Chapter 14: Recommendations for Reform

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A. Chapter One: Introduction

1. Law schools should provide more education to students in the recognition of clients' mental disabilities, and the special ethical and practical difficulties of representing mentally disabled clients. The courses should include recommendations for effective communication and representation as well as methods for locating professionals and agencies that deal with mentally disabled persons.

2. Lawyers, mental health experts, mental handicap experts and community groups should examine the relationship between mental disability and criminal activities. Advocacy groups should consider educating legislators and others about this relationship and about alternatives to the current criminal justice system.

Generally, there needs to be more contact between these groups so that each group becomes better informed about the unique issues facing mentally disabled persons.

3. Lawyers and judges should become educated about the special needs of mentally disabled clients. In particular, lawyers should become aware of the long-range effects of their strategies when the client is mentally disabled.

For example, a mentally disabled client who has plead guilty after charged with an offence may find that treatment and housing are unavailable when he leaves prison.

4. Lawyers should be educated about which agencies and support persons to contact in order to better represent and communicate with a client who is mentally disabled.

5. Lawyers should become aware of all possible alternatives to incarceration and the possible effects of these alternatives on the mentally disabled client.

For example, lawyers should canvass the possibility of voluntary commitment with the client to negotiate with the Crown as an alternative to the criminal justice system.

6. The government should improve support programs for de-institutionalized mentally disabled individuals who are re-integrated into the community.

Some mental health experts argue that with appropriate support in the community, the risk of encountering the criminal justice system is diminished.[1]

7. The government should improve support programs for mentally disabled people while they are inmates, and after their release into the community.

8. Lawyers and caregivers should investigate alternatives to involuntary committal—other than the criminal justice system—in order to obtain treatment for mentally disabled persons.

We should curtail the use of the criminal justice system as a means of obtaining treatment for mentally disabled persons.

B. Chapter Two: Diversion

9. Police officers should be fully informed about all available community resources that could be used as alternatives to processing a mentally disabled person thorough the criminal justice system.

10. Police forces and Crown prosecutors across Canada should disclose their selective enforcement policies and should publish guidelines for diversion.

Publishing guidelines for diversion avoids the uncertainty that currently exists and could lower the possibility of discrimination in the exercise of discretion. See for example, Crown Prosecutor's Manual, Chapter on Adult Alternative Measures online:

[1] See discussion in Chapter One, Introduction, under I. B. 1. Social Trends Away from Institutionalizing Mentally Disabled Persons and Chapter Thirteen, Mentally Disabled Persons in Prison and Jail, under Recidivism and Mentally Disabled Prisoners.

https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/AdultAlternativeMeasuresProgram.aspx

The Law Reform Commission also recommended that when formulating the policies the following should be taken into account:[2]

> (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.

11. If called to act in a situation involving a person with a mental disability who allegedly committed a minor non-violent criminal act, police officers should be encouraged to negotiate a voluntary disposition, which may consist of a referral to a mental health facility, but may also involve alternatives to treatment, such as summoning the assistance of the person's friends or family.

This is the standard recommended by the American Bar Association's *Criminal Justice Standards on Mental Health,* 2016, Standard 7-2.2 (b).

12. If there are pre-trial negotiations between the mentally disabled client and the Crown (or police) regarding diversion, the mentally disabled offender should be represented by counsel.

Mentally disabled persons may be particularly vulnerable during negotiations. For example, the person may agree to admit that she is guilty of an offence, even though the Crown does not have sufficient evidence, or where a defence might be available. Thus, a lawyer should be available to advise the accused during the negotiation process.

13. When processing a mentally disabled person on charges based on offences that are *not* non-violent, as soon as possible after arrest, the police should, in consultation with the accused's lawyer, arrange for an appropriate mental health professional to provide

[2] Law Reform Commission of Canada, *Mental Disorder in the Criminal Process* (Ottawa: Supply and Services Canada, 1977) at 10.

evaluation, treatment or habilitation.

This is similar to the standard recommended by the American Bar Association in its *Criminal Justice Standards on Mental Health,* 2016, Standard 7-2.4.

14. If a mentally disabled person is arrested, the Crown and all custodial officials who will be dealing with the person should be made aware that the arrestee has a mental disability. Custodial officials should screen detainees for mental disabilities and should report any observation of mental disorder to the person in charge of detention at the facility.

