Criminal Law Review

MENTAL DISORDER PROJECT

Discussion Paper

Department of Justice
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Chapter 1

INTRODUCTION

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. In this paper, it is hoped to identify areas of particular concern and to present options that may assist in the development of a consistent approach to this complex area. 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.

The first area that will be examined deals 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 will be explored in the "Psychiatric Remands" part of this paper.

The second part of the paper will examine 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?

One of the most severe criticisms of the current fitness provisions concerns the fact that an accused person may be found unfit and 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 accused person suffers from a chronic condition, such as mental retardation, that is likely to render him or her permanently unfit to stand trial.

The third section of the paper will examine "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 will be examined in this paper. Whatever definition of insanity is ultimately adopted, the operation of the defence will involve a number of thorny procedural and evidentiary questions.

The fourth section of the paper deals with "Automatism and Criminal Responsibility." A basic question considered in this part 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 will also be considered, as will such questions as burden of proof and disposition.

The largest single part of the paper deals 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 will be examined in this paper is 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 part of this paper will examine 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, there may be some utility in examining the principle behind s.546 and the appropriateness of extending it to mentally disordered prisoners in federal penitentiaries. In this regard, it may also be useful to review the scope of s.19 of the Penitentiaries Act.

One area that is briefly considered in this part of the paper involves the possibility of permitting so-called "hospital orders" for convicted offenders. While this subject may be 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. Nevertheless, the Law Reform Commission of Canada's recommendation for the adoption of a similar system has not been received very well here. 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 psychiatric 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 issues and options relating to this subject are reviewed in this paper.

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. It has been 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.

The Appendix contains a Bibliography of cases, articles, books and reports referred to in the text; a summary of an American study; and the States of Oregon review board legislation.

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 (and is relied on in a

number of important parts of this paper), 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 in relation to the foregoing areas of discussion.

One of the most important considerations in the development of this paper has been the impact of the Canadian Charter of Rights and Freedoms. As the CLCS document points out on p.31:

> "[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)).

One of the recurring themes of the 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 (pp.4, 5, 6, 29, 48, 49, 50, 51, 53, and 64). 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 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

(at p.61), 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.

The CLCS document discusses at length the need for an appropriate balance (pp.49, 50, 51) "between individual liberties and the provision of adequate powers for the state to allow for effective crime prevention and control...." There is reference to the British Royal Commission on Criminal Procedure's recognition of the increasing popularity of the concept of the need to balance the rights of individuals with the security of society, and the statement that the means of achieving this balance can often best be gained through the use of "a presumption, onus, or burden of proof that must be discharged by reference to facts and experience." This principle is explored in a number of parts of this paper.

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. This concept is of particular importance in relation to the review mechanism that is used to consider the continuing appropriateness of initial disposition orders by lieutenant governors. The current Code provisions and some provincial mechanisms established to deal with the review process have been criticized because of their perceived inherent unfairness. It may now be appropriate to consider developing a more formalized mechanism that includes certain fundamental rights, such as a right to a hearing, a right to counsel, a right to call and to cross-examine witnesses, and a right to an effective appeal. Indeed, the very question of the appropriateness of continuing the role of provincial lieutenant governors in the process should be considered in light of the guiding principles in the CLCS document.

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" (p.61).

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...." (p.48). It may be that the current mechanism whereby lieutenant governors reach decisions on disposition and review does not satisfy this concept.

The CLCS document stresses the "right to appeal" as a crucial means of ensuring legal accountability. In addition to the possible need to mandate procedural safeguards for persons found insane or unfit who are subject to confinement orders, therefore, there is the issue of whether a special appeal mechanism should be established (p.32).

Another important theme throughout the CLCS document is its reference to a recommendation of the Law Reform Commission of Canada that the principle of responsibility must remain the cornerstone of the imposition of criminal sanctions (p.47). The CLCS document refers to the need to clear up confusion about insanity and to clarify the concept of responsibility, which in many ways is one of the most important principles of our criminal justice system for it determines the state of mind that is necessary for an individual to be held culpable for his or her acts. Both the need to clarify the notion of "responsibility" and the principle that the criminal law must provide clarity and precision as to which persons are to be caught by its sanctions make it particularly important that the Code amendments remove any ambiguities currently found in s.16 and set forth language that hopefully will need little judicial interpretation.

One of the purposes of the criminal law expressed in the CLCS document is that sanctions for criminal conduct should be related to the degree of responsibility of the offender (p.53). Consideration is, therefore given, in the "Insanity" part of this paper, to the possibility of including a defence of diminished responsibility in the Criminal Code.

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 (p.53). Consistent with this principle and with s.15(1) of the Charter of Rights is the notion that the principles involved in making decisions regarding the disposition of persons found not guilty by reason of insanity or unfit to stand trial should be consistently applied in all areas of the country. To the extent that the exercise of discretion by lieutenant governors in similar cases varies greatly, both the consistency and equality principles may be offended.

Another guiding principle is that "the criminal law should ...clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process..." (p.53). To the extent that many of the current Code provisions (and omissions) in the area of the disposition and review of persons found not guilty by reason of insanity or unfit to stand trial are unclear and ambiguous, this principle may also be offended.

Alternatives aimed at satisfying these principles are set out in this paper.

The equality concept is again emphasized by another CLCS principle that "in order to ensure equality of treatment and accountabilty, discretion at critical points of the criminal justice process should be governed by appropriate controls..." (p.54). Current Code omissions and vague provisions may be inconsistent with this principle in a number of areas. For example, provincial lieutenant governors currently have a virtually unfettered discretion regarding the disposition and review of persons found not guilty of indictable offences by reason of insanity or unfit to stand trial. Some boards of review follow a "paternalistic" review model, within which the rights of the individual may not be fully respected. In some cases, lieutenant governors disregard the advice of their boards of review to permit a greater degree of freedom and make decisions on political and other grounds which may be unconnected to the rehabilitative needs of the individual and that individual's current dangerousness. The provisions of the Code that guide the actions of the lieutenant governor refer to "the best interest of the accused..." and "the interest of the public..." The provisions that guide the board of review (where one is established) refer inter alia to the question of whether the person "has recovered..." and "the interest of the public and of that person...." These terms are so vague and imprecise as to permit

arbitrariness in the decision-making process. The "Disposition and Continuing Review" part of this paper, therefore, considers alternatives that might come closer to satisfying the principle of "appropriate controls" proposed in the CLCS document.

There is mention in the CLCS document of the importance of meeting our obligations under international covenants and agreements (p.56). It may be particularly useful to examine decisions of the European Court of Human Rights in some of the areas discussed in this paper, and the effect that those decisions have had on requiring amendments to similar legislation and administrative procedures in other jurisdictions (such as Great Britain).

There is reference in the last paragraph of the CLCS document to "the attitudes and behaviour of individual citizens...." (p.69). In the end, the legislative mechanisms that will be adopted to attempt to satisfy the guiding principles in the CLCS document (and, therefore, to achieve the necessary balance between the rights of individuals and the security of society in relation to mentally disordered persons caught up in the criminal justice system) will inevitably be influenced (and perhaps eventually determined) by public attitudes and desires. It is an old and somewhat trite adage that justice must not only be done but must be seen to be done. To the extent that the current system is fraught with ambiguities and uncertainties in an area so vital to the rights and freedoms of the individual, it is particularly important that a range of alternatives be presented and debated as fully as possible. Hopefully, these alternatives will serve as a framework for developing a complete package of legislative reforms in the important and sensitive area of mental disorder and criminal justice.

In the interest of making this paper understandable to non-lawyers, an attempt has been made to keep legal terminology and citations to a minimum. Those wishing a copy of legal materials prepared as part of the research for this paper should write to the Project Office at the following address:

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Chapter 2

PSYCHIATRIC REMANDS

PSYCHIATRIC REMANDS

INTRODUCTION

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."

Questions concerning the purposes and grounds for remand, the duration of remands, the evidence required by the court, the place and nature of the remand, treatment of the person under remand, and so on, are issues which clearly require attention in any review of the Code.

ISSUES

Issue 1

For what purposes should "psychiatric remand" be sanctioned?

Discussion

One clear purpose of the observation provisions in ss. 465 and 738 is the gathering of information concerning the accused's mental condition relevant to the question of whether an issue should be tried as to his or her fitness to conduct a defence at a preliminary inquiry or to stand trial, respectively. Such purpose, though likely, is less clear in the Code's main provision relating to fitness to stand trial, s. 543.

Although not expressly articulated, one probable purpose of the observation provisions contained in ss. 465, 543 and 738 is that of providing potential expert psychiatric witnesses with a basis upon which to give expert testimony on the fitness issue itself.

Another possible purpose suggested by the observation provisions in ss. 465, 543 and 608.2 is the gathering of evidence relevant to the offence (or defence) of infanticide.

It appears from at least one reported case that the purpose of the observation provision in s. 608.2 is the gathering of psychiatric information relevant to the issue of whether the appellant was insane at the time of the offence.

Because s. 543(2) of the Code may be used "at any time before verdict or sentence ..." (emphasis added) one purpose of that provision would appear to be the gathering of psychiatric evidence which may be relevant to the question of sentence. The express purpose of s. 691 of the Code is that of obtaining evidence relevant to the question of whether an offender is a dangerous offender within the meaning of s. 688 and should be sentenced to detention in a penitentiary for an indeterminate period.

In practice, the Code's observation provisions may also be used to obtain information relevant to the issue of civil commitment. (It is doubtful, however, that this use could in any way be considered a "purpose" (however oblique) of any of the Code's provisions).

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.

Alternative I

Provide clear statutory authority for psychiatric remands, but only for the purpose of assessing present mental condition relevant to the issue of fitness to stand trial.

Considerations

Such a provision would preserve the accused's right to a fair trial by ensuring that he or she can effectively participate in the process. By restricting remands to questions of fitness, the provision would reduce the chance that the acused might be compelled (or unfairly induced) to provide evidence against him- or herself on the issue of guilt (particularly if coupled with a "psychiatric privilege" regarding statements made to a psychiatrist in the course of a court-ordered fitness examination).

A provision of this sort might, however, deprive the accused of an easy and efficient means of gathering evidence for a possible "psychiatric defence," unless fitness is an issue. It might also preclude the prosecution from obtaining evidence relevant to an issue other than fitness, e.g., the issue of whether the accused is a "dangerous offender" for the purpose of an application under s. 688 of the Criminal Code, or the question of bail.

Alternative II

Provide clear statutory authority for psychiatric remands for the purpose of assessing the accused's mental condition in cases where it may be relevant to some or all of the following:

(a) the question of bail;

(b) the accused's fitness;

(c) the accused's mental state at the time of the alleged offence;

(d) the question of disposition;

(e) the question of whether the accused is a "dangerous offender" for the purpose of Part XXI of the Code;

(f) the accused's capacity to make an oath;

(g) the accused's credibility as a witness or deponent; or

(h) the question of whether withdrawal of charges is appropriate.

Considerations

Bail

The first contact that the accused has with the judicial system after arrest is often a bail hearing. The issue of the accused's mental state may be relevant to the question of whether bail should be granted and, if so, on what conditions. If included as a purpose for remand, it may provide an additional safeguard to the

public; if the accused is found to be seriously mentally disordered and therefore either dangerous or unlikely to appear for the next stage of the proceedings, psychiatric evidence on this point would be available to the judge before he or she makes a determination on the question of bail.

The Accused's Fitness

The advantages discussed for Alternative I would apply here.

The Accused's Mental State at the Time of the Alleged Offence

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 was prevalent during the time the offence was committed.

Disposition

Currently, 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. 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.

Even where a conviction is registered, it may be useful to have a remand provision available to the court to enable the court to determine the most appropriate sentence to impose. This may be particularly beneficial if the recommendation of the Law Reform Commission of Canada on hospital orders is adopted (see infra).

Dangerous Offender

In the 1976-77 amendments to the Criminal Code, the Dangerous Sexual Offender provisions were combined with the Habitual Offender provisions into what are now the

Dangerous Offender provisions of the Code. Under the current provisions, s. 691 provides for remand for the purpose of obtaining evidence relevant to an application. In order for an indeterminate sentence to be substituted for the usual sentence, the accused must be found to be a Dangerous Offender at a hearing at which the evidence of two psychiatrists is required.

Accused's Capacity to Make an Oath

Insofar as mental disorder may interfere with one's capacity to make an oath, the utility of such a provision as this is obvious.

Accused's Credibility as a Witness

Evidence as to credibility may be admissible in some instances. It may therefore be considered useful to obtain a psychiatric assessment that could provide an expert view of the accused's credibility as a witness. (The accused may, for example, be suffering from delusions, be a pathological liar, and so on).

Withdrawal of Charges

In some circumstances (e.g., in the case of relatively minor offences, or where an individual is unlikely to become fit to stand trial) it may be possible that following a psychiatric assessment the Crown would agree to withdraw the charges on the condition that the individual receive treatment and/or remain under someone's control (i.e., through the use of provincial mental health statutes or otherwise).

Issue 2

When should psychiatric remands be authorized?

Discussion

The powers enumerated in s. 465(1) and (2) are exercisable only by "a justice acting under this Part...." As Part XV of the Criminal Code (in which s. 465 is located) deals exclusively with procedure on preliminary inquiry, the wording of s. 465 would appear to indicate that a justice has no power under the Code either to direct an accused to attend for observation, or to remand an accused in custody prior to the commencement of a preliminary inquiry. It is not made absolutely clear in the Code, however, when a preliminary inquiry commences for this purpose.

It is also unclear whether the power to make an observation order is available under the Code at the judicial interim release stage. While s. 457.1 allows for a three-day remand before or at any time during a "show cause" (bail) hearing, during which time either the Crown or defence counsel may arrange to have the accused examined on an informal basis, there is no provision in Part XIV dealing specifically with orders for observation. While it may be that s. 543 (2) of the Code could be used, as it empowers a "court, judge or magistrate..." to order the remand in custody or attendance of an accused for observation "at any time before verdict or sentence...," it is likely that the observation provision of s. 543 cannot be used at any earlier stage than the fitness to stand trial provision contained in that section.

Some judges, it should also be noted, see no problem in the use of s. 465 prior to judicial interim release hearings. Note, however, that there is nothing in either the Code or the case law to suggest that remands may be ordered prior to the accused's first appearance in court.

The provisions of s. 738(5) and (6) of the Code enable summary conviction courts to make observation orders "at any time before convicting a defendant or making an order against him or dismissing the information, as the case may be...."

Alternative I

Make provisions that allow for remand at all stages of the trial process.

Considerations

This would clearly allow for remand to be used prior to a bail hearing, prior to the commencement of a preliminary inquiry, etc., thereby providing for the assessment of the accused's mental condition at any time where this may be in question. Such provision would allow the accused to participate in treatment at the earliest stage possible and might provide the court with evidence germane to public safety, i.e., the accused's mental condition.

Alternative II

Provide for remands as described in Alternative I, but allow as well for remands prior to the accused's first appearance in court.

Considerations

This would allow commencement of treatment of an acutely disordered accused person (e.g., a suicidal individual) at the earliest possible time. It might also provide the best possible opportunity to discover what the mental condition of the accused might have been at the time of the offence. In light of the minimal time lag between an accused's arrest and his or her first appearance in court, however, it is questionable whether this type of provision would be necessary.

Issue 3

Under what conditions should the remand take place?

Discussion

Psychiatric examination, observation, assessment, etc. may or may not require detention of the accused person, depending on a variety of factors. At issue here is the question of whether custodial and/or non-custodial remand should be expressly provided for in the Criminal Code. The Code's current observation provisions allow alternatively for courts to "direct" the accused, defendant or offender, as the case may be, to "attend, at a place or before a person specified in the order and within a time specified therein, for observation ...."

Issue 4

Assuming that both custodial and non-custodial remands are authorized, on what basis should a choice between the two be made?

Discussion

The Criminal Law in Canadian Society, published by the Government of Canada in 1982, set out a formal statement of principles for criminal law intended to give guidance

to the Criminal Law Review. One principle to be applied in achieving the purposes of the criminal law is that, wherever possible, "preference should be given to the least restrictive alternative adequate and appropriate in the circumstances." There appears to be only one alternative consistent with this principle.

Alternative

Specify that the psychiatric remand must 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 justified.

Considerations

This makes it clear that non-custodial observation is the preferred option, and minimizes unnecessary custody. This approach is also consistent with the Code's judicial interim release (bail) provisions which also generally require the prosecutor to show cause why detention of the accused is justified. In addition, this option would go a long way toward satisfyng the requirements under ss. 7,9,11(e) and 15(1) of the Charter.

Issue 5

What provision should be made with respect to the place to which persons may be remanded?

Discussion

When directed to attend for court-ordered observation under current Criminal Code provisions, the subject may be sent to "a place or before a person specified in the order ...." When remanded in custody, the subject 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.

Issue 6

Should provision be made requiring notice of an application for psychiatric remand?

Discussion

Currently, the Criminal Code makes no provision for notice of an application for psychiatric remand. Arguably, because any detention under remand is normally relatively short, the absence of notice may not be seen as unduly prejudicial to the rights of the accused. Often the issue of remand arises spontaneously, and notice may be impractical. Furthermore, a notice requirement may waste valuable time where there are compelling reasons to remand the accused as soon as possible.

It is possible, however, that the absence of a notice requirement may render the current remand provisions susceptible to attack under s. 7 of the Charter. Moreover, the possible evidentiary implications of psychiatric remand are currently serious (i.e., information obtained during remand may, in some circumstances, be introduced as admissions or confessions, or to rebut a psychiatric defence). If notice were given, the unrepresented accused could obtain legal advice on the question of whether he or she should co-operate.

Issue 7

What should be the criteria for ordering a psychiatric remand?

Discussion

The question of grounds is closely related to the purpose for which psychiatric remand may be ordered. Under current Criminal Code provisions, the purpose of remand may not always be clear from the wording of the grounds, which vary slightly depending on the section of the Code applicable.

In order for a justice acting under Part XV to make an observation order under s. 465 (1), he or she must be of the opinion that "there is reason to believe that ...the accused may be mentally ill, or...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..." (emphasis added). Under s. 543(2), however, a court, judge or magistrate must be of the opinion that "there is reason to believe that...an accused is mentally ill, or...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..." (emphasis added). Section 608.2(1) of the Code seems to have borrowed from each of the above two provisions, requiring a judge of the court of appeal to be of the opinion that "there is reason to believe that...the appellant may be mentally ill, or ... 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..." (emphasis added). Section 738(5) of the Code has adopted the format of s. 543(2)(a), requiring a summary conviction court to be of the opinion that "there is reason to believe that the defendant is mentally ill ..." (emphasis added) but has omitted the provision contained in s. 543(2)(b) for the obvious reason that infanticide is an indictable offence. Lastly, s. 691(1) of the Code (which deals with the power of a court to which an application has been made to have an offender declared a "dangerous offender" under Part XXI and sentenced accordingly) sets out a test entirely different from any in the Code's other observation order provisions. Under its terms, the court must simply be of the opinion that "there is reason to believe that evidence might be obtained as a result of such observation that would be relevant to the application."

Note that the term "mental illness" is not defined in the Criminal Code. The terms may well be narrower than the concept of "mental disorder," an expression which appears frequently in provincial mental health legislation and is defined therein. It may be, for example, that mental retardation would be embraced by the term "mental disorder" but not by the term "mental illness." Furthermore, it may be argued that the reference to the infanticide section of the Code is either superfluous or illogical. If the term "mentally ill" really means "mentally disordered," then the woman who fits within the infanticide section would no doubt fall within its meaning. If the term "mentally ill" is narrower than "mentally disordered," why make a special exception only for women potentially guilty of infanticide?

Under the present criteria, many more persons are remanded in some jurisdictions than can be adequately coped with. It may be that delays in jail resulting

from severe backlogs worsen the remanded person's mental condition. It should also be noted that under the present system many more persons are remanded than are ultimately found to be unfit. In a recent Canadian study (Webster et al.), for example, 84.7% of those persons remanded for assessment in six Canadian cities were ultimately found to be fit. In other Canadian studies, the figure ranged from 65% (Arboleda-Florez et al.) to 93% (Kunjukrishnan et al.). It is not known, however, what effect treatment or "coaching" (i.e., education or training as to the nature of the proceedings and the court process) had on these statistics.

Alternative I

Same as status quo, but:

(1) substitute the words "is mentally disordered" for "may be mentally ill" and define "mental disorder" as "any disease or disability of the mind" (Ouimet Committee recommendation); and

(2) delete the ground relating to infanticide.

Considerations

This change would help ensure that the mentally retarded could be remanded for observation under the Code. It might also permit the remand of persons with other disorders who might not be eligible under the current provisions. Under this approach the "may be"/"is" inconsistency alluded to earlier would be eliminated as well. Note, however, that broadening the category of persons eligible for remand might place an increased burden on mental health facilities; this may raise cost, safety, and other related policy issues.

Alternative II

Same as status quo or Alternative I, but specify that psychiatric remand may be ordered where a defence based on mental disorder is raised or where the prosecution is given notice that the accused intends to raise such a defence (ALI Model Penal Code, s.4.05).

Considerations

This approach may help the prosecution to cope more effectively with a "psychiatric defence" where the consequences of an accused's failure to cooperate once a psychiatric remand has been ordered (e.g., criminal penalty or adverse inference) are made clear. It may be argued, on the other hand, that this approach is unnecessary. It appears from recent rulings that an inference adverse to the defence of insanity can currently be drawn from an accused's failure to submit to examination by Crown-retained psychiatrists. Moreover, the Crown may attack a "psychiatric defence" by cross-examination of defence psychiatrists and/or by calling its own psychiatric witness(es) to testify on the basis of hypothetical questions.

Issue 8

What provision should be made with regard to consent for the purposes of psychiatric remand?

Discussion

Under the present Criminal Code provisions, there is no requirement for consent of the accused to psychiatric remand. Since all that is currently being expressly authorized is "observation" (as opposed to treatment or examination) it is arguable that consent is a non-issue. Even if examination were expressly authorized, it could be argued that because the law prohibits the conviction of persons who either are currently unfit to stand trial or were insane at the time of the offence, the person's consent should not be a factor. Both of these arguments may, however, be rebutted. The first argument may be seen as artificial; in practice, once the accused is within the control of the psychiatrist during "observation" he or she may find it extremely difficult (owing to his or her mental disorder or to subtle investigatory techniques which the psychiatrist and associated staff may employ) to prevent some form of examination from taking place. The second argument above may be equally misleading. Under the present law, information obtained as the result of psychiatric examination may have many other uses beyond that of supporting unfitness or insanity; information obtained from psychiatric examination may incriminate the accused or support a finding of guilt in many instances.

Alternative I

Prohibit all non-consensual psychiatric remands.

Considerations

This approach would preclude the inquisitorial use of psychiatric expertise as a means of gathering incriminatory evidence against accused persons. It might, however, deprive unfit persons who refuse to be examined because of their mental disorder of the right to a fair trial (see s. 2(e) of the Bill of Rights and s. 7 of the Charter). It might also prevent the Crown from gathering incriminatory evidence from the accused, or evidence to rebut a psychiatric defence, by a psychiatric examination where the accused has not consented to examination. (Currently, of course, the Crown is not supposed to do this).

Alternative II

Permit non-consensual remands for the purpose of assessing the accused's mental condition relevant to the issue of fitness, but require the accused's consent for any remand ordered for any other purpose.

Considerations

This approach would protect the accused's right not to be tried while unfit. It would prevent the Crown from gathering incriminatory evidence from the accused, or evidence to rebut a psychiatric defence, via psychiatric examination where the accused has not consented to examination and his or her fitness is not in issue.

Issue 9

What provision should be made with regard to medical or other expert evidence in support of remand?

Discussion

The question of medical or other expert evidence raises the issues of both expediency and fairness to the accused. Ideally, any requirement for expert evidence should not be so stringent as to constitute an

unworkable impediment to necessary remands. On the other hand, the consideration of fairness demands that an accused not be subjected to a loss of liberty and/or an invasion of his or her privacy without good cause.

All of the Criminal Code's observation provisions normally require "the evidence ...of at least one duly qualified medical practitioner ..." before an order can be made. As indicated by the case law, these words require the actual presence of the doctor in court in order that he or she might give oral evidence and be subject to cross-examination. In circumstances "where [the prosecutor or respondent, as the case may be] and [accused, appellant, offender or defendant, as the case may be] consent...," the medical evidence requirement may be satisfied by "the report in writing of at least one duly qualified medical practitioner...." The requirement for such evidence may be dispensed with, at least for the purpose of a remand in custody, "where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the [accused, appellant, offender or defendant, as the case may be] and give evidence or submit a report...." It is not entirely clear, however, whether in such circumstances the requirement for the evidence or report of a duly qualified medical practitioner may be dispensed with (a) for the purpose of both a direction to attend for observation, and a remand in custody for observation or (b) only for the purposes of the latter order.

The general requirement for evidence of at least one duly qualified medical practitioner guards against unnecessary remands. Arguably, this requirement is not unduly onerous. A psychiatric opinion is not required; the opinion of any M.D. will do. Additionally, allowing for a report in writing instead of oral evidence makes the requirement flexible. Allowing for the general requirement to be dispensed with "where compelling circumstances exist for so doing and where a medical practitioner is not readily available..." also permits flexibility.

It may be argued, however, that the requirement for medical evidence is unreasonable, since the purpose of the remand is to obtain a medical/psychiatric opinion on the accused's mental condition. If this opinion were available, no remand would be necessary. Furthermore, the grounds on which medical evidence can be dispensed with may be too vague. One might question what the "compelling circumstances" are.

Alternative

Require the evidence of a psychiatrist, psychologist, social worker, psychiatric nurse, or other person qualified by the court or provincial law.

Considerations

It may be questioned why duly qualified medical practitioners are the only professionals named as persons entitled to provide the evidence necessary for remand. Expansion of the category of persons in the way suggested in this alternative would make the category less arbitrarily narrow.

It must be pointed out that if one or more of the above-named persons are required in addition to a physician, the requirement for such specialized evidence beyond that of a medical practitioner may be unduly onerous. The purpose of remand, after all, is to get such evidence. Moreover, under the current Criminal Code provisions, it could be argued that there is nothing to preclude the evidence of the qualified persons listed above from being used to show "compelling circumstances" wherein remand may be ordered without the evidence of a duly qualified medical practitioner.

Issue 10

Who should be permitted to seek the accused's remand?

Discussion

Currently there is no express provision specifying persons who may seek remand of the accused. The case law suggests, however, that the issue of remand may be sought by the accused, by the Crown, or by the Court itself. Considerations of fairness and justice to the accused may require more specificity on this question.

Alternative I

Provide that only the accused may seek remand.

Considerations

While this option would maximize protection of the accused's liberty, it may be unfair to require a pos-

sibly mentally disordered accused person to seek remand on his or her own behalf, particularly where he or she is not represented by counsel.

Alternative II

Provide that remand of the accused may be sought by the accused, by the prosecution and by the court.

Considerations

Providing that any of those identified above may seek remand of the accused would allow remand to be raised for the unrepresented accused who is too disordered to seek it him- or herself. It might, however, prevent the accused from proceeding to trial as quickly as he or she wishes.

Issue 11

What provisions should be made with regard to burden and standard of proof when the defence seeks remand?

Discussion

As was the case with the medical evidence issue above, the issue of burden and standard of proof involves consideration of both expediency and fairness to the accused. Where the accused is disordered and unrepresented by counsel, it may be unfair to require him or her to satisfy any burden. Where the defence seeks remand, fairness to the accused is, of course, not that significant a consideration. There remains, however, an interest in minimizing unnecessary remands which may delay the administration of justice. Burden and standard of proof will, in theory, govern the ease with which remand may be obtained at the request of the defence.

While the Code makes no specific provision concerning burden of proof, it may be inferred from the general requirement for medical evidence, that there is a presumption against the existence of the conditions set out in the provisions, and that the burden of rebutting this presumption rests on the party seeking the observation order. The fact that medical evidence may be dispensed with in "compelling circumstances" where a

medical practitioner is not readily available, however, raises the question of whether the court is entitled i the appropriate circumstances to make an observation order notwithstanding the fact that neither party has sought one. It may be argued, in other words, that any presumption as to the non-existence of the requisite conditions simply disappears on the appearance of "compelling circumstances," such as the accused's behaviour in court, etc. On the other hand, it may be contended that both the existence of compelling circumstances and the fact that no medical practitioner is readily available must be proved by a party seeking an observation order in the absence of medical evidence.

In practice, the prosecution or defence generally makes application for remand. Though there is little Canadian case law on point, the recent case of R. v. Deacon is worth mentioning on the subject of standard of proof. There, where the Crown had made application to have the accused remanded for observation under s. 465(1)(c) of the Code, Shupe J. stated that "As a condition precedent to ordering a thirty-day psychiatric remand, this Court must be satisfied on the balance of probabilities that the accused...may be mentally ill...." It might be questioned whether the requisite standard of proof remains the same regardless of which party seeks the remand, and whether it is affected by the alternate uses of the expressions "may be" and "is" in the Code's various observation provisions.

Alternative I

Require the applicant to prove the existence of the requisite criteria on a balance of probabilities.

Considerations

This approach would minimize unnecessary remand but would not be unduly burdensome for the defence.

Alternative II

Require the applicant to raise the possibility that the requisite criteria exist.

Considerations

This option would make it easier for the defence to obtain remand. However, it may result in unnecessary remands.

Issue 12

What provision should be made with regard to burden and standard of proof when the prosecution seeks remand?

Discussion

The considerations raised under Issue 11 apply here as well. Minimizing unfair invasion of privacy may be an additional consideration where the prosecution seeks remand. As mentioned before, however, this consideration must be balanced against expediency.

Alternative I

Require the prosecution to prove the existence of the requisite criteria beyond a reasonable doubt.

Considerations

This burden and standard would be consistent with the normal burden on the Crown in criminal cases as regards proof of guilt, and might help ensure against attack under s. 7 of the Charter. On the other hand, it may be that this standard is inconsistent with the nature of the issue involved (i.e., mental disorder, rather than guilt) and the purpose and nature of the deprivation of liberty (i.e., investigation which may ultimately benefit the accused, rather than punishment). Where the purpose of the remand is related to the issue of fitness, an unduly heavy burden of proof could impede a finding of unfitness being made in proper circumstances, and could therefore infringe the right to a fair trial.

Alternative II

Require the prosecution to prove the existence of the requisite criteria on a balance of probabilities.

Considerations

Although this standard is not consistent with the normal burden on the Crown as regards proof of criminal guilt, it is perhaps more compatible with the nature of the issue involved, and with the purpose and nature of the deprivation of liberty.

Alternative III

Require the applicant to raise the possibility that the requisite criteria exist.

Considerations

This approach would be even more inconsistent with the normal burden on the Crown as regards proof of criminal guilt than Alternative II, and could result in more unnecessary remands than occur at present. It would, however, provide maximum assurance that the mental condition of the accused would be ascertained in situations where it might be relevant.

Issue 13

What should be authorized as far as the nature of the observation/examination/assessment is concerned?

Discussion

Although ss. 465, 543, 608.2 and 738 of the Criminal Code all use the term "examine" when referring to the envisioned function of the duly qualified practitioner who is normally required to give evidence or submit a report before an order can be made, it is interesting that the order itself may only authorize "observation." No definition of this term is offered in the Code. Owing to the nature of the grounds upon which observation may be ordered, however, the term is generally taken in practice to refer to psychiatric examination, an expression that appears frequently (though again without definition) in provincial mental health legislation. Because the Code is silent on the question of exactly what method of examination is permissible, it may be inferred that (subject to any common law or statutory limitations) psychiatrists and those working in conjunction with them are prima facie authorized to use the standard techniques of their professions. This inference would seem, moreover, to be supported by the few judicial dicta there are on the point.

Alternative I

Specify that the remand is for psychiatric observation/examination/assessment.

Considerations

This approach is consistent with that taken in some provincial mental health legislation. Without more, however, this alternative in itself may be taken to authorize non-consensual examination, which some might see as an unjustified intrusion. Others, on the other hand, may feel that the alternative does not provide sufficiently clear authority to use standard investigatory techniques in the absence of the accused's consent.

Alternative II

Specify that the remand is for medical and/or psychological and/or psychiatric observation/ examination/ assessment.

Considerations

An assessment of mental condition may entail medical and/or psychological tests in addition to a psychiatric interview. Though the whole package is often considered part of a thorough "psychiatric examination," this approach would specifically authorize such procedures for the sake of clarity.

As with the above option, this approach in itself may be taken to authorize non-consensual examination, which some again might see as an unjustified intrusion. Others, on the other hand, may again feel that the alternative does not provide sufficiently clear authority to use standard investigatory techniques in the absence of the accused's consent.

Alternative III

Same as Alternative I or II, but provide that the examination or assessment techniques may not be used without consent of the accused.

Considerations

This approach would provide the accused with safeguards similar to those available to other citizens. By placing such control in the hands of the accused, however, it may allow the purpose of remand to be frustrated.

Alternative IV

Same as Alternative I or II, but provide that mental health professionals are authorized to use the standard techniques of their profession regardless of whether the accused consents.

Considerations

Under this approach, the accused would not be provided with the same rights as any citizen, but the purpose of remand would likely not be frustrated.

Issue 14

Assuming that examination/assessment is permitted, what provision should be made with regard to the persons authorized to conduct examination/assessment of the accused on remand?

Discussion

The current provisions are silent on this point and are therefore flexible. Specifying the persons authorized to conduct the examination/assessment, however, might promote uniformity in quality of examination/assessment, and would limit the category of individuals or professionals allowed to conduct examination/assessment of the accused on remand.

Alternative I

Authorize only duly qualified psychiatrists and the support staff and related personnel (i.e., medical, psychological, etc.) they require.

Considerations

This approach would endorse psychiatric techniques as being most suitable in the diagnosis of mental disorder, and would endorse current practice, whereby the psychiatrist is often assisted by other persons such as those described above. Critics, however, have pointed to the paucity of empirical evidence affirming either the reliability or the accuracy of psychiatric diagnoses. They have also noted the fallibility and often unproven reliability or accuracy of psychological tests.

Note that psychiatrists may not be available in all jurisdictions where there are courts.

Alternative II

Same as Alternative I, but authorize duly qualified physicians (who may not be assisting psychiatrists and who are not themselves psychiatrists).

Considerations

This provision would be useful in jurisdictions where there are no psychiatrists. On the other hand, it may be argued that physicians who are not specialists in psychiatry should not be authorized to conduct examinations/assessments of accused persons on remand.

Alternative III

Same as Alternative I or Alternative II, but where the examination is for the purpose of determining fitness to stand trial, authorize any trained fitness evaluator.

Considerations

Recent studies, particularly one undertaken for the Department of Justice (Roesch et al.) indicate that evaluators who are not necessarily graduates in psychiatry or psychology may (when certain rigorous procedures are used) be as capable as psychiatrists or psychologists in making reliable assessments on the narrow question of fitness. Allowing fitness evaluators (other than psychiatrists or psychologists) to participate in this process is one way of increasing assessment services as well as making more efficient use of scarce forensic psychiatric resources.

There might be some resistance, however, to the introduction of a new form of expert into the courtroom. The accused might also prefer to have his or her fitness assessed only by a psychiatrist. The use of fitness evaluators will require consideration of issues dealing with training, certification, resources allocation and overall manpower planning.

Issue 15

Assuming that examination is permitted, what provision should be made with regard to the actual procedures that may be used?

Discussion

Here we are concerned with the regulation of diagnostic and/or assessment procedures. Such regulation may be necessary to protect accused persons from unwarranted exposure to intrusive, dangerous or unreliable procedures. For example, procedures such as narcoanalysis and hypnosis may be unfair to the accused for reasons to be discussed below. Regulation may also be necessary to ensure uniformity with respect to use of such procedures.

The Criminal Code makes no provision with regard to the procedures that may be used in the course of a court-authorized psychiatric examination.

Alternative I

Provide that an examination may be conducted "in accordance with recognized normal psychiatric procedures" (Wilband v. The Queen).

Considerations

This approach provides examining psychiatrists (and/or other mental health professionals) with some discretion. While it would preclude the use of innovative, experimental procedures, it would not prohibit the use of procedures currently in use. Some of these procedures, however, may still be regarded as unduly risky or intrusive. This approach has, in effect, been adopted in the ALI Model Penal Code, which specifically provides that in any court-authorized psychiatric examination, "any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect."

There may, however, be procedures that the medical profession considers "normal" but which may be regarded by others as intrusive.

If the Code is to authorize the use of non-consensual examination/assessment, the matter of regulating the actual procedures used will be of greater significance.

Alternative II

Same as Alternative I, but provide that no examination shall include the techniques of hypnosis, narcoanalysis, or the administration of any drug to produce abreaction or a disinhibited state.

