Bill C-14 and issues for CAPL members

The relevant portions of Bill C-14 (the "*Not Criminally Responsible Reform Act*") come into force on July 11, 2014. Bill C-14 amends sections of the Mental Disorder provisions in Part XX.1 of the *Criminal Code of Canada*. The Bill was opposed by CAPL and the CPA, and members made submissions to the Commons and Senate Committees on the Bill. Those submissions are available on the CAPL website. This memo briefly summarizes the amendments. The ultimate impact of the Bill is uncertain; this memo provides some commentary on its significance for CAPL members.

Key amendments include:

1. A new statutory definition for "significant threat to the safety of the public"

2. A new framework for making Dispositions [Replacement of "least onerous least restrictive" framework with "necessary and appropriate in the circumstances", with public safety expressly recognized as the paramount consideration]

3. Creation of a new designation of "high risk accused" that can apply to certain NCR accused persons

4. Enhancements to victim rights and victim involvement

1) Meaning of 'Significant Threat'

The *Criminal Code* requires that if the state cannot demonstrate that an accused person poses a "significant threat to the safety of the public", he or she must be granted an absolute discharge. Previously this was not defined in statute, but was interpreted by the Supreme Court of Canada in *Winko*. The new statutory definition of "significant threat to the safety of the public" is as follows:

"a risk of serious physical or psychological harm to members of the public – including any victim or witness to the offence, or any person under the age of 18 years – resulting from conduct that is criminal in nature but not necessarily violent."

This is a codification of the *Winko* standard, but with subtle differences in the statutory wording that *may* have the effect of lowering the threshold for significant threat. For example, the new statutory definition dropped the term "real" in reference to the risk. This may represent a change in the threshold, or Review Boards may view it as sufficiently close to the *Winko* wording as to have little material difference on the risk threshold. Arguably, however, parliament meant to distinguish between *real risk* and *risk simpliciter.*

Case law will assist us with this over time. The testimony of psychiatrists at Review Board hearings will need to reflect this new definition.

2) Dispositions ("necessary and appropriate in the circumstances", with public safety as the "paramount" consideration)

Bill C-14 replaces the requirement that the Review Board make a disposition that is the "least onerous and least restrictive to the accused" with the requirement that it make a disposition that is "necessary and appropriate in the circumstances." The legislation also states that public safety is the "paramount" consideration in deciding what disposition to make, with the other factors (mental condition of the accused, reintegration, and other needs of the accused) being secondary considerations.

Again, it is not clear whether this represents a meaningful shift in the threshold for issues such as the type of detention order applied, the degree of wellness needed to gain important progress such as community living or conditional discharge status. Once again, recommendations at hearings after July 14 will need to use this new language.

3) Victim Involvement

Victims already have the right to be present, and to prepare a Victim Impact Statement ("VIS") for a hearing at which a Court or Review Board (RB) is going to make or review a disposition. However, Bill C-14 does not change the allowable content of a VIS. As before, a VIS must "describe the harm done to, or loss suffered by, the victim arising from the offence". There is increased victim notification responsibility on the Crown and RB, with no additional administrative burden on clinical programs. Psychiatrists need to be aware of this increased need to have consideration to the voice of victims at Hearings. This voice will be considered by the ORB to the extent that it is logically probative of any issue in dispute.

4) Implications of the new "High Risk" Designation

(a) Process of Obtaining Designation

The amendments create a process for the designation of NCR accused persons as "high-risk" where the accused person has been found NCR for a serious personal injury offence , and:

- there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person, OR
- the acts that constitute the index offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person.

The process for seeking a "high risk" designation is initiated by the Crown filing an application in Court. The hearing occurs in Court, and the decision is made by a judge. The Hospital is not a party to this proceeding.

In deciding whether to impose the designation, the Court must consider all relevant evidence, including:

- the nature and circumstances of the index offence;
- any pattern of repetitive behaviour associated with the index offence;
- the current mental condition of the accused;
- the past and expected course of treatment, including the accused's willingness to follow treatment; and

- the opinion of experts who have examined the accused.

While, curiously, the Bill contains no amendment providing for assessments to determine whether, upon a verdict of NCR an accused satisfies the HRA criteria, presumably psychiatrists will be engaged in conducting assessments (including direct assessment of the accused and collection of collateral information), formulating opinions, drafting reports, and attending court to testify at the hearing of these applications. It is unclear how often the Crown will seek these designations, and whether this will be consistent nationally. The Bill appears to apply retrospectively to any current RB Accused.

(b) Consequences of Designation for NCR Accused

If an NCR accused person is designated as "high risk", the consequences to the accused are as follows:

- The only allowable disposition is a detention order
- The accused is only permitted to leave hospital in the following circumstances:
    - o the purpose for leaving hospital is for medical reasons or treatment necessity; and
    - o the accused is escorted by someone who has been authorized by the person in charge of the hospital, AND
    - o a structured plan has been prepared addressing any risk relating to the absence, so that there is no "undue risk" to the public.
- The timing of the accused's annual disposition review hearing may be extended from the current 12 months to maximum of 36 months, in the following circumstances:
    - o if the accused (represented by counsel) and the Crown consent; OR
    - o if the accused's condition is not likely to improve and the detention remains necessary for the period of the extension.

Forensic programs will need to revise existing "Passes and Privileges" policies to align with the following legislative requirements:

(c) Process for Review and Revocation of Designation

Once a designation of "high risk" is in place, this designation may, upon application, be reviewed at each disposition hearing before the RB. If the RB is satisfied, on the basis of the evidence, that there is not a "substantial likelihood that the accused will use violence that could endanger the life or safety of another person", it shall refer the finding back to Court for a review. The Court can then revoke the designation.

If the Court does not revoke the designation, the matter is sent back to the RB for a hearing to review the conditions of detention.

This process for review and revocation of the "high risk" designation includes two additional opportunities for an assessment to be ordered. First, the Review Board can order an assessment of the accused if it needs such evidence to decide whether to refer the "high risk" finding to Court for review. Second, the Court can order an assessment of the accused if it needs such evidence to decide whether

to revoke the “high risk” finding. Again, as noted above, no provision for assessment at first instance has been included in the Bill.

It is also important to note that each of these decisions made by a Court or Review Board (including whether an accused is “high risk”, whether to refer a finding of “high risk” back to the court for review, and whether to revoke the “high risk” designation) gives rise to a right of appeal to the Court of Appeal. We can reasonably expect an increase in litigation, with implications on the legal resources of forensic programs. As well, given that the definition of ‘serious personal injury offence’ requires the Crown to proceed by way of indictment, this litigation may be at Superior Court with a jury.

Comments re Expected Impact

These amendments have been controversial. Some elements (such as the victims’ amendments) have widespread support in the sector, others less so. It is difficult to be certain of their impact.

Some commentators have said that points 1 and 2 above, if simply seen as codification of existing case law, should not alter the thresholds that Review Boards apply. Other commentators have been less sure about this, with suggestions that Review Board decision making may become more conservative. We will only know this over time.

The impact of the new High Risk Accused category is unknown, because we do not know how frequently the Crown will seek it with new and existing RB accused persons. Regardless of the frequency of these Crown applications, others have thought that the inclusion of provisions such as the HRA designation may, unfortunately, cause many mentally disordered accused to avoid the provisions of Part XX.1 of the *Criminal Code* which would then put many more into the jails and prisons.