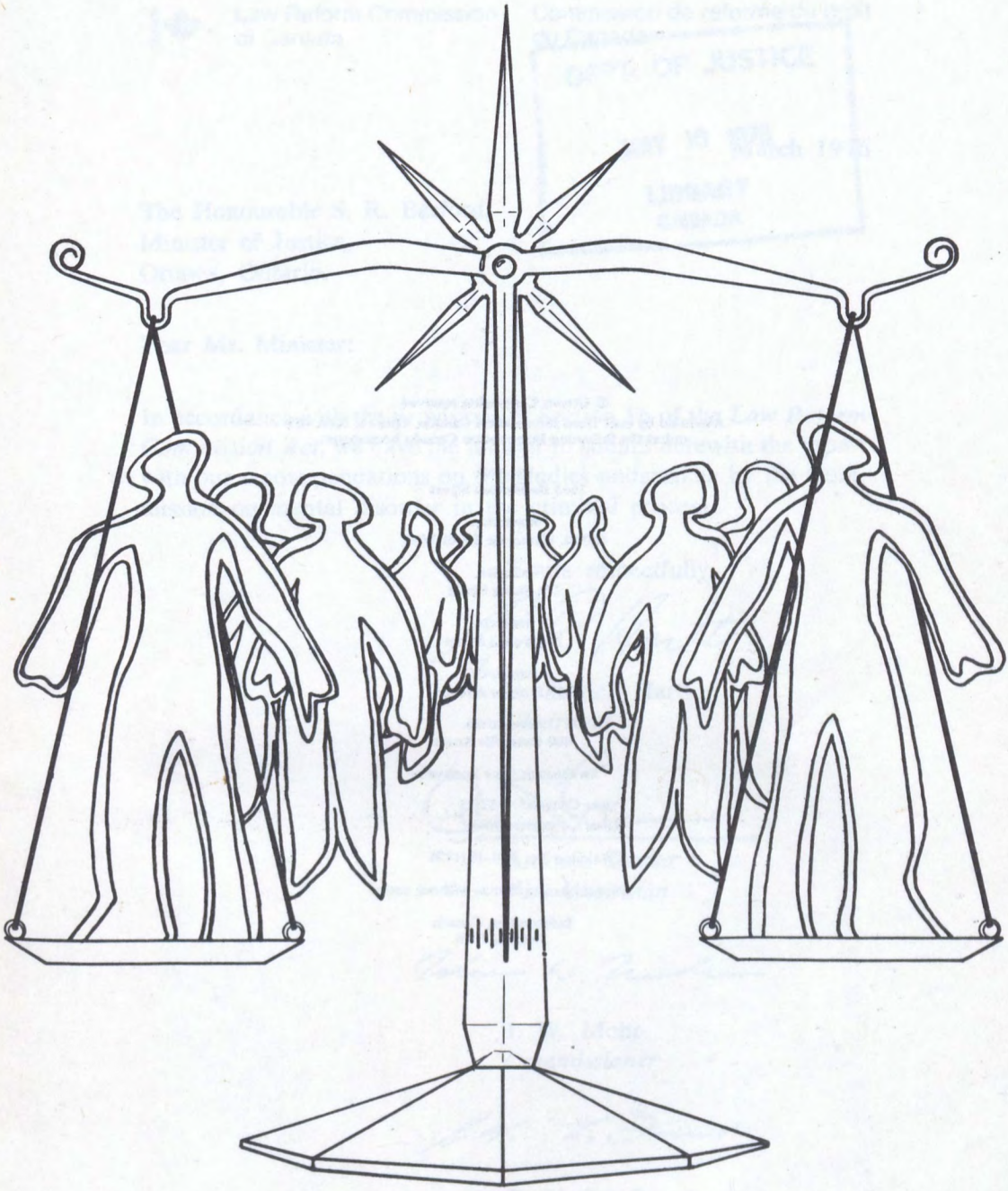
Law Reform Commission of Canada
Commission de réforme du droit du Canada

REPORT

MENTAL DISORDER
THE CRIMINAL PROCESS



Justice is respect for human dignity

PROUDHON

Available by mail from Information Canada, Ottawa, K1A 0S9
and at the following Information Canada bookshops:

HALIFAX
1683 Barrington Street

MONTREAL
640 St. Catherine Street West

OTTAWA
171 Slater Street

TORONTO
221 Yonge Street

WINNIPEG
393 Portage Avenue

VANCOUVER
800 Granville Street

or through your bookseller

Price: Canada: $2.75
Other Countries: $3.30

Catalogue No. J 31-18/1976

Price subject to change without notice

Information Canada
Ottawa, 1976

Law Reform Commission of Canada

Commission de réforme du droit du Canada

March 1976

The Honourable S. R. Basford,
Minister of Justice,
Ottawa, Ontario.

Dear Mr. Minister:

In accordance with the provisions of Section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on mental disorder in the criminal process.

Yours respectfully,

E. Patrick Hartt
Chairman

Antonio Lamer
Vice-Chairman

J. W. Mohr
Commissioner

G. V. La Forest
Commissioner

A REPORT TO PARLIAMENT ON MENTAL DISORDER IN THE CRIMINAL PROCESS

A REPORT
TO PARLIAMENT
ON
MENTAL DISORDER
IN THE
CRIMINAL PROCESS

Commission

Honourable E. Patrick Hartt, Chairman

Honourable Antonio Lamer, Vice-Chairman

Dr. J. W. Mohr, Commissioner

Dr. Gérard V. La Forest, Q.C., Commissioner

Secretary

Jean Côté

Research Consultant

Tanner Elton

Other Members of Project Staff

Jacques Fortin

Bernard Grenier

Gerard Ferguson

Dr. R. E. Turner

Table of Contents

I. Introduction

A. The Nature of the Report

This report concerns the many ways mental disorder affects the criminal process. To some extent, it is a patchwork quilt made from bits of fabric taken from substantive criminal law, criminal procedure, evidence and other areas, then sewn together with the common thread of mental disorder. It would, of course, have been possible to consider the problems of the mentally ill separately as they arose in each of the areas mentioned. But our study convinced us that a principal difficulty of reforming the law dealing with the mentally ill offender has been a tendency to consider each particular substantive or procedural problem relating to mental disorder in isolation as if the rest did not exist and to ignore the subtle but important links between them all. We have chosen, therefore, to include in one report virtually all recommendations concerning the mentally disordered and the criminal process.

There is one important exception. We do not deal comprehensively with the important and complex issues stemming from the insanity defence. These will be considered in the future within the wider and, in our view, more appropriate context of criminal responsibility. Only certain procedural aspects of the insanity defence will be considered here.

The report contains many recommendations. These we divide into two categories: recommendations for implementation and recommendations for policy formulation. The distinction between the two need not be pushed too far, but generally we wish to distinguish between recommendations which can be considered for

immediate implementation and those which by their nature are directed at developing rational policies and attitudes within the criminal justice system.

B. The Aims of the Criminal Process

The impact of mental disorder in the criminal process may only be properly assessed where there is agreement as to what that process is to achieve. We therefore briefly restate our view on the aims and purpose of the criminal process.

(1) The criminal law, the foundation of the process, serves to protect us from the harmful effects of criminality and to promote and underline values shared by Canadians. This is done through education, by furnishing a necessary social response when basic values such as personal security, honesty and protection of property are infringed. Such a view of the criminal law treats people as responsible individuals with rights and obligations, who may choose to do wrong and risk the consequences.

(2) The criminal trial is the institution through which persons accused of crimes are brought to account or exonerated and the threatened values reaffirmed. Its procedure is adversarial, structured as a dispute between the state and the accused and arbitrated by an impartial judge. The accused's presence and participation is essential; not only is he the reason for the proceeding, he also is an active party, answering the charge, engaging and dismissing counsel and suffering the consequences if convicted.

(3) From conviction flows sentencing and punishment, the final stage of the process. In our view criminal sanctions should further underline the dignity and well-being of the individual, both offender and victim. They should be humane, proportional to the offence and treat like cases in a like manner. As well, account should be taken of the need to reconcile the offender with the victim and society through restitution and compensation.

(4) Underlining the entire criminal process should be a principle of restraint. Because the criminal law is society's most destructive and intrusive form of intervention, it should only be invoked

with caution and with full recognition of its moral and practical limitations. It is society's last resort to be used only when milder methods have failed.

