



Alberta not criminally responsible project: Rates of persons found NCRMD and absolute discharges in Alberta following the Not Criminally Responsible Reform Act

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ABSTRACT

In 2014, then-Canadian Prime Minister Stephen Harper passed the *Not Criminally Responsible Reform Act* into law, which gave Canadian courts and Review Boards new powers to protect the public from particularly dangerous mentally ill offenders. The most controversial change to the law included the designation of the High-Risk Accused. Once designated by the courts as a High-Risk Accused, that individual is barred from leaving a forensic hospital except for urgent medical reasons. In this article, the authors assess the impact of the *Not Criminally Responsible Reform Act* on the forensic mental health system in Alberta, Canada. The findings indicate that the legislation did not lead to any meaningful changes in the Alberta forensic mental health system in terms of absolute discharges and incoming persons found not criminally responsible.

Key Words High-risk accused; mental health; Review Board.

INTRODUCTION

In Canada, a person who is accused of a crime can be found Not Criminally Responsible on account of a Mental Disorder (hereafter NCRMD) when the court utilizes Section 16 (1) of the Canadian *Criminal Code*. Section 16 (1) applies to persons who commit a crime but are not able to either appreciate the nature or quality of the act or to know that the act committed was wrong. Individuals who qualify for NCRMD designation are not “guilty” but are instead transferred to a provincial/territorial Review Board (and typically a forensic hospital) pursuant to section 672.38 of the Criminal Code. Section 672.54 (b) of the Criminal Code grants the Review Board authority to give a variety of legal conditions to persons found NCRMD (Haag et al., 2016; Latimer & Lawrence, 2006).

On 11 July 2014, the *Not Criminally Responsible Reform Act* (hereafter NCRRA) came into force in Canada. The NCRRA included four post-verdict amendments to the Canadian *Criminal Code*, which were: 1) a new High-Risk Accused designation (which was the most controversial amendment) for individuals found NCRMD who committed particularly brutal offenses or are found by the court to be a significantly

high risk to public safety; 2) reducing the number of Review Board hearings for individuals deemed a High-Risk Accused (hereafter HRA); 3) restricting community access and engagement for persons found HRA; and 4) altering the definition of significant threat. Various interest groups expressed considerable opposition when the Canadian government brought forth the legislation to Parliament. For instance, the Canadian Psychiatric Association (CPA) and the Canadian Academy of Psychiatry and the Law (CAPL) submitted an Information Release to the Senate Committee that detailed how “the not criminally responsible (NCR) provisions of the *Criminal Code* are functioning well and do not need major reform” (Brink, 2014). Alternatively, the Canadian Bar Association (2013) recommended the HRA designation not be enacted on the grounds that persons found to be HRA are afforded fewer procedural protections.

In this article, the authors had four objectives, which were to determine: 1) the rates of incoming persons in Alberta found NCRMD before and after the NCRRA; 2) the number of absolute discharges before and after the NCRRA, as well as the proportion of absolute discharges per the number of persons found NCRMD under the Review Board; 3) the

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number of months that persons found NCRMD spent under the jurisdiction of the Review Board (time-to-event analysis) before they were absolutely discharged; and 4) the number of persons found NCRMD who were designated as HRA. In this article, the authors conducted a pre–post analysis with respect to the NCRRA for these four measures over two 5-year periods, from 2009 to 2013 and from 2015 to 2019. For all of these four research objectives, it was hypothesized that there would not be a statistically significant difference before and after the enactment of the NCRRA.

LITERATURE REVIEW

Overview of NCRMD System

The vast majority of individuals found NCRMD are transferred to the forensic mental health system (Carver & Langlois-Klassen, 2006). Section 672.38 (1) of the Criminal Code outlines the authority of Review Boards: “Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder... is rendered.” Provincial/territorial Review Boards are tasked with handing out one of three dispositions to individuals found NCRMD: 1) detention in a hospital; 2) conditional discharge from the hospital with conditions; or 3) absolute discharge. If the Review Board determines that a person found NCRMD poses a significant threat to the safety of the public, that person cannot be granted an absolute discharge and must be either conditionally discharged or detained (Lacroix et al., 2017). Individuals found NCRMD who are conditionally discharged can live in the community with conditions. In the case of detention, the individual can be detained within a forensic psychiatric facility or be granted privileges/conditions, including living in the community (Haag et al., 2016).

