

Submission on
Mental Disorder Provisions
of the *Criminal Code*

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION



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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Criminal Justice Section of the Canadian Bar Association.

Submission on Mental Disorder Provisions of the *Criminal Code*

I. INTRODUCTION

The Canadian Bar Association National Criminal Justice Section and its Committee on Imprisonment and Release (the CBA Section) appreciate this opportunity to participate in the House of Commons Standing Committee on Justice and Human Rights' review of the mental disorder provisions of the *Criminal Code*. In this submission, we provide our general comments, as well as our response to the questions raised in the Library of Parliament's brief Issues Paper circulated in December, 2001.

We must begin by stressing our grave concerns about the plight of mentally disordered persons who come within the grasp of the criminal justice system. These are surely some of the most vulnerable people in our society. As we stated in our earlier letter to the Committee Chair (January, 2002), we agree that it is timely to conduct a review of those provisions and related issues. However, we believe strongly that the importance of the interests at stake warrants an extremely thorough and cautious review based on the most comprehensive and objective research and statistical information available at this time. For example, the Issues Paper implicitly acknowledges the absence of existing research and information on page 5, when it asks how many mentally disordered accused are currently subject to supervision orders in each jurisdiction.

The current provisions were enacted in 1992, the culmination of a lengthy process of research and debate that spanned decades. The issues were addressed by the *Ouimet Report* in 1969 (Report of the Canadian Committee on Corrections) and

led to the ground-breaking work of the Law Reform Commission of Canada.¹ The detailed amendments² now comprising the various elements from sections 672.1 to 672.95 of the *Criminal Code* were also the subject of years of discussion. In fact, legislators delayed enactment of those sections until the Supreme Court decision in *R. v. Swain*³ in order to ensure compliance with that Court's application of the *Charter*. In our view, the cautious and thorough approach taken in these previous deliberations is appropriate given the gravity of the interests at stake. We respectfully urge the Committee to take the time and expend the resources to ensure the same depth of review at this juncture.

II. ISSUES FOR CONSIDERATION

A. Mental Disorder Defence

The courts' application of section 16 of the *Criminal Code*, the mental disorder defence, has been the subject of debate among scholars, jurists, psychiatrists and policy makers for decades. The current section 16 derives, with some refinements, from the answers provided by the judges to the questions posed by the House of Lords after the 1843 decision in *M'Naghten's Case*. While Canadian law has refined the original test,⁴ it still retains the original two-pronged approach focusing solely on cognitive incapacity. In our view, this reflects an outdated and under-developed understanding of psychiatry and psychology, and of how those disciplines can inform the criminal law.

¹ See Working paper No. 14, *The Criminal Process and Mental Disorder*, 1975, and the Report to Parliament entitled *Mental Disorder and the Criminal Process*, 1976.

² S.C. 1991, c.43.

³ [1991] 1 S.C.R. 933.

⁴ See, *R. v. Cooper* (1980), 51 C.C.C. (2d) 129 (S.C.C.) and *R. v. Chaulk* (1991), 2 C.R. (4th) 1 (S.C.C.).

The controversy about section 16 spans a spectrum of views. For example, some advocate abolishing the defence (with or without mental disorder playing a role in relation to *mens rea*), while others suggest various alternative formulations (the *Durham* test, *Browner* test, *Butler* test or the proposal in the *Model Penal Code*).

It does happen that severely mentally disordered individuals are convicted of criminal offences and incarcerated for long periods of time in spite of the clear existence of mental disorder having a relation to their crimes. Recently newsworthy, the Andrea Yates case in Texas is an example of the injustice created by an inadequate “mental incapacity” test which actually criminalizes mental disorder. While this result was attributable to the very narrow mental disorder defence in that state, there is a degree of narrowness in our own section 16. By focusing on impairment of cognitive faculties (and how that impairment affects the accused’s capacity to appreciate the nature and quality of the act or to know that it is wrong), it does not encompass situations in which the accused can appreciate that an act is wrong but the act is the result of delusion, paranoia or other irrationality attributable to mental disorder. For example, in *R. v. Cheong*,⁵ a man was convicted of murder after pushing a complete stranger from a subway platform. He suffered from a major mental illness, schizophrenia, as well as a substance abuse disorder, and experienced auditory hallucinations. At the time of the offence, he was in a delusional state that caused him to focus on an image of the kind of woman whom he believed would mock him and subject him to racial epithets. While he appreciated the nature of his act and knew that it was wrong, the act was clearly a product of mental illness.