The above view represents the Commission's position arrived at after careful thought and deliberation. Its development may be traced through our Working Papers and it is stated and restated in our Reports to Parliament.

C. Mental Disorder and the Criminal Process

Given this view of the criminal process, when is it relevant to consider an individual's mental disorder?

(1) At the outset, mental disorder may affect the exercise of the principle of *restraint* in the use of the criminal law. An individual's mental disorder might influence the decision whether the criminal law should be used at all.

(2) At the beginning of and during trial mental disorder may affect the exercise of the principle that parties to a criminal proceeding should be *aware* and be able to *participate*. Where an accused is so mentally disordered as not to realize the personal import of the proceedings or direct his defence, the question arises as to whether he should stand trial at all.

(3) Mental disorder may also affect the exercise of the principle of *responsibility* from which springs the presumption that individuals can control and be held accountable for their acts. For individuals so afflicted by mental disorder as to be unable to understand the consequences of their acts or exercise a minimum of control over their behaviour, the question arises whether they should be held criminally accountable in court.

(4) After conviction mental disorder may affect the principle that dispositions should be *humane and just*. A sentence depriving a mentally disordered offender of essential psychiatric services that would otherwise have been available would be both inhumane and unfair.

It follows that a person's mental state becomes relevant in different ways at each phase of the criminal process.

Before trial—The relevant question is whether the criminal process should be used at all or whether some other non-penal procedure would be more appropriate.

At trial—There are two questions: Is the accused mentally fit to stand trial? And, if so, was he mentally capable, entirely or partially, of being held responsible for his acts.

After trial—To what extent should mental disorder be taken into consideration when sentencing a convicted offender?

The report later considers each of these questions under the headings, "Pre-Trial Issues", "The Issue of Responsibility", "The Issue of Fitness" and "Post-Trial Issues". We first consider three preliminary concerns important to the entire process.

II. Preliminary Concerns

A. Legislative Language

Although legislation is not a principal cause of problems in this area, it does little to help. The sections of the Code dealing with the mentally ill offender are poorly organized and articulated. This has led to ambiguity and misunderstanding as to the purpose and intent of many of the present sections. Moreover, the Code is incomplete and further confusion results from the incomplete articulation of principles and procedures.

It is important, therefore, that sections of the Code dealing with the mentally ill offender be carefully re-examined in light of recommendations made in this report, and that the legislative language be rationalized and clarified to clearly articulate and differentiate between the various legal concepts and procedures affecting mental disorder in the criminal law.

B. Attitudes and Information

As is often the case, the most important reform in this area is also the most elusive and difficult to implement. It concerns our attitude towards the mentally ill offender. As we said in our Working Paper, "attitudes and the values they reflect determine the possible and the impossible in law reform, for attitudes form and define the limits of human activity".

Our study of the mentally ill in the criminal process revealed that many problems stem from an unjustifiable fear of mentally

imbalanced delinquents and from the unjustified expectation that psychiatric and criminal intervention can deal effectively with such individuals. These attitudes are largely responsible for the needlessly long terms of detention commonly imposed on mentally ill offenders and the lack of development and the infrequency of recourse to more efficient, less restrictive non-penal measures.

But changing attitudes is a difficult and an elusive task. It cannot be achieved simply through implementing one or a series of specific recommendations. It involves a long process of dialogue and education which government may seek to influence but cannot control. What government can do, however, is to encourage the gathering and dissemination of clear and accurate data on the problems of the mentally ill in the criminal process. Such information, we suggest, is essential to both the rational development of criminal policy toward the mentally ill and the re-ordering of social attitudes toward mentally disordered offenders.

In particular, the government, through appropriate agencies, should:

(1) inform the legislators of the shortcomings and strengths of the present law and practice, and

(2) provide information and systems for the evaluation of future changes in procedure and practice.

C. Policy Towards the Mentally Ill

Far too often the present law reflects policies that are largely the result of myth and misunderstanding as to the character and nature of the problems created by mentally ill offenders in the criminal process. The development of clear and rational policies toward the mentally ill offender requires accurate and factual description of the nature of the problems. Only then can practical solutions be developed and policy formulated. After careful study of the law and practice in this area, taking into account the aims of the criminal law as we perceive them, the lack of positive correlation between mental disorder and criminality or mental disorder and violent behaviour, and the well documented limitations of psychiatric assessment, treatment and prediction of dangerousness,

we advance the following general guidelines for the formulation of policies to deal with mentally disordered individuals in the criminal process.

(1) When dealing with a mentally disordered individual, the criminal process should be invoked only when it is the best available alternative. Implicit in this guideline is the assumption that increased emphasis will be placed on the pre-trial diversion of the mentally ill.

(2) Mentally disordered persons are entitled to the same procedural fairness and should benefit from the same protections of personal liberty as any other person. In this regard extreme caution should be exercized before there is any deprivation of personal liberty in the form of a psychiatric examination or treatment. As well, psychiatric treatment of any kind should only be given after obtaining the consent of the individual, subject only to the limited exceptions outlined later in this report.

(3) In those instances where some form of detention is deemed necessary, it must be subject to review and in no circumstances should it be indeterminate.

III. Pre-Trial Issues

Before trial the basic question to be asked is whether the criminal process is appropriate. This is simply another way of asking what is the best way of dealing with a particular problem. The criminal process is one, but only one possibility. This active seeking of non-penal alternatives has been called "diversion".

"Diversion" could be described as an effort to deal with social conflict and problem resolution without resort to the criminal process. Seen in this way, diversion is more an approach than a rule, an approach which manifests itself more through attitudes than procedures. Diversion is dealt with in depth in our series of Working Papers on Sentencing and Disposition and in our Report to Parliament on Sentencing Guidelines. Here we consider those aspects of police and prosecutorial diversion which directly touch the mentally ill and the effect of mental disorder on the decision to grant bail.

A. Police Screening of the Mentally Ill

People faced with a difficult situation often respond by calling the police. Often, therefore, the mentally disordered person's first contact with the criminal process is with a police officer. The traditional police response, when evidence is sufficient, is to dispose of the incident through charging. When dealing with a mentally ill individual, some police officers do exercise their discretion not to

charge, but the practice is infrequent, usually intuitive without reference to clearly stated policy or criteria and of uneven application. As well, there is insufficient communication between the community's law enforcement agencies and those agencies that deal with the mentally ill. This has the effect of frustrating proper pre-trial diversion of the mentally ill even where the procedural framework for such diversion does exist.

The role of the police in the community is changing and increasing demands are being made upon police officers. Because of this, we consider it important that as part of their professional formation policemen be trained to recognize and deal with the mentally ill offender, to be knowledgeable of available community resources and means of access to those resources and to encourage the consensual community-based solution of marginal cases.

We do not suggest that the police should become lay psychiatrists—just better prepared to seek non-criminal dispositions for a range of troublesome incidents with which they must frequently deal. This recognizes that the police should not be viewed merely as an extension of the coercive power of the criminal law, but also as agents of the community authorized to meet difficult situations in a variety of ways. In this regard, we point out that the police are granted a variety of powers under municipal and provincial acts which differ from traditional law enforcement. It is natural, therefore, that the training of police officers reflect the increasing portion of their work taken up by these "non-penal" responsibilities.

It is important that stated policies be developed by police departments in conjunction with the provincial Attorney General's Department to aid in the police screening of the mentally ill. When formulating such policies, the following should be taken into account:

(1) whether the nature of the apparent disorder is so serious as to warrant taking the individual into custody;

(2) whether there exists in the community the necessary facilities to deal with the individual;

(3) whether the nature of the offence and the surrounding circumstances are not so serious as to warrant charging;

(4) whether the impact of arrest and charging on the accused and his family would be excessive having regard to the harm done.

The procedure adopted in a particular area will depend on a host of local factors such as the size of the community, the size of the police force, the availability of psychiatric facilities, the co-operation of local hospitals, the co-operation and consultation of the law enforcement and mental health agencies, not to mention the temperament and make-up of the community. It would be foolish to suggest the adoption of one system for the entire country. It is necessary, however, that experiences be shared, general guidelines be established and model procedures be developed. This should be undertaken by the Ministry of Justice, the Ministry of the Solicitor General and their provincial counterparts.