This is similar to the standard recommended by the American Bar Association in its *Criminal Justice Standards on Mental Health,* 2016, Standard 7-2.5(b).

15. Attorneys General should publish guidelines for prosecutors dealing with the initiation of criminal proceedings. In particular, the guidelines should set out the requirements when the accused is mentally disabled.

The publication of guidelines was recommended by the Law Reform Commission of Canada in its Working Paper 62 in 1990.

16. Prosecutors should make full use of Criminal Code s 717—the Alternative Measures provision.

This provision permits measures other than judicial proceedings to be used to deal with an adult who has been charged with a criminal offence.

17. Mentally disabled persons should be fully informed about their rights should they be voluntarily or involuntarily committed into a mental health facility.

18. Lawyers should become aware of all diversion options and should discuss these options fully with their mentally disabled clients. The legal, social and practical effects of civil commitment, as opposed to involvement in the criminal justice system, must be canvassed with the clients.

19. Law enforcement officials, lawyers and mental disability advocates should work together to develop a protocol regarding the role of "normalization" in obtaining an effective resolution in a criminal matter involving a mentally disabled accused.

20. Canadian provincial governments should consider the formulation of specialized

Mental Health Courts, especially for mentally disabled offenders who face minor criminal charges.

These courts are based on therapeutic jurisprudence and restorative justice principles, and emphasize an individualized approach using a team with specialty in mental disability consisting of judges, prosecutors, psychiatrists, case workers and probation officers. These should emphasize treatment.[3]

C. Chapter Three: Solicitor and Client Issues

Capacity Issues

21. Lawyers should be well informed about noticing and dealing with a client who lacks capacity to retain a lawyer or understanding the nature of a retainer. In particular, they should follow the guidance (or similar guidance) as provided in the Law Society of Alberta's *Code of Conduct* (2018), under 3.2-15 *Clients with Diminished Capacity*, and its accompanying Commentary.[4]

Similar provisions may be found in the Federation of Law Societies of Canada's *Model Code of Professional Conduct* (March 2017).

22. Lawyers may find that taking instructions from a mentally disabled client can pose ethical and practical difficulties. Lawyers should become well informed about and follow guidelines similar to those found in the Law Society of Alberta's *Code of Conduct* (2018), Commentary under Rule 3.2-15 *Clients with Diminished Capacity*. When dealing with a client the lawyer believes is incapable of giving instructions, the lawyer should follow the advice given in the Commentary to this rule.[5]

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[3] Sue-Ann MacDonald *et al. Mental Health Courts: Processes, Outcomes and Impact on Homelessness* (Canada: Université of Montreal, 2014) at 7. Online: https://www.canada.ca/en/employment-social-development/programs/communities/homelessness/publications-bulletins/mental-health-courts.html#h2.1.

[4] [1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

[5] [2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity

Similar provisions may be found in the Federation of Law Societies of Canada's *Model Code of Professional Conduct* (March 2017). The American Bar Association's *Criminal Justice Standards on Mental Health 2016,* provides the following guidance:

> **Standard 7-1.4. Roles of the attorney representing a defendant with a mental disorder**
> (a) Consistent with the ABA Resolution on Comprehensive Criminal Representation, attorneys who represent defendants with mental disorders should provide client-centered representation that is inter-disciplinary in nature. These attorneys should be familiar with local providers and programs that offer mental health and related services to which clients might be referred in lieu of incarceration, in the interest of reducing the likelihood of further involvement with the criminal justice system.
>
> (b) Attorneys who represent defendants with mental disorders should work particularly closely with their clients to ensure that the clients understand their options. Attorneys should be prepared to deal with difficulties in communication that can result from the client's mental disorder or from transfers to a different locale necessitated by treatment needs.
>
> (c) Attorneys who represent defendants with mental disorders should explore all mental state questions that might be raised, including whether the client's capacities at the time of police interrogation bear on the admissibility or reliability of any incriminating statements that were made, whether the client is competent to proceed at any stage of the adjudication, and whether the defendant's mental state at the time of the offense might support a defense to the charge, a claim in mitigation of sentence, or a negotiated disposition.
>
> (d) Attorneys who represent defendants with mental disorders should seek relevant information from family members and other knowledgeable collateral sources. Attorneys should share information about their clients with family members and knowledgeable collateral sources only with their clients' assent, and in a way that does not compromise the attorney-client privilege.
>
> (e) Attorneys who represent defendants in specialized courts should be familiar with and abide by the [draft ABA Specialized Court Standards]. Because a

only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client. [3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

defendant may relinquish substantial rights in a specialized court, the attorney's role as counselor is particularly important in this setting.