Certainly, these cases represent serious offences with tragic results. However, the issue of criminal responsibility must be addressed in a way consistent with modern understanding of psychiatry and psychology, reflecting the important

⁵ [1998] O.J. No. 5857 (Q.L.).

principle that we do not punish people for conduct caused by a compelling mental disorder.

In 1992, the CBA's Criminal Recodification Task Force responded to the Law Reform Commission's Report, *Recodifying Criminal Law*. The Task Force recommended expanding the scope of section 16 as follows:

No one is criminally liable for conduct if, through disease or mental disability, the person at the time:

- a. was incapable of appreciating the nature or consequences of such conduct,
- or
- b. believed what he or she was doing was morally right, or
- c. was incapable of conforming to the requirements of the law.⁶

This recommendation is a slight variation of the "*M'Naghten* test" with the addition of a *Model Penal Code* element. While it could no doubt be improved, it would be an important expansion of the mental incapacity defence and would encompass cases like *Yates* and *Cheong*, discussed above.

The adequacy of the current section 16 is a major dispute within criminal law, and between lawyers and mental health practitioners. It requires careful scrutiny and a substantial public debate to identify the options and consider how they would enhance or diminish the pursuit of progressive goals. We must be committed to the goal that no one be convicted as a result of a mental illness. Certainly, there will be legitimate questions about protection of the community although this aspect of the debate must avoid the tendency to invoke uninformed stereotypes about dangerousness.

B. Defining Fitness to Stand Trial

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Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code (Ottawa: Canadian Bar Association, 1992) at 59.

Reform of the mental disorder provisions must begin with the definitions in section 16 (mental disorder defence) and section 2 (fitness to stand trial) of the *Criminal Code*. The application of these sections triggers all remaining provisions in Part XX.1 of the *Code*. These sections evolved from the common law rule that an accused must be present, both physically and mentally, for trial. This requires that the accused be capable of understanding the nature of the proceedings as, without this understanding, the accused is unfit to plead.

As an inherent protection within section 672.22, an accused is presumed to be fit to stand trial unless a court is satisfied on the balance of probabilities or preponderance of evidence that the accused is unfit. The person making the application bears the onus of proving unfitness. Further protections for an accused charged with a summary conviction offence are contained in section 672.12(2), setting a higher standard of proof and limitations on when an order of assessment can be made. The difficulties lie not in the process but with the application and definition of “fitness to stand trial”.

Section 2 of the *Criminal Code* defines “unfit to stand trial” as being unable because of mental disorder to conduct a defence at any stage of the proceedings before a verdict is entered or to instruct counsel to do so and, particularly, being unable on account of mental disorder to understand the nature or object of the proceedings, understand the possible consequences of the proceedings or communicate with counsel. The definitions of “unfit to stand trial” and “not criminally responsible” in both sections 16 and section 2 refer to “mental disorder”. “Mental disorder” is defined in section 2 of the *Code* as meaning a “disease of the mind”. Although both concepts refer to the disorder in the same way, they differ in the time of reference. Section 16 relates to the effect that the mental disorder had on the accused’s mind at the time the offence was committed, while the section 2 definition of unfit to stand trial relates to the effect of the disorder on the accused’s ability to conduct a defence to the charges.

