Canadian Psychiatric Association
Dedicated to quality care
Association des psychiatres du Canada
Dévouée aux soins de qualité

CPA SUBMISSION

Bill C-54: An Act to Amend the Criminal Code and the National Defence Act (mental disorder)

Submitted in writing to the House of Commons Standing Committee on Justice and Human Rights by Dr. Sandy Simpson on behalf of CPA
May 29, 2013

Background to the CPA

The Canadian Psychiatric Association (CPA) is the national voice for Canada's 4,100 psychiatrists and more than 600 psychiatric residents. Founded in 1951, the CPA is dedicated to promoting an environment that fosters excellence in the provision of clinical care, education and research.

Background to Bill C-54

Bill C-54 was signalled late last year by the federal government as a response primarily to individual cases of major public profile in BC, Manitoba and Quebec. It has been signalled as the government's response to the concerns of Canadians, most important being to put the rights of victims first. We note that the legislation has proceeded rapidly to this point, and that, to the best of our knowledge, neither the CPA nor other concerned bodies were consulted during its drafting.

One major issue that arises from this is a risk of unintended consequences from such rapid change in legislation. We will address such consequences as our experience and expertise would tell us may arise if the Bill is passed in its current form.

Summary of Position Taken in This Brief

It is not the view of the CPA that the functioning of Part XX.1 of the Criminal Code is in need of the revision at this time. However, there are issues within it that we would like to see improved, as will be covered below.

Some aspects of the reform, particularly the increased notification of key aspects of an NCR accused's progress through the review board system, are in line with other trends to greater responsiveness of the criminal justice system to the requests of victims. We respect those requests and support those amendments, subject to the comments below.

We do not support the other changes proposed in the Bill, and suggest an alternate approach to the concerns of higher-risk persons subject to orders under Part XX.1.

The Bill can be divided into three major elements: involvement of victims, establishment of a new category of NCR accused entitled "high-risk accused" and amendment of the instruction to Review Boards contained in 672.54. These three areas will be briefly summarized.

1. **Involvement of Victims**

The Bill includes a number of changes in relation to victims.

- First, it gives victims the right to notice of Board decisions to grant conditional or absolute discharges, or when the Board refers a case to the Court to review high-risk status.
- Second, it gives victims the right to file a victim impact statement to any of the Court or Board considerations for, or the supervision of, high-risk accused.
- Third, at multiple points it requires that a Court or a Board explicitly consider the impact of decisions on victims, and whether the Board should impose conditions including not communicating with victims or refraining from going to an identified place, or comply with any condition necessary to ensure the safety and security of victims.

Commentary: We support the request of victims for greater notice regarding the proceedings taking place under the legislation. We note that the ability to notify victims and to receive victim impact statements is already included the existing legislation. In our experience, only a minority of victims choose to use this opportunity for notification.

There is a likelihood that the new requirements for notification will increase the demand on justice resources for tracking and communicating with victims. These requirements are also likely to lead to delays in procedures that will affect mental health resources by delaying transitions out of hospital and into community.

We wonder whether this is the best way to support victims. While some victims choose to remain engaged in the offender's release process, others express a range of other needs for support. These include requests not to be further victimized and other victim- related support services. However, we wonder about whether this is the best way to support victims. The needs of victims, and to prevent further victimization are already very much on our minds and we support increased funding for support of victim related services.

Recommendation: We support these components of the legislation, but note that resource impacts and other responses to the needs of victims, including victim support and consideration of restorative justice approaches, may be of equal importance.

2. **Establishment of a New Category of "High-Risk Accused"**

Clause 12 proposes a new category of high–risk accused. At any time prior to absolute discharge of an accused found NCR of a serious personal injury offence, the prosecutor may apply to the court for the person to become a "high-risk accused."

Eligibility: NCR accused AND 18-years-of-age or over at the time of the index offence AND index offence was a serious injury offence.

Criteria: The Court may make the order in the following situations:

- There is a substantial likelihood the accused will use violence that could endanger the life or safety of another person (risk criterion).
- 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 (index severity or "heinousness" criterion).

Relevant evidence: Court must consider all relevant evidence including:

- The nature and circumstances of the 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.
- The opinions of experts who have examined the accused.

Effect of high-risk designation:

- Accused can only be under a detention order.
- Can only leave hospital on an escorted basis, and only for "treatment" or "medical purposes."
- Must have a structured plan and must be prepared to address any risk related to the absence, so there is no "undue risk" to the public.
- Reviews can be extended to every 36 months, on the consent of the prosecution and the accused represented by counsel.

Decision-making is taken from the Board to the Court. The Court makes the designation on application of the prosecutor *"before any disposition to discharge the accused absolutely*." It therefore appears to act retroactively and can be applied to an accused at any point in their rehabilitation. Cessation of the high-risk status can only be by the Court, on the recommendation of the Board.

