February 4, 2002

The Honourable Andy Scott, M.P., Chair
Standing Committee on Justice
and Human Rights
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Mr. Scott:

RE: Review of *Criminal Code* Mental Disorder Provisions

The Canadian Bar Association's (CBA) National Criminal Justice Section and its Committee on Imprisonment and Release (the Section) appreciate your invitation to participate in the Standing Committee's proposed review of the mental disorder provisions of the *Criminal Code*. We agree that it is timely to conduct a review of those provisions and related issues. However, we urge the Committee to reconsider the methodology of its review to ensure that all substantive aspects are given thoughtful and detailed consideration, given the importance of the interests at stake.

We have grave concerns about the plight of mentally disordered persons who come within the grasp of the criminal justice system. These are surely some of the most vulnerable people in our society. We know that many people working within the criminal justice system have some experience with mental disorder issues, but there are few specialists in the area. Your letter of invitation suggests that the Committee's intention is to proceed rather quickly with written and oral submissions on the basis of the fairly brief summary of issues you have circulated. In our view, such a process is likely to provide only anecdotal feedback, at best.

The current provisions were enacted in 1991, the culmination of a lengthy process of research and debate that spanned decades. The issues were addressed by the *Ouimet Report* in 1969 (Report of the Canadian Committee on Corrections) and led to the ground-breaking work of the Law Reform Commission of Canada (see Working paper No. 14, *The Criminal Process and Mental Disorder*, 1975, and the Report to Parliament entitled *Mental Disorder and the Criminal Process*, 1976). The detailed amendments contained in S.C. 1991, c.43, now comprising the various elements from sections 672.1 to 672.95 of the *Criminal Code*, were also the subject of years of discussion. In fact, legislators delayed enactment of those sections until the Supreme Court decision in *R.* v. *Swain*, [1991] 1 S.C.R. 933 to ensure compliance with that Court's application of the *Charter* to the dispositional issues.

Section 672 deals with findings of “fitness” or “not guilty by reason of mental disorder”, and the dispositional framework that flows from these findings. However, as the Issues Paper acknowledges, the underlying issues are much broader. While over 2000 people are currently subject to some form of confinement emanating from section 672, it is impossible to estimate the number of mentally disordered persons who actually come before the courts. The past decade has witnessed innovations in the form of diversion and even a specialized court for the mentally disordered. However, new "mega-jails" capable of housing up to 1500 people are also being built in some provinces, with an emphasis on security rather than programming. We, like others, are concerned that this trend foreshadows a dramatic increase in the proportion of mentally disordered prisoners. More importantly, the inadequacy of treatment services for prisoners, both provincial and federal, has already been the subject of comment by the Supreme Court of Canada (see *R.* v. *Knoblauch* (2000), 149 C.C.C. (3d) 1).

The current provisions allow appeals to provincial appellate courts. Over the past ten years, there have been a number of decisions, including *Winko* v. *British Forensic Psychiatric Institute*, [1999] 2 S.C.R. 624, which have made important contributions to the dispositional debate. However, their effects have never been evaluated.

The drafters of the 1991 amendments specifically decided not to follow the British hospital order model. Instead, Parliament passed section 747 pertaining to hospital orders, in our view an unsatisfactory substitute, which has never been proclaimed in force. Similarly, the capping provisions in section 672.64 have never been proclaimed in force, although the decision in *Winko* deals briefly with this issue. The drafters of the 1991 amendments decided that section 672.11 should not include the power to order assessments solely for sentencing purposes. In spite of sound reasons for this decision, some appellate courts have chosen not to follow it (see *R.* v. *Lenart* (1998), 123 C.C.C. (3d) 353 (Ont.C.A.)). To date, these controversies have not been evaluated in either empirical, comparative, or psychiatric terms.

We note that the Standing Committee’s recent statutory review of the *Corrections and Conditional Release Act* extended over several months. For that review, your Committee had the benefit of extensive data collection and research reports prepared by Corrections Service Canada and the National Parole Board. In contrast, in the "mental disorder" area, there are no national agencies that can provide this function. Each province and territory has its own review boards and hospital facilities, some being better equipped than others. How the various regions are responding to the challenges of mental disorder and the expectations of section 672 are important questions that need to be answered. To date, there has been no serious and systematic effort to address these questions.

Rather than proceed with a review of the provisions at this time, and on the basis of the current background information alone, we urge you to adopt one of the following strategies:

1. Refer the entire issue to the Law Commission of Canada to organize a multi-disciplinary research programme;

2. Refer the entire issue to the Minister of Justice to fund and organize a multi-disciplinary research programme;

or

3. Your Committee take upon itself to ensure that the appropriate multi-disciplinary research programme is done.

We believe that anything short of a serious programme of research conducted by psychiatrists, lawyers and social scientists will be a disservice to the many people who suffer from mental disorder and find themselves facing criminal charges. These people are among the most vulnerable and politically powerless of any in our society. The question of how Canada's justice system should best respond to them should be given the utmost in careful consideration.

In spite of our concerns about the proposed process, we would like to be involved in any review your Committee ultimately decides to pursue. Thank you for considering our views at this preliminary stage.

Yours truly,

Heather Perkins-McVey
Chair, National Criminal Justice Section

Professor Allan Manson
Chair, Committee on Imprisonment and Release

c.c Minister of Justice
President, Law Commission of Canada