Submissions on Bill C-54:
Not Criminally Responsible Reform Act

THE CRIMINAL LAWYERS' ASSOCIATION

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PREFACE

The Criminal Lawyers' Association (CLA) is a non-profit organization founded on November 1, 1971. The Association is one of Canada's largest legal specialty organizations, comprised of approximately 1200 criminal defence lawyers, many of whom deal with mentally disordered offenders on a regular basis. One of the objects of the CLA is to educate the membership on issues relating to criminal and constitutional law. To that end, the Association presents educational workshops and seminars throughout the year, culminating in its annual Fall Convention and Education Programme. In addition, the CLA publishes a nationally circulated newsletter five times per year aimed at highlight current developments in criminal and constitutional law. The intersection of criminal law and mental health is a frequent topic of discussion.

The CLA is routinely consulted and invited by this Honourable Committee to share its views on proposed legislation pertaining to issues in criminal and constitutional law. Similarly, the Association is often consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, legal aid assistance and various other concerns that involve the administration of criminal justice in the Province of Ontario.

The CLA has been granted standing to participate in many significant criminal appellate cases and government commissions of inquiry. In relation to the intersection of criminal law and mental health, the CLA has been granted intervenor status in leading appellate cases, including *R. v. Conway*, [2010] 1 S.C.R. 76. The CLA also participated in the Inquest into the Death of G.A., a mentally disordered youth who committed suicide while in custody awaiting transfer to a treatment facility.

The CLA is privileged and greatly appreciates the opportunity to appear before this Committee to express its views on Bill C-54.

1. INTRODUCTION

The task of balancing the public's need for protection from the symptomatic behavior of mentally disordered offenders with the liberty and dignity interests of the mentally ill is both difficult and delicate.

The CLA applauds Parliament's desire to ensure that the public is adequately protected from the involuntary misconduct of seriously mentally disordered persons. Unfortunately, the amendments contained in Bill C-54 do nothing to further Parliament's laudable goal. For that reason, the CLA cannot support the legislation. In particular, the CLA opposes creation of the "high risk" designation and the removal the requirement that dispositions be the least onerous and least restrictive in the circumstances.

The reasons for the CLA's opposition to Bill C-54's proposed reforms, and our recommendations for improvements, are outlined below.

2. AIMING AT THE WRONG TARGET

"Assuming there was a real problem with the current scheme, the proposed amendments completely miss the target"

- Justice Richard Schneider, Chair - Ontario Review Board[1]

Shortly after Bill C-54 was tabled in the House of Commons, Prime Minister Stephen Harper met privately with Darcie Clark, the ex-wife of Allan Schoenborn. Mr. Schoenborn was found not criminally responsible by reason of mental disorder (NCR) in relation to the killing of their three children in 2008.

As with all victims of serious violent crime, it is easy to sympathize with Ms Clark. The victims of criminal acts are no less victims simply because the crime was committed as a result of a serious mental disorder. Unfortunately, as the Prime Minister acknowledged at the news conference held following his meeting with Ms Clark, the reforms proposed in Bill C-54 "cannot undo the terrible things that have been perpetrated" on such victims.[2] More importantly, however, while it may be possible to help prevent such tragedies from recurring, the CLA submits that Bill C-54 does virtually nothing to help **prevent** symptomatic behavior by mentally disordered offenders **because it takes aim at the post-verdict treatment, rather than the pre-offence circumstances, of these seriously mentally ill persons.**

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[1] Kim Mackrael, "High-risk offender label 'misses target,' says head of Ontario Review Board" *The Globe and Mail*, 15 March 2013, online: http://www.theglobeandmail.com/news/politics/high-risk-offender-label-misses-target-says-head-of-ontario-review-board/article9848889/

[2] Tobi Cohen, "Emotional Stephen Harper tears up over controversial bill to keep mentally ill murderers in prison longer" *The National Post* (8 February 2013) online: http://news.nationalpost.com/2013/02/08/emotional-stephen-harper\-tears-up-over-controversial-bill-to-keep-mentally-ill-murderers-in-prison-longer/