Two landmark Supreme Court of Canada cases, (hereafter Supreme Court), *R v. Swain* (1991) and *Winko v. British Columbia* (1999), undoubtedly transformed the Review Board decision-making process and moved the pendulum towards protecting the rights of persons found NCRMD (Balachandra et al., 2004). For instance, the Swain decision overturned previous practices whereby the individual found NCRMD, regardless of their risk/threat profile, could be held indefinitely in a forensic institution at the pleasure of the Lieutenant Governor. The Winko decision, on the other hand, defined the meaning of significant threat, declaring that all persons found NCRMD would be absolutely discharged if they did not pose a significant threat to public safety (including individuals found NCRMD whose risk profiles were unclear).

There is an existing literature base in Canada that has analyzed the effects of the Swain and Winko decisions (Arboleda-Florez et al., 1995; Balachandra et al., 2004; Desmarais, et al., 2008). For our purposes, Balachandra et al. (2004) is the most pertinent because the authors analyzed the rates of absolute discharges under the Ontario Review Board following the Winko decision. The authors compared the proportion of absolute discharges per the number of accused pre-Winko (1997–1999) and post-Winko (1999–2001). The authors reported that there was a rate of absolute discharge per number of accused before the Review Board of 0.053 (5.3%) in 1997/1998, 0.051 (5.1%) in 1998/1999, 0.122 (12.2%) in 1999/2000, and 0.127

(12.7%) in 2000/2001. Despite these increases in absolute discharges post-Winko (1999), Balachandra et al. (2004) reported these differences were not statistically significant. Moreover, the authors reported the length of time from a finding of NCRMD to absolute discharge pre-Winko was 12.9 years compared with 9.2 post-Winko, and this difference was not statistically significant.

Not Criminally Responsible Reform Act (NCRRA)

Drawing from negative public perceptions of individuals found NCRMD and from high-profile murder cases such as Vince Li, Guy Turcotte, and Allan Schoenborn (and from an overall tough-on-crime agenda), the Conservative Government of Canada introduced the NCRRA (Bill C-54) into the House of Commons on 8 February 2013. While addressing the public about the purpose of the NCRRA, then-Canadian Prime Minister Stephen Harper reported that the legislation provides “the courts the powers they need to keep those deemed too dangerous to be released where they should be—in custody” (Cohen, 2013).

The NCRRA comprised 33 amendments to the mental disorder regime in the *Criminal Code* and *National Defense Act* (NCRRA, 2014), including four key post-verdict amendments. First, Section 672.5(5.1) of the *Criminal Code* established a new process whereby the victim(s) would be notified of the place of residence of individuals found NCRMD if they were conditionally or absolutely discharged. Second, the NCRRA altered the wording of section 672.54 of the *Criminal Code* to ensure that Review Boards “must take into account the safety of the public, which is the paramount consideration.” Moreover, in that same section, the words “least onerous and least restrictive” were replaced with “necessary and appropriate.” Third, the NCRRA introduced an official statutory definition for what constitutes a significant threat to the safety of the public:

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

Finally, the NCRRA established a new HRA designation for persons found NCRMD who were deemed to pose a high-risk threat to public safety, which was based on future risk or the severity of the index offence—e.g., homicide or a serious sexual assault.

Section 672.64 (1) (a) (b) of the *Criminal Code* outlines the primary legislative criteria for the HRA designation:

- (a) 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
- (b) 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.

The HRA designation can be applied to individuals found NCRMD following a particularly serious personal injury offense or if they posed a substantial likelihood of committing future violence (Grantham, 2014). Once an individual is

designated as HRA, they are barred from entering the community for rehabilitative purposes (e.g., day passes), even escorted supervised privileges, until a Superior Court lifts the HRA designation (Goossens et al., 2019). Moreover, persons found HRA cannot be conditionally or absolutely discharged by the provincial/territorial Review Boards unless a superior court first retracts their HRA designation. Finally, the Review Board is also allowed to lengthen the time between hearings for individuals found HRA to every 36 months, as opposed to the typical practice of holding hearings for persons found NCRMD every 12 months (Grantham, 2014).

