



# Psychiatric Patient Advocate Office

*Submission to the Standing Senate Committee  
on Legal and Constitutional Affairs*

*Re: Bill C-10*

*An Act to Amend the Criminal Code (Mental Disorder)  
and to Make Consequential Amendments to Other Acts*

April 20, 2005

Psychiatric Patient Advocate Office  
55 St. Clair Avenue West  
Suite 802, Box 28  
Toronto, Ontario, M4V 2YZ  
Telephone: (416) 327-7000  
Toll Free: 1-800-578-2343

**PROMOTING PATIENTS' RIGHTS**



# Psychiatric Patient Advocate Office

Bureau de l'intervention en faveur des patients des établissements psychiatriques

April 20, 2005

The Honourable Lise Bacon  
Chair  
The Standing Senate Committee on Legal and Constitutional Affairs  
The Senate  
Ottawa, Ontario  
K1A 0A4

The Hon. Ms. Bacon:

Re: Submission on Bill C-10: An Act to Amend the Criminal Code (Mental Disorder) and to Make Consequential Amendments to Other Acts

The Psychiatric Patient Advocate Office (PPAO) appreciates the opportunity to participate in the review of the Mental Disorder Provisions of the *Criminal Code*. Attached is our submission, which we have previously provided to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, House of Commons. Our submission is made on behalf of our clients, vulnerable persons with a mental illness and highlights our concerns and offers recommendations to redress them.

The PPAO is an arm's length program of the Ontario Ministry of Health and Long-Term Care established in 1983 to promote the civil and legal rights of persons with mental illness in provincial psychiatric hospitals through individual and systemic advocacy and education. The PPAO also responds to any systemic concerns of a provincial nature affecting these individuals as citizens. The PPAO works to empower these individuals to improve their quality of life, to uphold their rights as citizens and to make informed decisions about their care and treatment. In Ontario, the PPAO has extensive involvement with forensic clients in the mental health facilities where we provide service.

The PPAO is supportive of many of the clauses in Bill C-10 but has identified several areas where there is room for improvement. We hope that our submission clarifies the concerns we have heard from our clients. Many of our clients talk of the stereotypes that the public holds with respect to their illness and involvement in the forensic system, which ultimately leads to stigma and discrimination. It is in this light that we ask the Committee and the government to consider our submission.

We encourage the committee and federal government to consider our recommendations and to move forward with this legislation. Successful implementation will require the dedication of resources, a broad based public education campaign, and engagement of all stakeholders, including individuals who have been found unfit to stand trial or not criminally responsible.

Once again, thank you for the opportunity to have input into this very significant piece of legislation.

Sincerely,

David Simpson  
Program Manager

*Submission of the Psychiatric Patient Advocate Office  
to the Standing Senate Committee on Legal and Constitutional Affairs*

*Re: Bill C-10: An Act to Amend the Criminal Code (Mental Disorder)  
and to Make Consequential Amendments to Other Acts*

**Background**

The Psychiatric Patient Advocate Office (“PPAO”), an arm’s-length program of the Ontario Ministry of Health and Long-Term Care, has been advocating for strengthening the rights of persons with serious mental illness since 1983. With field offices located in the current and former provincial psychiatric hospitals, the PPAO has a unique perspective on the effects of the Mental Disorder provisions in the *Criminal Code* (“Code”).

Patients who have a mental illness and who find themselves in contact with the criminal justice system (forensic clients) represent a significant portion of our client-base. We are involved in both individual and systemic advocacy as well as public education. We participate in inquests, work with clients and their counsel in matters involving the Ontario Review Board and facilitate client-centred policies and best practices within hospitals. We are pleased to provide this submission for your consideration as you modernize the law to protect the rights of forensic clients and ensure they are treated fairly and equitably.

The PPAO previously made submissions to the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. In these submissions we present several recommendations that we believe are still relevant and which speak directly to the barriers faced by forensic clients.

**Introduction**

The PPAO, having advocated on behalf of forensic clients for a number of years, has serious concerns about the forensic mental health system in Ontario. Forensic clients have consistently reported frustration with a system that fails to provide individual care, lacks effective rehabilitative programs, and removes a sense of hope.

Forensic clients also report that the system fails to provide meaningful employment opportunities, education, re-training, socialization and recreation, making successful rehabilitation and re-integration into the community very difficult. The invisible barriers linked to stigma rear their heads and thwart similar efforts once in the community.

