Policy:		
Mental Illness and Mental Disorder		
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In this policy, "mental illness" refers to a wide range of mental health conditions and cognitive disabilities that can affect a person's mood, thinking, and behaviour.

In this policy, "mental disorder" means "a disease of the mind", which is how it is defined in the *Criminal Code* (section 2) for the purpose of the *Criminal Code* tests for fitness to stand trial and the verdict of "not criminally responsible on account of mental disorder."

Mental illness

People with mental illness may experience unique challenges associated with the criminal justice system. The circumstances of an accused's mental illness may be relevant at various stages in a prosecution.

A person's mental illness may cause them to behave in unusual ways which may suggest a risk of harm, even when none exists. An alleged commission of an offence, including a serious one, is not determinative of whether an accused with a mental illness poses an ongoing risk to the community. Public safety concerns that inform prosecutorial decision-making should be based on reliable evidence.

Charge assessment

Mental illness may affect the ability of the accused to form the specific intent to commit an offence.

At each stage of the prosecution, Crown Counsel should consider any available evidence of the accused's mental illness and the impact it may have on whether the charge assessment standard is met, including whether the public interest requires a prosecution (*Charge Assessment Guidelines* (CHA 1).

Alternatives to prosecution

In some cases, the public interest may be best served by the appropriate use of alternative measures rather than the prosecution of an accused with a mental illness (*Alternatives to Prosecutions – Adults* (ALT 1), *Youth Criminal Justice Act – Extrajudicial Measures* (YOU 1.4). This may include community-based sanctions. Successful completion of an alternative measures program may enhance public safety and avoid the harmful effects of criminalizing the accused for their illness.

Bail

When determining a position on bail, Crown Counsel should recognize the unique circumstances and inherent vulnerability of an accused with a mental illness. Even a brief period of pre-trial detention in custody can have a disruptive impact upon an accused's social support systems, housing, medical care, and mental stability. Bail conditions or pre-trial detention must not be sought to enforce treatment of an accused's underlying mental health or addiction issues (*Bail – Adults* (BAI 1)). However, when the risk to public safety by an accused's release could be mitigated by a therapeutic bail order, Crown Counsel should consider seeking a treatment condition in the form of a *Rogers* order.[1]

Resolution discussions and sentencing

An accused person's mental illness may be a mitigating factor for Crown Counsel to consider during plea resolution discussions or in formulating a sentencing position, including in circumstances when the mental illness causes or contributes to the commission of the offence, thus diminishing the offender's moral culpability.[2]

If an unrepresented accused wishes to plead guilty Crown Counsel should consider asking the court to order a pre-sentence report with a psychiatric component to address any specific issue of concern.

Psychiatric assessments

The court may order a psychiatric assessment of an accused but only in limited circumstances, most commonly:

- to address the issue of fitness to stand trial (section 672.11(a))
- to address the issue of whether someone is not criminally responsible due to a mental disorder (section 672.11(b))

1 *R v Rogers* (1990), 61 CCC (3d) 481 (BCCA)
2 *R v Badhesa*, 2019 BCCA 70 at para 42, *R v Milne*, 2021 BCCA 166

- as part of a pre-sentence report (sections 721(4), 723(3))

These orders initiate the process for creating a report for the court. It does not result in treatment, risk management, or case management.

Mental disorder

Part XX.1 of the *Criminal Code* provides a complete code for the handling of mentally disordered accused. A mental disorder is a "disease of the mind", which is "any illness, disorder or abnormal condition which impairs the human mind and its functioning".[3] Mental disorder is a broad legal concept with a medical dimension.

Fitness to stand trial

Fitness relates to the current mental state of the accused, not their mental state at the time of the alleged offence. Everyone is presumed to be fit to stand trial (section 16(2)). However, a mentally disordered accused who cannot meaningfully participate in their criminal proceeding will be found unfit to stand trial (section 2). The accused will be unfit if they are unable to:

- understand the nature or object of the proceedings
- understand the possible consequences of the proceedings
- communicate with counsel[4]

The issue of fitness to stand trial can arise at any time during the criminal proceedings. If the court finds the accused to be unfit, the court proceedings will be paused and any plea that has been made shall be set aside until the accused becomes fit to stand trial (section 672.31). During this period, the court defers jurisdiction over the accused to the BC Review Board (BCRB).