23. If a lawyer determines that the client needs a legal representative, or if the client has a legal representative, this may also affect how the lawyer deals with the client. Lawyers should become well informed about and follow guidelines similar to those found in the Law Society of Alberta's *Code of Conduct* (2018), Commentary under Rule 3.2-15 *Clients with Diminished Capacity*.[6]

24. A client's lawyer may have some concerns about whether the client who is mentally disabled has the capacity to enter a guilty plea. The existing *Codes of Conduct* have some guidance about mental disability and also about entering a guilty plea (see Law Society of Alberta's *Code of Conduct* (2018), Rules 3.2-15 and 5.1-8 and Federation of Law Societies *Model Code of Professional Conduct,* Rules 3.2-9 and 5.1-7), but these do not specifically address clients with mental disabilities' capacity to enter a guilty plea. The relevant authorities should consider providing more guidance on this issue in their *Codes of Conduct*.

The ABA *Criminal Justice Standards on Mental Health* read:

> **Standard 7-4.2 Competence to Plead**
>
> (a) No plea of guilty or nolo contendere[7] should be accepted from a defendant who is incompetent to proceed.
>
> (i) Absent additional information bearing on the defendant's competence, a finding that the defendant is competent to proceed should be sufficient to establish the defendant's competence to enter a plea of guilt or nolo contendere.
>
> (ii) The test for determining mental competence to proceed with pleading should be whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and whether, given the nature and complexity of the charges and the potential consequences of a conviction, the defendant has a rational as well as factual understanding of the proceedings relating to entry of a plea of guilty or nolo contendere.
>
> (b) Evaluations of persons believed to be incompetent to proceed with pleading and treatment of persons found incompetent to proceed with pleading should take place in accordance with this part.

Most of the significant capacity issues that arise in a lawyer's relationship with a mentally

[6] [4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

[7] This particular plea is generally not recognized in Canada.

disabled client revolve around the dilemma of whether the lawyer should act in the best interests of the client or whether the lawyer should follow the client's instructions. Although the lawyer is ethically bound to proceed in a fashion that is in the best interests of the client, the lawyer also has to take instructions from the client. When the client has a mental disability, the lawyer's ethical duties sometimes conflict with the client's wishes and the lawyer may be forced to choose between them.

The lawyer has the difficult ethical responsibility of ensuring that the client fully understands all options and the possible consequences of any choices that the client might make. In some cases, this obligation is quite onerous because it is impossible for a lawyer to determine whether the clients fully appreciate the implications of their decisions.

After investigating the facts and analyzing the other circumstances of the case, the defence lawyer may agree with the prosecutor to enter a plea of guilty on behalf of the client. For many accused, plea-bargaining is the only real hope of reducing their sentence. However, by pleading guilty, the accused is waiving all rights and the guilty plea will have the full effect of a conviction. Because the client is waiving several important rights by pleading guilty, the prospect of a mentally disabled client entering a plea of guilty without fully understanding its consequences, Ellis and Luckasson note this "is most alarming, because those consequences are uniquely momentous for that defendant".[8]

A lawyer with a mentally disabled client who may not be competent to enter a guilty plea is faced with some difficult decisions. If the client was suffering the effects of a mental disability at the time of the offence, there may be a lack of the required mental element for the crime. The client, however, may be unwilling to raise this defence. One symptom of several types of mental disabilities is the inability to recognize that one is suffering from a disease of the mind. The client may be adamant about wanting a plea bargain and therefore about admitting guilt. This poses the thorny ethical dilemma as to whether the lawyer can proceed to plead guilty on the client's behalf when she believes that the client has a possible defence. Does this client

[8] J. Ellis and R. Luckasson, "Mentally Retarded Defendants" (1985) 53(3-4) George Washington Law Rev 414, at 461 (hereinafter Ellis and Luckasson).

fully appreciate the consequences of entering a guilty plea?[8]

25. The *Criminal Code* should be amended in Part XX.1—Mental Disorder to provide for mentally disabled offenders who have become incompetent to be sentenced.[9]
Because the abilities of a mentally disabled accused can wax and wane over the course of the criminal matter, an accused may become unfit to instruct counsel after he/she has been found guilty of or has plead guilty to an offence.