B. Mental Disorder and Bail

Once the charge has been laid the question arises whether the accused will be granted bail or await trial in custody. This question is considered by the police at the time of arrest, by the justice of the peace before or at arraignment, or by a justice of the peace in a "show cause" hearing. At each stage an accused's apparent mental state may influence the decision to grant or refuse bail.

We feel that considering an accused's mental state in the granting of bail is proper and, in some cases, vital. It is important, however, to try to minimize the tendency of refusing bail to mentally disordered persons who would not otherwise be detained under the usual bail criteria. The recommendations of this Report concerning the remand provisions of the Code will put the necessary psychiatric evidence before the justice in cases where psychiatric assessment is advisable. In principle no mentally disordered accused should be refused bail if his disorder is unrelated to the offence charged and he would not otherwise be detained by the civil authorities. If his psychiatric state, although unrelated to the offence, makes him a danger to himself or others, the appropriate provincial legislation should be used. If the accused's psychiatric state is directly related to his crime, pre-trial detention criteria under the criminal law would be appropriate.

C. Prosecutorial Diversion of the Mentally Ill

It is generally accepted that prosecutors have wide discretion to settle cases and that an accused's mental illness will be considered in the decision whether to proceed to trial. Part of a prosecutor's duty is to ensure that inappropriate cases are settled or diverted before trial. It is important, therefore, that they be aware of community facilities and the various possible options for diverting the mentally ill before trial. It is also important that a policy for the prosecutorial diversion of the mentally ill be developed bearing in mind the same criteria as previously mentioned for the police. That policy should also be highly visible and require accountability in its exercise.

A procedure to encourage increased pre-trial discovery (as considered in our Working Paper, *Discovery*, and to be considered in a future Report to Parliament) would encourage consistency and openness in the pre-trial diversion of the mentally ill. Whatever the eventual procedure, it is important to encourage pre-trial discussion of the possibility of diversion, preferably with the participation and consent of the accused and his counsel. A prerequisite to the success of such discussions would be the early availability to both sides of a psychiatric report on the accused.

IV. The Issue of Fitness

Insofar as the criminal trial retains an adversarial procedure, an exemption based on the accused's mental inability to participate will be necessary. In spite of the increasing use of counsel for the mentally ill and the legal guarantees of representation, we consider the presence of the accused at trial, both mental and physical, to be essential. It is important, therefore, that the accused be mentally fit to stand trial.

A. The Proper Rationale of the Rule

There has been confusion as to the proper role of the fitness rule. After considering the various alternatives, we consider the following rationale to be the correct one. The purpose of the fitness rule is to promote fairness to the accused by protecting his right to defend himself and by ensuring that he is an appropriate subject for criminal proceedings. The fitness procedure should be formulated to be in accord with this rationale.

B. The Scope of the Rule

Although the Commission did consider the possibility of enlarging the scope of the fitness rule to causes of unfitness other than mental disorder, we feel it appropriate in this paper to recommend only that mental disorder continue to be one cause of unfitness. The broader question of whether other causes such as physical disability

should also be included is a question of criminal procedure which goes beyond the scope of this Report.

C. Criteria of Unfitness

There has been confusion concerning the criteria of unfitness, partly because none appear in the Criminal Code. We consider the following criteria to be the most appropriate:

A person is unfit if, owing 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.

These criteria should be clearly articulated in the Code.

The third criteria, an ability to communicate with counsel, has created problems in some jurisdictions where amnesia is considered, of itself, a cause of unfitness. We do not feel this should be the case. The fitness rule is concerned with *present* mental ability to communicate. If the accused is rational and is able to tell his lawyer that he does not remember any of the circumstances of the alleged offence, he should be considered fit to stand trial. To avoid confusion, the Code should specifically exclude lack of recollection as a cause of unfitness.

D. Who Should be Able to Raise the Issue of the Accused's Unfitness?

We considered four possibilities: the accused only, the accused and judge but not the prosecution, the accused, judge and prosecution or a panel of experts. Although each choice has advantages and disadvantages, we feel the present practice of al-

lowing both parties and the judge to raise the issue of unfitness is the most appropriate.

E. When Should the Issue be Raised?

Although an accused suffering from a mental disorder would probably show signs of his impairment soon after his arrest, under present procedure the question of an accused's fitness may only be raised at trial. Not raising the issue before trial may result in an unfit accused awaiting trial in jail, being at liberty without the benefit of therapy or being remanded for observation under a provision of the Code not expressly dealing with fitness. It is important therefore that provisions be made to raise the fitness issue at any time from arraignment to verdict so as to ensure immediate attention for a mentally disordered accused. The determination of the issue, however, may only take place at the preliminary hearing or trial.

F. When Should the Issue be Decided?

At present, the issue of an accused's mental fitness to stand trial may only be decided at trial, and only then subject to the possibility of the issue being postponed to the end of the case for the prosecution.

In appropriate circumstances we feel it should be possible to deal with the issue of fitness at the preliminary hearing as well. This could only be done, however, where it is not in the interests of justice to proceed on the merits of the charge. If the accused, through counsel, wishes to contest the charge, the presiding judge or magistrate should consider postponing the issue until the end of the preliminary hearing. If, at that time, the Crown has not made out a *prima facie* case against the accused, he should be discharged and there would be no fitness hearing. If, however, there is sufficient evidence to bind the accused over for trial, the presiding judge or magistrate should consider whether it would be in the interests of justice to further postpone the issue of unfitness until

trial. In making this determination he would use the same criteria as outlined for the trial judge in the next part.

G. Postponing the Issue of Fitness

The present law allows the postponement of the fitness issue to the end of the case for the prosecution. We would go further and recommend that there be the possibility of full adjudication on the merits before an accused risks detention as unfit. The procedure we suggest would allow the judge to postpone the determination of the fitness issue to the end of the trial. In order to make such a procedure manageable two further changes in the present law are necessary.

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.

H. Disposition Should be Made by the Court

At present, the disposition of the unfit accused, a federal power, has been delegated to the Lieutenant Governor of the provinces. We recommend that this power no longer be delegated and that it be exercised by the trial judge or in the case of a preliminary hearing, by the presiding magistrate.

We make this recommendation for several reasons. First, we consider the Lieutenant Governor's warrant to be inappropriate for *any* disposition for reasons to be considered in greater detail later in this report. Second, of the various alternatives to the present system, we consider disposition by the court to be the best. No one is in a better position to fully consider the disposition of the unfit accused. After a complete fitness hearing, the judge or magistrate either has or, in the procedure we recommend, may obtain a full medical report, and psychiatric testimony, and he may also call upon his own experience with the accused at trial. This alternative also has the virtue of being open, judicial and subject to appeal.

The judge or magistrate must, however, make his decision on the basis of known criteria which, **we recommend,** should be articulated in the Criminal Code. We consider the appropriate criteria to be:

(1) the gravity of the offence charged,

(2) the danger the accused represents to himself and society,

(3) the likelihood of the accused regaining sufficient mental capacity to be considered fit,

(4) the recommendations of the medical personnel for treatment which would best facilitate the recovery of the accused.

In applying these criteria, the judge should consider the relationship between the mental disorder and the crime charged. Where the disorder has a direct bearing on the seriousness of the offence, or where the offence is one for which detention would be appropriate, the disposition of the court should reflect the appropriate restrictions.

I. A Variety of Orders Should be Available

Automatic, indeterminate detention of an unfit accused is not justified. Any disposition must be directed toward facilitating the accused's recovery so as to permit him to return to court with a minimum of delay. Detention, then, is only justified for two reasons. First, where treatment available within the institution is likely to help the accused become fit and where no similar treatment not involving detention is available. Second, where the offence charged is one for which pre-trial detention is normally required. Otherwise, the interests of the accused or society are better served if the order of the court involves no or little deprivation of liberty. A finding of unfitness, therefore, should not always lead to detention and there should be a range of possibilities available, some involving little or no deprivation of individual freedom.

These would include at least three different orders:

(1) An order releasing the accused forthwith, subject to reindictment and trial if he later becomes fit to stand trial. This order would be appropriate for the chronically unfit accused who is

of no danger to himself or others. In such a case, treatment is a waste of time and detention serves no purpose.

(2) An order for treatment as an outpatient. This would be the appropriate order for an unfit accused who is not dangerous and who can be effectively treated without being institutionalized.

