Unnecessary, Counterproductive, Unconstitutional.
An examination of Bill C-54: The Not Criminally Responsible
Reform Act

By

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Abstract

The involvement of individuals with mental illness in the criminal justice system is receiving increased attention. Under the current law, the court or jury makes a special verdict of “Not Criminally Responsible on Account of Mental Disorder” if the accused did not at the time of the offence appreciate what he or she was doing, or that it was wrong, due to a mental disorder. This paper will outline the current Criminal Code mental disorder regime, before examining how Bill C-54, the Not Criminally Responsible Reform Act, proposes to build on the existing law. By exploring the provisions of Bill C-54 aimed at enhancing public safety, this thesis will discuss whether the reforms are supported by empirical evidence, and will likely achieve its stated objective. This paper will also consider the possibility of constitutional challenge in light of the ‘twin goals’ statutory framework and Supreme Court jurisprudence.
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This paper is dedicated to W.H. Wong. Loving grandfather and role model.
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Chapter 1

Introduction

“In every society there are those who commit criminal acts because of mental illness. The criminal law must find a way to deal with these people fairly, while protecting the public against further harms. The task is not an easy one.”

McLachlin J.

Amongst people in the general population who are suffering from a mental disorder, a small proportion has become entangled in the Criminal Justice System. According to a Statistics Canada research paper published in 2002, approximately 2.6 million individuals or 10% of the population has reported symptoms consistent with mental health disorders. This includes major depression, ‘mania disorder,’ and panic disorder. What constitutes mental illness is not fixed since its definition changes with the course of time to reflect new advancements in the field of science; and, in response to the social landscape. Academics frequently cite homosexuality as an example of the substantial variation as to which behaviors and conditions should be classified under the “umbrella” of mental illness. Although Canadian law has extended the application of marriage to two persons of the same sex, homosexuality was still listed in the Alberta diagnostic codes under “Mental Disorders: Sexual Deviations and Disorders” until it was removed by the provincial government in 2012.

3 Ibid
4 Hy Bloom & Richard Schneider, Mental Disorder and the law: A Primer for Legal and Mental Health Professionals (Toronto: Irwin Law Inct, 2006) [Bloom].
5 StatsCan 2009, supra note 2.
For centuries, legislators have struggled to define the methodology of, and the justifications for, social control of individuals who may not conform to community mores. The law, as it now stands, provides a defence of mental disorder that operates as “an exception to the general criminal law principle that an accused is deemed to be autonomous and rational.” Since “[c]onvicting a person who acted involuntarily would undermine the foundations of the criminal law and the integrity of the judicial system,” section 16 of the Criminal Code operates, at the most fundamental level, as an exemption from criminal liability. Although the Criminal Law relies on a presumption that every person is an autonomous and rational being who can distinguish right from wrong, a person suffering from a ‘mental disorder’ within the meaning of s. 16 Code is not considered capable of appreciating the nature of his or her acts, or understanding that they were inherently wrong. Justice Lebel explained the rational for exempting mentally disordered accused from criminal responsibility in Bouchard-Lebrun at paragraph 45:

According to a traditional fundamental principle of the common law, criminal responsibility can only result from the commission of a voluntary act. This important principle is based on a recognition that it would be unfair in a democratic society to impose the consequences and stigma of criminal responsible on an accused who did not voluntarily commit an act that constitutes a criminal offence.

The Criminal Code includes a general framework to determine whether an accused will be held criminally responsible for his or her actions. In order for an accused to successfully raise the defense of mental disorder, the two-stage statutory test provided in s. 16 must be satisfied.

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11 Bouchard-Lebrun, supra note 8 at para 50.
12 Ibid at para 45 [emphasis added].
13 Ibid at 38.
Section 16(1) of the *Criminal Code* reads as follows:

16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.\(^\text{14}\)

The first stage involves a characterization of the mental state of the accused, and determining whether the accused was suffering from a mental disorder at the time of the alleged events.\(^\text{15}\) Under s. 2 of the *Criminal Code*, mental disorder is as a ‘disease of the mind.’ Justice Dickson, writing for the Court in *Cooper*, defined the legal concept of ‘disease of the mind’ as follows:

> In a legal sense “disease of the mind” embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.\(^\text{16}\)

The quote suggests that understanding the source of the mental disorder or psychosis is a key element when determining whether the accused will be held criminally responsible for his or her actions.\(^\text{17}\)

The second stage of the test focuses on assessing the effects of the mental disorder, and whether, owing to his or her mental condition, the accused was incapable of knowing that the act or omission was ‘wrong.’\(^\text{18}\) If an accused satisfies both components of s. 16, the judge or a jury makes the special verdict of ‘Not Criminally Responsible on account of a Mental Disorder’ [NCR or NCRMD].\(^\text{19}\) Once an accused is found NCR, he or she becomes subjected the mental disorder regime set out in Part XX.1\(^\text{20}\) of the *Criminal Code*.\(^\text{21}\)

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18 *Ibid* at para 45.
19 *Ibid* at para 52.
20 Part XX.1 SC 1991, c 43 [Part XX.1].
21 *Winko, supra* note 1 at para 23.
At the core of Part XX.1 is the recognition that mentally disordered accused is a unique group with special needs, and the need to protect the public from the harm they might perpetrate.22 A verdict of NCR triggers an ‘administrative’ process that determines whether the accused is a significant threat to the safety of the public.23 If the court or Review Board makes a positive finding that such a threat exists, restrictions may be imposed on the NCR’s liberty through an order of conditional discharge or detention.24 Since Part XX.1 engages important liberty interests, the Supreme Court has found that this legislative scheme must preserve the autonomy and dignity of the NCR accused by treating him or her with “the utmost dignity” and according him with “the maximum liberty compatible with Part XX.1’s goals of public protection and fairness to the NCR accused.”25 Part XX.1 abandons conventional notions of punishment, retribution or incarceration, and instead, opts to protect society on a long-term basis by addressing and stabilizing the cause of the offending behavior – the mental illness.26 This gives effect to society’s interest in ensuring that morally innocent offenders are treated rather than punished, while protecting the public as fully as possible.

More recently, three high-profile cases have brought renewed attention to the way people whom are found NCR are handled in the Criminal Justice System.27 The cases involve Vince Li, who decapitated fellow passenger Tim McLean on a Greyhound bus in Manitoba; Allan Schoenborn, who killed his three children in British Columbia; and, Guy Turcotte, who stabbed his two children to death in Quebec were all found NCR for their respective offences. These cases have generated mass emotional responses from Canadians, and individuals impacted by persons found NCR have questioned whether the existing regime adequately protects society from people whose behavior has proven to be outrageous, extreme and a serious danger to others. Widespread public concern that

22 Bloom, supra note 4 at 2.
23 Winko, supra note 1 at para 65.
24 Ibid at para 48.
25 Ibid at para 42-43.
26 Ibid at para 20 and 40.
mentally ill accused are dangerous and unpredictable has led to further calls for reforming the existing mental disorder regime in the *Criminal Code* that relates to accused individuals found not criminally responsible.

On February 8, 2013, the Conservative government introduced Bill C-54, the ‘*Not Criminally Responsible Reform Act,*’ which aims to better protect the public from accused persons who have been found NCR, and enhance the role of victims in the *Criminal Code* mental disorder regime. The proposed statute seeks to build upon the legal foundation established by the Supreme Court of Canada on controlling the risks posed by NCR accused, as well as, “provide enhanced guidance to the courts in applying several key legal tests that are present in the mental disorder regime of the Criminal Code.” As well, Bill C-54 aims to provide courts and Review Boards with enhanced guidance and clearer language when applying several key legal tests that are present in the mental disorder regime of the *Criminal Code.* In particular, Bill C-54 contains three amendments: putting public safety first; creating a high-risk not criminally responsible accused designation; and enhancing victims’ involvement.

This paper discusses how the proposed reforms for enhancing public safety in Bill C-54 is unnecessary, counterproductive, and will likely be vulnerable to constitutional challenge. Chapter 1 looks at the historical progression of the *Criminal Code* mental disorder regime before outlining the current framework governing NCR accused. Chapter 2 summarizes the key amendments in the proposed Bill C-54. Chapter 3 delves into assumptions that are underlying the creation of Bill C-54, namely that inappropriately releasing violent NCR accused from detention and subsequent recidivism are pressing problems. It will also discuss whether Bill C-54 will likely achieve its objective of

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28 Bill C-54, *An Act to amend the Criminal Code and the National Defense Act (Mental Disorder),* 1st Sess, 41st Parl, 2013, (as passed by the House of Commons on 18 June 2013) [Bill C-54].
30 *House of Commons Debates (Hansard),* 41st Parl, 1st Sess, 146 (27 May 2013) at 2150 (Hon. Laurie Hawn) [Hawn 27 May 13].
enhancing public safety. Chapter 4 contrasts the prevailing legal standards established in case law with the proposed reforms in Bill C-54 to discuss its constitutional validity. Chapter 5 evaluates the provisions for enhancing victims’ rights. The final section provides a summary and my personal view on legal reform in the area of mentally disordered accused.
Chapter 2

Legislative History of Part XX.1

This chapter examines the legislative history of the Criminal Code mental disorder regime, highlighting the impact that increased awareness of civil liberties had on the treatment of mental disorders in the general population and in the criminal context. In particular, it illustrates how the regime has progressively shifted away from the prerogative of universal and indeterminate detention in psychiatric institution. A clear understanding of the current provisions of our criminal law that apply to persons found not criminally responsible on account of mental disorder will form the basis for our analysis of Bill C-54, the Not Criminally Responsible Reform Act.