The difficulty with the present definition in section 2 is in its application by the courts. For example, the Ontario Court of Appeal in *R. v. Taylor*⁷ applied the new definition to preclude a finding of unfitness where a mentally disordered accused was unable to act in his own best interests in conducting his defence. Mr. Taylor could not co-operate with his counsel, or with his previous counsel, because he believed they were part of a conspiracy against him. As a result, he would not communicate with them, nor would he receive their advice regarding his case. Counsel argued that they could not properly receive instructions or communicate with the accused. However, the court decided that issues regarding his relationship with counsel were not relevant to fitness and that the “limited cognitive capacity test” required the court to inquire only into whether the accused can recount to his counsel the necessary facts relating to the offence in such a way that counsel can then properly conduct a defence.

Such a narrow application of the definition severely limits the application of the fitness section to the detriment of many persons suffering from mental disorder and, in our view, the integrity of the justice system as a whole. A trial is not a true trial unless the accused can properly communicate and instruct counsel. Following *Taylor*, a determination of fitness is too often limited to three basic questions:

1. Do you know what you are charged with ?
2. Do you know what a judge does?
3. Do you understand what the job of the Crown is and what your lawyer is supposed to do?

These questions go to a minimal threshold level of understanding quite at variance with a fair understanding of what it takes to defend oneself adequately in

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(1992) 77 C.C.C. (3d) 551.

a trial which may mean the loss of freedom. Furthermore, in our experience, findings too often depend on the availability of beds at treatment facilities.

The subjective interpretation of the criteria in the definition also results in an inconsistent application. In *R. v. MacPherson*,⁸ the court found the accused unfit even though he was reasonably aware of the role of the judge, jury and purpose of the preliminary inquiry. However, as the accused was obsessed with the events surrounding the offence and could not discuss them in a relevant manner, the court found that his ability to instruct counsel was inadequate.

One rationale for a restrictive definition is that too high a threshold of fitness will overburden the system and permit fitness cases when there is the necessary understanding of the process. However, there are sufficient other protections of the rights of an accused in the assessment, review and disposition provisions of Part XX.1. Surely, to include persons as unfit solely on the basis that they are unable to make decisions in their own best interests would be too expansive. However, we submit that there must be a substantive requirement of an ability to instruct counsel. The definition under section 2 should be re-defined to incorporate a test of real or effective ability to communicate and provide reasonable instructions to counsel. An expansive definition and interpretation would ensure that trials are only held with accused truly present in mind and body, and able to effectively communicate with counsel.

C. Automatism

Whether to codify the automatism defence is a controversial and complex question in both law and psychiatry. In our view, it should only be considered with a thorough review of the defence provisions of the *Code*, and not on a piecemeal basis. However, we do note here that, when there is a finding of non-

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(1998) 168 N.S.R. (2d) 323.

insane automatism, supervisory conditions should not be imposed given that there is no finding of mental disorder to trigger Part XX.1 of the *Code*.

D. Powers of Review Boards

In our view, giving the Review Board power to order an assessment is unnecessary in most cases. When a hearing is held before the Review Board, generally a hospital will outline the assessment that the accused has already undergone. Where people are not in a hospital, they are usually seen regularly by psychiatrists whose testimony is also heard by the Review Board.

The guiding principles to animate the process should be the use of the least restrictive dispositions and conditions in the circumstances of each case, and the requirement that persons subject to the provisions of Part XX.1 be represented by counsel at each stage of the proceedings. Given the complexity of the issues and the competing interests at stake, there are potential concerns with giving power to the Review Board to discharge absolutely those who are unfit to stand trial. While such a power may appear an attractive option in cases where the Crown can no longer demonstrate sufficient evidence to put the accused to trial or where a minor offence is involved, it raises several concerns. It would implicitly give the Review Board the full powers of a court to judge sufficiency of evidence. Board hearings currently employ the balance of probabilities standard. It would raise the question whether such a power should be available only after a set period of time or cap. Without such a limitation, victims of crime may perceive that the accused suffered no consequences for the crime. If such a power was to be available for all offences, including serious violent offences, it may be seen as excessive for a body not judicially constituted.

