supported the position that the court is in the best position to make the initial disposition based on evidence available at the trial of the fitness or insanity issue (it can obtain additional evidence, where necessary) and that it should be free to choose from a broad range of disposition options, having regard to the needs of the individual and the protection of society, without being restricted by presumptions.

26. IT IS RECOMMENDED THAT THE INTERIM ORDER AND INITIAL DISPOSITION AS SET OUT IN THE CURRENT CRIMINAL CODE PROVISIONS BE COMPRESSED AND THAT THE COURT BE GIVEN A DISCRETION TO MAKE THE INITIAL DISPOSITION FOLLOWING A VERDICT OF NOT GUILTY (NOT RESPONSIBLE) BY REASON OF INSANITY OR A FINDING OF UNFIT TO STAND TRIAL.

27. IT IS RECOMMENDED THAT IF THE COURT CHOOSES NOT TO MAKE THE INITIAL DISPOSITION, THE STATUS OF THE INDIVIDUAL (WHETHER AT LIBERTY OR INCARCERATED) BE CONTINUED UNTIL THE REVIEW BOARD ASSUMES JURISDICTION; HOWEVER, THE CROWN OR THE INDIVIDUAL MAY APPLY TO THE COURT FOR A HEARING FOR THE PURPOSE OF MAKING THE INITIAL DISPOSITION.

28. IT IS RECOMMENDED THAT WHERE THE COURT MAKES THIS DISPOSITION, IT ORDER THE LEAST INTRUSIVE OR RESTRICTIVE OPTION IN THE CIRCUMSTANCES, HAVING REGARD TO THE NEEDS OF THE INDIVIDUAL AND THE PROTECTION OF SOCIETY.
29. IT IS RECOMMENDED THAT THE COURT HAVE THE POWER TO ORDER HOSPITALIZATION (SO LONG AS THE HOSPITAL CONSENTS).
30. IT IS RECOMMENDED THAT THERE BE AN OUTER LIMIT PLACED ON THE COURT'S DISPOSITION ORDER (UP TO THREE MONTHS IS SUGGESTED), AFTER WHICH TIME THE REVIEW BOARD WOULD MAKE SUBSEQUENT DECISIONS.

#### Establishing an Outer Time Limit Re: Insanity Acquittees

The Law Reform Commission of Canada recommended (Recommendation #12) that such persons be released subject to provincial civil committal laws because the Code should no longer have jurisdiction over persons found not guilty by reason of insanity. As indicated on p. 36, it is important that the Code ensure the continuing protection of society in a uniform manner for the country. Although it was decided, based on the issues outlined on pp. 166-168 of the Discussion Paper, that such persons should remain subject to Code provisions, on consultation, many argued that such persons should not be confined any longer than they would have been had they been convicted. Although punishment is certainly not the aim of confinement for insanity acquittees, there is merit to such a concern. The formula for the court on initial disposition in setting an outer limit beyond which review board jurisdiction ceases is not easily ascertainable. The judiciary have demonstrated little consistency in setting sentences for similar fact situations. Moreover, prisoners are subject to statutory remission and to early parole. How would these concepts apply in the case of insanity acquittees? Notwithstanding these difficulties, there is merit in attempting to formulate a method to set outer limits, after which time only provincial civil committal laws would apply to keep a dangerous, mentally ill individual in custody.

During some consultations, it was suggested that the outer limit concept should not apply to offences against the person although it would be expected that a long outer limit would be placed on an obviously dangerous accused person. Some also suggested an alternate option where the court would establish an outer limit for all offences at the initial disposition stage, but permit an application to the court as the limit is being reached to seek an extension on suitable ground. Some were also of the opinion that the review board instead of the court should set an outer limit, and that that time should be equivalent to the maximum sentence permitted in the Code for the most serious offence.

31. IT IS RECOMMENDED THAT FOR INSANITY ACQUITTEES THERE BE AN OUTER LIMIT BEYOND WHICH DETENTION UNDER THE CRIMINAL CODE SHOULD TERMINATE. IT IS RECOMMENDED THAT THIS TIME LIMIT BE

(a) LIFE, IN THE CASE OF FIRST DEGREE MURDER;

(b) TEN YEARS OR THE MAXIMUM SENTENCE (WHICHEVER IS THE SHORTER) AND OFFENCES AGAINST THE PERSON OR THAT ENGANGER PUBLIC SAFETY; AND

(c) TWO YEARS IN ALL OTHER CASES.

Establishing an Outer Time Limit Re: Persons Found Unfit to Stand Trial

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

"We hold... that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."

Several types of provisions have been built into American statutes in an effort to conform to the requirements of this decision. In view of the present uncertainty regarding the interpretation of various sections of our new Charter of Rights and Freedoms (particularly ss.7 and 9), it may be necessary to set an outer time limit after which the Crown either proceeds with the charges or the charges are deemed stayed within the meaning of s. 508 of the Code. This is particularly important where the individual was confined longer than he or she would have been had he or she been convicted.



On consultation, some suggested that in circumstances where an individual has been unfit over a prolonged period of time (e.g., 2 years), there may no longer be sufficient evidence for the Crown to proceed and perhaps the Crown should at least have to establish that such evidence still exists.

It was also suggested that, particularly for chronically unfit persons, after a prolonged period of time (perhaps 5 years), there should be a requirement that charges be stayed or withdrawn even if sufficient evidence relating to the commission of the offence still exists, where it is unlikely that the person will become fit in the foreseeable future.

32. IT IS RECOMMENDED THAT FOR PERSONS FOUND UNFIT TO STAND TRIAL, THE CROWN BE REQUIRED, AT A FIXED TIME (E.G., AFTER TWO YEARS), TO PRESENT TO THE COURT A DEPOSITION THAT SUFFICIENT EVIDENCE STILL EXISTS TO JUSTIFY PROCEEDING WITH THE CHARGE.
33. IT IS RECOMMENDED THAT WHERE AN INDIVIDUAL HAS BEEN FOUND UNFIT TO STAND TRIAL BY REASON OF MENTAL DISORDER THERE BE AN OUTER LIMIT BEYOND WHICH DETENTION UNDER THE CRIMINAL CODE SHOULD TERMINATE. IT IS RECOMMENDED THAT THIS TIME LIMIT BE
  - (a) LIFE, IN THE CASE OF FIRST DEGREE MURDER;
  - (b) TEN YEARS OR THE MAXIMUM SENTENCE WHICHEVER IS THE SHORTER) FOR OFFENCES AGAINST THE PERSON OR THAT ENGANGER PUBLIC SAFETY; AND
  - (c) TWO YEARS IN ALL OTHER CASES.

#### Role of the Lieutenant Governor at Disposition

The initial disposition decision by the lieutenant governor pursuant to s.545(1) of the Criminal Code provides for either confinement, or for release -- either conditionally or absolutely. The choice of initial disposition is within the complete discretion of the lieutenant governor and there is no legislative guidance for the selection of any of the three Code options. In practice, the decision is often delegated to a member of the staff of a provincial ministry or department. That person may have access to some information from the court or from treatment facilities, but there is rarely any input from the individual affected. Essentially, the decision is often purely an administrative one.

It has already been recommended that the court should become the decision-maker at the initial disposition stage, and that it follow a procedure whereby it conducts a disposition hearing for insanity acquittees and for unfit accused persons

to determine the most appropriate disposition (selecting from a range of disposition options the least intrusive and restrictive alternative in the circumstances).

This would necessitate the abolition of the role of the lieutenant governor at the disposition stage, because the court will have assumed responsibilities currently vested in the lieutenant governor.

While a few persons on consultation argued in favour of retaining the lieutenant governor at this stage because of the "weightiness" and prestige offered by this office, this is little reason to retain such an arbitrary and potentially unfair system, particularly as the court is truly in the best position to make an appropriate initial disposition order.

34. IT IS RECOMMENDED THAT THE ROLE OF THE LIEUTENANT GOVERNOR AT THE STAGE OF INITIAL DISPOSITION BE REMOVED CONSISTENT WITH THE PREVIOUS RECOMMENDATION THAT APPROPRIATE PROVISION BE MADE IN THE CRIMINAL CODE FOR THE COURT TO ASSUME THIS RESPONSIBILITY CURRENTLY VESTED IN THE LIEUTENANT GOVERNOR.

### Burden and Standard of Proof at Disposition

#### Burden of Proof

The Discussion Paper set out as one of the primary issues whether provision should be made in the Code regarding burden of proof at the disposition stage.

As was noted in the Discussion Paper, burden of proof is relevant only where the decision-maker has a discretion, and usually only where there is an opportunity for a hearing.

Since the court is currently required to make a custody order at the interim order stage, and since there is no provision for a hearing by the lieutenant governor at the initial disposition stage, the issue of burden of proof does not now arise. However, if the interim order/initial disposition were to be made by a court, choosing from a range of options, this issue may have to be addressed.

It was recognized that the least restrictive alternative principle may generally require that the prosecution bear the burden of demonstrating to the decision-maker that any more restrictive form of disposition is preferable to any less restrictive form. This reasoning may be supported by analogy to the judicial interim release (bail) provisions of the

Criminal Code, and by reference to ss. 7, 9 and 15(1) of the Charter. However, the Discussion Paper raised the possibility that where the offence involved is one of violence or the threat of violence, there may be justification for placing the burden on the accused to demonstrate why any less restrictive form of disposition is preferable to any more restrictive form. Such a presumption in favour of some form of confinement would help ensure the protection of the public; however, requiring an accused to prove that he or she is not dangerous, not mentally disordered, etc. may impose considerable hardship and run contrary to the Charter (particularly if no right to counsel is guaranteed).

On consultation, many drew an analogy to sentencing wherein there is no express Code provision regarding burden and standard, although recent jurisprudence suggests that where the Crown seeks to prove aggravating facts, it has the burden of establishing its case beyond a reasonable doubt. They argued that lack of burdens, standards and presumptions reflect the non-adversarial nature of the goals of sentencing which are similar to those of disposition.