There is no evidence to suggest that the public is at risk from overly permissive review boards releasing dangerous NCR accused into the community without adequate consideration of public safety. All of the notorious crimes which have motivated the creation of Bill C-54 were committed by persons who were both seriously mentally ill **and not yet under the authority of the review boards**. Increasing the amount of time NCR accused spend detained in forensic psychiatric facilities will do nothing to ensure that potential mentally disordered offenders are identified, treated and monitored **before they deteriorate to a point where their illness produces a serious violent crime**. If this Government were truly committed to preventing the criminal consequences of serious mental illness, it would devote more resources and support to the provincial authorities responsible for mental health. Over the past decade, many reports and studies have confirmed that the symptomatic misconduct of mentally ill persons can be prevented with the appropriate level of treatment and support. Regrettably, shrinking health budgets have significantly reduced the availability of such support.

i) The Proposed Amendments

To the extent Bill C-54 introduces new notice requirements in s. 672.5 – and other reforms aimed at increasing victim participation in the review board process – the CLA does support the legislation. Anything which may assist in providing victims with some sense of engagement in the process is worthwhile.

By contrast, the CLA does **not** support the other major components of Bill C-54, namely:

- The amendment of s. 672.54 of the *Criminal Code* which sets out the requirements for determining the appropriate disposition for an NCR accused; and

- The creation of a "high-risk" regime for certain NCR accused.

The amendment to s. 672.54 would remove the requirement that the disposition made by a court or review board be the least onerous and least restrictive to the accused and add an explicit instruction that the safety of the public be the paramount consideration in determining an appropriate disposition.

Upon being designated by a court as high-risk, an NCR accused must be held in custody and cannot be considered for release by a review board until the designation is revoked by a court. The review periods for these designated NCR accused could be extended to up to three years. Such individuals would not be entitled to unescorted passes into the community, and could only obtain an escorted pass in narrow circumstances, unrelated to therapeutic needs.

ii) Public is Protected by the Current System

The proposed reforms are aimed at "giving the courts the powers they need to keep those deemed too dangerous to be released where they should be — in custody."[3] The CLA submits that courts and review boards already have those powers and are exercising them responsibly. Indeed, there is no evidence that the current review board system, with its attendant appeal safeguards, has resulted in serious violent recidivism by released dangerous mentally disordered offenders.

Statistics on recidivism rates of NCR individuals demonstrate that the current review board regime for risk-management is working well. Dr. Anne Crocker, a professor of psychiatry at McGill University, was tasked by the Department of Justice to study the review board system for managing individuals found NCR. As a result of her research, Dr. Crocker concluded that there is "no current evidence indicating the need for changing the way things are being done…." She further told reporters that public safety is already "front and centre" when review boards are determining appropriate dispositions. According to Dr. Crocker, individuals found NCR already spend **more time** detained in hospital under the jurisdiction of the review board **than if they had been found guilty** and sent to prison.[4]

More specifically, Dr. Crocker's study reveals that:

- Serious violent offences represent less than 10% of all NCR offences in Quebec, Ontario and British Columbia.

- Recidivism rates for NCR accused who have committed serious violent offences are low.

- Only 7.3% of accused found NCR in relation to a serious violent offence committed another violent offence in the following three years.

- In the three years following being absolutely discharged by a review board, only 4.1% of accused found NCR in relation to a serious violent offence committed another violent offence. Moreover, only 4 of the 49 (8.2%) individuals in this category committed any sort offence in the three years following absolute discharge.

- The rate of recidivism among NCR accused is significantly lower than that of offenders who serve a custodial sentence in jail or prison.[5]

Criminal Code review boards are comprised of expert psychiatric and legal members chosen for their specialized knowledge concerning mentally disordered offenders and the

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[3] *Ibid.*

[4] Douglas Quan, "Mental health organizations, researcher criticize proposed changes to legislation" *PostMedia News*, 1 March 2012, online: http://www.canada.com/Mental+health+organizations+researcher+criticize+proposed+changes+legislation/8031609/story.html

[5] Anne G. Crocker *et al.* "Descriptions 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.

risks they pose.[6] In addition, the review boards are provided with community input by the inclusion of a lay member of the community on each panel. Given both their composition and the public nature of their proceedings, review boards in Canada are inherently conservative in their approach to risk-management. They take very seriously their function of making appropriate dispositions that meet **both** goals of public safety and fair treatment of NCR accused.[7] There is no evidence of any review board in Canada being willing to sacrifice public safety on the altar of liberty and dignity for the NCR accused.

