THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 26, 2014

Via email: lcjc@sen.parl.gc.ca

The Honourable Bob Runciman, Senator
Chair, Senate Committee on Legal and Constitutional Affairs
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Senator Runciman:

Re: Bill C-14, *Not Criminally Responsible Reform Act*

The National Criminal Justice Section of the Canadian Bar Association (CBA Section) appreciates the opportunity to comment on Bill C-14, the *Not Criminally Responsible Reform Act*.

The CBA is a national association of over 37,500 lawyers, notaries, law students and academics, and our mandate includes seeking improvement in the law and the administration of justice. The National Criminal Justice Section consists of criminal law experts, including a balance of Crown and defence lawyers and legal academics from every province and territory.

We attach the CBA Section's submission analyzing Bill C-54 (now Bill C-14). In this letter we address the two amendments made by the House, namely to section 7 (notice to the victim of the not criminally responsible (NCR) accused's "intended place of residence" upon discharge) and the new section 20.1 (five year review).

Victim notification of the accused's "intended place of residence"

The CBA Section agrees with the provision that would allow the victim, if requested, to be notified of the NCR accused's conditional or absolute discharge. However, the CBA Section does not support the amendment to section 7 that would also give the victim, on request, the NCR accused's "intended place of residence" on discharge. The CBA Section recommends that this change not be enacted for five reasons.

First, no contact orders offer a better approach to addressing victim concerns about encountering the NCR accused in the community. No contact orders can be drafted to protect the victim by prohibiting contact based on the specific concerns of the victim, including inadvertent contact. For example, should the victim encounter the NCR accused in a shopping mall, the no contact order could require the NCR accused to leave the vicinity of the victim immediately. This

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approach more effectively balances the victim's concerns with fair treatment of the NCR accused, the latter being one of the "twin goals" of the NCR regime.

Second, the amendment is contrary to the NCR regime's goal of the accused's treatment and reintegration into the community. Indeed, the requirement to provide place of residence puts the NCR accused, in effect, in a category similar to sex offenders in terms of the requirements placed on them at discharge. This only serves to further stigmatize NCR accused who are, by definition, not guilty of a criminal offence committed while mentally ill. Public safety is best served when the NCR accused is given treatment and, on review, reintegrated into the community through an appropriate program.

Third, the language of "intended place of residence" is vague. Does this mean a radius within which the NCR accused lives? Or does this mean NCR accused's actual address? Further, the length of time this information must be provided to the victim is not specified. Is it only once when the NCR accused is discharged? Is it each time the NCR accused moves? Is it for a set amount of time (e.g. 5 years) or indefinitely?

Fourth, releasing the private information of a citizen who has not been convicted of a crime raises potential constitutional issues under section 7 of the *Canadian Charter of Rights and Freedoms.* Every citizen has a constitutional right to privacy under section 7 and cannot be deprived of thereof "except in accordance with the principles of fundamental justice." It is unclear whether the proposed breach of privacy rights could be justified under principles of fundamental justice or section 1 of the *Charter.*

Fifth, the CBA Section fears that this proposed amendment would lead to vigilante justice and potential harm to the NCR accused. It is akin to the jurisprudence dealing with sentences which 'exile' or 'banish' the accused.

In the 1987 case *R. v. Smith*, the Supreme Court of Canada was clear that section 12 of the *Charter* protects persons from "a condition amounting to virtual exile." Providing the NCR accused's address may result in a virtual exile because the NCR accused may not wish to reintegrate into his or her community for fear of extra-judicial reprisal. This negates the goal of successful community reintegration at the heart of the NCR regime.