Considerations

Such a provision may be useful so long as admissions and confessions made to the examining psychiatrist are not strictly confidential and privileged. These procedures may be unfair methods of gathering evidence even where the accused has consented; during normal interrogation an accused may choose not to answer certain questions, but under hypnosis or narcoanalysis it may be impossible to properly renew or withdraw consent before answering each question. This approach, however, restricts flexibility in the use of what may be considered useful diagnostic techniques.

Issue 16

What provision should be made concerning the treatment of persons on remand?

Discussion

Under the present system, the question of treatment is governed by the common law and the provisions of provincial statute. Because the persons being dealt with have come in contact with 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. In some provinces, psychiatrists may feel that provincial legislation does not go far enough since it may not permit the compulsory treatment of persons on remand under the Code. Arguably, however, 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 and the exceptions thereto.

Alternative I

Authorize compulsory treatment where the accused is incompetent to give or withhold consent to treatment

and, in the opinion of the physician in charge, it is necessary:

(1) to protect the health or safety of the person under psychiatric remand or that of others; or

(2) to render the person fit.

Considerations

Treatment to Protect the Health or Safety of the Person Under Psychiatric Remand or That of Others

Such a provision may be considered rational and humane by many. On the other hand, this approach may not adequately protect or respect the fundamental rights of the accused, and may give rise to Charter challenges (s.7). In addition, this approach may entail difficulties in predicting danger to health or safety.

Treatment to Render the Person Fit

If a mentally incompetent person who might otherwise be subjected to the possibility of indefinite confinement under a warrant of the lieutenant governor can be rendered fit, there is an argument for the authorization of compulsory treatment.

As previously suggested, however, this approach would provide psychiatrists (and/or other mental health professionals) with greater power to treat individuals who have been accused (though not necessarily convicted) of offences than they would normally have.

Alternative II

Provide that compulsory treatment may only be ordered by a court upon being satisfied:

(1) that the accused is mentally disordered;

(2) that the accused appears to be unfit or a danger to him- or herself because of mental disorder;

(3) that treatment is likely to render the accused fit or to protect the health or safety of the accused; and

(4) that the accused is mentally incompetent to give or withhold consent.

Considerations

While this approach would judicialize the decision regarding compulsory treatment of persons under remand, it is arguable that unless the accused is allowed to participate in such a process, this mechanism would become a mere "rubber stamp" of the doctor's recommendation and would therefore be redundant. If, on the other hand, the accused is allowed to participate, the procedure may in some cases amount to a form of fitness hearing. If so, the matter of compulsory treatment might be better dealt with after a finding of unfitness at a real fitness hearing.

Alternative III

Provide that, subject to the ordinary common law exceptions, no person remanded or ordered to attend for observation/assessment/examination shall be provided any treatment without his or her consent.

Considerations

This approach would embody current practices in most provinces. "Consent" in this alternative includes substitute consent, which may be required in specific cases (e.g., in the case of an incompetent patient).

Issue 17

Assuming examination is permitted, what provision should be made with respect to the presence of counsel?

Discussion

Insofar as the results of psychiatric examination may affect crucial issues concerning the accused's liberty, there is an argument for monitoring the procedures used during such an examination by counsel. The Code makes no provision either providing for or excluding the presence of counsel.

Alternative I

Provide that any person undergoing a court-authorized psychiatric examination has the right to have counsel present.

Considerations

Several American courts have held that accused persons undergoing court-authorized psychiatric examination have this right. Counsel, if present, might notice improprieties in the procedure which the person being examined might not notice, thereby enhancing his or her ability to cross-examine. Counsel's presence would enable him or her to discover the exact methods used in the examination, thereby enhancing his or her ability to challenge the examiner's conclusions, if necessary. (At present the trier of fact tends to accept psychiatric opinions, at least on the issue of fitness). By being present, counsel would be able to advise the accused not to answer certain questions or participate in certain examination procedures that might have prejudicial consequences. By being present, counsel would be able to ensure that there is voluntary informed consent where required. In some states, the right to counsel during psychiatric examination has been statutorily enacted.

The right to have counsel present may not, however, be required by the Charter. In many American cases, the courts have rejected the notion that accused persons have the right to have counsel present in these circumstances under the Sixth Amendment. The presence of counsel may well interfere with objective psychiatric assessment. Moreover, where psychiatric examination takes place on several occasions during a long period of time (e.g., 60 days) arranging for the presence of counsel may prove to be extremely cumbersome.

Alternative II

Provide that both defence and Crown counsel may be present.

Considerations

Under this approach the prosecution would have the same opportunity to enhance the effectiveness of its cross-examination of the examining psychiatrist(s) as defence counsel would have. The presence of counsel for the

prosecution, however, may have even more potential for interfering with the accuracy of the results of the examination than does the presence of defence counsel. The accused might become even more inhibited in his or her responses to questions by the examiner, thereby making valid assessment more problematic. The presence of counsel for the prosecution may also increase the likelihood of self-incrimination. The present practice of many psychiatrists is to treat incriminatory statements as confidential, particularly where they are irrelevant or are not essential to diagnosis. Under present law, however, psychiatrists may be compelled to divulge such information in court. The presence of counsel for the prosecution would impede the efforts of psychiatrists to keep statements to themselves, and might increase the frequency with which psychiatrists are required to repeat them in court.

Alternative III

Provide that neither Crown counsel nor defence counsel shall be present.

Considerations

This approach would minimize interference with psychiatric examination. While this alternative does not provide the accused with many of the safeguards described above, the absence of Crown counsel still provides some protection to the accused in terms of self-incrimination.

Alternative IV

Provide that the question of whether counsel should be permitted to be present during the examination is a matter for the discretion of the court.

Considerations

As noted earlier, the presence of counsel may not be required by the Charter. Several American courts have held this to be a matter for the court's discretion. This alternative allows the court to weigh the merits in each case.

For the reasons alluded to earlier, however, it is arguable that the presence of counsel should be an absolute right.

Issue 18

Assuming examination is permitted, what provision (if any) should be made for the presence of a psychiatrist retained by the accused?

Discussion

Here again the extent to which psychiatric examination should be monitored is at issue. Allowing the presence of a psychiatrist retained by the accused, in addition to or instead of the presence of counsel, is another means of safeguarding the freedom of the accused. Currently, the Criminal Code contains no provisions either permitting or prohibiting the presence of a psychiatrist retained by the accused.

Alternative I

Specifically provide that the court "may direct that a qualified psychiatrist retained by the [accused] be permitted to witness and participate in the examination" (ALI Model Penal Code s. 4.05).

Considerations

A psychiatrist who was present during the court-authorized examination could better assist defence counsel in preparing cross-examination of the psychiatrist who conducted the examination of the accused. The presence of the defence psychiatrist may also improve the calibre of the examination conducted, and may reassure the accused and make him or her more cooperative. It might also help minimize differences of opinion between defence and Crown psychiatrists.

This approach might, however, be unduly cumbersome, costly and difficult to arrange. Furthermore, the use of the word "may" gives the court discretion and therefore does not guarantee this right to the accused.

Alternative II

Same as Alternative I, but substitute the word "shall" for "may."

Considerations

This approach would have all of the advantages described for Alternative I and would also respond to the concern that the presence of a psychiatrist for the accused should be an absolute right. However, the concern that this approach might be unduly cumbersome, costly and difficult to arrange remains.

Issue 19

What provision should be made with respect to the duration of remands?

Discussion

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 up to 30 days and specify no minimum remand period (thus allowing for very short remand where appropriate), in practice the maximum period is often ordered whether it is required or not. The result in such circumstances may be unnecessary detention. Conversely, there may be instances in which a longer remand than that which is currently provided for may be appropriate.

A period of remand longer than the usual 30 days may be authorized in some cases, as the Code provisions allow for remand in custody "for a period of more than thirty days but not exceeding sixty days where [the justice, court, judge, magistrate, etc.] 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, defendant, offender or appellant] consent, by the report in writing, of at least one duly qualified medical practitioner."

Note that the 30 day provision in s.465(1)(c)(ii) would appear to conflict with the general requirement of

s.465(1)(b) that "no...adjournment shall be for more than eight clear days...." The only exceptions that appear in s.465(1)(b) are those situations where "(i) the accused... and the prosecutor consent..." or "the accused is remanded for observation under subparagraph (c)(i)...." Remand under sub-para. (c)(ii) is not referred to. Arguably, this means that while an accused can be remanded for a maximum of thirty days under s.465(1)(c)(ii), any period in excess of eight clear days must be with his or her consent and that of the prosecutor. The reference in s.465(1)(b)(ii) to "sub-paragraph (c)(i)..." is an apparent error.

Alternative I

Same as status quo, but limit the duration to 3-5 days where the purpose of remand is assessment of fitness, and allow for renewals of this period where necessary (Lindsay).

Considerations

In practice, a short period is generally all that is required to determine fitness. This approach would therefore give substance to the "least restrictive alternative" principle. It would also be consistent with s. 7 of the Charter.

If this is the only change made in the status quo, however, certain problems will remain. Where a 30-day remand is ordered and it turns out not to be long enough, it is doubtful that under the current Code provisions the remand could simply be extended to a 60-day remand. Successive 30-day remands are not permissible, according to one case.

Alternative II

Provide for 30-day and 60-day remands "or such longer period as the Court determines to be necessary for the purpose..." (ALI Model Penal Code, s. 4.05).

Considerations

This approach provides for longer examination, which may be appropriate for some purposes (e.g., accurate diagnosis). In addition, where the accused's fitness is at issue, and treatment may be required to achieve fitness, a longer remand period may be desirable.

On the other hand, failure to specify a maximum limit may be seen as unfair to accused persons who have not yet been found guilty. This approach may also be challenged under ss.7 and 15(1) of the Charter. (See also s. 1(b) of the Bill of Rights).

Alternative III

Same as Alternative I, but do not limit renewal to cases where the issue of fitness is involved.

Considerations

There may be cases other than those where fitness is an issue, where 3-5 day renewable remands would be appropriate.

Issue 20

What provision should be made with respect to the number of remands allowed?

Discussion

Under current Criminal Code provisions, it may not be possible to order successive remands where the first remand allowed insufficient time. The Code makes no specific provision as to the number of remands allowable.

Alternative I

Allow for successive remands where more time is required.

Considerations

Sometimes a longer period of observation than that which has been ordered may be required for diagnostic purposes. In addition, a longer period than that which has been ordered may be required in order to provide treatment that will stabilize the accused and, perhaps, render him or her fit to stand trial. Moreover, in cases where the accused deteriorates following the initial remand, moreover, it is not clear under the current provisions that an additional remand can be ordered. This approach would respond to such concern.

It might be argued, however, that the examining psychiatrist and the court should not have the authority to detain an accused indefinitely under the Criminal Code, particularly if such person has not been convicted of any offence. Successive remands may amount to indefinite detention, which may infringe ss. 7 and 15(1) of the Charter (see also s. 1(b) of the Bill of Rights).

Alternative II

Allow for successive remands where more time is required and the accused consents.

Considerations

While this approach would have all of the advantages described for Alternative I above, it may avoid the potential Charter problems possible under that alternative. Arguably, however, this approach does nothing about the real problem person, i.e., the one who needs more study but refuses to consent.

Issue 21

What provision should be made with regard to the communication of psychiatric findings to the court following a "psychiatric remand"?

Discussion

The Criminal Code's observation provisions clearly contemplate that the results of any court-authorized observation will ultimately be made known to the court. This fact is particularly apparent in the wording of ss. 465(3) and 738(7), which envision that the question of whether there appears to be sufficient reason to doubt the accused's or defendant's fitness in order for a trial of the issue to be directed will be determined "as a result of observation made pursuant to an order issued under [paragraph (1)(c) or subsection (5), respectively]." Nevertheless, there exist no provisions in the Criminal Code governing the manner in which the results of observations are to be received by the court. This situation is particularly puzzling in light of the elaborate provisions, discussed above, relating to the reception of "the evidence, or where the prosecutor and the accused consent,... the report in writing, of at least one duly qualified medical

practitioner..." (emphasis added) for the purposes of obtaining a court order for observation. By way of contrast, the observation provisions contained in the mental health legislation of some provinces make specific provision for the reception of written (as opposed to oral) psychiatric reports following court-authorized observation.

Alternative I

Provide for the submission to, and reception by, the court of a written report and permit either side, with leave of the court, to require the attendance of the examining mental health professional for the purpose of cross-examination.

Considerations

The current general practice is for the examining psychiatrist to submit a report to the court, despite the failure of the Code to specify that this is required. In the absence of any explicit statutory requirement for the submission of a report, however, it is possible that the disclosure of information to the court by a physician who is not under subpoena would constitute breach of a statutory duty of confidentiality. Providing for the submission and reception of written reports is consistent with provisions in provincial mental health statutes. It is a speedier procedure than requiring the oral evidence of the examining mental health professional(s) at this point. Oral evidence (and consequent cross-examination) may not be particularly necessary at this point because there will be ample opportunity to cross-examine the examining mental health professional(s) at the fitness hearing if one is directed and they are called as witnesses. While psychiatric reports may contain irrelevant and potentially prejudicial information or opinions, judges are used to dealing with this problem.

This approach would allow cross-examination where necessary, but would not necessarily require such a cumbersome procedure. In addition, it would be similar to that which is already in place with regard to the analysis of substances under s.237(4) of the Code, s. 30(2) of the Food and Drugs Act and s. 9(2) of the Narcotics Control Act.

On the other hand, the submission and reception of written reports approach would be inconsistent with the Code's present general requirement for the oral evidence

of "at least one duly qualified medical practitioner...." Furthermore, this approach is inconsistent with the absolute right of cross-examination set out in several sections of the Code. Though cross-examination may not be necessary in cases where a fitness hearing is ultimately directed and the examining mental health professionals are then called to give oral evidence (at which point there will be ample opportunity for cross-examination), it may be crucial in cases where the court would not otherwise be inclined to hold a trial of the fitness issue on the basis of the opinion(s) of the examining mental health professional(s) and one side or the other wishes to have a trial of the fitness issue directed. In addition, psychiatric reports to the court may contain information or opinions that are irrelevant to the issue for which the "psychiatric remand" was made, inadmissible or of marginal probative value on other issues, yet of great prejudicial effect to the accused on such other issues. While judges may instruct themselves to disregard such material, it is arguable that the need for them to go through such mental contortions should be obviated if possible.

Alternative II

Same as Alternative I, but do not require leave of the court in order for either side to compel the attendance of the examining mental health professional(s)for cross-examination (see Bill S-33, s.43).

Considerations

While this approach would have the same disadvantages as those indicated for Alternative I, it would be more consistent with the general right of cross-examination than that described in that alternative.

Alternative III

Require the oral evidence of the examining mental health professional(s) except where the prosecution and defence consent to the reception of the report(s) in writing of the examining mental health professional(s).

Considerations

This approach would be consistent with the Code's provision concerning the medical evidence necessary for

remand. It would also allow cross-examination of the examining mental health professional(s) and would enable counsel to prevent, to a greater extent, extraneous and prejudicial material from being placed before the trial judge.

Issue 22

What provision should be made with regard to the communication of psychiatric findings to counsel following a "psychiatric remand"?

Discussion

Although the current general practice is for both sides to receive copies of a mental status report following a remand, there are no statutory provisions that require such reports to be provided. It may be essential for counsel to have this material to adequately prepare for court proceedings, such as the trial of an issue of fitness to stand trial.

Alternative I

Specify that a copy of the report(s) of the findings of the examining mental health professional(s) must be sent to both counsel for the defence and counsel for the prosecution (see Bill S-33, s.42).

Considerations

Under this alternative, both sides would be guaranteed the information necessary to prepare for the court proceedings. It may be argued, however, that the prosecution should not have automatic access to a report that may, in addition to containing information relevant to the issue of fitness, contain information that directly or indirectly incriminates the accused. (This difficulty would be alleviated to a great extent by the limited "psychiatric privilege" created by s. 165 of Bill S-33).

It might also be argued that neither the prosecution nor the defence should automatically be entitled to a copy of the mental status report, since such a report might contain information which, if made known to the accused, could be harmful to the accused's mental condition or endanger the safety of third party "informants."

Alternative II

Specify that the court may require that copies of the report(s) of the examining mental health professional(s) be sent to counsel for the defence and/or counsel for the prosecution unless, in its opinion, providing such report(s) to counsel would unduly endanger the health or safety of the accused or another person.

Considerations

This alternative generally allows both counsel to have copies of the report(s), but addresses itself to the problem raised above under Alternative I. On the other hand, by allowing the court to withhold from the accused information on which it may later rely in reaching a decision, it may deny the accused the opportunity to know the case he or she must meet. This may constitute a violation of s.7 of the Charter and may result in unchallenged and inaccurate information forming the basis of a judicial decision.

Issue 23

What provision should be made with regard to the contents of mental status reports?

Discussion

The Code makes no provision as to the contents of mental status reports following remand. In the absence of any specific provisions, psychiatrists who conduct observations under the authority of a Criminal Code order are left without guidance as to the contents of their reports. The result is that the nature, amount and relevancy of the information contained in such reports may vary considerably in practice.

Alternative I

Depending on the purpose for which remand was ordered, require that the examining mental health professional address himself or herself to a check-list of specific issues (Rule 3.211(a)(1) of Florida's Rules of Criminal Procedure, ALI Model Penal Code).

Considerations

This approach may result in more specific and relevant reports in many instances. Arguably, however, it might result in the imposition of legal standards on medical decisions.

Alternative II

Same as Alternative I, but specify that the report shall contain no material other than an assessment of the accused on the criteria enumerated in the checklist.

Considerations

This approach would help keep out extraneous or prejudicial material, and would provide guidance to mental health professionals as to what is expected of them. On the other hand, this approach might unduly limit the reporting mental health professional. Alternatively, it may be argued that this approach does not go far enough since it does not exclude possibly incriminating statements made by the accused that illustrate the basis of the professional's opinion.

Alternative III

Same as Alternative I or II but specify that the report shall contain no statements that may be construed as admissions or confessions by the accused.

Considerations

This alternative would prevent, to the maximum extent possible, prejudicial information from being put before the court. It may be argued, however, that if the statements show the basis of the opinion, they should be left in; if the basis for the opinion is not known, it may be difficult to assess the weight it should properly be given.

Issue 24

What provision should be made with respect to informing the accused of the possible evidentiary consequences of psychiatric remand or examination in advance?

Discussion

At present, psychiatric remand may have serious evidentiary consequences for the accused. Unlike police interrogation, psychiatric examination may be assumed by the accused to be a confidential procedure. Moreover, the methods of psychiatry may be more persuasive than police interrogation, particularly where techniques such as hypnosis or narcoanalysis are used. In light of these facts, a warning to the accused as to the possible evidentiary consequences of psychiatric remand or examination may be seen as inherently fair.

The Criminal Code makes no provision with respect to informing the accused of the possible evidentiary consequences of psychiatric remand or examination in advance.

Alternative

Provide for a warning as to the possible evidentiary consequences of psychiatric remand or examination in advance.

Considerations

Such a provision would address itself to the concerns raised in the discussion above. It may be argued, however, that informing the accused might cause him or her to be so inhibited in his or her communications during examination that an accurate assessment will be impeded. Such a provision might also discourage an accused from voluntarily providing useful evidence.

Issue 25

What provisions should be made regarding the consequences of the accused's failure to cooperate in examination?

Discussion

The extent to which the subject of an observation order is required to cooperate in the "observation" is not made clear by the provisions of the Criminal Code. Where the person in question is less than fully cooperative, therefore, it is equally unclear what consequences may result. Essentially, there are two

possibilities: (1) penal consequences, and (2) evidentiary consequences. With regard to the former, it is notable that provisions in the mental health legislation of some provinces are considerably more explicit than the Criminal Code on the question of what may be required of the subject under "psychiatric remand."

It may be argued that an order under the Criminal Code, by specifying the purpose for which a person may be remanded or directed to attend (i.e., "for observation"), implicitly requires the person to cooperate beyond merely submitting peacefully to the remand or "attend[ing] at [the] place or before [the] person specified in the order... within the time specified therein...." If this is so, it is possible that a failure to answer questions and to take part in the various tests suggested by authorized "observers" would put the subject in violation of the order. What case law and commentary exists, however, suggests that this is not the case. Certainly there is a dearth of case law to suggest that persons with respect to whom an observation order has been made under the Code must submit to examination or else be subject to criminal penalty.

Alternative I

Specifically provide for penal and/or evidentiary consequences (e.g., a possible adverse inference regarding the strength or existence of any "psychiatric defence" put forward, or a judicial comment to the trier of fact (see Bill S-33, s.95)).

Considerations

While many would see this approach as fair and logical, it may also be viewed as an indirect abridgement of the so-called right to be silent, or the right not to be compelled to furnish evidence against oneself.

This approach would seem at first glance to be consistent with the breathalyzer provisions of the Code, which contain penalty and adverse inference provisions for failure to provide a breath sample. The analogy to the breathalyzer provisions may be false, however, because: (1) psychiatric examination arguably has not been demonstrated to be as objective and reliable as the breathalyzer; and (2) the penal and evidentiary consequences in the breathalyzer provisions do not apply where the breathalyzer test is sought to be administered for the purpose of rebutting a defence.

Alternative II

Specifically provide that no psychiatric defence may be left with the trier of fact where the accused has failed to cooperate in a court-ordered psychiatric examination designed to inquire into the basis for such defence.

Considerations

This approach would help to overcome the disadvantage at which the Crown is put when the accused refuses to be examined. If, however, the refusal to cooperate is due to mental disorder, this approach may be both unfair and illogical.

Alternative III

Specifically provide that no penal consequences or adverse inference shall be drawn from an accused's failure to cooperate in examination.

Considerations

While this approach would, arguably, protect the accused's interests to the maximum extent possible, it might place the prosecution at an unfair disadvantage by making any "psychiatric defence" raised by the accused invulnerable.

Chapter 3

FITNESS TO STAND TRIAL

FITNESS TO STAND TRIAL

INTRODUCTION

In the section on remand, it was noted that the mental state of an accused person may be relevant to various issues that may arise in the course of a criminal trial. As further indicated in that section, one of the main purposes of orders for psychiatric observation currently relates to the issue of fitness to stand trial. In this section, the procedure for determining fitness will be examined.

At the outset, some consideration should perhaps be given to the purpose of the fitness rule. As the Law Reform Commission of Canada has recognized, there has been some confusion in this regard. 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. The Commission went on to suggest that the procedure for determining fitness should be formulated so as to be in accord with this interpretation. As will become apparent throughout the course of this section, 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.

ISSUES

Issue 1

What provision should be made with respect to the test for fitness?

Discussion

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. Although mental retardation has, in effect, been held to fall within the definition of "insanity" for the purpose of the Code's fitness provisions, 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 suggest, a finding of unfitness requires the "insanity" to have rendered the individual incapable of "conducting his defence."

Perhaps conditions other than insanity which substantially interfere with the ability to conduct one's defence should be included. 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 which 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."

The Criminal Code is not very specific on the issue of what constitutes fitness or unfitness. The issue in ss. 543(1) and 738(7) is simply whether the "accused" or "a defendant," respectively, "is then, on account of insanity, unfit to stand his trial." In s. 465(3), the issue is "whether the accused is then, on account of of insanity, unfit to conduct his defence at the preliminary inquiry." According to the case law, capacity to conduct one's defence involves essentially two things: the ability to understand the proceedings; and the ability to instruct counsel. With regard to the former requirement, it has been held to be sufficient that the person "follow as much as it is necessary that he should follow of the proceedings at his trial...." As regards the latter requirement, it has been held that an inability to act with good judgment or in one's own best interests is irrelevant, and that retrograde amnesia does not in itself render a person unable to instruct counsel. While it would appear that delusions will not necessarily give rise to a finding of unfitness, the presence of delusions and/or hallucinations will usually have this effect. According to various text-writers, the capacity to conduct one's defence involves such other considerations as the ability to choose between the various pleas available, challenge jurors, examine and cross-examine witnesses and testify on one's own behalf. In the recent case of R. v. Kieling, the Trial Judge asked eight questions of each of

the expert witnesses who testified on the issue of fitness: "(1) 'Does he understand the nature of the charge against him?' (2) 'Does he understand the nature of an oath?' (3) 'Is he aware of the purposes of the trial?' (4) 'Can he distinguish the pleas that are open to him?' (5) 'Does he understand the consequences of a conviction?' (6) 'Is he able to comprehend the nature of the evidence?' (7) 'Can he give his evidence in a coherent fashion?' (8) 'Does he have the ability to instruct his counsel on the evidence that is led properly, so that he can make full answer and defence?'" Although the Judge's finding of unfitness was overturned on appeal, Rapson Co. Ct. J. made a point of expressing approval for this eight point test. The decision of the Trial Court was ultimately restored by the Ontario Court of Appeal.

Alternative I

Statutorily define unfitness as an inability to: "(i) understand the course of the proceedings of the trial so as to make a proper defence; (ii) understand the substance of the evidence; (iii) give adequate instruction to [one's] legal advisors;" or "(iv) plead with understanding..." (recommendation of England's Butler Committee).

Considerations

This test essentially codifies and enumerates the common law requirements. However, the test is unclear on what sort of "understanding" is sufficient, i.e., whether purely factual understanding will suffice, or whether rational (i.e., non-delusional) understanding is necessary. Furthermore, the expression "give adequate instruction to [one's] legal advisors...," as worded, may not accurately reflect what happens in practice. Bull has argued that in practice an accused does not instruct his or her legal advisor; more often, it is counsel who instructs the accused.

Alternative II

Statutorily provide that "A person is unfit if, due to mental disorder:

(1) he does not understand the nature or object of the proceedings against him, or

(2) he does not understand the personal import of the proceedings, or

(3) he is unable to communicate with counsel."

Specifically exclude lack of memory as a factor which in and of itself negates fitness. (Law Reform Commission recommendation).

Considerations

This test comes close to articulating the requirement for a rational (as opposed to merely factual) understanding, although it is still not clear as to whether rational understanding is necessary. Specific statutory exclusion of memory failure would avoid confusion as to what is meant by the ability to "communicate with counsel," although it may still be argued that amnesia should in itself amount to unfitness.

Alternative III

Same as Alternative I or II, but add genuine amnesia relating to the period during which the offence was alleged to have been committed as an independent criterion.

Considerations

Genuine amnesia constitutes a serious handicap to an accused person, making it extremely difficult (if not impossible) to instruct counsel and prepare a defence. This approach acknowledges that the amnesiac is in a worse position than someone who, for example, has lost his or her diary or is unable to trace a witness (Butler Committee examples); while such a person knows his or her defence and is merely unable to come up with the evidence, the amnesiac may have no idea what his or her defence might be (Butler Committee).

On the other hand, as the Butler Committee majority argued, amnesia is easily (and often) feigned. Moreover, in many cases, there is no sure way of determining whether an alleged amnesiac is malingering. Arguably, the accused with amnesia is in no worse position than the accused who has a poor memory for reasons not related to mental disorder. Such difficulties should not prevent the trial from proceeding.

Alternative IV

Statutorily provide that a person is unfit if because of a mental disorder, he or she does not have:

(1) "sufficent present ability to consult with" counsel; and

(2) "a rational as well as factual understanding of the proceedings" against him or her (Dusky v. United States).

Considerations

This test, which has been adopted by statute in several American states, may be wider than those in Alternative I or II, as it clearly specifies that a factually correct but delusional notion of what the proceedings are about would not satisfy the fitness test. This test does not however, explicitly exclude or include amnesia as a ground for unfitness in itself. It may be argued, moreover, that a purely factual understanding should suffice.

Issue 2

Who should be allowed to direct the issue of fitness to be tried?

Discussion

The Code's main fitness provision is that contained in s.543. It may be used by a court, judge or magistrate trying an accused person charged with an indictable offence. Section 465 contains a provision allowing for a justice acting under Part XV to direct the issue of fitness to be tried. Section 738(7) allows a summary conviction court to direct that the issue of fitness be tried and, by s. 755(4), applies mutatis mutandis in the case of summary conviction appeals determined by trial de novo. There are no specific provisions in the Code relating to trial of the fitness issue by summary conviction appeal courts under Part XXIV or by courts of appeal under Part XVIII. However, s. 610 of the Code allows for the examination and cross-examination of witnesses, etc., where appeals are taken under Part XVIII, and this provision has been incorporated into the summary conviction appeal procedure by s. 755(1).

Alternative I

Maintain status quo, but preclude justices acting under Part XV of the Code from trying the issue of fitness without the consent of the accused.

Considerations

It is arguable that the power of justices acting under Part XV of the Code to try the issue of fitness to conduct one's defence at a preliminary inquiry runs contrary to the philosophy behind allowing postponement of the issue until after the close of the case for the prosecution at trial. If a potentially unfit accused who has been committed for trial can have the issue of fitness postponed until the close of the case for the prosecution, perhaps accused persons who are potentially unfit during a preliminary inquiry should have the right to have the issue of fitness postponed until the close of the case for the prosecution at trial. This option would enhance the right of potentially unfit persons to have the case against them put to the test at the preliminary inquiry and would eliminate any conflict in the present provisions. At the same time, this option would protect the rights of unfit persons not to be subjected to court proceedings if they do not want to be.

On the other hand, depriving an accused of the right not to be committed for trial following a preliminary hearing at which he or she was incapable of conducting his or her defence may be contrary to s. 7 of the Charter (see also s. 2(e) of the Bill of Rights). Furthermore, preventing justices acting under Part XV from trying the issue might make their remand powers virtually useless. It might also be a waste of valuable treatment time; an accused who would doubtless be found unfit to stand trial would be deprived of the chance to receive sufficient treatment to become fit by then.

Alternative II

Provide that the issue of fitness may be tried by any justice, court, judge, magistrate, appeal court, court of appeal or summary conviction court before whom an accused, defendant or offender appears.

Considerations

This alternative would, in effect, allow the issue of fitness to be tried by all judicial bodies before whom an accused may appear. This procedure would therefore enhance the right of accused persons not to be subjected to court proceedings while unfit. Although there may be benefits in doing this, it may be argued that such a provision would amount to over-kill. It may not be necessary, for example, for a person to be fit before he or she can undergo a bail hearing or be sentenced.

Issue 3

Who should be permitted to raise the issue?

Discussion

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 either the defence or the prosecution, or by the court itself for that matter.

Alternative I

Specify in the Code that the issue of fitness may be raised by the defence, by the prosecution or by the court (Law Reform Commission of Canada).

Considerations

This approach is consistent with the right of accused persons not to be convicted without a fair trial (see s.2(e) of the Bill of Rights and s. 7 of the Charter), since it would allow fitness to be raised for the unrepresented accused who is too disordered to raise the issue for him- or herself.

This approach may, however, prevent the accused who wishes to proceed to trial as quickly as possible from doing so. Furthermore, allowing the court to raise the issue may introduce inquisitorial features which may be seen as incompatible with the adversary system. Allowing the prosecution to raise the issue, at least under the present system, may tempt the prosecution to prove unfitness rather than proving its case where the former is easier than the latter.

Alternative II

Specify in the Code that the issue of fitness may only be raised by the defence.

Considerations

While this approach would respond to the criticisms raised above with regard to Alternative I, there are at least two major drawbacks. Under the present law, it would be possible for an unfit accused to deliberately fail to raise the issue of fitness and, if convicted, appeal on the ground that he or she was unfit. If the court and prosecution were prevented from raising the issue at trial, the number of appeals on the ground of unfitness might increase dramatically. In addition, this approach would be inconsistent with the right of unfit persons not to be convicted without a fair trial (which they themselves might have prevented because their unfitness prevented them from raising the issue of their fitness) and might infringe s. 7 of the Charter (see also s. 2(e) of the Bill of Rights).

Issue 4

What provision should be made concerning notice prior to a trial of the issue of fitness?

Discussion

The issue here is essentially the same as that raised with regard to notice prior to remand. As mentioned above in that context, some applications require that notice be given to the other party or to certain persons interested in the litigation. Where notice provisions exist, their exact terms vary from one statutory provision to another. One object of notice provisions, as mentioned earlier, is to enable the respondent to prepare argument.

Currently, the Criminal Code makes no provision for notice prior to a trial of the issue of fitness. Theoretically, under s. 543 of the Code, the court could hold a fitness hearing without there having been a remand, and therefore without prior "notice." Because the issue of fitness often arises spontaneously, it may be argued that a notice provision would be impractical. As in the case of remand, however, it is possible that the absence of the notice

requirement may render the current fitness provisions susceptible to an attack based on s.7 of the Charter. To forestall any such challenge, it may be advisable to consider the possibility of enacting a notice provision.

Issue 5

What provision should be made with respect to the grounds requiring the issue of fitness to be tried?

Discussion

In considering the grounds that must exist before the issue of fitness can be tried, we are again involved in the process of balancing fairness against expediency. On the one hand, the grounds must be sufficiently clear and stringent to preclude unnecessary trials of the fitness issue. On the other hand, they must not be so stringent as to constitute an unworkable impediment to the holding of necessary trials to determine fitness.

Section 543(1) of the Code currently provides that a court, judge or magistrate "may" direct the issue of fitness to be tried "where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence...." (In s. 738(7) the words "a defendant" are used instead of "the accused"). Although the imperative word "shall" is used in the fitness provisions contained in ss. 465(3) and 738(7), it would appear from the case law that the use of the permissive word "may" in s. 543(1) does not permit a trial judge to whom sufficient reason to doubt fitness has or should have appeared to choose not to direct a trial of the issue. The permissive word "may" is, however, consistent with para. (4)(a) which allows for postponement of a direction that the fitness issue be tried.

The question of whether there exists "sufficient reason" to doubt fitness has been held to be a question of law. The problem of what constitutes sufficient reason has been dealt with in a number of cases. In practice, sufficient reason to doubt fitness (where it appears) generally appears from the psychiatric report submitted following court-ordered observation. Although this is not a strict requirement of s.543, it does seem to be a requirement of both ss. 465(3) and 738(7), which provide that sufficient reason to doubt fitness must appear "as a result of observations made pursuant to an order issued under[ss. 465(1)(c) or 738(5), respectively]..." in order for a direction for trial of the fitness issue to be mandatory.

While the current provisions are broad and flexible, and are familiar to judges and lawyers, a number of criticisms may be made. For example, the present requirement for "sufficient reason to doubt...," etc., seems to beg the question and may be no test at all. What is sufficient reason? Furthermore, it is unclear whether the current words of the Code mean merely that there need only be reasonable doubt as to fitness in order for the issue to be tried, or whether the word "sufficient" raises the standard. It is also unclear what the significance of the word "appears" is. It may be argued that this word connotes a subjective test and that the test, to ensure reviewability, should be made clearly objective. The various provisions of the Code are also inconsistent. While ss. 465(3) and 738(7) require that the reason to doubt fitness must appear as the result of observations made pursuant to an order under the appropriate Criminal Code provisions, s. 543(1) does not impose any such restriction. The various provisions of the Code are inconsistent in another respect as well; while ss. 465(3) and 738(7) provide that once the grounds exist, the justice or summary conviction court shall direct the fitness issue to be tried, s. 543 uses the word "may." For the above reasons, the words "sufficient," "appears" and "may" will not be included in the following alternatives.

Alternative I

Provide that in all cases the issue of fitness shall be tried whenever there is reason to doubt an accused person's fitness.

Considerations

This approach makes it clear that the court has no discretion in the matter, thereby protecting fully the right not to be tried while unfit. It seeks to eliminate the inconsistencies referred to above, and make the test objective and clearly reviewable. Arguably, however, this test is too lax. Perhaps there should be more than just "reason to doubt" the accused person's fitness.

Alternative II

Provide that in all cases the issue of fitness shall be tried whenever, as a result of observation/examination/assessment (unless the accused has consented to having such observation/examination/assessment dispensed with) there is reason to doubt an accused person's fitness.

Considerations

This approach is similar to Alternative I but is more stringent; it makes clear the source of the reason to doubt the accused person's fitness and requires that it be supported by some evidence. Allowing such requirement to be waived on the consent of the accused would expedite the procedure and retain elements of flexibility as well as fairness to the accused. On the other hand, the requirement that the reason to doubt fitness can only be based on observation/examination/assessment may be too restrictive. It does not deal with the situation where the accused behaves strangely in court or when talking to his or her lawyer, but reveals nothing during observation/examination/assessment.

Alternative III

Use a different formula depending on whether the accused is before a justice conducting a preliminary inquiry, before a court on arraignment or trial for an indictable offence, or before a summary conviction court on arraignment or trial for a summary conviction offence.

Considerations

It is arguable that the more complex the proceedings are and/or the more there is at stake, the easier it should be to have the issue tried. Devising a different formula for each situation, however, would be a very difficult exercise. There is, moreover, no guarantee that the purpose and operation of such differences would be clear.

Alternative IV

Use a different formula depending on who raises the issue.

Considerations

Perhaps in cases where the defence raises the fitness issue, a trial of the issue should be more readily required than when the prosecution raises it. This approach would, arguably, enhance the rights of the accused; it would protect both the accused's liberty and his or her right not to be tried while unfit. On the other hand, this approach might be unnecessarily complex, and the drafting difficulties would be considerable.