Beyond the review boards, both the hospital and the prosecutor have rights of appeal against any disposition made by a review board. If there is a concern that a review board improperly releases a dangerous mentally ill offender into the community, the hospital and/or Crown can appeal against that disposition and, pursuant to s. 672.76, apply to the Court of Appeal for an immediate suspension of the offender's release pending the outcome of the appeal.

There are approximately 5000 dispositions rendered annually in Canada by review boards. "You can count on the fingers of one hand the number of significant problems with those accused."[8] NCR accused who commit further offences after being released into the community are the exception, not the rule. Notably, despite the hundreds of NCR accused who have been processed through Ontario's review board system, the CLA is aware of only 13 instances in Ontario since 1994 when either the Crown or hospital has felt it necessary to appeal against an absolute discharge.[9] The CLA believes that, if the public were properly educated as to the true nature of the work of *Criminal Code* review boards, the public would readily agree that the current system is functioning well.

iii) An Evidence-Based Approach to NCR Reform

Understandably, the horrendous nature of some NCR offences evokes a powerful and emotional response from the public, especially from those who have been directly victimized by these acts. Parliament's most effective approach to policy and legislative reform, however, cannot be "pulled and contorted by reflex and emotion."[10] It must be informed by research and evidence. As discussed further below, the best protection for victims, and potential victims, is a robust mental health care system aimed at supporting both mentally ill individuals and their families so as to prevent symptomatic criminal behavior.

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[6] *R. v. Owen*, [2003] 1 S.C.R. 779.
[7] Ian Hunter, "The wrong way to protect Canadian from mentally ill defendants" *National Post*, 27 November 2012, online: http://fullcomment.nationalpost.com/2012/11/27/ian-hunter-the-wrong-way-to-protect-canadians-from-mentally-ill-defendants/
[8] Kirk Makin, "Critics slam new 'high-risk' designation for mentally ill offenders" *The Globe and Mail*, 28 April 2013, online: http://www.theglobeandmail.com/news/national/critics-slam-new-high-risk-designation-for-mentally-ill-offenders/article11603053/
[9] Motion record of the Attorney General of Ontario, *Re Kobzar*, 2012 ONCA 326.
[10] Justice Schneider in Makin, *supra* note 8.

In *Winko*, the Supreme Court recognized that individuals with mental disorders have long been the subject of "negative stereotyping and social prejudice in our society based on an assumption of dangerousness." In explaining that the historic discrimination faced by the mentally ill, the Supreme Court adopted the following remarks of Dr. Paul Mullen:

> There is a widely held belief in our culture that the mentally ill are predisposed to act in a violent and dangerous manner. . . . The origins of such beliefs probably lie in the unease which acutely mentally disturbed individuals produce in those around them. Their unpredictable, strange and often inappropriately intrusive behaviours easily produce a reaction of fear. When we experience fear, we all too readily attribute that fear to dangerousness in the exciting object, rather than considering whether our reactions may not be excessive or misplaced. The more frightened we become, the more dangerous we assume that which excites the fear is.[11]

Discomfort caused to members of the public that is based on intolerance, stereotypes or irrational fears of mentally disordered accused should not form the basis for making policy and legislative decisions.