Cases involving sentences that, in effect, 'banish' the accused have also found it is fundamentally wrong for one community to foist its 'undesirables' off onto another.[1] This was best stated by Dickson J. A. (as he then was) in *Fuller*:

> In Canada communities are interdependent and relations between them should be marked by mutual respect and understanding. A practice whereby one community seeks to rid itself of undesirables by foisting them off on other communities violates this basic concept of consideration for the rights of others and should not be tolerated.[2]

The effect of imposing 'geographic scarlet letters' on mentally ill persons will be to create intolerance and bias in our communities where there should be none. Mentally ill persons are members of our communities and, once properly treated, must be allowed to reintegrate back into those same communities. This amendment is self-defeating and counter-productive in this regard.

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1 *R. v. Beal* (2011), 267 C.C.C. (3d) 424 at para.16 (Alta.C.A.).

2 *R. v. Fuller*, [1969] 3 CCC 348, at p. 351 (Man.C.A.).

Review period

The second amendment in section 20.1 is the addition of a five-year comprehensive review period of sections 672.1 to 672.89 of the *Criminal Code* by a Senate and/or Commons Committee. The CBA section welcomes this review process.

Thank you for considering the views of the CBA Section.

Yours truly,

(original signed by Gaylene Schellenberg for Eric V. Gottardi)

Eric V. Gottardi
Chair, National Criminal Justice Section

encl.

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C-54 – *Not Criminally Responsible Reform Act*

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

March 2013

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-54, the *Not Criminal Responsible Reform Act*. The CBA Section consists of defence lawyers, prosecutors and legal academics from every province and territory.

Bill C-54 will amend Part XX.1 of the *Criminal Code* which deals with accused persons who have been found not criminally responsible by reason of mental disorder (NCR accused).

Bill C-54 has three main components, all of which impact the mental disorder regime in the *Criminal Code* and the *National Defence Act*. First, it amends the criteria to be considered when determining the "disposition" for an NCR accused, making safety of the public the "paramount consideration" and removing the requirement that the disposition be the "least onerous and least restrictive" possible in the circumstances. Second, it creates a scheme where the Court, on an application by the Crown, can designate an NCR accused "high-risk", subjecting them to a more onerous form of custody after the trial. Third, it makes procedural amendments that will alert victims when NCR accused are discharged into the community.[1]

The CBA Section recognizes the delicate balance that must be struck between public safety and individual liberty when determining how best to handle an NCR accused who has committed a serious offence. Both goals are best achieved by treatment and reintegration into society. This balance, unlike in the sentencing context, must address public safety but still recognize that the accused has not been convicted of a crime and should not be punished as a result. A disposition of an NCR accused is not a sentence, but rather management of a mental disorder. The leading authorities in this area clearly state, that to be constitutionally sound, the

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[1] Legislative Summary, http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5964767&View=8 Library of Parliament, February 2013

disposition must address what has been described as the "twin goals": protecting the public while still treating the accused fairly and with the utmost dignity and liberty possible in the circumstances.[2]

This submission begins with a summary of the CBA Section's perspective on the intersection between mental health issues and the criminal law. We then turn to the procedural and substantive reforms proposed in Bill C-54. The CBA Section supports the new notice requirements in Bill C-54. However, the remaining substantive reforms represent an unnecessary and potentially unconstitutional incursion into this area of criminal law. We recommend that these reforms, including the new "High-Risk Accused" designation, not be enacted.

II. INTERSECTION BETWEEN CRIMINAL LAW AND MENTAL HEALTH ISSUES

Part XX.1 of the *Criminal Code* was enacted, in part, to eliminate stereotypes and the stigmatization of mentally ill accused. For decades, the stereotype of the "mad offender" led to the indefinite institutionalization and incarceration of individuals at the pleasure of the Lieutenant Governor, contributing to the view that the mentally ill are always dangerous.[3] In *R. v. Swain*[4], the Supreme Court of Canada struck down the previous regime, accepting that the mentally ill have historically been the subject of abuse, neglect and discrimination in our society. This, the Court held, stemmed from an irrational fear of the mentally ill which has added to their systematic isolation, segregation, and devaluation in society over the years.[5]

The CBA Section agrees with the observations in *Swain* and subsequent decisions on the marginalization of NCR accused. Parliament must be vigilant to oppose any measures that criminalize the mentally ill or which propagate myths and stereotypes about NCR accused specifically. The goal must always be to encourage effective treatment of NCR accused so that they may eventually reintegrate into society in a safe and dignified manner. This recognizes

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2 *Winko v. British Columbia (Forensic Psychiatric Institute),* [1999] 2 S.C.R. 625 [*Winko*] at paras. 20, 22, 30, and 42. See also: R. v. Conway, [2010] 1 S.C.R. 765 at para. 86; Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services), [2006] 1 S.C.R. 326 at paras. 27 and 32.