(3) An order for mandatory hospitalization until the accused regains fitness or until six months have elapsed. The order is for the unfit accused who, owing to the nature of his mental disorder or the crime of which he is accused, should be detained. If at the end of the six month maximum the accused has not regained fitness, the disposition must be reviewed by the court. It can be then renewed for subsequent periods of up to one year, but in cases where the charge is not one for which imprisonment is an appropriate sanction, or where the length of time the accused has been detained as unfit approximately equals the sentence of imprisonment to which, in the opinion of the judge, the accused would have been sentenced if his trial had proceeded and he had been found guilty, the order should not be renewed. If, at that time, the accused is so mentally deranged as to warrant further hospitalization, he could be detained under the appropriate provincial legislation.

J. The Fitness Hearing

When the issue of fitness is tried, the hearing required by the Code should be a thorough and full inquiry and all evidence relevant to the issue should be placed before the court. This, unfortunately, is often not the case. The problem, at least in part, stems from the lack of any procedural guidelines for such a hearing in the Code. The fitness procedure should be clearly articulated in the Code and should be explicit on the following points:

(1) *Absence of the jury*—Because fitness is decided by the judge, the fitness hearing should be held in the absence of the jury if there is one. As is the case with a voir dire, the jury does not take part in the deliberation and the proceedings of the fitness hearing could influence a jury's decision on the merits.

(2) *Presence of the accused*—There may be circumstances in which it would be detrimental to the mental health of the accused for him to be present during a fitness hearing. We think that a judge, relying on medical advice, should be able to proceed with the fitness hearing in the absence of the accused.

(3) *Expert testimony—Viva voce* medical evidence will only be heard if the psychiatric report is contested. Oral medical testimony is time-consuming and expensive and should be avoided whenever possible. The thoroughness of the psychiatric report and distribution of the report to both counsel should lessen the abuse of medical testimony in this area.

(4) *Burden of persuasion*—We feel that the degree of proof required in civil cases to be the most appropriate evidentiary burden in a fitness hearing. Because the hearing does not involve a consideration of guilt or innocence, the criminal burden of persuasion was felt to be too stringent.

Once there exists some doubt as to the accused's mental ability to stand trial, the issue of fitness must be raised. It cannot be waived by the defence or the prosecution. The issue is not to be treated as a charge or a defence but as a fact, the determination of which is vital to the trial process. It is the responsibility of all parties at the trial to put before the court all relevant information for the determination of the issue.

V. The Issue of Responsibility

The rule that individuals should be held responsible for their conduct is at the base of the criminal law, and criminal insanity has been its chief exception. For reasons more fully explained in our Working Paper, the Commission did not deem it appropriate to discuss the insanity defence in its consideration of mental disorder in the criminal law. We adopted this approach for two reasons.

First, in this report we are concerned with the practical and procedural implications of mental disorder in the criminal process. From a practical and procedural point of view the insanity defence is not numerically significant and would only distract from what we considered, in quantitative terms, to be more important considerations. Further, we were convinced that if the criminal law as it pertains to the mentally ill moves in the directions suggested in this report, the use of the insanity defence will diminish even further.

Second, criminal responsibility, the wider question raised by the insanity defence, cannot be adequately discussed in this context and should be considered separately. There is, however, at least one procedural aspect of the present law concerning the accused found not guilty by reason of insanity, that merits mention in this report.

A. Not Guilty by Reason of Insanity

An individual acquitted of a criminal charge ordinarily leaves the courtroom a free man. But not the accused "acquitted" by

reason of insanity. He is, in fact, often worse off than if he had been convicted. The judge is required to order him "held" in a place of "safe custody", "until the pleasure of the Lieutenant Governor is known". The usual consequence is indeterminate detention under a Lieutenant Governor's warrant. To characterize such a result as an "acquittal" is, to say the least, inappropriate. There are, we feel, two alternatives to the present law.

First, we could treat such an "acquittal" for what it really is, a criminal disposition at least tantamount to conviction and subject to the same controls and reviews as any other sentence of the court. Second, "not guilty by reason of insanity" could be made a real acquittal, subject only to a post-acquittal hearing to determine whether the individual should be civilly detained on the basis of his psychiatric dangerousness. This brings into practical effect what has always been the insanity defence's theoretical intent—to treat the "insane" individual as a psychiatric rather than a criminal problem.

If an insanity defence is maintained, the second is the only fair alternative. We therefore recommend that the verdict, "not guilty by reason of insanity" be treated as a true acquittal, subject only to the post-acquittal hearing mentioned above.

VI. Issues of Disposition

The Commission's recommendations on sentencing and dispositions are contained in our Report to Parliament on Sentencing Guidelines. Our purpose here is to consider the recommendations of that report from the particular perspective of the mentally disordered offender.

A. Principles of Sentencing and Mental Disorder

Briefly, the Commission feels that sentencing in the criminal process should clarify and underline the responsibility of the offender for the injury caused to society and the individual victim, and should reaffirm the importance of the social values infringed. The trial judge must try to ensure that:

(1) the innocent are not harmed;

(2) dispositions are not degrading, cruel or inhumane;

(3) dispositions and sentences are proportional to the offence;

(4) similar offences are treated more or less equally, and

(5) wherever appropriate, the need for restitution or compensation for the wrong done is taken into account.

We observe that such a sentencing policy:

(1) relegates rehabilitation and treatment to an important but secondary role,

(2) underlines that the primary concern in sentencing is the determination of a disposition that is fair and just in the circumstances.

This is not to say that rehabilitation (in this context, psychiatric treatment) has no place in sentencing policy. Treatment in the context of a just sentence should be provided to the same extent as any other citizen. But the Commission's position on sentencing has two important implications for the psychiatric treatment of offenders:

(1) first, the perceived need for treatment must not affect the length of the sentence;

(2) second, treatment administered within the context of the sentence pronounced by the court must be consented to by the offender.

This last point, the consent of the individual, will be considered in greater detail later in the report.

B. Mental Disorder and Community Disposition

Presently, a probation order may contain conditions of psychiatric treatment. Under the sentencing scheme proposed in our Report to Parliament on Dispositions and Sentencing in the Criminal Process, conditions could form part of a Good Conduct Order, a Reporting Order, a Performance Order or a Residence Order. In principle, conditions of psychiatric treatment may be of help to the offender but should only be made where:

(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.

The requirement of consent and full consultation with the receiving institution should avoid burdening already over-taxed psychiatric services with individuals they may not be able to help because of inadequate or non-existent services or lack of co-operation.

C. Hospital Orders

Because a person may be criminally responsible for his acts, yet mentally disordered, it is important that the judge be able to take the offender's mental disorder in account when pronouncing sentence. When a sentence of imprisonment, due to the seriousness of the offence, is deemed appropriate, a therapeutic disposition should be possible. We feel it is important that judges be empowered to order that a term of imprisonment be spent in whole or in part in a psychiatric facility. This sentencing alternative we call a hospital order.

The essence of our proposal is as follows:

(1) Where a person is convicted of a crime and has been sentenced to a fixed term of imprisonment, the accused, prosecution or presiding judge may raise the question whether a hospital order would be appropriate.

(2) Before a hospital order may be made, the judge should, unless extensive psychiatric information is available, remand the offender under the Criminal Code to a psychiatric institution to determine whether he is suffering from a psychiatric disorder that is susceptible to treatment and whether the institution to which he has been remanded or another institution is able and willing to provide a program of treatment.

(3) After having considered the psychiatric report and the representations of both defence counsel and the prosecution the presiding judge may, with the consent of the accused and the agreement of the appropriate psychiatric institution, order that the accused spend part or all of his sentence in a hospital or psychiatric institution.

(4) Release procedures, generally should be governed by the same principles and criteria as ordinary prison sentences and be under the general supervision of the Sentence Supervision Board or, in appropriate circumstances, the sentencing court.*

* In those cases where the sentence is based in whole or in part on denunciation, control of the sentence remains in the court, as proposed in our Report to Parliament, *Report—Guidelines on Dispositions and Sentencing in the Criminal Process.*

(5) An offender who has lawfully consented to the hospital order may request the Sentence Supervision Board or the Sentencing Court to order that the balance of his sentence be served in the correctional system even if he could still benefit from further treatment in the hospital. He could also apply to the Board to be transferred to another hospital if he is not receiving the anticipated treatment.

(6) The hospital administration may request the Sentence Supervision Board or the sentencing court to transfer the offender back to the correctional system at any time before the expiration of the hospital order. Before such a transfer is made, however, the offender should be informed in writing of the reason for the discharge and have the right to apply to the Sentence Review Board for transfer to another hospital.