35. **IT IS RECOMMENDED THAT THE STATUS QUO BE MAINTAINED IN THAT THERE BE NO PROVISION IN THE CRIMINAL CODE REGARDING BURDEN OF PROOF AT THE DISPOSITION STAGE.**

#### **Standard of Proof**

The matter of standard of proof at initial disposition would only be relevant if there is to be a burden of proof. Only then would it be appropriate or necessary to consider how persuasively the party on whom the burden of proof rests should be required to prove his or her case in order to succeed.

The alternatives considered in the Discussion Paper regarding standard of proof included proof beyond a reasonable doubt and proof on a balance of probabilities. Other intermediate possibilities could include proof by "clear and convincing evidence" and proof to the "satisfaction" of the decision-maker.

Since it has been recommended that there be no provision in the Code in regard to burden of proof at the time of initial disposition,

36. **IT IS RECOMMENDED THAT THE STATUS QUO BE MAINTAINED IN THAT THERE BE NO PROVISION IN THE CRIMINAL CODE REGARDING STANDARD OF PROOF AT THE DISPOSITION STAGE.**

### Court Authorization of Treatment at the Initial Disposition Stage

An issue dealt with in the Discussion Paper is that pertaining to adding a provision to the Code that would give the initial decision-maker, i.e., the court, the authority to authorize compulsory treatment.

When remands to determine fitness to stand trial were considered, the question of whether the consent of the accused to treatment should be relevant and whether the assessing facility and its staff should have the authority to provide treatment to render an individual fit were discussed. If the goal is to have the accused proceed to trial as early as possible, and if the accused can be rendered "chemically fit" during the up to 3-month period following initial disposition, compulsory treatment may be justifiable.

Insofar as it may be possible to render the accused chemically fit to enable that person to return to trial as soon as possible, providing authority to treat as part of the initial disposition decision (particularly where the accused is to be ordered to a hospital) may be practical and expeditious. A prerequisite might be that the accused's condition be amenable to treatment. Some provinces have adopted a compulsory treatment approach for the involuntary psychiatric patient. Mental health professionals often argue that they are operating health care facilities and not jails. They feel that where persons who are required to be detained and have a treatable mental illness refuse treatment, it would be a waste of valuable health care resources not to provide it. They view their responsibility as attempting to rehabilitate such individuals to render these persons safe for release back into the community.

While some argue that forcing treatment on mentally competent individuals under any circumstances would not be appropriate, others (including some defence counsel) recognize the potential benefit that such a provision could provide for the individual, provided that strict safeguards regarding such authority are available. Some psychiatrists argued in favour of an expanded power to treat regardless of the legal purpose, and that unfits as well as insanity acquittees should be so treated. This was rejected. The only acceptable basis for such authority at the federal level would be the legitimate purpose flowing from the criminal law power and consistent with s. 11(b) of the Charter of Rights and that is to ensure that all accused persons receive their trial as expeditiously as possible. It was generally felt that the court should be able to authorize treatment on initial disposition during the up to 3-month period, but only for persons found unfit to stand trial (such persons

are usually also incompetent to consent to treatment in any event), not for insanity acquittees confined to psychiatric hospitals. For the latter group, provincial mental health statutes should make appropriate provision, where desired. (cf. ss. 25.1 and 25.2 of the British Columbia Mental Health Act).

37. IT IS RECOMMENDED THAT, SUBJECT TO PROVINCIAL LEGISLATION, THE COURT BE ABLE TO AUTHORIZE TREATMENT DURING THE FIRST THREE MONTHS (OR UNTIL THE REVIEW BOARD ASSUMES JURISDICTION) FOLLOWING INITIAL DISPOSITION, FOR PERSONS FOUND UNFIT TO STAND TRIAL BUT ONLY FOR THE PURPOSE OF RENDERING THEM FIT TO STAND TRIAL. THE SAME SAFEGUARDS SHOULD APPLY AS WITH RESPECT TO A PERSON REMANDED SPECIFICALLY FOR AN EVALUATION OF HIS FITNESS (RECOMMENDATION #3).

Role of the Board of Review and of the Lieutenant Governor at the Continuing Review Stage

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

Under the Criminal Code, the lieutenant governor is under no duty to review the case of an LGW. When reviewing a case, the lieutenant governor may rely on any evidence or information that he or she chooses, no matter how reliable. The lieutenant governor's discretion is virtually unfettered and absolute. This discretion, of course, might be subject to the duty of fairness, which would require at least that the lieutenant governor give notice of the fact that the case is under review and provide an opportunity for the person being reviewed to make submissions and possibly to be heard.

Pursuant to s.547(1) of the Code, the lieutenant governor of a province may appoint a board to conduct reviews of every person in custody under a lieutenant governor's warrant (LGW) and to make recommendations to the lieutenant governor regarding subsequent dispositions. The lieutenant governor is under no obligation to appoint such a board. The Code provides no guidance or criteria for deciding whether to appoint a board. Once appointed, the board of review is composed of a combination of psychiatrists, lawyers and others. If appointed, it has an obligation to review the case of every LGW in custody.

Pursuant to s.547(5) of the Code, a board (once created) must review the case of each detained LGW subject not later than six months after the making of the initial disposition order, and then at least once a year thereafter so long as the person remains in custody. As well, by s.547(6), the board must review any case when requested to do so by the lieutenant governor. The board of review has no jurisdiction to review the case of LGW subjects who have been released absolutely or on condition pursuant to s.545(1)(b) of the Code. After each review, the board must report to the lieutenant governor, setting out the results of each review. Where the LGW subject is an insanity acquittee, the board must report whether that person "has recovered" and, if so, whether it is "in the interest of the public and of that person for the lieutenant governor to order that he be discharged absolutely or subject to such conditions as the lieutenant governor may prescribe...." Where the person in custody was found to be unfit to stand trial, the board must state whether that person "has recovered sufficiently to stand his trial...." As well (for both insanity acquittees and unfit accused persons) s.547(5)(f) of the Code provides that the board may make "any recommendations that it considers desirable in the interests of recovery of the person to whom such review relates and that are not contrary to the public interest."

There is no legislative requirement that the board follow certain procedures in conducting its reviews, that the lieutenant governor consider the report of the board, or that he or she follow its recommendations. Further, there is little legislative guidance structuring the actual decision by the lieutenant governor.

During consultations, considerable attention was given to the whole area of continuing reviews, focussing specifically on the decision-making process and how that process affects the individual subject to a warrant of the lieutenant governor.

Many of those consulted recognized the important role played by the multi-disciplinary boards in the process and accepted the fact that in practice if not in law, the boards in fact make decisions. Indeed, many were concerned about the great delay in some provinces necessary for the bureaucracy to process the board's "recommendations" to obtain the signature of the lieutenant governor. In those provinces where Cabinet considers the board's recommendations, added delays are often involved. Many expressed particular concern about the fact that where Cabinet decides otherwise than the board's position, it is usually for "political" rather than therapeutic or public protection reasons.

Consultation results indicated a substantial consensus in favour of abolishing the role of the lieutenant governor on reviews and establishing the boards as decision-makers.\*

38. **IT IS RECOMMENDED THAT THE ROLE OF THE LIEUTENANT GOVERNOR AS IT RELATES TO CONTINUING REVIEW BE ABOLISHED; THAT THE ESTABLISHMENT OF A BOARD OF REVIEW BECOME MANDATORY; AND THAT BOARDS OF REVIEW BECOME DECISION-MAKERS.**

#### Composition of the Review Boards

It was generally though not universally, felt that if the boards were to become decision-makers and were to act in a judicial fashion, the Code should require that the board be chaired by a judge or a retired judge. This would provide a certain continuity of process as being still within the "judicial" system, and it should serve to instil public confidence in the boards.

There was strong support for the notion that the minimum number of board psychiatrists be reduced from two to one, and that scope be provided for the appointment of other mental health professions in a somewhat similar fashion to that of the Oregon legislation set out in Appendix III of the Discussion Paper.

There was also strong support for the continuation of lay representation; however, former mental health professionals should not be included in this category. While a second board member at any review could be a second psychiatrist, this need not be the case. Certainly, it is always open to the chairman or any party to provide for psychiatric consultants at any review. Where possible, the board psychiatrist(s) sitting on individual cases should not have been involved in treating the individual being reviewed.

It was pointed out that because some provinces conduct several hundred reviews each year, it is important that the Code clarify that a pool of board members can be available, although at most five persons should be able to sit at any review.

39. **IT IS RECOMMENDED THAT A BOARD OF REVIEW BE CHAIRED BY A JUDGE OR A RETIRED JUDGE; THAT THE NUMBER OF PSYCHIATRISTS REQUIRED TO SIT ON ANY REVIEW BE REDUCED FROM TWO TO ONE, BUT IF THE SECOND INDIVIDUAL IN THE MENTAL HEALTH CARE CATEGORY IS NOT A PSYCHIATRIST IT MUST BE ANOTHER MENTAL HEALTH PROFESSIONAL.**

---

\*s. 116 of the Criminal Code would then provide a mechanism for enforcing orders of the review board.

### Criteria for Release

Many of those consulted expressed concern about the vague, non-specific criteria in the Code. Concepts such as recovery and public interest are not easily capable of definition, and do not usually accurately reflect the realities of mental illness. Moreover, such criteria are possibly susceptible to Charter attack (s.9).

The notion of "has recovered" is unrealistic for persons suffering from illnesses such as schizophrenia. A more realistic concept (which was supported on consultation) might be "is no longer suffering from a mental disorder likely to result in a safety risk to society".

40. IT IS RECOMMENDED THAT CRITERIA SUCH AS "IS NO LONGER SUFFERING FROM A MENTAL DISORDER LIKELY TO RESULT IN A SUBSTANTIAL RISK TO THE SAFETY OF SOCIETY" BE ARTICULATED IN THE CRIMINAL CODE IN LIEU OF THE CURRENT CONCEPTS OF "HAS RECOVERED" AND "IN THE INTEREST OF THE PUBLIC".