Fitness assessments

If at any stage of proceedings an accused appears to be unfit, the court may order a fitness assessment on its own motion, on application of the accused, or on application of the prosecutor. Crown Counsel's right to apply for a fitness assessment for a summary conviction offence is limited (section 672.12(2)).

3 *R v Cooper*, [1980] 1 SCR 1149

4 *R v Taylor* (1992), 77 CCC (3d) 551, (ONCA); *R v Kampos*, 2018 BCSC 2206; 2020 BCSC 1437 and 2021 BCSC 460; *R v Bharwani*, 2023 ONCA 203 (leave granted 2023 SCCA 236)

Forensic Psychiatric Services conducts court-ordered fitness assessments and provides reports to the court.

Trial of the issue of fitness

If, after a trial of the issue of fitness, the court renders a verdict that the accused is unfit to stand trial, the court may either hold an initial disposition hearing (section 672.45(1)) or defer the initial disposition to the BCRB (sections 672.31, 672.47). Jurisdiction over the accused remains with the BCRB until they become fit to stand trial or the charges are terminated by a stay of proceedings. The BCRB must review the accused's fitness every 12 months until the BCRB is of the opinion that the accused has become fit. By way of disposition, the BCRB may detain the accused in hospital or discharge the accused on conditions in the community if their risk to the public can be mitigated (section 672.54).

If the accused appears to be fit to stand trial, the BCRB must return the accused to court for a retrial of the issue of fitness (672.48(2)). If the court determines that the accused has become fit to stand trial, the court proceedings recommence. If an accused's mental status fluctuates over the course of the prosecution, the fitness issue may arise again, and this process begins anew.

Keep fit orders

If an accused person who is detained in custody is found fit to stand trial, and there is an evidentiary basis to believe that they may become unfit again, the court may order that the accused be detained in hospital rather than a correctional facility (section 672.29). If this order is made, Crown Counsel should consider measures to expedite the trial, including applying for an earlier trial date, if feasible.

Not Criminally Responsible on Account of Mental Disorder (NCR)

A verdict of "not criminally responsible on account of mental disorder" (NCR) means that the accused was incapable of appreciating the nature and quality of their act or of knowing that it was wrong (section 16(1)), and they cannot be held criminally responsible for the act.

An NCR verdict recognizes that a criminal act was a product of the accused's mental illness, and that the accused should be treated, not punished.

The *actus reus* (wrongful act) of the offence must be proven or admitted before an NCR verdict can be rendered (section 672.34). This is because NCR is "a verdict that the accused committed the act … that formed the basis of the offence … but is not criminally responsible on account of mental disorder" (section 672.1(1)). A person who receives an NCR verdict is called an NCR accused until they are granted an absolute discharge.

Advancing an NCR verdict

NCR is a special verdict; it is neither guilty nor not guilty. An NCR accused is not sentenced. Instead, jurisdiction over them is transferred to the BCRB, which is a specialized tribunal whose legal mandate is "to determine whether the accused is a significant threat to the safety of the public, to take any necessary action to control that threat and, if necessary, to provide the accused with appropriate care".[5] An NCR accused is therefore subject to an undetermined period of supervision by the BCRB, regardless of the gravity of their wrongful act. The BCRB must hold annual disposition hearings for an NCR accused. The person remains under the jurisdiction and supervision of the BCRB until they no longer pose a significant threat to the safety of the public (section 672.5401).

Accused persons have a constitutional right, under section 7 of the *Charter*, to control their own defence. This emanates from society's "respect for individual autonomy within an adversarial system".[6] However, an accused's right to conduct their own defence is not absolute.

During the trial, Crown Counsel can raise the issue of NCR if the accused puts their mental capacity in issue.