For many centuries, religious, spiritual or cultural beliefs dominate the way in which individuals with mental illness were treated and regarded in society.\(^{32}\) In ancient Greece, individuals with severe mental illness were thought to be influenced by angry gods, and were treated with contempt, humiliation and abuse.\(^{33}\) The dominant view in the 17\(^{th}\) and 18\(^{th}\) centuries was that mental illness was an impaired physical state self-inflicted through an excess of passion was used to justify poor living conditions, and the use of physical restraints in places of confinement.\(^{34}\) As society began to recognize the importance of specialized treatment for mental illness in the late 1800s, the government increased funding of centralized mental health facilities.\(^{35}\) Over the next 50 years, psychiatric institutions proliferated across Canada because separation of the mentally ill from the rest of society during treatment was believed to be a key factor in rehabilitation.\(^{36}\) However,
mental health facilities became large custodial institutions and the initial goal of providing therapeutic treatment was undermined. Rather than separating only those who were deemed to be ‘dangerous,’ institutionalization became “an alternative way of dealing with dissenters and putting away ‘undesirables’” even when their mental state does not require hospitalization. The mentally ill were confined in hospitals, isolated from their communities and subjected to involuntary treatment.

With the rise of the human rights movement in the 1960s, the increased emphasis on civil liberties prompted awareness of the stigma, prejudicial attitudes and discriminatory practices towards mentally ill. The modernization of social norms lead to the widespread concern regarding the quality and effectiveness of institutional care eventually perpetuated the deinstitutionalization movement in the early 1960s. Due to improvements in psychiatric diagnosis and care over the next three decades, mental health care facilities have progressively shifted the treatment of mentally ill persons from mental health facilities to less restrictive community-based services. As psychotropic medication became readily available, gradual reintegration and inclusion of mentally ill people into the community were recognized as essential to making a recovery.

1 Defence of Insanity

Along with a shift in approach to treating mental disorders in the general population, the Criminal Code treatment of individuals with mental illness has evolved and shifted away from the prerogative of universal and indeterminate detention in psychiatric institutions.
The Common Law defence of insanity, originally governed by the *M’Naghten* rules, was incorporated into first Canada’s *Criminal Code* in 1892. This statutory defense provides that individuals who were “incapable of appreciating the nature and quality of the act or omission, and of knowing that it was wrong,” by reason of a ‘natural imbecility’ or ‘disease of the mind,’ were found ‘not guilty by reason of insanity’ [NGRI]. Notwithstanding public belief that a successful defense of insanity amounted to a ‘ticket to freedom,’ the reality was that persons found NGRI were automatically detained with no immediate prospect of release. From 1892 to 1992, persons acquitted on the basis of insanity were automatically detained in ‘strict custody’ at the pleasure of the Lieutenant Governor, and Provincial Cabinets for an indefinite duration because of their “potential dangerousness or risk to the public.” In the 1970s, the Law Reform Commission published several reports questioning the fairness of the existing ‘Lieutenant Governor’s Warrant Scheme.’ It was found that in some cases, it was possible for a person who had been found NGRI to be detained for a longer period of time than a person found guilty would be (Law Reform Commission, 1976). Underlying the ‘needlessly long terms of detention’ of mentally disordered offender was ‘an unjustifiable fear of mentally unbalanced delinquents.’ As noted by Carver and Langlois-Klassen, the forensic system was plagued with “politically driven detention.” In a few high-profile cases involving sensational offences, Provincial Cabinets were unwilling to release individuals into the community despite advice from treatment teams that the accused no longer posed a serious risk to society.

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44 *Criminal Code*, SC 1892, c 29 [*Criminal Code 1892*].
45 *Criminal Code*, RSC 1970, c C-34 s 16 [*Criminal Code 1970*].
50 *Ibid*
2 R. v. Swain

With the enactment of the *Canadian Charter of Rights and Freedoms*\(^{51}\) in 1982, the Department of Justice initiated the Mental Disorder Project, which issued a report suggesting that the mental disorder provisions of the *Code* were in conflict with constitutionally guaranteed liberties.\(^{52}\) Mentally disordered accused can either enforce their fundamental rights with legislation or by way of a constitutional challenge.\(^{53}\) In the seminal case of *R. v. Swain*,\(^ {54}\) the appellant was charged with aggravated assault, committed during a period of mental disorder. By the time of the trial, Swain had received treatment for his illness and his condition improved rapidly with medication.\(^ {55}\) Over Swain’s objections, Crown counsel in Ontario was permitted to adduce evidence of his insanity at the time of the offence.\(^ {56}\) Swain was found not guilty by reason of insanity on all counts, and was detained in strict custody under s. 542(2) of the *Code*. Sections 7 and 9 of the *Charter* were invoked to challenge the constitutionality of the rule that allows the Crown to seek a finding of insanity, and the Lieutenant Governor warrant scheme governing accused found NCR.\(^ {57}\) The relevant provisions of the *Charter* are as follows:

**s. 7:** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.\(^ {58}\)

**s. 9:** Everyone has the right not to be arbitrarily detained or imprisoned.\(^ {59}\)

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\(^{51}\) *Charter*, supra note 51 at s. 7.

\(^{52}\) Law and Government Division, Mental Disorder and Canadian Criminal Law by Marilyn Pilon (22 January 2002) [Pilon, “Mental Disorder”].

\(^{53}\) PPAO 2008, supra note 6 at 25.


\(^{55}\) *Ibid* at 954-955.

\(^{56}\) *Ibid*.

\(^{57}\) *Ibid*.

\(^{58}\) *Charter*, supra note 51 at s. 7.

\(^{59}\) *Ibid* at s. 9.
The Supreme Court of Canada found that the Common Law rule, which allows the Crown to raise evidence of insanity over the objections of the accused, limited Swain’s liberty interest under section 7 of the *Charter*.\(^{60}\) Furthermore, this deprivation was contrary to the principles of fundamental justice because it interferes with an accused person’s right to have control over the conduct of his or her defence.\(^{61}\) Since it was possible for Parliament to reformulate the common law rule so as to avoid infringing the constitutionally protected right to liberty, Chief Justice Lamer noted “[s]uch reformulation should be undertaken.”\(^{62}\)

A majority also ruled that section 542(2) of the *Criminal Code* infringed sections 7 and 9 of the *Charter*. With respect to s. 7, the Supreme Court held that the deprivation of liberty did not meet the minimum standard of procedural fairness required by the principles of fundamental justice. Since s. 542(2) “provides for no hearing or other procedural safeguards” when the initial remand into ‘strict custody’ is ordered, the impugned provision requires the trial judge to “always act in a manner that would infringe the s. 7 rights of an insanity acquittee.”\(^{63}\) Furthermore, because s. 542(2) requires a trial judge to automatically order strict custody without any criteria or “rational standard for determining which individual insanity acquittee should detained and which should be released,” it was held that s. 542(2) infringed the appellant’s right not to be arbitrarily detained under s. 9 of the *Charter*.\(^{64}\)

Upon concluding that s. 542(2) cannot be justified as a reasonable limit on the appellant’s rights under sections 7 and 9 of the *Charter*, the court did not simply declare the provision to be of no force or effect pursuant to s. 52(1) of the *Constitution Act 1982*.\(^{65}\) Instead, the court granted temporarily suspended the declaration of invalidity for a period of six months.\(^{66}\) The transitional period would enable the federal government to modify

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\(^{60}\) *Swain*, supra note 54 at 978.

\(^{61}\) *Ibid* at 979.

\(^{62}\) *Ibid* at 978-979.

\(^{63}\) *Ibid* at 1009 and 1011.

\(^{64}\) *Ibid* at 1012 - 1013.

\(^{65}\) *Ibid* at 1021.

\(^{66}\) *Ibid* at 1022.
the existing scheme for the supervision of mentally disordered accused, without compelling judges to release all insanity acquittees into the community, including those who may well be a danger to the public.\textsuperscript{67} It is worthy to mention that even though the Supreme Court only considered the constitutional validity of s. 542(2) in \textit{Swain}, Chief Justice Lamer indicated in passing that the Lieutenant Governor’s warrant system itself (ss. 545 and 547) does ‘attract suspicion due to the lack of procedural safeguards.’\textsuperscript{68}

### 3 The Current Regime Under \textit{Part XX.1}

In response to the Supreme Court’s decision in \textit{Swain}, the Liberal Government introduced Bill C-30\textsuperscript{69} in 1991, which would end the Lieutenant Governor’s warrant system and create a new scheme for managing mentally disordered accused under Part XX.1 of the \textit{Criminal Code}.\textsuperscript{70} The majority of Bill C-30 was proclaimed in 1992.\textsuperscript{71} Bill C-30 ‘modernized’ the terminology of the former insanity defense by replacing the finding of “not guilty by reason of insanity” with a verdict of ‘Not criminally Responsible on account of a Mental Disorder’ [NCR].\textsuperscript{72}

The NCR verdict stands outside the traditional strict dichotomy of either a finding of guilt or not guilt, since a finding of NCR is neither an acquittal nor a conviction.\textsuperscript{73} Justice McLachlin, writing for the majority in \textit{Winko}, summarized the rationale of Part XX.1:

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\textsuperscript{67} \textit{Ibid} at 1022

\textsuperscript{68} \textit{Ibid} at 1021

\textsuperscript{69} Bill C-30, \textit{An Act to amend the Criminal Code (Mental Disorder) and to amend the National Defense Act and the Young Offenders Act}, S.C. 1991, c.43 [Bill C-30].