### Options for Review Boards

In each province, an advisory body has been created. Each "order" or "case" or "warrant" is reviewed at least yearly and, where appropriate, the terms of the warrant are varied (often in the direction of "loosening") so that an individual can be gradually reintegrated into the community before a warrant is actually vacated. Under such an approach, the individual may still be technically in secure custody under a "safely keep" warrant rather than discharged on condition. This practice of "loosening warrants" appears to have been adopted in some provinces for two reasons. First, if the individual is technically in custody, he or she may be monitored through a review system that only applies to persons who are in custody. Second, if an individual being gradually reintegrated into the community needs to be confined again, this may be done administratively under the existing warrant without having to act under s.545(4),(5) and (6) to impose a new warrant. At present, there is no clear statutory authority in the Code for this practice of "loosening" or "tightening" of warrants, nor for the delegation of authority to hospital personnel to permit greater or lesser freedom (within general release parameters set by the board) - a practice used in some provinces. Where a warrant is significantly tightened, there should be express provision for an early review by the board.



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

It is generally considered that the lieutenant governor currently has the s.545(1) options available on review. Consultations revealed the feelings of many presently involved in the review process that three discrete options do not reflect the gradual nature of the process of rehabilitation.

41. **IT IS RECOMMENDED THAT THE CURRENT INFORMAL PRACTICE OF "LOOSENEED WARRANTS" BE EXPRESSLY ADOPTED IN THE CRIMINAL CODE WITH A SIMILAR RANGE OF OPTIONS AS THOSE SET OUT FOR THE INITIAL DISPOSITION.**

#### Powers of Review Boards

The powers under sections 4 and 5 of the Inquiries Act should be continued.

In addition, after much discussion, it appears important that these boards have the power to authorize treatment in certain very carefully controlled circumstances (cf. s.35 of the Ontario Mental Health Act).

Where treatment is necessary to render someone fit to stand trial and where such treatment is available and likely to have that effect, consent may be irrelevant, particularly as it may be more cost-effective to rehabilitate the individual compulsorily than to detain the individual indefinitely, and because many "unfit" persons are also incompetent to consent to treatment with no available relatives to authorize needed treatment. It may be appropriate in these circumstances to provide the reviewing body with the ability to authorize treatment.

Moreover, it is arguable that compulsory treatment may be less restrictive than simple confinement if the results of such treatment lead to trial.

The merits and possible problems of providing review boards with authority to order treatment were considered during consultation. The majority felt that the review board should have the authority to order treatment, with careful controls similar to the provisions set out in Section 35 of the Ontario Mental Health Act. (For earlier discussion re authorizing treatment, see p. 11-12).

42. **IT IS RECOMMENDED THAT, SUBJECT TO PROVINCIAL LEGISLATION, THE BOARDS OF REVIEW BE ABLE TO AUTHORIZE TREATMENT FOR PERSONS FOUND UNFIT TO STAND TRIAL BUT ONLY FOR THE PURPOSE OF RENDERING THEM FIT TO STAND TRIAL. THE SAME SAFEGUARDS SHOULD APPLY AS WITH RESPECT TO A PERSON REMANDED SPECIFICALLY FOR AN EVALUATION OF HIS FITNESS (SEE RECOMMENDATION #3).**

#### **Procedures Before the Review Boards**

Generally, on the matter of standardizing procedures for the review boards, consultation results indicate significant variance in views. For example, some individuals were of the opinion that only minimal procedural safeguards should be codified, such as the provision of notice and the right to counsel. Those who were of this opinion felt that the current absence of statutory provisions, thereby permitting those provinces that desire informality to have it, should be maintained. On the other hand, others (particularly defence counsel) were of the opinion that specifically stated procedural safeguards should be provided and a "fairer" orientation should be adopted. It was noted that this latter view may be required in any event by such Charter terms as "fundamental justice" (s.7).

Psychiatric opinion in this regard was also mixed. For example, some psychiatrists felt that a more adversarial procedure would be detrimental to the therapeutic relationship with their patients, while other psychiatrists felt that safeguards such as the right to cross-examination, access to clinical reports, etc. should be mandated. In those provinces (and states) where such "due process" safeguards exist, psychiatrists appear comfortable with the results and in some instances indicated that a better therapeutic relationship results.

The chairmen of provincial boards of review met on two occasions to consider the various issues presented in the Discussion Paper, giving significant attention to the matter of procedures before their boards. The following summarizes what appears to be the general view as to those rules and procedures that should be set out in the Code as presented by all of the

relevant groups including defence counsel, professional groups and associations, and the chairmen of provincial boards of review:

- (a) there should be a right to a hearing on a regular (at least once a year) basis;
- (b) hearings before the board should not be open to the public;
- (c) there should be an express provision in the Code granting a right to counsel;
- (d) there should be a standardized notice provision (to the Attorney-General as well) that includes the date, time and place of the hearing and an indication of the right to counsel;
- (e) the subject of the review should have a right to be present at the hearing (except that the chairperson can exclude him in exceptional circumstances, cf. s. 577(2)(a) and (b) of the Code);
- (f) the subject of the review should have the right to present evidence and to make submissions;
- (g) the subject of the review should have a right to question witnesses and other parties;
- (h) all material before the reviewing body should be available to the patient or to his counsel as of right, subject to the right of the board to withhold material that if revealed might put the life or safety of someone other than the patient in danger;
- (i) disclosure of the clinical record should be at the discretion of the provincial authorities unless it has been put into evidence by the hospital or it is subpoenaed by the board of review, in which case the rule in (h) above should apply;
- (j) where the attending physician feels that disclosure of the clinical record would seriously impair the treatment of the patient, the board may request that the patient's counsel take this consideration into account in seeking disclosure and in his dealings with his client.
- (k) the patient should not have the right to compel the attendance of witnesses, although a request could

always be made to the chairperson who can exercise his or her powers under the Inquiries Act in this regard. In general, there should be a presumption in favour of attendance with ultimate discretion remaining with the board;

- (l) there should not be any express burden or standard of proof at the hearing;
- (m) the reviewing body should be required to keep a record of the proceedings, but the means are within the power of each board (reporter, tape, etc.);
- (n) the reviewing body should be required to give written reasons if requested by the party being reviewed;
- (o) there should be a right of appeal to the court on the basis of error of law, fact, or both;\*
- (p) where the person is being detained, the place in which the person is being detained should have the right to require an early review;
- (q) the subject of an order or "warrant" should be able to request an early review;\*\*

\*For several years prior to the proclamation of procedural safeguards surrounding regional review boards that consider civil committals under the Ontario Mental Health Act, some board members and others suggested that providing a right of appeal from review board decisions would result in a plethora of appeals by patients (particularly those suffering from paranoia) that would clog the courts. After one full year of operation under such rules and hundreds of review board hearings, only a few patients have appealed to court. Of those appeals to court, all have been resolved satisfactorily without the need for a court hearing.

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

- (r) where a "loosened" order or warrant is "tightened" significantly, there should be provision for an automatic early review;
- (s) the Code should contain specific power to allow the board to delegate its authority regarding detention and release to the hospital or place where a person is being held or attached, but only in the context of "loosened" warrants wherein the board sets the general parameters for gradual release as part of the rehabilitation process, with an implementation plan permitting such gradual release to be decided upon by the hospital or place; and
- (t) as currently there is no party before the board charged with the responsibility of representing the interests of the security of the public, agents or counsel for the Attorney General should be granted the right to present evidence to the board where the Attorney General feels that he or she has evidence that is relevant to the review.

43. IT IS RECOMMENDED THAT THE CRIMINAL CODE PROVIDE FOR THOSE RULES AND PROCEDURES AS SET OUT ABOVE IN (a) THROUGH (t) INCLUSIVE.

#### Dual Status Offenders

On occasion, persons on a warrant of the lieutenant governor commit an offence for which they are convicted and sentenced to a term in prison; or persons serving a sentence commit an offence for which they are found to have been insane.

Failure to clarify which order takes precedence can result in confusion for the treatment facilities, prisons, boards of review, and national and provincial parole boards. In addition, it may result in unfairness to the individual, who may find the parole board deferring to the judgment of the board of review, and vice versa.

During consultations, some supported the direction of staying the effect of the disposition resulting from unfitness or insanity (currently an LGW) until the person has been released from prison. At this point, the review process applicable to insanity acquittees and unfit accused persons would come into play. Others supported the position that the most recent event, i.e., the charge or the warrant, should take precedence. It is, of course, essential that where both statuses exist and the order following an unfitness or insanity finding is geared towards obtaining needed treatment for the individual, all efforts should be made to obtain this treatment.

Because conviction of a Code offence resulting in a prison sentence is generally perceived as a more serious matter, it seems most appropriate to establish it in priority over an order resulting from a finding of insanity or unfitness. Recency as a test is fraught with ambiguities and potential difficulties.

44. IT IS RECOMMENDED THAT, AS A GENERAL RULE, WHERE AN ORDER FOLLOWING AN INSANITY ACQUITTAL OR UNFITNESS FINDING CO-EXISTS WITH AN ORDER FOLLOWING A CONVICTION, ANY CONFINEMENT ORDER SHOULD TAKE PRECEDENCE. THUS, CONFINEMENT FOLLOWING A FINDING OF INSANITY WOULD TAKE PRECEDENCE OVER A CONVICTION AND A PROBATION ORDER. WHERE TWO CONFINEMENT ORDERS OCCUR, THE ONE RESULTING FROM A CONVICTION AND SENTENCE SHOULD TAKE PRECEDENCE.

## 7. INTERPROVINCIAL TRANSFERS

### Discussion

At present, it appears from the Code's provisions that an interprovincial transfer cannot be made unless: (1) the transfer is necessary for the rehabilitation of the prospective transferee; (2) the person in charge of the receiving facility consents; and (3) an officer authorized for the purpose of signing a warrant and effecting the transfer does so. Current practice suggests that a fourth condition may be the prior authorization of the transfer by the lieutenant governor by way of amendment to the original order made under s.545(1), although such authorization is clearly not in itself sufficient authority for the transfer. While the person in charge of the receiving facility has some say in the matter, there is no provision requiring either the individual being transferred or the receiving province to provide input or providing an opportunity for either to challenge the transfer decision. Thus, at present, transfers may be made against the wishes of the subject and the receiving province.