Issue 6

What provision should be made with regard to the assignment of counsel?

Discussion

The possibility of unfitness necessarily raises the issue of whether the accused is able to defend him- or herself. The practical question as to when, and under what conditions, the unrepresented and possibly unfit accused should be assigned counsel must be considered.

Section 543(3) of the Criminal Code provides that "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."

Alternative I

Provide for appointment of counsel whenever the criteria chosen from the relevant options relating to the grounds requiring the issue of fitness to be tried exist.

Considerations

Once there are grounds requiring the issue of fitness to be tried, it would seem only logical that there also are grounds requiring the appointment of counsel. This logic is reflected in the current Criminal Code provisions.

It may be argued, however, that the criteria requiring appointment of counsel should be less stringent; without counsel, it may never be brought to the court's attention that the criteria requiring the issue of fitness to be tried exist. The only way to avoid this problem would be to insist on the appointment of counsel in all cases.

Issue 7

What provision should be made with regard to the time at which trial of the issue should be directed?

Discussion

The major question here is fairness to the accused. From one standpoint, it may be argued that fairness to the accused demands that the issue of fitness be directed 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 may be argued that fairness to the accused demands that he or she not be subjected to trial of the issue of fitness (or treatment thereafter) where there is a good chance that the person, if tried, would be acquitted regardless of his or her present mental condition.

Section 543 of the Criminal Code, which applies in the case of indictable offences, provides in s-s. (1) that a court, judge or magistrate may direct a trial of the issue of fitness "at any time before verdict...." While it may be thought that this section allows for a trial of the fitness issue as early as the accused's first appearance in court, such interpretation is made doubtful by the provision's placement in Part XVII of the Code, by the nature of the issue under consideration (i.e., "whether the accused is then...unfit to stand his trial"), by s.543(5)'s provision that upon a finding of fitness "the arraignment or trial shall proceed...," and by the existence of s. 465(3) of the Code, which specifically enables a justice to direct trial of the issue of fitness at the preliminary inquiry stage. Under s. 465(3), it is worth noting, a justice acting under Part XV is not obliged to direct that the issue of fitness be tried until after there has been a court-ordered observation. As the provision states, sufficient reason to doubt fitness must have appeared "as a result of observations made pursuant to an order issued under paragraph 1(c)...."

In the case of summary conviction offences, the only restriction as to how early the court may direct trial of the fitness issue is s. 738(7)'s requirement that sufficient reason to doubt fitness must have appeared "as a result of observations made pursuant to an order issued under subsection (5)...." As was the case in preliminary inquiries, therefore, the issue must not be tried until after there has been a court-ordered observation.

Section 543(4)(a) of the Code provides that where the issue of fitness arises before the close of the prosecution's case, "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...." By s-s.(7) of s. 543, moreover, "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."

Note that the postponement provision contained in s.543(4)(a) does not appear to be applicable in the case of preliminary inquiries under s.465 or in the case of trials for summary conviction offences. By ss. 465(4) and 738(8), the provisions contained in s.543 become applicable only once a justice or summary conviction court respectively has directed the trial of the issue of fitness under ss. 465(3) or 738(7). In the absence of a specific postponement provision, it is an interesting question whether discretionary postponement by a justice or summary conviction court would be permissible. The Code offers no guidance concerning the grounds upon which the decision to postpone directing the trial of the issue should be made.

Alternative I

Maintain status quo.

Considerations

Section 543 allows postponement of the issue, permitting the case for the prosecution to be tested before a trial that may result in indefinite detention of the accused is directed. However, current Code provisions seem inconsistent with one another. Under s. 543, a court, judge or magistrate must direct a trial of the issue as soon as sufficient reason to doubt fitness appears to him or her, unless a postponement "until any time up to the opening of the case for the defence..." is deemed appropriate. Under ss. 465 and 738, however, the earliest time at which a justice or summary conviction court, respectively, is obliged (or allowed?) to direct that the issue be tried is following a period of court-ordered observation.

Another problem is that the Code gives no express right to justices acting under Part XV or to summary conviction courts to postpone directing a trial of the issue "until any time up to the opening of the case for the defence..." as in s.543. It is paradoxical that if a potentially unfit person is charged with an indictable offence he or she may be set free upon acquittal at the close of the case for the prosecution, while the same person charged with a less serious offence would be found unfit and subjected to the discretion of the lieutenant governor.

A third difficulty with the Code's current provisions is that they offer no guidance whatsoever as to the grounds upon which the decision whether to postpone should be made.

Finally, it may be argued that the current provisions may not go far enough, since they do not allow for the case for the defence to be presented even where there may be an affirmative defence which does not depend on the participation of the accused.

Alternative II

Require that in all cases trial of the issue of fitness must be directed as soon as the criteria are fulfilled.

Considerations

This alternative is premised on the position that if a person is unfit he or she should be provided the opportunity for treatment immediately, regardless of the possible outcome of the trial. It would ensure that no trial proceeds in which the accused cannot participate effectively.

There are, however, several arguments against this approach. First, it may be questioned what harm there is in testing the prosecution's case. Second, it is arguable that this option might encourage prosecutors to prove unfitness where they cannot prove guilt (particularly if there is a lower standard of proof required for unfitness). Third, it may be argued that if the accused is ultimately to be hospitalized, he or she may have more incentive to respond to treatment if he or she has been acquitted of criminal charges first.

Alternative III

Provide that in all cases trial of the issue must normally be directed as soon as the criteria are fulfilled, but that in all cases where the issue of fitness is raised before the close of the case for the prosecution the issue shall be postponed until the close of the case for the prosecution.

Considerations

This alternative would be consistent with judicial decisions dealing with postponement in cases where the right of the prosecution to raise the "defence" of insanity "for" the accused arises. While it may also provide more protection for the accused's right to freedom than the previous two alternatives, it may be argued that it does not go far enough in protecting the accused's right to liberty, since it does not permit the leading of an affirmative defence that does not depend on the participation of the accused.

Alternative IV

Provide that in all cases trial of the issue must normally be directed as soon as the criteria are fulfilled, but that in all cases where the issue of fitness is raised before the close of the case for the prosecution the issue must be postponed until the close of the case for the prosecution unless the defence consents to it being tried immediately.

Considerations

This approach has the same advantages as those outlined for Alternative III above, but has the additional benefit of dispensing with the necessity for the prosecution to present its case where the accused, for one reason or another, wishes to waive this right. On the other hand, this approach has the same problems or disadvantages associated with Alternative III above.

Alternative V

Provide that in all cases trial of the issue must normally be directed as soon as the criteria selected from the options for Issue 5 above are fulfilled, but that the issue may (or shall) be postponed "if having regard to the nature of the supposed disability the court are of opinion that it is expedient so to do and in the interests of the accused..." (Criminal Procedure (Insanity) Act 1964 (U.K.), s.4).

Considerations

This approach is flexible and gives discretion to the court. Because it has been used in another comparable

jurisdiction, there is case law dealing with the operation of the postponement criteria which would help with the interpretation of this type of provision.

The English case law suggests that under this test the court may decide not to postpone if in its view the accused belongs in a psychiatric hospital even if he or she is acquitted. If a similar interpretation were made in Canada, this test might be poor protection for the accused's right to liberty; it may be argued that this type of consideration should more properly be left to persons involved in the civil commitment process than to a court trying the accused for an alleged criminal offence. There is again the criticism that this approach does not allow the case for the defence to be heard. In addition, the use of the permissive word "may" appears to give the court discretion not to postpone even when the criteria for postponement have been fulfilled.

Alternative VI

Same as Alternative V but provide that the defence may consent to having the issue tried immediately.

Considerations

This approach would have the same advantages and disadvantages as those indicated for Alternative V, but has the additional advantage of automatically dispensing with postponement (thus saving time) when the accused does not wish to have the trial of the issue of fitness postponed.

Alternative VII

Permit the trial of the issue to be postponed until the end of the trial by adopting the procedure recommended by the Law Reform Commission of Canada:

> "First, an accused's fitness to stand trial should become a question of law. Because of its procedural nature and because there is no consideration of the accused's culpability, we recommend that fitness be determined by the presiding judge. Second, in jury trials where the question of unfitness has been postponed to

the end of the trial, the judge should be able to direct the jury to deliver either an acquittal or a conditional verdict. With these two changes the procedure would be roughly as follows.

If the fitness issue has been raised and both parties agree that it should be determined immediately, the trial judge may order a hearing on the accused's fitness to stand trial. Upon request by either party or where, in his opinion, it would be in the interests of justice to do so, the trial judge shall postpone determination of the fitness issue until the end of the case for the prosecution.

After presentation of the case for the prosecution, the trial judge has three possibilities: he may, on motion by the defence, acquit the accused; he may, on motion by the defence, postpone the issue to the end of the trial; or he may order a hearing on the accused's fitness to stand trial. He would only postpone the determination of the issue to the end of the trial where defence counsel has demonstrated that he has a case to present and that it would be in the interests of justice to proceed on the merits of the charge.

Postponing the fitness hearing to allow presentation of the case of the defence is relatively simple when the trial is by magistrate or judge sitting alone. Consideration of fitness is postponed to the end of the trial. After having heard all the evidence and the summations of both parties, the presiding judge has two alternatives; he may acquit the accused or direct that the issue of fitness be determined. If the accused is found fit to stand trial, a conviction is entered.

In the case of trial by jury the procedure to postpone to the end of the trial is somewhat different. The trial judge would postpone the issue until all the evidence at trial had been heard. He would then direct the jury to consider the guilt or innocence of the accused. If the jury delivered a verdict of not guilty the accused would be acquitted and there would be no fitness hearing. If the jurors thought the accused guilty of the charge, they would

deliver a conditional verdict that on the evidence presented to them they are unable to acquit the accused. The verdict is conditional in the sense that it is a verdict of guilty if the accused is fit. The judge would then dismiss the jury and a hearing on the accused's fitness would be held. If the accused is found fit the conditional verdict would be made absolute and the judge would sentence the accused. If unfit, the judge would set aside the verdict and the trial proceedings and make an order for the disposition of the unfit accused."

Considerations

This approach provides maximum protection for the rights of the accused. It allows the fitness of the accused to be assessed in a more accurate manner, i.e., to be put to the test of an actual trial. On the other hand, especially where lengthy trials are involved, this approach could prove to be a very costly and time-consuming burden on our already over-burdened criminal courts. In addition, implementation of this approach could induce accused persons to feign unfitness at the outset of their trials as a possible "insurance policy" allowing for a new trial should they be found guilty. It should be noted that in a recent Canadian survey, (Eaves et al.), 89.2% of judges questioned, 84.1% of the Crown attorneys questioned and 82.2% of defence counsel questioned disagreed with the Law Reform Commission's proposal that trial of the fitness issue be postponable to the end of the trial.

Alternative VIII

Require that in all cases trial of the issue of fitness shall be directed as soon as the criteria selected above are fulfilled but that "If the [accused] is found to be [unfit] there should nevertheless be a trial of the facts to the fullest extent possible having regard to the medical condition of the [accused]." Provide that "If a finding of not guilty cannot be returned the [trier of fact] should be directed to find 'that the [accused] should be dealt with as a person under disability.' This new verdict should not count as a conviction nor should it be followed by punishment" (Butler Committee recommendation).

Considerations

As in Alternative VII, this approach allows the fullest opportunity for the accused to be acquitted, thereby making the trial of the fitness issue unnecessary. On the other hand, however, concerns raised for that alternative apply here as well.

Issue 8

Who should try the fitness issue?

Discussion

Here the main issues are: (1) whether, and in what circumstances, the trial of the fitness issue should be before a judge alone or before a judge and jury; and (2) whether, and in what circumstances, the trial of the fitness issue should be before a different court than the one trying the issue of guilt. These questions require consideration of fairness to the accused on the one hand, and expediency and cost on the other.

Subsections (4)(b) to (6) of s. 543 set out the procedure to be followed once a trial of the fitness issue has been directed. In cases where the trial is held or to be held before a judge and jury, and the judge directs the issue to be tried before the accused is given in charge to the jury for trial, the issue must normally be tried by twelve jurors. In the Yukon Territory and Northwest Territories, only six jurors are required. Where the judge directs the issue to be tried after the accused has been given in charge to a jury for trial, the jury must be sworn to try the issue of fitness in addition to that on which they have already been sworn. In cases where the trial is held before a judge sitting without a jury or before a magistrate, the issue must be tried by that judge or magistrate, as the case may be.

Where, following the trial of the fitness issue, the verdict is that the accused is fit, the arraignment or trial proceeds as if the issue had not been directed. Where the verdict is that the accused is unfit, "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.

Alternative I

Provide that in all cases the issue shall be tried by a jury.

Considerations

If a finding of unfitness continues to result in the possibility of long-term or indefinite detention, perhaps the seriousness of such a finding requires the right to trial by jury. If trial by jury is guaranteed to persons facing imprisonment for five years or more upon conviction for an offence (by s. 11(f) of the Charter), perhaps it should be guaranteed in these circumstances as well. This procedure, however, would make many trials considerably more cumbersome and expensive.

Alternative II

Provide that in all cases the issue shall be tried by a jury unless the defence elects to have it tried by the court without a jury.

Considerations

This approach has the advantages and disadvantages described for Alternative I above, but has the added advantage of dispensing with the cumbersome necessity for a jury trial where the accused wishes to waive this right.

Alternative III

Provide that in all cases the issue shall be tried by the court without a jury.

Considerations

This procedure would be speedier than that suggested in Alternative I in cases where there is not already a jury present. Even where a jury has already been empanelled, this provision would avoid lengthy jury deliberations. In the case of jury trials, this provision has an advantage over the status quo; presumably, the jury would be absent from the fitness hearing and would not be subjected to evidence that might prejudice them on the issue of guilt.

It is noteworthy that despite the latitude of the concept of "due process" under the Fifth Amendment, the United States' Federal incompetency provisions (18 USCS,s. 4244), which provide that the findings shall be made by the trial judge, have been upheld. This fact suggests that this alternative would likely not have "due process" (i.e., Charter s. 7) problems in Canada. This approach, however, ignores all of the advantages that a jury trial would have (described under Alternative I above).

Alternative IV

Provide that in all cases the issue shall normally be tried by the court without a jury unless the defence elects to have it tried by a jury.

Considerations

This approach would be essentially the same as that described for Alternative II. Here, however, non-jury trials would be the norm, effecting time and cost savings.

Alternative V

Provide that "The issue of [fitness] should be decided by the judge except if the medical evidence is not unanimous and the defence wish a jury to determine the issue" (Butler Committee).

Considerations

Arguably, a jury trial would serve no purpose where medical evidence is unanimous. As the Butler Committee has noted: "In such circumstances it does not greatly matter whether the issue is decided by the judge or jury, since in effect the judge decides and the jury will normally follow his direction." This approach has the advantages and disadvantages of Alternative IV above. It is likely that this alternative would be rarely used, however, since it presupposes that the court will have all the medical evidence before it prior to the trial of the issue.

Alternative VI

Apply any of the above alternatives, but provide as well that where the accused is found to be fit "The full

trial...[shall] take place before a differently constituted court from that which decided on the [fitness] issue" (Butler Committee).

Considerations

This approach would prevent the court trying the issue of guilt from being prejudiced by evidence led at the fitness hearing, particularly if no privilege exists with regard to statements made in the course of court-ordered mental status observation/examination/assessment. This approach was recommended by the Federal/Provincial Task Force on Uniform Rules of Evidence, even though it recommended privilege except on the issue of fitness. "Otherwise," the Task Force felt, "the same jury which heard a confession at the fitness hearing would be expected to ignore the confession at trial." In spite of the advantages discussed above, this approach would be more cumbersome, costly and time-consuming than the present procedure.

Issue 9

What provision should be made concerning the presence of the accused at the trial of a fitness issue?

Discussion

Section 577(2)(c) of the Code currently provides that "The court may...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 a failure to do so might have an adverse effect on the mental health of the accused." This provision appears in Part XVII of the Code, which relates to procedure by indictment, and does not appear to have been incorporated into the procedures allowing justices conducting preliminary inquiries or summary conviction courts to hold a trial of the fitness issue.

This provision may be criticized on the basis that it is premised on a theory as to the cause of mental deterioration which is extremely difficult to either substantiate or refute by empirical evidence. If the purpose of this provision is to prevent the accused from hearing his or her mental condition discussed, its logic may be seen as somewhat paradoxical; unless the court is required to judge the mental condition of the accused on the basis of evidence that has not been subjected to cross-examination

in open court, it will be necessary for evidence of the accused's mental condition to be led in his or her presence in order to satisfy the court that the accused should not be hearing such evidence. It is also arguable that the accused's absence from court during the fitness hearing may interfere with his or her ability to advise counsel on the cross-examination of prosecution witnesses. This being the case, it may be challenged as running contrary to the right to make full answer and defence, and as being a violation of s. 7 of the Charter (see also s. 2(e) of the Bill of Rights).

Alternative

Provide that all accused persons have the absolute right to be present in court during the trial of a fitness issue.

Considerations

This alternative may be seen as more logical, and would ensure against the potential Charter attacks referred to above. However, it would also remove the protection to the accused's mental health afforded by s. 577(2)(c).

Issue 10

What provision should be made with respect to the amount of expert evidence (if any) required on the issue of fitness?

Discussion

As has been the case with several of the issues discussed above in the context of both fitness and remand, the issue here is balancing fairness to the accused against expediency. While it is necessary that there be sufficient information on which to base the finding of fitness or unfitness, too stringent a requirement may result in an inability to find an accused unfit in proper circumstances.

There is no provision in the Criminal Code that requires that any expert evidence be produced at any trial of the issue of fitness. Not requiring expert evidence saves time and expense where such evidence is not necessary. Arguably, expert evidence is unnecessary in many cases, and the trier of fact can infer unfitness from the accused's behaviour. If however, the codified criteria

for unfitness are to include "mental disorder," it is arguable that expert evidence may be required. In practice, there is usually psychiatric evidence where this is required. Not requiring expert evidence causes minimum interference with counsel's ability to conduct the case as he or she sees fit.

On the other hand, not requiring expert evidence is inconsistent with the fact that the evidence or report in writing of "at least one duly qualified medical practitioner..." is generally necessary at present for mere remand. Not requiring expert evidence is also inconsistent with s. 690 of the Code, which requires inter alia that on the hearing of a dangerous offender application, "the court shall hear the evidence of at least two psychiatrists..." and makes elaborate provision for the nomination of such psychiatrists. Moreover, not requiring expert evidence may create a danger that persons will be improperly found unfit and detained.

Alternative I

Require that on any trial of the fitness issue the court shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the prosecution and one of whom shall be nominated by the defence.

Considerations

Such a provision would be consistent with current normal practice and would also be consistent with the provisions of s. 690 of the Code. This approach would guard against improper findings of unfitness and consequent deprivation of liberty.

Such a provision may, however, be unnecessary in light of current normal practices. Arguably, moreover, such a provision may elevate the stature of psychiatric evidence beyond that which is appropriate. The question of fitness to stand trial is not necessarily either beyond the competence of a lay trier of fact or exclusively within the psychiatrist's field of expertise. (The validity and reliability of psychiatric diagnosis and its relevance to the question of fitness is being questioned generally). This approach would also be more costly.

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Alternative II

Require the evidence of a specified number of psychiatrists in support of any finding of unfitness (Butler Committee).

Considerations

This approach goes a step beyond that described in Alternative I; under Alternative I, although the evidence of a specified number of psychiatrists is required, there is no requirement as to what their opinions must be before a finding of unfitness can be made.

Under this alternative, the opinion of one psychiatrist plus the surrounding circumstances may be sufficient evidence in many cases. If evidence of more than one psychiatrist is required in support of any finding of unfitness, however, this approach may interfere with the present right of the jury to accept the evidence of one expert and reject that of another.

Alternative III

Require that the court shall hear the evidence of a panel of court-appointed psychiatrists and/or mental health professionals.

Considerations

This alternative would eliminate the practice of "psychiatrist shopping," and might therefore result in uniform and unbiased expert evidence. It might, of course, be argued that this approach might only achieve the illusion of impartiality, which may be more dangerous than obvious partiality. This option allows for qualified persons (appointed by the court) other than psychiatrists to give evidence.

Alternative IV

Same as Alternative I, II or III, but provide that the court shall receive a report instead of hearing oral evidence, and permit either side, with leave of the court, to require the attendance of experts for the purpose of cross-examination.

Considerations

The chief advantage of this approach is expediency. The chief disadvantage lies in the fact that the reports may contain prejudicial material, and may not in themselves be subject to cross-examination unless the courts grant leave.

Alternative V

Same as Alternative IV, but give both sides the absolute right to require the attendance of experts for the purpose of cross-examination.

Considerations

This approach has the same advantages and disadvantages as Alternative IV, with one exception: here cross-examination becomes an absolute right.

Issue 11

What provision should be made with regard to burden of proof when the issue of fitness is raised at first instance?

Discussion

Burden and standard of proof were discussed earlier. As mentioned, the issues of burden and standard of proof raise the question of expediency versus fairness to the accused. Once again, there is the interest in minimizing delay; a fair trial may require that persons who are in fact unfit should be found unfit, and that burden and standard of proof should not impose an undue impediment to such finding. On the other hand, fairness to the accused may dictate that explicit and stringent requirements be enacted with regard to burden and standard of proof. Burden and standard of proof will, in theory, govern the ease with which a finding of unfitness can be made.

While the Code provides in s. 16(4) that "Everyone shall, until the contrary is proved, be presumed to be and to have been sane" (emphasis added), it is unclear whether this section applies only with respect to the defence of insanity or with respect to the question of fitness to stand trial as well. The case law is unclear and conflicting on the issue of who bears the burden of proof, and what the standard is at first instance.

Alternative I

Provide that the burden of proving unfitness rests on the party that raises the issue.

Considerations

This approach is a simple application of the maxim "he who alleges must prove." It is consistent with that taken with respect to the defence of insanity and the presumption of sanity (at least for the purposes of the defence of insanity) contained in s. 16(4) of the Code. This approach, which has the effect of articulating a presumption of fitness, may be seen as fair, having regard to the fact that a finding of unfitness may result in indefinite confinement. Arguably, however, this alternative is inconsistent with the right of unfit accused persons not to be tried (see s. 2(e) of the Bill of Rights, and s. 7 of the Charter); perhaps it is unfair to require an unfit accused person to prove unfitness.

Alternative II

Provide that once one party raises the issue of unfitness, the burden of proving fitness rests on the other party.

Considerations

While this approach would protect the right of accused persons not to be tried while unfit, it comes very close to creating an illogical presumption of unfitness. Furthermore, fitness may be difficult to prove.

Alternative III

Provide that regardless of who raises the issue, "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...that the accused is fit to stand his trial" (Bill S-33,s. 13).

Considerations

This approach is consistent with the fact that under present law the court can apparently raise the issue of fitness itself. According to Professor Allan Manson:

"support for the argument that the burden must always rest with the Crown lies in the recognition that any participant, including the Court of its own motion, may raise the issue of fitness. If concern that the accused may be unfit emanates solely from the Court itself, surely it is the Crown which must satisfy the trier of the issue that the accused is fit if the prosecution which the Crown has initiated and over which the Crown has conduct is to proceed." This approach is consistent with the general rule in Woolmington v. D.P.P. and Crane v. D.P.P., although it is inconsistent with the M'Naghten "exception" to the general rule in Woolmington (i.e., the "exception" that applies to the defence of insanity). It may be argued that such an approach is illogical insofar as it virtually creates a presumption of unfitness.

Alternative IV

Provide that burden of proof rests with no one.

Considerations

This approach derives from and is consistent with the concept in some English and Canadian cases that the question of fitness is "strictly an inquiry on behalf of the Queen to determine the status of the subject and not a trial involving adversaries to determine whether an offence has been committed...." It is also consistent with the right of the accused not to be tried while unfit (see s. 2(e) of the Bill of Rights and s. 7 of the Charter), and with the present apparent power of the court to raise the fitness issue of its own motion.

On the other hand, this approach runs contrary to the general rule that "he who alleges must prove." It runs contrary to the prevailing law, and has either not been followed or has been expressly rejected by a number of Canadian courts. Furthermore, this approach is inconsistent with the law regarding the onus of proving insanity for the purpose of s. 16 of the Code (where there also exists an absolute right not to be convicted of a crime committed while insane). By s. 16(4) of the Code there is a presumption of sanity, at least for the purposes of the defence of insanity. Insofar as a finding of unfitness may result in deprivation of liberty for an indefinite period, it is arguable that there should be a presumption of fitness just as there is a presumption of innocence.

Issue 12

What provision should be made with regard to burden of proof when a person previously found unfit is returned for trial?

Discussion

Currently, persons are only returned for trial once the lieutenant governor of the province determines that they are fit. It is therefore arguable that there should be a presumption of fitness. On the other hand, it is arguable that once a person has been found unfit he or she should be presumed unfit upon return for trial, unless and until the court determines otherwise.

The Code makes no provision in this regard, and there is unclear and conflicting case law.

Alternative I

Provide that the burden of proving unfitness rests on the party that raises the issue.

Considerations

Under this alternative there would not be a new fitness hearing unless the issue were raised again. This approach, which has been advocated in at least one recent Canadian case, is consistent with the fact that the issue is present fitness. It is also consistent with Criminal Code provisions requiring the issue to be tried only where sufficient reason to doubt fitness appears to the trial judge. Arguably, however, a previous finding of unfitness should create a presumption of unfitness when the accused is returned for trial.

Alternative II

Provide that the accused is presumed to be unfit and that the burden of proving fitness rests on the prosecution.

Considerations

Under this alternative, the fitness issue would be automatically tried upon the accused's return to trial. This approach has support in several Canadian and English cases and is consistent with the fact that there has been

a previous verdict on this issue and that the only evidence that the findings of fact on which it was based are no longer correct (i.e., the opinion of the lieutenant governor and/or the board of review) has not been adduced in court or subjected to any kind of scrutiny, cross-examination, etc. Arguably, however, this approach is inconsistent with the Code's current provisions which state that the trial judge need only direct the trial of fitness issue where sufficient reason to doubt fitness appears. In effect, it removes the trial judge's discretion and makes a fitness hearing mandatory every time a previously unfit accused is returned for trial.

While the presumption of unfitness would give due weight to the previous finding of unfitness, the effect of this alternative would be to require fitness to be tried whenever previously unfit accused persons are returned for trial. This would be redundant where the return for trial has resulted from a proper review procedure. In addition, there would be the problem as to what to do with the accused if the presumption is not rebutted (see below).

Alternative III

Provide that the accused is presumed to be unfit and the burden of proving fitness rests on the defence.

Considerations

Such a provision would be a strong safeguard for the accused's right not to be tried while unfit, and would give due weight to the previous finding of unfitness. It may be argued, on the other hand, that it is not logical for there to exist a presumption of unfitness, considering that (under present law and practice at least) the accused is only returned to court once he or she has been assessed as fit by the lieutenant governor (with the help of a board of review and psychiatric experts). If the presumption is not rebutted, then what? Should the accused be sent back for treatment by psychiatrists who, by releasing him or her, have already made clear their position that the accused is fit and does not need treatment to become fit? Perhaps the answer to this question lies in the fact that the issue is not a psychiatric one but a legal one.

Alternative IV

Provide that "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... that the accused is fit to stand his trial" (Bill S-33, s. 13).

Considerations

This approach would avoid the problems of presumptions and automatic fitness hearings discussed above. It would also be a strong safeguard for the right of the accused not to be tried while unfit.

Issue 13

What provision should be made with regard to standard of proof if and when the burden is on the defence to prove fitness?

Discussion

As mentioned earlier, the standard of proof will govern the ease with which a finding of fitness or unfitness can be made. Currently, the Code makes no provision in this regard.

Alternative I

Require proof on a balance of probabilities.

Considerations

This standard would protect the accused's right not to be tried while unfit (see s.2(e) of the Bill of Rights and s.7 of the Charter). Arguably, however, this approach would be inconsistent with s.7 of the Charter insofar as it would require the accused to prove fitness by a fairly high standard in order to avoid detention for treatment. It might constitute a deprivation of liberty otherwise than "in accordance with the principles of fundamental justice."

Alternative II

Require the raising of a reasonable doubt as to unfitness.

Considerations

This is a lower standard than that under Alternative I. While this approach gives utmost consideration to the right to be tried, it may give insufficient consideration to the right not to be tried while unfit (see s. 2(e) of the Bill of Rights, and s. 7 of the Charter).

Issue 14

What provision should be made with regard to standard of proof if and when the burden is on the prosecution to prove fitness?

Discussion

The discussion for Issue 13 applies here. Again, the Code makes no provision with regard to standard of proof if and when the burden is on the prosecution to prove fitness.

Alternative I

Require proof beyond a reasonable doubt.

Considerations

This is the ordinary burden that rests on the Crown in criminal cases with regard to proof of guilt. This standard is particularly appropriate where the defence raises the issue of unfitness. As Manson has argued: "The...situation, where the accused asserts unfitness and is challenged by the Crown, represents a substantial conflict between the parties, the resolution of which determines whether the accused will be subjected to the risk of criminal sanctions. Hence, there appears to be no reason why this conflict, cast in an adversarial setting, should not also be subjected to proof by the Crown beyond reasonable doubt." This standard is also consistent with the accused's right not to be tried while unfit (see s. 2(e) of the Bill of Rights and s. 7 of the Charter).

On the other hand, it may be argued that this standard effectively places the presumption of unfitness on the same plateau as the presumption of innocence. This situation might be seen by some as absurd. Furthermore, this standard might be seen as placing an unreasonable burden on the Crown, particularly since the accused may frustrate the Crown's efforts to prove fitness by refusing to undergo examination.

Alternative II

Require proof on a balance of probabilities (Bill S-33, s. 13).

Considerations

This approach has been taken in some Canadian cases. Arguably, it does not place an unreasonable burden on the Crown. This standard is, however, inconsistent with the burden that normally rests on the Crown in criminal cases regarding proof of guilt.

Issue 15

What provision should be made with regard to standard of proof if and when the burden is on the defence to prove unfitness?

Discussion

Similar considerations to those discussed for the above two issues apply here as well.

Again, the Code makes no provision with regard to the standard of proof if and when the burden is on the defence to prove unfitness.

Alternative I

Require proof on a balance of probabilities.

Considerations

This approach would be consistent with the present quantum of proof required for the defence of insanity (according to Canadian case law), and would also be consistent with a reasonable presumption of present sanity.

Alternative II

Require the raising of a reasonable doubt as to fitness.

Considerations

While this approach would constitute a strong safeguard against the trial of unfit persons in that very little would be required of possibly unfit accused persons to establish their unfitness, it would considerably weaken any presumption of present sanity that may exist. This standard is also inconsistent with the present standard of proof required for the defence of insanity (i.e., balance of probabilities), and makes trial of the issue somewhat redundant if the test for whether a trial of the issue should be directed remains the same as it currently is. Under this alternative the prosecution would be placed in a difficult position as far as rebuttal is concerned.

Issue 16

What provision should be made with regard to the standard of proof if and when the burden is on the prosecution to prove unfitness?

Discussion

Similar considerations to those discussed for Issue 13 apply here as well. Note that the Code makes no provision with regard to the standard of proof if and when the burden is on the prosecution to prove unfitness.

Alternative I

Require proof beyond a reasonable doubt.

Considerations

It may be argued that this standard is demanded by the seriousness of the consequences of a finding of unfitness under the present law. As Professor Manson has forcefully argued: "it is essential to note that when the Crown asserts unfitness in Canada, it constitutes an attempt by the state to deprive the citizen of liberty.... The citizen, albeit an accused within the criminal process, has not been found guilty. He has a constitutionally protected right to be presumed innocent and not to be deprived of his liberty except 'in accordance with the principles of fundamental justice'. Surely, the state must carry a substantial burden before it is entitled to commit him."

If, however, the law is changed so that indefinite detention is not as likely to follow a finding of unfitness, this rigorous standard may not be necessary. It may be argued, in any event, that this standard may not sufficiently protect the right of the unfit accused not to be tried.

Alternative II

Require proof on a balance of probabilities.

Considerations

This approach would be consistent with the present judicial view regarding the quantum of proof required for the defence of insanity when raised by the Crown, and would be consistent with a reasonable presumption of present sanity.

This standard would, however, be inconsistent with the usual standard of proof on the Crown in criminal cases, and might tempt prosecutors to prove unfitness by this lower standard rather than prove the accused guilty of the offence charged (assuming that postponement of the issue is not mandatory).

Chapter 4

THE DEFENCE OF INSANITY

THE DEFENCE OF INSANITY

INTRODUCTION

How ought the law respond to crimes committed by "insane," or partially "insane" persons? This question has plagued Canadian criminal law from its beginning, partly because of our difficulty in reconciling certain competing values, and partly because of our imperfect understanding of the human mind.

The issue of the proper scope of the insanity defence -- and whether such a defence should even exist -- has been hotly debated for the past 150 years. The longevity of the debate is testimony to its intractability. No obvious solution has emerged. This is not for want of trying; reports, books, articles and judicial decisions on insanity and its reform abound. Yet when all is said and done, we may have to accept the words of the Minister of Justice who, on introducing the insanity defence into our first Criminal Code in 1892, stated that it is "an unsatisfactory solution, still it is the best that can be devised."

In substance, we still have the 1892 insanity defence. The various insanity options that have been tried or recommended since then will be examined in this part in an effort to find the best solution for today's world. But first a preliminary question will be addressed.

Does it really matter all that much what the precise scope of the insanity test is? Is there any difference in result in using various insanity tests, or do jurors largely ignore the precise wording of the test and simply apply their own intuitive standards? No definitive answer can be given to these questions, but 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. What increase there was is 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 well, the increase in insanity acquittals appears to have come from what previously would have been not guilty verdicts. (Morris, Brakel, and Rock).

Mock jury studies have been conducted using the same trial facts but three different insanity tests -- M'Naghten, Durham, and a "non-test" in which the jury were simply asked if the accused was insane at the time of the act (Simon). The non-test produced the most insanity acquittals, M'Naghten the least, with Durham in between. But the authors of the study concluded that there were no significant differences in the percentage of insanity acquittals, although the difference between M'Naghten and Durham was 12 per cent. Their conclusion is obviously open to dispute.

Other studies indicate that only one-third to one-half of the jurors could accurately recall the judge's instructions on the insanity defence. This is the lowest accuracy recall rate of any material heard during each trial. Such disturbing findings tend to confirm that the precise wording of the insanity defence may not be too relevant in the jury's eventual decision.

A recent New York State study of insanity acquittees suggests that the particular language of the insanity test is not the deciding factor. Other variables (e.g., the type of person; the type of crime, the idiosyncrasies of attorneys, prosecutors and judges in particular counties; and the proximity of available facilities) would appear to be more relevant (Petrila).

In a recent Missouri study, the authors concluded that the words of the insanity test were not very important to psychiatrists' clinical opinions on whether the accused was legally insane, although the psychiatrists' clinical opinions were highly relevant to the insanity decision. Factors which appeared more important included: prior criminal history, prior mental illness, psychiatric diagnosis, the nature of the offence, and the relationship of the offender to the victim (Petrila).

Quinsey contends that perceived suitability for treatment is a significant factor in the insanity decision. He suggests that "the psychiatrists' perceptions of suitability for a mental hospital or some amalgam of the offender's stated interest in treatment, his attractiveness, his previous stays in hospital, the flagrancy of his psychopathological symptoms, and the bizarreness of his offence."

In addition to all of the above factors, it is arguable that the matter of disposition may be far more important to the jury than the exact words of the insanity test. The jury's decision may depend in large part on their perception of what will happen to the accused.

Having a test gives us a sense that we do know what we are doing. But (according to Wexler) the truth is "that we cannot now, and may never be able to make consistent, rational judgments in this terrible area." Thus, by Wexler's reasoning, our insanity tests are "secretly ratifying discretion without limiting or guiding it." The data listed above tend to support Wexler's thesis.

The attitude of individual jurors to psychiatry in general has been shown to affect outcome. Hostility by jurors to psychiatry may reduce the chances of succeeding on an insanity defence.