(7) An offender sentenced to a hospital order shall be entitled to parole. In addition, the hospital authorities may recommend, for psychiatric reasons, that the offender be released on parole rather than returned to prison.

(8) An offender serving his sentence under a hospital order is deemed to be serving his sentence in prison for the purposes of escapes and being at large without lawful excuse. Other rights and privileges such as recreation, visiting, correspondence, or temporary absences will be governed by the rules and regulations of the psychiatric institution and such criteria of fairness and decency as may be provided for by law.

(9) The judge's decision to impose or not to impose a hospital order may be appealed in the same manner as any other sentence of the court.

The implementation of a system of hospital orders raises important practical questions of jurisdiction and cost. The hospital order is federal, the mental institutions who receive the offenders are provincial. As well, before a provincial hospital could receive an offender on a hospital order it would have to be able to provide security. Apart from the policy debate between the relative merits of "closed" and "open" institutions, there is the economic cost of requiring and maintaining the minimum security necessary. It follows that the Federal Department of Justice and the Department of the Solicitor General, as part of their evaluation of the Commis-

sion's proposal on hospital orders, should undertake consultations with the provinces on the jurisdictional and economic implications of the proposal.

D. Mental Disorder in Prisons

There are at present provisions in the Criminal Code, the *Penitentiaries Act* and provincial corrections legislation for the transfer of a mentally ill prisoner to a psychiatric facility. These provisions have not been particularly effective due in part to jurisdictional problems both between different provincial departments and the federal and provincial governments.

It is therefore important that the various governments and departments sort out their respective jurisdictions and co-operate to provide expeditious and efficient transfer provisions from prisons to psychiatric facilities. As was recommended for hospital orders, such transfers should require the consent of the prisoner and the agreement of the psychiatric facility which is to receive him. Either the prisoner or the hospital may request his return to the correctional system subject to review by the Sentencing Review Board. As well, what was said concerning hospital orders with respect to privileges, remission and parole apply equally here.

Section 546 of the Criminal Code permits the use of a Lieutenant Governor warrant to transfer a prisoner from a prison "to a place of safe-keeping to be named". The place "named" is almost always a mental hospital. This section is redundant where there are similar provisions for transfer in the relevant provincial and federal correctional legislation. It is also an unnecessary use of the Lieutenant Govenor warrant. We see no valid reason why a prisoner transferred from a prison to a mental hospital should become subject to a warrant of indefinite length not subject to appeal or judicial review.

E. Psychiatric Services in Prison

Prisons are not presently seen as institutions of treatment, custody taking priority over treatment, punishment over rehabilitation. There is, however, a recognized need for better psychiatric services

for penitentiaries and provincial correctional facilities and efforts are being made to upgrade existing services.

Treatment capacity in prisons is necessary in three situations: in emergency situations, in situations where for security reasons, the individual cannot be treated in society, or where the needed services are not available in the community. It is important that prisons have access to the various kinds of treatment mentioned above. Whenever possible, the treatment should be provided from the community as would be the case for any other citizen.

We realize that the provision of psychiatric services raises important jurisdictional problems. In some areas of Canada the existing provincial facilities are capable of servicing both the federal penitentiaries and provincial prisons. In others, the necessary services can only be provided by the federal government. Without minimizing the jurisdictional and constitutional difficulties, the governing principle must be to provide the necessary access to services as efficiently as possible, irrespective of the source of the service. Whether the tune is federal or provincial, the public purse pays the piper and any unnecessary duplication of services should be avoided.

VII. The Use of Mental Health Resources in the Criminal Process

A. The Use of Mental Health Experts and Facilities

Whenever "expert" is mentioned in relation to mental disorder and the law most people immediately think of psychiatrists. This need not be the case. Especially in the pre-trial phases of the criminal process but also at other stages, other psychiatric experts such as psychiatric nurses, social workers and psychologists, should and are being used. Here, we are not concerned with the professional designation of the experts but rather with their role and function.

Whenever the mental stability of an accused is questioned, the participation of mental health experts is essential. Our study has led us to conclude that present mental health resources are not being used efficiently and that there is a great deal of confusion and misunderstanding as to the proper role of the psychiatric expert in the criminal process. In this regard we make the following observations.

(1) The psychiatric expert does not observe or directly participate in the disputed incident; his evidence is by way of opinion based on special knowledge, training and experience. His role, then, is to advise the court on matters outside its own general knowledge and experience.

(2) His advice and guidance is intended to aid judicial decision-making, not to cloud or usurp it. This is not always the case and both judges and psychiatric experts must understand that it is not the function of the expert witness—psychiatrist, psychologist or otherwise—to decide the question in issue.

(3) "Fitness to Stand Trial" and "Insanity" are legal issues to be determined by the court. These terms are medically meaningless and it is improper to expect or (as is sometimes the case) to demand that psychiatrists determine them. Rather than forcing psychiatric experts into medically meaningless "yes-no" answers to questions on which they are no more expert than anyone else, we should encourage them to give evidence on what they know best—the psychiatric state of the accused.

(4) Although it is sometimes necessary for psychiatrists to appear personally in court, many court appearances could be avoided. Complete and understandable psychiatric reports and a provision to allow the deposition of written rather than *viva voce* testimony would greatly reduce the number of courtroom appearances of psychiatrists. This could be effected under 29(2)(*e*) of our proposed Evidence Code. As well, exchange of psychiatric information and communication between examining psychiatrists as part of general pre-trial discovery would reduce the possibility of contradictory testimony when psychiatrists do appear in court.

B. The Question of Consent

Germane to any discussion of psychiatric treatment in the criminal process is the question of the offender's consent. As is often the case in criminal law, the debate may only be resolved by choosing between competing values. Some feel that society is justified in imposing any treatment on offenders if it will reduce the possibility of further criminality. This assumes, however, that psychiatric treatment has a pronounced effect on criminality, an assumption not always borne out by the facts.

Others take the view that involuntary treatment of individuals in the criminal process is an unwarranted interference with basic individual rights, one of which is the right not to be subjected to

involuntary treatment. We are of this view and recommend that as a general rule there be no treatment of accused or offenders at any stage of the criminal process without consent.

In some quarters it is contended that a person involuntarily constrained by the criminal law may never give a free and voluntary consent, that the fear of reprisal or hope of gain will always taint whatever consent is given. Although we appreciate the concerns which give rise to this view, we believe the feared abuses may be guarded against and that, in most cases, a reasonably informed consent may be given or withheld.

As an important safeguard, we propose that any treatment being considered for an inmate or any individual in some way constrained by the criminal law be directed toward his personal welfare and well being and be in no way experimental or unnecessarily dangerous. We suggest, therefore, that treatment only be considered when all of the three following conditions are met:

(1) that the treatment be for the individual's personal benefit,

(2) that the treatment is established and recognized as likely to be effective for the condition diagnosed,

(3) that the treatment does not unreasonably subject the individual to danger to life, limb or mental impairment.

Only when these conditions are met should it be possible to obtain the individual's consent to treatment. With this caveat on the kind of treatment to which an individual may consent, we reiterate that, in principle, treatment should only be administered with the consent of the individual.

But as with most general principles, there are a few, limited exceptions. First, when there is a need for emergency treatment it may be administered without the individual's consent. "Emergency" should be construed very narrowly to mean necessary steps for the immediate preservation of life or protection from serious bodily or psychiatric harm.

The second exception concerns individuals who are unable to consent or cannot consent because they are mentally incompetent. Vital, here, is the definition of "incompetency". We see it as being very narrow, narrow enough to allow individuals to refuse treat-

ment on grounds which, objectively, may not seem reasonable. The question is not whether the individual's refusal is reasonable, but rather whether the individual is sufficiently mentally aware to make a decision, even though we may consider it wrong.

As well, a finding of incompetency should be subject to appeal and periodic review by a board consisting of several persons at least one of whom is not connected to the institution. It goes without saying that the kinds of treatment that may be considered are restricted in the same way as where individual consent can be obtained.

C. Remands and Reports

Remands—An important phase of the procedure dealing with an accused thought to be mentally ill is the court ordered remand for examination. The Criminal Code presently provides for remands of up to 30 or 60 days but these account for only a small fraction of the psychiatric examinations that occur. Many are made under the less stringent provincial remand provisions or by way of "informal" assessment. Discussions with psychiatrists and court officials reveal the following problems.