Once there has been a transfer, the matter of continuing control must be considered. It is not clear what happens to the individual after he or she is transferred. Is the transferee to be reviewed by the board of review of the receiving province, or by that of the sending province? Clarification on this point is obviously important. Which province should have responsibility for making subsequent orders with respect to the transferee? Who should assume the responsibility of cost for the transfer and for the transferee's continuing care and treatment in the receiving province? Depending on the purpose of the original transfer (e.g., rehabilitation of the individual in a specific facility with treatment that is not available in the sending jurisdiction), it may be appropriate to consider release or return of the individual once it is determined by the receiving jurisdiction that such rehabilitation has been achieved. If full responsibility is to be assumed by the receiving province, it is arguable that the receiving province should be able to decide independently on whether to release the person. In many instances, however, release by the receiving province may be objected to by the sending province, which may not want the individual to return to its jurisdiction. Transfer and possible return of an individual may also raise constitutional issues. For example, the provisions of s.7 of the Charter concerning security of the person should be considered.

**Purpose(s)**

Section 545(2) of the Criminal Code permits the transfer of an individual held in custody pursuant to s.545(1)(a) "to any other place in Canada..." for the purpose of his or her rehabilitation. The concept of "rehabilitation" is somewhat vague, however, and is therefore subject to various interpretations. It is likely that the current provisions of the Code would allow transfer in circumstances where rehabilitation cannot be effected because appropriate treatment is not available in the sending province, and such a broadly stated purpose might also be flexible enough to provide for transfer to ensure that the review mechanism is not unduly influenced by local public sentiment arising from the nature or circumstances of the offence, or where security of the individual or of the public is of concern.

The Discussion Paper considered the appropriateness of articulating in the Code such purposes as compassion, security, expediency, and so on. It was generally concluded that the concept of "rehabilitation" is sufficiently broad to encompass all appropriate purposes.

- 45. IT IS RECOMMENDED THAT THE EXPRESSED PURPOSES BE RESTRICTED TO THE TERM "REHABILITATION" CURRENTLY SET OUT IN S.545(2) OF THE CRIMINAL CODE.**

**Consent of the Receiving Jurisdiction**

The current Criminal Code provisions appear only to require the consent of the person in charge of the intended receiving facility. These provisions do not specify what consent, if any, should be obtained from officials of the receiving province. Such consent may be relevant in those circumstances where overriding provincial concerns come into play. At the very least, such a transfer means that the receiving province's review board will play a role and that provincial funds will be expended.

Consultations revealed that there was general concurrence that the agreement of the Attorney General of the receiving province to the transfer should be a prerequisite, rather than (or in addition to) the consent of the receiving facility. One would anticipate that representatives of provincial Attorneys General would liaise with appropriate Health representatives and with facilities before agreeing to such transfers.

- 46. IT IS RECOMMENDED THAT THE CRIMINAL CODE REQUIRE THE CONSENT OF THE ATTORNEY GENERAL OF THE RECEIVING PROVINCE TO THE TRANSFER.**



### The Role of the Sending and Receiving Provinces regarding Subsequent Decisions

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

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

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

On consultation it was agreed that if the purpose of the transfer is rehabilitation, it makes little sense to permit the sending province to retain absolute jurisdiction. The receiving province may spend several years treating the transferee and may ultimately reach the point where it wishes to "loosen" his or her warrant for rehabilitative purposes. Arguably, this should not depend on the consent of the sending province. In such cases, the receiving province may be placed in the position of being required to "rehabilitate" the transferee without being able to use its own judgment as to how this should be done.

Some argued, however, that if the transferee was involved in a particularly heinous crime, the sending province may not want to agree to the loosening of the warrant, and may wish to have some say in subsequent decisions at least to ensure that the individual is not free to return to its province.

While some supported the ongoing involvement of the sending province for the above-noted reasons, it was recognized that such involvement would be particularly frustrating, particularly where the receiving province is required to bear the cost of continued custodial care. It was generally agreed that once the individual has been transferred, the receiving province should assume full responsibility for that individual, with the "door" being left open to provinces entering into private agreements governing restrictions on the ultimate release of the individual.

Insofar as costs are concerned, a number of provinces currently have agreements whereby the sending province pays all costs involved in the transfer, and the receiving province bears all costs thereafter. It is suggested that there is no need for the Code to formalize this arrangement.

47. IT IS RECOMMENDED THAT THE CRIMINAL CODE PROVIDE THAT A TRANSFER IS ABSOLUTE, AND THAT THE REVIEW BOARD OF THE RECEIVING PROVINCE CONDUCT ALL SUBSEQUENT REVIEWS AND MAKE ALL SUBSEQUENT DECISIONS, UNLESS A PRIOR AGREEMENT HAS BEEN MADE BETWEEN THE SENDING AND THE RECEIVING PROVINCES.

Management of an Individual Who Has Breached a Condition of a Warrant and Who Is Apprehended in Another Province

Section 545(3) of the Criminal Code seems to imply that an order under s.545(1)(a) is not in itself sufficient authority to detain an individual outside the province in which the order was made. A problem has arisen in the case of persons subject to an order under s.545(1)(a) who escape to another province. It is not clear whether the province to which the individual has eloped has the authority to apprehend, detain and return the person. It is questionable whether the escape from lawful custody provision of the Code (s.133) is appropriate here. It is also questionable whether an order of the lieutenant governor qualifies within the meaning of s.116 of the Code. It might, therefore, be advisable to enact a provision similar to s. 545(4) of the Code which allows a peace officer to arrest without a warrant someone subject to an order under s.545(1)(b). Such a provision might be made applicable to all persons found at large (inside or outside the province) who have been confined pursuant to any of the mental disorder-related provisions of the Code.

48. IT IS RECOMMENDED THAT THE CRIMINAL CODE SET OUT THE POWER TO ARREST AND RETURN PERSONS SUBJECT TO AN ORDER (OR A WARRANT) WHO ESCAPE, IN A SIMILAR FASHION TO S. 545(4), (5), AND (6). IT SHOULD BE MADE CLEAR THAT THESE PROVISIONS APPLY NOTWITHSTANDING THAT AN INDIVIDUAL HAS ESCAPED FROM THE PROVINCE WHERE THE ORIGINAL ORDER (OR WARRANT) WAS MADE.

## 8. THE CONVICTED MENTALLY DISORDERED OFFENDER

### Discussion

Currently, s.546 of the Criminal Code permits the lieutenant governor of a province to order a mentally disordered prisoner in a provincial prison to "be removed to a place of safe-keeping...." That order can survive the termination of the prisoner's sentence. One difficulty that flows from the restriction of the provision is that it applies only to persons serving sentences in provincial prisons. On occasion, persons who may be mentally disordered and dangerous are released on mandatory supervision from federal penitentiaries. Although in some circumstances provincial civil commitment statutes may be of assistance, the Mental Disorder Project considered the utility of extending s.546 to mentally disordered prisoners in federal penitentiaries. In this regard, the scope of s. 19 of the Penitentiaries Act was also reviewed.

In addition to examining s.546 and the advisability of extending this provision to federal penitentiaries, the possibility of permitting "hospital orders" or "permits" as a sentencing option for convicted offenders was also considered. While this subject may have been more appropriately dealt with as part of the Sentencing Project, it was decided to consider it under the topic of Mental Disorder because it does usually involve a direct disposition to a psychiatric facility.

As noted in the Discussion Paper, 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 throughout the entire criminal process and may 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 that 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 reduce much mental disorder in prisons, the issue of helping the mentally disordered prison inmate who requires treatment remains important.

Current procedures allow for inmates with suspected mental disorders to be evaluated by the correctional system and, where appropriate, treated using psychiatric resources within the prison. However, the adequacy of these resources is questionable. 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.

On consultation, some groups supported the notion of treating mentally ill prisoners within the prison system, where possible.

This would retain the "punishment" component of the prison sentence. (This argument has also been made by those opposed to hospital orders or permits.) Such groups supported the amendment of s.19 of the Penitentiaries Act to provide for a decision by an administrative tribunal similar to the one proposed to the Task Force to Review the Alberta Mental Health Act. Such a tribunal could serve as a coordinating body to facilitate requests for appropriate mental health intervention, and to order transfers to treatment programs. The tribunal could also act to safeguard the rights of the mentally disordered inmate and to ensure that treatment programs are made available. For a complete discussion of the tribunal concept, see Alternative IV to Issue 2 in Chapter 8 of the Discussion Paper on pp. 300-302 inclusive.

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 ways, as follows:

- 1) The transfer of mentally disordered inmates housed in federal penitentiaries can be made to Regional Psychiatric Centres (RPCs) (where appropriate staff can be found).
- 2) The transfer of penitentiary inmates to provincial mental hospitals can be effected under s.19 of the Penitentiaries Act. This provision, however, has been employed only sparingly. Historically, the provinces have been reluctant to accept into their facilities mentally disordered persons from the criminal justice system. Today, while formal or informal agreements are in place under s. 19, the practical difficulties of arranging for transfers remain enormous. As a result, penitentiary-to-hospital transfers are not common. Currently, such mentally ill prisoners are certified under provincial civil commitment statutes (where they qualify) for the purpose of providing those facilities with the authority to detain those prisoners, as those facilities are not "prisons" and as it would be impractical to require the prison to provide 24-hour guards to retain custody. Assuming constitutional problems can be sorted out, one solution might be to provide in the Penitentiaries Act for such transfers and for authority for the provincial mental health facility to detain the prisoner as if he or she were still in prison.

- 3) 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.
- 4) 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. It has been noted that arguments in favour of this transfer procedure -- efficiency, convenience and protection of society -- are weak. It is almost never used (with the exception of Newfoundland whose representatives explained that they employed this procedure because of inconsistencies between their provincial correctional services legislation and their mental health legislation, making it difficult to consider alternative 3 above). There was a general consensus expressed during consultations that s.546 should be abolished. The Law Reform Commission, in its 1976 Report, recommended its repeal for several reasons (Recommendation #32). It was considered redundant, since its objects are 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 beyond the expiry of the sentence and despite the fact that he or she may never meet the relevant civil commitment criteria. In addition, the non-reviewability and indeterminacy aspects of the LGW procedure may violate ss.7 and 9 of the Charter of Rights and Freedoms.

When this issue was considered on consultation, it was suggested that there be greater reliance on agreements between federal and provincial governments regarding mentally ill prisoners (through s.19(1) of the Penitentiaries Act).

