

CANADIAN
PSYCHOLOGICAL
ASSOCIATION



SOCIÉTÉ
CANADIENNE
DE PSYCHOLOGIE

Fitness to Stand Trial and Criminal Responsibility Assessments in Canada: Improving Access to Qualified Mental Health Professionals

A Position Paper of the Canadian Psychological Association

Prepared by

Joanna Hessen Kayfitz, PhD, R. Psych., Chair

Barry S. Cooper, PhD, R. Psych.

Laura S. Guy, PhD, R. Psych., ABPP

Andrew M. Haag, PhD, R. Psych.

David Hill, PsyD, C. Psych.

David J.C. Kolton, PhD, C. Psych.

Milan Pomichalek, PhD, C. Psych.

Ronald Roesch, PhD

Margo C. Watt, PhD, R. Psych.

December 2017

Fitness to Stand Trial and Criminal Responsibility Assessments in Canada: Improving Access to Qualified Mental Health Professionals

Preamble

The Canadian Psychological Association (CPA) is the national association for the science, practice and education of psychology in Canada. The assessment of fitness to stand trial and the assessment of criminal responsibility are key activities necessary to the administration of justice at the interface of mental health and the law. Canadian psychologists have the expertise and scope of practice in the areas of forensic and correctional psychology required to perform these assessments. Given this expertise, the fact that physicians who undertake this work routinely rely on assessments done by psychologists, and the fact that in Canada psychologists outnumber psychiatrists 4:1,¹ designating appropriately qualified psychologists to undertake this work independently will serve the public good. The CPA is advocating for psychologists to be designated under the *Criminal Code of Canada* (CCC) to perform assessments of fitness to stand trial and criminal responsibility.

Background

Fitness to stand trial and criminal responsibility assessments are two types of forensic mental health evaluations that can be ordered by Canadian courts when an accused person is charged with a criminal offence. To address these issues, Canadian courts have typically relied on physicians, in most cases psychiatrists, to provide an expert opinion that may assist the legal system. Although section 672 of the CCC allows for “any other person who has been designated by the Attorney General as being qualified to conduct an assessment of the mental condition of the accused under an assessment order”² to complete these assessments, there has been no such addition of other disciplines. In other sections of the CCC and the *Youth Criminal Justice Act* (YCJA), the language about who can perform court-ordered assessments is different from section 672. For example, psychologists are included in section 760 of the CCC in relation to dangerous offender assessments. For youth forensic assessments, section 34 of the YCJA defines a “qualified person” as “a person duly qualified by provincial law to practice medicine or psychiatry or to carry out psychological examinations or assessments.”³ In our opinion, fitness to stand trial and criminal responsibility evaluations require an expert professional that has specialized training and knowledge in the assessment of mental disorders.

Psychologists are sometimes involved in fitness to stand trial and criminal responsibility assessments in Canada, either in provincial forensic mental health systems as members of multidisciplinary teams, or as independent practitioners in the community. Current roles include providing diagnostic assessments, malingering assessments, or second opinions on the psycholegal questions of fitness or criminal responsibility.^{4,5} Assessments of fitness to stand trial and criminal responsibility are, in essence, a form of capacity assessment: for the former, does the accused have the capacity to understand the criminal justice process and participate meaningfully in the proceedings and, for the latter, at the time of the crime was the accused able to formulate the requisite intention for the crime in terms of knowing right

from wrong. For findings of unfitness or absence of criminal responsibility, the incapacity must be a result of mental disorder. Conducting capacity assessments and assessing mental disorder have long been the purview of psychologists. In provincial courts, judges have permitted testimony from psychologists to inform the determination of criminal responsibility⁶ and fitness to stand trial.⁷

Accessibility Issues

According to the CCC, there are specific timelines for completion of fitness to stand trial (seven days) and criminal responsibility (30 days) assessments ordered by the court.⁸ In practice, however, assessment timeframes can exceed these deadlines.^{9,10,11} Accused persons taking part in these assessments typically have some type of severe and persistent mental illness. If a qualified mental health professional is not available to conduct the assessment, there can be significant delays for the accused person waiting in custody to proceed with his or her legal case.^{12,13} When the courts request a fitness to stand trial or criminal responsibility evaluation, the accused person should have access to a qualified forensic mental health professional who can complete the assessment in a competent and timely manner. Failure to provide such access may contribute to delays in case processing and thereby compromise the accused's *Charter* right to be tried within a reasonable time, the rules of which the Supreme Court recently delineated in *R. v. Jordan* (2016)¹⁴ and *R. v. Cody* (2017).¹⁵

In our opinion, psychologists who practice in the area of forensic clinical psychology have the training, expertise, and skills needed to perform these assessments for the courts. For example, psychologists are able to assess and diagnose mental disorders – competency that is directly related to providing an opinion about fitness to stand trial and criminal responsibility. They also have expertise in evaluating mental status, cognitive functioning, and personality disorders; these topics are often encountered in court-ordered assessments. To complete fitness to stand trial and criminal responsibility assessments, psychological testing can be quite useful to help answer the psycholegal question. Psychologists have developed several validated measures of fitness to stand trial,¹⁶ criminal responsibility,¹⁷ personality and psychopathology,¹⁸ and malingering.¹⁹ More generally, psychologists who have trained and practiced in clinical forensic psychology receive and provide training in how to analyze the nexus between the clinical data and legal issues in order to address the psycholegal question.