3 *Winko*, *supra* at para. 84.

4 [1991] 1 S.C.R. 933 [*Swain*].

5 *Swain, supra*.

that once an accused is found not criminally responsible, they cease to be an "accused" and become a "patient" who may require the State's assistance.

The safety of the public is served through the State's assistance, which may involve temporary or even indeterminate custody. In *Winko*, Justice McLachlin (as she then was) wrote, "If society is to be protected on a long-term basis, it must address the cause of the offending behaviour — the mental illness."[6] In this context, there is no room for fear or blame, but rather compassion, an understanding of the harm done to victims, and an awareness that the accused is not at "fault" in the traditional sense.

With these objectives and principles in mind, the CBA passed a resolution in 2011 calling on the federal, provincial, and territorial governments to "allocate sufficient resources to reduce the criminalization of mentally ill individuals" and "develop policies to enhance the lives of those suffering from mental illness to prevent them from coming into contact with the criminal justice system." Likewise, the Mental Health Commission of Canada recently noted that the mentally ill are over-represented in the criminal justice system and that an urgent need exists for appropriate services and treatment for these individuals (see Priority 2.4).[7]

Bill C-54 does nothing to ensure that adequate mental health services are available before a person comes in contact with the criminal justice system. Persons with mental illness are much more likely to engage in criminal behaviour when their condition is poorly managed. Once contact is made with the criminal justice system, adequate services must be provided – either through the forensic psychiatric system or mental health services in regular prisons – to reduce any threat to the public on release. Public protection and adequate treatment go hand in hand.

Bill C-54 deals with how the Courts and Review Boards assess accused persons already found to be not criminally responsible. In this context, one must be careful not to conflate "treatment" and "punishment". Any measures which serve to further institutionalize NCR accused must be closely scrutinized to ensure they are *Charter*-compliant and actually achieve public safety. Unnecessarily detaining NCR accused, or subjecting them to certain restrictions that are not logically tied to their recovery, actually undermines public safety.

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6 *Winko*, *supra* note 2 at para. 40

7 Mental Health Commission of Canada. "Changing Directions, Changing Lives: The Mental Health Strategy for Canada." (2012).

III. REFORM NOT REQUIRED

Ostensibly, Bill C-54 is intended to promote public safety and further protect victim's rights. To this end, the government proposes a mechanism through which NCR accused can be denied annual reviews and certain freedoms now theoretically available to all accused (e.g., unescorted day passes), if they are deemed to be a high-risk. The government also suggests a new framework for determining the most appropriate disposition for an NCR accused that will, by necessity, result in the further institutionalization of the mentally ill.

These measures, incorrectly in our view, suggest that inappropriate release from detention and subsequent recidivism, particularly of violent NCR accused, are pressing problems. The CBA Section believes these measures are unnecessary, as they aim to address a problem that is already well managed.[8] On March 1, 2013, Dr. Anne Crocker, a McGill University researcher, told reporters that "there's no current evidence indicating the need for changing the way things are being done at the moment". She stated that public safety is already "front and centre" when Review Boards assess cases, and those who are detained in hospital tend to be held longer than if they had been found guilty and sent to prison.[9]