At each review the Board must consider "*whether there is a substantial likelihood that the accused will use violence that could endanger life or safety of another person*." If the Board decides there is not a "*substantial likelihood that accused will use violence*" that could endanger the life or safety of another person, it must refer the finding to the Court for review.

Commentary: This category will have a substantial effect on resources. The hearings to address these questions will be time-consuming and expensive. There will be high demand for forensic psychiatric expertise, which may detract from core treatment functions. Resourcing of training is vital, as is the development of a standard approach to giving evidence in relation to this test.

Also of major concern is the introduction of a quality of punishment or retribution into this regime. We wish to remind the Committee that the acts perpetrated by NCR accused are ones which are the product of the person's illness. That is what the NCR standard requires, not their criminality or their substance misuse. The insanity defence has existed in common law for hundreds of years. The moral principles that underlie it (i.e., that there are some persons who must not be punished for their actions, but receive care) can be found in both the Old and New Testaments, as well as in the Koran. The current Part XX.1 of the Criminal Code, and related case law, achieves this, cognizant of the need to protect the public. We note that there has been no evidence put forward to demonstrate that the policy settings are currently putting the public at undue risk. Indeed, that which we know suggests that the recidivism rate of NCR accused is five to six times lower than persons found criminally responsible and managed by correctional responses. Thus we can find no evidence to support the need for a "high-risk" accused category.

The effects of creating this category are also multiple. Receiving a high-risk designation may impair the recovery for an NCR accused since receipt of this label, without reference to current progress, will limit therapeutic opportunities. It may alter the therapeutic nature of the psychiatrist-patient relationship and cause a demoralizing effect on the quality of the treatment experience of persons undergoing forensic rehabilitation and recovery. Limiting passes to escorted status within the hospital is not only anti-therapeutic, but will also increase frustration of such NCR persons, impair therapeutic engagement and thus lower our ability to work with high-risk accused and thus, paradoxically, increase public risk. As well, it is likely to increase the demand for maximum security beds.

A key design fault in this legislation is the linking of the severity of index offence and the risk that is posed now, or in the future. Past behaviour helps inform risk assessment, but there is no direct relationship between the "heinousness" of the action and the risk inherent in the person. Thus, "brutality" should not be a factor in its own right in determining future risk. Certainly it is a measure of the damage caused, and if the person is criminally responsible for the action is rightly a part of sentencing. But where the person is not criminally responsible and therefore punishment has no place, this should not be included as a criterion for risk as the clause proposes.

We recognize that other jurisdictions may have differing levels of disposition for a court having found a person NCR. Commonly, that is a forensic order, a civil commitment order or an absolute release (this is the usual structure in Australia, New Zealand, England and Wales). Notably, all of these jurisdictions have much closer integration of their forensic and civil commitment laws (mental health acts). This does not occur in Canada because mental-health legislation is provincial. In none of these jurisdictions where a person becomes subject to a more restrictive order of detention does the review of their progress decrease in frequency. Rather, regular review of their care is one of the best means to ensure key issues of risk in a person's care are being addressed. As such, delaying reviews to three years, even on consent, is inappropriate.

There is one US state where the impact of "tough-on-crime" legislation was applied to Not Guilty be Reason of Insanity (NGRI, the old term for NCR often used in other jurisdictions) homicide perpetrators. In Missouri, this change was made in 1996. NGRI homicide perpetrators as a result had much longer hospital stays, but the unintended consequence was that all persons found NGRI now had longer hospital stays (Dirks-Linhorst and Kondrat, 2012). Establishing the "high-risk" category, combined with the other changes described below, significantly risks the same lengthening of hospital stays in Canada also, absent any evidence that the system is failing.

Recommendation: We do not recommend that the category of "high-risk accused" be created. If the government wishes to proceed with this category, then three changes to the regime are proposed. First, remove the "brutality" criterion. This is not evidence-based. Second, the limit on the scope of escorted passes should be increased to include escorted community passes for therapeutic purposes. Third, remove the 36-month review period option.

3. Amendments of 672.54

This amendment changes the wording of 672.54 from:

Where a court or Review Board makes a disposition under subsection…. 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 the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused"

To:

Where a court or Review Board makes a disposition under subsection…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"*** *(*emphasis added).

This will apply to all persons subject to Part XX.1 orders, regardless of whether they were found NCR before or after this legislation was passed.

The purpose and impact of this change is hard to judge as the Supreme Court of Canada (SCC) already tells us that the safety of the public is paramount. The wording "least onerous and least restrictive" has already been

endorsed by the SCC in *Winko,* making this amendment counter to SCC findings and open to Charter of Rights and Freedoms challenge as it over-rides the Supreme Court of Canada criteria. The new wording is difficult to define and will take some years of expensive litigation to define.