Mr. Schoenborn was not under the jurisdiction of a review board when he killed his children, nor was Vince Li (who beheaded a fellow Greyhound bus passenger), nor Richard Kachkar (who killed a police officer while driving a stolen snowplow). All of these men were actively psychotic when their serious mental illnesses led them to commit very horrible crimes. As noted above, **none of these offenders had been released into the community as a result of the review board system**. However, it is equally important to understand that, despite the seriousness of their offences, the nature of the illness from which these sorts of NCR accused suffer makes it very unlikely that any of them would ever re-offend **if properly treated and monitored**. Indeed, as the Chair of the Ontario Review Board has observed, for these types of offenders, the risk of them committing another violent act after appropriate treatment is so low that many would not qualify for the "high risk" designation in Bill C-54.[12]

3. INCREASING THE RISK TO PUBLIC SAFETY

The CLA has frequently opposed the government's "tough on crime" legislative agenda. Representatives from the Association have testified before this Committee emphasizing the importance of civil liberties and ensuring fair treatment for all Canadians, even those accused of committing heinous crimes. Our positions are not always popular and they are not always shared by other stakeholders. In this case, however, we support the Government's objective of better protecting the public from the symptomatic criminal conduct of mentally ill persons. Government action aimed at preventing mentally ill

[11] "The Dangerousness of the Mentally Ill and the Clinical Assessment of Risk", Chapter 4 in *Psychiatry and the Law: Clinical and Legal Issues*, W. Brookbanks, ed. (1996), 93, at p. 93 cited in *Winko v. British Columbia (Forensic Psychiatric Institute)* [1999] 2 S.C.R. 625 at para. 35 ["*Winko*"].
[12] Mackrael, *supra* note 1.

persons from committing crimes would not only benefit the public, it would necessarily help avoid the incarceration of those mentally ill persons.

The CLA's real concern about Bill C-54, in addition to the civil liberties issues raised by other organizations, such as the Canadian Bar Association (which the CLA shares), is that it will result in making things worse for the public, for victims and for mentally disordered offenders. We are not alone in raising this concern.

Justice Richard Schneider, chair of the Ontario Review Board and a leading expert in mental illness and the law, has warned that the reforms "have the very real potential to make our system much more dangerous – not less dangerous."[13] Bernd Walter, chair of the British Columbia Review Board has echoed this concern.[14] The CLA implores this Committee to listen to the advice of experts in the legal and psychiatric fields who have roundly criticized Bill C-54 as doing more harm than good to the public interest. These experts have repeatedly explained how, if enacted, the legislation may have the practical effect of increasing the risk to public safety:

- More mentally disorder accused will, sometimes on the advice of their counsel,[15] attempt to resist NCR verdicts in order to avoid indefinite detention in a forensic psychiatric institution. As a result, more mentally disordered accused will end up in jails and prisons where they will be released without treatment or any discharge plan to address their mental health issues, increasing the risk of recidivism.[16]

- Courts and commentators have noted the already "great scope for significant deprivations of liberty for those found NCR." In some cases, these deprivations seem disproportionate, especially when "the gravity of the accused person's conduct is minor to moderate in nature." Even under the current regime, in cases where the offence charged is minor or even moderately serious, the accused may prefer to be convicted and sentenced rather than be found NCR.[17] The CLA believes resistance to NCR verdicts will only increase if the reforms contained in Bill C-54 are enacted.

- Where the review period is extended up to three years for "high risk" NCR accused, the individual may be less motivated to access and engage in treatment.[18]

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[13] Makin, *supra* note 8.
[14] "B.C. board backs moving child killer Schoenborn to Manitoba" CBC News, 15 February 2013, online: http://www.cbc.ca/news/canada/british-columbia/story/2013/02/14/bc-allan-schoenborn-review-board.html
[15] Joan Barrett and Riun Shandler in *Mental Disorder in Criminal Law* (Scarborough, Ont.: Carswell, 2006)(looseleaf), at p. 4-37 note that "in some cases, it may be viewed as irresponsible to raise the defence where the offence charged is minor or only moderately serious."
[16] Makin, *supra* note 8; "The Consequences of Bill C-54, the 'Not Criminally Responsible Reform Act'" Canadian Psychiatric Association, 13 April 2013.
[17] See, *e.g.*, *R. v. Kankis* (2012), 281 C.C.C. (3d) 113 (Ont. Sup. Ct.) at paras. 20-22.
[18] Quan, *supra* note 4.