Empirical Research for the NCRRA

Goossens et al. (2019) represents the only empirical publication with respect to the HRA designation to date. The authors used the criteria pursuant to section 672.64 (1) (a) (b) to simulate an HRA designation for their sample of persons found NCRMD. Goossens et al. (2019) is part of the National Trajectory Project (NTP), a landmark project consisting of a population-level sample of 1,800 individuals found NCRMD in British Columbia, Ontario, and Quebec between 2000 and 2005. The average follow-up time was 5.7 years from the date of the index offense. Research assistants for the NTP examined the Review Board files and coded sociodemographic, clinical, criminal, and contextual factors and risk assessments.

Goossens et al. (2019) reported that 25.5% ($n = 459$) satisfied the criteria for an HRA designation ($n = 1,341$ for the non-HRA group). From there, the authors compared the recidivism rates between the HRA and non-HRA group. Interestingly, more individuals in the non-HRA group ($n = 235$; 17.5%) were convicted of a new offense 3 years after their index offense than in the HRA group ($n = 60$; 13.1%), $\chi^2(1, n = 1,800) = 4.95, p = .026$ (Goossens et al., 2019, p. 108). Moreover, there was no statistically significant difference between the HRA and non-HRA group for violent offenses against the person (hazard ratio [HR] = .95, 95% confidence interval [CI] .69, 1.31, $p = .757$). Despite the HRA group having slightly higher recidivism rates than the non-HRA group, Goossens et al. (2019) reported that the HRA group spent considerably more time under the supervision of the Review Board than the non-HRA group. Indeed, individuals in the HRA group were nearly two times less likely to receive an absolute discharge (HR = .51, 95% CI .44, .58, $p < .001$). This all to say that individuals who were more likely to commit violent index offenses (the HRA group) were less likely to re-offend and less likely to receive an absolute discharge.

The results from Goossens et al.'s (2019) simulation highlights the concerns about the relevance of the HRA designation. The recidivism rates between the HRA and non-HRA groups were comparable; however, the HRA group spent nearly twice as long under the supervision of the Review Board. Therefore, Review Boards were already prioritizing public safety prior to the NCRRA.

Criticisms of the NCRRA

Large portions of the public criticize measures aimed to enhance or protect the rights of persons found NCRMD due to their misunderstandings and fear (Maeder et al., 2016). Indeed, large proportions of the public believe: 1) those found NCRMD will be released shortly after their disposition; 2) the NCRMD defense is overused; and 3) a disproportionate

number of individuals exaggerate or fake their mental illness in order to be found NCRMD (Lacroix et al. 2017). Consequently, politicians who are accountable to the public are inclined to enact legislation aimed at enhancing deterrence and punishment.

Although the Conservative Government of Canada argued the NCRRA would enhance public safety, some scholars and professional organizations have been critical of the NCRRA. For instance, the Canadian Bar Association (2013) criticized the NCRRA for being overly punitive while Brodsky (2017) and the then-Chair of the Ontario Review Board (Ling, 2014) suggested that accused persons with severe mental illnesses may opt to go through the regular court process to avoid the HRA designation. Moreover, Lacroix et al. (2017, p. 50) criticized the NCRRA on several grounds, most notably on the grounds of "stigmatization, increased arbitrariness, and a curtailing of liberty... [for] NCR[MD] accused individuals."

In this article, the authors sought to determine whether the NCRRA led to any meaningful changes in the NCRMD system in Alberta, in terms of incoming NCRMD persons and absolute discharges. The authors compared specific measures before and after the implementation of the NCRRA to determine the merit of the claims made by both the supporters and the opponents of the NCRRA.

DATA AND METHODS

Design

This study builds on the Alberta NCRMD project, a retrospective longitudinal research study on persons found NCRMD across Alberta. The Alberta NCRMD project has published on several topics, including sociodemographics, mental health, criminogenic profiles, recidivism rates, and Review Board decisions (Dunford and Haag, 2021; Haag et al., 2016; Richer et al., 2018). In this article, the authors add to the Alberta NCRMD project by analyzing rates of incoming persons found NCRMD and absolute discharges from 2009 to 2013, and from 2015 to 2019. The authors excluded the dispositions (see Table 1) in 2014 from their analysis because it was preferable to compare full years. It is also unclear whether members of the Review Board fully took into account the new policy changes right after 11 July 2014.