Recommendation: We see no reason to change the existing wording to 672.54. It adds nothing to the existing case law, and may make the disposition less attractive to people who should come under this regime (see below). It is likely to take some years of litigation and Charter challenge before we know how to interpret the new wording. It is not clear to us what problem this change is trying to fix.

4. New Statutory Definition of "Significant Threat to the Safety of the Public"

Clause 10 adds the following definition: *significant threat to the safety of the public 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 necessarily violent.*

This is subtly different from the Supreme Court's definition in *Winko*. It changes "real risk" to "risk," and adds the words *"but not necessarily violent*."

Recommendation: As with the changes to 672.54, the addition of this test, with the changes made from *Winko*, adds complexity to an area where the case law is settled and where there is no evidence is that the law is malfunctioning. This further adds litigation and Charter challenge opportunities. We recommend that clause 10 be removed from the Bill.

5. Issue of Unintended Consequences

There are two major unintended consequences.

The first is to heighten stigma of mental illness especially in relation to violent acts by people with serious mental illness. Although internationally (Schanda, 2005) or in Canada (Jansman-Hart et al, 2011) there is no evidence of rising risk to the public, or public safety being at risk, the rhetoric that has surrounded this legislation and the wording changes proposed by it raise a spectre of public risk that is untrue. It seeks to label people high-risk who may not be. At a time when there are major national campaigns to open up the conversations about mental health and the Mental Health Commission of Canada strives to reduce stigma, this is a most unfortunate effect.

Second, the combined effect of the "high-risk" category, the changes of the wording to 672.54 and the addition of the new wording of "significant threat" make this defence for someone with a mental illness much less attractive. They will be much more likely to plead guilty and keep quiet about their mental heath needs. We know from research into the changes in patterns of use of the NCR defence (DOJ, 2006) that there was significant rise in the use of the NCR defence since Bill C-30. These persons might now avoid becoming NCR if at all possible. This will have two effects. First, this will increase the burden on the prison systems at provincial and federal levels, which will be faced with more people with serious mental illness in prison. Second, these persons who go to prison instead of hospital will now reoffend at a five to six times higher rate than they would have had they been made NCR. Thus, ironically, the public will be at higher risk, not lower risk, as a consequence of this legislation.

While making predictions of the effect of policy changes is difficult, we believe that the evidence all points to a long-term increase in risk to public safety as a consequence of this legislation. We view that outcome to be highly likely.

An alternative suggestion: We would like to make a different suggestion. Rather than creating a high-risk category, **we recommend the removal of summary offences from the NCR regime**. This would allow the structures and services under Part XX.1 to focus on persons who do represent a higher risk to others, and for services to be more focused and specialized on the truly higher-risk persons.

Currently, a significant subpopulation of persons on minor charges such as public order offences, failure to comply and theft under $5000 can be made NCR. Such persons should be diverted and provincial general mental health care and civil commitment laws should be provided to meet their needs. This would slow the growth in NCR-accused person numbers that have been noted in Ontario and Quebec in particular, and focus forensic mental health services on those with more serious index offending.

Summary of Recommendations

We make five broad recommendations:

- We support the victim notification components of the legislation, but note resource impacts and that other responses to the needs of victims, including victim support and consideration of restorative justice approaches, may be of equal importance.
- We do not recommend that the category of "high-risk accused" is created. If the government wishes to proceed with this category, then three changes to the regime are proposed. First, remove the "heinousness" criterion. This is not evidence-based. Second, the limit on the scope of escorted passes should be increased to include escorted community passes for therapeutic purposes. Third, remove the 36-month review period option.
- We see no reason to change the existing wording to 672.54.
- We recommend that Clause 10 be removed from the Bill.
- As an alternative, we recommend the removal of summary offences from the NCR regime.

We also note that the Bill will have the unintended consequences of increasing the stigma faced by persons with serious mental illness, the number of mentally ill persons in prison and the public's risk over the current regime due to mentally-ill offenders choosing to avoid the NCR disposition.

References

Department of Justice Canada. *The Review Board systems in Canada: An overview of results from the mentally disordered accused data collection study*. Ottawa, Ontario, 2006.

Dirks-Linhorst, P.A, Kondrat D. Tough on Crime or Beating the System: An evaluation of Missouri Department of Mental Health's Not Guilty by Reason of Insanity Murder Acquittees. *Homicide Studies* 16: 129-150, 2012.

Jansman-Hart, E, Seto M, Crocker A G, Nicholls T L, Cote G. International trends for demand for forensic mental health services. *International Journal of Forensic Mental Health Services* 10: 326-336, 2011.

Schanda, H. Psychiatry reforms and illegal behaviour of the severely mentally ill. *Lancet, 365:* 367-368, 2005.

Cases

Winko v British Columbia (Forensic Psychiatry Institute) 2 S.C.R. 625, 1999.