- The "high risk" designation takes away valuable therapeutic tools, such as community passes, that allow for a gradual reintegration of NCR accused into the community:

> The decoupling of therapeutic progress from increased freedoms may disrupt the therapeutic nature of the psychiatrist-patient relationship and cause patients to become frustrated and less engaged in their therapy, paradoxically increasing public risk.[19]

4. TAXING AN ALREADY OVERTAXED SYSTEM

The clear intention of the reforms contained in Bill C-54 is to lengthen the period of time during which NCR accused are detained in a psychiatric facility. The CLA wishes to caution the Committee that detaining more NCR accused for longer periods of time will have a ripple effect throughout the forensic psychiatric system, increasing the demands on already scare resources. To meet the steeper increase in demand, the provinces (with or without federal financial support) will shoulder the burden of creating more forensic mental health beds. The costs of custodial detention in forensic mental health facilities are significant. More importantly, according to Ontario's experience, custodial mental health facilities are much less cost effective for preventing mentally disordered recidivism than intensive community-based interventions.

When Part XX.1 of the *Criminal Code* was passed in 1992, it included provision for a parliamentary review of the legislation. After public hearings were held in 2002 to review the provisions of Part XX.1, this Committee concluded that the mental health system was "currently strained to the limit" and further that given the lack of adequate resources, "it would be irresponsible and unrealistic [for the Committee] to recommend the implementation of provisions that would place greater burdens on institutions that are the legal and fiscal responsibility of another level of government."[20]

The situation has not improved in the last 10 years. The Chief Justice of Canada, Beverley McLachlin, has observed that the lack of adequate forensic treatment facilities for mentally disordered offenders is a persistent problem.[21] It Ontario, the resource crisis manifests itself in a variety of ways:

- Accused individuals found unfit to stand trial and ordered to submit to involuntary anti-psychotic drug treatment under s. 672.58 of the *Criminal Code* spend days, and even weeks, in jails waiting for a bed in a hospital.[22]

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[19] Canadian Psychiatric Association, *supra* note 16. See also, Canadian Alliance on Mental Illness and Mental Health, Letter to the Honourable Robert Nicholson, 25 February 2013.
[20] Standing committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the Criminal Code*, June 2002.
[21] Beverley McLaughlin, "The Challenges of Mental Illness," (2010) 33 Dalhousie L.J. 15 at 24
[22] *Centre for Addiction and Mental Health v. Ontario*, 2012 ONCA 342, 284 C.C.C. (3d) 359, leave to appeal to S.C.C. granted, [2012] S.C.C.A No. 339 ["*Conception*"].

- Similarly, accused often endure lengthy periods in jails and detention centres awaiting court-ordered assessments in relation to issues of fitness and criminal responsibility.[23]

- Individuals found not criminally responsible and order detained pending the initial disposition of the review board have waited for months in the Toronto (Don) Jail because of wait lists for beds at the forensic hospitals.[24]

- Perhaps most relevant for this Committee's consideration is the fact that forensic hospitals are already sufficiently short of beds that they find it difficult to implement review board dispositions in a timely manner.[25] Those members of the CLA who conduct hearings before the review board have observed that it is not uncommon for NCR accused to wait months before being moved to the hospital or unit ordered by the review board following an annual hearing.

Significant litigation has already arisen as a result of what has been described as a "collision course of decreasing resources and increasing numbers of mentally disordered accused"[26] Courts in Ontario have expressed significant concern about the "the tension that exists where scarce public resources do not meet the needs of mentally ill persons coming into contact with the justice and health care systems."[27] In relation to the systemic problems affecting inter and intra-hospital transfer of NCR accused subject to review board dispositions, Ontario courts have made clear that that limitations in resources ought not prevent the Review Board's orders from being implemented within a *reasonable* time.[28]

In the case of *Pinet v. Penetanguishene*, Justice DiTomaso stated:

