



**Written Submission for the Pre-Budget Consultations
in Advance of the Upcoming Federal Budget**

Deputy Prime Minister and Minister of Finance
Department of Finance Canada
90 Elgin Street
Ottawa, ON K1A 0G5

February 2021

RECOMMENDATIONS

Recommendation 1

That the government re-establish a federal law reform commission to give independent advice to Parliament on improving and modernizing the laws of Canada, with an initial and immediate focus on reforming the *Criminal Code* to meet the changing needs of Canadian society, including its ageing population and the increasing number of persons with dementia entering the criminal justice system due to responsive behaviours.

Recommendation 2

That the government create an Office of the National Seniors Advocate.

INTRODUCTION

Most people with dementia will not have contact with the criminal justice system; however, this merciful fact does not diminish the importance and need for reform. For persons with dementia, entering the justice system can have devastating consequences for their health and wellbeing. It can also result in serious violations of their rights and dignity.

Dementia Justice Canada is a public advocacy and research association dedicated to advancing the rights, needs and dignity of people with dementia who come into conflict with the criminal justice system. We aim to make a positive impact by advocating for systemic reforms and by conducting interdisciplinary legal and policy research.

Four years ago, with the passage of the *National Strategy for Alzheimer’s Disease and Other Dementias Act*, Canada created a significant opportunity to improve the plight of criminal defendants with dementia—a group often overlooked and ignored by legislators and policymakers. The Act, which came into force on June 22, 2017, requires the federal Minister of Health, in cooperation with provincial and territorial governments, to develop and implement a comprehensive national dementia strategy that addresses all aspects of the disease.

To inform the strategy, the Government of Canada hosted a National Dementia Conference in Ottawa on May 14-15, 2018. The event brought together approximately 200 participants from six key stakeholder groups: people living with dementia; caregivers; researchers; health professionals; advocacy groups; and provincial and territorial government representatives.

Participants urged the Public Health Agency of Canada to take a “whole-of-government approach” to ensure dementia-related programs, research and innovations supported by the strategy go beyond health to include matters like social services, housing and criminal justice.¹

The World Health Organization has also endorsed such a multisectoral approach and encourages countries to avoid a health-centric perspective in their dementia plans.² To do so, the global health agency identifies a number of roles for the justice sector, such as protecting the rights and freedoms of people with dementia; diverting people with dementia from the criminal justice system; and treating and rehabilitating prisoners with the disease.

Regrettably, despite this increased willingness among international and domestic stakeholders to confront the relationship between dementia and offending behaviour, Canada’s national dementia strategy does not constructively address criminal justice reform.

Launched by the Liberal government in June 2019, the national plan, titled *A Dementia Strategy for Canada: Together We Aspire*, envisions a society in which all people with dementia are

¹ Public Health Agency of Canada, “What We Heard Report: Informing a dementia strategy for Canada” (April 2019) at 19.

² World Health Organization, “Towards a dementia plan: a WHO guide” (2018) at 15-18.

valued, supported and experience an optimal quality of life. All people with dementia except those like World War II veteran Jack Furman, who at age 94 was charged with second degree murder after he allegedly attacked his care home roommate with a shelf; and 74-year-old Piara Singh Sandhu who was charged with two counts of second degree murder after he allegedly pried the metal base off a bedside table and bludgeoned his two care home roommates to death; and 84-year-old Peter Lee who was found unfit to stand trial after allegedly strangling another long-term care resident; and widower Peter Brooks, who at age 76 was convicted of second degree murder and sentenced to life in prison with no parole eligibility for 10 years.

To be sure, there are some federal-level initiatives that consider the experiences of inmates with dementia in the correctional system. Notably, in May 2018, Correctional Service Canada, which has a legislative mandate to provide every inmate with essential health care and reasonable access to non-essential health care,³ released a policy framework on promoting wellness and independence among older federal inmates, including those with dementia.

However, there is considerably less attention on the plight of individuals who have dementia at the time of the alleged offence. Chiefly concerned with the post-arrest and prosecution experiences of persons with dementia, these matters focus on the interval between prevention efforts failing and prison terms starting. From a legal and policy perspective, this shifts different issues to the forefront. Most notably, it raises considerations about police and prosecutorial discretion, including arrest and charging policies in cases of suspected domestic violence; the consequences of no-contact orders for individuals on bail; chronically unfit accused who exhibit responsive behaviours; the civil liberties of mental health patients; the suitability of specialized mental health courts for persons with dementia; capacity and consent to diversion and alternative measures; as well as mandatory minimums and potential reforms such as codification of the diminished responsibility defence.

While Canada's criminal justice system is a shared responsibility among federal, provincial and territorial governments, a number of these issues—like *Criminal Code* reform and prosecutions in the territories—fall squarely within federal jurisdiction. The federal government also has a leadership role to play by supporting provincial administration of justice reforms.