Available data indicate that the insanity defence is not successfully raised very frequently. When it is successful, the language and scope of the test do not seem to be very significant to the ultimate outcome. Is not then all the debate on the insanity test little more than a tempest in a teapot? In the above two senses, the answer would appear to be yes. But although practically insignificant, the insanity test is theoretically quite significant since it is integrally related to the criminal law's theory of responsibility and punishment. That theory posits that man generally has the capacity to reason right from wrong and the capacity to choose good or evil. Packer has aptly, if not cynically, described the connection between this theory and the insanity defence:

> "We must put up with the bother of the insanity defense because to exclude it is to deprive the criminal law of its chief paradigm of free will. The criminal sanction, as I have pointed out before, does not rest on an assertion that human conduct is a matter of free choice; that philosophic controversy is irrelevant. In order to serve purposes far more significant than even the prevention of socially undesirable behaviour, the criminal sanction operates as if human beings have free choice. This contingent and instrumental posit of freedom is what is crucially at stake in the insanity defense. There must be some recognition of the generally held assumption that some people are, by reason of mental illness, significantly impaired in their volitional capacity. Again, it is not too important whether this is in fact the case. Nor is it too important how discriminating we are about drawing some kind of line to separate those suffering

> volitional impairment from the rest of us. The point is that some kind of line must be drawn in the face of our intuition, however wrongheaded it may be, that mental illness contributes to volitional impairment."

If the data and assertions described above are accepted, it is fair to conclude that the precise scope of the insanity test is largely insignificant on the practical level, yet quite important on the theoretical, philosophical or ethical level.

This portion of the paper will deal chiefly with the substantive question of what insanity test, if any, our Criminal Code ought to adopt. It will then go on to deal with several procedural and evidentiary issues inherent in the administration of any insanity defence.

ISSUES

Issue 1

Should insanity (i.e, mental disorder in some form) be a separate defence in criminal law?

Discussion

Many eminent jurors and legal scholars have advocated abolition of the insanity defence. Their reasons, which are both practical and theoretical, are not uniform. They do not necessarily share a common perception of how mental disorder in the criminal process should operate in the event that the insanity defence were abolished. For this reason it is difficult to treat "abolition" as only one option. It has several variations.

Alternative I

Abolish the notions of blame, criminal responsibility and insanity (the Wootton proposal).

Considerations

Under this alternative, the only question at trial would be whether the accused committed the actus reus (i.e, the prohibited act). Mental state would be relevant only at the dispositional stage.

This approach would avoid the possibly unrealistic division of conduct between mad and bad, would avoid "hairsplitting about the limits of mental abnormality" (Wootton), and would avoid the vagueness, the semantic jousting and the heavy reliance on experts which now characterize the insanity defence. It would, in fact, avoid all of the other criticisms that have been raised against the insanity defence.

Abolition of the insanity defence might, however, have a number of disadvantages. It is arguable, for example, that removal of responsibility and the insanity defence threatens respect for individuals (Fingarette); persons become mere objects to be treated, rather than autonomous, responsible agents. Abolition removes the "vitally important distinction between illness and evil" (Goldstein), the distinction which in dramatic trials reminds all the rest of us that we are in general responsible for our conduct. Conviction of the irrational, insane person who has no capacity to control his or her conduct or to know that it is wrong, may be seen as morally wrong, unfair, and cruel and unusual (Goldstein). It is arguable that to abolish the insanity defence is "to deprive the criminal law of its chief paradigm of free will" (Packer). H.L.A. Hart has pointed out that this option has the further disadvantage of subjecting to possible treatment persons who are neither blameworthy nor mentally ill. He has noted "To show that you have struck or wounded another unintentionally or without negligence would not save you from conviction and liability to such treatment, penal or therapeutic, as the court might deem advisable on evidence of your mental state and character."

Alternative II

Abolish the insanity defence but allow evidence of mental disorder to negate an essential element of the crime (i.e., mens rea or actus reus) (Idaho, Montana, proposed U.S. Federal Criminal Code).

Considerations

This approach was recommended some 20 years ago by Professors Goldstein and Katz, who pointed out that mental illness sufficient to constitute an insanity defence under the M'Naghten test would also be sufficent to vitiate mens rea, and that there may therefore be no need for a separate defence. The approach is consistent with the main principles of criminal law involving mens rea and actus reus, and does

away with the very difficult ask of formulating a separate insanity defence. It would likely reduce, though not eliminate, the frequency with which criminal trials become battles between psychiatrists.

This approach, however, has some theoretical disadvantages. To begin with, it must be pointed out that the defence of insanity is wider than the concept of mens rea. This being so, abolition of the insanity defence would result in the conviction of some mentally disordered persons who have mens rea, but no rational mens rea. Arguably, this is neither fair nor just to the accused, nor beneficial to society's perception of the criminal justice system. From a practical standpoint, abolition of the insanity defence and its special verdict may result in an outright acquittal on the basis of no mens rea for some persons who are likely to commit further serious offences. Psychiatric evidence restricted to the mens rea issues of intent, knowledge or recklessness would arguably not give a clear or full picture of the extent of an accused's total impairment and therefore his capacity to act rationally. In attempting to acquit the truly insane, courts may be forced to stretch or twist the concept of mens rea in a manner that creates confusion or inconsistency.

Issue 2

Assuming there is to be a separate defence of insanity, what should the test for insanity be?

Discussion

Our current test for insanity is contained in s. 16 of the Criminal Code, which provides in part as follows:

> "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."

"Disease of the mind" is a legal concept and has now been given a very wide definition by the Supreme Court of Canada. "Appreciating" has a broader meaning than "knowing"; appreciating the nature and quality of an act or omission includes a real understanding of its physical consequences. "Wrong" means legally wrong, not morally wrong.

The current test has been used for 100 years and seems reasonably capable of application by judges, juries and experts. The key words in the test ("know," "appreciate," "disease" and "wrong") have all been recently and authoritatively interpreted. The criteria in the test are reasonably susceptible to a layman's interpretation, and therefore do not totally remove the issue from the jury and place it in the hands of experts.

Despite these considerations, s. 16 may be seen as having a number of drawbacks. It does not, for example, include impairment of volition as a basis for insanity and may not include impairment of emotional processes, except to the extent that either impair the cognitive requirements of the test.

The interpretation of the word "wrong" as legally wrong, moreover, may exclude from the insanity defence some persons who are severely mentally disordered but who know what they are doing and know that it is against the law. The expressions "natural imbecility," "disease of the mind" and "insanity" are archaic expressions which are no longer in use in the medical world. Furthermore, while it is unclear whether the incapacity in the test must be total, s. 16 provides for only two options: full responsibility, and total lack of responsibility. This black and white approach does not recognize gradations of responsibility.

In light of the above arguments, it may be argued that s. 16 should be overhauled at a minimum (a) to remove the archaic language, (b) to insert an exemption to

cover lack of knowledge of moral wrongfulness, (c) to recognize emotional impairment and (d) to recognize volitional impairment. One disadvantage to expanding the insanity defence is that it could result in public and political criticism if an increase in the number or type of insanity acquittals were to result. Arguably, however, such concerns would be more closely linked with the disposition resulting from an insanity acquittal than with the actual test used.

Alternative I

Provide that "to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." Provide also that an accused who "labours under partial delusion only, and is not in other respects insane... must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real" (M'Naghten rules).

Considerations

This is perhaps the strictest test and, as such, it reduces the possibility of "too many" persons being found insane (which might erode public confidence in law enforcement). It uses words that are not defined in reference to the medical knowledge of any particular day, and provides understandable criteria for the jury. The first branch of the test is consistent with the principles of mens rea, while the second branch may be seen as consistent with sound principles of morality.

Note, however, that the test appears to define insanity in terms of cognitive capacity only, and not in terms of impairment of volitional or emotional capacities. This results in excluding some persons from the defence who, it may be argued, morally should not be held criminally responsible. The test may be criticized as representing an obsolete medical view of the personality as compartmentalized into separate functions -- thinking, willing and feeling -- rather than as an integrated whole. It does not recognize degrees of impairment; one either "knows" and is sane, or doesn't "know" and is therefore insane. The word "know" is also more restrictive than the word "appreciate." Repeal of the M'Naghten test has

been advocated widely from both legal and medical quarters. In England, abolition of M'Naghten has been advocated by the Royal Commission on Capital Punishment and by the Committee on Mentally Abnormal Offenders (Butler Committee).

Alternative II

Same as Alternative I (M'Naghten), but provide as well that a person is not responsible if that person had a mental disease that kept him or her from controlling his or her conduct even though he or she knew the nature and quality of his or her act and knew that it was wrong.

Considerations

This test recognizes volitional impairment and is arguably therefore consistent with the moral basis for imposing criminal liability; civilized penal systems do not punish people for what they cannot avoid. It recognizes that aspects of psychodynamics distinct from cognition may be involved in behaviour. The test has been adopted in a large number of American, Australian and South African jurisdictions. It was also recommended for adoption in England by Lord Atkin's Committee on Insanity and Crime.

This test may, however, be criticized on the ground that it may be impossible to distinguish an "irresistible" impulse from an impulse that has simply not been resisted.

Alternative III

Provide that "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect." Define "disease" as "a condition which is considered capable of either improving or deteriorating," and define "defect" as "a condition which is not considered capable of improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease" (Durham v. U.S.).

Considerations

This test is premised on the notion that the mind functions as an integrated whole, and that the functions of cognition and control cannot be properly separated;

it is therefore futile to attempt to identify types of malfunctioning symptoms which do not necessarily accompany even the most serious mental disorders. It is arguable that this test broadens the scope of non-responsibility for crime due to mental illness in a manner that is more consistent with the clinical realities of mental illness than are other insanity tests. It is a fairly simple test which gives the jury a wide latitude and may allow for greater flexibility and scope in psychiatric evidence.

There are, however, some major disadvantages to this test. It may, first of all, be considered a "non-rule," since it does not direct the jury to the factors or symptoms that are relevant to the law in determining criminal responsibility. The result may be undue reliance on expert opinion; the function of the jury may be usurped by experts. Leaving the issue of responsibility to the jury without any guidelines may also be undesirable, since it will inevitably result in lack of uniformity and equality in decisions.

Alternative IV

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 lacks 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 or otherwise anti-social conduct" (ALI Model Penal Code, s. 4.01).

Considerations

Professor Abraham Goldstein has described some advantages of the ALI test as follows:

> "This test is a modernized and much improved rendition of M'Naghten and the 'control' tests. It substitutes 'appreciate' for 'know,' thereby indicating a preference for the view that a sane offender must be emotionally as well as intellectually aware of the significance of his conduct. And it uses the word 'conform' instead of 'control,' while avoiding any reference to the misleading words 'irresistible impulse.' In addition, it requires only 'substantial'

> incapacity, thereby eliminating the occasional reference in the older cases to 'complete' or 'total' destruction of the normal capacity of the defendant."

According to the United States' Fourth Circuit Court of Appeals in United States v. Chandler;

> "With appropriate balance between cognition and volition, it demands an unrestricted inquiry into the whole personality of the defendant.... Its verbiage is understandable by psychiatrists; it imposes no limitation upon their testimony, and yet, to a substantial extent, it avoids a diagnostic approach and leaves the jury free to make its findings in terms of a standard which society prescribes and juries may apply."

This test may be seen as a compromise between the strictness of M'Naghten (Alternative I) and the unstructured nature of Durham (Alternative III). As of 1980, twenty-eight states and 10 out of 11 federal circuit courts had adopted in substance the ALI test as the best and most functional insanity test.

On the other hand, several criticisms may be levelled at this approach. It may, for example, be argued that the words "substantial" and "appreciate" are too vague.

The test of "conformity," moreover, may suffer from the same problem as the "irresistible impulse" test: how is the jury to distinguish between incapacity to conform and wilful or reckless failure to conform? It may be argued that the words "as a result of" are subject to the same causality difficulties inherent in the "product of" formulation in Alternative III (i.e., Durham).

Alternative V

Provide that an accused "is not responsible if at the time of his unlawful conduct his mental or emotional processes or behaviour controls were impaired to such an extent that he cannot justly be held responsible for his act" (U.S. v. Brawner, per Bazelon J.).

Considerations

This test emphasizes that it is the jury's function to make the ultimate decision on insanity, and discourages

encroachment on this issue by experts. It may, however, be criticized as being a "non-test," since it does not direct the jury to the factors or symptoms that are relevant to the law in determining criminal responsibility. Leaving the issue of responsibility to the jury without such guidelines may result in arbitrary or unequal decisions in which each jury formulates its own legal rule and standard of justice.

Alternative VI

Provide for the availability of a mental disorder defence in circumstances where there is either: (1) mental disorder negating mens rea (i.e., intention, foresight, knowledge, etc.); or (2) severe mental disorder or severe subnormality, notwithstanding technical proof of mens rea (Butler Committee).

Considerations

This test does away with the archaic word "insanity" (as does the Committee's recommended verdict, "not guilty on evidence of mental disorder"). It amalgamates the currently separate defences of "insanity" and "mental disorder short of insanity negating mens rea"; both become subject to the special verdict and give the courts a new and wide-ranging power of disposal which they would not have under an ordinary acquittal. The test avoids the narrowness of M'Naghten and its arguably obsolete belief in the pre-eminent role of reason in controlling human behaviour, recognizing that persons can know what they are doing yet be so severely disturbed in intellectual, emotional or control functions as not to be justly responsible for their conduct. Furthermore, the test avoids the "product" or causation problem of the Durham test (Alternative III, supra) by presuming causation in cases of severe mental illness. Unlike Durham, it defines "severe mental illness" and gives it a detailed, symptom-oriented definition. Finally, this test avoids the difficulty of the ALI test (Alternative IV, supra) of distinguishing between non-conformity and incapacity to conform.

The drawbacks to this approach may, however, be numerous. First, by doing away with causation, the test leaves open the possibility (slight as it may be) that a person will be exempt from liability for an offence that in no way was caused by or attributable to his or her severe mental disorder. Second, the first branch of the test calls for psychiatrists to testify as to whether a mental disorder negated mens rea at the time of the

offence. This involves reconstructive speculation, at which psychiatrists may be no more expert than a jury. Third, the second branch of the test, according to the Butler Committee, "necessarily turns over the test of criminal responsibility to medical opinion." Fourth, combining the "insanity" defence with the defence of "mental disorder short of insanity negating mens rea" may be undesirable. Under current law, the latter defence will normally reduce a charge from one level to a lower level (e.g., first degree murder to second degree murder or manslaughter); but at least there is a conviction on the lesser charge, since the court is of the opinion that the accused had the mens rea for the lesser offence. Under the Butler test, however, the accused is acquitted (and cannot be tried on the lesser charge) without any inquiry into whether he had the requisite mens rea for a lesser offence.

Alternative VII

Provide that "Every one is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he was incapable of appreciating the nature, consequences or unlawfulness of such conduct" (Law Reform Commission of Canada, Alternative Test #1).

Considerations

According to the Law Reform Commission, this alternative is designed to retain the substance of the current s. 16 insanity defence, subject to a tidying up of the legislative drafting.

Alternative VIII

Provide that "Every one is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he lacked substantial capacity either to appreciate the nature, consequences or moral wrongfulness of such conduct or to conform to the requirements of the law" (Law Reform Commission of Canada, Alternative Test #2).

Considerations

This test uses clearer, more precise (and of course wider) language than the present insanity test. It

relies on the same key words that have already been authoritatively interpreted ("disease of the mind" and "appreciate") in our existing insanity test. It widens the test (i.e., by including volitional impairment and lack of appreciation of moral wrongfulness) in a way that is not radically new in approach(see Durham, Bazelon J. in Brawner, and the Butler Committee approach, supra) and is therefore likely to cause less confusion and uncertainty in its implementation than one of the more radically different tests.

By using the words "substantial capacity... to conform to the requirements of the law," this test recognizes that behaviour has not only a cognitive but also a volitional component, and may therefore be more consistent with modern insights into human behaviour than the M'Naghten test and the current provisions of s. 16. This recognition of impairment of self-control is also consistent with the current defences of provocation and mental disorder short of insanity negating mens rea. Most importantly, this extension of the insanity defence is consistent with a fundamental moral principle that those who cannot control their actions through no fault of their own should not be held responsible or be punished. This provision would not open the insanity defence to all psychopaths. Those who simply lack feelings of guilt, remorse or concern for others would still be liable to conviction. Those who have a disease of the mind resulting in substantial incapacity to control their conduct would be able to rely on the insanity defence. (At least some of this group are also insane under the current law because they do not "appreciate" their conduct; others are successful in having the charge reduced by pleading no mens rea due to mental disorder short of insanity). In addition, this formulation avoids a major criticism of the "irresistible impulse" test: i.e., that it implies that the conduct must be sudden, unplanned and spontaneous.

Note also that the word "substantial" broadens the insanity test in a way that takes into account the reality that capacity or incapacity is seldom absolute. It also acknowledges that incapacity that is substantial should be adequate to relieve the accused from criminal liability, and recognizes that the question of substantiality is a normative one to be left to the jury.

Use of the expression "moral wrongfulness" may give a broader scope to the insanity defence than it has at present. (Unless this provision were expanded to include legal wrongfulness as well, however, this test may exclude some people to whom the current test would

apply). The arguments for expanding "wrong" to include "morally wrong" were set out and expressly adopted by the McRuer Report in 1956 and by Dickson J. in his dissenting judgment in Schwartz. The Law Reform Commission of Canada gave the following reasons in favour of the use of "morally wrong":

> "First, common-law tradition, it seems, saw 'wrong' as meaning 'morally wrong' and contrary interpretations are of recent vintage. Second, the term 'wrong' in the analogous rule about children -- that children between seven and fourteen cannot be convicted unless they appreciate that their conduct was wrong-- has generally been taken to refer to moral wrongfulness. Third, while it may be undesirable to acquit someone aware that his act was illegal but reckoning it justifiable on his own view of morality, it would be equally undesirable to acquit someone aware that his act was morally wrong but unaware, due to disease of mind, that it was illegal.
>
> Finally, and most important, the key point to remember is that in such situations the accused suffers from disease of mind. This being so, to inquire how far he knew the law makes little sense. What matters are his motives and his overall perception of the permissibility of his action. 'The question for the jury is whether mental illness so obstructed the thought processes of the accused as to make him incapable of knowing that his acts were morally wrong."

Deletion of the "specific delusions" portion of our current insanity test (i.e., s. 16(3)) accords with the view, shared by the McRuer Commission and the Law Reform Commission of Canada, that there are no instances in which a s. 16(3) case would not be covered by the current insanity test in s. 16(2).

The above test may, however, be subject to several grounds of criticism. To begin with, the "incapacity to conform" clause may raise a distinction that the jury cannot possibly discern. How, it may be argued, is the jury to distinguish between incapacity to conform and wilful failure to conform when all the jury has before it is proof that there was in fact no conformity? In

addition, it may be argued that recognition of impaired volition would weaken society's expectation that those who can reason right from wrong are expected to struggle with their own powers of self-control and to resist temptations to break the law. There may also be fears that such recognition would allow psychopaths to escape conviction too easily, or that it would lead to more domination of the insanity issue by the experts, rather than by the jury. It may also be argued that the "incapacity to conform" test is unnecessary on the ground that the present insanity defence already includes true cases of irresistible impulse caused by disease of the mind.

It may be argued that the "moral wrongfulness" clause is an unwise extension of the insanity test, since it is vague and subjective, allowing for each individual to follow his or her own morality no matter how bizarre or unnatural. Even if morality is given an objective meaning-- something that the accused knows would be condemned in the eyes of others -- there is still the problem that in Canadian society we do not have a single morality, but a plural morality in regard to many issues. It is also arguable that this clause favours the amoral over the moral. (These arguments are, however, less persuasive if one remembers that the issue only arises if the person's mistaken morality arises from disease of the mind).

Reducing the requirements of the test from full capacity to substantial capacity may be seen as undesirable, since it could allow persons who had at least some capacity to conform to the law to totally escape conviction and punishment.

It may also be argued that the above test is too narrow in one respect. The word "appreciate" may not include any requirement that an accused be aware of the emotional significance of his conduct (Kjeldsen). Arguably, emotional impairment is relevant to the "capacity to conform" branch of the test. It could be argued that total or substantial lack of capacity to appreciate the emotional significance of conduct can be itself a substantial impairment of the ability to control one's behaviour in the same way that persons with ordinary emotional processes can control their behaviour. Therefore, emotional impairment may be relevant under the "capacity to conform" branch of this test.

Alternative IX

Supplement the insanity test with a diminished responsibility test as follows:

(1) Everyone is partially excused from criminal liability for his or her conduct if it is proved that as a result of disease or defect of the mind he or she lacked a substantial or significant capacity either to appreciate the nature, consequences or moral or legal wrongfulness of such conduct or to conform to the requirements of the law.

(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.

Considerations

This test is drafted in a manner so as to be consistent with the criteria in the Law Reform Commission of Canada's Alternative Test #2 (Alternative VIII, supra). Since the criteria in the insanity test are wide (i.e., mental disorder has a wide definition, cognitive and volitional impairment are recognized, moral or legal wrongfulness is included), the same criteria should prove ample for a diminished responsibility test. It should be noted that this test, as presently drafted, excludes cultural, social or political disadvantage or impairment unless such factors constitute mental disease or defect. The proposal results 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). If insanity includes "substantial" impairment, then this word would be deleted from this proposal, leaving only "significant" impairment. (It may be noted that the English and German concepts of diminished responsibility use the word "substantial").

This approach has two major advantages. First, it recognizes that the line between sanity and insanity is not black and white, i.e, that there are degrees of sanity and insanity. Second, it recognizes partial responsibility not only by reducing the sentence but by reducing the offence. This point is significant, since the name attributed to an offence inherently indicates the seriousness of such offence and/or the degree of culpability of the person convicted.

There are, however, several possible disadvantages to this approach. To begin with, it would require a rewriting of the Code to provide for gradations of offences. The doctrine of diminished responsibility may also be criticized as weakening the deterrent effect of the criminal law, insofar as it arguably does nothing to encourage those with some, albeit limited, mental capacity to struggle to fully comply with the law. It may further be criticized on the basis that longer (not shorter) sentences are required for mentally disordered offenders.

Issue 3

Once insanity has been raised by the accused, should the accused be required to prove insanity, or should the prosecution be required to prove sanity? By what standard?

Discussion

Everyone is presumed, under the Criminal Code and at common law, to be sane until the contrary is proved. Normally, the accused raises insanity as a defence. If the accused does, he or she must prove it on a balance of probabilities. This is now an exceptional rule; in the case of other defences, excuses or justifications, once some evidence of their existence is before the court, the prosecutor must prove beyond a reasonable doubt that the alleged act occurred in the absence of such a defence or justification. Many commentators have questioned why this general rule does not apply to the insanity defence. Arguably, any change in the burden of proof would produce violent public reaction.

Although the defence of insanity is normally raised by the defence, the issue of insanity, at least in Canada, may be raised by the prosecutor. If it is, the burden is on the prosecutor to prove insanity on a balance of probabilities. If neither the accused nor the Crown is

alleging insanity, but there is evidence of insanity, the judge must still direct the jury that if the evidence establishes insanity on a balance of probabilities, the proper verdict is not guilty by reason of insanity.

Alternative I

Provide that the accused must prove insanity on a balance of probability basis (McRuer Commission (1956); Uniform Law Conference of Canada Task Force (1981); Law Reform Commission of Canada (1982); proposed new Canada Evidence Act (Bill S-33), s. 11(2)).

Considerations

Several arguments may be made in favour of placing the burden of proving insanity on the accused when he or she raises it. To begin with, it may be argued that since insanity may be easily claimed, the accused should be required to demonstrate that it is genuine. This proposition may, however, be attacked by three separate lines of reasoning. First, one might ask, if close clinical examination cannot weed out the malingerers or fabricators, can we really expect that the burden of proof will accomplish this purpose? Second, no claim of insanity, even one supported by psychiatric diagnosis, is invulnerable. In many cases, psychiatrists testify that an accused was insane at the time of the offence but the judge or jury rejects that opinion because lay evidence of external realities (i.e., what the accused said and did, how he or she looked, how he or she acted) before, during and after the offence, are inconsistent with a finding of insanity. Third, proof of mens rea (i.e., intent, knowledge, recklessness, etc.) also involves drawing inferences about internal, subjective states that might be feigned. But that difficulty has never caused us to shift the burden to the accused to prove mens rea. Likewise, it may be argued, there is no justification to place the burden on the accused to prove insanity simply because it involves drawing inferences about an internal, subjective state.

A main policy reason that is often put forward for allocating the burden of proving insanity to the accused is the fear that a reasonable doubt about an accused's sanity, and therefore his or her criminal responsibility, can be too easily created, especially in light of the imprecise and often conflicting nature of psychiatric evidence. Some might say, however, that

this argument underestimates the boundaries of the "reasonable doubt" standard and the difficulties that an accused can have in raising evidence of a reasonable doubt. We have sampled the reported cases during the past year from those jurisdictions where the burden is on the prosecutor to prove sanity beyond a reasonable doubt. Almost all of these cases involved at least some expert opinion evidence supporting the accused's plea of insanity. But this evidence was not enough to raise a reasonable doubt. In 28 of the 30 cases, the plea of insanity failed. If anything, these figures suggest that the standard of reasonable doubt is too hard to meet, not too easy.

There is very little empirical evidence indicating the frequency with which the insanity plea is raised and the number of times it succeeds when raised. The data that do exist indicate that the number of insanity acquittals is only a fraction of 1% of the total number of indictable or felony convictions (Pasework and McIntyre). There is nothing in the data to indicate that placing a "beyond a reasonable doubt" burden on the prosecution causes a significant rise in the number of successful insanity pleas.

Another argument that may be made is that proving sanity is impossible. This argument is in many respects similar to the previous argument and needs little additional refutation. The major point behind this argument is that in our society we have not agreed upon what it means to be sane. In addition, sanity implies that there is nothing wrong with an individual. Therefore, it is impossible to require the prosecutor to prove beyond a reasonable doubt such an indefinite, boundless, concept.

This argument may be misleading. It may be an unfair representation to suggest that the prosecutor must prove sanity in the above-mentioned sense beyond a reasonable doubt. The medical, social or metaphysical notion of sanity is not what must be proved. The current legal definition of sanity is confined specifically to the capacity to appreciate the nature and quality of an act or omission or to know that it is wrong.

The major argument against placing the burden of proving insanity on a balance of probabilities on the accused is that it may contradict the fundamental rule requiring the prosecution to prove all the elements of the offence. Where, for example, the accused raises a reasonable doubt as to whether he or she suffered from a disease of the mind that rendered him or her incapable

of appreciating the nature and quality of an act or omission that constituted the actus reus of the offence, there may be reasonable doubt as to whether the accused had the requisite mens rea for the offence. In this case, however, it has been argued that reasonable doubt of guilt will not be sufficient to acquit the accused. Several scholars have called the current burden theoretically unsound and an historic anomaly. It is likely, moreover, that if s. 16(4) continues to be interpreted as placing the persuasive burden of proof of insanity on the defence, it will be challenged as contrary to the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal...," a right which is enshrined in s. 11(d) of the Charter. In such case, the prosecution may have to show that the onus on the accused is a "reasonable limit" which can be "demonstrably justified in a free and democratic society" (Charter, s. 1). Is it "reasonable" to require the accused to prove insanity on a balance of probabilities when there is already a reasonable doubt about the existence of mens rea due to insanity?

Alternative II

Provide that the accused need only raise a reasonable doubt as to sanity, whereupon the legal burden shifts to the prosecution to prove beyond a reasonable doubt that the accused was not insane (Davis v. United States, English Criminal Law Revision Committee (1972, 1980)).

Considerations

Such a change could be accomplished by amending s. 16(4) of the Criminal Code to read: "Every one shall, until a reasonable doubt is raised, be presumed to have been sane." This option is consistent with the prosecution's legal burden of proving mens rea. Its possible shortcomings may, however, be inferred from the comments under Alternative I.

Alternative III

Provide that the prosecutor must prove mens rea beyond a reasonable doubt but that the accused must prove insanity on a balance of probabilities in cases where the mens rea has been proved (Butler Committee).

Considerations

This approach is consistent with the prosecution's legal burden of proving mens rea, yet has the advantages described for Alternative I. It may, however, confuse juries.

Issue 4

Should the prosecution be allowed to lead evidence of the accused's insanity when the accused has not put his or her mental state in issue and does not want it put in issue?

Discussion

Insanity, when used as an excusing condition for criminal liability, is normally referred to as a "defence." Originally, it was only raised by the accused, and usually only in the most serious of cases since the consequence of a finding of not guilty by reason of insanity was 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 Canada. But in England, 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 addressed in this section is 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. This question had not been subject to appellate court examination in Canada until the Ontario Court of Appeal raised it in the case of R. v. Simpson. Since then it has been considered in R. v. Saxell and in R. v. Dickie by the same court.

Alternative I

Provide that the prosecution may lead evidence of the accused's insanity when the accused has not put his or her mental state in issue and does not want it put in issue, but only in accordance with the following rules:

(1) Such evidence may be adduced only with the leave of the presiding judge, who might first see fit to hold a voir dire (R. v. Simpson, R. v. Saxell).

(2) There must be evidence "which would warrant a jury being satisfied beyond a reasonable doubt that the accused committed the act charged with the requisite criminal intent, apart from a condition of insanity" (R. v. Simpson).

(3) The trial judge has a discretion "to exclude evidence of insanity when tendered by the prosecution unless he is satisfied that the evidence of insanity proposed to be tendered is sufficiently substantial that the interest of justice requires that it be adduced" (R. v. Simpson).

(4) The proper test for the judge in exercising his or her discretion to allow the prosecutor to introduce evidence of insanity "is not whether, if advanced by the accused, the evidence would be sufficient to require the defence of insanity to be submitted to the jury by the trial Judge, but whether it is sufficiently substantial and creates such grave question whether the

accused had the capacity to commit the offence that the interest of justice requires it to be adduced" (R. v. Simpson).

(5) "[I]n exercising his discretion whether to permit the Crown to adduce evidence of the insanity of the accused, the Judge ought to have regard to the nature and seriousness of the offence alleged to have been committed and the extent to which the accused may be a danger to the public" (Saxell).

Considerations

Although many rationales may be advanced both for and against the rule permitting the Crown to raise the issue of insanity over the accused's objection, in the end it comes down to choosing between two competing principles. On the one hand, respect for individual autonomy suggests that the accused should be permitted to define his or her own best interests even if that means waiving the benefits of the insanity defence. On the other hand, respect for justice and the institutions administering justice suggests that the morally blameless must not be convicted and punished.

Additional arguments in favour of the rule might centre on public protection (assuming that an insanity verdict continues to result in the possibility of indefinite detention in the case of indictable offences). Although these concerns about public danger are understandable, it may be argued that they are inappropriate at this stage of the proceedings. The criminal trial is properly concerned with a determination of responsibility for the commission of a specific offence at a specific time.

Another argument that may be made is that raising the insanity defence for the accused may be in his or her best interests. There are, however, a number of very good reasons why the accused may not want the insanity defence raised: (1) the accused may prefer the certainty of a fixed sentence to the uncertainty of indefinite confinement under an LGW; (2) the accused may prefer confinement in prison to confinement in a psychiatric facility; (3) the accused may find the stigma of criminality and the label "convict" less damaging than the stigma of insanity and the label "ex-mental patient"; (4) the accused may not want to

jeopardize other defences such as alibi, self-defence or duress with evidence of insanity (this danger will be minimized but not totally eliminated by the Simpson rule); (5) The accused may be opposed to psychiatric treatment and fear its involuntary application to him or her under an LGW (although the requirements for consent and exceptions thereto would still apply); (6) the accused may not want the motives for his or her conduct denigrated by the assertion that they are the product of an insane person (this was the rationale behind Louis Reil's resistance to having the insanity defence raised at his trial).

The English rule precluding the prosecutor from raising the insanity defence if the accused has not placed his or her mental state in issue has been justified, in part, on the basis that it is an essential concomitant of the adversary system.

The Law Reform Commission of Canada has noted that the essential characteristic of the adversary system is that the proceedings should be structured as a dispute between two sides who, in criminal cases, are the Crown and the accused. In the English case of R. v. Price, Lawton J. expressed this division of responsibilities as follows: "Prosecutors prosecute. They do not ask juries to return a verdict of acquittal." He also stated: "If insanity is a defence, it seems to me that [it] is for the defendant and his advisers to decide whether to put it forward."

In order to explain the apparent anomaly of the prosecutor raising the insanity "defence" in what is supposed to be an adversary proceeding, it is sometimes suggested that insanity is not really a "defence." In R. v. Simpson, Martin J.A., in response to this apparent anomaly, suggested that insanity is not really a defence, but rather a matter of capacity to commit the offence. The suggestion is that incapacities are not really defences and may therefore be treated as issues to be raised by the prosecutor or judge as well as the accused.

Alternative II

Provide that the trial judge must accord absolute deference to the accused's decision not to raise the insanity defence if the accused has "voluntarily and intelligently" rejected the insanity defence (Frendak v. United States).

Considerations

This alternative is based: (1) on a recognition of a trend in American judicial decisions to give greater respect to individual rights, including the right of the accused to the choice of his or her own defence; (2) on a recognition that, if the accused "must bear the ultimate consequences of any decision" (Frendak) whether or not to raise the insanity defence, he or she should have the right to make that decision; (3) on the view that the valid reasons for a voluntary and intelligent decision not to raise the insanity defence outweigh some abstract principle of justice; and (4) on the view that imposing the insanity defence will do more harm and less justice than not imposing it.

Issue 5

Assuming the prosecution is allowed to lead evidence of the accused's insanity, what standard of proof should the prosecution be required to satisfy?

Discussion

According to current Canadian case law, insanity must be proved on a balance of probabilities basis regardless of which party raises the issue. Should this state of affairs remain the same?

Alternative I

Require proof on a balance of probabilities (Bill S-33, s. 11(2)).

Considerations

This standard would be consistent with the present law in Canada. Arguably, however, if a possible result of an insanity verdict is detention of the accused, the prosecution should be required to prove insanity beyond a reasonable doubt.

Alternative II

Require proof beyond a reasonable doubt.

Considerations

This standard would be consistent with the normal burden on the Crown in criminal cases, and might be seen as particularly appropriate if a possible result of an insanity verdict is detention of the accused. It might, however, be inconsistent with the nature of the issue if the accused who raises insanity is merely required to raise a reasonable doubt as to sanity, or to prove insanity on a balance of probabilities basis.

Issue 6

Should psychiatric and psychological evidence be admissible in insanity cases?

Discussion

Should the law permit psychiatrists and psychologists to testify in regard to insanity and criminal responsibility? As a general rule, opinion evidence is inadmissible. Witnesses are to testify in regard to observed facts, not in regard to inferences or conclusions drawn from those facts. A major exception to this rule is expert evidence. Such evidence is admitted in relation to matters upon which ordinary persons without special knowledge of the subject would be unlikely to form a correct judgment, provided the witness qualifies as an expert in the particular subject matter, through study or experience.

The use of psychiatric and psychological evidence in proving or disproving the insanity defence is an exceedingly complex and controversial issue. Historically, the relationship between law and forensic psychiatry has been a shaky one. Differences and uncertainties continue unabated today. Opinions on the accuracy, efficacy and utility of psychiatric and psychological evidence are strongly divided, though passionately espoused. This climate of uncertainty and disagreement make it difficult to know what reforms, if any, are necessary and feasible.

Alternative I

Provide that psychiatric and psychological evidence shall not be admitted as evidence in insanity cases.

Considerations

The law has generally assumed that psychiatry and psychology can provide "scientific information which is likely to be outside the experience and knowledge of a judge or jury" (R. v. Abbey, per Dickson J). To date, the law has assumed that psychiatric and psychological testimony is sufficiently scientific and reliable to warrant admission as expert evidence. There is substantial empirical information that casts considerable doubt on the validity of that assumption.

Seymour Pollack, a noted forensic psychiatrist, has argued that the psychiatrist's treatment goal, or therapeutic bias, "acts both subtly and overtly to subvert the objective and impartial application of psychiatry for purposes of justice." If the psychiatrist believes that the patient is in need of treatment rather than trial or punishment he or she may be easily swayed to bend the legal rules to achieve a therapeutic result.

Bernard Diamond, another eminent psychiatrist, also notes that this treatment bias will often cause psychiatrists to refuse to give evidence unless it will aid the accused. Some psychiatrists feel that they have a professional obligation to tailor their evidence to achieve the best "treatment" result. Others find that the legal criteria are so imprecise that they do not have to bend the legal rules to achieve a treatment result.

Some eminent lawyers and psychiatrists have argued, on the other hand, that as long as criminal responsibility is based on subjective mental factors, psychiatric and psychological evidence must be admitted on these issues. They have asserted that problems of precision, objectivity, reliability and bias can be dealt with through the adversary system's reliance on cross-examination. Professor Goldstein has pointed out that expert testimony will be required in subtle cases of insanity. In his words, "Only the grossest of aberrations are likely to be noted by [lay] witnesses as symptoms of mental illness. Moreover, the person alleging insanity is not likely to appear very aberrant at the time of trial." Huckabee has added that "opinions of psychiatrists will be necessary as long as the law uses the terms 'mental disease or defect'." If psychiatric and psychological evidence were inadmissible, the accused would have great difficulty proving insanity by lay testimony in all but the grossest of cases. Exclusion of such evidence might be seen as interfering with the accused's right to make full answer and defence.