The forensic system is, in many cases, more reflective of a correctional facility than a hospital, where security takes priority over care and treatment. For some the system represents an unrealistic living arrangement without any mechanism to vent because the consequence of doing so can be construed as evidence of a significant risk to public safety, while staff and the general public maintain this right. Others complain of having to be ‘perfect’ to get out of the system. To restore balance, the forensic system must adopt more of a recovery focus rather than a punitive focus. It must become client-centred by providing a feedback mechanism for forensic clients and families of forensic

clients. Only then will forensic clients be treated with the same respect and dignity afforded to any person in need of care.

### ***1: Preamble***

The PPAO recommends that the Mental Disorder provisions in the *Code* have a purpose or preamble. The language throughout this section should reflect the purpose of the legislation and to ensure that persons subject to the relevant provisions are treated with dignity, respect, and fairness.

### **Recommendation**

- The PPAO recommends that the *Code* be amended to include a statement of purpose with respect to the Mental Disorder provisions to emphasize the goals of recovery and reintegration into society.

### ***2: Guidelines for Provincial Review Boards***

The PPAO previously recommended that the *Code* be amended to provide guidelines to provincial Review Boards with respect to dispositions, rehabilitation, and dangerousness. Many clients complain of Review Board dispositions authorizing placement in the community, but a lack of appropriate community resources denies them the opportunity. Many clients are ‘warehoused’ in facilities, such that it is not unusual for forensic clients to reside in a hospital for twenty plus years. Such realities do not comply with the *Code*, which requires placement in the least onerous and least restrictive environment, and Review Boards are not given power under the Mental Disorder provisions to enforce their dispositions.

As the principles of rehabilitation and reintegration are as important to dispositions as public protection, specific factors relevant to rehabilitation should be articulated in the *Code*. Again, Review Boards should be given the authority to order that the myriad needs of the forensic client be addressed, and have the corresponding authority to enforce such orders.

Many clients report that undue emphasis continues to be placed on forensic clients’ index offences or current inappropriate behaviours rather than dangerousness. The common law duty created in *Winko*<sup>1</sup>, requiring Review Boards to make positive findings of dangerousness, should be codified and strengthened in the *Code*. This arises from the fact that Review Boards have not operationalized the Supreme Court’s recommendations in *Winko* to seek out evidence that supports release. This has increased the numbers of forensic clients detained on trivial offences who languish in the system for extended periods of time.

Unfortunately, undue emphasis is placed on behavioural issues associating with institutionalized living, detention and historical or static factors as opposed to dynamic factors such as current condition and current level of risk. The Mental Disorder provisions in the *Code* need to ensure that those persons who find themselves in the forensic system don’t remain there for longer than necessary.

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<sup>1</sup> *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 (hereinafter: “*Winko*”).

## Recommendations

- The PPAO recommends that timelines for compliance be introduced into dispositions, and that Review Boards be given the authority to enforce and order compliance with dispositions.
- The PPAO recommends that the *Code* specify the factors to be considered in determining the least onerous and restrictive disposition, and a range of treatment modalities to address rehabilitation needs, in keeping with the forensic client's wishes and choices.
- The PPAO further recommends that 'dangerousness' be defined in the *Code* and specifically drafted to exclude 'undesirable' or 'inappropriate' behaviour that does not pose a risk.

### **3: Guidelines for Forensic Facilities**

As a consequence of divestment, many forensic beds have been transferred from Provincial control to the charge of public hospitals. The lack of central oversight has resulted in inconsistent and fluctuating policies that hinder rehabilitation and reintegration efforts. For example, there is currently no uniform standard or definition for security levels such that some minimum secure level forensic clients are subjected to the same restrictions as those in medium secure levels.

A further concern voiced by forensic clients is that although s. 672.56 of the *Code* allows for Board Reviews following seven days of increased restrictions on liberties, overly broad dispositions allow for broad and restrictive interpretation by facilities, who despite having the obligation to report to the Review Board, often fail or refuse to do so. At present, there is no accountability mechanism or penalty provision in the *Code* for facilities that fail to report such restrictions. The process for adjournments of these hearings should be initiated and driven by the forensic client.

Finally, forensic patients are currently subject to random searches, restrictions on communication and speech, and restrictions on employment opportunities not related to their index offence. Facilities adopt security protocols that mirror those of the correctional system to institute higher security levels than the forensic client's history and behaviour do not warrant.