In this pre-budget submission, Dementia Justice Canada makes two recommendations to help ensure Canada's criminal justice system is efficient, just and compassionate toward people who have dementia at the time of the alleged offence. In a modern and prosperous country like Canada, this small and often invisible population deserves nothing less than criminal laws and policies that are responsive to their unique needs.

³ *Corrections and Conditional Release Act*, SC 1992, c 20, s 86.

Recommendation 1

Re-Establish a Federal Law Reform Commission

Canada's criminal justice system is among the best in the world; however, there are problematic aspects. Notably, the system has not kept pace with this country's ageing population and increasing number of criminal defendants with dementia. It is time for the *Criminal Code* to undergo a substantial overhaul to ensure our laws are responsive to this demographic shift as well as the overrepresentation of Indigenous peoples and individuals with mental health and addiction conditions in the criminal justice system.

Unfortunately, fifteen years ago, the Conservative federal government ended the Law Commission of Canada's funding. This institutional void has left Canada without a permanent, independent and expert national law reform body dedicated to constantly studying and, when appropriate, recommending improvements to the criminal law.

Dementia Justice Canada urges the government to re-establish a federal law reform commission to give independent advice to Parliament on improving and modernizing the laws of Canada, with an initial and immediate focus on reforming the *Criminal Code* to meet the changing needs of Canadian society, including its ageing population and the increasing number of persons with dementia entering the criminal justice system due to responsive behaviours.

In March 2018, the Minister of Justice and Attorney General of Canada shared what the government heard during provincial and territorial stakeholder consultations on transforming the criminal justice system. Participants included prosecutors and defence lawyers; academics; victim advocates; restorative justice proponents; and representatives of front-line community support systems and other areas such as health, mental health and housing.

Among those who work in interpreting and applying the law, there were numerous calls for substantial criminal law reform:

Some called for a complete overhaul and re-write. Many said the *Criminal Code* is now a patchwork of legislation that is hard to follow. Many sections are outdated and other sections have been struck down by the courts but remain on the books. Some said the Code fails to reflect major social reforms and often unfairly affects the vulnerable, including women, those with addictions and Indigenous people.⁴

One crosscutting reform ripe for consideration is codification of the diminished responsibility defence. Developed in Scottish common law more than 150 years ago, the defence was imported into the law of England & Wales by the *Homicide Act 1957* and modernized in 2009.

⁴ Department of Justice Canada, "What We Heard: Transforming Canada's Criminal Justice System" (March 2018) at 7.

Diminished responsibility is a partial defence to murder that reduces the offence to manslaughter, a crime that carries a wide range of sentencing options. Though it attracts much controversy, the verdict allows for the humane desire to temper justice with mercy in cases where an accused's mental disorder substantially impaired their ability to understand the nature of their conduct; form a rational judgment; or exercise self-control.

Variations of the defence have also been statutorily available in Northern Ireland;⁵ New South Wales,⁶ Queensland,⁷ the Australian Capital Territory⁸ and the Northern Territory;⁹ as well as several other Commonwealth countries such as Singapore,¹⁰ the Bahamas¹¹ and Barbados.¹² It has also been recognized in Hong Kong¹³ and Ireland.¹⁴

With Senator Kim Pate's discretionary sentencing bill currently before the Senate,¹⁵ now is a particularly timely moment to have an independent and expert law reform agency examine alternatives to mandatory minimums, including options like diminished responsibility for the most serious crime of murder by individuals with substantially impairing mental disorders.

"One of the most effective ways to bring about legal change is arguably the specialised law reform agency," wrote Gavin Murphy in 2004.¹⁶ Investing in a permanent and centralized independent institution will ensure the stability, continuity and non-partisanship that comprehensive criminal law reform demands in a constitutional democracy.

Recommendation 2

Create an Office of the National Seniors Advocate

In our youth-obsessed culture, ageism is the most tolerated form of prejudice. Indeed, across Canada and the globe, the COVID-19 pandemic has exposed long-standing societal apathy towards the mistreatment of seniors. There have been no mass marches or political leaders standing in solidarity with large crowds to demand change to the unconscionable abuse and neglect of seniors in long-term care, even after two heartbreaking reports from the Canadian Armed Forces detailed cruel and inhumane conditions in several Ontario and Quebec care

⁵ *Criminal Justice Act (Northern Ireland) 1966* (c 20), s 5, as amended by *Coroners and Justice Act 2009* (c 25), s 53.

⁶ *Crimes Amendment (Diminished Responsibility) Act 1997* (No 106), amending *Crimes Act 1900* (No 40), s 23A.

⁷ *Criminal Code and Other Acts Amendment Act 1961*, 10 Eliz 2 No 11, amending *Criminal Code Act 1899*, s 304A.

⁸ *Crimes (Amendment) Ordinance (No 2) 1990*, amending *Crimes Act 1900*, s 14.

⁹ *Criminal Reform Amendment Act (No 2) 2006*, s 17, amending *Criminal Code Act*, s 159.