E. Capping Provisions

After findings of no criminal responsibility for reason of mental disorder and unfitness, section 672.64 would limit the authority of courts and Review Boards

to impose detention for specific periods of time based on the nature of the offence. The capping provisions raise significant and complex issues on the interface of mental health, criminal responsibility and community protection concerns. It would be appropriate for the mental health system and the criminal justice system to intersect with one another here but it appears that we face a void of knowledge, other than regional anecdotal accounts.

The capping provisions contained in *Criminal Code* section 672.64 were not proclaimed into force when Part XX.1 came into force in 1992. Over the past ten years, a number of decisions, including *Winko*,⁹ have made important contributions to the debate. Under section 672.54, *Winko* requires courts or Review Boards to make the least onerous and restrictive disposition order possible. Where the accused poses no significant threat to the safety of the public, he or she must be absolutely discharged. If the accused poses a significant threat, the court or Board can discharge with conditions or detain in a hospital subject to conditions, so long as the order is consistent with the principles established in *Winko*. However, in spite of the S.C.C.'s sound reasoning in *Winko*, Review Boards have not applied it consistently. More importantly, the effect of these decisions has not been evaluated in either empirical, comparative, or psychiatric terms.

Given the lack of hard data and comprehensive research currently available, it is difficult to evaluate the need to proclaim the capping provisions. We do not think that this should be done on whim or gut feelings. The CBA's national membership of criminal law practitioners can provide anecdotal information, but we lack reliable statistical data on how *Winko* is being followed or implemented across the country.

However, with a consistent application of the *dicta* in *Winko*, there would be no need for the capping provision. All those unfit to stand trial who do not pose a

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Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625.

significant threat would be discharged absolutely. We strongly recommend an empirical evaluation to determine how long people remain under the jurisdiction of the Review Board in each form of disposition. This information should be compared to sentences imposed on similarly situated offenders for similar offences within the criminal court. Without such cross-jurisdictional data on the length of conditional discharges or detention in hospital for those found NCRMD or unfit, we cannot properly assess whether there is a need for the capping provisions.

F. Dangerous Mentally Disordered Accused

The dangerous mentally disordered accused provisions (DMDA) [proposed section 672.65] would accompany the proclamation of the capping provisions. They would highlight the difficult decisions involved. These questions of capping and DMDA raise very difficult policy issues and issues of principle. In the absence of information outlining current practices and problems and, again, reliable statistics, it seems premature and even inappropriate to attempt to provide recommendations as to proper courses of action. We urge the Committee to ensure that any proposed reforms will be based on sound research, documenting all problems and successes in the existing system.

G. Numbers Subject to Supervision Orders

Section 672 deals with findings of “fitness” or “not guilty by reason of mental disorder” and with the consequences flowing from these findings. However, as the Issues Paper acknowledges, the underlying questions are much broader. While over 2000 people are currently subject to some form of confinement governed by section 672, it is impossible to estimate the number of mentally disordered persons who actually come before the courts. We must stress that it is critical that those subject to assessment orders under section 672 have immediate access to such assessments, rather than being subject to undue incarceration while awaiting assessment. It is extremely disturbing that many prisoners remain

incarcerated for most, if not all, of their thirty or sixty day assessment orders without attending hospital at all. Resources and legislative provisions should allow for the immediate placement in hospital of those meeting the requirements for an assessment order under section 672.

The past decade has witnessed innovations in the form of diversion and even a few specialized courts for the mentally disordered,¹⁰ but many mentally disordered persons remain incarcerated. New “mega-jails” capable of housing up to 1500 people are being built in some provinces, with an emphasis on security rather than programming. We are concerned that this trend could foreshadow a dramatic increase in the proportion of mentally disordered prisoners. In addition, the inadequacy of treatment services for prisoners, both provincial and federal, has already been the subject of comment by the S.C.C.¹¹

The Issues Paper’s question as to how many mentally disordered accused are currently subject to supervision orders in each jurisdiction suggests that the Committee is seeking what information exists, while simultaneously asking for advice on how any such individuals should be treated. Again, we believe that the data on such offenders should first be collected in an organized and independent fashion, presented to the Committee and then shared for comment. To come to conclusions on, for example, the need for capping without that data in hand is to proceed by whim or gut reaction on questions which deserve a more serious approach.