49. **IT IS RECOMMENDED THAT S.546 OF THE CRIMINAL CODE BE REPEALED.**
50. **IT IS RECOMMENDED THAT A MECHANISM BE ESTABLISHED UNDER THE PENITENTIARIES ACT TO PROVIDE FOR THE CONSIDERATION OF ONGOING PROBLEMS OF MENTALLY ILL CONVICTS AND TO ARRANGE FOR APPROPRIATE CARE AND TREATMENT, AND THAT THAT ACT PROVIDE FOR DETENTION AUTHORITY IN THE RECEIVING PROVINCIAL MENTAL HEALTH FACILITY.**

### Hospital Permits (Orders)

Canadian courts are presently powerless to sentence convicted 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 health facility.

Hospital permits may be considered appropriate in instances where the offender suffers from a disorder too serious to be the subject of a community-based order (probation), yet not so dangerous as to require incarceration in prison. Proponents argue that such orders would ensure that a mentally ill offender would avoid the debili-tating effects of incarceration without treatment, and that he or she would receive the treatment required. Treatment, rather than (or in addition to) punishment is the object.

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 that took 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 that 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 as an involuntary patient and he or she is released when recovered.

On the whole, hospital orders have provided mentally disordered offenders in England with better access to treatment, although the English experience has not been entirely satisfactory.

In 1976, the Law Reform Commission of Canada recommended the utilization of a variation of the hospital order. It noted that consent (on the part of both the offender and the treating institution) lies at the heart of its proposal.

A model whereby the consent of both the offender and the treating institution would be relevant was examined during consultation. Consultations revealed strong support for the underlying concept along the following lines:

- (a) While the hospital permit should specify which persons are to be released and which should go to jail to serve the remainder of their sentence on release from hospital, the patient should retain the right to apply to the parole board. However, the hospital should have status before the parole board.
- (b) Certain serious offences that carry mandatory minimum sentences, e.g., first degree murder, should be excluded from the hospital permit sentencing option.
- (c) A hospital order may not exceed the sentence the offender would have received as a sentence of imprisonment. (A hospital order may not be given where a non-custodial sentence otherwise would have been given).
- (d) It may be necessary to provide for a remand to gather appropriate evidence prior to such a sentence being issued.
- (e) Certain problems similar to those of s.16 may occur; e.g., how best to deal with the psychopath. However, by requiring the consent of the psychiatric facility, these may generally be alleviated.
- (f) While the individual is in hospital, the mental health review board should have jurisdiction. The parole board could be used just on the issue of parole apart from release from hospital and could assume complete jurisdiction for those who are ultimately moved to prison.



Defence counsel, Attorneys General representatives, Departments of Corrections, and some psychiatrists generally supported the model recommended by the Law Reform Commission of Canada (Recommendation #30). The main points are 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.

**51. IT IS RECOMMENDED THAT A HOSPITAL ORDER MODEL BE DEVELOPED FOR THE CRIMINAL CODE AS A SENTENCING OPTION SIMILAR TO THAT PROPOSED BY THE LAW REFORM COMMISSION OF CANADA. CERTAIN SERIOUS OFFENCES THAT INVOLVE MANDATORY MINIMUM SENTENCES, E.G. FIRST DEGREE MURDER, SHOULD BE EXCLUDED FROM THE HOSPITAL ORDER SCHEME. A HOSPITAL ORDER MAY NOT EXCEED THE SENTENCE THE OFFENDER WOULD HAVE RECEIVED AS A SENTENCE OF IMPRISONMENT.**

## 9. THE MENTALLY DISORDERED YOUNG OFFENDER

### Discussion

Although there are many significant changes in the Young Offenders Act (YOA) from the approach taken in the Juvenile Delinquents Act, the fitness, insanity and disposition provisions of the Criminal Code are retained for young offenders. The Mental Disorder Project was asked to address the matter of whether separate provisions for mentally disordered young offenders should be included in the YOA or whether the adult provisions being contemplated for the Code should apply mutatis mutandis.

Chapter 9 of the Discussion Paper considered this and related issues.

Insane or unfit young people who commit "criminal" acts have generally been dealt with in a similar fashion to adults. While the number of young people placed on warrants of the lieutenant governor is relatively small, there are many who feel that greater protections and provisions, tailored to the special needs of young people, should be developed for mentally disordered young offenders, particularly as the YOA will apply to 16 and 17 year olds. Some have argued that as the thrust and underlying philosophy of the Young Offenders Act is different from that of the Criminal Code, there should, therefore, be special provisions designed for inclusion in the Young Offenders Act that would apply to mentally disordered young offenders and the Code provisions should not be applied, even if they are amended to make the system more sensitive to the specific needs of the individual. These special provisions should apply to all issues, including fitness, insanity, disposition and review.

Although many of the provinces did not discuss or elaborate extensively on this area, special problems relating to mentally ill young people were raised by some. Generally, most who responded supported the notion that special rules for young people should be articulated in the YOA. Where child psychiatrists were present at consultations, they indicated that the approach for children should be different because of developmental and maturity problems that are special and unique. They also supported the direction taken in the YOA which requires a unique range of diversion and disposition options for young people, and indicated a need that this model be applied for "unfit" or "insane" young people as well.

Many pointed out that the special problems set out in the last paragraph at the bottom of page 320 and the rest of that paragraph and the next two paragraphs on the top of page 321 of the Discussion Paper need to be addressed.

Many of those consulted identified a major practical problem. If the Young Offenders Act should be proclaimed as is before the Code can be amended in this area, the current adult provisions would then apply mutatis mutandis. After a finding that a young persons is unfit or insane, the court will have no choice but to order custody for that youngster until the pleasure of the lieutenant governor becomes known. This is contrary to the diversion philosophy of the Young Offenders Act - the least restrictive concept and that of special needs, and is most inappropriate in many cases, particularly in those provinces that do not have special secure settings for young people.

Overall, it was generally agreed that this area requires more study before final recommendations can be proposed.

**10. STATISTICS**

It is very clear from research done as a part of the Mental Disorder Project that there is a great need for information to be gathered on a systematic basis in regard to mentally disordered offenders if the two levels of government are to be in a position to evaluate the success of the law and various administrative initiatives.

- 52. IT IS RECOMMENDED THAT THE FEDERAL GOVERNMENT WORK WITH THE PROVINCES TO DEVELOP AND KEEP UP-TO-DATE APPROPRIATE STATISTICS REGARDING PERSONS FOUND UNFIT TO STAND TRIAL OR NOT GUILTY (NOT RESPONSIBLE) BY REASON OF MENTAL DISORDER.**

## 11. SUMMARY OF RECOMMENDATIONS

<u>REMANDS</u>	<u>PAGE</u>
1. IT IS RECOMMENDED THAT THE <u>CRIMINAL CODE</u> PROVIDE STATUTORY AUTHORITY TO SEEK REMANDS FOR THE PURPOSES OF DETERMINING: THE FITNESS OF THE ACCUSED TO STAND TRIAL; THE ACCUSED'S MENTAL STATE AT THE TIME OF THE ALLEGED OFFENCE; AND THE APPROPRIATE DISPOSITION WHERE THE ACCUSED HAS BEEN FOUND UNFIT TO STAND TRIAL, NOT GUILTY (NOT RESPONSIBLE) BY REASON OF INSANITY (MENTAL DISORDER) OR GUILTY BUT APPARENTLY REQUIRING HOSPITAL CARE FOR A MENTAL DISORDER. IT IS ALSO RECOMMENDED THAT APPROPRIATE FORMS BE PROVIDED TO EXPEDITE THE PROCEDURE.	10
2. IT IS RECOMMENDED THAT THE <u>CRIMINAL CODE</u> PROVIDE THAT THE CROWN, DEFENCE OR THE COURT ITSELF SHOULD BE ABLE TO SEEK A PSYCHIATRIC REMAND, BUT THAT THE CROWN BE ABLE TO DO SO ONLY IN RELATION TO PROCEEDINGS BY WAY OF INDICTMENT.	11
3. IT IS RECOMMENDED THAT THE <u>CRIMINAL CODE</u> PROVIDE THE COURT WITH THE AUTHORITY TO PERMIT TREATMENT, UNDER SPECIAL CIRCUMSTANCES, AND ONLY IN "FITNESS" CASES, REGARDLESS OF WHETHER THE ACCUSED CONSENTS, FOLLOWING ASSESSMENT BY A PHYSICIAN WHICH INDICATES THAT SUCH TREATMENT WILL LIKELY RENDER THE ACCUSED FIT TO STAND TRIAL WITHIN THE FORMAL REMAND PERIOD AND THAT WITHOUT SUCH TREATMENT THE ACCUSED IS LIKELY TO REMAIN NOT FIT TO STAND TRIAL. THE ACCUSED MAY, HOWEVER, CHALLENGE SUCH AN APPLICATION AND CALL INDEPENDENT MEDICAL EVIDENCE ON THE ISSUE.	12
4. IT IS RECOMMENDED THAT THE <u>CRIMINAL CODE</u> SPECIFY THAT PSYCHIATRIC REMANDS BE NON-CUSTODIAL UNLESS:	13
(a) the accused consents to a remand in custody;	13
(b) the accused is otherwise required to be detained in custody; or	13
(c) the court is satisfied that detention of the accused is necessary for purposes of a proper assessment of the accused's mental condition, or because evidence indicates that bail should be refused in this case.	13