Review Boards already detain 90% of those NCR accused who have been found not criminally responsible of homicide offences or attempted murder. The great variability in the tenure of NCR accused under the Review Board suggests that each case is highly individualized and a one-size-fits-all approach is inappropriate. Moreover, recidivism rates for NCR accused who have committed serious violent offences are quite low. Only 7.3 % of NCR accused who fall into this category actually committed another violent offence in the following three years. When only looking at those who are absolutely discharged, the recidivism rate for another violent offence falls to 4.1 %. The current system of gradual reintegration and eventual release, while not perfect, works well to put NCR accused on a path of effective treatment.[10] Approximately half of all NCR accused are hospitalized in the civil system within three years. This suggests

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8 Anne G. Crocker *et al*. "Description and processing of individuals found Not Criminally Responsible on Account of Mental Disorder accused of "serious violent offences." Final report submitted to the Research and statistics division, Department of Justice, Canada (March, 2013).

9 http://www2.canada.com/calgaryherald/news/story.html?id=861fe61d-c360-4e4c-be57-de05fee55fc6&p=1

10 Anne G. Crocker *et al*. "Projet National Trajectoires : Taux de récidive criminelle et réhospitalisation psychiatrique en période d'observation à risqué" Résultats préliminaires – pour le président de la Commission d'examen du Québec (7 Septembre 2011).

that most NCR accused are successfully oriented towards the mental health system rather than the criminal justice system, once they have engaged the process.

The proposed changes will actually exacerbate problems with the current system. First, the changes will create additional demand on forensic psychiatric services, already over-burdened, by keeping more NCR accused detained in forensic hospitals for legal rather than clinical reasons. This is also incompatible with viewing NCR accused as "patients" and not "prisoners".

Second, knowing that a high-risk designation and the more onerous sanctions that come with it is a possible outcome, fewer accused will seek an NCR verdict as a plea. This will send more people with a mental illness into the regular prison population; individuals better served by getting treatment in the psychiatric system. Mental illness is already prevalent in the prison system, estimated as affecting as much as 10% of the current federal penitentiary population.[11] Persons with mental illness released from the regular prison systems do not have a community reintegration plan and the same follow-up as those discharged by a Review Board.

IV. ANALYSIS OF BILL C-54

Bill C-54 makes three major changes to the mental disorder regime:

1. It removes the "least onerous and least restrictive" requirement when determining the appropriate disposition for an NCR accused;
2. It creates the "High-Risk" accused regime; and
3. It adds new procedural requirements that will provide notice to victims of when NCR accused are discharged into the community.

The CBA Section welcomes the new notice requirements in Bill C-54. However, the CBA Section believes the other substantive reforms in Bill C-54 are potentially unconstitutional, given the narrow scope our Courts have proscribed for Parliament in this area of the criminal law.

A. Removal of "Least Onerous and Least Restrictive" Requirement

Currently, the Court or Review Board must discharge absolutely any accused found not criminally responsible, unless they pose a significant threat to the safety of the public (s. 672.54). In making this decision, the Court or Review Board must consider the need to protect

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11 Public Safety Canada Portfolio Corrections Statistics Committee. 2007. Corrections and Conditional Release Statistical Overview: Annual Report 2007.

the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and other needs of the accused. Where an accused does pose a significant threat to the safety of the public, the Court or Review Board must select the "least onerous and least restrictive" form of disposition available in the circumstances, which may include a conditional discharge or an order directing the accused be detained in a hospital.

Bill C-54 would amend s. 672.54 to make the safety of the public the "paramount" consideration when choosing the appropriate disposition. It also proposes to eliminate the requirement that the disposition be the "least onerous and least restrictive" to the accused in the circumstances, replacing it with the requirement that the disposition be what is "necessary and appropriate in the circumstances."

This proposed reform mirrors what Parliament has recently enacted in other areas of the criminal law. However, NCR accused are not **sentenced** under the criminal law in the traditional sense. Therefore, eliminating the "least onerous and least restrictive" requirement engages different considerations in this area, raising constitutional implications.