\textsuperscript{70} StatsCan 2009, \textit{supra} note 2 at 14; Pilon, “Mental Disorder,” \textit{supra} note 52.

\textsuperscript{71} Parliament of Canada: Law and Government Division, Bill C-10: An Act to Amend the Criminal Code (Mental Disorder) and to make consequential amendments to other Acts by Wade Raaflaub (Ottawa: Law and Government Division, 2005) online <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=C10&Parl=38&S es=1> [Raaflaub Bill C-10].

\textsuperscript{72} Department of Justice, Response to the 14\textsuperscript{th} report of the Standing Committee on Justice and Human Rights: Review of the Mental Disorder Provisions of the \textit{Criminal Code}, online: <http://www.justice.gc.ca/eng/rp-pr/ep-pm/cr-rc/md-tm/defin.html> [DoJ Response to Standing Committee Report].

Under the new scheme, once an accused person is found to have committed a crime while suffering from a mental disorder that deprived him or her of the ability to understand the nature of the act or that it was wrong, *that individual is diverted into a special stream*. Thereafter, the court or a Review Board conducts a hearing to decide whether the person should be kept in a secure institution, released on conditions or unconditionally discharge. *The emphasis is on achieving the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately.*

A NCR verdict results in an mentally disordered accused being removed from the mainstream Criminal Justice System, and ‘diverted to a special stream’ that provides individualized assessment and treatment for those found to be a significant danger to the public. Much like the deinstitutionalization movement in the civil mental health regime, Part XX.1 emphasizes treatment and stabilization over incarceration and punishment.

The creation of a system of Review Boards in each province and territory is one of the principal reforms accomplished by Part XX.1. Review Boards are “specialized, independent tribunals” responsible for reviewing and issuing dispositions relating to the management of those individuals accused of committing a crime who have been found NCRMD. The role of each Review Board is identical throughout Canada regardless of provincial jurisdiction. As s. 672.38(1) of the Code clearly provides, “a Review Board shall be established or designated for each province to make or review dispositions concerning an accused in respect of whom a verdict of not criminally responsible by reason of mental disorder is rendered.”

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74 *Winko, supra* note 1 at para 21 [emphasis added].
75 *Conway*, supra note 73 at para 87.
78 *Criminal Code* 1985, *supra* note 9, s. 672.38(1); *Winko, supra* note 1 at para 25.
79 *Ibid*
3.1 NCR Disposition

After a verdict of NCR, the court may, on its own motion or on application by the prosecutor or the NCR accused, hold a disposition hearing.80 The Court can make a disposition with respect to the accused at the hearing “if it is satisfied that it can readily do so and that a disposition should be made without delay.”81 If the Court does not hold a hearing, the NCR accused is directed under the jurisdiction of the provincial or territorial Review Board and a disposition must be rendered within forty-five days after the initial verdict.82 The court and the Review Board can make one of three dispositions set out in s. 672.54 of the Code: absolute discharge, a conditional discharge, or detention in hospital.83 Where the Court of first instance conducts its own disposition hearing and makes any disposition other than an absolute discharge, the Review Board must hold a hearing and make a disposition within 90 days after the Court’s initial order.84

Parliament has set out a list of factors that the court and Review Boards must take into account when making a disposition. Section 672.54 of the Code is read as follows:

672.54 Where a court or Review Board makes a disposition under 672.54(2) or section 672.47 or 672.83, it shall taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

(a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;

(b) by order, direct that the accused be discharged subject to such conditions as the court of Review Board considers appropriate; or

80 Criminal Code 1985, supra note 8, s. 672.46(1).
81 Ibid s. 672.45(2); Winko, supra note 16 at para 23.
82 Ibid s. 672.47(1)
83 Ibid s. 672.54
84 Ibid s. 672.47(3).
(c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

To clarify, the court or Review Board conducts an individualized assessment of each NCR accused by taking into account “the need to protect the public from dangerous persons; the mental condition of the accused; the reintegration of the accused into society; and, the other needs of the accused” when determining which disposition is the “least onerous and least restrictive to the accused.” In 1999, the Supreme Court interpreted s. 672.54 as imposing an obligation on the court and the Review Board to make an order for unconditional discharge if the evidence does not support the conclusion that the NCR accused poses a significant threat to the safety of the public. This reasoning is consistent with the ‘twin goals’ approach in Part XX.1 because it ensures that an NCR accused’s liberty is only restricted for the purpose of preventing further criminal conduct and protecting society.

3.2 Procedural Safeguards

Considering how Chief Justice Lamer’s cautioned in Swain that the Lieutenant Governor’s warrant system does ‘attract suspicion due to the lack of procedural safeguards,’ it is not surprising that Parliament incorporated “a fully panoply of procedural justice rights” under part XX.1.

Review of Dispositions

Section 672.81 of the Code further protects the NCR accused’s liberty by setting out circumstances where the Review Board must undertake a ‘mandatory review of

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85 Department of Justice Canada, The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study, rr06-1e (Research and Statistics Division, January 2006) at 2 [Review Board Overview 2006].
86 Winko, supra note 1 at para 69.
87 Ibid at para 32.
Firstly, the Review Board is required to hold a hearing within twelve months after making the initial disposition, and every twelve months thereafter until the Board is satisfied that the NCR accused no longer poses a significant threat to the safety of the public. Review Boards are also required to review an NCR accused’s disposition if the 'restrictions on his or her liberties have significantly increased for more than seven days, or if it is requested by the hospital. In addition, s. 672.82 confers Review Boards with discretion to review any of its dispositions at any time, either on its own motion, or at the request of the accused or any other party.

**Appeal**

Section 672.72(2) allows any party to appeal against a disposition ordered by the court or Review Board to the respective provincial Court of Appeal on a question of fact, law, or both.

This Chapter demonstrates that the emphasis on public protection inherent in the Lieutenant Governors warrant system is now balanced by greater consideration of the NCR accused’s rights and personal needs. Under Part XX.1, persons found NCR occupy a special place in the criminal justice system; they are spared the full weight of criminal responsibility, but are subject to those restrictions necessary to protect the public. Nonetheless, the scope of the criminal law’s ‘preventative or protective’ jurisdiction over NCR accused is only warranted where necessary to prevent further criminal activity and protect society.

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89 *Criminal Code* 1985, *supra* note 9, s. 672.81.
90 *Ibid* at s. 672.81(1).
91 *Ibid* at s. 672.81(2.1) and s. 672.81(2).
92 *Ibid* at 672.82(1).
93 *Ibid* at s. 672.72(1).
94 *Winko, supra* note 1 at para 91.
95 *Ibid* at 3.
96 *Ibid* at 32.
Chapter 3

Bill C-54

A number of high profile, gruesome and violent offences committed by persons found NCR have been subjected to intense media coverage, and likely serve as the basis for Bill C-54, the Not Criminally Responsible Reform Act.\(^\text{97}\) It can be noted at the outset that the proposed legislation does not apply to all individuals in the criminal justice system who have a mental illness, nor does it change the current eligibility criteria in the Criminal Code with respect to criminal responsibility on account of mental disorder. Instead, Bill C-54 strictly focuses on mentally ill people who come within the purview of the Criminal Code mental disorder regime, and have been found NCR.\(^\text{98}\) Individuals who have a mental illness, but have not been found NCR, are handled in the traditional criminal justice system. This chapter sets out the three main components of Bill C-54: (1) ensure that public comes first in the decision-making process with respect to persons found Not Criminally Responsible on Account of Mental Disorder; (2) create a new high-risk, not criminally responsible accused designation; and, (3) enhance the safety of victims and their involvement in the mental disorder regimes.\(^\text{99}\)

1 Alter the Wording of Section 672.54

As discussed earlier, s. 672.54 of the Code lists a number of considerations that the court and Review Board must take into account when making a disposition. Bill C-54 proposes to amend this provision by introducing more straightforward terminology and clearer language so that public safety will receive the “[a]ppropriate emphasis in the Criminal Code mental disorder regime.”\(^\text{100}\) Public safety will be the paramount consideration in the

\(^\text{97}\) Bill C-54, supra note 28.

\(^\text{98}\) *House of Commons Debates (Hansard)*, 41st Parl, 1st Sess, 146 (1 March 2013) at 1005 (Hon. Rob Nicholson) [Nicholson 1 Mar 13].