The disadvantages of retaining mental health testimony in insanity trials may be seen as substantial. Relying upon the adversary system to expose these difficulties and uncertainties is less than ideal since: (1) a general attack on the empirical validity of psychiatric and psychological clinical judgment is an expensive, time-consuming task (and it presupposes that the judge will allow such an attack and be competent to evaluate the empirical evidence); (2) such an attack in each insanity case would be highly wasteful of the accused's or the state's resources (if psychiatric, clinical judgments on insanity are empirically suspect in general, why should this matter have to be separately proven in each case?); and (3) the accused may be financially incapable of making such an attack, or his or her lawyer may be unaware of this avenue of defence.

Alternative II

Continue to allow psychiatric and psychological testimony on the insanity issue, but take the following steps: (1) make mandatory a jury instruction that carefully cautions the jury about the various weaknesses of such evidence, and (2) clearly define the qualifications and experience necessary for offering such expert evidence.

Considerations

This approach would minimize the difficulties discussed above, but would not eliminate them.

Alternative III

Provide for the appointment of a panel of impartial expert witnesses.

Considerations

The impartial psychiatric expert or panel of experts is a device that has been used frequently in the United States to avoid the embarrassing and confusing spectacle of "the battle of the experts." Critics, however, have attacked both the notion that psychiatric experts are or can be impartial and the aura of infallibility and increased credibility surrounding "impartial" experts.

Alternative IV

Provide that expert psychological or psychiatric witnesses shall not be permitted to "offer opinions on the ultimate legal issues before the trier of fact" (ABA Provisional Criminal Justice Mental Health Standards, 1982).

Considerations

In the commentary to this standard, it is explained that a determination of whether the insanity test has been met is the ultimate legal issue. Thus, the expert can not offer his or her opinion on whether the accused has the capacity to appreciate the nature and quality of his or her act or to know that it is wrong. The commentary further explains: "The expert would be restricted to explaining how the defendant's mental disability 'related to his alleged offense, that is, how the development, adaptation and functioning of defendant's behavioural processes may have influenced his conduct' (Washington v. U.S., 390 F.2d 444, 456 (1967))." The ABA standard is premised on the belief that the insanity test "is neither a scientific test nor an inquiry as to a clinical condition," but rather "a moral, social judgment that the defendant's actions, measured by the community's sense of justice and ethics and balanced by the criminal law's need to exert social control, are or are not to be deemed blameworthy." The ABA commentary adds: "The mental health professional is not an expert on this question and it is misleading to present the mental health professional in that light. Scientific credentials may persuade a jury that the issue before them is simply one of deciding which expert is to be believed. The defendant is thus denied the right to have culpability determined by a jury of his peers."

A Standing Committee on ABA Standards for Criminal Justice has provided a critique on the above-mentioned Provisional Standards. In their critique, the Standing Committee recommended that consideration be given to including a precise definition of "ultimate issue of fact" to avoid unnecessary confusion and controversy. The Standing Committee has also recommended the following: "In addition the commentary will need to delineate the extent to which experts may testify regarding all elements of mental condition and the commentary will need to identify precisely the threshold point at which testimony shifts from a description of mental condition and opinions regarding that condition to testimony on 'the ultimate legal issue'."

Alternative V

Provide that "Expert opinion testimony as to how the development, adaptation and functioning of the [accused's] mental processes may have influenced his conduct at the time of the [offence] charged should be admissible. When the [defence] of insanity has been properly raised, opinion testimony, whether expert or lay, as to whether or not the accused was sane [or criminally responsible or insane] at the time of the [offence] charged should not be admissible." (ABA Draft Criminal Justice Mental Health Standards, 1983).

Considerations

According to the ABA commentary to this draft:

> "The rationale for not permitting a mental health professional to offer an opinion as to whether the defendant's general mental condition at the time of the offense met the test for legal insanity is the persuasion that this judgment is not subject to expertise. For, while the test is expressed in terms apparently capable of expert assessment, i.e., the degree of defendant's grasp of the wrongfulness of his conduct, the test is actually posing a query as to whether it is just to hold the defendant responsible for his conduct, given his mental condition at the time. The expert, as a member of society with his own social philosophy and a privileged insight into the workings of the defendant's mind, undoubtedly has an opinion on this issue. He is not, however, an expert on this socio-legal question. It would be misleading to present him as such. Scientific credentials may persuade the jury that the issue before them is simply one of deciding which expert is to be believed. This effectively denies the defendant the right to have culpability determined by a jury of his peers.

The Federal Rules of Evidence are generally liberal on the use of opinion testimony. There is one restriction, however: opinion testimony that is not helpful is excluded. The opinion of an expert in the exact sciences, e.g., engineering, as to the physical causal relationship between a defect in material or design and the collapse of a structure, is of a different nature than that of an opinion as to culpability and as to how society should view the conduct of a mentally abnormal defendant. The scientifically untrained juror is equal to this task. The advisory committee on the Federal Rules

of Evidence, however, was of the opinion that once expert testimony is admitted at all, the expert might as well be allowed to offer his opinion on the ultimate issue since he will manage through circumlocution to get it in anyway. This need not be so. While the experts called by the opposing sides presumably will be of different persuasions as to the degree of mental impairment suffered by the defendant at the time of the offense and undoubtedly will communicate these differences in the manner and content of their testimony, they can, by timely objection, be prevented from responding to questions that merely rephrase the test question.

This limitation on expert opinion testimony is not meant to minimize the importance of expert testimony on the issue of mental condition. The expert is needed to shed light on the inner workings of the defendant's mind and emotions and their interactions at the time of the offense charged. He is needed to explain how the impairment of mental processes may have influenced the defendant's perceptions, judgments, and conduct. Such testimony calls for opinion and inferences derived from data available to the expert and the application of accepted principles and trained insight. Thus, while the expert may not offer an opinion as to whether the defendant could appreciate the wrongfulness of his act, he may, for example, if persuaded from the data that the defendant was suffering an acute phase of a schizophrenic disorder at the time, give his opinion that the defendant's perceptions of reality quite likely were disturbed by hallucinations and delusions, that the defendant was absorbed in the persuasion that his movements were controlled by an outside force and that he did not recognize them as his own. This information may bear directly on the issue of whether the defendant viewed his physical movements as moral acts. The opposing expert, of course, may be of the opinion that the data does not support such inferences and that the 'outside force' is a convenient rationalization by a malingerer.

It is hoped that this shifting of psychiatric testimony away from abrupt conclusions of law and more toward descriptions of psychic functioning and the data which led the expert to his inference will provide the trier of fact with more information upon which to make his own judgment, a long sought goal."

The rule prohibiting lay or expert witnesses from stating an opinion on an "ultimate fact" or "ultimate issue" has been the subject of considerable scholarly criticism. Judicial ambivalence in applying this rule has been aptly summarized in the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence. The latest Supreme Court of Canada pronouncement on this rule was made in Graat v. The Queen, where Dickson J., speaking for the entire court, held that lay opinion evidence may be given only on the issue of whether a person's ability to drive is impaired. Dickson J. agreed with Professor Cross that "the exclusion of opinion evidence on the ultimate issue can become something of a fetish." However, this case dealt with lay opinion evidence and was not addressing the difficult issue of expert opinion evidence on the issue of insanity.

Alternative VI

Provide that any witness (psychological, psychiatric, or otherwise) "may give opinion evidence that embraces an ultimate issue to be decided by the trier of fact where

(a) the factual basis for the evidence has been established;

(b) more detailed evidence cannot be given by the witness; and

(c) the evidence would be helpful to the trier of fact" (proposed new Canada Evidence Act (Bill S-33 (s.36)).

Considerations

It should be noted that expert opinion evidence is currently admitted in regard to matters calling for special knowledge and skill. The ABA proposal is premised on the argument that the ultimate issue in the insanity defence is a socio-legal question, that the mental health expert is not an expert on this question and that therefore his or her opinion on this issue ought not to be admitted. There are strong policy arguments to support this result; the expert's scientific credentials may lead the fact-finder to assume that the expert has some special competence to answer this question, and by deferring unduly to the opinion of the expert, it may result in inadvertently allowing the

expert to usurp the fact-finder's function. Under the Canada Evidence Act proposal, the judge would have a discretion under paragraph (c) to decide whether an opinion on the ultimate issue of insanity "would be helpful to the trier of fact." Because of the various problems involved in mental health expert evidence outlined in this section of the paper, the risks of admitting such opinion evidence on the ultimate issue of insanity may outweigh any help such opinion would be to the trier of fact. Some might favour outright exclusion of such opinion evidence on this ultimate issue, rather than leaving it to the discretion of judges to be decided on a case by case basis.

Issue 7

What form of verdict should result from a finding of insanity?

Discussion

In Canada, at least in the case of indictable offences, successful reliance on the insanity defence results in the special verdict of "not guilty on account of insanity," in England, a similar verdict was originally discretionary, became mandatory in 1800, was changed in 1883 and became known in popular language as "guilty but insane", and 80 years later was changed back again to "not guilty by reason of insanity." An alternative verdict of "guilty but mentally ill" has been enacted recently in several states of the United States. The special verdict in Canada is a direct descendant of an English statute of 1800 which created the mandatory, special verdict in English criminal law.

It has often been said that the verdict of "not guilty on account of insanity" is unpopular with, and misleading to, the general public. First, it has been suggested that the words "not guilty" in the special verdict may leave the impression that the acquitted person is unconditionally set free, since that is the invariable consequence of the general verdict of "not guilty." This criticism could be met in part by instructing the jury on the consequences of a verdict of not guilty on account of insanity. However, the general public might still be misled. Regular reporting in the media of the judge's instruction on the jury on this issue would be helpful, but unlikely.

Second, the "not guilty" portion of the special verdict seems contradictory to some people in cases where the evidence is clear that the accused has committed the prohibited harm. In their opinion, for example, John Hinckley is "guilty" of attempting to murder the President of the United States,but exempt from punishment by reason of insanity. To them it seems ridiculous to say that Hinckley is "not guilty" of attempted murder. This view, of course, is premised on the belief that the commission of the prohibited harm is sufficient by itself to constitute guilt. As noted earlier, this was the early common law view, where criminal liability was absolute upon proof of the actus reus. Justifications and excuses did not prevent convictions but they provided good grounds for a pardon from convictions and punishment. For the past several centuries, criminal liability generally has been based upon the existence of actus reus and mens rea and the absence of any justification or excuse. If the word "guilty" is intended to be synonymous with criminal liability (and at the moment, in our criminal law, it is), then a verdict such as "guilty but insane" would be ambiguous. It would imply that criminal responsibility has been imputed, when in fact it has not. The verdict "not guilty on account of insanity" is more accurate, since it implies that there is no criminal responsibility and the reason for this fact is the accused's insanity.

Third, it has been suggested that the words "not guilty" in the special verdict do not express the necessary public disapproval of the harm caused. The proponents of this view explain that the words "not guilty" often conjure up in the public eye visions of innocence. There are many reasons for this. Guilt and innocence have ancient religious roots. These words are often used as opposites. Likewise, there is a legal maxim and a constitutional principle that a person is "presumed innocent until proven guilty...." If a person is found not guilty, does it not seem logical to say that he or she must be innocent?

If the words "not guilty" are associated with the concept of innocence, then it may be true that these words "not guilty" do not express the necessary public disapproval of the harm or wrong that has been done to the victim. How can one express anger, revulsion and disapproval of conduct that is "innocent"? The difficulty here is the failure to distinguish between the act and the actor. An act may be wrongful and harmful, but the actor may be excused from blame. The verdict "guilty" or "not guilty" speaks to the personal attribution of blame or responsibility to the actor; it is not a statement on the lawfulness or innocence of the act.

The problem described above is a serious one. If the public continues to rely upon the notion that the verdicts "guilty" and "not guilty" speak to the innocence or wrongfulness of the act as well as the blameworthiness or otherwise of the actor, then they will continue to view verdicts of "not guilty on account of insanity" (rather than "guilty but insane") as ridiculous and inadequate. The verdict "not guilty on account of insanity" will be seen as inadequate because the words "not guilty" imply, at least for some members of the public, that the act is innocent and therefore the words "not guilty" do not express the necessary public disapproval of the harm caused. By contrast, a verdict of "guilty," even if punishment is withheld because of the existence of a valid excuse, makes a statement, at least for some members of the public, on the wrongfulness of the harm caused. Thus, for the public who assume that the verdict "guilty" or "not guilty" is a statement as to the act as well as to the actor, the "guilty" verdict provides a "civilized" mechanism to express society's feelings of anger, revulsion, vengeance and disapproval for the harm caused.

The problems described above with the verdict of "not guilty on account of insanity" are perhaps symptomatic of a larger problem in our criminal law system. Both the legal profession and the public use terms such as guilt, innocence, culpability, blameworthiness, conviction, acquittal, crime and offence somewhat loosely, assuming that they have an obvious and commonly accepted meaning, when in fact they do not. One illustration of this problem, which is relevant to the subject of verdicts, is the relationship between the word "guilty" and the word "offence." The Criminal Code, in its offence-creating sections, sets out norms of prohibition or command and everyone who breaches these norms is, in the words of the Criminal Code, "guilty" of "an [indictable or summary] offence" and liable to [a specified punishment]." Are the words "guilty," "offence" and "liable" coextensive? The word "offence" is a legal construct; the more popular expression "crime" is not used. Legally, the concept "offence" consists of actus reus, any necessary mens rea, and the absence of justification (e.g., self-defence), but not the absence of excuse. When an excuse is successfully raised, it does not negate the offence; it excuses the actor from liability, culpability or legal guilt. Excuses do not negate the offence but they do negate legal guilt; no finding of guilt is made, no conviction is entered. Because of this distinction in legal theory

between elements of the offence and justifications on the one hand, and excuses on the other hand, it is possible legally to commit an offence, but legally not to be guilty of the offence (because of a valid excuse). To say the least, this is confusing to the public.

When one considers this problem in the context of the insanity defence, the situation is even stranger. In some cases, insanity negates the mens rea. In other cases, mens rea exists and insanity acts as an excuse. In the first case, no offence occurs. In the second, an offence occurs, but is excused. The wording of section 542, "at the time the offence was committed" (emphasis added), assumes that insanity acts only as an excuse. The language of s. 16 is more careful. It does not assume that the acts or omissions necessarily constitute an offence. The present distinction in law between offence and guilt is not only hard to rationalize, it also makes drafting of sections dealing with insanity particularly treacherous.

The discussion of the meaning of "guilt" and "offence" as legal concepts reveals the existence of a more general problem: the general verdict "not guilty" is not very informative for the public. It expresses a conclusion or judgment, but gives no reasons. Judges are expected to give reasons for their judgments, but juries are not asked or required to give even elementary explanations for their verdicts. However, the narrower point of relevance here is that a general verdict of "not guilty" lacks necessary specificity. It does not tell the general public whether: (1) the prohibited harm has not been proven; or (2) the harm occurred but there is a reasonable doubt whether this accused caused it; or (3) this accused caused the harm, but it was not intended because of mistake, intoxication, insanity or some other reason; or (4) the accused intentionally caused the harm but he or she was justified by lawful authority, self-defence or otherwise; or (5) the accused intentionally caused the harm but he or she is excused from liability because of duress, insanity, entrapment or some other excuse. These situations are vastly different, yet the public is left in doubt as to which one applies. If public acceptance of our criminal laws and their administration and enforcement is important, and few would doubt that it is, then perhaps the public should be given a clear explanation of why the accused is not guilty.

The special verdict of insanity is the one instance where an explanation is given. But the special verdict that we presently have is, arguably, incomplete and misleading, at least to some members of the public. Arguably, this form of the verdict is incomplete since it does not make it clear that the accused committed the prohibited harm. If the special verdict is only used when there are no grounds for a general verdict of "not guilty," then the special verdict necessarily implies that the accused has committed the proscribed harm. But this necessary implication is neither clear nor obvious to the public from the verdict itself. The special verdict enacted in England in 1883 (i.e., "guilty but insane") avoided this criticism by making it crystal clear that the accused committed the act charged. But this verdict had prohibitive problems of its own, which will be explained below.

Alternative I

Provide for a verdict of "not guilty."

Considerations

It could be argued that insanity, like any other excuse or defence, should result in the general verdict of "not guilty." But the special verdict and its special consequences were enacted in 1800 because it was thought to be unsafe to let an insane murderer such as Hadfield go free as he would if the normal consequence of a "not guilty" verdict were applied. The response to this claim is that the purpose of the criminal trial is to render a verdict of "guilty" or "not guilty" for a particular act at a particular time, months or years before; the criminal trial is not a vehicle for determining present dangerousness or for triggering preventive detention. If evidence of insanity were presented at trial, and the accused were given a general verdict of "not guilty," the issue of preventive detention could be raised in a separate civil commitment hearing, immediately after the acquittal if necessary. Depending on the province, the prosecutor, the police, the judge, the victim or any member of the public may lay an information upon oath before a justice that he or she believes that the accused is suffering from a mental disorder and is a danger to himself or herself or others and thereby initiate a civil commitment hearing if the justice believes such a hearing is warranted.

This option has the advantage of putting to an end the use of a criminal verdict as an automatic, mandatory form of preventive detention. However, it suffers from the many faults of the general verdict that have already been noted, namely: it is not informative of the reason for the acquittal; it may suggest to some people that the act is innocent rather than the actor; and it may not provide a sufficient mechanism for some people to express their disapproval of the harm caused.

Alternative II

Provide for a verdict of "guilty of the act or omission charged, but insane at the time the accused did the act or made the omission."

Considerations

This verdict was instigated by Queen Victoria in an effort to make it clear that the accused did the act charged and with the expectation that a "guilty" verdict would act as a greater deterrent for would-be offenders than the "not guilty by reason of insanity" verdict.

The advantage of this verdict is that it makes it clear that the accused committed the act charged, that he is not innocent of the act, that the act is not condoned as appropriate behaviour, but that it was committed by an insane person. Unfortunately, this advantage may not outweigh the verdict's disadvantages. One disadvantage of this form of the verdict is that it does not specify that the accused is "not criminally responsible" and it leaves the impression that the verdict is a conviction rather than an acquittal. In fact, the English Court of Appeal treated it as a conviction, at least in regard to appeals, for some years before the House of Lords declared that it was an acquittal. But that decision does not remove the criticism that, on its face, the verdict is misleading since it appears to be a conviction rather than an acquittal. This misrepresentation was all the more apparent when the popular but inaccurately contracted form of its verdict, namely, "guilty but insane," was raised by judges and juries.

Another disadvantage of this verdict is that it uses "guilty" to refer to the commission of the actus reus alone, whereas "guilty" is used in all other contexts to be synonymous with criminal responsibility or blameworthiness (i.e., actus reus, mens rea, and the absence of justification and excuse). In this way, it confuses the word "guilty" and devalues it as a symbol of responsibility and blame.

The Atkin Committee (1923) and the Royal Commission on Capital Punishment (1949-1953) recommended a change in this special verdict. Their proposal was that the verdict should be "the accused did the act (or made the omission) charged, but is not guilty on the ground that he was insane so as not to be responsible, according to law, at the time." One possible objection to this formula is that it is a bit long and cumbersome. What follows is a modified form of this verdict.

Alternative III

Provide for a verdict of "not responsible for the proscribed harm committed while insane."

Considerations

This form of the verdict is arguably more accurate and informative. Admittedly, it is longer than our present verdict, but its public education value may be worth that cost.

This form of the verdict substitutes the words "not responsible" for "not guilty." In law, these terms seem to have the same meaning, but they may not have the same meaning for all members of the public. In any event, since some members of the public associate the words "not guilty" with the absence of fault or harm and the unconditional release of the accused, perhaps it is better to use other words like "not responsible" which do not necessarily bear this connotation. (New York and Oregon have recently replaced "not guilty" with "not responsible" in their insanity verdicts).

This form of the verdict adds the words "for the proscribed harm committed" to make it clear to the public that harm has been committed and that such harm is proscribed and not approved. An alternative variation might read: "committed the proscribed harm, but not responsible by reason of insanity."

Either form of this verdict could be used with the words "not guilty" replacing "not responsible" if one thought the former to be preferable to the latter.

Another variation of this verdict could involve substituting the words "act or omission constituting the offence" in lieu of "proscribed harm." The verdict could also read: "Not responsible because of insanity at the time the acts or omissions constituting the offence were committed."

Alternative IV

Same as any of the above 3 alternatives, but substitute the expression "mental disorder" for "insanity."

Considerations

The term "insanity" has been criticized as being archaic, and as leading to difficulty in communication between psychiatrists and lawyers. However, one might wish to retain the word "insanity" for any one of several reasons. It may, for example, be argued that since it is not a word in current medical use, this helps to emphasize that the issue is a legal rather than a medical one; the words "mental disorder "might invite a greater medical usurping of the issue. Further, the term insanity has been used for a long time, it is familiar to the public and it conveys the fact that the mental impairment must be quite severe; better than the term "mental disorder" would since this latter term is often used to describe minor as well as major impairments (such as minor depressions, phobias or anxieties). Also, it may be argued that while the term "mental disorder" is more clearly a medical term, the insanity defence is a legal concept and requires a legal meaning. Changing the name to "mental disorder" may not lessen the difficulties of legal definition.

Issue 8

Should the special verdict apply to both indictable and summary conviction offences?

Discussion

Section 16(1) of the Criminal Code states that "No person shall be convicted of an offence in respect of an act or omission on his part while he was insane." Insanity is clearly a defence to all offences, whether indictable or summary conviction. But ss. 542 and 545 refer only to indictable offences. There is no provision in the Criminal Code for the disposition of persons found not guilty of summary conviction offences on account of insanity. A similar omission existed in England but the matter was corrected in 1840. One explanation could be that the consequences of ss. 542(2) and 545 are far too drastic for a summary conviction offence. However, there is good reason to doubt that this was the real reason and, in any event,

this explanation hardly explains why at least the verdict "not guilty on account of insanity" in s. 542(1) was not extended to summary conviction offences even if the provisions for custody were not. The more likely explanation is that the omission was a legislative oversight. (Note that the LGW provisions apply to all persons found to be unfit to stand trial, regardless of which type of offence they were charged with). This is understandable since the insanity defence was normally raised only in the most serious of offences. Whatever the reason, it is an anomaly that should be addressed.

Issue 9

Should provision be made for informing the jury of the consequences of an insanity verdict?

Discussion

At present, there is no provision in the Criminal Code either expressly allowing or requiring the jury to be informed of the consequences of an insanity verdict. While there is very little Canadian jurisprudence on the subject, those courts that have dealt with the issue have said that: (1) as a general rule juries are not to be informed of the consequences of their verdicts: (2) as an exception to this general rule, counsel may inform the jury of the consequences of an insanity verdict; (3) the jury should be told that the consequences of a verdict should not influence their verdict; and (4) while the trial judge has no duty as a matter of law to direct the jury on this issue, it may be wise to do so, particularly when the evidence indicates that the accused is a dangerous individual and counsel have not informed the jury of the consequences of an insanity verdict. What ought to be said in regard to informing the jury of the consequences of an insanity verdict remains unclear; in particular, doubt exists as to whether reference ought to be made to the length of any confinement that may be ordered, the place of such confinement, the review process and the availability of treatment (assuming that confinement is the option chosen).

Alternative I

Provide that jurors may not be informed of the consequences of an insanity verdict.

Considerations

The general rule that juries are not to be informed of the consequences of their verdict is a sound one. Its justification is found in its rational connection to the function of the jury. It is the jury's function to decide, on the evidence presented, whether the offence charged has been made out. The issue of sentence or disposition is for the judge. Sentence or disposition is in no way relevant to the decision whether or not the accused is innocent or guilty. Therefore, the extraneous factor of what happens to the accused if a particular verdict is returned should not be permitted to interfere with the jury's fact-finding duty. In determining innocence or guilt, the jury should not be influenced by considerations of what will happen to the accused as a result of their verdict.

In many American jurisdictions, the jury cannot be informed of the consequences of an insanity verdict. The main reason for this is the belief that such information is not relevant to the jury's fact-finding function and that provision of such information encourages unwarranted compromise verdicts. If jurors are informed that an insanity verdict may result in the accused being committed to a psychiatric institution for treatment and that he or she will not be released until safe, some people believe that such information may influence the jury to return an insanity verdict as a compromise between imprisonment and absolute release. If jurors assume that treatment is unavailable in prison and that the accused needs treatment, some people assume that jurors will be all the more inclined to return an insanity verdict.

Are these assumptions about juror behaviour warranted? The data on these assumptions are scarce. Professor Simon did find a desire on the part of jurors to return a verdict of "guilty but in need of treatment." However, Simon did not find any evidence that the need for treatment was a sufficient influence on the jurors to cause them to change a "guilty" verdict to a verdict of "not guilty by reason of insanity."

Alternative II

Make provision for informing the jury of the consequences of an insanity verdict, and for informing the jury as well that this information is not to influence their verdict, but that it is being given to them to prevent extraneous considerations or misapprehensions relating to disposition from interfering with their verdict.

Considerations

Those cases in which an exception to the general rule seems to have been made as regards the consequences of an insanity verdict indicate that such exception is premised on the assumption that some jurors may be labouring under the misapprehension that a verdict of "not guilty on account of insanity" would result in the accused (who may still be dangerous) being allowed to go free and that such a misapprehension may influence them not to return an insanity verdict that is otherwise warranted. How common is such a misapprehension? Simon, in mock-jury studies in Chicago, St. Louis and Minneapolis, found that 91 percent of jurors assumed, without being told, that an insanity verdict would result in the accused being committed to a mental institution. Three percent assumed that probation or being set free was the consequence. The study did not reveal how many of the remaining six percent, if any, were influenced by their mistaken assumption to return a verdict of "guilty" rather than "not guilty by reason of insanity". Although Simon's view of the data indicates that an instruction on the consequences of an insanity verdict may not be needed since over 90 percent of the jurors assumed its consequences correctly, she does conclude that "it would be a useful precaution to include such an instruction under all circumstances and not leave it to the common sense of the jury. On occasion it can do some good and it can never do any harm."

Are Canadian jurors as knowledgeable or more knowledgeable about the consequences of an insanity verdict than Simon's American verdict? It seems safe to assume that not every Canadian juror will assume correctly the consequences of an insanity verdict. If that is so and if jurors may be adversely influenced by their misapprehension, then one may agree with Simon that it is a "useful precaution" to advise the jury of the consequences of an insanity verdict.

It is arguable that the risk of the jury being influenced by extraneous matters of disposition or treatment to a greater degree when informed of these matters and told that they are extraneous is outweighed by the miscarriage of justice that would result if a jury's misapprehension about release of the accused caused them to return a "guilty" verdict when a "not guilty on account of insanity" verdict is warranted. This conclusion is fortified in part by the fact that the judge instructs the jury that it is their duty to return a true verdict and not to be influenced by matters of disposition. If

no instruction is given, jurors are not expressly told that they are not supposed to take into account the consequences of their verdict in reaching their decisions and thus one may speculate that the risk of this occurring is greater.

Issue 10

Assuming that the jury is to be told about the consequences of an insanity verdict, what provision should be made concerning the contents of the instruction?

Discussion

What should the jury be told about the consequences of an insanity verdict? Should the length of any possible confinement, the place of any such confinement, the release or review process, the availability of treatment and other such matters be communicated by the trial court?

In determining the question of what ought to be told to the jury, one should keep in mind that the purpose of the rule about informing the jury is to encourage true verdicts, verdicts that are not influenced by extraneous matters such as disposition. But since experience and research indicates that jurors have a natural interest in disposition, it is important that they do not have misconceptions about disposition that may influence their deliberations and that they be warned that disposition is not a relevant factor in the discharge of their duty. The two misconceptions that are most often thought to be influential in a juror's verdict are: (1) that a "not guilty on account of insanity" verdict will result in the accused [even a dangerous accused] going free; and (2) that under the law an accused in need of psychiatric treatment may only receive that treatment by being found insane and sent to a psychiatric institution rather than being found guilty and sent to prison. The first misconception may influence jurors to return a verdict of "guilty" when the proper verdict is "not guilty on account of insanity." The second misconception may cause jurors to return a verdict of "not guilty on account of insanity" when the proper verdict is "guilty."

Alternative I

Provide that the jury ought to be told: (1) where the accused is likely to go if acquitted; and (2) that there exists a mechanism for treating convicted prisoners who are mentally disordered.

Considerations

Arguably, it is only necessary, in order to dispel misconceptions that may be prejudicial to a true verdict, that these two points be dealt with. Any more elaborate explanation may be irrelevant and may encourage greater rather than lesser speculation by the jury on the effect of an insanity verdict.

Issue 11

Assuming that the jury is to be told about the consequences of an insanity verdict, who should so instruct them?

Discussion

In R. v. Conkie, Moir J.A. noted that in Alberta the practice, at least since 1942, has been that "counsel for the defence often advises the jury as to the provisions of s.542 of the Criminal Code." In R. v. Lappin, counsel for the Crown advised the jury about the consequences of an insanity verdict. The trial judge also informed the jury of the consequences. In R. v. Smith, defence counsel asked the trial judge to advise the jury. In these cases, the matter was brought to the jury's attention by three different parties -- defence counsel, prosecutor and judge. Should there be any rule on who may inform the jury?

Alternative I

Allow either counsel to inform the jury.

Considerations

In regard to the prosecutor informing the jury, it may be argued that if the prosecutor is prevented from raising the insanity defence, he or she has little justification for informing the jury of the consequences of an insanity verdict. This argument is based on a

misconception of the rationale behind the rule permitting the jury to be informed of the consequences of an insanity verdict. The rule is not designed solely for the party raising the insanity defence, to be invoked solely at his or her discretion. The rule is designed to encourage true verdicts, whether or not such verdict is the one sought by the party raising the insanity defence. A prosecutor has as much interest, if not more, in the jury returning a true verdict as defence counsel does.

A possible solution to this potential problem might be to allow either counsel to inform the jury, but only in accordance with the simple and brief instruction referred to in the previous section. If counsel deviated from that instruction, the trial judge could intervene and make any necessary corrections. The words of the general instruction, and the judge's power of supervision over its delivery by counsel, would arguably be adequate devices to ensure that the purpose of the instruction (i.e., to encourage true verdicts and to discourage reliance on extraneous matters) is achieved.

Alternative II

Provide that only the judge may inform the jury of the consequences of an insanity verdict.

Considerations

This approach would avoid the potential drawbacks of Alternative I. If, however, the jury were only informed of the consequences of an insanity verdict in the course of the judge's charge, this approach might be perceived as having at least one drawback; counsel may want the jurors to be informed at an earlier point so that they will not be distracted by any extraneous factors when they are listening to counsel's evidence and arguments.

Issue 12

Assuming that the jury may be told about the consequences of an insanity verdict, should a judicial instruction be mandatory or discretionary?

Discussion

In the United States, the majority of courts have held that the jury should not be informed of the consequences

of an insanity verdict, although there is a growing trend in courts and legislatures to permit such an instruction. However, there is considerable disagreement amongst these latter jurisdictions as to whether the instruction should be mandatory or discretionary (and, if discretionary, at whose discretion). In some jurisdictions, the instruction is given only if the accused requests it. In other jurisdictions, it must be given unless the accused objects. In some jurisdictions, it must be given even if the accused objects, and in a few jurisdictions, it may be given despite the accused's objection. In some jurisdictions, it may be given if the jury inquires (assuming they are aware of their ignorance) and if the accused does not object. One commentator (Schwartz) has argued that rather than imposing an inflexible requirement that the instruction must be given, the trial judge should be given a discretion to provide the instruction when he or she feels it is necessary to avoid juror misapprehension or bias.

Alternative I

Make the instruction discretionary.

Considerations

It has been argued (by Schwartz) that an inflexible rule either requiring or prohibiting the instruction in all cases is appropriate. Requiring the trial judge to give instruction might tempt the jury to arrive at a "compromise verdict." On the other hand, prohibiting the instruction might create an injustice where there is the possibility that the prosecution's argument has created misapprehension as to the consequences of the insanity verdict. In many cases, it is likely that one counsel or the other will inform the jury of the consequences of the insanity verdict. If neither does, it is arguable that the trial judge should have a discretion to inform the jury if he or she believes that such information is more likely to enhance a true verdict than to lead to a compromise verdict. If counsel does inform the jury, it is arguable that the judge should, as with other points of the law, also instruct the jury on this issue so that the jury gives as much credibility to counsel's statement of this point as they do to the other points of law on which the judge charges them (although failure to do so should not be considered a "substantial wrong or miscarriage of justice" (Criminal Code, s. 613(1)(b)(iii)).

Chapter 5

AUTOMATISM AND CRIMINAL RESPONSIBILITY

AUTOMATISM AND CRIMINAL RESPONSIBILITY

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ISSUES

Issue 1

Should automatism be a defence?

Discussion

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

Issue 2

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

Discussion

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

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

Alternative 1

Define automatism in terms of involuntary conduct only.

Considerations

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

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

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

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

Alternative II

Define automatism in terms of conscious conduct only.

Considerations

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

Issue 3

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

Discussion

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

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

Issue 4

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

Discussion

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

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

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

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

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

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

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

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

Alternative I

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

Considerations

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

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

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

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

(ii) The possibility of feigning a defence of automatism will undermine public confidence in the criminal justice system and will spawn a flood of similar allegations.

(iii) It will be very difficult for the Crown to prove beyond a reasonable doubt that the accused's act was conscious and voluntary if the accused is allowed to plead his or her particular vulnerability to a dissociative state.

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

Alternative II

(1) Define automatism simply as the absence of voluntary conduct even where the conduct is caused by insanity. Automatism resulting from fault on the part of the accused (for example, self-induced intoxication) would be dealt with by a separate provision, discussed later.

(2) Enact a flexible range of dispositions for the judge to make following an acquittal by reason of automatism.

Considerations

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

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

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

Alternative III

(1) Enact a flexible range of dispositions.

(2) Make automatism a separate defence only if it is not caused by insanity, intoxication or fault on the part of the accused.

(3) Use a wide definition of "disease of the mind" but for greater clarity designate certain conditions as constituting either insanity or automatism.

Considerations

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

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

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

Issue 5

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

Discussion

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

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

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

Issue 6

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

Discussion

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

Alternative I

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

Considerations

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

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

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

(1) There is an inconsistency in result between the Commission's intoxication and automatism proposals. If a person is charged with a specific intent offence and is unconscious due to self-induced intoxication the intoxication defence affords him or her an acquittal. However, if the unconsciousness is due to other types of fault (i.e., failure to take insulin) there is no defence of automatism and the intoxication defence does not apply.

(2) The Commission uses the word "unforeseeable" rather than "reasonably unforeseeable."

(3) The Commission does not clarify whether the test of "unforseeable" is an objective or subjective test.

(4) Does the requirement of unforeseeability relate only to the possible unconscious state or to the specific type of offence which might occur?

Alternative II

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

Considerations

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

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

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

(2) Criminal Negligence Offence. In criminal negligence offences liability attaches when the actions of the accused generate harm which a reasonable person would have foreseen whether or not the accused did so. Application of this objective test imposes liability on the accused even where the final act causing the harm was involuntary.

(3) Mens Rea Offence. In mens rea offences, the harm must be foreseen by the accused. If the accused induced an involuntary state with the intent of committing a crime (a highly unlikely scenario), he or she can be convicted of an intentional crime even though the final act is committed involuntarily. Likewise, if the accused foresaw the likelihood of the very harm which occurred, but nonetheless ran the risk of rendering him- herself unconscious, then he or she can be convicted of an offence where recklessness is the requisite mens rea. He or she should not, however, be convicted of a special intent offence.

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

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

Alternative III

Adopt a "constructive mens rea" approach.

Considerations

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

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

Alternative IV

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

Considerations

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

Alternative V

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

Considerations

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

Issue 7

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

Discussion

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

Issue 8

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

Discussion

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

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

Alternative I

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

Considerations

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

Alternative II

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

Considerations

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

Chapter 6

DISPOSITION AND CONTINUING REVIEW OF UNFIT AND INSANE ACCUSED PERSONS

DISPOSITION AND CONTINUING REVIEW OF UNFIT AND INSANE ACCUSED PERSONS

THE CRIMINAL COMMITMENT SYSTEM AS IT RELATES TO DISPOSITION

Introduction

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

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

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

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

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

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

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

ISSUES

Issue 1

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

Discussion

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

Alternative I

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

Considerations

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

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

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

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

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

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

Alternative II

Provide for a separate commitment system under the Criminal Code.

Considerations

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

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

Issue 2

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

Discussion

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

Alternative I

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

Considerations

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

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

Alternative II

Provide for a separate commitment system under the Criminal Code.

Considerations

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

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

Issue 3

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

Discussion

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

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

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

Alternative I

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

Considerations

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

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

Alternative II

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

Considerations

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

Issue 4

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

Discussion

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

Alternative I

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

Considerations

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

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

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

Alternative II

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

Considerations

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

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

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

UNDERLYING ASSUMPTIONS RELATING TO A CRIMINAL COMMITMENT SYSTEM

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

(a) The main purposes of disposition will be the protection of society and the treatment and rehabilitation of the accused person.