- |  | <u>PAGE</u> |
|--|-------------|
| 5. IT IS RECOMMENDED THAT THE <u>CRIMINAL CODE</u> PROVIDE THAT NOTWITHSTANDING <u>CONFIDENTIALITY</u> REQUIREMENTS, A REPORT BE PROVIDED TO THE COURT WHICH IN TURN SHALL PROVIDE IT TO BOTH CROWN AND DEFENCE.   | 14          |
| 6. IT IS RECOMMENDED THAT THE REMAND BE ONLY FOR THAT TIME NECESSARY TO ACHIEVE THE PURPOSE, WITH 30 DAYS REPRESENTING THE MAXIMUM.  | 15          |
| 7. IT IS RECOMMENDED THAT, IN THE ABSENCE OF AN AGREEMENT TO THE CONTRARY BETWEEN THE PROSECUTOR AND THE ACCUSED, A REMAND FOR THE PURPOSE OF DETERMINING FITNESS TO STAND TRIAL SHOULD BE NO LONGER THAN THREE CLEAR DAYS, AND THAT THERE SHOULD BE NO REQUIREMENT OF MEDICAL EVIDENCE OF MENTAL ILLNESS AS A CONDITION OF THIS THREE-DAY REMAND. | 15          |
| 8. IT IS RECOMMENDED THAT WHERE THE DEFENCE OR THE CROWN SUBMITS THAT A PERIOD OF REMAND LONGER THAN THE USUAL 30 DAYS IS REQUIRED, THE <u>CRIMINAL CODE</u> SHOULD PROVIDE FOR THE COURT, JUSTICE OR MAGISTRATE TO AUTHORIZE ONE 30 DAY EXTENSION.  | 15          |
| 9. IT IS RECOMMENDED THAT THE <u>CRIMINAL CODE</u> PROVIDE EXPRESS AUTHORITY TO KEEP THE ACCUSED IN HOSPITAL UNTIL TRIAL WHERE THERE ARE REASONABLE GROUNDS TO BELIEVE THAT HE OR SHE HAS BECOME FIT BUT MAY BECOME UNFIT AGAIN IF RETURNED TO JAIL.   | 15          |
| 10. IT IS RECOMMENDED THAT THE <u>STATUS QUO</u> BE MAINTAINED IN THAT THE <u>CONSENT</u> OF ACCUSED PERSONS NOT BE A PREREQUISITE TO THE ORDERING OF PSYCHIATRIC REMANDS.   | 15          |

PAGE

11. IT IS RECOMMENDED THAT THE CRIMINAL CODE NOT REFER TO THE KIND OF EVIDENCE REQUIRED BY THE COURT BUT MERELY INDICATE THAT, BASED ON THE EVIDENCE OBTAINED DURING THE BRIEF ASSESSMENT, THE COURT MUST HAVE REASONABLE GROUNDS TO BELIEVE THAT THE MENTAL STATE OF THE ACCUSED IS SUCH THAT A REMAND IS NECESSARY. THE COURT, WITH INPUT FROM THE PARTIES, WILL THEN DECIDE UPON THE BEST EVIDENCE NECESSARY FOR IT TO REACH A DECISION TO ORDER A REMAND AND ON DECISIONS INVOLVING FITNESS, INSANITY AND DISPOSITION. 17
12. IT IS RECOMMENDED THAT THE STATUS QUO BE MAINTAINED IN THAT THE CRIMINAL CODE REMAIN SILENT AS TO WHO CAN CONDUCT THE EXAMINATION/ASSESSMENT, THEREBY PERMITTING THE COURT TO ACCEPT WHATEVER EVIDENCE IT DEEMS APPROPRIATE. 17
13. IT IS RECOMMENDED THAT THE PRIVILEGE PROPOSED BY SECTION 165 OF BILL S-33 BE EXPANDED TO PROTECT THE ACCUSED AGAINST THE USE IN COURT OF STATEMENTS MADE BY HIM AS PART OF A COURT-ORDERED MENTAL EXAMINATION, OBSERVATION OR ASSESSMENT TO A DULY QUALIFIED MEDICAL PRACTITIONER OR CLINICAL PSYCHOLOGIST (OR SOMEONE WORKING UNDER THEIR DIRECTION), EXCEPT WHERE THE PROPOSED USE IS IN RELATION TO (a) THE ISSUE OF THE FITNESS TO STAND TRIAL, (b) AN ISSUE OF SANITY OR MENTAL CONDITION RAISED BY THE ACCUSED; (c) AN ALLEGATION THAT THE ACCUSED MADE A PREVIOUS INCONSISTENT STATEMENT; OR (d) A CHARGE OF PERJURY. 18

FITNESS

14. IT IS RECOMMENDED THAT THE TERM "MENTAL DISORDER" (DEFINED AS A DISEASE OR DISABILITY OF THE MIND) BE SUBSTITUTED FOR THE TERM "INSANITY" WITH REGARD TO FITNESS. 20
15. IT IS RECOMMENDED THAT THE CRIMINAL CODE PROVIDE THAT A PERSON IS UNFIT TO STAND TRIAL WHERE BECAUSE OF MENTAL DISORDER HE IS INCAPABLE (1) OF UNDERSTANDING THE NATURE OR OBJECT OF THE PROCEEDINGS AGAINST HIM; (2) OF UNDERSTANDING 20

	<u>PAGE</u>
THE POSSIBLE CONSEQUENCES OF THE PROCEEDINGS, OR (3) OF COMMUNICATING WITH COUNSEL. THE COURT SHOULD, HOWEVER, RETAIN SOME DISCRETIONARY POWER TO FIND AN ACCUSED UNFIT TO STAND TRIAL FOR OTHER REASONS ATTRIBUTABLE TO MENTAL DISORDER.	20
16. IT IS RECOMMENDED THAT THE CRIMINAL CODE SPECIFY THAT THE ISSUE OF FITNESS MAY BE RAISED BY THE CROWN, BY THE DEFENCE OR BY THE COURT.	21
17. IT IS RECOMMENDED THAT THE <u>STATUS QUO</u> BE MAINTAINED WHEREBY THE COURT, JUDGE OR MAGISTRATE HAS, AT ANY POINT IN THE PROCEEDINGS, THE DISCRETION TO DELAY CONSIDERING THE FITNESS ISSUE UNTIL THE CROWN ESTABLISHES A <u>PRIMA FACIE</u> CASE OF GUILT.	22
18. IT IS RECOMMENDED THAT S.13 OF BILL S-33 BE AMENDED TO PLACE THE ONUS ON THE PERSON WHO RAISES THE ISSUE TO PROVE UNFITNESS ON A BALANCE OF PROBABILITIES: HOWEVER, WHERE THE ACCUSED HAS BEEN FOUND UNFIT AND SUBSEQUENTLY BROUGHT BACK TO THE COURT, THE CROWN SHOULD BEAR THE ONUS OF PROVING ON THE BALANCE OF PROBABILITIES THAT THE ACCUSED IS NOW FIT TO STAND TRIAL.	24
19. IT IS RECOMMENDED THAT THE <u>STATUS QUO</u> BE MAINTAINED IN THAT THE <u>CRIMINAL CODE</u> REMAIN SILENT REGARDING PROCEDURES FOR TRYING THE FITNESS ISSUE, AND THE NEED FOR EXPERT EVIDENCE.	24

**DEFENCE OF INSANITY**

20. IT IS RECOMMENDED THAT FOR THE TIME BEING THE CURRENT INSANITY TEST BE RETAINED AND MODERNIZED, REMOVING THE PHRASE "IN A STATE OF NATURAL IMBECILITY OR HAS DISEASE OF THE MIND" AND SUBSTITUTING THEREFOR "SUFFERS FROM A MENTAL DISORDER", DEFINED AS A "DISEASE OR DISABILITY OF THE MIND".	26
---	----



21. IT IS RECOMMENDED THAT WHERE THE ACCUSED IS FOUND TO HAVE COMMITTED THE OFFENCE WHILE MENTALLY DISORDERED, THE VERDICT TAKE THE FOLLOWING FORM 27

ALTERNATIVE I

THE ACCUSED IS NOT GUILTY BY REASON OF MENTAL DISORDER.

ALTERNATIVE II

THE ACCUSED COMMITTED THE ACT THAT FORMS THE BASIS OF THE CHARGE BUT IS NOT CRIMINALLY RESPONSIBLE BY REASON OF MENTAL DISORDER.

22. IT IS RECOMMENDED THAT THE CRIMINAL CODE PROVIDE FOR EITHER THE CROWN, THE DEFENCE OR THE COURT TO RAISE THE ISSUE OF INSANITY, BUT WHERE THE CROWN PROPOSES TO RAISE IT, THE COURT IN DECIDING WHETHER TO PERMIT THE CROWN TO RAISE IT WOULD TAKE INTO ACCOUNT THE FOLLOWING FACTORS: THE COGENCY OF THE EVIDENCE OF MENTAL DISORDER; THE SERIOUSNESS OF THE OFFENCE; THE DANGEROUSNESS OF THE ACCUSED; AND WHETHER THE ADMISSION OF EVIDENCE ON INSANITY WOULD PREJUDICE A VIABLE DEFENCE SUCH AS SELF-DEFENCE OR ACCIDENT. 29

23. IT IS RECOMMENDED THAT THE STATUS QUO BE MAINTAINED IN REGARD TO THE NATURE OF THE TRIAL OF THE INSANITY ISSUE, WITH THE BURDEN RESTING ON THE PARTY THAT RAISES THE ISSUE TO PROVE IT ON BALANCE OF PROBABILITIES; HOWEVER, THERE SHOULD BE NO OTHER EXPRESS PROCEDURES AND NO RESTRICTIONS PLACED ON THE NATURE OR SOURCE OF EXPERT EVIDENCE THAT CAN BE PRESENTED. 29

24. IT IS RECOMMENDED THAT ALTHOUGH ULTIMATE ADOPTION OF THE CONCEPT IS A WORTHWHILE GOAL, ADDITIONAL RESEARCH AND CONSULTATION SHOULD BE CONDUCTED PRIOR TO FORMALLY ADOPTING BROAD-BASED DIMINISHED RESPONSIBILITY PROVISIONS FOR THE CRIMINAL CODE. 30