\(^\text{100}\) Nicholson 1 Mar 13, supra note 98.
decision-making process involving mentally disordered accused persons.\textsuperscript{101} Clause 9 of Bill C-54 proposes to replace the existing portion of s. 672.54, with the following:

\textbf{672.54:} When a court or Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3) or section 672.83 or 672.84, it shall, taking into account the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is necessary and appropriate in the circumstances:\textsuperscript{102}

Besides making public safety the “paramount consideration,” clause 9 alters the wording of s. 672.54 so that the Court or Review Board is no longer required to make the disposition that is “the least onerous and least restrictive to the accused.” Instead, clause 9 requires the court or Review Board to make the disposition that is “necessary and appropriate in the circumstances.”\textsuperscript{103}

Lastly, Bill C-54 aims to provide a statutory definition for the phrase a “significant threat to the safety of the public,” which was previously left undefined by Parliament in Bill C-30.\textsuperscript{104} The meaning attributed to this phrase is critical because whether the Review Board can maintain its jurisdiction and continue supervising an NCR accused is dependent upon a finding that he or she poses a ‘significant threat to the safety of the public.’ Clause 10 of Bill C-54 provide this statutory definition:

\textbf{672.5401} For the purposes of section 672.54, a significant threat to the safety of the public means a risk of serious of physical or psychological harm to members of the public – including any victim of 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.\textsuperscript{105}

\textsuperscript{101} Blanchfield, “New legislation,” \textit{supra} note 27.
\textsuperscript{102} Bill C-54, \textit{supra} note 28, cl 9.
\textsuperscript{103} Ibid
\textsuperscript{104} “Not Criminally Responsible Act” (2013) 8 Litigation Notes 1-2 at 1 [Litigation Notes].
\textsuperscript{105} Bill C-54, \textit{supra} note 28, cl 9.
2 High-Risk Designation

Perhaps the most controversial reform in Bill C-54 is the introduction of a high-risk designation under s. 672.64 of the Code. Clause 12 of Bill C-54 seeks to create a legislative scheme by which Canadians who are found not criminally responsible on account of mental disordered may be designated ‘high-risk.’

According to Bill C-54, once a person is found NCR, the Crown may make an application to the court for a finding of ‘high-risk’ if the accused is over the age of 18 years at the time of the offence, and he or she has been found not criminally responsible on account of mental disorder for a ‘serious personal injury offence.’ Section 672.81(1.3) of the Code currently defines a ‘serious personal injury’ as “an indictable offence involving the use or attempted use of violence, conduct endangering life and a number of sexual offences listed in the Code.”

Once the court holds a hearing, a NCR accused may be found to be ‘high-risk’ in two circumstances: (1) if the Court is satisfied that there is a “substantial likelihood that the accused will use violence that could endanger the life or safety of another person;” or, when (2) the Court 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.”

In determining whether to designate an accused high-risk, clause 12 seeks to create subsection 672.64(2), which would direct the Court to consider all the ‘relevant evidence’ and a number of factors, including:

(a) The nature and circumstances of the offence;
(b) Any pattern of repetitive behavior of which the offence forms a part;
(c) The accused’s current mental condition;
(d) The past and expected course of the accused’s treatment, including the accused’s willingness to follow treatment; and,
(e) The opinions of experts who have examined the accused.

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106 Ibid cl 12.
107 Ibid.
108 Ibid.
109 Ibid.
110 Ibid.
2.1 Disposition of High-Risk NCR Accused

As noted by the Canadian Bar Association, high-risk NCR accused will generally be subjected to a more onerous form of custody after trial.\(^{111}\) Once an accused has been designated high-risk, the only disposition that a Court can make is a detention order, which cannot be subject to any condition that would permit the accused to be absent from the hospital, unless:

(a) “it is appropriate in the opinion of the person in charge of the hospital, for the accused to be absent from the hospital for medical reasons or for any purpose that is necessary for the accused’s treatment, if the accused is escorted by a person who is authorized by the person in charge of the hospital; and,

(b) a structured plan has been prepared to address any risk related to the accused’s absence and, as a result, that absence will not present an undue risk to the public.”\(^{112}\)

Until the Court revokes the designation, high-risk accused would not be eligible for conditional or absolute discharge; they would not be authorized to visit the community without an escort; and, escorted visits into the community would be allowed in extremely limited circumstances.\(^{113}\) In order to revoke a high-risk designation, the Review Board must first hold a hearing, and be 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.”\(^{114}\) The Review Boards refers its findings to the court to hold a hearing to review an accused’s high-risk designation. If the court decides not to revoke the high-risk finding, the Review Board as 45 days to hold a hearing and review the accused’s conditions of detention.\(^{115}\) If the court does revoke the high-risk finding, the accused continues to be supervised by the Review Board until he or she no longer poses a significant threat to the safety of the public, at which time he or she can be discharged.\(^{116}\)

\(^{111}\) Canadian Bar Association, “Bill C-54 – Not Criminally Responsible Reform Act” (March 2013), online: Canadian Bar Association <http://www.cba.org/cba/submissions/pdf/13-20-eng.pdf> [CBA].
\(^{112}\) Ibid, supra note 28, cl 12.
\(^{113}\) Ibid.
\(^{114}\) Ibid cl 16.
\(^{115}\) Ibid.
\(^{116}\) Ibid.
2.2 Annual Review

While Part XX.1 of the Criminal Code requires that a hearing be held annually to review a disposition, Bill C-54 would permit the Review Board to extend the time for holding a hearing in respect of a high-risk accused to a maximum of 36 months after making or reviewing a disposition if the accused is represented by counsel and the accused and the Attorney General consent to the extension.\(^{117}\) Irrespective of whether the accused consents, Clause 15 includes a provision that would enable the Review Board to opt for triennial review if it is satisfied on the basis of any relevant information that the accused’s condition is not likely to improve and that detention remains necessary for the period of the deferral.\(^ {118}\) If enacted, high-risk accused would potentially have to wait up to three years before the Review Board considers their case.

3 Enhance Victim Rights and Involvement

Many victims and victim advocates, including the Office of the Federal Ombudsman for Victims of Crime (OFOVC), have repeatedly voiced their concern that the present legal system is very complicated and does not provide the general public with opportunities to be better informed and to be included the justice system.\(^ {119}\) In response, the Conservative government proposed a series of procedural reforms in Bill C-54 aimed to enhance the safety of victims and provide an opportunity for their greater involvement in the Criminal Code mental disorder regime.\(^ {120}\)

\(^ {117}\) Ibid cl 15.
\(^ {118}\) Ibid.
\(^ {119}\) House of Commons, Standing Committee on Justice and Human Rights Evidence, 41st Parl, 1st Sess (12 June 2013) at 1620 [Ms. Susan O'Sullivan, Office of the Federal Ombudsman for Victims of Crime] [OFOVC Standing Committee 12 June 13].
\(^ {120}\) PM introduce NCR Act, Feb 2013, supra note 99.
3.1 Victim Impact Statements

Victims already have the right to be present at hearings where the court or Review Board makes or reviews a disposition, and to present a victim impact statement (VIS). Clause 10 of Bill C-54 goes further by stipulating that the court or Review Board shall take into consideration any statement filed by a victim at disposition hearings, at annual reviews, at discretionary reviews, and where a high-risk designation is under consideration.\textsuperscript{121}

3.2 Notice Requirements

Clause 7 introduces new notice requirements under s. 672.5 of the\textit{ Criminal Code}. Bill C-54 seeks to introduce a provision that would allow victims to be notified, upon request, when an NCR accused is discharged absolutely or conditionally into the community, and their intended place of residence.\textsuperscript{122} Moreover, Bill C-54 seeks to add subsection 672.5(13.3), which would require the Review Board to notify every victim of the offence that they are entitled to file a statement with the Court in accordance with subsection (14) if it refers its finding to the Court for the purpose of reviewing a high-risk designation under s. 672.84(1).\textsuperscript{123}

3.3 Victims’ Safety and Security

Bill C-54 also addresses the need to consider the safety of victims when decisions are being made about an accused person. While the option for non-communication orders already exists, clause 10 requires the Court or Review board to consider “whether it is desirable in the interests of the safety and security of any person, particularly a victim or witness,” to impose a non-communication order prohibiting contact with a concerned

\textsuperscript{121} Bill C-54,\textit{ supra} note 28, cl 10.
\textsuperscript{122} \textit{Ibid} cl 7(2).
\textsuperscript{123} \textit{Ibid} cl 7(3).
victim or complainant; or, to require that the accused refrain from going to particular locations.\textsuperscript{124}

Bill C-54 puts forward major changes to Part XX.1 of the \textit{Code} that appear to be consistent with the stronger law-and-order agenda pursued by the Conservative Government of Prime Minister Stephen Harper.\textsuperscript{125} The need to closely consider the underlying rationale and implications of the proposed amendments is rendered more urgent by the fact that Bill C-54 already passed the House of Commons on June 19, 2013 and will move to the Senate for further study.\textsuperscript{126}

\textsuperscript{124} Ibid cl 10.
\textsuperscript{125} Litigation Notes, \textit{supra} note 104.
\textsuperscript{126} DoJ Bill Passed HoC, \textit{supra} note 29.
Chapter 4

Rationale For Bill C-54

At the heart of Bill C-54 is the complex matter of assessing and managing the risks that NCR accused pose to public safety. In order to ensure that the goal of public safety animates the entire legal regime that applies to mentally disordered accused persons who are referred to the Review Boards, Bill C-54 would clarify that public safety is the paramount consideration when rendering a disposition. Another key measure is the implementation of a new ‘high-risk’ designation. According to the Conservatives, this high-risk scheme would allow the court to mitigate risks posed by a small subset of NCR accused who committed a serious personal injury offence of such a brutal nature as to indicate a risk of grave harm to another person, or has a substantial likelihood of using violence to endanger the life or safety of another person. NCR accused deemed by a court as ‘high-risk’ would be detained in a hospital, barred from obtaining a conditional or absolute discharge and denied unescorted passes until the designation is revoked by a court. Once again, the public safety objective justifies the imposition of stricter and more onerous rules of detention on NCR accused who ‘pose’ a higher risk of danger to society. As Rob Nicholson, Minister of Justice and Attorney General of Canada, explained, “(…) the nature of the actions that resulted in a serious personal injury that formed the basis for the application would point to the need for increased protection and restrictions.”