Confidentiality—Involvement of Third Parties

26. Where it becomes absolutely necessary to consult with third parties in order to effectively represent a mentally disabled client who has been charged with a criminal offence, the lawyer must be aware of the possible consequences of this consultation, even if the lawyer has the consent of the client to consult with other persons. Lawyers should be encouraged to consult and follow the guidance available in Law Society of Alberta's *Code of Conduct* (2018) under Rule 3.2-15 and related Commentary.[11]

Generally, because the client has a mental disability, there are other significant players in that person's life. These include social workers, family, medical personnel and other organizations that assist clients with disabilities. Sometimes, these individuals and agencies may be of invaluable assistance to the client and the lawyer. For example, an awareness of community resources may be extremely important in developing an alternate plan (e.g., sentence) for the mentally disabled offender. Lawyers could draw on the support provided by these individuals and groups to make the most effective use of the resources available in the community. Further, supportive individuals may be very helpful in explaining the nature and consequences of the person's mental disability.[10]

There are two possible concerns, which may arise as a result of the interjection of third parties

[8] The issues raised by this recommendation are fully canvassed in Chapter Three, Solicitor and Client Issues.
[9] RSC 1985, c C-46 (all references are to this legislation unless otherwise indicated).
[11] [5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances: See commentary under Rule 3.3-1 (Confidentiality) for a discussion of the relevant factors. If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.
[10] See: N Mickenberg, "The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals" (1979) 31 Stanford Law Review 625, at 633. See also Jeanice Dagher-Margosian ,"Representing the Cognitively Disabled Client in a Criminal Case" (2011), online: <http://www.michbar.org/programs/EAI/pdfs/disabledclient0905.pdf>

into the process. First, there are concerns that communications between the client and third parties are not protected from being disclosed in court. This means that they are not "privileged" and that family members could be called upon to testify as to the content of potentially damaging conversations. Second, there is the lawyer's general ethical duty to maintain the client's confidentiality when discussing aspects of the case with others.[11]

D. Chapter Four: Confessions and Statements

27. The police should videotape all interactions with accused—from the time that the accused arrives at the police station through to interrogations—so that it would be possible to see if the mentally disabled person's rights were properly protected. Videotaping confessions could assist in ensuring that the accused had the capacity to confess and that the confessions were voluntary.

28. Police officers and trainees should be instructed in effective, fair techniques for interrogating mentally disabled persons.

Because of their vulnerability, mentally disabled persons often make false confessions. Police officers need to be aware of the special considerations when they interrogate mentally disabled persons.

29. Police departments should develop special policies for dealing with mentally disabled suspects. For example, it may be necessary to ensure that an advocate or lawyer is present during interrogations.

In Britain and Australia, for example, there are policies regarding the questioning of mentally disabled suspects. One policy requires that an “appropriate adult” be present to assist mentally vulnerable accused during interactions with the police.

E. Chapter five: Fitness to Stand Trial and Appeals

Remands

30. When the Alberta courts implement video remand and arraignment procedures, they should proceed with caution if the accused is mentally disabled. In some cases, video remands will not be appropriate and the accused should be transported to court for arraignment or remand. Tapes of these proceedings should be retained for a period of

[11] This issue is discussed in this chapter under III Confidentiality.

time so that they are available to be analyzed in order to ensure that the accused understood the nature of the proceedings.

31. Prison and remand officers should be trained about the special handling and treatment needs of mentally disabled prisoners.

32. Where arresting officers or other officials are aware that an arrestee has a mental disability, remand officials and others should be informed about the nature of the mental disability and its effect on the individual.

See *ABA Criminal Justice Standards on Mental Health,* 7-2.5 Obligations of Custodial Personnel to Detainees.