¹⁰ *Penal Code* (1961), s 300 (Exception 7).

¹¹ *Penal Code*, s 305.

¹² *Offences Against the Person Act*, s 4.

¹³ *Homicide Ordinance* (Cap 339), s 3.

¹⁴ *Criminal Law (Insanity) Act 2006*, s 6.

¹⁵ Bill S-207, *An Act to amend the Criminal Code (independence of the judiciary)*, 2nd Sess, 43rd Parl, 2020 (first reading 30 September 2020).

¹⁶ Gavin Murphy, "Law Reform Agencies" (2004).

homes. Ageism has enabled those in positions of trust and power, including our law and policymakers, to escape accountability. This must change.

To help undo the ageism embedded in our institutions and ingrained in much of society, Canada needs an independent Office of the National Seniors Advocate. Reporting directly to Parliament, the Seniors Advocate would work to protect and promote the rights of seniors.

While mandates and powers vary, several other countries have independent seniors advocates. For example, the Older People's Commissioner in Wales "protects and promotes the rights of older people throughout Wales, scrutinising and influencing a wide range of policy and practice to improve their lives."¹⁷ Among other roles, the Commissioner reviews the work of public bodies and holds them to account when necessary. Northern Ireland also has an independent Commissioner for Older People that provides advice to government.¹⁸

In Canada, COVID-19's devastating toll on seniors in long-term care has accelerated the need for the creation of an Office of the National Seniors Advocate. Indeed, a growing chorus of individuals and organizations are calling for such an office to be promptly established.¹⁹

Many senior-related issues fall within provincial jurisdiction; however, there is a role for a federal-level independent advocate to champion the rights of older Canadians. Notably, the national advocate could review and make recommendations to Parliament on the criminal laws as they affect older people, including in cases of elder abuse and incidents involving individuals with dementia who enter the justice system due to responsive behaviours.

CONCLUSION

COVID-19 is having a devastating toll on people with dementia. Recent data from Statistics Canada shows that dementia was listed on the death certificate of 42 percent of women and 33 percent of men in COVID-involved deaths.²⁰ During the first wave of the pandemic, long-term care homes, where nearly 60 percent of residents aged 80 and older have dementia,²¹ accounted for 81 percent of COVID-19 deaths in the country, compared to an average of 42 percent among 16 other Organisation for Economic Co-operation and Development countries.²²

Over 350,000 seniors aged 65 and older, or approximately seven percent of all seniors in Canada, live in long-term care and residences for seniors.²³ Due to COVID-19 response

¹⁷ Older People's Commissioner for Wales, "Commissioner's Role" (2016).

¹⁸ Commissioner for Older People for Northern Ireland, "What we do" (nd).

¹⁹ For example, CanAge and the Canadian Bar Association Elder Law Section.

²⁰ Statistics Canada, "COVID-19 death comorbidities in Canada" (16 November 2020).

²¹ Statistics Canada, "Alzheimer's disease and other dementias in Canada" (18 May 2016).

²² Canadian Institute for Health Information, News Release, "New analysis paints international picture of COVID-19's long-term care impacts" (25 June 2020).

²³ Statistics Canada, "Living arrangements for seniors" (2012).

measures, many residents remain unlawfully detained in their homes and unable to receive visitors of their choice and without interference. They are struggling with severe isolation and loneliness, desperate to see their family and friends again.

In Ontario, the Advocacy Centre for the Elderly reports that “residents have had police called on them when they attempted to leave,”²⁴ an extremely worrying tactic by long-term care and retirement home operators that risks criminalizing seniors, including those with dementia.

In private dwellings across Canada, people with dementia and their families are also struggling, with a worrying number of anecdotal accounts of worsening responsive behaviours including increased agitation and aggression. With little to no respite, tensions are escalating and people with dementia, as well as other vulnerable individuals, are at risk of abuse and neglect.

In some cases, as behavioural symptoms worsen, dementia patients may be the perpetrators of violence, resulting in an arrest, criminal charge and prosecution. Those found unfit to stand trial may languish in forensic settings ill-equipped to provide specialized dementia care, while others may be convicted and caged in dangerous jails and prisons.

While criminal law reforms are too late for people like Messrs. Furman, Sandhu, Lee and Brooks, there is still time to address changes that will ensure Canada’s criminal justice system going forward is efficient, just and compassionate towards people who have dementia at the time of the alleged offence. Budget 2021 is an opportunity to invest in this transformation and reduce the tragic and cruel criminalization of people with dementia.

For questions or further information, please contact:

Heather Campbell Pope, BA (Hons.), LLB, LLM
Founder & Principal Advocate

Dementia Justice Canada

Email: dementiajustice@outlook.com

Website: www.dementiajustice.com

²⁴ Advocacy Centre for the Elderly, Newsletter, “Legality of Detention in Long-Term Care and Retirement Homes During the COVID-19 Pandemic” (Winter 2020/21) at 6.