Although enhancing public safety is undoubtedly a desirable objective in any criminal justice system, one must, however, take a step back to assess whether empirical evidence ‘points to the need for’ new measures to better protect the public from NCR accused as a group, and those who have committed violent offences. With such insight, this chapter not only criticizes the underlying rationale of Bill C-54, but also suggests that proposed

127 Bill C-54, supra note 28, cl 9.
128 Ibid cl 10.
129Ibid.
130Nicholson 1 Mar 13, supra note 98 at 1010.
amendments to Part XX.1 would not effectively promote the goal of protecting public safety even if enacted.

1 Empirical Evidence and Necessity

Recognizing that Bill C-54 expressly aims to make it more difficult to release NCR accused in the name of public safety, Irwin Cotler, former Minister of Justice and Attorney General of Canada, stressed during a House of Commons Debate that “[i]f legislation is to protect the public against a particular threat, information regarding the extent of the threat is fundamental. Otherwise we are legislating based on gut instinct and stereotyping, which the NCR regime sought specifically to guard against with respect to the mentally ill.” Since Bill C-54 purports to protect the public from NCR accused who pose a danger, this section will evaluate the ‘extent of the threat’ in relation to the proposed amendments.

It can be noted that in reality, only a small fraction of criminal cases result in a not-criminally-responsible plea. According to Dr. Patrick Baillie, Canada experiences approximately 400,000 criminal charges per year, of which 0.2% or 720 cases are resolved by way of a not criminally responsible verdict. Moreover, approximately 10% percent of all NCR cases, or about 72 cases each year, involve serious violence offending. Close examination of Ontario Review Board annual report shows that the number of accused entering the Board’s jurisdiction has been decreasing since 2007. Whereas 179 individuals declared NCR were referred to the Ontario Review Board between 2009 and 2010, only 170 offenders were found NCR in Ontario between 2010 and 2011.

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131 House of Commons Debates (Hansard), 41st Parl, 1st Sess, 146 (1 March 2013) at 1215 (Hon. Irwin Cotler) [Cotler 1 Mar 13].
132 House of Commons, Standing Committee on Justice and Human Rights Evidence, 41st Parl, 1st Sess, Meeting 77 (10 June 2013) at 1605 (Dr. Patrick Baillie)[Baillie Standing Committee].
133 Ibid.
1.1 Recidivism Rates

Moreover, there is significant consensus among academics and mental health professionals that the legal instruments found in Part XX.1 of the *Criminal Code* adequately protects the public from those who have been found NCR. According to a Mental Health Commission survey that looked at NCR accused in Quebec, Ontario and British Columbia, the recidivism rate for NCR individuals granted an absolute discharge after a finding of not criminally responsible, over a three-year period, sits at 11 percent.\(^{135}\) Similarly, the fact that 90 percent of people found not criminally responsible between 1992 and 2004 did not have a past finding of NCR indicates that the work carried out by Review Boards and medical service providers is producing successful results.\(^{136}\) Although reoffending rates for persons found not criminally responsible differ between provinces, these numbers are considerably lower than those of federal offenders in the regular justice system, which range from 41 percent to 44 percent\(^{137}\) A Correctional Service of Canada paper reported that approximately 40 percent of offenders released from federal prison are subsequently re-incarcerated.\(^{138}\) Contrary to what Conservatives would have Canadians believe, NCR accused are no more likely than their convicted counterparts to commit any offence, let alone a violent offence, upon release.\(^{139}\)

In her most recent work, “Description and processing of individuals found Not Criminally Responsible on Account of Mental Disorder accused of “serious violence offences,”\(^{140}\) Professor Anne Crocker examined data from 165 cases resolved by way of a NCR verdict for a serious violent offence. Among the 49 individuals who had been

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135Baillie Standing Committee, *supra* note 126.
139 *Winko, supra* note 1 at para 37.
140 Anne G. Crocker et al, *Description and processing of individuals found Not Criminally Responsible on Account of Mental Disorder accused of “serious violence offences* (March 2013) [Final report submitted to the Research and statistics division, Department of Justice, Canada], online: <https://ntp-pts.org/NCRMD-SVO-NTPteam_March_2013.pdf> [Crocker 2013].
absolutely discharged for more than three years, Crocker found that 8.3 percent were
convicted or found NCR for a new offence, half of which for a violent offence.141 This
indicates that seriousness of a crime does not necessarily indicate one’s likelihood to re-
offend.142 While 35.8 percent of the sample had at least one past conviction, the fact that
only 6.1% had a previous finding of NCR suggests that Review Boards are “doing their
jobs” and are not likely to give an absolute discharge to someone who may endanger the
life or safety of another person.143

When speaking at the Justice and Human Rights Committee meeting, Chris Summerville,
chief executive of Schizophrenia Society of Canada, urged Members of Parliament to
“give greater credit to the review boards and the medical service providers – the
professional experts.”144 Similarly, the Supreme Court acknowledged in Owen145 that
Review Boards are provided with ‘expert membership’ since s. 672.39 of the Code
stipulates that the Board must sit in panels of three with at least one psychiatrist, a mental
health professional such as a psychologist or doctor, and a chairperson who is either a
senior lawyer or a retired judge.146 This medical and legal expertise enables the Review
Board to assess whether a NCR accused’s mental condition renders him or her a
significant threat to public safety, and determine how best to manage the risks posed by
that accused.147 In the absence of evidence that the existing mental disorder regime does
not adequately protect the public from NCR accused, it seems unnecessary to toughen the
rules for violent offenders deemed “not criminally responsible.

141 Ibid at 23.
142 Douglas Quan, “Mental health organizations, researcher criticize proposed changes to
legislation, Postmedia news (28 February 2013) online,
<http://www.hsjcc.on.ca/Uploads/Mental%20health%20organizations,%20researcher%20criticiz
e%20proposed%20changes%20to%20legislation.pdf> [Quan Postmedia].
143 Crocker 2013, supra note 140 at 17-18; Ibid.
144 House of Commons, Standing Committee on Justice and Human Rights Evidence, 41st Parl,
1st Sess, Meeting 75 (5 June 2013) (Chris Summerville)[Chris Summerville Standing
Committee].
146 Criminal Code 1985, supra note 9, s 672.49 & 672.4.
147 Owen, supra note 145 at para 29-30.
2 Will Bill C-54 Enhance Public Safety?

There have been concerns that the proposed amendments in Bill C-54 may have the unintended consequence of jeopardizing the safety of Canadians, and underpinning the objective of the legislation. This section explores two ways that Bill C-54 may hinder the goal of enhancing public safety; by compromising treatment and reintegration, and deterring mentally disordered offenders from relying on the mental disorder defence.

2.1 Access to Treatment

At this point, it must be remembered that Part XX.1 is intended to reconcile the “twin goals” of protecting the public from the dangerous offenders while safeguarding the NCR accused’s liberty to the maximum extent possible. Recognizing that the NCR accused has committed crimes for which he or she cannot in justice be held responsible or punished, both goals are best achieved by treatment and reintegration into society. As McLachlin J. explains:

> The purpose of Part XX.1 is to replace the common law regime for the treatment of those who offend while mentally ill with a new approach emphasizing individualized assessment and the provision of opportunities for appropriate treatment.

In other words, the best way of protecting society on a long-term basis is to address the cause of the offending behavior – the mental illness, and ensure effective treatment to stabilize the condition. “Society will be safer for every individual cured.”

Although the Nicholson, on behalf of the Government, has asserted, “nothing in the bill would impact a mentally disordered accused’s access to mental health treatment,” denying high-risk accused unescorted passes into the community and limiting escorted passes to narrow circumstances has the effect of compromising the rehabilitation and

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148 *Winko, supra* note 1 at para 43.
149 *Ibid*
150 *Ibid* at para 41.
151 *Swain, supra* note 54 at 1005.
community reintegration process. The Centre for Addiction and Mental Health has stressed that Review Boards and forensic mental health programs gradually and carefully introduce passes to individuals detained in forensic health programs, in a thoughtful and planned manner that takes into account the person’s commitment to treatment, his or her rehabilitative progress, and his or her mental status at the time. Unescorted day passes serve an important intermediate step because it enables clinicians to accurately assess an individual’s risk, his or her readiness for greater community involvement and ability to function in society unsupervised. Taking away valuable therapeutic tools such as unescorted passes not only prevents NCR accused from developing skills necessary to reintegrate into society, but releasing an individual into the community with no prior experience of being unsupervised ‘paradoxically’ increases the risk to public safety.