33. All remand facilities should work with mental health experts to develop and implement voluntary, valid and reliable screening programs, so that more mentally disabled individuals can be identified at an earlier stage of the criminal justice process.

Voluntariness is essential at this first stage of entering the remand centre in order to protect the individuals' privacy.

34. Non-criminal mentally disabled persons should not be placed in jails. Mental health and criminal justice professionals need to develop alternative placement facilities in order to provide assistance for persons suffering from crises due to their mental disability.

See *ABA Criminal Justice Standards on Mental Health,* 7-1.2 Responding to persons with mental disorders in the criminal justice system.

Assessments

35. Section 672.11 of the *Criminal Code* should be amended to clarify that if necessary, the accused may be assessed more than once for a particular purpose (e.g., to determine fitness to stand trial) and that he or she may be assessed for more than one particular purpose on different occasions.

36. Section 672.14(3) of the *Criminal Code* should be amended to clarify that the court can order an assessment that remains in force for *up to* sixty days instead of "for sixty days".

Fitness Provisions

37. Section 2 of the *Criminal Code* should be amended to add mental handicap to the definition of "mental disorder". Clearly, the fitness provisions should apply to a person who is unable to stand trial because of a mental handicap.

It is clear that persons whose mental disorder renders them unable to conduct a defence may be found unfit to stand trial. However, "mental disorder" is defined as a "disease of the mind". The case law has given a fairly broad interpretation to "mental disorder" (see *R v Cooper* (1980), 13 CR (3d) 97 (SCC)). However, the definition should be clarified as much as possible and included in the *Criminal Code.*

38. Section 2 of the *Criminal Code* should be amended by deleting "on account of mental disorder" so that a person could be found unfit to stand trial for reasons other than "mental disorder".

For example, there are people who do not have a "mental disorder" but who do have other conditions that make it impossible for them to instruct counsel, such as severe communication difficulties. These accused should be able to rely on the fitness provisions.

39. The *Criminal Code* should be amended in section 672.26 (protected statements) so that where the accused has given a protected statement that has been used before a jury to determine if the accused is fit to stand trial, that same jury does not determine the issue of mental disorder.

40. Section 672.29 of the *Criminal Code* should be amended to require that the court may order an accused detained in custody to be moved to a hospital until the completion of the trial, if the court has reasonable grounds to believe that the accused requires hospitalization in order that his or her mental condition does not deteriorate because of the detention.

Currently, s 672.29 provides that the court can order an accused to be detained in a hospital if the court has reasonable grounds to believe that the accused would become unfit to stand trial *if released.* This is ambiguous and needs clarification.

41. *Criminal Code* section 672.58 provides for court-ordered treatment of an accused who has been found unfit to stand trial if the court has not made a disposition under s 672.54. This section should be amended to require the accused's consent to treatment.

When an accused has been found unfit to stand trial, the accused has not yet been tried for any offence. Yet, this person can be ordered to take treatment against his or her will. An accused who has been found not criminally responsible on account of mental disorder is not required by law to accept treatment. Therefore, a person who has not even been found to have committed the act of which he is accused should have the right to refuse treatment.

42. The Law Society of Alberta's *Code of Conduct* should include guidance for counsel as to how to determine whether a client is fit to stand trial, when to raise the issue of fitness, and when it is appropriate to proceed to trial with a client who has a mental disability.

Even if counsel sends his client to a mental health expert to determine the client's fitness to stand trial, the lawyer may be unsure whether to raise the fitness issue. Counsel must balance the psychiatric opinion against his own perception of the client's ability to understand the nature of the allegations and the criminal process, to appreciate the potential consequences, to communicate with counsel and to assist generally in the conduct of the defence. The ABA's *Criminal Justice Standards on Mental Health* provide:

> **Standard 7-4.1. Competence to proceed; rules and definitions**
> …
>
> (b) The test for determining the defendant's competence to proceed when the defendant is represented by counsel should be whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings.

F. Chapter Six: The Exemption for Mental Disorder

43. The definition of "mental disorder" in s 2 of the *Criminal Code* should be amended to clearly indicate that persons with mental handicaps or brain injuries would be covered by section 16.

44. The definition of "mental disorder" in section 2 of the *Criminal Code* should be amended to include irresistible impulse. If the accused suffers a lack of control over his or her behaviour because of a mental disorder, section 16 should apply.