## Recommendations

- The PPAO recommends that the *Code* clearly define levels of custodial restrictions.
- The PPAO recommends that the *Code* clarify the phrase 'restriction on the liberty of the accused' to give guidance to facilities that must apply to the Review Board for a hearing, and further, that the Board be given authority to order compliance with s. 672.56 of the *Code*.
- The PPAO recommends that the *Code* be amended to ensure that regardless of whether a facility files for a restriction of liberties hearing, the regular annual review should proceed. Furthermore, only the forensic client should have the right to waive such hearings.

- The PPAO further recommends that the *Code* specify that a forensic client's rights are not altered unless specifically stated by the *Code* or by the disposition.

#### ***4: Victim Impact Statements***

The PPAO is concerned about the proposed changes to the Mental Disorder provisions allowing victim impact statements to be presented at Review Board hearings. Victims deserve recognition and a voice, but in the appropriate forum. Historically, victim impact statements allow victims of crime to provide input into the sentencing process; however, mentally disordered accused persons deemed not criminally responsible are not sentenced and are instead considered patients. The goals of Review Boards are quite distinct from criminal courts. The PPAO questions how such statements would be effective in a process designed to rehabilitate and reintegrate individuals found not criminally responsible, and determine current condition and level of risk.

Ultimately, such statements will divert the Review Board from concentrating on relevant evidence relating to the current condition of the forensic client resulting in the least onerous and least restrictive disposition. Such statements focus exclusively on the effect of the forensic client's actions while they were potentially at the low point in their illness, and neglect other considerations such as the potential for rehabilitation and reintegration.

#### **Recommendations**

- The PPAO recommends that clause 16(3), which permits victim impact statements to be presented at Review Board hearings, be repealed and that a more appropriate forum be considered for such statements.

#### ***5: Right to Annual Hearing and Mandatory Attendance***

The PPAO does not support the proposal to permit Review Boards to hold hearings later than 12 months after a forensic client's recent disposition. Persons whose liberties have been severely restricted are entitled to annual reviews to ensure that the disposition is being followed, and that the person is in the least restrictive environment possible. The proposed amendments make assumptions about forensic clients, in particular their clinical progress, and appear to impose a presumption of dangerousness on the forensic client, which the Supreme Court of Canada (in *Winko*) deemed inappropriate and possibly discriminatory.

Some forensic clients might also wish to self-represent before the Review Board. In this regard the PPAO believes that it is crucial that unrepresented accused forensic clients have access to *amicus curiae*, or a friend of the court, to assist with strict legal matters, adjournment requests, etc., similar to the process in place at the Ontario Court of Appeal when a Review Board disposition is appealed.

The PPAO is opposed to any amendment to the *Code* authorizing Review Boards to compel a forensic client's attendance before a Review Board. The PPAO respects Review Boards' ability to compel the attendance of witnesses, but some clients choose not to participate in the process and have their legal counsel attend in their place to protect their rights. Still others prefer to attend but not give evidence. To compel the attendance of forensic clients is an abusive and paternal amendment that has no role in

the forensic system, particularly where victim impact statements may be presented year after year. Indeed, forcing a forensic client to undergo such a process could be counter-therapeutic and frustrate efforts at rehabilitation.

### **Recommendations**

- The PPAO recommends that Review Boards continue to hold hearings no later than 12 months after each forensic client's disposition, and that duty counsel or an *amicus curiae* process be instituted to assist unrepresented forensic clients before the Review Board.
- The PPAO recommends that clauses 31 and 32 relating to s. 672.85 of the *Code* be repealed and that forensic patients retain the right to choose how they wish to participate in the process.

### **6: Treatment Orders**

There is no more important principle in medicine and law than treatment with consent. The PPAO remains very concerned with court ordered treatment orders under s. 672.58 of the *Code*. Ontario's *Health Care Consent Act* ("Act") deems each person capable of consenting to treatment unless found otherwise. It also provides for the treatment of individuals who are found incapable of making their own treatment decisions through the consent of a substitute decision-maker ("SDM"). The *Act* requires the SDM to consider the incapable person's prior capable wishes and, if none apply, the best interests of the individual according to specific criteria.

### **Recommendation**

- The PPAO recommends that the treatment disposition section in the *Code* be repealed and a mode of consent-based treatment be adopted similar to that under Ontario's law.

### **7: Stigma, Discrimination, and Criminalization of Mental Illness**

The PPAO is pleased that the Federal government supported the development of education programs for stakeholders and the public, but feels that the Federal government needs to take a proactive leadership role given the national scope of the mental disorder provisions in the *Code*.