2.2 Opt Out of the Mental Disorder Regime

One of the biggest concerns is that Bill C-54 might prompt some mentally ill offenders to go through the regular criminal justice system and abandon the defence of being not criminally responsible. According to Bernd Walter, Chairman of the B.C. Human Rights Tribunal, “many of the approximately 260 cases under the jurisdiction of the board were resolved by agreement between the defence and the Crown that the offenders were so mentally ill that they did not understand their actions to be criminal.” However, in light of the combined effect of the ‘high-risk’ category and the changes in the wording to the Criminal Code, Walter suspects that defence lawyers may be less inclined to enter a plea of not criminally responsible by reason of mental disorder if they think the sentence will be onerous. As a result, more people with serious mental illness will plead guilty and

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153 Letter from Alexander Simpson, Chief of Forensic Psychiatry, Centre for Addiction and Mental Health) to Mike Wallace, Chair of Standing Committee on Justice and Human Rights (15 March 2013) (Re: Bill C-54 – An Act to amend the Criminal Code and the National Defence Act) [CAMH].
154 Ibid at 3.
155 Ibid.
156 Ibid; CBA, Bill C-54, supra note 111.
157 Anna Mehler Paperny & Lindsey Addawoo, “New rules for mentally ill offenders could backfire, experts warn,” Global News (3 June 2013) online: Global News <
enter the prison system in order to avoid the possibility of being subject to a very restrictive and long lasting high-risk designation.\textsuperscript{158} While estimates vary on the prevalence of mental health issues with prison, it is clear that there is an “expanding rate of incarceration of individuals with mental health problems and/or mental illnesses.”\textsuperscript{159} An influx of mentally ill people ‘going down the prison route’ would put a significant strain on the already over-burdened provincial and federal correction systems as they strive to meet the needs of existing mentally ill prisoners.\textsuperscript{160}

Besides inadequate provision of mental health treatment and intervention in most penitentiaries, the correctional system is evidently not designed for recovery or treatment of mental disorders.\textsuperscript{161} Housing people with mental disorders in prison rather than in medical facilities may have consequences for public safety.\textsuperscript{162} According to the Canadian Psychiatric Association (CPA), mentally ill persons released from the regular prison system will reoffend at a “five to six times higher rate than if they had been made NCR.”\textsuperscript{163} Although this difference in recidivism rates may be due to the lack of community reintegration plans or the same follow-up as NCR discharged by a Review Board, it is mainly because incarceration is not the best way of protecting the public from individuals with mental illness.\textsuperscript{164} Locking a mentally ill offender up for a term of imprisonment and then releasing him or her into society, without having provided any

\textsuperscript{158} Canadian Psychiatric Association, Information Release, “The Consequences of Bill C-54, the “Not Criminally Responsible Reform Act” (18 April 2013) online: Canadian Psychiatric Association <http://www.cpa-apc.org/media.php?mid=1854> [CPA].

\textsuperscript{159} Corrections Service Canada, Mental Health Strategy For Corrections in Canada, online: <http://www.csc-scc.gc.ca/health/092/MH-strategy-eng.pdf>.

\textsuperscript{160} CAMH, supra note 153 at 4.


\textsuperscript{163} CPA, supra note 158.

\textsuperscript{164} CBA, supra note 111 at 5.
opportunities for psychiatric or other treatment, does not reduce the threat to public safety created by that mental condition.\textsuperscript{165} It would throw the entire Justice System into disarray if mentally ill offenders who genuinely require mental assistance opt out of the mental disorder defence in hopes of receiving a lesser and definite sentence through the traditional criminal justice system. As Justice McLachlin emphasized in \textit{Winko}, “The need for treatment rather than punishment is rendered even more acute by the fact that the mentally ill are often vulnerable and victimized in the prison setting.”\textsuperscript{166}

\textsuperscript{165} \textit{Winko, supra} note 1 at para 39.
\textsuperscript{166} \textit{Ibid} at para 41.
Chapter 5

Vulnerable to Charter Challenge

The verdict of NCR under Part XX.1 of the Criminal Code triggers a “balanced assessment of the offender’s possible dangerousness and of what treatment-associated measures are required to offset it. While the NCR accused is spared the full weight of criminal responsibility, he or she may be subject to those restrictions necessary to protect the public and prevent further criminal conduct." As illustrated in Chapter 2, the Supreme Court of Canada has established that the only constitutional basis for imposing alternative coercive measures to restrict the liberty of an NCR accused, is the protection of the public from significant threats to its safety.  

With the core principles of Part XX.1 in mind, this chapter will examine whether the proposed reforms in Bill C-54, particularly changes to the wording in s. 672.54 and the creation of a high-risk designation, undermine the “twin goals” approach running through the Criminal Code mental disorder regime. While public safety is of primary importance in the Canadian justice system, it is critical that Bill C-54 does not drastically distort the balance in favor of public safety because the Supreme Court has upheld the constitutionality of Part XX.1 on the basis that the provisions are “carefully crafted to protect the liberty of the NCR accused to the maximum extent compatible with the current’s situation and the need to protect public safety.” Since the proposed reforms set out in the Bill C-54 would undoubtedly limit individual liberty interests so as to engage section 7 of the Charter, it is necessary to consider whether such deprivation is in accordance with the principles of fundamental justice. This chapter will contrast the prevailing legal standards and case law, with the proposed reforms set out in Bill C-54, in order to examine the possibility of constitutional challenge with respect to s. 7 of the Charter.

167 Ibid at para 32.
168 Ibid at para 32 and 47.
1 Overbreadth

To begin, section 7 is a “prolific source of litigation” because it “includes an internal balancing mechanism” whereby individuals may be deprived of their right to life, liberty, or security of the person insofar as that the deprivation is consistent with the principles of fundamental justice. 170 In *Re B.C. Motor Vehicle Act*, 171 principles of fundamental justice were described as “basic tenets of our legal system whose function is to ensure that state intrusions on life, liberty and security of the person are effected in a manner which comports with our historic, and evolving, notions of fairness and justice.” As the ‘custodian’ of the Charter, the Court has the unique role of determining whether core values within the justice system prevail over the three constitutionally entrenched rights for the greater good of society. 172

Fundamental justice requires that laws only impair an individual’s liberty to the extent that is necessary to achieve specific objectives set by the legislature. 173 In other words, the overbreadth analysis focuses on whether the means chosen by the State are broader than necessary to accomplish its intended purpose. According to the Supreme Court of Canada in *R v. Heywood*, 174 “[t]he effect of overbreadth is that in some applications the law is arbitrary or disproportionate” and the individual’s right will have been limited for no reason.

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170 University of Alberta Centre for Constitutional Studies, *Section 7 of the Charter or Rights and Freedoms*, online: Centre for Constitutional Studies <http://www.law.ualberta.ca/centres/ccs/issues/section7ofthecharterofrightsandfreedoms.php#_ftn11> [Centre for Const Studies].


172 Centre for Const Studies, *supra* note 170.


1.1 Remove the ‘Least Onerous and Least Restrictive’ Requirement

In the leading case of Winko, the Supreme Court of Canada held that s. 672.54 of the Code does not violate s. 7 of the Charter through overbreadth because the means chosen by the Government were not “broader than necessary” to achieve the goals of protecting the public from NCR accused who pose a significant threat to public safety while safeguarding the NCR accused’s liberty to the maximum extent possible.\(^\text{175}\) According to Justice McLachlin, on behalf of the majority, s. 672.54 is not overbroad because Parliament has included two safeguards to “ensure that the NCR accused’s liberty will be trammeled no more than is necessary to protect public safety.”\(^\text{176}\)

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\text{[P]arliament has stipulated that unless it is established that the NCR accused is a significant threat to public safety, he must be discharged absolutely. Furthermore, “in cases where such a significant threat is established, Parliament has further stipulated that the least onerous and least restrictive disposition to the accused must be selected.”}\(^\text{177}\)
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Based on McLachlin’s interpretation of s. 672.54 (state directly above), the Supreme Court held that the provision is tailored to achieve the “dual objectives” of Part XX.1.\(^\text{178}\) Considering how significant weight was placed on the fact that s. 672.54 is designed to arrive at the least restrictive regime for an NCR accused, it is argued that replacing the threshold test of “least onerous and least restrictive” with “necessary and appropriate” not only fails to ensure that the NCR accused’s liberty rights will be impaired as little as possible, but it may be construed as conferring a very broad latitude and discretion.\(^\text{179}\)

It is worthy to note that the Ontario Review Board and the Nunavut Review Board have explicitly rejected the “appropriateness” standard on the basis that it “does not provide

\(^{175}\) Winko, supra note 1 at para 70; Marynuik 2008, supra note 173.

\(^{176}\) Winko, supra note 1 at para 70.

\(^{177}\) Ibid [emphasis added].

\(^{178}\) Ibid.

\(^{179}\) Ibid at para 48 and 56.
guidance, consistency, clarity of fairness” to justify the interference with liberty.\textsuperscript{180} As Binnie noted in \textit{Penetanguishine}, “it is the position of the Ontario Review Board and Nunavut Review Board and [these statutory] goals are accomplished by applying the disposition as a whole, including the conditions, the least onerous and least restrictive standard.”\textsuperscript{181} This suggests that anything less than the ‘least onerous and least restrictive’ standard may be overbroad insofar that the law will become almost unlimited in scope.\textsuperscript{182}

Speaking at a Justice and Human Rights Committee meeting, Bernd Walter, Chair of the British Columbia Review Board, recently criticized that the ‘necessary and appropriate’ criterion has no sensible meaning, is vague and is “fraught with interpretation difficulties.”\textsuperscript{183} He subsequently warned that the proposed threshold “encourages detention and restriction disproportionate to the individual’s actual assessed risk.”\textsuperscript{184} With the context of Bill C-54 and the precedence of public safety in mind, application of the ‘necessary and appropriate’ standard may result in more restrictive dispositions, and NCR accused may be detained in forensic units for longer period than is actually necessary.\textsuperscript{185} Considering how fundamental justice requires that the liberty interest of NCR accused be taken into account at all stages of a Review Board’s consideration, the \textit{Charter} challenge dismissed in \textit{Winko} may be brought back to life if the NCR accused is not protected by the “least restrictive and least onerous” requirement.\textsuperscript{186}