> It was not good enough to leave Mr. Pinet in a maximum security mental health facility for 11 ½ months when the Board had ordered that he transfer to a medium security institution forthwith. Not only does the Province have a legal obligation to provide sufficient space to meet its legal obligation for NCR persons like Mr. Pinet, but also the Province has a legal obligation to ensure that the *Charter* rights of NCR persons like Mr. Pinet and others are not violated. The Province cannot continue to plead a lack of bed space as the basis for continuing to breach the rights of NCR persons, like Mr. Pinet, who are in

[23] *R. v. Hussein and Dwornik*, [2004] O.J. No. 4594 (S.C.J.); *R. v. Rosete*, [2006] O.J. No. 1608 (O.C.J.)
[24] See, *e.g.*, *R. v. Hneihen*, [2010] O.J. No. 4115 (S.C.J.).
[25] See, *e.g.*, *Beauchamp v. Penetanguishene Mental Health Centre* [1999] O.J. No. 3156 (Ont. C.A.), *Orru v. Penetanguishene*, [2004] O.J. No. 5203 (S.C.J.) and *Pinet v. Penetanguishene* (2006), 206 C.C.C. (3d) 116 (Ont. S.C.J.)
[26] Hy Bloom, Brian Butler and Richard Schneider, "The Criminal Code of Canada: The Mental Health Act of Last Resort" (The Cambridge Lectures, Centre for Advanced Legal Education, Queens College, Cambridge University, July 11-21, 1999) cited in Janet Leiper, "The Resort to *Habeas Corpus* to Enforce Part XX.1 of the *Criminal Code*" (2009) 55 Crim. L.Q. 134 at 169.
[27] *Conception*, *surpa* note 22 at para 1.
[28] See, e.g., *Beauchamp v. Penetanguishene Mental Health Centre* [1999] O.J. No. 3156 (Ont. C.A.), *Orru v. Penetanguishene*, [2004] O.J. No. 5203 (S.C.J.) and *Pinet v. Penetanguishene* (2006), 206 C.C. C. (3d) 116 (Ont. S.C.J.)

> the total control of the state. It is not for administrators or accountants to become the ultimate arbiters for the delivery of the most fundamental safeguards under Part XX.1 of the *Criminal Code* and sections 7 and 9 of the *Canadian Charter of Rights and Freedoms*. To do so would condemn NCR persons to a regime of discrimination and unaccountability. The Province is capable of doing better and should be taking active steps to remedy the injustice caused by transfer delays due to the lack of bed space. A proliferation of these types of applications to the courts is not the answer to solving these problems. Rather, the Province ought to take immediate remedial steps to resolve these issues.[29]

The problem of timely implementation of review board dispositions persists today. The CLA believes that the reforms of Bill C-54 will serve to increase the burden on an already strained system.

5. PREVENTION IS THE BEST WAY TO PROTECT THE PUBLIC

"Mental illness is a disability. It is not a sin, nor a moral wrong; it is just a disability."

- The Right Honourable Beverley McLachlin , Chief Justice of Canada

The Chief Justice of Canada began a lecture given in October of 2010 with the following anecdote:

> A couple of years ago I found myself at a dinner at Rideau Hall in honour of recipients of the Order of Canada. I was seated next to a police officer who was in charge of the police precinct in a downtown area of Toronto where people were poor and crime was high.
>
> "What," I asked the officer, "is the biggest challenge you face?"
>
> I expected him to reply that his biggest problem was the defense-oriented *Charter* rulings the Supreme Court of Canada kept handing down. But, he surprised me.
>
> "Our biggest problem," the officer answered, "is mental illness."
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> My dinner companion went on to explain that a large proportion of the people arrested and brought into his police station were not "true criminals," but people who were mentally ill. They were people who had committed some offence, usually minor, occasionally more major, for no other reason than the confusion in their disordered minds.
>
> Whatever the reason for these individuals' actions, the officer told me that the ordinary police processes did not respond well to their situations: how are the police, who are not doctors or nurses, to deal with continuing acts of derangement? How do they read a person their rights when they are not capable of listening to, or comprehending their situation? How do they find

[29] *Pinet v. Penetanguishene* (2006), 206 C.C. C. (3d) 116 (Ont. S.C.J.) at para. 70