(1) Although the mentally ill usually manifest the symptoms of their illness at the early stages of the criminal process, the Code provides for no remand before the preliminary hearing.

(2) No attempt is made to tailor existing remand provisions to their purpose or to communicate the purpose of the remand to the examining psychiatrist.

(3) The present remand system does not take into account the different kinds of information and expertise required for the various legal issues to be decided.

(4) Although the Code now provides for flexibility as to the length of remands (up to 60 days) most remands are for the maximum periods and there is no provision for non-custodial examination.

To meet these problems we suggest the following. Remands for examination of accused or offenders suspected of being mentally

disordered should be made under the Criminal Code. When the need for psychiatric examination flows from an individual's involvement in the criminal process, it is important that the remand for such examination be provided by the criminal law. Informal and provincial remands may have the effect of depriving the accused of the safeguards provided by the Code. This, however, will only be possible if the Code's remand provisions are improved.

The Criminal Code should, therefore, provide for a variety of remand possibilities, some involving no or minimum detention. There must be flexibility in the remand system with a choice of remands appropriate for the different legal questions in issue. For example, psychiatrists tell us that of all the various things courts ask them to do, unfitness is the easiest and quickest to assess. Some even suggest that lay assessment would suffice in most instances. This being the case, the remand for an examination to determine fitness should be of relatively short duration. Also, because unfitness does not necessarily entail dangerousness, the examination should be made with no more restriction on the accused's freedom than if no examination were required. That is to say, if the accused would ordinarily be released pending trial, the examination should be on an out-patient basis. If, however, the accused is awaiting trial in custody, the examination could also be made in custody, either in the correctional facility or the psychiatric hospital.

The remand order by the court should be specifically linked to the nature of the psychiatric expertise sought and this intent should be clearly communicated to the psychiatrist. Because of the difference in the kinds of information the court is seeking from psychiatrists, it is important that the purpose of the report be clearly communicated to the psychiatrist. We consider this point further in the next part.

Wherever possible all pre-trial and trial remands should avoid deprivation of the accused's freedom. As a general principle, examinations before or during trial should not entail detention in a mental hospital. If examination in detention is felt necessary as a preventive measure or for therapeutic reasons, it must be justified by the person or authority alleging its necessity. Otherwise, the least intrusive remand should be used.

This, however, does not apply to post-trial examination for the purpose of hospital orders. At that time detention of the offender is inevitable and the examination would usually require observation for longer periods of time within an institution. This allows the staff of the institution to fully consider possible therapy programs, the degree to which the offender could benefit and whether they would accept him as a patient. It also allows the offender to become familiar with the institution and help him decide if he would rather spend his sentence there than in prison. As was indicated in the earlier section on hospital orders, the decision to enter therapy is his and the hospital's.

Psychiatric reports—Basic to effective use of mental health expertise is an understandable report appropriate to the issue. At present, however, the Code not only doesn't specify what psychiatric reports should contain, it doesn't even require that a report be made at all. This is an important defect in the Code and should be remedied.

There are, we feel, two basic requirements for all psychiatric reports. First, the judge must decide what information he needs and then clearly communicate this to the mental health expert. Second, the mental health expert must communicate his professional knowledge to the judge in a complete and understandable report. It is important, therefore, that the Criminal Code specifically state that psychiatric remands are for the purpose of preparing psychiatric reports. We further suggest that the form and content of the report be designed to encourage the understandable presentation of psychiatric evidence. It should also discourage psychiatrists from testifying in legally conclusive terms.

All psychiatric reports are not the same. Different issues arise at different stages of the process. It follows that the form and content of the reports will vary. Indeed, there are some kinds of information that should *not* be communicated to the judge before guilt or innocence is established. In the following paragraphs, we outline the general content of psychiatric reports, before, during and after trial.

(1) *Examination before trial*—An accused suspected of a mental disorder should be examined as early as possible to provide

information to both the defence and the prosecution as to how that particular case should be handled. The relevant issues before trial are the accused's fitness to stand trial and the possibility of diversion from the criminal process. Pre-trial reports should focus on these two issues and not contain information potentially prejudicial to the accused. For example, there should be no reference to the psychiatric likelihood of the accused committing an offence similar to that charged. This and other kinds of information could create the risk of convicting the accused for what he might do rather than for what he actually did.

(2) *Examination at trial*—At trial the relevant issues are fitness to stand trial and criminal responsibility. If fitness is the issue it should be the only question considered by the report. The report on criminal responsibility should limit the psychiatric evidence to that specific issue. When both issues are raised, they could be considered in the same report but in separate sections.

(3) *Examination after trial*—Examination after trial would only be ordered where the accused has been convicted and sentenced to a term of imprisonment. The purpose of the report would be to provide the judge with psychiatric information that is helpful in deciding whether a hospital order is appropriate. It would be comprehensive, considering the severity of the mental disorder, the possibility of treatment, the time required and whether the examining institution would receive the offender back as a patient or if they would recommend some other institution.

From the above, it follows that the Code should clearly indicate when psychiatric reports are to be prepared, why they are to be prepared and to whom they should be sent. The preparation of detailed report forms, however, should be worked out and continually reviewed by psychiatrists, lawyers and judges in various communities and jurisdictions. This would allow the adjustment of reports to changing scientific developments and local court and psychiatric facilities. It would also foster communication and understanding between psychiatry and the law. The Department of

the Solicitor General or the Department of Justice in consultation with the provinces should provide leadership and assistance by developing model report forms and check lists.

D. Lieutenant Governor's Warrant

"Held at the pleasure of the Lieutenant Governor"—a phrase which describes and justifies the detention of several hundred Canadians in various mental institutions across the country. They are in psychiatric facilities because of a perceived mental illness; they are detained "in safe custody" because of the criminal law. The detention, neither entirely medical nor entirely criminal, is authorized by a Lieutenant Governor warrant.

While most legal jurisdictions have provisions authorizing the detention of mentally ill offenders, the Lieutenant Governor's warrant (L.G.W.) is uniquely Canadian. It has five distinguishing characteristics: (1) jurisdictional complexity, (2) emphasis on custody rather than therapy, (3) indeterminacy, (4) non-reviewability, and (5) problems of termination.

(1) *Jurisdictional complexity*—The L.G.W. is a federal power contained in the Criminal Code, delegated to the provincial Lieutenant Governor, usually exercized by the provincial Attorney General or Cabinet, and most often administered by the provincial Department of Health. It cuts across constitutional jurisdiction between the federal and provincial governments, and across departmental jurisdictions within the provincial government.

(2) *Custody vs. therapy*—Although the warrant is ostensibly for the psychiatric benefit of the individual, the legislation is silent on treatment or therapy. The only authority given is to "keep safe". This is reflected in the relevant sections of the Code. For example, section 542, concerning an accused acquitted by reason of insanity, requires the trial judge to order the accused "kept in strict custody . . . until the pleasure of the Lieutenant Governor is known". A similar provision in section 543 deals with accused found unfit to stand trial. In most provinces, this is interpreted as meaning detention in custody. Although, theoretically, the "pleasure" of the Lieutenant Governor could be anything, it in-

variably is a warrant to safekeep the individual, usually in a security mental hospital. Nowhere does the legislation mention "hospital", "therapy", "treatment" or the like.

(3) *Indeterminacy*—How long is a person to be held in safe cutody? Until the "Lieutenant Governor" decides otherwise, because the warrant is indeterminate. Release is predicated on the occurrence of a future event, in this case, getting better. Until it is felt that "it would be in the best interesst of the accused and not contrary to the interests of society to release the accused", he remains in custody.

This is in contrast with the usual criminal sentence which is for a fixed term. The difference, of course, is based on the objective of each disposition. A sentence is to punish, and punishment, although unpleasant, can only go on for a pre-determined length of time. The L.G.W., on the other hand, is ostensibly for treatment (although, as mentioned earlier, there is nothing in the Code to indicate this). Treatment is intrinsically "good", therefore may go on forever and in far too many cases, has. For the individual from the inside looking out, one form of detention may look very much like the other.

(4) *Non-reviewability*—Detention under a L.G.W. is not subject to judicial review. The warrant is issued under the authority of the provincial sovereign and is not subject to either review or appeal. Even though we now have Boards of Review in most provinces that periodically consider the cases of all individuals held under L.G.W., these Boards only "advise" the Lieutenant Governor. If the advice is not followed, there is nothing the individual can do to compel his release or a review of his detention.