\textsuperscript{180} \textit{Penetanguishine}, supra note 76 at para 50.  
\textsuperscript{181} Ibid.  
\textsuperscript{182} Marynuik 2008, supra note 173.  
\textsuperscript{183} House of Commons, \textit{Standing Committee on Justice and Human Rights Evidence}, 41st Parl, 1st Sess, Meeting 77 (12 June 2013) at 1610 (Mr. Bernd Walter)[Walter Standing Committee 12 June 13].  
\textsuperscript{184} Ibid.  
\textsuperscript{185} CAMH, supra note 153 at 2.  
1.2 High-Risk Regime

Recognizing that mentally disordered offenders need due process, and fundamental fairness when they come into conflict with the criminal law, Justice McLachlin stated by way of introduction:

[...] Parliament intended to set up an assessment-treatment system that would identify those NR accused who pose a significant threat to public safety, and treat those appropriately while impinging on their liberty rights as minimally as possible, having regard to the particular circumstances of each case.187

Besides the safeguards of the NCR accused’s liberty found in s. 672.54, McLachlin emphasized that Part XX.1 further protects the liberty by providing for, at minimum, annual consideration of the case by the Review Board (s. 672.81) and giving NCR accused the right to appeal a disposition made by the court or a Review Board to the Court of Appeal (s. 672.72).188 Since consideration of the NCR’s liberty interest is not built into the statutory framework of the proposed high-risk regime in Bill C-54, the scheme, as a whole, may constitute an overbroad method of achieving the objective of public safety and “twin goals” associated with Part XX.1.189

Right to Appeal

However, close examination of Bill C-54 reveals that there is currently no mechanism through which a high-risk accused could apply to the criminal courts to review the designation. If the court or Review Board fails to interpret and apply the high-risk accused regime in s. 672.84 and unduly impinges on an individual’s liberty, he or she would not have an appropriate remedy.190 As noted in the 2010 – 2011 Ontario Review Board Annual Report, “the importance of the Ontario Review Board’s decisions as they relate to these basic human rights (liberty of individuals and the safety of the public) is

187 Winko, supra note 1 at para 16.
188 Ibid at para 71.
189 CBA, supra note 111; Penetanguishene, supra note 76 at para 53.
190 Winko, supra note 1 at para 71.
further underlined by the fact appeals from Ontario Review Board’s decisions are made directly to the Court of Appeal for Ontario.”

**Review Board Hearing**

Under the existing *Criminal Code* mental disorder regime, once an order of conditional discharge or detention is rendered, the Review Board has the task of monitoring the NCR individual under he or she is discharged absolutely. The Board is required to hold a hearing “no less frequently than every 12 months” to determine whether the NCR accused *continues* to constitute a significant threat to the safety of the public.\(^{192}\) If the Review Board cannot be satisfied at the time of the hearing that the NCR constitutes a significant threat to the safety of the public, the legal justification for confinement is absent and the NCR individual must be discharged absolutely.\(^{193}\) Thus, annual reviews ensure that the Board refers to up-to-date information and assessments when making further disposition orders or altering any one of the conditions previously imposed on the NCR accused.\(^{194}\) This scheme prevents NCR accused from ‘languishing in custody’ when further detention is not warranted.\(^{195}\)

Tripling the length of time between review hearings from 12 to 36 months with respect to high-risk NCR accused, as set out in Bill C-54, may be an overbroad method of achieving the objective of public safety. Mental health professionals caution that extending the period between review hearings from one year to three years is incongruent with the clinical reality that these persons need more careful and regular oversight.\(^{196}\) In particular, Ian Hunter, Emeritus Professor of Law at the University of Western Ontario, has cautioned that shifting annual review to triennial hearings would have immediate impact of inducing stasis into a forensic system that is already strained to the breaking point by

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\(^{191}\) ORB 10-11, *supra* note 134.
\(^{192}\) *Owen, supra* note 145 at para 26.
\(^{193}\) *Ibid* at para 27.
\(^{194}\) *Ibid* at para 3.
\(^{195}\) *Ibid*
\(^{196}\) CAMH, *supra* note 153 at 2.
inadequate forensic beds.197 Since annual reviews “weed out threats to public safety” by selectively detaining only those who pose a significant threat to public safety, removing this safeguard would unduly restrict high-risk NCR accused’s liberty.198 The Canadian Bar Association gives an example where a high-risk NCR accused who have benefited from treatment in one or two years may be detained for an additional year before the Review Board considers their case.199 Since the only justification for detaining an NCR accused is maintaining public safety, confining high-risk NCR accused who no longer pose a significant threat to public safety is unconstitutional and introduces a quality of punishment of retribution in the NCR system.200 Justice Binnie reiterates this principle in Owen, where he explains:

It is central 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.201

2 Vagueness

The “void for vagueness” principle is frequently related to the concept of “overbreadth” since both are concerned with whether the legislature has used precise enough means to achieve its objective.202 The “doctrine of vagueness” is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion.203 As clarified by Peter Hogg, it is a principle of fundamental justice that

198 CBA, supra note 111 at 10.
199 Ibid.
200 Ibid.
201 Ibid.
203 Ibid.
vague laws are unconstitutional and invalid because they “do not provide clear standards for those entrusted with enforcement, which may lead to arbitrary enforcement.”

The test for determining when a law is too vague is found in *R v. Nova Scotia Pharmaceutical society*, where Justice Gonthier states at p. 609:

A law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate – that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria.

In other words, a law will be impermissibly vague contrary to the principles of fundamental justice if it does not provide an intelligible standard or an adequate basis for legal debate. That is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. Notwithstanding the fact that the threshold for finding a law vague is “relatively high,” this section seeks to illustrate that the proposed amendments in Bill C-54 may be susceptible to constitutional challenge on the basis that it is vague.

### 2.1 Significant Threat to the Safety of the Public

Bill C-54 proposes to codify the meaning of “significant threat to the safety of the public,” which is the current test to determine whether a Review Board can maintain jurisdiction and continue to supervise an NCR accused. More specifically, the Conservative Government claims that the statutory definition of ‘significant threat to the

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206 *Winko, supra* note 1 at para 68-69.
207 *Nova Scotia Pharmaceutical Society, supra* note 205 at 609.
208 *House of Commons Debates (Hansard), 41st Parl, 1st Sess, 146* (27 May 2013) at 2225 (Mr. Mark Warawa) [Warawa 27 May 13].
safety of the public’ codifies the Supreme Court of Canada’s interpretation of this phrase in the Winko case in 1999.\(^{209}\)

The appellant in Winko argued that s. 672.54 infringes his s. 7 right to liberty because the standard of “significant threat to the safety of the public” is too vague.\(^{210}\) McLachlin J. submitted that ‘significant threat to the safety of the public’ provides sufficient precision for legal debate because “without purporting the define the term exhaustively, the phrase conjures a threat to public safety of sufficient importance to justify depriving a person of his or her liberty.”\(^ {211}\) While acknowledging that it is impossible to predict or catalogue in advance all the types of conduct that may threaten public safety to this extent, McLachlin explains why the phrase ‘significant threat to the safety of the public’ is not unconstitutionally vague:

To engage these provisions, the threat must be \textit{more than speculative in nature}; it must be supported by evidence” (57). The threat must also be ‘significant,’ both in the sense that there must be a \textit{real risk of physical or psychological harm occurring to individuals in the community} and in the sense that this potential harm must be serious. A miniscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold. Finally, the conduct or activity creating the harm must be \textit{criminal in nature}.\(^ {212}\)

In contrast, clause 10 in Bill C-54 provides that ‘a significant threat to the safety of public,’ for the purposes of s. 672.54, means “a risk of serious physical or psychological harm to members of the public – including any victim of or witness to the offence, or any person under the age of 18 years – resulting from conduct that is criminal in nature but not necessary violent.”\(^ {213}\)

Despite claims that the statutory definition of a ‘significant threat to the safety of the public’ in Bill C-54 is “specifically intended to adopt and confirm the interpretation of the Supreme Court of Canada in Winko,” there are stark differences between the Supreme

\(^{209}\) \textit{House of Commons Debates (Hansard),} 41st Parl, 1st Sess, 146 (27 May 2013) (Mr. Patrick Brown) [Brown 27 May 13].
\(^{210}\) \textit{Winko, supra} note 1 at para 67.
\(^{211}\) \textit{Ibid} at para 68.
\(^{212}\) \textit{Ibid} at para 57.
\(^{213}\) Bill C-54, \textit{supra} note 28, cl 10.
Court and the Conservative Governments’ interpretation of the phrase.\textsuperscript{214} Most notably, the new statutory regime of ‘significant threat’ no longer requires the word ‘real’ in relation to potential harm or violence.\textsuperscript{215} While the Supreme Court defined a ‘significant threat’ as a “real,” “foreseeable” or “substantial” risk, Bill C-54 does not provide clear standards as to the level of risk necessary to justify depriving an NCR accused’s liberty. Inasmuch as ‘dangerousness’ has been described as a “protean concept,” the phrase ‘significant threat to the safety of the public’ must also be given a “specific, restricted meaning.”\textsuperscript{216} Without “an intelligible standard according to which the judiciary must do its work,” lower courts and Review Boards will have excessive discretion when deciding how to define and apply the concept of a ‘significant threat to the safety of the public’ in each case. Contrary to the aim of ensuring “consistent interpretation and application of the law across our great country,” the proposed statutory definition may lead to arbitrary enforcement since it is impermissibly vague and does not provide sufficient precision for legal debate.\textsuperscript{217}