45. The *Criminal Code* should be amended in section 2 to provide a full definition of "disease of the mind".

46. The criminal law should continue to recognize non mental-disorder automatism as an absolute defence to an offence in some cases.

See, for example *R v Parks*, [1992] 2 SCR 871; *R v Stone*, [1999] 2 SCR 290.

47. Section 16 of the *Criminal Code* should be amended to define "wrong" as meaning legally or morally wrong.

The common law has extended the meaning of "wrong" to mean morally wrong (more than legally wrong). The *Criminal Code* should be amended to clearly indicate that this is the meaning of "wrong".

48. Section 16 of the *Criminal Code* should be amended so that it is clear that persons with specific delusions are qualified to raise the defence that they are not criminally responsible on account of mental disorder (s 16(1)).

G. Chapter Seven: Lack of Intent due to Mental Disability

49. The *Criminal Code* should be amended to include the defence of diminished responsibility, particularly for more serious crimes. The defence of diminished responsibility would result in a finding of guilty of a lesser included offence.

For example, in Britain, if the accused is charged with murder, the presence of diminished responsibility can result in a conviction for manslaughter. Recognizing the accused's diminished responsibility accords with the general principle that persons should not be held fully responsible if their mental capacity to form intent was seriously hindered by a mental disorder. The defence of diminished responsibility could apply in situations where the accused's mental state did not meet the s 16 requirements.

H. Chapter Eight: Evidence Considerations

50. The *Criminal Code* should be amended in s 672.12(2) and (3) [assessment orders] to explicitly prohibit the prosecution from raising the issues of fitness to stand trial or mental disorder indirectly unless the accused has raised the issue(s).

I. Chapter Nine: Experts

51. Mental disability experts, courts, lawyers and justice departments should clarify the nature and limitation of the various functions served by mental disability experts in the criminal justice system.[14]

52. Mental disability experts, courts, lawyers and justice departments should cooperate to monitor and improve the quality of professional performance of their members and to improve the quality of the criminal justice system in dealing with cases that involve mental disability issues.[15]

53. Mental disability experts should be educated, as part of their professional education,

[14] See: *ABA Criminal Justice Standards on Mental Health,* Standard 7-1.3.

[15] See: *ABA Criminal Justice Standards on Mental Health,* Standard 7-1.6.

and on a continuing basis, about mentally disabled clients in the criminal justice system.[16]

The American Bar Association (ABA) suggests that advanced education on such topics as court ordered evaluation be available for those professionals who anticipate direct participation in criminal justice activities (e.g., providing expert evidence).[17]

54. Lawyers should become educated on how to choose an appropriate expert for their particular client.

For example, a psychiatrist may not have training on mental handicaps.

55. The justice department should provide written guidelines that inform experts about the law and procedure regarding the preparation and content of expert's reports.[18]

56. Lawyers, judges, mental health professionals and the justice department should cooperate to produce guidelines regarding the professional qualifications required (1) to perform court-ordered assessments[19] **and (2) to testify as an expert witness.**[20]

57. The *Code of Conduct* should include commentary on the lawyer's obligation to explain to a professional retained to evaluate a client's mental condition the specific legal and factual matters relevant to the evaluation, as well as the confidentiality and privilege aspects of performing the evaluation.

J. Chapter Twelve: Sentencing

58. The *Criminal Code* should be amended to include more options for sentencing a mentally disabled offender.

For example, where the accused's mental disability influenced the commission of the offence, probation could be made available even where it is not currently permitted.

59. In some cases, it may be necessary to engage the services of a mental health expert to assist the court in sentencing a mentally disabled accused. Where the accused cannot afford such services, the public should fund them.[21]

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[16] See: *ABA Criminal Justice Standards on Mental Health,* Standard 7-1.7.
[17] See: *ABA Criminal Justice Standards on Mental Health,* Standard 7-1.7(d).
[18] See: *ABA Criminal Justice Standards on Mental,* Standard 7-3.6.
[19] See: *ABA Criminal Justice Standards on Mental,* Standards 7-3.4; 7-3.5; 7-3.6.
[20] See: *ABA Criminal Justice Standards on Mental,* Standard 7-3.11.
[21] See: *ABA Criminal Justice Standards on Mental,* Standard 7-8.3.