H. Hospital Order Provisions

The drafters of the 1992 amendments deliberately decided not to follow the British hospital order model. Instead, Parliament passed section 747 pertaining to

¹⁰ For example, there is a pilot project in Toronto under the auspices of Judge E. Ormstead. Also, in Saint John, New Brunswick, Judge Alfred Brien sits bi-weekly to deal with such cases in a very individualized manner.

¹¹ See *R. v. Knoblauch* (2000), 149 C.C.C. (3d) 1.

hospital orders, in our view an unsatisfactory substitute, but the section has never been proclaimed in force. Section 747 would deal with hospital orders as an element of the sentencing process. In *R. v. Knoblauch*,¹² the S.C.C. noted the gap this has left in the ability of a sentencing court to respond fairly and properly to an offender who is suffering from a mental disorder, especially in light of the inadequacy of treatment resources within Canada's prison systems.

It is important to note that section 747 does not propose a true hospital order in the sense advocated by the Law Reform Commission in its report *Mental Disorder in the Criminal Process*. Section 747.1(1) would only permit a court to

order that an offender be detained in a treatment facility as the initial part of a sentence of imprisonment where it finds, at the time of sentencing, that the offender is suffering from a mental disorder in an acute phase and the court is satisfied... that immediate treatment of the mental disorder is urgently required to prevent further significant deterioration.

This order would only be available for "a single period of treatment not exceeding sixty days".¹³ Accordingly, there are two inherent limitations to a section 747 order; it can only apply in cases of acute disorder where there is an established urgency, and it can only last for 60 days. As a result, the section would not fill the void noted in *Knoblauch*, in which the S.C.C. ultimately resorted, in a controversial 5 to 4 decision, to a conditional sentence.

Section 747 is also not the kind of mechanism recommended by the Law Reform Commission. The Commission proposed an alternative that would address the therapeutic needs of someone who is criminally responsible yet mentally disordered. It recommended a hospital order which would permit a sentencing judge to order that a sentence of imprisonment could be served, in whole or in part, in a psychiatric facility for therapeutic reasons. This model is very similar to

¹² *Ibid.*

¹³ See section 747.1(2).

the hospital order which exists in a variety of forms in the United Kingdom, pursuant to the *Mental Health Act* 1983.¹⁴

Some things have changed since the enactment of Part XX.1. In Toronto and Saint John, current pilot mental health courts provide important insights into how the criminal process can respond to mentally disordered offenders when resources are made available. However, we still have no reliable data about the extent of mental disorder among people who are subject to the criminal process.

The Section urges the Committee to take steps to ensure that, whenever possible, people who are mentally ill receive treatment in an appropriate therapeutic context and not be imprisoned. We recommend that the Committee conduct the necessary research and collect the relevant data to determine:

- a. the extent of the problem of mental disorder within the criminal process that is not governed by either section 16 or fitness inquiries;
- b. the potential utility to sentencing judges of a sentencing tool that would permit a kind of hospital order broader than section 747; and
- c. whether resources exist to implement forms of hospital orders like those used in the United Kingdom.

III. CONCLUSION

The Standing Committee's recent statutory review of the *Corrections and Conditional Release Act* extended over several months. For that review, your Committee had the benefit of extensive data collection and research reports prepared by Corrections Service Canada and the National Parole Board. In contrast, in the "mental disorder" area, there are no national agencies that can fulfill this function. Each province and territory has its own review boards and

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See section 37 for a "hospital order"; section 41 for a "restriction order".

hospital facilities, some being better equipped than others. How the various regions are responding to the challenges of mental disorder and the expectations of Part XX.1 are important questions that need to be answered. To date, we are aware of no serious and systematic effort to address these questions. We reiterate our view that anything short of a comprehensive programme of research conducted by psychiatrists, lawyers and social scientists will be a disservice to the many people who suffer from mental disorder and find themselves facing criminal charges. It will be a disservice, in that way, to us all.