	<u>PAGE</u>
<b><u>AUTOMATISM AND CRIMINAL RESPONSIBILITY</u></b>	32
25. IT IS RECOMMENDED THAT THE <u>STATUS QUO</u> BE MAINTAINED WITH RESPECT TO AUTOMATISM.	
<b><u>DISPOSITION AND CONTINUING REVIEW</u></b>	40
26. IT IS RECOMMENDED THAT THE INTERIM ORDER AND INITIAL DISPOSITION AS SET OUT IN THE CURRENT <u>CRIMINAL CODE</u> PROVISIONS BE COMPRESSED AND THAT <u>THE COURT</u> BE GIVEN A DISCRETION TO MAKE THE INITIAL DISPOSITION FOLLOWING A VERDICT OF NOT GUILTY (NOT RESPONSIBLE) BY REASON OF INSANITY OR A FINDING OF UNFIT TO STAND TRIAL.	
27. IT IS RECOMMENDED THAT IF THE COURT CHOOSES NOT TO MAKE THE INITIAL DISPOSITION, THE STATUS OF THE INDIVIDUAL (WHETHER AT LIBERTY OR INCARCERATED) BE CONTINUED UNTIL THE REVIEW BOARD ASSUMES JURISDICTION; HOWEVER, THE CROWN OR THE INDIVIDUAL MAY APPLY TO THE COURT FOR A HEARING FOR THE PURPOSE OF MAKING THE INITIAL DISPOSITION.	40
28. IT IS RECOMMENDED THAT WHERE THE COURT MAKES THIS DISPOSITION, IT ORDER THE LEAST INTRUSIVE OR RESTRICTIVE OPTION IN THE CIRCUMSTANCES, HAVING REGARD TO THE NEEDS OF THE INDIVIDUAL AND THE PROTECTION OF SOCIETY.	41
29. IT IS RECOMMENDED THAT THE COURT HAVE THE POWER TO ORDER HOSPITALIZATION (SO LONG AS THE HOSPITAL CONSENTS).	41
30. IT IS RECOMMENDED THAT THERE BE AN OUTER LIMIT PLACED ON THE COURT'S DISPOSITION ORDER (UP TO THREE MONTHS IS SUGGESTED), AFTER WHICH TIME THE REVIEW BOARD WOULD MAKE SUBSEQUENT DECISIONS.	41

- PAGE
31. IT IS RECOMMENDED THAT FOR INSANITY ACQUITTEES THERE BE AN OUTER LIMIT BEYOND WHICH DETENTION UNDER THE CRIMINAL CODE SHOULD TERMINATE. IT IS RECOMMENDED THAT THIS TIME LIMIT BE
- (a) LIFE, IN THE CASE OF FIRST DEGREE MURDER;
- (b) TEN YEARS OR THE MAXIMUM SENTENCE (WHICHEVER IS THE SHORTER) AND OFFENCES AGAINST THE PERSON OR THAT ENGANGER PUBLIC SAFETY; AND
- (c) TWO YEARS IN ALL OTHER CASES.
32. IT IS RECOMMENDED THAT FOR PERSONS FOUND UNFIT TO STAND TRIAL, THE CROWN BE REQUIRED, AT A FIXED TIME (E.G., AFTER TWO YEARS), TO PRESENT TO THE COURT A DEPOSITION THAT SUFFICIENT EVIDENCE STILL EXISTS TO JUSTIFY PROCEEDING WITH THE CHARGE.
33. IT IS RECOMMENDED THAT WHERE AN INDIVIDUAL HAS BEEN FOUND UNFIT TO STAND TRIAL BY REASON OF MENTAL DISORDER THERE BE AN OUTER LIMIT BEYOND WHICH DETENTION UNDER THE CRIMINAL CODE SHOULD TERMINATE. IT IS RECOMMENDED THAT THIS TIME LIMIT BE
- (a) LIFE, IN THE CASE OF FIRST DEGREE MURDER;
- (b) TEN YEARS OR THE MAXIMUM SENTENCE WHICHEVER IS THE SHORTER) FOR OFFENCES AGAINST THE PERSON OR THAT ENGANGER PUBLIC SAFETY; AND
- (c) TWO YEARS IN ALL OTHER CASES.
34. IT IS RECOMMENDED THAT THE ROLE OF THE LIEUTENANT GOVERNOR AT THE STAGE OF INITIAL DISPOSITION BE REMOVED CONSISTENT WITH THE PREVIOUS RECOMMENDATION THAT APPROPRIATE PROVISION BE MADE IN THE CRIMINAL CODE FOR THE COURT TO ASSUME THIS RESPONSIBILITY CURRENTLY VESTED IN THE LIEUTENANT GOVERNOR.
35. IT IS RECOMMENDED THAT THE STATUS QUO BE MAINTAINED IN THAT THERE BE NO PROVISION IN THE CRIMINAL CODE REGARDING BURDEN OF PROOF AT THE DISPOSITION STAGE.

- |  | <u>PAGE</u> |
|--|-------------|
| 36. IT IS RECOMMENDED THAT THE <u>STATUS QUO</u> BE MAINTAINED IN THAT THERE BE NO PROVISION IN THE <u>CRIMINAL CODE</u> REGARDING STANDARD OF PROOF AT THE <u>DISPOSITION STAGE</u> .   | 45          |
| 37. IT IS RECOMMENDED THAT, SUBJECT TO PROVINCIAL LEGISLATION, THE COURT BE ABLE TO AUTHORIZE TREATMENT DURING THE FIRST THREE MONTHS (OR UNTIL THE REVIEW BOARD ASSUMES JURISDICTION) FOLLOWING INITIAL DISPOSITION, FOR PERSONS FOUND UNFIT TO STAND TRIAL BUT ONLY FOR THE PURPOSE OF RENDERING THEM FIT TO STAND TRIAL. THE SAME SAFEGUARDS SHOULD APPLY AS WITH RESPECT TO A PERSON REMANDED SPECIFICALLY FOR AN EVALUATION OF HIS FITNESS. | 47          |
| 38. IT IS RECOMMENDED THAT THE ROLE OF THE LIEUTENANT GOVERNOR AS IT RELATES TO CONTINUING REVIEW BE ABOLISHED; THAT THE ESTABLISHMENT OF A BOARD OF REVIEW BECOME MANDATORY; AND THAT BOARDS OF REVIEW BECOME DECISION-MAKERS.  | 49          |
| 39. IT IS RECOMMENDED THAT A BOARD OF REVIEW BE CHAIRED BY A JUDGE OR A RETIRED JUDGE; THAT THE NUMBER OF PSYCHIATRISTS REQUIRED TO SIT ON ANY REVIEW BE REDUCED FROM TWO TO ONE, BUT IF THE SECOND INDIVIDUAL IN THE MENTAL HEALTH CARE CATEGORY IS NOT A PSYCHIATRIST IT MUST BE ANOTHER MENTAL HEALTH PROFESSIONAL.   | 49          |
| 40. IT IS RECOMMENDED THAT CRITERIA SUCH AS "IS NO LONGER SUFFERING FROM A MENTAL DISORDER LIKELY TO RESULT IN A SUBSTANTIAL RISK TO THE SAFETY OF SOCIETY" BE ARTICULATED IN THE <u>CRIMINAL CODE</u> IN LIEU OF THE CURRENT CONCEPTS OF "HAS RECOVERED" AND "IN THE INTEREST OF THE PUBLIC".   | 50          |
| 41. IT IS RECOMMENDED THAT THE CURRENT INFORMAL PRACTICE OF "LOOSENED WARRANTS" BE EXPRESSLY ADOPTED IN THE <u>CRIMINAL CODE</u> WITH A SIMILAR RANGE OF OPTIONS AS THOSE SET OUT FOR THE INITIAL DISPOSITION.   | 50          |

- |  | <u>PAGE</u> |
|--|-------------|
| 42. IT IS RECOMMENDED THAT, SUBJECT TO PROVINCIAL LEGISLATION, THE BOARDS OF REVIEW BE ABLE TO AUTHORIZE TREATMENT FOR PERSONS FOUND UNFIT TO STAND TRIAL BUT ONLY FOR THE PURPOSE OF RENDERING THEM FIT TO STAND TRIAL. THE SAME SAFEGUARDS SHOULD APPLY AS WITH RESPECT TO A PERSON REMANDED SPECIFICALLY FOR AN EVALUATION OF HIS FITNESS.  | 52          |
| 43. IT IS RECOMMENDED THAT THE <u>CRIMINAL CODE</u> PROVIDE FOR THOSE RULES AND PROCEDURES AS SET OUT ABOVE IN (a) THROUGH (t) INCLUSIVE.  | 55          |
| 44. IT IS RECOMMENDED THAT, AS A GENERAL RULE, WHERE AN ORDER FOLLOWING AN INSANITY ACQUITTAL OR UNFITNESS FINDING CO-EXISTS WITH AN ORDER FOLLOWING A CONVICTION, ANY CONFINEMENT ORDER SHOULD TAKE PRECEDENCE. THUS, CONFINEMENT FOLLOWING A FINDING OF INSANITY WOULD TAKE PRECEDENCE OVER A CONVICTION AND A PROBATION ORDER. WHERE TWO CONFINEMENT ORDERS OCCUR, THE ONE RESULTING FROM A CONVICTION AND SENTENCE SHOULD TAKE PRECEDENCE. | 56          |

**INTERPROVINCIAL TRANSFER**

- |  |    |
|--|----|
| 45. IT IS RECOMMENDED THAT THE EXPRESSED PURPOSES BE RESTRICTED TO THE TERM "REHABILITATION" CURRENTLY SET OUT IN S.545(2) OF THE <u>CRIMINAL CODE</u> .   | 58 |
| 46. IT IS RECOMMENDED THAT THE <u>CRIMINAL CODE</u> REQUIRE THE CONSENT OF THE ATTORNEY GENERAL OF THE RECEIVING PROVINCE TO THE TRANSFER.   | 58 |
| 47. IT IS RECOMMENDED THAT THE <u>CRIMINAL CODE</u> PROVIDE THAT A TRANSFER IS ABSOLUTE, AND THAT THE REVIEW BOARD OF THE RECEIVING PROVINCE CONDUCT ALL SUBSEQUENT REVIEWS AND MAKE ALL SUBSEQUENT DECISIONS, UNLESS A PRIOR AGREEMENT HAS BEEN MADE BETWEEN THE SENDING AND THE RECEIVING PROVINCES. | 60 |

PAGE

48. IT IS RECOMMENDED THAT THE CRIMINAL CODE SET OUT THE POWER TO ARREST AND RETURN PERSONS SUBJECT TO AN ORDER (OR A WARRANT) WHO ESCAPE, IN A SIMILAR FASHION TO S. 545(4), (5), AND (6). IT SHOULD BE MADE CLEAR THAT THESE PROVISIONS APPLY NOTWITHSTANDING THAT AN INDIVIDUAL HAS ESCAPED FROM THE PROVINCE WHERE THE ORIGINAL ORDER (OR WARRANT) WAS MADE. 61