In *Winko*, *supra*, the Supreme Court of Canada gave an in depth analysis of Part XX.1. Portions of Part XX.1, including s. 672.54, were challenged on the basis that they violated s. 7 of the *Charter* on multiple fronts, including vagueness and over breadth. In rejecting these assertions, Justice McLachlin (as she was then) placed significant reliance on the fact that any disposition made pursuant to s. 672.54 must be the least onerous and restrictive possible in the circumstances.[12] In particular, it was argued that s. 672.54 was unconstitutional in that it employed means broader than necessary to achieve the objective of public safety. In rejecting this argument, Justice McLachlin held as follows:

> [71] … **The dual objectives of Part XX.1, and s. 672.54 in particular, are to protect the public from the NCR accused who poses a significant threat to public safety while safeguarding the NCR accused's liberty to the maximum extent possible.** To accomplish these goals, Parliament has stipulated (on the interpretation of s. 672.54 set out above) that unless it is established that the NCR accused is a significant threat to public safety, he must be discharged absolutely. **In cases where such a significant threat is established, Parliament has further stipulated that the least onerous and least restrictive disposition of the accused must be selected. In my view, this scheme is not overbroad. It ensures that the NCR accused's liberty will be trammeled no more than is necessary to protect public safety.** It follows

12 See, for example, paras. 47-48 and 71-73.

> that I cannot agree with the contrary decision of the Manitoba Court of Appeal in *R. v. Hoeppner*, [1999] M.J. No. 113 (QL).
>
> [72] **In addition to the safeguards of the NCR accused's liberty found in s. 672.54, Part XX.1 further protects his or her liberty by providing for, at minimum, annual consideration of the case by the Review Board: s. 672.81.** The NCR accused has the right to appeal to the Court of Appeal a disposition made by a court or Review Board: s. 672.72. If a court or Review Board fails to interpret and apply s. 672.54 correctly and unduly impinges on the NCR accused's liberty, the NCR accused therefore has an appropriate remedy.
>
> [73] **For these reasons, I conclude that the legislative scheme Parliament has established to deal with persons found not criminally responsible for offences does not infringe s. 7 of the *Charter.*** [emphasis added][13]

In *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*[14], a related but narrower constitutional challenge was rejected on similar grounds. In that case, the appellant argued that conditions imposed pursuant to subsections 672.54(b) or (c) would also have to comply with the "least onerous and least restrictive" standard, otherwise the *Charter* challenge in *Winko*, *supra* would be revived. Writing for a unanimous court, Justice Binnie concluded that the challenge failed because the conditions imposed on an NCR accused *were in fact* subject, as a whole, to the least onerous and least restrictive standard. In coming to this conclusion, Justice Binnie said:

> [67] The heart of the Crown's argument is that a "least onerous and least restrictive" requirement may undermine treatment needs. The Crown argues the "least onerous and least restrictive" requirement would impose undue rigidity, whereas the "appropriateness" test guarantees flexibility. With respect, these arguments do not do justice to the wording of s. 672.54. Just as the Crown is wrong, I think, to try to detach the word "appropriate" from the factors listed in s. 672.54 in order to give Review Boards greater "flexibility", so, too, the Crown is wrong, with respect, to try to detach the "least onerous and least restrictive" requirement from its statutory context. Section 672.54 directs the Review Board to have regard to "the other needs of the accused" (emphasis added). At the forefront of these "other needs" is the need for treatment. Moreover, public safety, another key factor listed ins. 672.54, is ultimately assured by facilitating the recovery of the NCR accused. **The "least onerous and least restrictive" requirement cannot be divorced from the statutory factors that condition its exercise. It is not a free-standing requirement. It operates once the Review Board has duly taken into consideration public safety, the mental condition and other needs of the NCR accused and the desired result that, at some point, when ready, he or she will be reintegrated into the community.** [emphasis added]

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13 See also concurring judgment, *Winko*, *supra* at para. 165.

14 [2004] 1 S.C.R. 498.