(b) There will be criteria for determining which persons fall into the two groups (i.e., insane or unfit).

(c) The range of available dispositions will include confinement and release (conditionally or unconditionally).

(d) Criteria will be proposed in the selection of an appropriate disposition. These criteria will have regard to: (1) the seriousness of the offence charged; (2) the present dangerousness of the accused; (3) the severity of the mental disorder; and (4) the current need for treatment.

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

(f) A system will be available whereby the decision-makers' accountability is clearly defined.

Issue 5

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

Discussion

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

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

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

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

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

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

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

Alternative I

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

Considerations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conditional Discharge

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

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

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

Issue 6

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

Discussion

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

Alternative I

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

Considerations

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

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

Alternative II

Provide that current mental disorder and dangerousness must be considered.

Considerations

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

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

Alternative III

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

Considerations

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

Issue 7

How should the interim order decision be made?

Discussion

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

Alternative I

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

Considerations

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

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

Alternative II

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

Considerations

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

INITIAL DISPOSITION

Issue 8

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

Discussion

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

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

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

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

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

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

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

CONTINUED

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

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

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

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

Note:

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

Alternative I

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

Considerations

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

Alternative II

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

Considerations

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

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

Alternative III

Provide for psychiatric assessment to be ordered.

Considerations

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

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

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

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

Alternative IV

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

Considerations

Restraint

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

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

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

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

Issue 9

What factors should be considered in deciding on initial disposition?

Discussion

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

Criteria for Confinement

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

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

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

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

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

Criteria for Conditional Release

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

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

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

Criteria for Absolute Release

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

Issue 10

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

Discussion

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

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

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

Alternative 1

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

Considerations

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

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

Alternative II

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

Considerations

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

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

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

Alternative III

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

Considerations

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

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

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

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

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

Issue 11

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

Discussion

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

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

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

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

Issue 12

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

Discussion

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

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

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

Alternative I

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

Considerations

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

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

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

Alternative II

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

Considerations

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

Issue 13

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

Discussion

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

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

Alternative

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

Considerations

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

Issue 14

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

Discussion

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

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

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

Alternative I

Provide for notice.

Considerations

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

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

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

Alternative II

Provide for the right to counsel.

Considerations

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

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

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

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

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

Alternative III

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

Considerations

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

Issue 15

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

Discussion

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

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

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

Alternative I

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

Considerations

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

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

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

Alternative II

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

Considerations

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

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

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

Alternative III

Do not provide for a burden of proof.

Considerations

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

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

Issue 16

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

Discussion

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

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

Alternative I

Require proof beyond a reasonable doubt.

Considerations

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

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

Alternative II

Require proof on a balance of probabilities basis.

Considerations

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

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

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

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

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

Alternative III

Make no provision for a standard.

Considerations

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

Other Related Alternatives

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

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

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

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

Issue 17

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

Discussion

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

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

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

Alternative

Provide for an opportunity to appeal the initial disposition decision.

Considerations

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

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

Issue 18

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

Discussion

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

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

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

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

Alternative I

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

Considerations

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

Alternative II

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

Considerations

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

Issue 19

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

Discussion

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

REVIEWS

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

Issue 20

Should there be periodic reviews of the initial disposition?

Discussion

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

Alternative I

Provide no right to a periodic review.

Considerations

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

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

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

Alternative II

Provide for mandatory reviews.

Considerations

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

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

Issue 21

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

Alternative I

Provide for reviews to be conducted by the same body.

Considerations

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

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

Alternative II

Provide for reviews to be conducted by a different body.

Considerations

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

Issue 22

What body should conduct the review?

Discussion

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

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

Alternative I

Provide for the review to be conducted by the executive.

(a) Lieutenant Governor

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

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

(b) Lieutenant Governor-in-Council

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

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

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

Alternative II

Provide that the review be conducted by a court.

Considerations

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

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

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

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

Alternative III

Provide that the review be conducted by an administrative tribunal.

Considerations

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

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

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

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

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

Issue 23

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

Discussion

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

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

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

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

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

Special Procedural Questions Relating to the Current Two-Tier Approach

(a) Disclosure of Recommendation

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

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

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

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

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

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

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

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

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

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

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

Issue 24

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

Discussion

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

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

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

Alternative I

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

Considerations

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

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

Alternative II

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

Considerations

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

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

Issue 25

Should the reviewing body be required to review all cases?

Discussion

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

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

Alternative

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

Considerations

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

Issue 26

What investigative powers should the reviewing body possess?

Discussion

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

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

Alternative I

Provide the power to compel the attendance of witnesses.

Considerations

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

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

Alternative II

Provide the power to compel the production of documents.

Considerations

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

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

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

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

Alternative III

Provide the power to administer oaths and affirmations.

Considerations

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

Alternative IV

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

Considerations

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

Alternative V

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

Considerations

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

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

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

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

Alternative VI

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

Considerations

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

Issue 27

How frequently should periodic reviews be held?

Discussion

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

Alternative I

Provide for annual reviews.

Considerations

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

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

Alternative II

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

Considerations

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

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

Issue 28

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

Discussion

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

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

Alternative I

Provide for a "no change" order.

Considerations

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

Alternative II

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

Considerations

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

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

Alternative III

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

Considerations

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

Alternative IV

Provide for conditional discharges.

Considerations

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

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

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

Alternative V

Provide for absolute discharges.

Considerations

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

Alternative VI

Provide for return for trial.

Considerations

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

Issue 29

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

Discussion

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

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

Alternative I

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

Considerations

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

Alternative II

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

Considerations

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

Alternative III

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

Considerations

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

Alternative IV

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

Considerations

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

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

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

Alternative V

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

Considerations

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

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

Alternative VI

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

Considerations

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

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

Alternative VII

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

Considerations

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

Alternative VIII

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

Considerations

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

Alternative IX

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

Considerations

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

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

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

Issue 30

What factors should give rise to specific dispositions?

Discussion

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

Issue 31

What procedures should be followed by the reviewing body?

Discussion

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

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

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

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

Alternative I

Provide for minimal rules of procedure.

Considerations

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

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

Alternative II

Provide for formalized procedures.

Considerations

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

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

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

Issue 32

Should there be parties to the review proceedings?

Discussion

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

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

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

Alternative

Provide that parties shall be clearly designated.

Considerations

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

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

Issue 33

If parties are designated, who should the parties be?

Note:

The following alternatives are not necessarily mutually exclusive.

Alternative I

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

Considerations

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

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

Alternative II

Designate the Crown as a party.

Considerations

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

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

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

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

Alternative III

Designate the attending physician as a party.

Considerations

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

Alternative IV

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

Considerations

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

Issue 34

Should the reviewing body be required to hold a hearing?

Discussion

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

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

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

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

Alternative I

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

Considerations

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

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

Alternative II

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

Considerations

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

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

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

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

Issue 35

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

Discussion

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

Alternative I

Provide for open hearings.

Considerations

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

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

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

Alternative II

Provide for notice.

Considerations

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

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

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

Alternative III

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

Considerations

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

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

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

Alternative IV

Provide for the right to counsel.

Considerations

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

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

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

Alternative V

Provide for the right to present evidence and make submissions.

Considerations

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

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

Alternative VI

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

Considerations

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

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

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

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

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

Alternative VII

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

Considerations

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

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

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

Alternative VIII

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

Considerations

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

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

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

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

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

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

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

Alternative IX

Provide for the right to compel the attendance of witnesses.

Considerations

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

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

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

Alternative X

Provide for the right to an independent psychiatric assessment.

Considerations

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

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

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

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

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

Alternative XI

Provide that the reviewing body shall record its proceedings.

Considerations

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

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

Alternative XII

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

Considerations

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

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

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

Alternative XIII

Provide for a right of appeal.

Considerations

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

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

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

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

Note:

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

(1) "[I]n the instant case, Article 5, s.4 required an appropriate procedure allowing a court to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety."

(2) "In habeas corpus proceedings,...the court will not be able to review the grounds or merits of a decision taken by an administrative authority to the extent that under the legislation in question these are exclusively a matter for determination by that authority."

(3) "The habeas corpus proceedings brought by X in 1974 did not therefore secure him the enjoyment of the right guaranteed by Article 5, s.4; this would also have been the case had he made any fresh application at a later date."

(4) "There is nothing to preclude a specialised body of this kind being considered as a 'court' within the meaning of Article 5, s.4, provided it enjoys the necessary independence and offers sufficient procedural safeguards appropriate to the category of deprivation of liberty being dealt with."

(5) "Nonetheless, even supposing Mental Health Review Tribunals fulfilled these conditions, they lack the competence to decide 'the lawfulness of [the] detention and to order release if the detention is unlawful, as they have advisory functions only."

(6) "[A]nyone entitled...to take proceedings to have the lawfulness of his detention speedily decided cannot make effective use of that right unless he is promptly and adequately informed of the facts and legal authority relied on to deprive him of his liberty."

(7) "[T]he onus was effectively on X to show that the Home Secretary had acted unlawfully in exercising his statutory discretion. However, it is clear from the evidence that lack of information as to the specific reasons for the recall, a matter almost exclusively within the knowledge of the Home Secretary, prevented X's counsel, and thus the Divisional Court, from going deeper into the question...."

Issue 36

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

Discussion

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

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

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

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

Issue 37

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

Discussion

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

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

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

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

Alternative I

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

Considerations

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

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

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

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

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

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

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

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

Issue 38

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

Discussion

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

Alternative I

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

Considerations

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

Alternative II

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

Considerations

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

Alternative III

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

Considerations

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

Alternative IV

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

Considerations

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

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

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

Issue 39

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

Discussion

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

Issue 40

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

Discussion

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

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

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

Chapter 7

INTERPROVINCIAL TRANSFERS

INTERPROVINCIAL TRANSFERS

INTRODUCTION

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

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

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

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

ISSUES

Issue 1

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

Discussion

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

Alternative I

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

Considerations

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

Alternative II

Provide that transfer may be made for compassionate reasons.

Considerations

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

Alternative III

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

Considerations

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

Alternative IV

Provide that transfer may be made for security purposes.

Considerations

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

Alternative V

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

Considerations

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

Issue 2

Should the consent of the receiving jurisdiction be required?

Discussion

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

Alternative I

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

Considerations

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

Issue 3

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

Discussion

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

Alternative I

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

Considerations

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

Alternative II

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

Considerations

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

Issue 4

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

Discussion

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

Issue 5

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

Discussion

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

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

Issue 6

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

Discussion

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

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

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

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

Alternative I

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

Considerations

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

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

Alternative II

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

Considerations

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

Alternative III

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

Considerations

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

Issue 7

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

Discussion

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

CONTINUED

3 OF 5

Issue 8

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

Discussion

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

Issue 9

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

Discussion

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

Chapter 8

THE CONVICTED MENTALLY DISORDERED OFFENDER

THE CONVICTED MENTALLY DISORDERED OFFENDER

INTRODUCTION

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

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

(a) Rehabilitation and treatment play an important but secondary role in sentencing the mentally disordered offender; the primary concern should be the determination of a sentence that is just and fair in the circumstances. Protection of society is the major concern in this regard.

(b) "[T]he perceived need for treatment must not affect the length of the sentence."

(c) "Treatment administered within the context of the sentence pronounced by the court must be consented to by the offender. (This is a contentious issue. As the Commission has noted, "Some feel that society is justified in imposing any treatment on offenders if it will reduce the possibility of further criminality....Others take the view that involuntary treatment of individuals in the criminal process is an unwarranted interference with basic individual rights...").

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

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

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

(a) The naturally occurring incidence of mental disorder

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

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

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

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

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

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

ISSUES

Issue 1

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

Discussion

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

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

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

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

(a) Fine

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

(b) Probation

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

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

(c) Imprisonment

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

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

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

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

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

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

Alternative I

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

Considerations

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

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

Alternative II

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

Considerations

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

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

"(1) the offender understands the kind of program to be followed,

(2) he consents to the program, and

(3) the psychiatric or counselling services have agreed to accept the offender for treatment."

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

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

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

Alternative III

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

Considerations

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

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

Alternative IV

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

Considerations

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

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

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

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

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

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

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

(a) English facilities were at first simply not able to respond to the demand resulting from hospital orders.

(b) Notwithstanding the availability of restriction orders, security has proved to be a problem at many English hospitals. This is probably the result of a lack of communication between court and hospital authorities, and an inability to satisfactorily assess an offender's dangerousness.

(c) Although an English judge must be satisfied that arrangements have been made for admission of an offender to a hospital, "those identified with [Canadian] mental health facilities were particularly concerned that a court should appear to have the right to order admission to and restrict discharge from hospital. It was felt that hospital officials should be able to determine who, based upon appropriate admission criteria, would be admitted to and discharged from psychiatric facilities..." (Ouimet Report).

(d) The question of consent to treatment was not clearly dealt with in the 1959 Act, leading to the ethical and practical questions associated with this concern.

(e) Under the English hospital order system, detention is largely indeterminate.

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

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

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

(a) A hospital order may be made for a fixed term in lieu of imprisonment.

(b) The sentencing judge should first remand the offender to a psychiatric institution to determine whether the offender is suffering from a psychiatric disorder that is susceptible to treatment.

(c) The judge should further determine that there exists an institution able and willing to provide treatment.

(d) The order should only be made with the consent of the offender and the agreement of the psychiatric institution.

(e) Release procedures should be governed by the same principles and criteria as ordinary sentences.

(f) The offender or the institution may ask either the court or a board that transfer be effected to the correctional system.

(g) The offender should be entitled to parole.

(h) The offender would be deemed to be serving his or her sentence for the purposes of escape, or being unlawfully at large.

(i) A hospital order should be appealable in the same manner as any other sentence.

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

(a) There is uncertainty as to what type of mental disorder should be the subject of a hospital order. The Law Reform Commission prefers "a psychiatric disorder that is susceptible to treatment..." but this might include alcoholism, addiction or even (according to some) psychopathy. The English Mental Health Act 1959 stipulates "mental illness, psychopathic disorder, mental impairment or severe mental impairment." The Ouimet Committee, on the other hand, preferred the standard for eligibility to be the same as that for provincial civil commitment.

(b) A hospital order is a sentence of custody and a sentence of treatment. There are conflicting interests on the part of the court and the treating psychiatrist as to who should determine the specific terms of treatment (i.e., whether custody should be "open" or "secure", "in-patient" or "out-patient", etc.) English-type restriction orders, for example, may conflict with the psychiatrist's plans for treatment.

(c) Psychiatrists are unanimous in the view that no treatment should be ordered without the consent of the psychiatric facility.

(d) Again, because of the great differences in psychiatric opinion and theoretical approach, it is possible that psychopaths (generally accepted as being untreatable) will be assessed as treatable and be admitted to psychiatric hospitals. This may lead to a misuse of available therapeutic resources. Amendments to the English legislation have responded to this concern by stipulating that before making a hospital order, the court having evidence of this form of disorder must also have evidence that treatment is likely to alleviate or prevent a deterioration of the offender's condition.

(e) Availability of appropriate treatment facilities is currently a problem in any event. In some parts of Canada, the required psychiatric facilities are nonexistent. In order to accommodate a hospital order system, therefore, new facilities would have to be built, and old ones modified for security purposes. The question of whether such a system warrants the cost that would be involved must be considered.

(f) More generally, hospital orders were conceived of at a time of optimism with regard to the attainable results of psychiatric treatment. It has been argued that psychiatric procedures have since largely failed to live up to their initial promise. Labouring under false assumptions, judges may over-utilize the hospital order, and deplete therapeutic resources.

(g) It may be argued that offenders who have been found to be criminally responsible, regardless of whether they suffer from mental disorder, should be punished rather than treated.

(h) While there are difficulties with regard to the ordering of compulsory treatment, there are also difficulties with a requirement for the consent of the offender to treatment under a hospital order. Some argue that there will be a problem in determining whether mentally disordered offenders are sufficiently mentally competent to give voluntary consent; others counter that if they have been found criminally responsible for their acts, they should also be capable of consenting. Still others argue that society, in the interest of its protection, may have the right to treat disordered offenders compulsorily. Perhaps only certain classes of offenders should be subject to compulsory treatment. The problem is one of balancing competing interests. In this regard, principle (a) of the Statement of Purpose and Principles in the CLCS document should be kept in mind. It requires that "the criminal law should be employed...in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose...."

(i) As with the present transfer system, the financial and jurisdictional difficulties of assigning offenders (via federal hospital orders) to provincial mental hospitals would remain.

(j) If, through reform, prison-hospital tranfers can be achieved quickly and efficiently, is the hospital order system really necessary?

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

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

Issue 2

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

Discussion

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

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

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

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

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

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

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

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

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

(i) The provinces have inadequate forensic psychiatric facilities, in terms of both of treatment and security.

(ii) The provinces were overburdened with their traditional civil mental health responsibilities.

(iii) There is a perceived danger to civil programmes and patients.

(iv) There is an inability to reach agreement on mutually acceptable per diem rates and other cost-related factors.

(v) There is confusion as to whether certifiability should be the standard for provincial acceptance during the term of imprisonment and, if not, as to whether and when civil commitment should be sought prior to scheduled release.

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

(c) The transfer of inmates in provincial prisons to provincial mental hospitals can be effected pursuant to the relevant mental health or corrections legislation in each province.

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

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

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

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

Alternative I

Expand or establish adequate psychiatric facilities within penal institutions.

Considerations

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

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

Alternative II

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

Considerations

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

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

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

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

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

Alternative III

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

Considerations

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

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

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

Alternative IV

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

Considerations

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

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

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

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

(a) Voluntary Transfer - Where the inmate desires treatment and both the correctional and mental health facilities believe such treatment is warranted, the inmate should be transferred upon endorsement by the proposed authorities. According to the commentary, "The purpose of this provision is to avoid the time, expense and trauma of judicial commitment procedures when all parties agree that the prisoner needs treatment in a mental health facility."

(b) Court-ordered Transfer - Where the inmate desires treatment, and the correctional facility believes such treatment is required but the mental health facility is unwilling to accept the inmate, then the correctional facility should be able to petition before the proper authority for a transfer order. This provision is intended to provide a means for resolution of disputes between correctional and mental health facilities where negotiations between them break down.

(c) Involuntary Transfer - Where correction officials believe an inmate requires treatment and the inmate objects to such treatment, involuntary transfer proceedings should be initiated before the proper authority. This provision would give the inmate most of the rights normally enjoyed by the subjects of American commitment procedures, including due process protection. (Alternatively, this transfer could be effected through civil commitment).

(d) Emergency Transfer - If the need for emergency intervention arises with respect to any inmate, correctional authorities should be able to authorize the immediate transfer of such person to a suitable mental health facility. This procedure would be subject to a hearing to review the transfer within a reasonable time after it has been effected.

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

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

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

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

Issue 3

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

Discussion

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

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

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

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

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

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

Alternative I

Provide for a modified version of executive review.

Considerations

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

Alternative II

Provide for regular review proceedings before a court.

Considerations

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

Alternative III

Provide for regular review proceedings before an administrative board.

Considerations

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

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

Chapter 9

THE MENTALLY DISORDERED YOUNG OFFENDER

THE MENTALLY DISORDERED YOUNG OFFENDER

INTRODUCTION

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

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

CURRENT STATUS OF JUVENILE JUSTICE LEGISLATION

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

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

CURRENT PROVISIONS: THE JUVENILE DELINQUENTS ACT

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

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

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

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

(b) The Act provides that no one younger than 7 years may be dealt with as a "juvenile," while providing that provinces may set the upper age at under 16, 17 or 18. (Current ages under the Juvenile Delinquents Act are as follows: Under 16 - Alberta, New Brunswick, Nova Scotia, Ontario, P.E.I., Saskatchewan, Northwest and Yukon Territories, Under 17 - British Columbia, Newfoundland; Under 18 - Manitoba, Quebec).

(c) The Act does not demand strict adherence to the procedural standards of the ordinary criminal courts. According to s.17(2) "No adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child."

(d) Once a child has been adjudged a "juvenile delinquent," the court is empowered to deal with that person in any manner permitted by the Act until he or she has reached the age of 21 (s.20(3)). In other words, a finding of delinquency results automatically in an indeterminate disposition. The exception to the above authorizes provinces to assume jurisdiction over any child who, having been found delinquent, has been committed to care or an industrial training school. This provision, perhaps more than any other, gives concrete expression to the parens patriae assumptions. It also has very significant policy implications in that it places authority for the ultimate disposition of children involved in serious delinquency in an administrative rather than a judicial forum.

(e) The "condition" of delinquency under the Act may arise from violation of "any provision of the Criminal Code or of any federal or provincial statute, or of any by-law or ordinance of any municipality ...," from "sexual immorality or any similar form of vice...," or from being "liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute...."

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

(a) The Act makes no specific reference to the question of mental disorder. Section 5(1) of the Juvenile Delinquents Act adopts the summary conviction procedures of the Code. Section 738 of the Code provides for assessment remands and a voir dire on the issue of fitness; this section also adopts the provisions of s.543 which include detention to await the pleasure of the lieutenant governor.

(b) Where a person is found to have been insane at the time of the offence, a judge can do no more than acquit completely, with a recommendation for treatment.

(c) Children of 14 years and older can be transferred to adult court. Thus, under extreme circumstances, children have been subjected to the full provisions of the Criminal Code pertaining to mental disorder.

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

NEW PROVISIONS: THE YOUNG OFFENDERS ACT

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

(a) The principles governing juvenile justice will be amended in fundamental ways. These principles are discussed below under the heading "Philosophy of the Young Offenders Act."

(b) The minimum age of criminal responsibility will be raised from 7 to 12 years. Consequently, all persons under 12 years of age and involved in "criminal" behaviour will be subject to provincial statutes.

(c) The "maximum" age (effective April, 1985) will be uniform throughout Canada: under the age of 18 (s.2). As a result, the number of cases dealt with in 10 of 12 jurisdictions may increase in size, with immediate consequences for justice and mental health resources.

(d) The new legislation restricts itself to offences created by federal law, most notably the Criminal Code and the two drug control statutes. In other words, it is concerned exclusively with criminal offences rather than with regulatory or "status" offences.

(e) Full natural justice provisions, enhanced by special safeguards to ensure these rights, are guaranteed by the Act.

(f) All dispositions will be determinate and young offenders will remain under the jurisdiction of the youth court. Thus, the characteristic features of dispositions under the Juvenile Delinquents Act (i.e., indeterminate length and potential for the assumption of jurisdiction by provincial authorities) will be struck down.

(g) Numerous provisions have been included with respect to custody, such as the creation of two levels ("open" and "secure"), the requirement that the youth court designate the level, specific conditions for committals to secure custody, and so on.

(h) The rights of appeal closely parallel those granted by the Criminal Code.

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

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

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

(i) Section 13 of the Act provides the youth court with the opportunity to obtain medical and psychological reports at crucial stages of judicial proceedings.

(ii) The range of dispositions available to the youth court includes a "treatment order. "Under this provision, a young person may be detained in a hospital or other treatment facility, provided both the young person and the facility consent. Out-patient treatment would remain accessible through probation orders.

(iii) Finally, the Young Offenders Act provides for the review of dispositions by the youth court to ensure that they remain meaningful and appropriate. These

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

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

PHILOSOPHY OF THE YOUNG OFFENDERS ACT

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

(a) Age and Criminal Responsiblity

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

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

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

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

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

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

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

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

(b) Relationship of State and Citizen

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

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

(i) the right to counsel;

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

(iii) special guarantees of rights and freedoms that are consistent with the assumption discussed earlier regarding age and criminal responsibility (it is as a result of the person's age and level of development that such special measures are required);

(iv) the right to be informed of rights and freedoms where these may be affected by the Act; and

(v) the right to the least possible interference with freedom consistent with the protection of society and having regard to the needs of young persons and the interests of their families.

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

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

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

(c) Criminal Law to be Used with Restraint

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

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

(d) Role of Community

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

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

(i) A broad range of community-based dispositions are established to enable the young offender to assume responsibility and to be dealt with within the community.

(ii) The instances when secure custody may be used are limited.

(iii) A decision respecting custody must be made by a youth court judge in open court where the parties will have the opportunity to make representations and to challenge the evidence.

FUNDAMENTAL POLICY OPTIONS

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

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

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

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

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

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

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

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

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

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

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

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

(a) responses to the mentally disordered in the ordinary criminal law defined through the current review process;

(b) the priority given to, and the nature of, the special circumstances affecting young people;

(c) the capacity of the nation's mental health processes to respond to the issues at hand; and

(d) the assessment of the issues associated with the criminal involvement of mentally disordered young people.

ISSUES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

APPENDICES

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APPENDIX I

REFERENCES

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

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APPENDIX II

SUMMARY OF AMERICAN STUDY

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

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

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

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

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

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

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

The Insanity Test

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

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

Insanity Defence Language

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

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

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

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

Proposed Changes in State Legislation

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

Significant reported developments in the selected jurisdictions include the following:

- Idaho: Effective July 1, 1982, insanity was abolished as an affirmative defence. (Note: Montana is the only other state to abolish the defence).

- Virginia: A special Task Force on the Insanity Defence appointed by the Virginia General Assembly recommended major changes, including elimination of the volitional impairment component (i.e., the "irresistible impulse" test) of the defence.

Recommended statutory language would require that:

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

- Massachusetts: Two separate sets of legislative proposals were introduced in the 1983 Massachusetts General Assembly, including (in one proposal) the establishment of a "guilty but mentally ill" ("GBMI") verdict.

- Michigan: Michigan is one of eight states using the GBMI verdict, established in 1975. Michigan also uses the more traditional defence of NGRI. A recently published study in Michigan concluded that:

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

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

- Maryland: A Governor's Task Force has been set up to study the insanity defence system.

- Missouri and Oregon: Legislation has been introduced in both states to change the existing laws on the insanity defence.

Federal Jurisdiction

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

Disposition Options

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

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

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

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

(1) to protect society from people who have committed crimes, have been found not responsible, are mentally ill, and are dangerous to others;

(2) to promote the welfare of persons found not responsible for their criminal conduct because of mental disease or defect; and

(3) to otherwise promote the interests of justice.

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

1. The Board is unique. There is no similar mechanism in the United States.

2. The Board has great powers to supervise persons and to revoke conditional release -- even so, the American Civil Liberties Union and all other significant groups support the Board.

3. Persons found NGRI like the Board's approach because they are receiving treatment, they are treated fairly and are released to community settings.

4. The present law [and Board system] has "struck the right balance" so that defendants, the ACLU, the public defender's office and the state attorney general's office all support the system.

* See Appendix III for the Legislation

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

> "1. Our experience so far suggests that insanity acquittees, upon their release, do not create, in general, significant legal problems for the community, and that community safety is adequately protected by the management system that we have.
>
> 2. By and large, whatever the nuances of the wording of the insanity plea are, [when testimony is presented] the juries apply fairly common sense standards to these things.
>
> 3. It is our experience that recidivism is more of a [perceived] problem [than a real] problem with this group of patients [acquittees].
>
> 4. At Perkins, we essentially have a three-tier decisional process, perhaps even four-tier:
>
> -- movement towards greater rsponsibility and greater liberty requires agreement between the patient and his therapist;
>
> -- their decision has to receive approval of the treatment team or hospital unit;
>
> -- the hospital staff and the director must authorize movement;
>
> -- if the move is to be outside the service area of the hospital, the court must be notified, and in the case of a release, the court must sign an order;
>
> -- if [our] state's attorney requests (or if the court orders) a hearing, it is held and expert testimony can be presented."

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

Due Process

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

An example of an apparently effective system for the protection of patients' rights is the Department of Mental Health run by Michigan's Office of Recipient Rights ("Office") which was mandated through recodification of the relevant Michigan statutes (see M.C.L. Section 330.1001-330.2106, effective August, 1975).

According to Mr. Coyl, Director of the Office, 1866 complaints among 6400 in- and out-patients were resolved during its first 17 months of operation. Of these 1866 resolved complaints in the 23 institutions in the state, Coyl reports that 572 (31%) resulted in remedial action by institution directors. Nineteen (out of 572) appealed to the Office of Recipient Rights and two further appealed to the Director of the Department of Mental Health.

One of the important elements of Michigan's Recipient Rights System is the acountability of its institutional rights advisors. Although initially accountable to the directors of the mental health institutions, rights advisors now report directly to the Office of Recipient Rights. Coyl emphasized that the office works effectively and interfaces the Michigan patient rights system with the courts, the bar association, other professional associations, the office of the Attorney General and employee organizations.

Due Process and the Therapeutic Relationship

One of the most important aspects of applying due process requirements to the decision-making process is its effect on the quality of the therapeutic relationship between therapist and patient. Based on interviews conducted in the study, it is clear that the application of due process requirements is not generally disruptive and in some cases even produced a therapeutic value to the patient.

A treating physician at Oregon State Hospital, for example, reported that when due process rights were initially introduced, they "bothered" him. He felt

that due process puts the therapist "in an awkward situation in a Board hearing. Yet in retrospect, there have been very few instances when due process rights have been a debilitating factor in the therapeutic relationship."

Dangerousness

The criteria for dangerousness were reviewed as they appeared in state statutes (in the selected jurisdictions).

Several areas of inquiry were pursued, including whether statutorily-stated dangerousness criteria in the selected jurisdictions were similar to abstract "subjective" criteria, (i.e., similar to Canada's "public interest" test) or to more explicit "objective" criteria.

All of the states use some form of dangerousness test and none use subjective language, such as is found in Canada. In some states, evidence of a recent overt act is required. In others, it is not. Retention of dangerous persons in Massachusetts is based on a determination that failure to hospitalize "would create a likelihood of serious harm by reason of mental illness". This phrase is defined with great precision and clarity to require evidence of serious harm of a physical kind. In the state of New York, a "dangerous mental disorder" is defined as a mental illness that causes the patient to be "a physical danger to himself or [to] others."

The issue of whether psychiatric testimony on "dangerousness" is mandated by statute was also investigated and key individuals spoke to the study team as to whether such a mandate would be necessary and/or advisable. They also commented on the future of the dangerousness criteria.

Psychiatric testimony on dangerousness may be mandated by statute or ordered by the court in its discretion. Such testimony might be required at several stages of the disposition proceedings after a person was acquitted by reason of insanity or in connection with the management of persons found unfit to stand trial.

In both insanity and unfitness proceedings, the predictability of future dangerous behaviour is the central issue and is discussed in the literature.

As Steadman appropriately notes, detention of dangerous persons is really a product of the state's right to protect its citizens. The question arises as to how often the state can be justified in identifying persons as dangerous who will not actually display the predicted behaviour in order to protect society from those who will. According to Steadman, "The essence of dangerousness is that it is a perception and a prediction." According to Steadman and Morrisey, it is useful to emphasize that what remains unresolved is the core social policy issues: (1) the use of dangerousness as an involuntary commitment standard; (2) the appropriate role of psychiatrists, mental health professionals and the courts in making such predictions; and (3) the appropriate balance of individual and community rights.

There was general (but varied) support for the necessity and advisability of psychiatric testimony among the respondents to the interviews.

Attorney Hyde (Missouri) advanced a view that represents one (possibly prevailing) position in the United States. He told this study that "psychiatric testimony concerning dangerousness may leave a lot to be desired in terms of reliability and validity, but in my opinion it is both necessary and advisable. When an individual has committed a dangerous violent act and has been acquitted on grounds of insanity, the public has a right to expect that [he/she] will not be released... into society until there has been some reasonable [indication] that [he/she] is no longer mentally ill and dangerous. Even [as] an educated guess, psychiatrists must attempt to assess dangerousness in proceedings to determine whether or not the individual [may] be released."

Recommendations

The study makes the following recommendations:

(1) While careful attention should be given to the development of criteria for the insanity defense, it should be recognized that the particular wording or format of the test may have little effect on jury decisions regarding acquittal. Thus, heavy reliance on test language designed to promote public safety should be avoided.

(2) The major emphasis in reform should be on disposition. A system such as that of the Oregon Psychiatric Review Board should be carefully examined with a view to possibly merging Oregon's law and procedures with the Canadian experience, while incorporating appropriate refinements and improvements.

(3) Experience in the selected jurisdictions indicates that increased due process rights for insanity acquittees and other mentally disabled persons can promote the interests of the individual as well as potentially enhance therapeutic relationships and promote justice. Careful consideration should therefore be given to developing a full battery of due process guarantees for persons found not guilty by reason of insanity and persons found not fit to stand trial, consistent with the Canadian constitution and with Provincial legislation.

(4) The consequences flowing from determinations of a person's potential for dangerous behavior have a profound impact on the overall management of the person in the criminal/mental disability system. Efforts to expand the classification by using more subjective criteria will undoubtedly result in more types of behavior being included within the definition. Prediction of future violent dangerous behavior as well as judicial reliance on expert testimony continues to pose significant difficulty for the courts. Careful consideration should therefore be given to formulation of the dangerousness test within the management system.

(5) Because statutory definitions of mental disease or defect vary, consideration should be given to adopting a general definition that includes serious mental abnormality (e.g., psychoses).

APPENDIX III

OREGON REVISED STATUTES

TITLE 16

CRIMES AND PUNISHMENTS

Chapter 161

General Provisions

RESPONSIBILITY

RESPONSIBILITY

161.290 Incapacity due to immaturity.
(1) A person who is tried as an adult in a court of criminal jurisdiction is not criminally responsible for any conduct which occurred when the person was under 14 years of age.

(2) Incapacity due to immaturity, as defined in subsection (1) of this section, is a defense.

161.295 Effect of mental disease or defect.
(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) As used in chapter 743, Oregon Laws 1971, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

161.300 Evidence of disease or defect admissible as to intent.
Evidence that the actor suffered from a mental disease or defect is admissible whenever it is relevant to the issue of whether he did or did not have the intent which is an element of the crime.

161.305 Disease or defect as affirmative defense.
Mental disease or defect excluding responsibility under ORS 161.295 or partial responsibility under ORS 161.300 is an affirmative defense.

161.309 Notice prerequisite to defense; content.
(1) No evidence may be introduced by the defendant on the issue of criminal responsibility as defined in ORS 161.295, unless he gives notice of his intent to do so in the manner provided in subsection (3) of this section.

(2) The defendant may not introduce in his case in chief expert testimony regarding partial responsibility under ORS 161.300 unless he gives notice of his intent to do so in the manner provided in subsection (3) of this section.

(3) A defendant who is required under subsection (1) or (2) of this section to give notice shall file a written notice of his purpose at the time he pleads not

guilty. The defendant may file such notice at any time after he pleads but before trial when just cause for failure to file the notice at the time of making his plea is made to appear to the satisfaction of the court. If the defendant fails to file any such notice, he shall not be entitled to introduce evidence for the establishment of a defense under ORS 161.295 or 161.300 unless the court, in its discretion, permits such evidence to be introduced where just cause for failure to file the notice is made to appear.

161.315 Right of state to obtain mental examination of defendant; limitations.
Upon filing of notice or the introduction of evidence by the defendant as provided in ORS 161.309(3), the state shall have the right to have at least one psychiatrist or licensed psychologist of its selection examine the defendant. The state shall file notice with the court of its intention to have the defendant examined. Upon filing of the notice, the court, in its discretion, may order the defendant examined. Upon filing of the notice, the court, in its discretion, may order the defendant committed to a state institution or any other suitable facility for observation and examination as it may designate for a period not to exceed 30 days. If the defendant objects to the examiner chosen by the state, the court for good cause shown may direct the state to select a different examiner.

161.319 Form of verdict on aquittal on grounds of disease or defect.
When the defendant is found not responsible due to mental disease or defect, as defined in ORS 161.295, the verdict and judgment shall so state.

161.325 Entry of order finding defendant not responsible on grounds of disease or defect; order to include whether victim wants notice of hearings or release of defendant.
(1) After entry of judgment of not responsible due to mental disease or defect, the court shall, on the basis of the evidence given at the trial or at a separate hearing, if requested by either party, make an order as provided in ORS 161.327 or 161.329 whichever is appropriate.

(2) If the court makes an order as provided in ORS 161.327, it shall also:

(a) Determine on the record what offense the person would have been convicted of had the person been found responsible, and

(b) Make specific findings on whether there is a victim of the crime for which the defendant has been found "not responsible" and if so, whether the victim wishes to be notifed, under ORS 161.326(2), of any Psychiatric Security Review Board hearings concerning the defendant and of any conditional release, discharge or escape of the defendant.

(3) The court shall include any such findings in its order.

161.326 Commission of crime by person under board jurisdiction; notice to victim.
(1) Whenever a person already under the board's jurisdiction commits a new crime, the court or the board shall make the findings described in ORS 161.325(2).

(2) If the trial court or the board determines that a victim desires notification as described in ORS 161.325(2), the board shall make a reasonable effort to notify the victim of board hearings, conditional release, discharge or escape.