After the accused has pled or been found guilty, but prior to a conviction being entered, Crown Counsel may raise the NCR issue and request an assessment, in limited circumstances. The circumstances in which the Crown can call evidence relating to NCR are limited.[7]

If Crown Counsel is of the view it would be in the interests of justice to seek an order for an NCR assessment or lead evidence of NCR, against the position of defence counsel, they should consult with a Regional Crown Counsel, Director, or their respective deputy.

Resolution discussions involving NCR

If defence counsel proposes an NCR verdict as a resolution, Crown Counsel should consider the relevant available information in determining whether this may be an appropriate outcome. Crown Counsel should request a court-ordered psychiatric assessment (section 672.11). Crown Counsel may, after consulting with a Regional Crown Counsel, Director, or their respective deputy, retain a forensic psychiatrist to conduct an independent assessment of the accused's mental state at the time of the offence. If Crown Counsel and defence counsel agree that an NCR verdict would be a just result, the court will still require adequate psychiatric evidence to support the verdict.

5 *R v Bouchard-Lebrun*, 2011 SCC 58 at para 52
6 *R v Swain*, [1991] 1 SCR 933
7 *R v Faire,* 2020 BCCA 110 at paras 24-30, 39-43; *R v Nelson,* 2021 BCCA 343 at para 8; *R v* Swain, [1991] 1 SCR 933

If Crown Counsel does not agree that an NCR verdict is appropriate based on the available evidence, Crown Counsel should prosecute the file in the ordinary fashion, await evidence of NCR as called by the accused, and respond with its own evidence as appropriate.

High-risk designation

The court may designate an NCR accused as high-risk pursuant to section 672.64. There is a complex evidentiary and legal threshold to meet for this designation.[8] Crown Counsel must obtain approval of Regional Crown Counsel, Director, or their respective deputy before applying for this designation.

Indigenous Persons

Numerous government commissions and reports, as well as the judgments of the Supreme Court of Canada, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally-inappropriate practices, extends to all parts of the criminal justice system.

The history of colonialism, displacement, and residential schools in Canada has translated into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for Indigenous persons.[9] The rates of victimization of Indigenous persons, especially for Indigenous women and girls, are also significantly higher than those for non-Indigenous persons.[10]

The continuing consequences of colonialism for Indigenous persons in Canada "must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views."[11]

Colonialism has had a devasting impact on Indigenous people which includes complex, layered, and intergenerational traumas. As a result, many communities and Indigenous individuals grapple with mental health and suicide crises. Scholars have termed these collective experiences "colonial trauma":

> *The collective impact of the enduring colonial trauma can be understood within the larger health framework of post-traumatic stress disorder (PTSD). PTSD affects individuals in a vicious cycle of denial, avoidance, and becoming overwhelmed with memories and related feelings. Post-traumatic stress is unique as a mental health diagnosis and appropriate for*

8 *R v Schoenborn*, 2017 BCSC 1556
9 *R v Ipeelee*, 2012 SCC 13
10 *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016
11 *Ewert v Canada*, 2018 SCC 30 at paras 57-58; *R v Barton*, 2019 SCC 33 at paras 198-200; also *BC First Nations Justice Strategy*, February 2020

> *framing an understanding of the Indigenous collective and intergenerational trauma because a diagnosis is dependent upon exposure to a traumatic event.*[12]

Crown should be aware of the existence and scope of colonial trauma and approach an Indigenous accused or victim in a trauma-informed manner.

Because of a historical lack of health care resources and limited access to health care, Indigenous people may be living with a mental illness without having a formal diagnosis. A lack of diagnosis is not determinative of an accused's actual mental health or functionality. If there is any suggestion that an Indigenous accused may have an undiagnosed mental illness which could impact their moral culpability, Crown Counsel should canvass the issue with defence counsel and not oppose reasonable adjournments for diagnostic testing.

Crown Counsel should consider any available Indigenous programs and supports that may assist Indigenous accused.

12 Mitchell, T., Arseneau, C., & Thomas, D. (2019). "*Colonial Trauma: Complex, continuous, collective, cumulative and compounding effects on the health of Indigenous peoples in Canada and beyond*." International Journal of Indigenous Health, 14(2), 72-94. https://doi.org/10.32799/ijih.v14i2.32251