The Supreme Court of Canada has repeatedly held that the "least onerous and least restrictive" requirement is critical to the constitutional validity of s. 672.54. In other words, if Parliament eliminates the "least onerous and least restrictive" requirement, as it proposes, it may well expose the legislation to successful constitutional challenges pursuant to s. 7 of the *Charter*.

RECOMMENDATION

1. ***Criminal Code* s. 672.54 should not be amended to remove the "least onerous and least restrictive" requirement.**

B. "High-Risk Accused"

Bill C-54 would introduce a legislative scheme where the Courts may designate an NCR accused as "high-risk" if:

1. The accused is 18 years of age or older;
2. The accused is found not criminally responsible by reason of mental disorder;
3. The accused committed a "serious personal injury offence" as defined in s. 672.81(1.3); and
4. The Court is either
    a. "satisfied that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person" – subsection 672.64(1)(a); **or**
    b. "is of the opinion that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person" – subsection 672.64(1)(b).

Once designated high-risk, the NCR accused will be denied unescorted day passes for the duration of the detention, and may have only triennial reviews of his or her condition, as opposed to the current entitlement of annual reviews. In determining whether to designate an accused high-risk, the Court must consider a number of factors in subsection 672.64(2), which appear to reflect, to some extent, the factors suggested by the Supreme Court of Canada in *Winko*, *supra* at paragraph 61.

The CBA Section believes the high-risk designation is not only unnecessary, but self-defeating and counterproductive. The designation as a whole suggests, without much empirical support, that because an NCR accused has committed one serious offence, they will do so again. Furthermore, subsection 672.64(1)(b) suggests that the "brutal nature" of the accused's conduct *while mentally ill* is determinative of whether the accused is a risk to others in the

future. Although this may appear rational, it is not always valid.[15] In fact, the Courts now recognize that there is no presumption of dangerousness when assessing NCR accused.[16] We now understand that the stereotype of the "mad offender" has been undermined by research indicating that only a few mental disorders are associated with increased violence, and most NCR accused are "no more likely than their convicted counterparts to commit any offence, let alone a violent offence, upon release."[17]

The association between mental illness and violence is weak and research indicates that co-morbid substance abuse, personality traits, and the presence of active symptoms play a more important role in assessing dangerousness than a diagnosis of a mental illness.[18] For these reasons, NCR accused are kept in custody only when they pose a "significant threat" to public safety.[19] The commission of an offence in the past may be considered with other factors in determining whether there exists a pattern of behaviour. However, the CBA Section agrees with Justice McLachlin's comments in *Winko*, *supra* that a "past offence committed while the NCR accused suffered from a mental illness is not, by itself, evidence that the NCR accused continues to pose a significant risk to the safety of the public."[20]

The CBA Section believes that subsection 672.64(1)(b) is likely unconstitutional as it violates s. 7 of the *Charter* on the grounds of arbitrariness and vagueness. The high-risk regime as a whole is potentially overbroad. It employs means that are broader than required to achieve the objective of public safety.

Finally, there is currently no mechanism through which a high-risk accused could apply to the criminal courts to review the designation. At most, the high-risk accused can request a psychiatric assessment to determine whether the *Review Board* should refer the designation back to court: s. 672.121(c). Otherwise, the high-risk accused must appeal the disposition in the normal course pursuant to s. 672.72. As a matter of procedural fairness, the CBA Section recommends that a provision be added to the regime, if enacted, which would allow high-risk accused to apply to a court of competent jurisdiction to have the designation removed. We

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15 *Swain, supra.*

16 *R. v. Owen*, [2003] 1 S.C.R. 779 [*Owen*] at para. 23; *Winko*, *supra* at paras. 35-36.

17 *Winko*, *supra* at paras. 37-38.

18 Mulvey 1997, *supra*.

19 *Winko*, *supra* at paras. 33 and 57.