60. The new language in *Criminal Code*, s 672.54, which was amended in 2014, should be clarified to explain that a disposition which is "necessary and appropriate" is also "least onerous and least intrusive".

The provision read *before* it was amended:

> **672.54** Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, *taking into consideration the need to protect the public from dangerous persons,* the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the *least onerous and least restrictive to the accused:* [emphasis added]
>
> > (*a*) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
> >
> > (*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
> >
> > (*c*) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

The amended section reads:

> **672.54** When a court or Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3) or section 672.83 or 672.84, it shall, *taking into account the safety of the public, which is the paramount consideration*, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is *necessary and appropriate in the circumstances*: [emphasis added]
>
> > (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
> >
> > (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

> (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

Any departure from the "least onerous and least restrictive" approach will raise considerable questions regarding compliance with *Charter* ss 7, 9, and 15(1).

61. The *Criminal Code* should be amended in section 672.86 (interprovincial transfer of accused detained under mental disorder provisions) to require the accused's consent to an interprovincial transfer.

Currently, the section does not provide for the accused's consent. There should be provision for the accused to have input into the transfer decision. If the accused is not competent, then provision could be made to apply to the court to waive the consent.

62. The *Criminal Code* should be amended in section 672.86(1) so that a decision to transfer an accused is a disposition that may be appealed under s 672.72.

Currently, dispositions and placement decisions made by review boards are appealable under s 672.72. However, a decision to transfer an accused does not appear to fall into either of these categories. Consequently, an accused who is not in favour of a transfer may only be able to review the review board's decision making procedure under provincial administrative law.

63. The *Criminal Code* should be amended to repeal section 672.64 (High Risk Accused Designation). Alternatively, this designation should be reviewed annually at a disposition hearing.

Currently, a "high-risk accused" designation means that the period of time between reviews of an accused's detention status by the Review Board is extended for up to 36 months, rather than holding an annual hearing. However, a 36-month review period is not automatic upon a "high-risk" finding. It is available only where either of the pre-conditions set out in the *Criminal Code* has been met:

- the NCR accused consents; or,
- the accused has committed a prescribed serious personal injury offence and the Review Board is satisfied that his condition is not likely to improve, and detention remains necessary for the period of the extension (section 672.81(1.31) and (1.32)).

K. Chapter Thirteen: Prisons and Jails

64. The Nelson Mandela Rules[22] should be fully implemented applied in Canada. In particular, the provisions dealing with mentally disabled persons should be applied. They state:

> Rule 25 (1). Every prison shall have in place a health-care service tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs or with health issues that hamper their rehabilitation.
>
> (2) The health-care service shall consist of an interdisciplinary team with sufficient qualified personnel acting in full clinical independence and shall encompass sufficient expertise in psychology and psychiatry…
>
> Rule 33 The physician shall report to the prison director whenever he or she considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.
>
> Rule 39(3) Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act underlying the disciplinary charge. Prison administrations shall not sanction any conduct of a prisoner that is considered to be the direct result of his or her mental illness or intellectual disability.
>
> Rule 45(2). The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures…
>
> Rule 46(2) Health-care personnel shall report to the prison director, without delay, any adverse effect of disciplinary sanctions or other restrictive measures on the physical or mental health of a prisoner subjected to such sanctions or measures and shall advise the director if they consider it necessary to terminate or alter them for physical or mental health reasons.

[22] *Standard Minimum Rules for the Treatment of Prisoners* (Revised 2015), UN Doc A/Res/70/175 ["Nelson Mandela Rules"].

(3) Health-care personnel shall have the authority to review and recommend changes to the involuntary separation of a prisoner in order to ensure that such separation does not exacerbate the medical condition or mental or physical disability of the prisoner.

Rule 109 (1) Persons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.

(2) If necessary, other prisoners with mental disabilities and/or health conditions can be observed and treated in specialized facilities under the supervision of qualified health-care professionals.

(3) The health-care service shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.

Rule 110 It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric aftercare.

65. Similarly, Canada should adopt the American Bar Association's *Treatment of Prisoners Standard, 2011,* which provides the following guidance for treatment of prisoners with mental disabilities:

Standard 23-6.11 Services for prisoners with mental disabilities
(a) A correctional facility should provide appropriate and individualized mental health care treatment and habilitation services to prisoners with mental illness, mental retardation, or other cognitive impairments.

