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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

**Presented by
[Joanna Wells]**

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**Ottawa
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Presented to the Criminal Section

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info@ulcc-chlc.ca

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[1] At the 2021 virtual meeting of the Uniform Law Conference of Canada (ULCC), the Criminal Section passed 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 Working Group (WG) determined it was best to focus how *inefficiency* and *risk of prejudice* may arise in the application of the *Criminal Code* fitness regime to a person who has elected (or is deemed to have elected) trial by judge and jury. Inefficiency can arise 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. Potential prejudice to the accused can arise if fitness arises mid-jury trial. The empaneled jury must decide if the accused is fit to stand trial, which requires jurors to hear a wide range of evidence relating to the accused's 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 heard. The group continues to consider the ramifications of removing the jury from the determination of fitness and any lesser amendment that could remedy the two classes of problems identified.

[3] The WG has met virtually 12 times since its establishment in 2021. These meetings have been fruitful, and consensus has been reached on some points. During the first fall meeting of the WG in September 2023, the members agreed to complete the study of the issue by spring 2024 and submit a final report for consideration at ULCC in August 2024. However, due to an unanticipated leave of absence of one members, as well as two members being appointment to the bench, there were insufficient members available to continue the work and reach a meaningful consensus recommendation.

[4] We would like the WG to reconvene in September 2024 and complete its work by spring. To date, the working group has been co-chaired by counsel from Justice Canada and Ontario, however a new federal co-chair will be taking over in the fall. It is critically important that any recommendations of the WG are informed by a variety of jurisdictions and perspectives, including those of the defence bar. We ask delegations to assist us in identifying interested counsel to join the group this fall.

[5] It is recommended that the working group continue its study of this issue and report back to the Criminal Section at the annual meeting in 2025.