> them lawyers and arrange appearances before judges? In the end, where the initiating incident is not of great consequence, often all that can be done is to hold the mentally ill person for a few hours and then return him to the street, where the cycle begins all over again.
>
> We do not like to talk about mental illness, but as people like this police officer attest, it is a huge problem.[30]

Most people living with mental health problems and illnesses are not violent or dangerous and do not commit criminal offences. In fact, they are more likely to be victims of violence than perpetrators. Nevertheless, these individuals are overrepresented in the criminal justice system.[31] The reasons for the "huge problem" recounted by the officer to the Chief Justice are complex. It seems clear, however, that it will not be solved, or even ameliorated, by the reforms of Bill C-54.

In its strategy document, *Changing Directions, Changing Lives,* the Mental Health Commission states that over-representation in the criminal justice system "has increased as the process of de-institutionalization of people with living with mental health problems and illnesses, coupled with inadequate re-investment in community-based services, has unfolded."[32] The Ontario Government Select Committee on Mental Health and Addictions reached the same conclusion, quoting the words of former Senator Michael Kirby who testified before the Committee that "we have made the streets and prisons the asylums of the 21st century."[33]

Both the Mental Health Commission and the Select Committee recommend that efforts to reduce the over-representation must focus on *preventing mental health illnesses* and providing *timely access* to services, treatments and supports in the community when problems to arise.

Services for young people are particularly important. "Seventy per cent of mental-health problems and illnesses begin in childhood and adolescence and young people are more likely to report mental-health disorders than any other age group." Early intervention improves the quality of life for the individual living with mental health issues and reduces the tragic toll that mental illness can have on the patient's family and friends, and on society at large by reducing the burden and cost on our health-care, criminal justice and social service systems.[34]

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[30] McLachlin, *supra* note 21 at 15-16.
[31] Mental Health Commission of Canada. "Changing Directions, Changing Lives: The Mental Health Strategy for Canada," 2012 at 46.
[32] *Ibid*. Canada, Parliament, Senate. (2006). Standing Senate Committee on Social Affairs, Science and Technology. M.J.L. Kirby (Chair) & W.J. Keon (Deputy Chair). Out of the shadows at last: Transforming mental health, mental illness and addiction services in Canada. 38th Parl., 1st sess., p. 301.
[33] Select Committee on Mental Health and Addictions, "Final Report – Navigating the Journey to Wellness: The Comprehensive Mental Health and Addictions Action Plan for Ontarians" (2010) at p. 13.
[34] M. Wilson & T. Tony Boeckh "Network helps mentally ill teens" *The Gazette*, 3 December 2012, online:http://www.montrealgazette.com/health/Opinion+Network+helps+mentally+teens/7644038/story.html#ixzz2V8gDR5a4

By definition, individuals found not criminally responsible by reason of mental disorder have committed the offence because of their mental illness. Because we know what causes the criminal conduct, we are well-placed to prevent it. To do so we must deal with the underlying mental health issues.

6. CONSTITUTIONAL SHORTCOMINGS

In *Winko*, the Supreme Court of Canada gave careful constitutional consideration to the provisions of Part XX.1 of the *Criminal Code* governing the treatment of mentally disorder accused. The Court concluded that s. 672.54, which permits an NCR accused to be detained for so long as a Review Board is satisfied that he or she constitutes a significant threat to the safety of the public, is constitutional. Justice Binnie subsequently explained in *Penetanguishene Mental Health Centre v. Ontario (A.G.)* that the provisions at issue in *Winko* survived *Charter* challenge precisely, and "**only because at every step of the process consideration of the liberty interest of the NCR accused was built into the statutory framework**."[35]

The reforms proposed in Bill C-54 represent a significant shift in the statutory framework and, in particular, the manner in which the liberty interests of individual NCR accused are balanced against the need to protect the public. This shift puts the legislation on shaky constitutional ground.