Context and Data Sources

The first and third authors are employees at Alberta Hospital Edmonton (AHE), a provincial psychiatric hospital under the authority of Alberta Health Services located in Edmonton, Alberta. The overwhelming majority of inpatient beds for persons found NCRMD are located at AHE, which is an assessment and treatment centre for voluntary, formal, and *Criminal Code* referrals (Haag et al., 2016). The Forensic Assessment and Community Services (FACS) is the primary site for outpatient and community supervision for persons found NCRMD. Consequently, both the Provincial Director (who is in charge of overseeing all Review Board cases in all of Alberta) and the Clinical Director (who is in charge of all Review Board cases at either AHE or FACS) store their files at AHE. Copies of all reports submitted to the Alberta Review Board are therefore stored at AHE. The authors were therefore able to secure access to all the files at AHE, FACS, and the Alberta Review Board.

TABLE I The number and types of dispositions per year for persons found NCRMD

Year	Total NCRMD Persons Under the Review Board	Absolute Discharges	Conditional Discharges	Missing: Died or Transferred Out of Province	New/Incoming Persons Found NCRMD
2009	136	9	40	3	12
2010	143	4	42	0	22
2011	162	5	52	0	25
2012	178	12	49	2	18
2013	183	9	49	3	20
2015	194	4	61	1	21
2016	204	10	62	5	18
2017	198	15	64	1	6
2018	193	13	63	0	16
2019	188	11	71	0	11
Mean annual pre-NCRRA	160.40	7.80	46.40		19.40
Mean Post NCRRA	195.40	10.60	64.20		14.40
P value	.007**	.271	<.001**		.184

*The authors did not include information for 2014. However, there were 4 total absolute discharges in 2014, 3 before 11 July 2014 and 1 after 11 July 2014.

NCRMD = Not Criminally Responsible on account of a Mental Disorder

The authors compared the data from 2009 to 2013 with that from 2015 to 2019. Data collection was conducted at AHE. The principal investigator (first author) and trained research assistants coded the data for the project. This dataset excluded two persons who died while under the Review Board during the years in question.

Data Analysis

The authors used a paired *t*-test to determine whether the intervention (the legislative changes following the NCRRA and the HRA) led to statistically significant results in the Alberta NCRMD system. The data met the assumptions for the use of parametric testing (continuous scaled data, normal distribution, sufficient sample size, similar standard deviations, and homogeneity of variance).

Ethics

The authors received ethics approval from the University of Alberta's Research Ethics Office and Alberta Health Services.

RESULTS

There was a total of 169 incoming persons found NCRMD from 2009 to 2019 (excluding 2014), with a total of 97 incoming individuals found NCRMD from 2009 to 2013 and 72 persons found NCRMD from 2015 to 2019. During this period, the mean annual rates of incoming individuals found NCRMD in Alberta from 2009 to 2013 and from 2015 to 2019 were 19.40 and 14.40, respectively. These rates were not statistically distinct ($t = 1.454, p = .184$) (Table I).

The Review Board issued 92 absolute discharges from 2009 to 2019 (excluding 2014 where there were 4 absolute discharges), with a mean rate of 9.2 absolute discharges per year. Prior to the NCRRA, a total of 39 absolute discharges were granted from 2009 to 2013 compared with 53 from 2014

to 2019. During this period, the mean annual rate of absolute discharges from 2009 to 2013 was 7.80 compared with a rate of 10.60 between 2015 and 2019. There were no observed statistically significant differences in the rates of absolute discharges between these two time periods ($t = -1.183, p = .271$). Moreover, the proportion of absolute discharges per the number of accused under the Review Board from 2009 to 2013 was 0.048 compared with 0.054 after the NCRRA. This difference was not statistically significant ($t = -.400, p = .699$) (Table II).