20 *Winko*, *supra* at paras. 60 and 62(6).

suggest that high-risk accused be permitted to make this application on an annual basis, to provide a procedural counterbalance to some of the new provisions proposed in Bill C-54.

i. Overbreadth – "High-Risk" Consequences

Legislation is overbroad where the means to achieve the objective are broader than necessary. Under Bill C-54, high-risk accused would be subject to a different form of custody than regular NCR accused. In particular, high-risk accused would be denied any form of unescorted day passes for the duration of detention and could also be deprived of annual reviews of their condition for up to three years at a time: ss. 672.64(3)(a) and 672.81(1.32).

There appears to be no evidence to suggest how these added sanctions would further the treatment of high-risk accused or otherwise increase public safety. In fact, these sanctions may actually hinder an accused's treatment, imperilling public safety. For instance, if a high-risk accused is not permitted unescorted day passes, mental health authorities will not be able to effectively assess whether the accused can function in society unsupervised. Unescorted day passes serve an important intermediate step for an accused's reintegration into society. Without them, high-risk accused may be eventually released into the community with no prior experience of being unsupervised, which may have negative consequences.

Similarly, the CBA Section is not persuaded that extending the period between review hearings from one year to three years enhances public safety. The Review Board does not release every NCR accused at their first hearing, nor do the criteria for release change at subsequent review hearings. Whether in year one or year three, the NCR accused is evaluated using the same factors and considerations. If a high-risk accused can be cured or effectively managed in one or two years, there is no logical or medical reason to extend the period of detention for an additional year. A yearly review will weed out threats to public safety and, at the same time, allow those who have had the benefit of treatment and who are fit for reintegration to be appropriately released with supervision if required. As such, Bill C-54 amounts to an overbroad method of achieving the objective of public safety and is also inconsistent with the "twin goals" associated with Part XX.1.

Arguably, the added sanctions on high-risk accused could be characterized as punitive in nature. Punishment is not a valid objective of Part XX.1 of the *Criminal Code*. As Justice Binnie noted in *Owen*, "It is of central importance to the constitutional validity of this statutory

arrangement that the individual…be confined only for reasons of public protection, not punishment."[21]

ii. Vagueness and Arbitrariness – Subsection 672.64(1)(b)

An NCR accused may be deemed high-risk if the court is of the opinion that the "acts which constitute the offence" were of such a "brutal nature" as to indicate "a risk of grave physical or psychological harm to another person." Subsection 672.64(1)(b) is vague and arbitrary.

The first problem with the proposed law is that it contains no definition of "brutal nature". Brutal to whom? At what time and in what sense? The concept of brutality by its breadth and subjective nature does not lend itself to informed legal debate on the scope of the prohibited conduct. For example, under the proposed law, a court could theoretically find that an NCR accused poses no risk of violence in the future pursuant to subsection 672.64(1)(a), but still designate the individual as high-risk because the brutal nature of *past* acts indicates a possible risk of grave psychological harm to "another person" at some undefined time. Does this mean an accused could be deemed high risk simply because of past acts that cause the victim, or anyone else for that matter, "grave psychological harm" whenever the victim thinks about the offence? The current wording of s. 672.64(1)(b) appears to include this type of reasoning, potentially subjecting the accused to the high-risk regime indefinitely.

Subsection 672.64(1)(b) suggests that brutality is connected to recidivism. However, we know from other areas of the criminal law that such a connection is tenuous, if not non-existent. In fact, the rate of recidivism amongst those convicted of murder is among the lowest of all offenders, despite it being undoubtedly the most brutal and heinous crime.[22] Where public safety is the primary objective, it is inconsistent to create policy on the basis of the brutality of an accused's acts while mentally ill. Brutality bears no relation to recidivism, particularly where the NCR accused can be effectively treated. As a result, restricting an accused's liberty on the basis of brutality may be considered arbitrary pursuant to s. 7 of the *Charter*.

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21 *Owen*, *supra* at para. 25.