The Criminal Justice Section of the Canadian Bar Association has provided an extensive legal analysis of Bill C-54 and the constitutional issues it raises. The CLA adopts and relies on the submissions of the Canadian Bar Association. The CLA further wishes to emphasize the following points:

i) Removal of the "Least Onerous and Least Restrictive" Requirement

- The Supreme Court of Canada has unambiguously held that the "least onerous and least restrictive" requirement is critical to the constitutionality of s. 672.54 because it ensures the NCR accused's liberty interests will be "trammelled no more than necessary."[36]

- Removal of that requirement will, as a result, expose the legislation to a successful challenge on grounds that s. 672.54 as amended by Bill C-54 violates s. 7 of the *Charter*.

- The amended legislation will likely only survive *Charter* scrutiny if the revised version s. 672.54 is interpreted in accordance with current jurisprudence. That is, courts may decide that the "necessary and appropriate" disposition will necessarily be the one in which the liberty of the NCR accused is infringed as

[35] *Winko v. British Columbia (Forensic Psychiatric Institute)* [1999] 2 S.C.R. 625; *Penetanguishene Mental Health Centre v. Ontario (A.G.)*, [2004] 1 S.C.R. 498 at para. 53
[36] *Winko* at para. 70.

minimally as possible while ensuring the protection of the public. In this way, the amendments proposed to s. 672.54 are unnecessary. Public safety is already the determinative factor in review board decisions. Individuals are not absolutely discharged if they pose a significant risk to the public. Dispositions imposed by review boards are the "least restrictive and least onerous" that are *consistent with public safety.*[37]

ii) High-Risk Accused

- The designation is unnecessary and unhelpful. Unnecessary, because under the current system, no NCR accused who poses a substantial likelihood of using violence that could endanger the safety of another person can be absolutely discharged. Unhelpful, because the restrictions placed on those NCR accused designated "high risk" do not assist, and could even hinder, their successful rehabilitation and reintegration into the larger community.

- The CLA is not aware of any empirical research to support the suggestion in s. 672.64(1)(b) that the "brutal nature" of the index offence, while the accused was actively mentally ill and likely untreated, is determinative of the future risk posed by the accused.

- If enacted as currently drafted, the "high risk" designation regime is susceptible to arguments that it is overbroad and/or arbitrary. The scheme uses means (the denial of unescorted day passes, the strict limitations on the use of escorted passes and the denial of annual reviews) that are 1) broader than necessary to achieve the objective sought by Parliament (the safety of the public) ; or 2) bear no relation to or are inconsistent with the stated purposes of the legislation.

- The amended Part XX.1 provisions will not withstand constitutional scrutiny if the courts find that the reforms are aimed at *punishing* NCR accused. The government's goal of enacting legislation that will hold violent criminals accountable for their crimes is inconsistent with the twin goals of Part XX.1 of the *Criminal Code*. As the Supreme Court explained in *Owen*:

> It is of central importance to the constitutional validity of this statutory arrangement that the individual, who by definition did not at the time of the offence appreciate what he or she was doing, or that it was wrong, be confined only for reasons of public protection, not punishment.[38]

- If the high risk designation regime is enacted, the CLA recommends the following changes to the legislation:

    - Eliminate "brutality" of the index offence as a criterion for the designation.

[37] *Penetanguishene*, *supra* note 35.
[38] R. *v.* Owen, [2003] 1 S.C.R. 779 at para. 25.

- Permit escorted and accompanied community passes for therapeutic and rehabilitative purposes for those in the high risk category.

- Remove or shorten the 36-month review period option.

- Add a procedural mechanism to permit NCR accused who have been designated "high risk" to apply to a court of competent jurisdiction on an annual basis for the removal of the designation.

iii) Section 672.76

- The CLA supports the amendment of s. 672.75 to eliminate the automatic suspension of absolute discharge dispositions pending appeal.

- The CLA suggests that the Committee may wish to consider whether to amend s. 672.76(2)(c) to reflect the changes to s. 672.75, such that the provision would read as follows:

> Where the application of a disposition is suspended pursuant to s. 672.75 or paragraphs (a.1) or (b), make any other disposition in respect of the accused that is appropriate in the circumstances, other than a disposition under paragraph 672.54(a) or section 672.58, pending the determination of the appeal.