(b) Correctional officials should implement a protocol for identifying and managing prisoners whose behavior is indicative of mental illness, mental retardation, or other cognitive impairments. In addition to implementing the mental health screening required in Standard 23-2.1 and mental health assessment required in Standard 23-2.5, this protocol should require that the signs and symptoms of mental illness or other cognitive impairments be documented and that a prisoner with such signs and symptoms be promptly referred to a qualified mental health professional for evaluation and treatment.

> (c) A correctional facility should provide prisoners diagnosed with mental illness, mental retardation, or other cognitive impairments appropriate housing assignments and programming opportunities in accordance with their diagnoses, vulnerabilities, functional impairments, and treatment or habilitation plans. A correctional agency should develop a range of housing options for such prisoners, including high security housing; residential housing with various privilege levels dependent upon treatment and security assessments; and transition housing to facilitate placement in general population or release from custody.
>
> (d) When appropriate for purposes of evaluation or treatment, correctional authorities should be permitted to separate from the general population prisoners diagnosed with mental illness, mental retardation, or other cognitive impairments who have difficulty conforming to the expectations of behavior for general population prisoners. However, prisoners diagnosed with serious mental illness should not be housed in settings that may exacerbate their mental illness or suicide risk, particularly in settings involving sensory deprivation or isolation.

66. Severely mentally ill and seriously mentally handicapped offenders should be treated in mental health or mental handicap facilities and should not be detained in prisons.[23]

67. Prisoners with less severe mental disabilities should be provided with services within the correctional facilities (both federal and provincial).

68. Prison infrastructure and programming for mental health needs must reflect the changing demographics of prisons in Canada; including developing facilities and programs aimed at older inmates, female inmates, and Indigenous inmates (e.g., increased access to appropriate services for indigenous inmates).

Currently female inmates who require psychiatric treatment are housed in segregated sections inside of male treatment facilities. There must be separate designated facilities for female inmates requiring psychiatric treatment.

69. Prison officials and employees should be educated about the special needs of mentally disabled prisoners and the special effects of incarceration on them.

70. Special advocates should be appointed to assist mentally disabled prisoners with all aspects of coping with prison, including preparation for parole and discipline hearings.

[23] See: *Corrections and Conditional Release Act*, SC 1992, c 20, section 121; ABA *Criminal Justice Mental Health Standards* Standard 7-1.5(a).

Solitary Confinement/Segregation/Isolation

71. In compliance with the *Nelson Mandela Rules* and the *Canadian Charter of Rights and Freedoms*, solitary confinement should not be used at all for mentally disabled prisoners.

72. If it is absolutely necessary to use administrative segregation units for the general prison population, Canada should eliminate *indefinite* solitary confinement and there should be very specific procedures and limits regarding their use.

Involuntary mental health treatment and transfer of prisoners

73. Alberta's *Corrections Act* (RSA 2000, c C-29) should be amended to state that prisoners have the right to refuse treatment. The Act should also list the factors that indicate that an inmate has the ability to provide informed consent to treatment.[24]

74. Alberta's *Mental Health Act* (RSA 2000 c M-13) should be amended in section 13 in order to clarify the authority of the mental health facility when dealing with persons who have been found not criminally responsible on account of mental disorder or persons who are transferred to mental health facilities from prisons or jails.[25]

75. Alberta's *Mental Health Act* (RSA 2000 c M-13) Part 3 should be amended to increase safeguards to ensure that declarations of incapacity to consent to treatment are used rarely and involuntary treatment is provided only in exceptional circumstances.

76. The federal and provincial governments should develop and implement programs that provide combined probation and mental health/ mental handicapped services, as a means of reducing recidivism among mentally disabled offenders.

The implementation of a specialized Mental Health Court system could provide prompt, specialized assessment of individuals with suspected mental disabilities and could facilitate treatment. One disposition available from these courts, might involve combined probation and mental disability services.

[24] See s 88(2) of the *Corrections and Conditional Release Act* SC 1992, c 20.

[25] See also: *ABA Treatment of Prisoners Standards, 2011,* Standard 23-6.14 and 23-6.15.