161.327 Order giving jurisdiction to Psychiatric Security Review Board; court to commit or conditionally release defendant; notice to board; appeal.
(1) Following the entry of a judgment pursuant to ORS 161.319 and the dispositional determination under ORS 161.325, if the court finds that the person would have been guilty of a felony, or of a misdemeanor during the criminal episode in the course of which the person caused physical injury or risk of physical injury to another, and if the court finds by a preponderance of the evidence that the person is affected by mental disease or defect and presents a substantial danger to others requiring commitment to a state mental hospital designated by the Mental Health Division or conditional release, the court shall order the person placed under the jurisdiction of the Psychiatric Security Review Board for care and treatment. The period of jurisdiction of the board shall be equal to the maximum sentence the court finds the person could have received had the person been found responsible.

(2) The court shall determine whether the person should be committed to a state hospital designated by the Mental Health Division or conditionally released pending any hearing before the board as follows:

(a) If the court finds that the person presents a substantial danger to others and is not a proper subject for conditional release, the court shall order the person committed to a state hospital designated by the Mental Health Division for custody, care and treatment pending hearing before the board in accordance with ORS 161.341 to 161.351.

(b) If the court finds that the person presents a substantial danger to others but that the person can be adequately controlled with supervision and treatment if conditionally released and that necessary supervision and treatment are available, the court may order the person conditionally released, subject to those supervisory orders of the court as are in the best interests of justice, the protection of society and the welfare of the person. The court shall designate a person or state, county or local agency to supervise the person upon release, subject to those conditions as the court directs in the order for conditional release. Prior to the designation, the court shall notify the person or agency to whom conditional release is contemplated and provide the person or agency an opportunity to be heard before the court. After receiving an order entered under this paragraph, the person or agency designated shall assume supervision of the person pursuant to the direction of the Psychiatric Security Review Board. The person or agency designated as supervisor shall be required to report in writing no less than once per month to the board concerning the supervised person's compliance with the conditions of release.

(3) For purposes of this section, a person affected by a mental disease or defect in a state of remission is considered to have a mental disease or defect requiring supervision when the disease may, with reasonable medical probability, occasionally become active and, when active, render the person a danger to others.

(4) In determining whether a person should be conditionally released the court may order evaluations, examinations and compliance as provided in ORS 161.336 (4) and 161.346(2).

(5) In determining whether a person should be committed to a state hospital or conditionally released the court shall have as its primary concern the protection of society.

(6) Upon placing a person on conditional release the court shall notify the board in writing of the court's conditional release order, the supervisor appointed, and all other conditions of release, and the person shall be on conditional release pending hearing before the board in accordance with ORS 161.336 to 161.351. Upon compliance with this subsection and subsections (1) and (2) of this section the court's jurisdiction over the person is terminated and the board assumes jurisdiction over the person.

(7) An order of the court under this section is a final order appealable by the person found not responsible in accordance with ORS 19.010(4). The person shall be entitled on appeal to suitable counsel possessing skills and experience commensurate with the nature and complexity of the case. If the person is indigent, suitable counsel shall be appointed in the manner provided in ORS 138.500(1), and the compensation for counsel and costs and expenses of the person necessary to the appeal shall be determined, allowed and paid as provided in ORS 138.500.

(8) Upon placing a person under the jurisdiction of the board the court shall notify the person of the right to appeal and the right to a hearing before the board in accordance with ORS 161.336(7) and 161.341(4).

161.328 Commitment to state mental hospital; standard of proof; duration of commitment.
(1) Following the entry of a judgment pursuant to ORS 161.319 and the dispositional determination under ORS 161.325, if the court finds that the person would have been guilty of a misdemeanor during a criminal episode in the course of which the person did not cause physical injury or risk of physical injury to another, and if the court finds by a preponderance of the evidence that the person is affected by mental disease or defect and presents a substantial danger to others requiring commitment to a state mental hospital designated by the Mental Health Division or conditional

release, the court shall make disposition of the person as provided in ORS 426.130(2) and (3) and pursuant to procedures set forth in ORS 426.135 to 426.150, 426.170, 426.223 to 426.297 and 426.301 to 426.395, except as provided in subsections (2) and (3) of this section.

(2) The standard of proof in all proceedings pursuant to this section shall be based upon a preponderance of the evidence.

(3) The period of jurisdiction of the court and any commitment pursuant to this section shall be no longer than the maximum sentence the court finds the person could have received had the person been found responsible.

161.329 Order of discharge
Following the entry of a judgment pursuant to ORS 161.319 and the dispositional determination under ORS 161.325, if the court finds that the person is no longer affected by mental disease or defect, or, if so affected, no longer presents a substantial danger to others and is not in need of care, supervision or treatment, the court shall order the person discharged from custody.

161.332 Definition of conditional release.
As used in ORS 137.540, 161.315 to 161.351, 161.385 to 161.395, 192.690 and 428.210, "conditional release" includes, but is not limited to, the monitoring of mental and physical health treatment.

161.336 Conditional release by Psychiatric Security Review Board; supervision by board; termination or modification of conditional release; hearing required.
(1) If the board determines that the person presents a substantial danger to others but can be adequately controlled with supervision and treatment and if conditionally released and that necessary supervision and treatment are available, the board may order the person conditionally released, subject to those supervisory orders of the board as are in the best interests of justice, the protection of society and the welfare of the person. The board may designate any person or state, county or local agency the board considers capable of supervising the person upon release, subject to those conditions as the board directs in the order for conditional release. Prior to the designation, the board shall notify the person or agency to whom conditional release is contemplated and

provide the person or agency an opportunity to be heard before the board. After perceiving an order entered under this section, the person or agency designated shall assume supervision of the person pursuant to the direction of the board.

(2) Conditions of release contained in orders entered under this section may be modified from time to time and conditional releases may be terminated by order of the board as provided in ORS 161.351.

(3) For purposes of this section, a person affected by a mental disease or defect in a state of remission is considered to have a mental disease or defect requiring supervision when the disease may, with reasonable medical probability, occasionally become active and, when active, render the person a danger to others. The person may be continued on conditional release by the board as provided in this section.

(4) **(a)** As a condition of release, the board may require the person to report to any state or local mental health facility for evaluation. Whenever medical, psychiatric or psychological treatment is recommended, the board may order the person, as a condition of release, to cooperate with and accept the treatment from the facility.

(b) The facility to which the person has been referred for evaluation shall perform the evaluation and submit a written report of its findings to the board. If the facility finds that treatment of the person is appropriate, it shall include its recommendations for treatment in the report to the board.

(c) Whenever treatment is provided by the facility, it shall furnish reports to the board on a regular basis concerning the progress of the person.

(d) Copies of all reports submitted to the board pursuant to this section shall be furnished to the person and the person's counsel. The confidentiality of these reports shall be determined pursuant to ORS 192.500.

(e) The facility shall comply with any other conditions of release prescribed by order of the board.

(5) If at any time while the person is under the jurisdiction of the board it appears to the board or its chairman that the person has violated the terms of the conditional release or that the mental health of the individual has changed, the board or its chairman may order the person returned to a state hospital designated by the Mental Health Division for evaluation or treatment. A written order of the board, or its chairman on behalf of the board, is sufficient warrant for any law enforcement officer to take into custody such person and transport the person accordingly. A sheriff, municipal police officer, constable, parole or probation officer, prison official or other peace officer shall execute the order. Within 20 days of a revocation of a conditional release, the board shall conduct a hearing. Notice of the time and place of the hearing shall be given to the person, the attorney representing the person and the Attorney General. The board may continue the person on conditional release or, if it finds by a preponderance of the evidence that the person is affected by mental disease or defect and presents a substantial danger to others and cannot be adequately controlled if conditional release is continued, it may order the person committed to a state hospital designated by the Mental Health Division. The state must prove by a preponderance of the evidence the person's unfitness for conditional release. A person in custody pursuant to this subsection shall have the same rights as any person appearing before the board pursuant to ORS 161.346.

(6) The community mental health program director, the director of the facility providing treatment to a person on conditional release, any peace officer or any person responsible for the supervision of a person on conditional release may take a person on conditional release into custody request that the person be taken into custody if there is reasonable cause to believe the person is a substantial danger to others because of mental disease or defect and that the person is in need of immediate care, custody or treatment. Any person taken into custody pursuant to this subsection shall immediately be transported to a state hospital designated by the Mental Health Division. A person taken into custody under this subsection shall have the same rights as any person appearing before the board pursuant to ORS 161.346.

(7) (a) Any person conditionally released under this section may apply to the board for discharge from or modification of an order of

conditional release on the ground that the person is no longer affected by mental disease or defect or, if still so affected, no longer presents a substantial danger to others and no longer requires supervision, medication, care or treatment. Notice of the hearing on an application for discharge or modification of an order of conditional release shall be made to the Attorney General. The applicant, at the hearing pursuant to this subsection, must prove by a preponderance of the evidence the applicant's fitness for discharge or modification of the order of conditional release. Applications by the person for discharge or modification of conditional release shall not be filed more often than once every six months.

(b) Upon application by any person or agency responsible for supervision or treatment pursuant to an order of conditional release, the board shall conduct a hearing to determine if the conditions of release shall be continued, modified or terminated. The application shall be accompanied by a report setting forth the facts supporting the application.

(8) The total period of conditional release and commitment ordered pursuant to this section shall not exceed the maximum sentence the person could have received had the person been found responsible.

(9) The board shall maintain and keep current the medical, social and criminal history of all persons committed to its jurisdiction. The confidentiality of records maintained by the board shall be determined pursuant to ORS 192.500.

(10) In determining whether a person should be committed to a state hospital, conditionally released or discharged, the board shall have as its primary concern the protection of society.

161.341 Order of commitment; application for discharge or conditional release; release plan.
(1) If the board finds, upon its initial hearing, that the person presents a substantial danger to others and is not a proper subject for conditional release, the board shall order the person committed to, or retained in, a state hospital designated by the Mental Health

Division for custody, care and treatment. The period of commitment ordered by the board shall not exceed the maximum sentence the person could have received had the person been found responsible.

(2) If at any time after the commitment of a person to a state hospital designated by the Mental Health Division under this section, the superintendent of the hospital is of the opinion that the person is no longer affected by mental disease or defect, or, if so affected, no longer presents a substantial danger to others or that the person continues to be affected by mental disorder or defect and continues to be a danger to others, but that the person can be controlled with proper care, medication, supervision and treatment if conditionally released, the superintendent shall apply to the board for an order of discharge or conditional release. The application shall be accompanied by a report setting forth the facts supporting the opinion of the superintendent. If the application is for conditional release, the application must also be accompanied by a verified conditional release plan. The board shall hold a hearing on the application within 60 days of its receipt. Not less than 30 days prior to the hearing before the board, copies of the report shall be sent to the Attorney General.

(3) The attorney representing the state may choose a psychiatrist or licensed psychologist to examine the person prior to the initial or any later decision by the board on discharge or conditional release. The results of the examination shall be in writing and filed with the board, and shall include, but need not be limited to, an opinion as to the mental condition of the person, whether the person presents a substantial danger to others and whether the person could be adequately controlled with treatment as a condition of release.

(4) Any person who has been committed to a state hospital designated by the Mental Health Division for custody, care and treatment or another person acting on the person's behalf may apply to the board for an order of discharge or conditional release upon the grounds:

(a) That the person is no longer affected by mental disease or defect;

(b) If so affected, that the person no longer presents a substantial danger to others; or

(c) That the person continues to be affected by a mental disease or defect and would continue to be a danger to others without treatment, but that the person can be adequately controlled and given proper care and treatment if placed on conditional release.

(5) When application is made under subsection (4) of this section, the board shall require a report from the superintendent of the hospital which shall be prepared and transmitted as provided in subsection (2) of this section. The applicant must prove by a preponderance of the evidence the applicant's fitness for discharge under the standards of subsection (4) of this section. Applications for discharge or conditional release under subsection (4) of this section shall not be filed more often than once every six months commencing with the date of the initial board hearing.

(6) The board is not required to hold a hearing on a first application under subsection (4) of this section any sooner than 90 days after the initial hearing. However, hearings resulting from any subsequent requests shall be held within 60 days of the filing of the application.

(7) **(a)** In no case shall any person committed by the court under ORS 161.327 to a state hospital designated by the Mental Health Division be held in the hospital for more than 90 days from the date of the court's commitment order without an initial hearing before the board to determine whether the person should be conditionally released or discharged.

(b) In no case shall a person be held pursuant to this section for a period of time exceeding two years without a hearing before the board to determine whether the person should be conditionally released or discharged.

161.346 Hearings on discharge, conditional release, commitment or modification; psychiatric reports; notice of hearing; hearing rights.

(1) The board shall conduct hearings upon any application for discharge, conditional release, commitment or modification filed pursuant to ORS 161.336, 161.341 or 161.351 and as otherwise required by ORS 161.336 to 161.351 and shall make findings on the issues before it which may include:

(a) If the board finds that the person is no longer affected by mental illness or defect, or if so affected, no longer presents a substantial danger to others, the board shall order the person discharged from commitment or from conditional release.

(b) If the board finds that the person is still affected by a mental disease or defect and is a substantial danger to others, but can be controlled adequately if conditionally released with treatment as a condition of release, the board shall order the person conditionally released as provided in ORS 161.336.

(c) If the board finds that the person has not recovered from the mental disease or defect and is a substantial danger to others and cannot adequately be controlled if conditionally released on supervision, the board shall order the person committed to, or retained in, a state hospital designated by the Mental Health Division for care, custody and treatment.

(2) At any time, the board may appoint a psychiatrist or licensed psychologist to examine the person and to submit a report to the board. Reports filed with the board pursuant to the examination shall include, but need not be limited to, an opinion as to the mental condition of the person and whether the person presents a substantial danger to others, and whether the person could be adequately controlled with treatment as a condition of release. To facilitate the examination of the person, the board may order the person placed in the temporary custody of any state hospital or other suitable facility.

(3) The board may make the determination regarding discharge or conditional release based upon the written reports submitted pursuant to this section. If any member of the board desires further information from the examining psychiatrist or licensed psychologist who submitted the report, these persons shall be summoned by the board to give testimony. The board shall consider all evidence available to it which is material, relevant and reliable regarding the issues before the board. Such evidence may include but is not limited to the record of trial, the information supplied by the attorney representing the state or by any other interested party, including the person, and

information concerning the person's mental condition and the entire psychiatric and criminal history of the person. All evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible at hearings. Testimony shall be taken upon oath or affirmation of the witness from whom received. The officer presiding at the hearing shall administer oaths or affirmations to witnesses.

(4) The board shall furnish to the person about whom the hearing is being conducted, the attorney representing the person and the Attorney General written notice of any hearing pending under this section within a reasonable time prior to the hearing. The notice shall include:

(a) The time, place and location of the hearing.

(b) The nature of the hearing and the specific action for which a hearing has been requested, the issues to be considered at the hearing and a reference to the particular sections of the statutes and rules involved.

(c) A statement of the authority and jurisdiction under which the hearing is to be held;

(d) A statement of all rights under subsection (6) of this section.

(5) Prior to the commencement of a hearing, the board or presiding officer shall inform each party as provided in ORS 183.413(2).

(6) At the hearing, the person about whom the hearing is being held shall have the right:

(a) To appear at all proceedings held pursuant to this section, except board deliberations.

(b) To cross-examine all witnesses appearing to testify at the hearing.

(c) To subpena witnesses and documents as provided in ORS 161.395.

(d) To be represented by suitable legal counsel possessing skills and experience commensurate with the nature and complexity of the case, to consult with counsel prior to the hearing and, if indigent, to have suitable counsel provided without cost.

(e) To examine all information, documents and reports which the board considers. If then available to the board, the information, documents and reports shall be disclosed to the person so as to allow examination prior to the hearing.

(7) A record shall be kept of all hearings before the board, execept board deliberations.

(8) Upon request of any party before the board, or on its own motion, the board may continue a hearing for a reasonable period not to exceed 60 days to obtain additional information or testimony or for other good cause shown.

(9) Within 15 days following the conclusion of the hearing, the board shall provide to the person, the attorney representing the person, the Attorney General and the attorney representing the state, written notice of the board's decision.

(10) The burden of proof on all issues at hearings of the board shall be by a preponderance of the evidence.

(11) If the board determines that the person about whom the hearing is being held is indigent, the board shall appoint suitable counsel to represent the person. The board shall determine and allow, as provided in ORS 135.055, the compensation for counsel appointed by it and the reasonable expenses of the person in respect to the hearing. The compensation and expenses so allowed shall be paid, upon order by the board, by the state from funds available for the purpose.

(12) The Attorney General shall furnish notice of any pending contested hearing before the board to the district attorney and the court or department of the county from which the person was committed. The Attorney General shall represent the state at contested hearings before the board unless the district attorney of the county from which the person was committed elects to represent the state. The district attorney of the county from which the person was committed shall cooperate with the Attorney General in securing the material necessary for presenting a contested hearing before the board. If the district attorney elects to represent the state, the district attorney shall give timely written notice of such election to the Attorney General, the board and the attorney representing the person.

161.351 Discharge of person under jurisdiction of Psychiatric Security Review Board; burden of proof; periodic review of status.

(1) Any person placed under the jurisdiction of the Psychiatric Security Review Board pursuant to ORS 161.336 or 161.341 shall be discharged at such time as the board, upon a hearing, shall find by a preponderance of the evidence that the person is no longer affected by mental disease or defect or, if so affected, no longer presents a substantial danger to others which requires regular medical care, medication, supervision or treatment.

(2) For purposes of this section, a person affected by a mental disease or defect in a state of remission is considered to have a mental disease or defect. A person whose mental disease or defect may, with reasonable medical probability, occasionally become active and when it becomes active will render the person a danger to others, shall not be discharged. The state has the burden of proving by a preponderance of the evidence that the person continues to be affected by mental disease or defect and continues to be a substantial danger to others. The person shall continue under such supervision and treatment as the board deems necessary to protect the person and others.

(3) Any person who has been placed under the jurisdiction of the board and who has spent five years on conditional release or a total of five years in hospital and on conditional release shall be brought before the board for hearing within 30 days of the expiration of the five-year period. The board shall review the person's status and determine whether the person should be discharged from the jurisdiction of the board.

161.360 Mental disease or defect excluding fitness to proceed.

(1) If, before or during the trial in any criminal case, the court has reason to doubt the defendant's fitness to proceed by reason of incompetence, the court may order an examination in the manner provided in ORS 161.365.

(2) A defendant may be found incompetent if, as a result of mental disease or defect, he is unable:

(a) To understand the nature of the proceedings against him; or

(b) To assist and cooperate with his counsel; or

(c) To participate in his defense.

161.365 Procedure for determining issue of fitness to proceed.
(1) Whenever the court has reason to doubt the defendant's fitness to proceed by reason of incompetence as defined in ORS 161.360, the court may call to its assistance in reaching its decision any witness and may appoint a psychiatrist to examine the defendant and advise the court.

(2) If the court determines the assistance of a psychiatrist would be helpful, the court may order the defendant to be committed to a state mental hospital designated by the Mental Health Division for the purpose of an examination for a period not exceeding 30 days. The report of each examination shall include, but is not necessarily limited to, the following:

(a) A description of the nature of the examination;

(b) A statement of the mental condition of the defendant; and

(c) If the defendant suffers from a mental disease or defect, an opinion as to whether the defendant is incompetent within the definition set out in ORS 161.360.

(3) Except where the defendant and the court both request to the contrary, the report shall not contain any findings or conclusions as to whether the defendant as a result of mental disease or defect was responsible for the criminal act charged.

(4) If the examination by the psychiatrist cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect affecting competency to proceed.

(5) The report of the examination shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the district attorney and to counsel for defendant.

(6) When the court has ordered a psychiatric examination, a justice's court shall order the county to pay, and a circuit or district court shall order the state to pay from funds available for the purpose:

(a) A reasonable fee if the examination of the defendant is conducted by a psychiatrist in private practice; and

(b) All costs including transportation of the defendant if the examination is conducted by a psychiatrist in the employ of the Mental Health Division or a community mental health program established under ORS 430.610 to 430.670.

161.370 Determination of fitess; effect of finding unfitness; proceedings if fitness regained; pretrial objections by defense counsel.
(1) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed by a psychiatrist under ORS 161.365, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the party who contests the finding thereof shall have the right to summon and to cross-examine the psychiatrist or psychiatrists who submitted the report and to offer evidence upon the issue. Other evidence regarding the defendant's fitness to proceed may be introduced by either party.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (5) of this section, and the court shall commit him to the custody of the superintendent of a state mental hospital designated by the Mental Health Division or shall release him on supervision for so long as such unfitness shall endure. The court may release the defendant on supervision if it determines that care other than commitment for incompetency to stand trial would better serve the defendant and the community. It may place conditions which it deems appropriate on the release, including the requirement that the defendant regularly report to the Mental Health Division or a community mental health program for examination to determine if the defendant has regained his competency to stand trial. When the court, on its own motion or

upon the application of the superintendent of the hospital in which the defendant is committed, a person examining the defendant as a condition of his release on supervision, or either party, determines, after a hearing, if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment or release of the defendant on supervision that it would be unjust to resume the criminal proceeding, the court on motion of either party may dismiss the charge and may order the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070 to 426.170.

(3) Notwithstanding subsection (2) of this section, a defendant who remains committed under this section to the custody of a state mental hospital designated by the Mental Health Division for a period of time equal to the maximum term of the sentence which could be imposed if the defendant were convicted of the offense with which he is charged or five years, whichever is less, shall be discharged at the end of the period. The superintendent of the hospital in which the defendant is committed shall notify the committing court of the expiration of the period at least 30 days prior to the date of expiration. The notice shall include an opinion as to whether the defendant is still incompetent within the definition set forth in ORS 161.360. Upon receipt of the notice, the court shall dismiss the charge and shall order the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070 to 426.170.

(4) If the defendant regains fitness to proceed, the term of any sentence received by the defendant for conviction of the crime charged shall be reduced by the amount of time the defendant was committed under this section to the custody of a state mental hospital designated by the Mental Health Division.

(5) The fact that the defendant is unfit to proceed does not preclude any objection through counsel and without the personal participation of the defendant on the grounds that the indictment is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon any other ground at the discretion of the court which the court deems susceptible of fair determination prior to trial.

161.385 Psychiatric Security Review Board; composition, term of office, qualifications, compensation, appointment, confirmation and meetings; judicial review of orders.

(1) There is hereby created a Psychiatric Security Review Board consisting of five members appointed by the Governor and subject to confirmation by the Senate under section 4, Article III of the Oregon Constitution.

(2) The membership of the board shall not include any district attorney, deputy district attorney or public defender, but, the membership shall be composed of:

(a) A psychiatrist experienced in the criminal justice system and not otherwise employed on a full-time basis by the Mental Health Division or a community mental health program;

(b) A licensed psychologist experienced in the criminal justice system and not otherwise employed on a full-time basis by the Mental Health Division or a community mental health program;

(c) A member with substantial experience in the processes of parole and probation;

(d) A member of the general public; and

(e) A lawyer with substantial experience in criminal trial practice.

(3) The term of office of each member is four years. The Governor at any time may remove any member for inefficiency, neglect of duty or malfeasance in office. Before the expiration of the term of a member, the Governor shall appoint a successor whose term begins July 1 next following. A member is eligible for reappointment. If there is a vacancy for any cause, the Governor shall make an appointment to become immediately effective for the unexpired term.

(4) Notwithstanding the term of office specified by subsection (3) of this section, of the members first appointed to the board:

(a) One shall serve for a term ending June 30, 1979.

(b) Two shall serve for terms ending June 30, 1980.

(c) Two shall serve for terms ending June 30, 1981.

(5) A member of the board not otherwise employed full time by the state, shall be paid on a per diem basis an amount equal to four percent of the gross monthly salary of a member of the State Board of Parole for each day during which the member is engaged in the performance of official duties, including necessary travel time. In addition, subject to ORS 292.250 regulating travel and other expenses of state officers and employes, the member shall be reimbursed for actual and necessary travel and other expenses incurred in the performance of official duties.

(6) Subject to any applicable provision of the State Personnel Relations Law, the board may hire employees to aid it in performing its duties under ORS 137.540, 161.315 to 161.351, 161.385 to 161.395, 192.690 and 428.210.

(7) (a) The board shall select one of its members as chairperson to serve for a one-year term with such duties and powers as the board determines.

(b) A majority of the voting members of the board constitutes a quorum for the transaction of business.

(8) The board shall meet at least twice every month, unless the chairperson determines that there is not sufficient business before the board to warrant a meeting at the scheduled time. The board shall also meet at other times and places specified by the call of the chairperson or of a majority of the members of the board.

(9) (a) When a person over whom the board exercises its jurisdiction is adversely affected or aggrieved by a final order of the board, the person is entitled to judicial review of the final order. The person shall be entitled on judicial review to suitable counsel possessing skills and experience commensurate with the nature and complexity of the case. If the person is indigent, suitable counsel shall be appointed by the reviewing court in

the manner provided in ORS 138.500(1). If the person is indigent, the reviewing court shall determine and allow, as provided in ORS 138.500, the cost of briefs, any other expenses of the person necessary to the review and compensation for counsel appointed for the person. The costs, expenses and compensation so allowed shall be paid as provided in ORS 138.500.

(b) The order and the proceedings underlying the order are subject to review by the Court of Appeals upon petition to that court filed within 60 days of the order for which review is sought. The board shall submit to the court the record of the proceeding or, if the person agrees, a shortened record. The record may include a certified true copy of a tape recording of the proceedings at a hearing in accordance with ORS 161.346. A copy of the record transmitted shall be delivered to the person by the board.

(c) The court may affirm, reverse or remand the order on the same basis as provided in ORS 183.482(8).

(d) The filing of the petition shall not stay the board's order, but the board or the Court of Appeals may order a stay upon application of such terms as are deemed proper.

161.387 Board to implement policies; rulemaking; meetings not deliberative under public meeting requirements.
(1) The Psychiatric Security Review Board, by rule pursuant to ORS 183.325 to 183.410 and not inconsistent with law, may implement its policies and set out its procedure and practice requirements and may promulgate such interpretive rules as the board deems necessary or appropriate to carry out its statutory responsibilities.

(2) Administrative meetings of the board and the evidentiary phase of board hearings are not deliberations for the purposes of ORS 192.690.

161.390 Rules for assignments of persons to state mental hospitals; release plan prepared by division.
(1) The Mental Health Division shall promulgate rules for the assignment of persons to state mental hospitals under ORS 161.341, 161.365 and 161.370 and for

establishing standards for evaluation and treatment of persons committed to a state hospital designated by the division or ordered to a community mental health program under ORS 137.540, 161.315 to 161.351, 192.690 and 428.210.

(2) Whenever the Psychiatric Security Review Board requires the preparation of a predischarge or preconditional release plan before a hearing or as a condition of granting discharge or conditional release for a person committed under ORS 161.327 or 161.341 to a state hospital for custody, care and treatment, the Mental Health Division is responsible for and shall prepare the plan.

(3) In carrying out a conditional release plan prepared under subsection (2) of this section, the Mental Health Division may contract with a community mental health program, other public agency or private corporation or an individual to provide supervision and treatment for the conditionally released person.

161.395 Subpena power of Psychiatric Security Review Board.
(1) Upon request of any party to a hearing before the board, the board or its designated representatives shall issue, or the board on its own motion may issue, subpenas requiring the attendance and testimony of witnesses.

(2) Upon request of any party to the hearing before the board and upon a proper showing of the general relevance and reasonable scope of the documentary or physical evidence sought, the board or its designated representative shall issue, or the board on its own motion may issue, subpenas duces tecum.

(3) Witnesses appearing under subpenas, other than the parties or state officers or employes, shall receive fees and mileage as prescribed by law for witnesses in civil actions. If the board or its designated representative certifies tnat the testimony of a witness was relevant and material, any person who has paid fees and mileage to that witness shall be reimbursed by the board.

(4) If any person fails to comply with a subpena issued under subsections (1) or (2) of this section or any party or witness refuses to testify regarding any matter on which he may be lawfully interrogated, the judge of the circuit court of any county, on the application of the board or its designated representative or

of the party requesting the issuance of the subpena, shall compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpena issued by the court.

(5) If any person, agency or facility fails to comply with an order of the board issued pursuant to subsection (2) of this section, the judge of a circuit court of any county, on application of the board or its designated representative, shall compel obedience by proceedings for contempt as in the case of disobedience of the requirements of an order issued by the court. Contempt for disobedience of any order of the board shall be punishable by a fine of $100.

161.400 Leave of absence; notice to board.
If, at any time after the commitment of a person to a state hospital under ORS 161.341(1), the superintendent of the hospital is of the opinion that a leave of absence from the hospital would be therapeutic for the person and that such leave would pose no substantial danger to others, the superintendent may authorize such leave for up to 48 hours in accordance with rules adopted by the Psychiatric Security Review Board. However, the superintendent, before authorizing the leave of absence, shall first notify the board for the purposes of ORS 161.326(2).

APPENDIX IV

SECTIONS EXTRACTED FROM THE CRIMINAL CODE

INSANITY - When insane delusions - Presumption of insanity.

16.(1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.

(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.

(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

POWERS OF JUSTICE - Remand for observation - Direct issue to be tried - Section 543 applicable.

465.(1) A justice acting under this Part may

(c) by order in writing

(i) direct an accused to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or

(ii) remand an accused to such custody as the justice directs for observation for a period not exceeding thirty days, where in his opinion, supported by the evidence or where the prosecutor and the accused consent,

by the report in writing of at least one duly qualified medical practitioner, there is reason to believe that

(iii) the accused may be mentally ill, or

(iv) the balance of the mind of the accused may be disturbed, where the accused is a female person charged with an offence arising out of the death of her newly-born child;

465.(2) Notwithstanding paragraph (1)(c), a justice acting under this part may remand an accused in accordance with that paragraph

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the accused and give evidence or submit a report; and

(b) for a period of more than thirty days but not exceeding sixty days where he is satisfied that observation for such a period is required in all the circumstances of the case and his opinion is supported by the evidence or, where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified medical practitioner.

465.(3) Where, as a result of observations made pursuant to an order issued under paragraph (1)(c), it appears to a justice that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, the justice shall direct that an issue be tried whether the accused is then, on account of insanity, unfit to conduct his defence at the preliminary inquiry.

465.(4) Where the justice directs the trial of an issue under subsection (3), he shall proceed in accordance with section 543 in so far as that section may be applied.

INSANITY OF ACCUSED WHEN OFFENCE COMMITTED - Custody after finding.

542.(1) Where, upon the trial of an accused who is charged with an indictable offence, evidence is given that the accused was insane at the time the offence was committed and the accused is acquitted

(a) the jury, or

(b) the judge or magistrate, where there is no jury, shall find whether the accused was insane at the time the offence was committed and shall declare whether he is acquitted on account of insanity.

542.(2) Where the accused is found to have been insane at the time the offence was committed, the court, judge or magistrate before whom the trial was held shall order that he be kept in strict custody in the place and in the manner that the court, judge or magistrate directs, until the pleasure of the lieutenant governor of the province is known.

INSANITY AT THE TIME OF TRIAL - Direction or remand for observation - Idem - Court shall assign counsel - Trial of issue - If sane, Trial proceeds - If insane, order for custody - Where accused acquitted - Subsequent trial.

543.(1) A court, judge or magistrate may, at any time before verdict, where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, direct that an issue be tried whether the accused is then, on account of insanity, unfit to stand his trial.

543.(2) A court, judge or magistrate may, at any time before verdict or sentence, when of the opinion, supported by the evidence or, where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified medical practitioner, that there is reason to believe that

(a) an accused is mentally ill, or

(b) the balance of the mind of an accused is disturbed where the accused is a female person charged with an offence arising out of the death of her newly-born child,

by order in writing

(c) direct the accused to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or

(d) remand the accused to such custody as the court, judge or magistrate directs for observation for a period not exceeding thirty days.

(2.1) Notwithstanding subsection (2), a court, judge or magistrate may remand an accused in accordance with that subsection

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the accused and give evidence or submit a report; and

(b) for a period or more than thirty days but not exceeding sixty days where he is satisfied that observation for such a period is required in all the circumstances of the case and his opinion is supported by the evidence, or, where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified medical practitioner.

(3) Where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, the

court, judge or magistrate shall, if the accused is not represented by counsel, assign counsel to act on behalf of the accused.

(4) For the purposes of subsection (1), the following provisions apply, namely,

(a) where the issue arises before the close of the case of the prosecution, the court, judge or magistrate may postpone directing the trial of the issue until any time up to the opening of the case for the defence;

(b) where the trial is held or is to be held before a court composed of a judge and jury,

(i) if the judge directs the issue to be tried before the accused is given in charge to a jury for trial on the indictment, it shall be tried by twelve jurors, or in the Yukon Territory and the Northwest Territories, by six jurors, and

(ii) if the judge directs the issue to be tried after the accused has been given in charge to a jury for trial on the indictment, the jury shall be sworn to try that issue in addition to the issue on which they are already sworn; and

(c) where the trial is held before a judge or magistrate, he shall try the issue and render a verdict.

(5) Where the verdict is that the accused is not unfit on account of insanity to stand his trial, the arraignment or the trial shall proceed as if no such issue had been directed.

(6) Where the verdict is that the accused is unfit on account of insanity to stand his trial, the court, judge or magistrate shall order that the accused be kept in custody until the pleasure of the lieutenant

CONTINUED

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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 be 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 exeeding 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) Nothwithstanding subsection (1), a judge of the court of appeal may remand an appellant in accordance therewith

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the accused and give evidence or submit a report; and

(b) for a period of more than thirty days but not exceeding sixty days where he is satisfied that observation for such a period is required in all the circumstances of the case and his opinion is supported by the evidence or, where the appellant and the respondent consent, by the report in writing, of at least one duly qualified medical practitioner.

POWERS - Order to be made - Substituting verdict - Appeal from acquittal - New trial under Part XVI - Where appeal against verdict of insanity allowed - Appeal court may set aside verdict of insanity and direct acquittal - Additional powers.

613.(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a), or

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

(c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion as to the effect of a special verdict, and may order the conclusion to be recorded that appears to the court to be required by the verdict, and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court;

(d) may set aside a conviction and find the appellant not guilty on account of insanity and order the appellant to be kept in safe custody to await the pleasure of the lieutenant governor where it is of the opinion that, although the appellant committed the act or made the omission charged against him, he was insane at the time the act was committed or the omission was made, so that he was not criminally responsible for his conduct; or

(e) may set aside the conviction and find the appellant unfit, on account of insanity, to stand his trial and order the appellant to be kept in safe custody to await the pleasure of the lieutenant governor.

DIRECTION OR REMAND FOR OBSERVATION - Idem.

691.(1) A court to which an application is made under this Part may, by order in writing,

(a) direct the offender in relation to whom the application is made to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or

(b) remand the offender in such custody as the court directs, for a period not exceeding thirty days, for observation,

where in its opinion, supported by the evidence of, or where the prosecutor and the offender consent, supported by the report in writing of, at least one duly qualified medical practitioner, there is reason to believe that evidence might be obtained as a result of such observation that would be relevant to the application.

(2) Notwithstanding subsection (1), a court to which an application is made under this Part may remand the offender to which that application relates in accordance with that subsection

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the offender and give evidence or submit a report and;

(b) for a period of more than thirty but not more than sixty days where it is satisfied that observation for such a period is required in all the circumstances of the case and its opinion is supported by the evidence of, or where the prosecutor and the offender consent, by the report in writing of, at least one duly qualified medical practitioner.

ADJOURNMENT - Non-appearance of defendant - Consent of Attorney General required - Non-appearance of prosecutor - Direction or remand for observation - Idem - Court may order trial of issue - Section 543 applicable.

738.(5) Notwithstanding subsection (1), the summary conviction court may, at any time before convicting a defendant or making an order against him or dismissing the information, as the case may be, when of the opinion, supported by the evidence, or, where the prosecutor and defendant consent, by the report in writing, of at least duly one qualified medical practitioner, that there is reason to believe that the defendant is mentally ill, by order in writing,

(a) direct the defendant to attend, at a place or before a person specified in the order and within a time specified therein, for observation; or

(b) remand the defendant to such custody as the court directs for observation for a period not exceeding thirty days.

738.(6) Notwithstanding subsection (5), a summary conviction court may remand the defendant in accordance therewith

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the accused and give evidence or submit a report; and

(b) for a period of more than thirty days but not exceeding sixty days where it is satisfied that observation for such a period is required in all the circumstances of the case and that opinion is supported by the evidence or, where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified medical practitioner.

738.(7) Where, as a result of observations made pursuant to an order issued under subsection (5), it appears to a summary conviction court that there is sufficient reason to doubt that a defendant is, on account of insanity, capable of conducting his defence, the summary conviction court shall direct that an issue be tried as to whether the defendant is then, on account of insanity, unfit to stand his trial.