As part of fitness to stand trial assessments, evaluators routinely offer opinions regarding feasibility of restoration and recommendations regarding treatment for the restoration of fitness. The most common form of intervention for individuals found Unfit to Stand Trial is psychotropic medication to target the symptoms of mental disorder impairing the defendant's competence related functional abilities; psychologists are trained to identify when pharmacological intervention should be considered and referral to a psychiatrist to provide such treatment is warranted. Psychologists with training in clinical forensic psychology can recognize when other forms of intervention for the restoration of fitness may be helpful, such as educational treatment programs developed to increase the defendant's legal knowledge or individualized programs to target his or her symptoms of mental disorder or fitness specific deficits. Moreover, they have provided these forms of fitness restoration interventions.²⁰

FITNESS TO STAND TRIAL AND CRIMINAL RESPONSIBILITY ASSESSMENTS

At present, the skills and expertise of clinical psychologists with forensic training are underutilized in Canada. In the United States, psychologists have been considered qualified to conduct assessments for the federal and lower-level courts in the areas of competency to stand trial (i.e., fitness to stand trial) and criminal responsibility for many years.²¹ Designating psychologists as qualified to perform these assessments in Canada would significantly increase the number of mental health professionals that are available to the courts, as “psychologists are Canada’s largest group of specialized and regulated mental health providers, outnumbering psychiatrists about 4:1.”²²

Recommendations

We respectfully recommend that the following changes be considered by the federal government:

- In section 672.1 of the *Criminal Code*, we propose a change to the definition of “assessment” to say, “assessment means an assessment by a qualified mental health professional, and any incidental observation or examination of the accused.”
- Similarly, to the *Youth Criminal Justice Act*, we propose that “qualified mental health professional” is defined as: “a person duly qualified by provincial law to practice psychiatry or a person duly qualified by provincial law to practice psychology.”
- Beyond these basic requirements, we also strongly recommend that a qualified mental health professional, whether a psychiatrist or psychologist, should have specialized knowledge and expertise in forensic mental health assessment in order to conduct evaluations under section 672 of the CCC.

Our recommendations are based upon several factors that we consider important in the court-ordered assessment process. First, psychologists have the training and expertise to conduct assessments of fitness and criminal responsibility. Psychologists have in fact developed many of the forensic assessment instruments upon which psychiatry relies to assess these legal issues. Second, amending the wording of the CCC will improve access to mental health professionals for accused persons, courts, and provincial forensic mental health systems. With the inclusion of psychologists and psychiatrists in the definition, courts and accused persons will have access to a larger group of forensic mental health professionals to complete these assessments. In provincial forensic mental health systems, the inclusion of psychologists in these assessments may assist administrators in taking advantage of existing resources, especially in geographical areas where there are few professionals with forensic mental health expertise. Third, changing the definitions in section 672 may help provide more consistency in the language within the CCC and between the CCC and YCJA. Aiming for consistent language across legislation can help provide clarity to judges and lawyers in determining which mental health professionals are qualified to conduct forensic assessments for the courts. Finally, not all mental health professionals have specialized knowledge and expertise in the area of forensic mental health. Amending the CCC and YCJA to require that those conducting forensic mental health evaluations be both a qualified mental health professional and have specialized knowledge and expertise in forensic mental health assessment help ensure that

FITNESS TO STAND TRIAL AND CRIMINAL RESPONSIBILITY ASSESSMENTS

courts and accused persons with severe mental illnesses receive services that are evidence-based and meet community standards of care.