Many of our clients' illnesses are 'criminalized'. Rather than being diverted to receive care in the publicly accessible mental health system, individuals are charged with crimes, sometimes very minor offences, and diverted into the forensic system. Forensic patients are perceived as increased safety risks, leading to restrictive policies not clearly provided for under the law. Even within the hospital setting, some patients are still being charged criminally by hospital staff for disputes between other patients or staff, acting-out or minor offences.

Once out in the community, clients face the dual stigmatization of having a mental illness and having had contact with the criminal justice system. The discrimination faced by forensic clients in their efforts to obtain housing, employment and social acceptance is well documented in literature, and in the PPAO's opinion unacceptable. There is another

population within the forensic system who faces even higher even higher hurdles in the community, namely those individuals with a mental illness and a developmental disability.

There must be a concerted effort on the federal government's part to address community fears of mental illness and violence if individuals with serious mental illness are to achieve their full potential and reintegrate into a welcoming community with a wide array of supports.

### **Recommendation**

- The PPAO recommends that a Federal-Provincial-Territorial working group be promptly established to undertake an extensive education campaign aimed at tackling the stigma facing forensic patients. The working group must include a variety of stakeholders, including consumers, to promote tolerance, understanding and acceptance of individuals with a mental illness.

### **Conclusion**

Echoing our previous submissions, the PPAO again encourages the Standing Senate Committee on Legal and Constitutional Affairs to continue to consult with the public and stakeholders on this very fundamental legislation. We advocate for equitable treatment for individuals with mental disorders or impairments and see the Mental Disorder provisions in the *Code* as a key mechanism to rehabilitate and reintegrate persons with mental illness and help them participate fully in society. We encourage the Committee to review our recommendations and implement them to reflect Canada's leadership in the area of rehabilitation and reintegration.

The PPAO believes that there is much to be done before we could have an inclusive and welcoming society for individuals with mental disabilities. We are confident, however, that Canada can rise to meet this challenge. Doubtless, it will take much effort on the part of all stakeholders, but with modern and progressive Mental Disorder provisions in the *Code* that focus on restorative rather than punitive justice, the dream will become a reality.



David Simpson  
Program Manager

## ***Summary of Recommendations***

- The PPAO recommends that the *Code* be amended to include a statement of purpose with respect to the Mental Disorder provisions to emphasize the goals of recovery and reintegration into society.
- The PPAO recommends that timelines for compliance be introduced into dispositions, and that Review Boards be given the authority to enforce and order compliance with dispositions.
- The PPAO recommends that the *Code* specify the factors to be considered in determining the least onerous and restrictive disposition and a range of treatment modalities to address rehabilitation needs, in keeping with the forensic client's wishes and choices.
- The PPAO further recommends that 'dangerousness' be defined in the *Code* and specifically drafted to exclude 'undesirable' or 'inappropriate' behaviour that does not pose a risk.
- The PPAO recommends that the *Code* clearly define levels of custodial restrictions.
- The PPAO recommends that the *Code* clarify the phrase 'restriction on the liberty of the accused' to give guidance to facilities that must apply to the Review Board for a hearing, and further, that the Board be given authority to order compliance with s. 672.56 of the *Code*.
- The PPAO recommends that the *Code* be amended to ensure that regardless of whether a facility files for a restriction of liberties hearing, the regular annual review should proceed. Furthermore, only the forensic client should have the right to waive such hearings.
- The PPAO further recommends that the *Code* specify that a forensic client's rights are not altered unless specifically stated by the *Code* or by the disposition.
- The PPAO recommends that clauses 16(3) and 21, which permits victim impact statements to be presented at Review Board hearings, be repealed and that a more appropriate forum be considered for such statements.
- The PPAO recommends that Review Boards continue to hold hearings no later than 12 months after each forensic client's disposition, and that duty counsel or an *amicus curiae* process be instituted to assist unrepresented forensic clients before the Review Board.
- The PPAO recommends that Clauses 31 and 32 relating to s. 672.85 of the *Code* be repealed and that forensic patients retain the right to choose how they wish to participate in the process.
- The PPAO recommends that the treatment disposition portion of the *Code* be removed and a model of consent and substitute decision-making be adopted similar to that in Ontario's law.
- The PPAO recommends that a Federal-Provincial-Territorial working group be promptly established to undertake an extensive education campaign aimed at tackling the stigma facing forensic patients. The working group must include a variety of stakeholders, including consumers, to promote tolerance, understanding and acceptance of individuals with a mental illness.