The time to absolute discharge differed from year to year. Persons absolutely discharged in 2013 ($n = 9$) spent the least number of months under the Review Board, at 50.75 months, compared with the maximum of 118.20 months in 2017 ($n = 15$). The least number of months that anyone spent under the jurisdiction of the Review Board was 1 (in 2012, 2013, and 2018) whereas the greatest number of months spent under the Review Board before an absolute discharge was 372 in 2012. The mean number of months to acquire an absolute discharge from 2009 to 2013 was 78.044 compared with 90.082 months post-NCRRA. This difference was not statistically significant ($t = -.879, p = .405$).

The data indicated that there has not been any HRA designations since the NCRRA was implemented on 11 July 2014.

DISCUSSION AND CONCLUSION

The Canadian government reported the NCRRA would provide the judiciary with new powers to detain persons found NCRMD who were too dangerous to be released into the community (Canadian Mental Health Association, 2013). However, our findings indicated that the NCRRA did not have any meaningful impact on the dispositions of the Alberta Review Board.

TABLE II Rates of absolute discharges and average number of months spent under the Review Board

Year	Proportion of Absolute Discharges per Number of Accused Under the Review Board	Average Number of Months Spent Under the Review Board Before Absolute Discharge
2009	.068	52.888
2010	.027	99.000
2011	.030	102.000
2012	.068	85.583
2013	.050	50.750
2015	.020	72.500
2016	.049	84.400
2017	.075	118.200
2018	.067	96.500
2019	.058	78.810
Mean annual Pre NCRRA	0.048	78.044
Mean Annual Post NCRRA	0.054	90.082
p value	.699	.405

*We did not include the numbers for 2014 in the table. However, the proportion of absolute discharges per number of accused from 1 January to 11 July 2014 was .032 compared with .011 from 12 July to 31 December 2014. Moreover, the average number of months spent under the Review Board before absolute discharge from 1 January to 11 July 2014 was 46 months compared with 34 months from 12 July to 31 December 2014.

In this article, the authors analyzed four objectives relating to the NCRRA. The results indicated that there was no meaningful difference between rates of incoming persons found NCRMD, rates of absolute discharges, and the number of months that persons found NCRMD were supervised under the Review Board pre/post NCRRA. Moreover, the HRA designation has never been applied in Alberta. All this to say, the NCRRA has had no observable impact on the NCRMD system in Alberta. This finding is not surprising given the low rates of recidivism for the NCRMD population in Alberta when compared with general criminal populations (Richer et al., 2018). This suggests that changes to the current system were likely unnecessary (Charette et al., 2015; Richer et al., 2018) precisely because the Alberta Review Board had already prioritized public safety prior to the NCRRA.

Drawing from our experience working within the Alberta criminal justice system (especially the first author, who has provided expert opinion and testimony in Alberta courtrooms and Review Boards for over a decade), we suggest the NCRRA and the HRA were political objectives, and not based on public safety or empirical analysis. There has never been a person deemed HRA in Alberta precisely because the Alberta NCRMD system already assesses risk and prevents NCRMD persons from engaging in future violence. Indeed, the recidivism rates (including violent recidivism) for persons found NCRMD are exceedingly low in Canada, especially in Alberta. Clinical practitioners (contrary to Stephen Harper and the Conservative Government of Canada) working in the Alberta

NCRMD system use both clinical research and their expert judgement to assess their patients' risk in order to protect public safety. Indeed, we do not anticipate an individual being deemed HRA in Alberta in the foreseeable future because the NCRMD system already prioritizes risk and public safety.

LIMITATIONS AND FUTURE RESEARCH

This article has one primary limitation. The authors could not obtain access to court records that would allow for a comparison of the rates of accused who sought an NCRMD designation pre/post the NCRRA. Therefore, the authors could not determine whether there was a higher or lower number of persons applying for an NCRMD designation after the NCRRA, or whether there were more or fewer persons found NCRMD after the NCRRA.

There is a need for a large-scale longitudinal study in Alberta comparing general and violent recidivism rates between persons found NCRMD who committed particularly brutal index offenses with NCRMD persons who did not commit "brutal index offenses." This study, like Goossens et al. (2019), could help provide practitioners, researchers, and policy makers the data to help determine institutional best practices for the forensic mental health system. This research could help inform Review Boards across Canada.

CONFLICT OF INTEREST DISCLOSURES

The authors have no conflicts of interest to declare.

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