This proposed statutory definition will likely lower the threshold of ‘risk’ necessary to maintain jurisdiction of NCR accused because it purports to extend the meaning of ‘significant threat’ to include risks that are speculative in nature and a ‘miniscule risk of a grave harm will suffice.’\textsuperscript{218} The Centre for Addiction and Mental Health caution that, “It may be harder for a person who came under the purview of a Review Board to attain an absolute discharge.”\textsuperscript{219}

\textsuperscript{214} Hawn 27 May 13, supra note 30.
\textsuperscript{215} House of Commons, \textit{Standing Committee on Justice and Human Rights Evidence}, 41st Parl, 1st Sess (10 June 2013) at 1620 (Dr. Alexander Simpson)[Simpson Standing Committee 10 June 13].
\textsuperscript{216} Winko, supra note 1 at para 56-57
\textsuperscript{217} Hogg 2003, supra note 204 at 1039; Warawa 27 May 13, supra note 200.
\textsuperscript{218} Winko, supra note 1 at para 57.
\textsuperscript{219} CAMH, supra note 153 at 2.
2.2 Retroactivity

Since s. 672.64(1)(a) provides that “on application made by the prosecutor before any disposition to discharge the accused absolutely…” it implies that an accused can be found high-risk at any time, and not just at the time of the original NCR finding.\(^\text{220}\) Assuming that Bill C-54 is passed into law, can the prosecutor make an application to a superior court for a high-risk finding with respect to an NCR accused who has not been discharged absolutely and is currently still under a Review Board’s jurisdiction? Since the wording of the provision is vague, and does not provide clear standards as to whether the high-risk designation is intended to be retroactive, this regime may have the effect of arbitrarily depriving NCR accused’s liberty interest.

\(^{220}\) Bill C-54, supra note 28, cl 12.
Chapter 6

Victim Safety and Involvement

Over the past fifteen years, Parliament has taken significant measures to enhance the role played by victims in the Criminal Code mental disorder regime.\textsuperscript{221} When Part XX.1 was first enacted, victim impact statements (VIS), which are hand-written accounts by the victim describing the harm or loss suffered as a result of the offence, were not permitted in cases involving mentally disordered offenders.\textsuperscript{222} In 1999, the Government enacted a package of reforms to the Criminal Code, which included a provision enabling victims to prepare and submit a VIS at a disposition hearing for an NCR accused.\textsuperscript{223} Moreover, Parliament also imposed a duty on the court or Review Board to verify whether the victim wished to file a statement at the initial hearing after an NCR verdict.\textsuperscript{224} This preliminary legislative step towards victim participation was expanded upon in 2006 when Parliament introduced a number of changes pertaining to victims in Bill C-10.\textsuperscript{225} Similarly, Bill C-10 introduced new requirements to give victims notice of a court or Review Board hearing to make or review a disposition (s. 672.5(5.1)), and their entitlement to file a VIS for consideration if there are grounds for a discharge.\textsuperscript{226}

The role victims ought to play in relation to NCR cases is a ‘live question’ that Parliament continues to grapple with.\textsuperscript{227} Although the existing Criminal Code mental disorder regime has increasingly recognized victims’ rights and participation, Conservatives claim that the proposed reforms will ensure that all victims of NCR accused are better informed, considered and protected.\textsuperscript{228} In comparison to the provisions in Bill C-54 aimed at protecting the public from NCR accused, the procedural reforms

\textsuperscript{221} Review Board Overview 2006, supra note 85 at 193.
\textsuperscript{222} Criminal Code 1985, supra note 9 at s. 672.5(14).
\textsuperscript{223} Review Board Overview 2006, supra note 85 at 193.
\textsuperscript{224} Ibid
\textsuperscript{225} Review Board Overview 2006, supra note 85 at 193; Bill C-10, An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other acts, 1st Sess., 38th Parl., 2004 (assented to 19 May 2005), S.C. 2005, c.22.
\textsuperscript{226} Raaflaub Bill C-10, supra note 71.
\textsuperscript{227} Review Board Overview 2006, supra note 85 at 193.
\textsuperscript{228} Ibid.
that provide victims with opportunities for greater involvement have generally been met with much less resistance. In addition to the usual supporters of the victims’ rights, including the Office of the Federal Ombudsman for Victims of Crime (OFOVC) and the Canadian Resource Centre for Victims of Crime, organizations such as the Criminal Lawyers’ Association and Canadian Psychiatric Association also agree that victims deserve respect, care and support. This Chapter critically analyzes the provisions in Bill C-54 pertaining to victims, and discusses whether they will likely encourage victim participation and enhance victim safety in practice.

1 Encourage Victim Involvement

As submitted by the Office of the Federal Ombudsman for Victims of Crime (OFOVC), all victims have certain basic needs irrespective of the mental state of the accused – the need to be informed of the process and their rights within it, and the need to have their safety considered. In line with this emphasis on victim rights, Bill C-54 seeks to encourage greater involvement by enabling victims to submit impact statements at each of the NCR accused’s review hearings, and increasing victim notification requirements. More specifically, clause 7(3) of Bill C-54 provides that whenever the Review Board refers an NCR accused to the court for a high-risk hearing, it shall notify every victim of the offence that they are entitled to file a statement. The OFOVC supports the inclusion of these measures entirely because increased consideration of the victims’ rights, input and need to be informed may significantly increase the victims’ sense of safety and confidence.

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229 House of Commons Debates (Hansard), 41st Parl, 1st Sess, 146 (5 June 2013) (Dr. J. Paul Fedoroff) [Fedoroff 5 June13].
230 OFOVC Standing Committee 12 June 13, supra note 119.
231 Bill C-54, supra note 28, cl 7(3).
232 OFOVC Standing Committee 12 June 13, supra note 119.
Though most victims appear to believe that submitting a statement is a positive way of participating in the sentencing process, a Department of Justice paper found that only a minority of all victims, submit impact statements.\textsuperscript{233} Notifying and encouraging victims the use of impact statements may not necessarily be the most effective means of enhancing victim participation because “the mere introduction of a victim impact statement regime will not result in widespread use of the statements.”\textsuperscript{234} A significant number of victims, for a variety of reasons, seem to be content to remain out of the sentencing process or parole hearings.\textsuperscript{235} Recent research sponsored by the Department of Justice found that lack of awareness among victims of the existence of victim impact statements does not constitute a ‘barrier’ because approximately 80% of victims reported receiving information about victim impact statements.\textsuperscript{236} Similarly, Walter asserted at a Standing Committee on Justice and Human Rights meeting that, “Since 2005 not a single victim has asked to read a victim impact statement in B.C., even though they’re constantly being provided with notice and a brochure of their rights.”\textsuperscript{237} Consequently, there seems to be no persuasive evidence to suggest that requiring Review Boards to notify victims of their entitlement to file an impact statement does not necessarily lead to an increase in the number of statements submitted.

The Canadian Psychiatric Association suggests that the government can better address victims’ needs by adopting alternative victim supports and restorative justice approaches because many victims do not wish to remain engaged in the offender’s release process, experiencing it as re-victimization.\textsuperscript{238}

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\textsuperscript{234} Ibid.

\textsuperscript{235} Ibid at 7.

\textsuperscript{236} Ibid at 4.

\textsuperscript{237} Walter Standing Committee 12 June 13, \textit{supra} note 183.

\textsuperscript{238} CPA, \textit{supra} note
2 Victim Safety

Bill C-54 also proposes specific measures to promote victim safety, such as allowing victims to be notified, upon request, when an NCR accused is discharged absolutely or conditionally into the community, and their intended place of residence.\(^{239}\) The OFOVC supports this measure because providing victims with information about the accused’s movement within the correctional system has the benefit of addressing victims’ general feelings of anxiety and isolation that come from finding themselves in an unknown and unfamiliar system; and, promoting psychological healing of some victims.\(^{240}\)

\(^{239}\) Bill C-54, *supra* note 28, cl 7(2).

\(^{240}\) OFOVC Standing Committee 12 June 13, *supra* note 119.
Between 2002 and 2004, Parliament’s Standing Committee on Justice and Human Rights carried out a mandatory ten-year review of Part XX.1. Although the Standing Committee received submissions from groups promoting the public safety goal of the forensic system and groups promoting the civil liberties goal, the more dramatic positions did not get taken up by the Committee or, in the end, by Parliament at that time.

Professor Peter Carver argued that this outcome reflected the legislators’ desire not to choose sides in this “delicate arena where public safety meets personal liberty.”

However, the proposed reforms in Bill C-54 appear to radically tip the balance towards public safety, without injecting adequate procedural safeguards to ensure the NCR accused is treated fairly and appropriately. As noted above, provisions of Bill C-54 aimed at enhancing public safety are unnecessary, counterproductive and will likely generate expensive Charter litigation. Considering how “individuals with serious mental health issues have made great strides toward protection and advancement of their civil and legal rights in the last quarter century,” enacting Bill C-54, as it stands, would be a step backwards for society. Instead of amending Bill C-54 to mandate a comprehensive review within five years after the bill comes into force, Parliament should go through the proposed legislation with a fine-comb in order to eliminate even the slightest possibility that NCR accused may be deprived of their liberty interests.

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242 Ibid.
243 Ibid.
244 Winko, supra note 1 at para 30.
245 PPAO 2008, supra note 7 at 203.
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