22 See, for example, Justice Canada's *Fact Sheet, Section 745.6, The "Faint Hope Clause"* at pp. 3-4.

RECOMMENDATIONS:

2. **The high-risk accused designation should not be enacted.**
3. **If the high-risk regime is enacted, subsection 672.64(1)(b) should be eliminated.**
4. **If subsection 672.64(1)(b) is not eliminated, it should be redrafted to provide greater specificity on the scope of conduct captured by the section, including a definition of "brutal nature" and a clarification that the subsection is focused on future conduct.**
5. **If the high-risk regime is enacted, a procedural mechanism should be added to permit the NCR accused to apply directly to a court of competent jurisdiction on an annual basis to remove the designation.**

C. New Notice Requirements

Bill C-54 introduces a new notice requirement in s. 672.5 of the *Criminal Code*. Under subsection 672.5(5.2), victims who request it will be given notice of the NCR accused's absolute or conditional discharge.

The CBA Section welcomes this amendment to the *Criminal Code*, as it fills a void in the legislative scheme. Now, in addition to notice of each of the NCR accused's review hearings[23], and the right to provide an impact statement at those hearings[24], victims would also receive notice of any discharge resulting from the hearing.

The CBA Section also supports the introduction of s. 672.542 which requires the court or Review Board to consider whether it is desirable for no contact and area restriction conditions to be imposed on an NCR accused if conditionally discharged into the community. The Court and Review Board already routinely impose these conditions under the current regime.

RECOMMENDATION

6. **The notice provisions in s. 672.5 should be enacted.**

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23 Subsection 672.5(5.1).

24 Subsections 672.5(13.2), 672.5(14), 672.5(15.1), and 672.5(15.2).

V. CONCLUSION

The future constitutionality of Part XX.1 requires the government to observe the balance between protecting the public and preserving the accused's dignity and liberty. Substantial portions of Bill C-54 threaten this critical balance. The concept of "high-risk accused" in Bill C-54 treads close to imposing punishment on NCR accused whose conduct, while tragic, is not morally culpable. The name of the designation – "high-risk accused" – will arguably contribute to the stereotype that the mentally ill are dangerous and should be isolated from the community. This was never the intention behind Part XX.1.

As Justice McLachlin noted in *Winko*, *supra*, Part XX.1, in its purpose and effect, "reflects the view that NCR accused are entitled to sensitive care, rehabilitation and meaningful attempts to foster their participation in the community, to the maximum extent compatible with the individual's actual situation."[25] Part XX.1 is intended to provide a means through which NCR accused can be cured or effectively managed. It is not an opportunity to exact retribution upon mentally ill offenders.[26]

Bill C-54 makes no attempt to foster the reintegration of NCR accused back into the community. In fact, it expressly prohibits such conduct for persons designated high-risk. Bill C-54 sends the message that NCR accused who commit serious offences cannot be efficiently treated and should be afforded fewer procedural protections. It sends the message that the societal interest of treatment and reintegration of mentally ill offenders is less important than the needs of victims. Though the suffering and harm to victims is always a relevant consideration, it cannot override the liberty interests of persons who are not criminally or morally responsible for their conduct. The goal must be reintegration, not retribution.

VI. SUMMARY OF RECOMMENDATIONS

1. ***Criminal Code* s. 672.54 should not be amended to remove the "least onerous and least restrictive" requirement.**
2. **The high-risk accused designation should not be enacted.**
3. **If the high-risk regime is enacted, subsection 672.64(1)(b) should be eliminated.**

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25 *Winko*, *supra* at para. 90.

26 *Owen*, *supra* at para. 52.

4. **If subsection 672.64(1)(b) is not eliminated, it should be redrafted to provide greater specificity on the scope of conduct captured by the section, including a definition of "brutal nature" and a clarification that the subsection is focused on future conduct.**
5. **If the high-risk regime is enacted, a procedural mechanism should be added to permit the NCR accused to apply directly to a court of competent jurisdiction on an annual basis to remove the designation.**
6. **The notice provisions in s. 672.5 should be enacted.**