738.(8) Where a summary conviction court directs the trial of an issue under subsection (7), it shall proceed in accordance with section 543 in so far as that section may be applied.

APPENDIX V

SECTIONS EXTRACTED FROM THE CHARTER

GUARANTEE OF RIGHTS AND FREEDOMS

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

FUNDAMENTAL FREEDOMS

2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;

MOBILITY RIGHTS

6.(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right:

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

LEGAL RIGHTS

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay and to be informed of that right;

11. Any person charged with an offence has the right

(b) to be tried within a reasonable time;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

EQUALITY RIGHTS

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disabilty.

ENFORCEMENT

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

APPENDIX VI

SECTIONS EXTRACTED FROM THE YOUNG OFFENDERS ACT

DECLARATION OF PRINCIPLE

Policy for Canada with Respect to young offenders.

3. (1) It is hereby recognized and declared that

(a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

(b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;

(c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

(d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;

(e) young persons have rights and freedoms in their own right, including those stated in the **Canadian Bill of Rights and Freedoms** or in the **Canadian Bill of Rights,** and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;

(f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;

(g) young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are; and

(h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.

Act to be be liberally construed.

(2) This Act shall be liberally construed to the end of that young persons will be dealt with in accordance with the principles set out in subsection (1).

MEDICAL AND PSYCHOLOGICAL REPORTS

Medical or psychological examination.

13. (1) For the purpose of

(a) considering an application under section 16,

(b) determining whether to direct than issue be tried whether a young person is, on account of insanity, unfit to stand trial, or

(c) making or reviewing disposition under this Act, a youth court may, at any stage of proceedings against a young person,

(d) with the consent of the young person and the prosecutor, or

(e) on its own motion or on the application of either the young person or the prosecutor, where the court has reasonable grounds to believe that the young person may be suffering

from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or mental retardation and where the court believes a medical, psychological or psychiatric report in respect of the young person might be helpful in making any decision pursuant to this Act,

by order require that the young person be examined by a qualified person and that the person who conducts the examination report the results thereof in writing to the court.

Examinaton for fitness to stand trial.

(2) Where a youth court makes an order for an examination under subsection (1) for the purpose of determining whether to direct that an issue be tried whether a young person is, on account of insanity, unfit to stand trial, the examination shall be carried out by a qualified medical practitioner.

Custody for examination.

(3) For the purpose of an examination under this section, a youth court may remand the young person who is to be examined to such custody as it directs for a period not exceeding eight days or, where it is satisfied that observation is required for a longer period to complete an examination or assessment and its opinion is supported by the evidence of, or a report in writing of, at least one qualified person, for a longer period not exceeding thirty days.

Disclosure of report.

(4) Where a youth receives a report made in respect of a young person pursuant to subsection (1),

(a) the court shall, subject to subsection (6), cause a copy of the report to be given to

(i) the young person,

(ii) a parent of the young person, if the parent is in attendance at the proceedings against the young person, and

(iii) counsel, if any, representing the young person

(iv) the prosecutor, and

(b) the court may cause a copy of the report to be given to a parent of the young person not in attendance at the proceedings against he young person if the parent is, in the opinion of the court, taking an active interest in the proceedings.

Cross-examination.

(5) Where a report is made in respect of a young person pursuant to subsection (1), the young person, his counsel or the adult assisting him pursuant to subsection 11(7) and the prosecutor shall, subject to subsection (6), on application to the youth court, be given an opportunity to cross-examine the person who made the report.

Report may be withheld from young person, parents or prosecutor.

(6) A youth court may withhold the whole or any part of a report made in respect of a young person pursuant to subsection (1) from

(a) a private prosecutor where disclosure of the report or part thereof, in the opinion of the court, is not necessary for the prosecution of the case and might be prejudicial to the young person; or

(b) the young person, his parents or a private prosecutor where the person who made the report states in writing that disclosure of the report or part thereof would be likely to be detrimental to the treatment or recovery of the young person or would be likely to result in bodily harm to, or be detrimental to the mental condition of, a third party.

Insanity at time of proceedings.

(7) A youth court may, at any time before the adjudication in respect of a young person charged with an offence, where it appears that there is sufficient reason to doubt that the young person is,

on account of insanity, capable of conducting his defence, direct that an issue be tried as to whether the young person is then on account of insanity unfit to stand trial.

Section 543 of Criminal Code to apply.

(8) Where a youth court directs the trial of an issue under subsection (7), it shall proceed in accordance with 543 of the Criminal Code in so far as that section may be applied.

Report to be part of record.

(9) A report made pursuant to subsection (1) shall form part of the record of the case in respect of which it was requested.

Disclosure by qualified person.

(10) Notwithstanding any other provision of this Act, a qualified person who is of the opinion that a young person held in detention or committed to custody is likely to endanger his own life or safety or to endanger the life of, or cause bodily harm to, another person may immediately so advise any person who has the care and custody of the young person whether or not the same information is contained in a report made pursuant to subsection (1).

Definition of "qualified person".

(11) In this section, "qualified person" means a person duly qualified by provincial law to practice medicine or psychiatry or to carry out psychological examinations or assessments, as the circumstances require, or, where no such law exists, a person who is, in the opinion of the youth court, so qualified, and includes a person or a person within a class of persons designated by the Lieutenant Governor in Council of a province or his delegate.

Form of order.

(12) An order under subsection (1) may be in Form 5.

DISPOSITIONS

Dispositions that may be made.

20. (1) Where a youth court finds a young person guilty of an offence, it shall consider any pre-disposition report required by the court, any representations made by the parties to the proceeding or their counsel or agents and by the parents of the young person and any other relevant information before the court, and the court shall then make any one of the following dispositions, or any number thereof that are not inconsistent with each other:

(a) by order direct that the young person be discharged absolutely, if the court considers it to be in the best interests of the young person and not contrary to the public interest;

(b) impose on the young person a fine not exceeding one thousand dollars to be paid at such time and on such term as the court may fix;

(c) order the young person to pay to any other person at such time and on such terms as the court may fix an amount by way of compensation for loss of or damage to property, for loss of income or support or for special damages for special injury arising from the commission of the offence where the value thereof is readily ascertainable, but no order shall be made for general damages;

(d) order the young person to make restitution to any other person of any property obtained by the young person as a result of the commission of the offence within such time as the court may fix, if the property is owned by that other person or was, at the time of the offence, in his lawful possession;

(e) if any property obtained as a result of the commission of the offence has been sold to an innocent purchaser, where restitution of the property to its owner or any other person has been made or ordered, order the young person to pay the purchaser, at such time and on such terms as the court may fix, an amount not exceeding the amount paid by the purchaser for the property;

(f) subject to section 21, order the young person to compensate any person in kind or by way of personal services at such time and on such terms as the court may fix for any loss, damage or injury suffered by that person in respect of which an order may be made under paragraph (c) or (e);

(g) subject to section 21, order the young person to perform a community service at such time and on such terms as the court may fix;

(h) make any order of prohibition, seizure or forfeiture that may be imposed under any Act of Parliament or any regulation made thereunder where an accused is found guilty or convicted of that offence;

(i) subject to section 22, by order direct that the young person be detained for treatment, subject to such conditions as the court considers appropriate, in a hospital or other place where treatment is available, where a report has been made in respect of the young person pursuant to subsection 13(1) that recommends that the young person undergo treatment for a condition referred in paragraph 13(1)(e);

(j) place the young person on probation in accordance with section 23 for a specified period not exceeding two years;

(k) subject to section 24, commit the young person to custody, to be served continuously or intermittently, for a specified period not exceeding

(i) two years from the date of committal, or

(ii) where the young person is found guilty for an offence for which the punishment provided by the Criminal Code or any other Act of Parliament is imprisonment for life, three years from the date of committal, and

(l) impose on the young person such other reasonable and ancillary conditions as it deems advisable and in the best interest of the young person and the public.

Coming into force of disposition.

(2) A disposition made under this section shall come into force on the date on which it is made or on such later date as the youth court specifies therein.

Duration of disposition.

(3) No disposition made under this section, except an order made under paragraph(1)(h) or (k), shall continue in force for more than two years, and where the youth court makes more than one disposition at the same time in respect of the same offence, the combined duration of the dispositions, except in respect of an order made under paragraph (1)(h) or (k), shall not exceed two years.

Combined duration of dispositions.

(4) Where more than one disposition is made under this section in respect of a young person with respect to different offences, the continuous combined duration of those dispositions shall not exceed three years.

Disposition continues when adult.

(5) A disposition made under this section shall continue in effect, in accordance with the terms thereof, after the young person against whom it is made becomes an adult.

Reasons for the disposition.

(6) Where a youth court makes a disposition under this section, it shall state its reason therefor in the record of the case and shall

(a) provide or cause to be provided a copy of the disposition, and

(b) on request, provide or cause to be provided a transcript or copy of the reasons for the disposition

to the young person in respect of whom the disposition was made, his counsel, his parents, the provincial director, where the provincial director has an interest in the disposition, the prosecutor, and, in the case of a custodial disposition made under paragraph (1)(k), the review board, if any has been established or designated.

Limitation on punishment.

(7) No disposition shall be made in respect of a young person under this section that results in a punishment that is greater than the maximum punishment that would be applicable to an adult who has committed the same offence.

Application of Part XX of the Criminal Code.

(8) Part XX of the Criminal Code does not apply in respect of proceedings under this Act except for sections 683, 685 and 686 and subsections 655(2) to (5) and 662.1(2), which provisions apply with such modifications as the circumstances require.

Section 722 of the Criminal Code does not apply.

(9) Section 722 of the Criminal Code does not apply in respect of proceedings under this Act.

Forms.

(10) A disposition made under this section, other than a probation order may be in Form 7.

Form of Probation order.

(11) A probation order made under this section may be in Form 8 and the youth court shall specify in the order the period for which it is to remain in force.

Consent for treatment order.

22. (1) No order may be made under paragraph 20(1)(i) unless the youth court has secured the consent of the young person, the parents of the young person and the hospital or other place where the young person is to be detained for treatment.

Where consent of parent dispensed with.

(2) The youth court may dispense with the consent of a parent required under subsection (1) if it appears that the parent is not available or if the parent is not, in the opinion of the court, taking an active interest in the proceedings.

Definitions.

24. (1) In this section, "open custody" means custody in

(a) a community residential centre, group home, child care institution, or forest or wilderness camp, or

(b) any other like place or facility

designated by the Lieutenant Governor in Council of a province or his delegate as a place of open custody for the purposes of this Act, and includes a place or facility within a class of such places or facilities so designated;

"secure custody" means custody in a place or facility designated by the Lieutenant Governor in Council of a province for the secure containment or restraint of young persons, and includes a place or facility within a class of such places or facilities so designated.

Order of committal to specify type of custody.

(2) Where the youth court commits a young person to custody under paragraph 20(1)(k), it shall specify in the order of committal whether the custody is to be open custody or secure custody.

Conditions for secure custody.

(3) Subject to subsection (4), no young person who is found guilty of an offence shall be committed to secure custody unless the young person was, at the time the offence was committed, fourteen years of age or more and unless

(a) the offence is one for which an adult would be liable to imprisonment for five years or more;

(b) the offence is an offence under section 132 (prison breach) or subsection 133(1) (escape or being at large without excuse) of the Criminal Code or an attempt to commit such offence; or

(c) the offence is an indictable offence and the young person was;

(i) within twelve months prior to the commission of the offence found guilty of an offence for which an adult would be liable to imprisonment for five years or more, or adjudged to have committed a delinquency under the Juvenile Delinquents Act in respect of such offence, or

(ii) at any time prior to the commission of the offence committed to secure custody with respect to a previous offence, or committed to custody in a place or facility for the secure containment or restraint of a child, within the meaning of the Juvenile Delinquents Act, with respect to a delinquency under that Act.

(4) A young person who is found guilty of an offence and who was, at the time the offence was committed, under the age of fourteen years may be committed to secure custody if

(a) the offence is one for which the adult would be liable to life imprisonment;

(b) the offence is one for which an adult would be liable to imprisonment for five years or more and the young person was at any time prior to the commission of the offence found guilty of an offence for which an adult would be liable to imprisonment for five years or more or adjudged to have committed a delinquency under the Juvenile Delinquents Act in respect of such offence; or

(c) the young person is found guilty of an offence under section 132 (prison breach) or subsection 133(1) (escape or being at large without excuse) of the Criminal Code to attempt such offence.

(5) The youth shall commit a young person to secure custody unless the court considers a committal to secure custody to be necessary for the protection of society having regard for the seriousness of the

offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person.

Place of custody.

(6) A young person who is committed to custody shall be placed in open custody or secure custody, as specified in the order of committal, at such place or facility as the provincial director or his delegate may specify and may, during the period of custody be transferred by the provincial director or his delegate from one place or facility of open custody to another or from one place or facility of secure custody to another.

Transfer from secure custody to open custody.

(7) The provincial director or his delegate, may with the written authorizaton of the youth court, transfer a young person from a place or facility of secure custody to a place or facility of open custody.

Transfer from open custody to secure custody.

(8) Subject to subsection (9), no young person who is committed to open custody may be transferred to a place or facility of secure custody except in accordance with section 33.

(9) The provincial director or his delegate may transfer a young person from a place or facility of open custody to a place or facility of secure custody for a period not exceeding fifteen days if the young person escapes or attempts to escape lawful custody or is, in the opinion of the director or his delegate, guilty of serious misconduct.

Young person to be held separate from adults.

(10) Subject to this section, a young person who is committed to custody under paragraph 20(1)(k) shall be held separate and apart from any adult who is charged with or convicted of an offence against any law of Canada or a province.

Pre-disposition report.

(11) Before making an order of committal to custody under paragraph 20(1)(k), the youth court shall consider a pre-disposition report.

Committal to custody deemed continuous.

(12) A young person who is committed to custody under paragraph 20(1)(k) shall be deemed to be committed to continuous custody unless the youth court specifies otherwise.

Availability of place of intermittent custody.

(13) Before making an order of committal to intermittent custody under paragraph 20(1)(k), the youth court shall require the prosecutor to make available to the court for its consideration a report of the provincial director or his delegate as to the availability of a place of custody in which an order of intermittent custody can be enforced and, where the report discloses that no such place of custody is available, the court shall not make such an order.

Transfer to adult facility.

(14) Where a young person is committed to custody under paragraph 20(1)(k), the youth court may, on application of the provincial director or his delegate made at any time after the youth person attains the age of eighteen years, after affording the young person an opportunity to be heard, authorize the provincial director or his delegate to direct that the young person serve his disposition or the remaining portion thereof in a provincial correctional facility for adults, if the court considers it to be in the best interests of the young person or in the public interest, but in any such event the provisions of this Act shall continue to apply in respect of that person.

Where disposition and sentence concurrent.

(15) Where a young person is committed to custody under paragraph 20(1)(k) and is concurrently under sentence of imprisonment imposed in ordinary court, that person may serve his disposition and sentence, or any portions thereof, in a provincial correctional facility for adults or in a place of custody for young persons.

Warrant of Committal.

(16) Where a young person is committed to custody under paragraph 20(1)(k), the youth court shall issue or cause to be issued a warrant of committal, which may be in form 10.

Transfer of disposition.

25. (1) Where a non-custodial disposition has been made in respect of a young person and the young person or a parent with whom he resides is or becomes a resident of a territorial division outside the jurisdiction of the youth court that made the disposition, whether in the same or in another province, a youth court judge in the territorial division which the disposition was made may, on the application of the Attorney General or his agent or on the application of the young person or his parent with the consent of the Attorney General or his agent, transfer the disposition and such portion of the record of the case as is appropriate to a youth court in the other territorial division, and all subsequent proceedings relating to the case shall thereafter be carried out and enforced by that court.

No transfer outside province before appeal completed.

(2) No disposition may be transferred from one province to another under this section until the time for an appeal against the disposition or the finding on which the disposition was based has expired or until all proceedings in respect of any such appeal have been completed.

Transfer to a province where person is adult.

(3) Where an application is made under subsection (1) to transfer the disposition of a young person to a province in which the young person is an adult, a youth court judge may, with the consent of the Attorney General, transfer the disposition and the record of the case to the youth court in the province to which the transfer is sought, and the youth court to which the case is transferred shall have full jurisdiction in respect of the disposition as if that court had made the disp siti , and the person shall be further dealt with in accordance with this Act.

Interprovincial arrangements for probation or custody.

26. (1) Where an appropriate agreement has been made between two provinces, young persons who have been placed on probation or committed to custody in one province under section 20 may be dealt with under the probation order or held in custody in the other province.

Youth court retains jurisdiction.

(2) subject to subsection (3), where a young person is dealt with under a probation order or held in custody pursuant to this section in a province other than that in which the disposition was made, the youth court of the province in which the disposition was made shall, for all purposes of this Act, retain exclusive jurisdiction over the young person as if the young person were dealt with or held within that province, and any warrant or process issued in respect of the young person may be executed or served in any place in Canada outside that province where the disposition was made as if it were executed or served in that province.

Waiver of jurisdiction.

(3) Where a young person is dealt with under a probation order or held in custody pursuant to this section in a province other than that in which the disposition was made, the youth court of the province in which the disposition was made may, with the consent in writing of the Attorney General of that province and the young person, waive its jurisdiction, for the purpose of any proceeding under this Act, to the youth court of the province in which the young person is dealt with or held, in which case the youth court in the province in which the young person is so dealt with or held shall have full jurisdiction in respect of the disposition as if that court had made the disposition.

REVIEW OF DISPOSITIONS

Automatic review of disposition involving custody.

28. (1) Where a young person is committed to custody pursuant to a disposition made in respect of an offence for a period exceeding one year, the provincial director of the province in which the young person is held in custody shall cause the young person to be brought before the youth court forthwith at the end of one year from the date of the most recent disposition made in respect of the offence, and the youth court shall review the disposition.

(2) Where a young person is committed to custody pursuant to dispositions made in respect of more than one offence for a total period exceeding one year, the provincial director of the province in which the young person is held in custody shall cause the

young person to be brought before the youth court forthwith at the end of one year from the date of the earliest disposition made, and the youth court shall review the dispositions.

Optional review of disposition involving custody.

(3) Where a young person is committed to custody pursuant to a disposition made in respect of an offence, the provincial director may, on his own initiative, and shall, on the request of the young person, his parent or the Attorney General or his agent, on any of the grounds set out in subsection (4), cause the young person to be brought before the youth court at any time after six months from the date of the most recent disposition made in respect of the offence or, with leave of a youth court judge, at any earlier time, and, where the youth court is satisfied that there are grounds for the review made under subsection (4), the court shall review the disposition.

Grounds for review under subsection (3).

(4) A disposition made in respect of a young person may be reviewed under subsection(3).

(a) on the ground that the young person has made sufficient progress to justify a change in disposition;

(b) on the ground that the circumstances that led to the committal to custody have changed materially;

(c) on the ground that new services or programs are available that were not available at the time of the disposition; or

(d) on such other grounds as the youth court considers appropriate.

No review where appeal pending.

(5) No review of a disposition in respect of which an appeal has been taken shall be made under this section until all proceedings in respect of any such appeal have been completed.

Youth court may order appearance of young person for review.

(6) Where a provincial director is required under subsections (1) to (3) to cause a young person to be brought before the youth court and fails to do so, the youth court may, on application made by the young person, his parent or the Attorney General or his agent, or on its own motion, order the provincial director to cause the young person to be brought before the youth court.

Progress report.

(7) The youth court shall, before reviewing under this section of disposition made in respect of a young person, require the provincial director to cause to be prepared, and to submit to the youth court, a progress report on the performance of the young person since the disposition took effect.

Additional information in progress report.

(8) A person preparing a progress report in respect of a young person may include in the report such information relating to the personal and family history and present environment of the young person as he considers advisable.

Written or oral report.

(9) A progress report shall be in writing unless it cannot reasonably be committed to writing, in which case it may, with leave of the youth court, be submitted orally in court.

Provisions of subsections 14(4) to (10) to apply.

(10) The provisions of subsections 14(4) to (10) apply, with such modifications as the circumstances require, in respect of progress reports.

Notice of review from provincial director.

(11) Where a disposition made in respect of a young person is to be reviewed under subsection (1) or (2), the provincial director shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent.

Notice of review from person requesting it.

(12) Where a review of a disposition made in respect of a young person is requested under subsection (3), the person requesting the review shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent.

Statement of right to counsel.

(13) Any notice given to a parent under subsection (11) or (12) shall include a statement that the young person whose disposition is to be reviewed has the right to be represented by counsel.

Service and form of notice.

(14) A notice under subsection (11) or (12) may be served personally or may be sent by registered mail and, in the case of a notice to a young person, may be in Form 11 and, in any other case, may be in Form 12.

Notice may be waived.

(15) Any of the persons entitled to notice under subsection (11) or (12) may waive the right to such notice.

Where notice not given.

(16) Where notice under subsection (11) or (12) is not given in accordance with this section, the youth court may

(a) adjourn the proceedings and order that notice be given in such manner and to such person as it directs; or

(b) dispense with the notice where, in the opinion of the court, having regard to the circumstances, notice may be dispensed with.

Decision of the youth court after review.

(17) Where a youth court reviews under this section a disposition made in respect of a young person, it may, after affording the young person, his parents, the Attorney General or his agent and the provincial director or his agent an opportunity to be heard, having regard to the needs of the young person and the interests of society,

(a) confirm the disposition;

(b) where the young person is in secure custody, by order direct that the young person be placed in open custody; or

(c) release the young person from custody and place him on probation in accordance with section 23 for a period not exceeding the remainder of the period for which he was committed in custody.

Form of disposition.

(18) A disposition made under subsection (17) may be in Form 13.

Recommendation of provincial director for probation.

29. (1) Where a young person is held in continuous custody pursuant to a disposition, the provincial director may, if he is satisfied that the needs of the young person and the interests of society would be better served if the young person were released from custody and placed on probation, cause notice in writing to be given to the young person, his parents and the Attorney General or his agent that he recommends that the young person be released from custody and placed on probation and give a copy of the notice to the youth court, and the provincial director shall include in the notice the reasons for his recommendation and the conditions that he would recommend be attached to a probation order.

Application to court for review of recommendation.

(2) A youth court shall, where notice of a review of a disposition made in respect of a young person is given under subsection (1), on the application of the young person, his parents or the Attorney General or his agent made within ten days after service of the notice, forthwith review the disposition.

Subsections 28(5), (7) to (10) and (12) to (18) apply.

(3) Subsections 28(5), (7) to (10) and (12) to (18) apply with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

Where the court does not review the disposition.

(4) A youth court that receives a notice under subsection (1) recommending that a young person be released from custody and placed on probation shall, if no application for review is made under subsection (2),

(a) release the young person and place him on probation in accordance with section 23, in which case the court shall include in the probation order such conditions referred to in that section as it considers advisable having regard to the recommendations of the provincial director, or

(b) where the court deems it advisable, make no direction under this subsection unless the provincial director requests a review under this section.

Where the provincial director requests a review.

(5) Where the provincial director requests a review under paragraph (4)(b),

(a) the provincial director shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent; and

(b) the youth court shall forthwith, after the notice required under paragraph (a) is given, review the disposition.

Form of notice.

(6) A notice given under subsection (1) may be in Form 14.

Review board.

30. (1) Where a review board is established or designated by a province for the purposes of this section, that board shall, subject to this section, carry out in that province the duties and functions of a youth court under sections 28 and 29 other than releasing a young person from custody and placing him on probation.

Other duties of review board.

(2) Subject to this Act, a review board may carry out any duties or functions that are assigned to it by the province that established or designated it.

Notice under section 29.

(3) Where a review board is established or designated by a province for the purposes of this section, the provincial director shall at the same time as any notice is given under subsection 29(1) cause a copy of the notice to be given to the review board.

Notice of decision of review board.

(4) A review board shall cause notice of any decision made by it in respect of a young person pursuant to section 28 or 29 to be given forthwith in writing to the young person, his parents, the Attorney General or his agent and the provincial director, and a copy of the notice to be given to the youth court.

Decision of review board to take effect where no review.

(5) Subject to subsection (6), any decision of a review board under this section shall take effect ten days after the decision is made unless an application for review is madse under section 31.

Decision respecting release from custody and probation.

(6) Where a review board decides that a young person should be released from custody and placed on probation, it shall so recommend to the youth court and, if no application for a review of the decision is made under section 31, the youth court shall forthwith on the expiration of the ten day period referred to in subsection (5) release the young person from custody and place him on probation in accordance with section 23, and shall include in the probation order such conditions referred to in that section as the court considers advisable having regard to the recommendations of the review board.

Form of notice of decision of review board.

(7) A notice of a decision of the review board under this section may be in Form 15.

Review by youth court.

31. (1) Where the review board reviews a disposition under section 30, the youth court shall, on the application of the young person in respect of whom the review was made, his parents, the Attorney General or his agent or the provincial director, made within ten days after the decision of the review board is made, forthwith review the decision.

Subsections 28(5), (7) to (10) and (12) to (18) apply.

(2) Subsection 28(5), (7) to (10) and (12) to (18) apply, with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

Review of dispositions not involving custody.

32. (1) Where a youth court has made a disposition in respect of a young person but has not committed him to custody, the youth court shall, on the application of the young person, his parent, the Attorney General or his agent or the provincial director, made at any time after six months from the date of the disposition or, with leave of a youth court judge, at any earlier time, review the disposition if the court is satisfied that there are grounds for a review under subsection (2).

Grounds for review.

(2) A review of a disposition may be made under this section

(a) on the ground that the circumstances that led to the disposition have changed materially;

(b) on the ground that the young person in respect of whom the review is to be made is unable to comply with or is experiencing serious difficulty in complying with the terms of the disposition;

(c) on the ground that the terms of the disposition are adversely affecting the opportunities available to the young person to obtain services, education or employment; or

(d) on such other grounds as the youth court considers appropriate.

Progress report.

(3) The youth court may, before reviewing under this section a disposition made in respect of a young person, require the provincial director to cause to be prepared, and to submit to the youth court, a progress report on the performance of the young person since the disposition took effect.

Subsections 28(8) to (10) apply.

(4) Subsections 28(8) to (10) apply, with such modifications as the circumstances require, in respect of any progress report required under subsection (3).

Subsections 28(5) and (12) to (16) apply.

(5) Subsections 28(5) and (12) to (16) apply, with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

Compelling appearance of young person.

(6) The youth court may, by summons or warrant, compel a young person in respect of whom a review is to be made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

Decision of the youth court after review.

(7) Where a youth court reviews under this section a disposition made in respect of a young person, it may, after affording the young person, his parents, the Attorney General or his agent and the provincial director or his agent an opportunity to be heard,

(a) confirm the disposition;

(b) terminate the disposition and discharge the young person from any further obligation of the disposition; or

(c) vary the disposition or make such new disposition listed in section 20, other than a committal to custody, for such period of time, not exeeding the remainder of the period of the earlier disposition, as the court deems appropriate in the circumstances of the case.

New disposition not to be more onerous.

(8) Subject to subsection (9), where a disposition made in respect of a young person is reviewed under this section, no disposition made under subsection (7) shall, without the consent of the young person, be more onerous than the remaining portion of the disposition reviewed.

Exception.

(9) A youth court may under this section extend the time within which an order to perform personal or community services is to be complied with by a young person where the court is satisfied that the young person requires more time to comply with the order, but in no case shall the extension be for a period time that expires more than twelve months after the date the disposition reviewed would expire.

Form of disposition.

(10) A disposition made under subsection (7) may be in form 13.

Form of summons or warrant.

(11) A summons referred to in subsection (6) may be in Form 16 and a warrant referred to in that subsection may be in Form 17.

Review of disposition where failure to comply.

33. (1) Where a youth court has made a disposition in respect of a young person and the Attorney General or his agent or the provincial director or his delegate lays an information alleging that the informant, on reasonable and probable grounds, believes that the young person has

(a) wilfully failed or refused to comply with the disposition or any term or condition thereof, or

(b) in the case of a committal to custody under paragraph 20(1)(k) escaped or attempted to escape custody,

the youth court shall, on application of the informant made at any time before the expiration of the disposition or within six months thereafter, by summons or warrant, require the young person to appear before the court and shall review the disposition.

Subsections 28(7) to (10) apply.

(2) Subsection 28(7) to (10) apply, with such modifications as the circumstances require, in respect of reviews made under this section.

Notice of review from the provincial director.

(3) Where the provincial director or his delegate applies for a review of a disposition under subsection (1), he shall such cause notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the parents of the young person in respect of whom the disposition was made and to the Attorney General or his agent.

Notice of review from the Attorney General or his agent.

(4) Where the Attorney General or his agent applies for a review of a disposition under subsection (1), the Attorney General or his agent shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the parents of the young person in respect of whom the disposition was made and to the provincial director or his delegate.

Subsections 28(13) to (16) apply.

Subsections 28(13) to (16) apply, with such modifications as the circumstances require, in respect of notices given under subsection (3) or (4).

Decision of the youth court after review.

(6) Where the youth court reviews under this section a disposition made in respect of a young person, it may, subject to subsection (8), after affording the young person, his parents, the Attorney General or his agent and the provincial director or his agent an opportunity to be heard, and if it is satisfied beyond a reasonable doubt that the young person has

(a) wilfully failed or refused to comply with the disposition or any term or condition thereof, or

(b) in the case of a committal to custody under paragraph 20(1)(k), escaped or attempted to escape custody,

vary the disposition or make any new disposition listed in section 20 that the court considers appropriate.

Limitation on custody.

(7) No disposition shall be made under this section committing a young person to custody

(a) for a period in excess of six months, where the disposition under review was not a committal to custody or was a committal to custody that has expired; or

(b) for a period that expires more than six months after the disposition under review was to expire, where the disposition under review was a committal to custody that has not expired.

Postponement of performance of previous dispositions.

(8) Notwithstanding any other provision of this Act, where a young person is committed to custody under this section, the youth court may order that the performance of any other disposition made in respect of the young person be postponed until the expiration of the period of custody.

Prosecution under section 132 or 133 of Criminal Code.

(9) Where a disposition is reviewed under this section on the ground set out in paragraph (1)(b), the young person may not be prosecuted under section 132 or 133 of the Criminal Code for the same act and, where a young person is prosecuted under either of those sections, no review may be made by the youth court under this section by reason of the same act.

Appeals.

(10) An appeal from a disposition of the youth court under this section lies as if the order were a disposition made under section 20 in respect of an offence punishable on summary conviction.

Form of disposition.

(11) A diposition made under subsection (6) may be in Form 13.

Form of summons or warrant.

(12) A summons referred to in subsection (1) may be Form 16 and a warrant referred to in that subsection in may be in Form 17.

Form of information.

(13) An information referred to in subsection (1) may be in form 18.

Government and private records

Government Records.

43. (1) A department or agency of any government in Canada may keep records containing information obtained by the department or agency

(a) for the purposes of an investigation of an offence alleged to have been committed by a young person;

(b) for use in proceedings against a young person under this act;

(c) for the purpose of administering a disposition;

(d) For the purpose of considering whether, instead of commencing or continuing judicial proceedings under this Act against a young person, to use alternative measures to deal with the young person; or

(e) as a result of the use of alternative measures to deal with a young person.

Private Records.

(2) Any person or organization may keep records containing information obtained by the person or organization

(a) as a result of the use of alternative measures to deal with a young person alleged to have committed an offence, or

(b) for the purpose of administering or participating in the administration of a disposition.

Record may be made available to specified persons and bodies.

(3) Any record kept pursuant to subsection (1) or (2) may, in the discretion of the department, agency, person or organization keeping the record, be made available for inspection to any person or body referred to in subsections 40(2) or (3) for the purposes and in the circumstances set out in those subsections.

Subsections 40(4) to (8) apply.

(4) Subsections 40(4) to (8) apply, with such modifications as the circumstances require, in respect of records kept pursuant to subsections (1) and (2).

Destruction of records

45. (1) Where a young person is charged with an offence and

(a) is acquitted, or

(b) the charge is dismissed for any reason other than aquittal, withdrawn or stayed and no proceedings are taken against him for a period of three months,

all records kept pursuant to sections 40 to 43 and records taken pursuant to section 44 that relate to the young person in respect of the alleged offence and all copies, prints or negatives of such records shall be destroyed.

(2) Where a young person

(a) has not been charged with or found guilty of an offence under this or any other Act of Parliament or any regulation made thereunder, whether as a young person or an adult,

(i) for a period of two years after all dispositions made in respect of the young person have been completed, where the young person has at any time been found guilty of an offence punishable on summary conviction but has never been convicted of an indictable offence, or

(ii) for a period of five years after all dispositions made in respect of the young person have been completed, where the young person has at any time been convicted of one or more indictable offences, or

(b) has after becoming an adult, been granted a pardon under the Criminal Records Act,

all records kept pursuant to sections 40 to 43 and records taken pursuant to section 44 that relate to the young person and all copies, prints or negatives of such records shall be destroyed.

Copy given for research or statistical purposes.

(3) Subsections (1) and (2) do not apply in respect of any copy of a record or part thereof that is given to any person pursuant to paragraph 40(3)(k), but does apply in respect of copies of fingerprints or photographs given pursuant to that paragraph.

Destruction on acquittal, etc.

(4) Any record that is not destroyed under this section because the young person to whom it relates was charged with an offence during a period referred to in that subsection shall be destroyed forthwith

(a) where the young person is acquitted, on the expiration of the time allowed for the taking of an appeal or, where an appeal is taken, when all proceedings in respect of the appeal have been completed;

(b) where no proceedings are taken against him for a period of six months, on the expiration of the six months; or

(c) where the charge against the young person is dismissed for any reason other than acquittal, withdrawn or stayed and no proceedings are taken against him for a period of six months, on the expiration of the six months.

Young person deemed not to have committed offence.

(5) A young person shall be deemed not to have committed any offence in respect of which records are required to be destroyed under subsection (1), (2) or (4).

Records not to be used.

(6) No record or copy, print or negative thereof that is required under this section to be destroyed may be used for any purpose.

Request for destruction.

(7) Any person who has under his control or in his possession any record that is required under this section to be destroyed and who refused or fails, on a request made by or on behalf of the young person to whom the record relates, to destroy the record commits an offence.

Application to delinquency.

(8) This section applies, with such modifications as the circumstances require, in respect of records relating to the offence on delinquency under the Juvenile Delinquents Act as it read immediately prior to the coming into force of this act.

Offence

Prohibition against possession of records.

46. (1) No person shall knowingly have in his possession any record kept pursuant to sections 40 to 43 or any record taken pursuant to section 44, or any copy, print or negative of any such record, except as authorized or as required by those sections.

Prohibition against disclosure.

(2) Subject to subsection (3), no person shall knowingly

(a) make available for inspection to any person any record referred to in subsection (1), or any copy, print or negative of any such record,

(b) give any person any information contained in any such record, or

(c) give any person a copy of any part of any such record except as authorized or required by sections 40 to 44.

Exception for employees.

(3) Subsection (1) does not apply, in respect of records referred to in that subsection, to any person employed in keeping or maintaining such records, and any person so employed is not restricted from doing anything prohibited under subsection (2) with respect to any other person so employed.

Offence.

(4) Any person who fails to comply with this section or commits an offence under subsection 45(7)

(a) is guilty of an indictable offence and liable to imprisonment for two years; or

(b) is guilty of an offence punishable on summary conviction.

Absolute jurisdiction of magistrate.

(5) The jurisdiction of a magistrate to try an accused is absolute and does not depend on the consent of the accused where the accused is charged with an offence under paragraph (4)(a).

APPLICATION OF THE CRIMINAL CODE

Application of Criminal Code.

51. Except to the extent that they are inconsistent with or excluded by this Act, all the provisions of the Criminal Code apply, with such modifications as the circumstances require, in respect of offences alleged to have been committed by young persons.

PROCEDURE

Part XXIV and summary conviction trial provisions of Criminal Code to apply.

52. (1) Subject to this section and except to the extent that they are inconsistent with this Act,

(a) the provisions of Part XXIV of the Criminal Code, and

(b) any other provisions of the Criminal Code that apply in respect of summary conviction offences and relate to trial proceedings

apply to proceedings under this Act

(c) in respect of a summary conviction offence, and

(d) in respect of an indictable offence as if it were defined in the enactment creating it as a summary conviction offence.

Indictable offences.

(2) For greater certainty and notwithstanding subsection (1) or any other provision of this Act, an indictable offence committed by a young person is for the purposes of this or any other Act, an indictable offence.

Attendance of young person.

(3) Section 577 of the Criminal Code applies in respect of proceedings under this Act, whether the proceedings relate to an indictable offence or an offence punishable on summary conviction.

Limitation period.

(4) In proceedings under this Act, subsection 721(2) of the Criminal Code does not apply in respect of an indictable offence.

Costs.

(5) Section 744 of the Criminal Code does not apply in respect of proceedings under this Act.

END