CONVICTED MENTALLY DISORDERED OFFENDER

49. IT IS RECOMMENDED THAT S.546 OF THE CRIMINAL CODE BE REPEALED. 64

50. IT IS RECOMMENDED THAT A MECHANISM BE ESTABLISHED UNDER THE PENITENTIARIES ACT TO PROVIDE FOR THE CONSIDERATION OF ONGOING PROBLEMS OF MENTALLY ILL CONVICTS AND TO ARRANGE FOR APPROPRIATE CARE AND TREATMENT, AND THAT THAT ACT PROVIDE FOR DETENTION AUTHORITY IN THE RECEIVING PROVINCIAL MENTAL HEALTH FACILITY. 64

51. IT IS RECOMMENDED THAT A HOSPITAL PERMIT (ORDER) MODEL BE DEVELOPED FOR THE CRIMINAL CODE AS A SENTENCING OPTION SIMILAR TO THAT PROPOSED BY THE LAW REFORM COMMISSION OF CANADA. CERTAIN SERIOUS OFFENCES THAT INVOLVE MANDATORY MINIMUM SENTENCES, E.G. FIRST DEGREE MURDER, SHOULD BE EXCLUDED FROM THE HOSPITAL ORDER SCHEME. A HOSPITAL ORDER MAY NOT EXCEED THE SENTENCE THE OFFENDER WOULD HAVE RECEIVED AS A SENTENCE OF IMPRISONMENT. 67

STATISTICS

52. IT IS RECOMMENDED THAT THE FEDERAL GOVERNMENT WORK WITH THE PROVINCES TO DEVELOP AND KEEP UP-TO-DATE APPROPRIATE STATISTICS REGARDING PERSONS FOUND UNFIT TO STAND TRIAL OR NOT GUILTY (NOT RESPONSIBLE) BY REASON OF MENTAL DISORDER. 70

Appendix I

EXTRACTS 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.

**DISOBEYING ORDER OF COURT - Attorney General of Canada may act.**

116.(1) Every one who, without lawful excuse, disobeys a lawful order made by the court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money is, unless some penalty or punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

(2) Where the order referred to in subsection (1) was made in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, any proceedings in respect of a violation or of a conspiracy to violate that order may be instituted and conducted in like manner.

**REMAND IN CUSTODY.**

457.1 A justice may, before or at any time during the course of any proceedings under section 457, upon application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by

warrant in Form 14, but no such adjournment shall be for more than three clear days except with the consent of the accused.

**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.

**ATTORNEY GENERAL MAY DIRECT STAY - Recommencement of Proceedings.**

**508.(1)** The Attorney General or counsel instructed by him for the purpose may, at any time after an indictment has been found and before judgment, direct the clerk of the court to make an entry on the record that the proceedings are stayed by his direction, and when the entry is made all proceedings on the indictment shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new charge or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for the purpose of giving notice of the recommencement to the clerk of the court in which the stay of proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, the proceedings shall be deemed never to have been commenced.

**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 spec-

ial 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.

(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.

Appendix II

EXTRACT FROM THE PENITENTIARIES ACT

**Mentally Ill or Diseased Inmates**

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.

**Mentally  
ill inma**

(2) Where no agreement has been made pursuant to subsection (1) between the Minister and the government of any province from which a mentally ill or mentally defective person is sentenced or committed to penitentiary, the officer in charge of the penitentiary may, on the advice of the penitentiary physician or psychiatrist, refuse to accept custody of that person under the sentence or committal or, if custody of that person has been accepted, may under the authority of a written direction by the Commissioner, return that person to the prison or other place of confinement from which he was received.

**Idem**

(3) 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 penitentiary hospitals, of persons who, having been sentenced or committed to a provincial prison, are found to be suffering from any dangerous, contagious or infectious disease at any time during the sentence.

**Diseased  
Inmates**

(4) A person who, pursuant to subsection (1), is confined in a provincial hospital or other institution shall, during the term of his confinement therein, be deemed to be confined in a penitentiary.

**Deemed**

(5) A person who, pursuant to subsection (3), is confined in a penitentiary hospital shall, during the term of his confinement therein, be deemed to be confined in a provincial prison.

**Idem**



Appendix III

EXTRACT FROM THE YOUNG OFFENDERS ACT

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

13.(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

(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.

Appendix IV

EXTRACTS 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 V

EXTRACTS FROM THE CANADA EVIDENCE ACT, 1982  
(BILL S-33)

**RE PRESUMPTIONS AND BURDENS**

- 11.(2) Where the issue of insanity at the time of the act is raised in a criminal proceeding, the legal burden with respect to that issue is on the proponent and that burden is discharged by proof on a balance of probabilities.
13. Where there is a real issue, on the ground of insanity, as to the fitness of an accused to stand trial, the prosecution has the legal burden of satisfying the court on a balance of probabilities that the accused is fit to stand trial.

**PRIVILEGE FOR PSYCHIATRIC ASSESSMENT**

165. Any statement communicated by an accused to a qualified medical practitioner during the course of a court-ordered psychiatric observation, examination or assessment is privileged and, unless the accused has first put his mental condition in issue, no evidence of or relating to that statement is admissible against the accused in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence, other than a hearing to determine the fitness of the accused to stand trial or conduct his defence.

Appendix VI

A. EXTRACTS FROM THE ONTARIO MENTAL HEALTH ACT

29.(6) Where the disclosure, transmittal or examination of a clinical record is required by a subpoena, order, direction, notice or similar requirement in respect of a matter in issue or that may be in issue in a court of competent jurisdiction or under any Act and the attending physician states in writing that he is of the opinion that the disclosure, transmittal or examination of the clinical record or of a specified part of the clinical record,

- (a) is likely to result in harm to the treatment or recovery of the patient;
- (b) is likely to result in,
  - (i) injury to the mental condition of a third person, or
  - (ii) bodily harm to a third person,

no person shall comply with the requirement with respect to the clinical record or the part of the clinical specified by the attending physician except under an order of,

- (c) the court before which the matter is or may be in issue;
- (d) where the disclosure, transmittal or examination not required by a court, under an order of the Divisional Court,

made after a hearing from which the public is excluded and that is held on notice to the attending physician.

29.(7) On a hearing under subsection (6), the court or body shall consider whether or not the disclosure, transmittal or examination of the clinical record or the part of the clinical record specified by the attending physician

**Matters  
to be  
considered  
by court or  
body**

- (a) is likely to result in harm to the treatment or recovery of the patient; or
- (b) is likely to result in,

(i) injury to the mental condition of a third person, or

(ii) bodily harm to a third person,

and for the purpose the court or body may examine the clinical record, and, if satisfied that such a result is likely, the court or body shall not order the disclosure, transmittal or examination unless satisfied that to do so is essential in the interests of justice.

35.(1) In this section, "psychosurgery" means any procedure that, by direct or indirect access to the brain, removes destroys or interrupts the continuity of histologically normal brain tissue, or which inserts indwelling electrodes for pulsed electrical stimulation for the purpose of altering behaviour or treating psychiatric illnesses, but does not include neurological procedures used to diagnose or treat intractable physical pain or epilepsy where these conditions are clearly demonstrable.

**Interpre-  
tation**

(2) Psychiatric treatment shall not be given to an involuntary patient without the consent of the patient or, where the patient has not reached age of majority or is not mentally competent, the consent of the nearest relative of the patient except under the authority of an order of a regional review board made on the application of the officer in charge.

(3) The consent of an involuntary patient or the nearest relative of an involuntary patient to treatment while an involuntary patient does not include and shall not be deemed to include psychosurgery.

**Consent  
to psych-  
surgery**

(4) Where,

(a) an involuntary patient or the nearest relative, as the case requires, refuses consent or an involuntary patient is not mentally competent and there is no relative of the patient from whom consent may be requested to the provision of a specific psychiatric treatment to the patient; and

**Applica-  
tion  
to regio  
review  
board**

(b) the attending physician, a psychiatrist who is a member and a psychiatrist who is not a member of the medical staff of the psychiatric facility in which the patient is detained each state in the prescribed form;

- (i) that he has examined the patient,
- (ii) that he is of the opinion that the mental condition of the patient will be or is likely to be substantially improved by the specific psychiatric treatment or the specific course of psychiatric treatment, and
- (iii) that the mental condition of the patient will not or is not likely to improve without the specific treatment or course of treatment,

the attending physician on notice to the patient or the nearest relative, as the case requires, may apply to the regional review board for an order authorizing the providing of treatment or course of treatment to the patient.

(5) Where the attending physician applies for a hearing under subsection (4), the regional review board shall appoint a time for and hold the hearing and shall issue its decision within seven days after the completion of the hearing and, where the board is satisfied,

**Hearing**

- (a) that the mental condition of the patient will be or is likely to be substantially improved by the specific psychiatric treatment or course of treatment for the providing of which authority is sought; and
- (b) the board by order may authorize the providing of the psychiatric treatment or course of treatment specified in the application, but the board shall not authorize and no order of the board is or shall be deemed to be authority to perform psychosurgery.

(6) The attending physician and the patient or, where the patient is not mentally competent, the nearest relative or, if none, the Official Guardian and such other persons as the regional review board may specify are parties to the proceedings before the board.

**Parties**

**B. EXTRACTS FROM THE BRITISH COLUMBIA MENTAL HEALTH ACT**

**Detention under Criminal Code**

25.1 Where, under the Criminal Code, a person is found to have been insane at the time that he committed an offence or is found unfit on account of insanity to stand his trial and the person is ordered to be detained in a Provincial mental health facility, he shall receive care and psychiatric treatment appropriate to his condition as authorized by the director.

**Deemed consent**

25.2 Where a person is detained in a Provincial mental health facility under section 20, 23, 24, 25, or 25.1, and notwithstanding that no order respecting the person has been made under the Patients Property Act, treatment authorized by the director shall be deemed to be given with the consent of the person.