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UNIFORM LAW CONFERENCE OF CANADA

**WORKING GROUP ON SECTION 672.26 AND RELATED SECTIONS OF
THE *CRIMINAL CODE*
(JURIES AND FITNESS HEARINGS)**

STATUS REPORT

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Presented to the Criminal Section

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WORKING GROUP ON SECTION 672.26 AND RELATED SECTIONS OF THE *CRIMINAL CODE*
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[1] At the 2021 virtual meeting of the Uniform Law Conference of Canada (ULCCA), the Criminal Section adopted a resolution at the request of Ontario (ON2021-03):

It is recommended that the Criminal Section of the ULCC strike a working group to review section 672.26 (and related sections) of the *Criminal Code* for possible legislative reform as to how the issue of fitness should be tried when an accused person has elected trial by judge and jury.

(Carried as amended 29-0-0)

[2] The resolution reflects the general consensus that there appear to be two issues in the application of the *Criminal Code* fitness regime for a person who has elected (or is deemed to have elected) trial by judge and jury. The first issue relates to efficiency. It arises in situations where the provisions operate to require the accused to have one jury empaneled to decide fitness and then, if found fit, have a second and different jury empaneled for the trial. The second issue relates to potential prejudice. If fitness arises mid-jury trial, the empaneled jury must decide if the accused is fit to stand trial, which requires them to hear a wide range of evidence relating to their mental condition. If that accused is eventually found fit to stand trial, the trial continues *with the same jury*, and the trial judge must then deliver limiting instructions to the jury. This has raised concerns that this process could prejudice the accused, by exposing the jury to evidence they might not otherwise have been privy to.

[3] The working group is co-chaired by Joanna Wells (Justice Canada) and Rebecca Law (Ontario). Members include Lee Kirkpatrick and Noel Sinclair (both Yukon), Adam Badari (Alberta), Alexander Godlewski (Justice Canada), Julie Roy (Quebec), Magalie Provost (Quebec DPCP), Lucie Joncas (Canadian Council of Criminal Defence Lawyers), and Rachel Anstey (New Brunswick).

[4] The working group has met virtually five (5) times since January 2022 and intends to continue meeting monthly over the coming year.

1. Work to date

[5] The group interpreted its mandate as including all provisions under the heading “Fitness to Stand Trial” in the *Criminal Code*, specifically section 672.22 to subsection 672.33(6). The group established a broad research question: “What are the implications of removing the issue of fitness to stand trial from the exclusive purview of the jury and placing it in the decision-making power of the judge?”. The question refers to “a judge” and not “the trial judge” because the group will consider how a new regime would apply in jurisdictions where a judge other than the trial judge hears and decides pre-trial motions in some cases (typically homicides or other long trials).

[6] Despite the breadth of this research question, the group agreed to examine more narrow changes and consider if they would adequately address the problems identified.

[7] Key areas that fall under this broad research question include the historical development of the provisions, the possible *Charter* implications (sections 7, 11(b), 11(d), 11(f)), and comparisons to legal systems in other countries.

[8] The group has made good progress on these issues. So far, two members have presented in-depth case studies to highlight problems and test possible solutions. More of these case studies are planned for the coming year. Group member also presented on the fitness/competency provisions in the criminal law systems of the United Kingdom, Ireland, Australia, New Zealand and parts of the United States, which reveal a wide range of practices.

[9] The work of the group involves a detailed procedural analysis of how Part XX.1 operates in the jury context. In particular, section 672.22 to subsection 672.33(6). It is likely that these provisions have been the subject of discussion in other working groups, such as the Federal-Provincial-Territorial Mental Disorder Working group under the Coordinating Committee of Senior Officials Criminal Justice (CCSO).

1.1 Work of the group this coming year

[10] When we reconvene in September 2022, the group will seek consensus on foundational issues, such as whether there is any policy, legal or practical impediment to having all fitness hearings heard by a judge and not a jury. In addition, it is proposed that the working group focus on the following issues this coming year:

- 1) The most significant impacts on the accused, and on the trial process of the current application of these provisions;
- 2) Whether legislative reform could address these impacts, or could they be addressed through other means;

[11] It is recommended that the working group continue its study of this issue, in consultation with other committees as needed, and report back to the Criminal Section at the annual meeting in 2023.