(5) *Problems of termination*—In fact, L.G.Ws. are not usually issued by the Lieutenant Governor but by the provincial Attorney General or the Cabinet, and it is they who decide when the warrants shall be terminated or varied. Most often, they follow the recommendations made to them by the Board of Review and the medical personnel involved. They can, and sometimes do, disregard these opinions for reasons which have nothing to do with the theoretical reasons for having L.G.Ws. It might be "politically" unwise to release a particular individual "at this time". And it is easy to

refuse because the denial need not be motivated or done in the open nor can it be appealed. Although actual abuse may be rare, the possibility remains.

Given the above description of the present L.G.W., what is our attitude towards it? Briefly, the use of L.G.Ws. as a means of disposition of an accused or prisoner suffering from a mental illness is incompatible with our overall sentencing policy and inconsistent with recommendations made in this report. We therefore recommend that it be abolished.

Before considering why we make this recommendation, let us briefly review the various ways individuals can be detained under L.G.Ws. There are three: first, persons found not guilty by reason of insanity, second, accused held not fit to stand trial, and third, prisoners transferred from provincial correctional facilities to mental hospitals. Of these three categories of warrants, we have recommended the repeal of the warrant for transfer of prisoners and that the disposition of unfit accused be exercised by the trial judge. As well, we recommend that the present verdict of "not guilty by reason of insanity" become a real acquittal, subject only to a post-acquittal hearing to determine if the individual is civilly committable.

Taken together the effect of these recommendations is to abolish the L.G.W. This accords with our position that dispositions should be made openly, according to known criteria, be reviewable and of determinate length. The present L.G.W. offends on all counts.

E. The Boards of Review

If the above recommendations are accepted and implemented, there will no longer be any need for the boards of review as presently constituted by section 547 of the Code. There is, however, an immediate need for study and rationalization of the boards which are in operation.

These boards periodically review the status of L.G.W. patients and make recommendations to the Lieutenant Governor. The Criminal Code authorizes the creation of the boards at the option of

the provincial governments and thus far seven provinces have established boards, two others have created boards which fulfill virtually the same functions and one has no board at all.

This arrangement, an example of co-operative federalism, reflects the constitutional division of powers, criminal law being federal, mental health being provincial. It is also a logical extension of the earlier delegation of the criminal law power of disposition of the mentally disordered accused or offender to the provincial Lieutenant Governor. On paper it appears to be an adequate and sound procedure.

In practice, however, it raises many difficult problems. First, there are the very important considerations of equality before the law. For example, an insane accused in Newfoundland, where there is no board, will not have his case reviewed. In Alberta, where there is a board created under the Code, he will be entitled to a review every six months, while in Ontario, where the Review Board is created under the Provincial Mental Health Act, his case will be reviewed only once a year.

There are other important differences between the boards, whether created by federal or provincial authority. In some provinces the review of the board, although only advisory in theory, is always accepted. In others, the recommendations are frequently ignored. The makeup of the boards differ, the resources available to the boards differ, the criteria they apply, the procedures they use, the material they examine, the rights they accord the prisoner—patients—all these differ from province to province. In sum, the differences far exceed the similarities.

No one is more aware of this state of affairs and the important questions it raises than the boards themselves. To date, the boards have held three meetings, the first in Quebec City in 1973, the second in Jasper, Alberta in 1974 and in Vancouver, B.C. in 1975. From these meetings came a series of resolutions which have helped the individual boards and aided the Law Reform Commission and the Federal Department of Justice in their studies of mental disorder in the criminal law.

The role of the boards of review as presently constituted requires further study on at least two levels. In the short term, there is an immediate need to standardize certain aspects of the boards'

operations. There is also a need to provide the services of such a board *everywhere* in Canada. This raises the question whether such boards should be provincial or federal.

A more long range study needs to be undertaken to consider the future role of the boards in the new scheme of sentencing and disposition we have proposed.

More precisely, there should be consideration of the relationship of the Review Boards and the proposed Sentence Supervision Board, and the effect of the abolition of the Lieutenant Governor's warrant.

We therefore recommend that the federal Department of Justice in conjunction with the provinces undertake the immediate study of the provincial boards of review to assess the operation of the boards and the need for standardization. At the same time, a more long range study should be initiated on the future role of the boards having regard to our recommendations in this and our other Reports to Parliament.

VIII. Summary of Recommendations

Rather than set out each recommendation as it appears, we decided to gather together in one section the major recommendations from various parts of the report. These are divided under the headings "Policy" and "Implementation", mentioned earlier.

A. Preliminary Concerns

Policy

R.1 The sections of the Criminal Code dealing with mental disorder should be carefully re-examined in light of recommendations made in this Report with a view to clarifying and clearly articulating the various legal concepts and procedures affecting mental disorder in the criminal law.

R.2 Clear and accurate data are essential to both the rational development of criminal policy toward the mentally ill and the re-ordering of social attitudes toward mentally ill offenders. In this regard the government, through appropriate agencies, should provide information and systems for the evaluation of future changes in procedure and practice.

R.3 The formation of policies to deal with mentally disordered individuals in the criminal process should be in accord with the following general guidelines:

(1) When dealing with a mentally disordered person, the criminal process should be invoked only when no other viable social alternative is available. Implicit in this

guideline is the assumption that increased emphasis will be placed on the pre-trial diversion of the mentally ill.

(2) A mentally disordered person is entitled to the same procedural fairness and should benefit from the same protections of personal liberty as any other person. In this regard extreme caution should be exercised before there is any deprivation of personal liberty in the form of a psychiatric examination or treatment. As well, psychiatric treatment of any kind should only be given with the consent of the individual, subject only to the limited exceptions outlined in this report.

(3) In those instances where some form of detention is deemed necessary, it must be subject to review and in no circumstances should it be indeterminate.

B. Pre-Trial Issues

Policy

R.4 Whenever appropriate, the pre-trial screening of mentally disordered accused should be encouraged by the police and prosecutorial authorities.

R.5 As part of their professional formation, police officers and prosecutors should be trained to recognize and deal with the mentally disordered offender, to be knowledgeable of available community resources and means of access to those resources and to encourage the consensual community based solution of marginal cases.

Implementation

R.6 Police and prosecutorial screening of the mentally ill should follow stated policies and be based on known criteria. It should therefore be required that policy directives to prosecutors, police or other officials dealing with the mentally ill be made available to the public. Such screening policies should consider the following criteria:

(1) whether the nature of the apparent disorder is so serious as to warrant taking the individual into custody;

(2) whether there exist, in the community, the necessary facilities to deal with the individual;

(3) whether the nature of the offence and the surrounding circumstances are not so serious as to warrant charging or proceeding to trial;

(4) whether the impact of arrest and charging, or the effect of trial on the accused and his family would be excessive having regard to the harm done.

R.7 Screening policies should be local to take into account community considerations. The Department of Justice, the Department of the Solicitor General and their provincial counterparts, however, should initiate and encourage an exchange of ideas and experiences, and undertake to develop guidelines and model police and prosecutorial procedures for screening of mentally ill persons.

C. The Issues of Fitness and Responsibility

Policy

R.8 An exemption from trial based on an accused's mental inability to participate should be maintained in Canadian criminal procedure.

R.9 The proper rationale of the fitness rule is to promote fairness to the accused by protecting his right to defend himself and by ensuring that he is an appropriate subject for criminal proceedings.

R.10 The present limitation of the fitness rule to mental disorder should be re-examined and the possibility of including other non-mental causes of an inability to participate at trial should be considered.

R.11 Detention of the unfit accused, either for examination or disposition should be regarded as a last resort and procedures not requiring detention must be considered first.

R.12 The verdict "not guilty by reason of insanity", if maintained, should be considered a real acquittal, subject only to a

mandatory post-acquittal hearing to determine whether the individual should be committed to an institution under provincial legislation.

Implementation

R.13 The criteria of unfitness should be articulated in the Code. The following criteria are suggested:

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.

R.14 The Code should specifically exclude lack of recollection alone as a cause of unfitness.

R.15 The Code should specify that the prosecution, the defence or the court may raise the issue of the accused's fitness to stand trial.

R.16 The Code should be amended to make it possible to raise the issue of an accused's fitness to stand trial at any time from arraignment to verdict.