References

- ¹ Nationally psychologists outnumber psychiatrists 4:1 but this ratio varies within each province and territory.
- ² *Criminal Code*, R. S. C., c. C-46, as amended (1992).
- ³ *Youth Criminal Justice Act*, S.C. 2002, c. 1.
- ⁴ Canadian Psychological Association (2017). Survey results: Fitness to stand trial survey final report.
- ⁵ Hill, D. A., & Demetriooff, S. (2016, June). *Forensic psychology practice in Canada: A survey of current practices and attitudes among clinical forensic psychologists*. Poster presented at the annual convention of the Canadian Psychological Association, Victoria, BC.
- ⁶ *R. v. Kociancic*, 2017, Alberta Provincial Court; *R. v. Otway*, 2016, Alberta Queen's Bench; *R. v. De Grood*, 2016, Alberta Queen's Bench; *R. v. Ben-Salem*, 2016, Alberta Provincial Court; *R. v. Forjan*, 2014, Alberta Provincial Court; *R. v. Deleeuw-Lafferty*, 2014, Northwest Territories Court.
- ⁷ *R. v. Cardinal*, 2017; Alberta Provincial Court; *R. v. Ben-Salem*, 2016, Alberta Provincial Court; *R. v. Lamb*, 2016 Alberta Queen's Bench.
- ⁸ *Criminal Code*, R. S. C., c. C-46, as amended (1992).
- ⁹ Crocker, A. G., Favreau, O. E., & Caulet, M. (2002). Gender and fitness to stand trial: A 5-year review of remands in Quebec. *International Journal of Law and Psychiatry*, 25, 67-84.
- ¹⁰ Zapf, P. A., & Roesch, R. (1998). Fitness to stand trial: Characteristics of remands since the 1992 Criminal Code amendments. *Canadian Journal of Psychiatry*, 43, 287-293.
- ¹¹ Haag, A. M., Cheng, J., & Wirove, R. (2016). Describing the not criminally responsible population in Alberta's history: Sociodemographic, mental health, and criminological profiles. *Journal of Community Safety and Well-Being*, 1, 68-74.
- ¹² Editorial (2013, February 28). Archaic court rules cause delay. *Winnipeg Free Press*. Retrieved from <http://www.winnipegfreepress.com/opinion/editorials/archaic-court-rules-cause-delay-193767131.html>
- ¹³ McIntyre, M. (2013, March 14). Courts face psych backlogs: Forensic unit down to one after exodus of psychiatrists. *Winnipeg Free Press*. Retrieved from <http://www.winnipegfreepress.com/local/courts-face-psych-backlogs-197933641.html>
- ¹⁴ *R. v. Jordan*, 2016 SCC 27, [2016] 1S.C.R. 631.
- ¹⁵ *R. v. Cody*, 2017 SCC 31.

FITNESS TO STAND TRIAL AND CRIMINAL RESPONSIBILITY ASSESSMENTS

- ¹⁶ Poythress, N. G., Nicholson, R., Otto, R. K., Edens, J. F., Bonnie, R. J., Monahan, J., et al. (1999). *Professional manual for the MacArthur Competence Assessment Tool–Criminal Adjudication*. Odessa, FL: Psychological Assessment Resources; Roesch, R., Zapf, P. Z., & Eaves, D. (2006). *Fitness Interview Test - Revised (FIT-R): A Structured Interview for Assessing Competency to Stand Trial*. Sarasota, FL: Professional Resource Press; Rogers, R., Tillbrook, C. E., & Sewell, K. W. (2004). *Evaluation of Competency to Stand Trial-Revised (ECST-R) and Professional Manual*. Odessa, FL: Psychological Assessment Resources; Everington, C. & Luckasson, R. (1987). *Competence assessment for standing trial for defendants with mental retardation: CAST-MR*. Unpublished manuscript, Miami University, Department of Educational Psychology, Oxford, OH; Grisso, T. (2005). *Evaluating juveniles' adjudicative competence: A guide for clinical practice*. Sarasota, FL: Professional Resource Press;
- ¹⁷ Rogers, R. (1984). *Rogers criminal responsibility assessment scales (R-CRAS) and test manual*. Odessa, FL: Psychological Assessment Resources.
- ¹⁸ Morey, L.C. (2007). *The PAI professional manual*. Lutz, FL: Psychological Assessment Resources; Butcher, J. N., Graham, J. R., Tellegen, A., & Kaemmer, B. (1989). *Manual for the restandardized Minnesota Multiphasic Personality Inventory: MMPI-2*. Minneapolis: University of Minnesota Press; Butcher, J. N., Graham, J. R., Ben-Porath, Y. S., Tellegen, A., Dahlstrom, W. G., & Kaemmer, B. (2001). *MMPI-2: Manual for administration and scoring*. (Rev. ed.). Minneapolis: University of Minnesota Press.
- ¹⁹ Rogers, R., Sewell, K. W. and Gillard, N. D. 2010. *Structured interview of reported symptoms professional manual*, 2nd Ed. Odessa, FL: Psychological Assessment Resources; Miller, H. A. (2001). *Miller-Forensic Assessment of Symptoms Test (M-FAST): Professional manual*. Odessa, FL: Psychological Assessment Resources; Tombaugh, T. N. (1996). *Test of Memory Malingering (TOMM)*. New York: Multi-Health Systems, Inc.
- ²⁰ Zapf, P. A., & Roesch, R. (2011). Future directions in the restoration of competence to stand trial. *Current Directions in Psychological Science*, 20, 43-47.
- ²¹ Viljoen, J. L., Roesch, R., Ogloff, J. R. P., & Zapf, P. A. (2003). The role of Canadian psychologists in conducting fitness and criminal responsibility evaluations. *Canadian Psychology*, 44, 369-381.
- ²² Canadian Psychological Association (2016). Psychologists practicing to scope: The role of psychologists in Canada's public institutions.