R.17 Subject to the possibility of postponement, the issue of fitness should be determined at trial or, in appropriate circumstances, at preliminary hearings.

R.18 The Code should be amended to allow, in appropriate circumstances, full adjudication of the merits of the charge before the issue of fitness is determined.

R.19 The issue of fitness should be made a question of law to be determined by the presiding judge or magistrate or justice.

R.20 In order to facilitate the postponement procedure suggested in this Report, the jury should be able to deliver a conditional verdict.

R.21 Disposition of the unfit accused should be made by the trial judge on the basis of the following criteria:

(1) the gravity of the offence charged,

(2) the danger the accused represents to himself and society,

(3) the likelihood of the accused regaining sufficient mental capacity to be considered fit,

(4) the recommendations of the medical personnel for treatment which would best facilitate the recovery of the accused.

In the exercise of the above criteria the trial judge should be required to use the least intrusive form of disposition unless there are compelling reasons for doing otherwise.

R.22 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:

(1) an order releasing the unfit accused forthwith, subject to reindictment and trial if he later becomes fit to stand trial;

(2) an order for treatment as an out-patient;

(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. It could be renewed or varied, but in cases where the charge is not one for which imprisonment is an appropriate sanction, or where the time the unfit accused has spent in custody is, in the opinion of the judge, approximately the time he would have spent in prison had he been found guilty, the order should be vacated and the accused set at liberty.

R.23 The fitness procedure should be clearly articulated in the Code and be explicit on the following:

(1) the exclusion of the jury,

(2) the presence of the accused,

(3) the reception of expert evidence,

(4) the necessary burden of persuasion.

R.24 Section 544 of the Code (insanity of accused to be discharged for want of prosecution) should be repealed. It is almost never invoked and is incompatible with the above recommendations.

R.25 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.

D. Issues of Disposition

Policy

R.26 The primary concern of any sentence is the determination of a disposition that is fair and just in the circumstances. Treatment, psychiatric or otherwise, plays an important but secondary role and should not affect the length of sentence.

R.27 As a general rule, treatment administered within the context of a just sentence must be consented to by the offender and the receiving institution.

R.28 Due to the complex jurisdictional questions which are often involved, there is a pressing need to encourage consultation between the various levels of government and between the various agencies involved so as to provide the services without costly and unnecessary duplication.

Implementation

R.29 Conditions of psychiatric treatment may form part of a Good Conduct Order, a Reporting Order, a Performance Order or a Residence Order (as outlined in our Report to Parliament) on or as a condition of the present system of probation, but only 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.

R.30 The trial judge should be able, in appropriate circumstances, to order that a portion of the entire term of imprisonment

imposed on an offender be spent in a mental hospital. This disposition we call a hospital order should operate according to the procedure outlined in this Report.

R.31 There should be provisions in provincial correctional legislation and the federal *Penitentiaries Act* for the transfer of mentally ill prisoners from prisons to mental institutions. The Uniformity Conference held each year with the provinces and the Department of Justice should ensure that such legislation is in place and is uniform.

R.32 Section 546 of the Criminal Code should be repealed as redundant and unnecessary.

E. The Use of Mental Health Resources in the Criminal Process

Policy

R.33 The role of the mental health expert in the criminal process should be to advise the court on matters outside its own general knowledge or expertise. The mental health expert should not be encouraged to usurp judicial decision making. In particular, mental disorder amounting to criminal irresponsibility and unfitness to stand trial should be reaffirmed as legal, not medical issues to be determined by the judge.

R.34 However, it must also be recognized that the participation of mental health experts in the determination of the above legal issues is essential. Rather than forcing mental health experts into medically meaningless "yes-no" answers to questions on which they are no more expert than anyone else, the procedures should be designed to encourage such experts to give evidence on what they know best, the psychiatric state of the accused.

R.35 Because of the relative scarcity of psychiatric resources in the community, procedures should be designed to use them efficiently.

R.36 As a general principle, there should be no treatment of individuals within the criminal process without consent.

R.37 To safeguard against the potential of abuse in the administration of treatment to individuals constrained in some way by the criminal process, the Code should provide that no treatment be undertaken unless:

(1) the treatment is for the individual's personal benefit,

(2) the treatment is established and recognized as likely to be effective for the condition diagnosed,

(3) the treatment does not unreasonably subject the individual to danger to life, limb or mental impairment.

R.38 There should be only two exceptions to the general rule of no treatment without consent. These are:

(1) in emergency situations where treatment is necessary for the immediate preservation of life or protection from serious bodily or psychiatric harm,

(2) when the individual is unable to consent because he is mentally incompetent to do so, but incompetency should be narrowly construed in the manner described in this report.

R.39 The incompetency of an individual within the criminal process should be determined by a board of at least three persons, one of whom is not connected or employed by the institution holding the individual under consideration. Once made, a decision of incompetency should be subject to appeal and periodic review.

R.40 Court remands for examination of mentally disordered accused should be made under the Criminal Code. As well, the Code should contain a variety of possible orders, some involving minimal interference with the individual's freedom.

R.41 The Criminal Code should specifically state that the purpose of such remands is to prepare a psychiatric report. Further, the examination should be linked to the specific expertise sought by the court and the Code should specify when and to whom the reports should be sent.

R.42 The Code should also contain guidelines on the general content of the report. Due to the different kinds of expertise

required by the court, it will be necessary to differentiate beween reports required before, during and after trial.

R.43 Because of the differences in facilities across the country the detailed report forms and procedures should be worked out by local committees. The Department of Justice, the Department of the Solicitor General and their provincial counterparts should provide leadership in this area by developing model reports and procedures.

R.44 One of the effects of the recommendations made in this report is to abolish the Lieutenant Governor's warrant as a means of disposition of mentally disordered accused or offenders. This has special repercussions on the boards of review established under section 547 of the Criminal Code. A re-examination of the purposes and functions of these boards should be undertaken to assess their present purpose and function and their future role having regard to recommendations made in this and our other Reports to Parliament.

Appendix

Contributions

This report is based on our Working Paper, *Mental Disorder in the Criminal Process,* background papers, consultations with individuals, groups, associations and government departments, and on subsequent research. As such, it is the result of the efforts of many different people.

Although it is impossible to mention all those who contributed, we are indebted to the many forensic psychiatrists who responded individually to our papers, to the various study committees set up by the Canadian Psychiatric Association, to the Provincial Boards of Review who responded both individually and through their recently formed association, to the research and clinical staff of the Clarke Institute of Psychiatry, the Philippe Pinel Institute, and the Mental Health Centre in Penetanguishene, Ontario, to the Canadian Mental Health Association, to the Canadian Association for the Mentally Retarded, to the British Columbia Forensic Services Commission and many others, such as the Western Workshop on Mental Disorder, who provided insight to specific areas of concern. Apart from the important information and insights this wide and varied consultation provided, it demonstrated the large number of concerned and dedicated individuals working to improve the law of the mentally ill in Canada. We trust that this report will be a positive step to the same end.

We would also like to express our appreciation to former Commissioners, our dedicated staff, and to the following consultants who contributed in a variety of ways.

Former Commissioners

M^me^ Justice Claire Barrette-Joncas
Dean Martin L. Friedland
John D. McAlpine
Mr. Justice William F. Ryan

Advisors and Contributors

Dr. J. D. Atcheson
Dr. L. Beliveau
Denise Beliveau
Dr. W. E. Boothroyd
Dr. B. Boyd
Jean-Pierre Bussières
Colin Campbell
Dr. F. C. R. Chalke
Dr. J. Clayton
Dr. Bruno Cormier
Dr. R. Coulthard
Dr. J. P. Duffy
Dr. J. D. Earp
Patrick Fitzgerald
Cyril Greenland
Mr. Justice Haines
Keith Jobson
André Jodouin
Judge Harold Keenlyside
Mark Krasnick
Dr. P. Laberge
Dr. R. Lajoie
Mr. Justice Liberman

Dr. I. McDonald
Dr. K. McKnight
Dr. G. Maier
Judge René Marin
Dr. J. E. Miles
Leon Mitchell
Jacques Morency
R. Parker
David Pomerant
Dr. V. Quinsey
Mark Raetzen
Alan Reid
Darrell Roberts
Dr. L. Roy
John Scollin
Dr. J. Talbot
Duff Waddell
Dr. D. M. Wickware