



Law Union of British Columbia
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June 26, 2020

Select Standing Committee on Finance and Government Services
% Parliamentary Committee Office
Room 224, Parliament Buildings
Victoria, BC, V8V 1X4

VIA ONLINE SUBMISSION

Re: Budget 2021 Consultation
Access to Justice Concerns Are Amplified By the COVID-19 Pandemic

Despite recent investment in access to justice initiatives, significant deficits remain in key areas where individuals' face deprivations of rights and liberties. The COVID-19 pandemic has resulted in further restrictions to access to justice as a result of increasing isolation, limitations on access to legal information and advice, and disproportionate harm to vulnerable populations. Adequate funding for legal services is an essential component of a just society.

The Law Union of British Columbia (the "LUBC") calls upon the Select Standing Committee on Finance and Government Services to recommend adequate funding in the 2021 BC Budget to achieve the following objectives:

1. Ensure family law legal aid adequately allows full representation, especially in child protection matters;
2. Ensure the BC Office of the Human Rights Commissioner is able to fulfil its mandate, especially in light of increased human rights violations as a result of COVID-19;
3. Establishing an Independent Mental Health Advice service to enable persons involuntarily detained under the *Mental Health Act* to have independent legal advice and full knowledge of their legal rights; and,
4. Ensure persons who are detained in a correctional facility have full access to legal counsel when their rights may be unlawfully restricted.

Law Union of British Columbia's Mandate

The Law Union of British Columbia (LUBC) is a progressive organization of lawyers, law students, legal workers, activists, and community members who seek to use the law as a tool for social change. We currently have a membership of over 200, with diverse lived and professional experiences interacting with multiple legal areas currently facing access to justice crises and worsening conditions due to the coronavirus disease (COVID-19) pandemic, including family law, human rights law, mental health law, and prison law.

Ongoing Deficits in Access to Justice

The LUBC commends this provincial government for its ongoing efforts to improve access to justice through greater legal aid funding¹ and the reinstatement of the BC Office of the Human Rights Commissioner (BCOHRC). These efforts, however, are not sufficient to meet the growing needs of British Columbians for legal aid services to protect their liberty, private and family life, and broader human rights – even prior to COVID-19. The legal aid tariff regime did not increase for *Mental Health Act* detention and prison law matters, leaving practitioners in these areas underpaid and compromising the ability of people facing deprivations of liberty as a result of state action to get adequate representation. Further, the scope of the BCOHRC’s powers was restricted to BC *Human Rights Tribunal* interventions with a specific restriction on filing systemic human rights complaints in its own right. The BCOHRC was denied its full budget request in the last budget cycle, which raises concerns as to whether it will be able to fulfil its mandate.

COVID-19 Amplifies Access to Justice Inequities

Since the start of the COVID-19 pandemic, the inequities in accessing human rights, and the legal aid safeguarding them, have been greatly amplified in varied, evolving, and often ill-understood ways.

Evidence has emerged that COVID-19, and specifically the socially isolating effects of public health restrictions to combat it, such as physical distancing and the resulting economic disruptions caused, have drastically increased domestic violence, while also increasing women’s vulnerability by reducing their ability to leave an abuser.² Similarly, in situations where individual liberty is curtailed, including mental health detention or incarceration, detainees have increased vulnerability to COVID-19 due to the inability to physically distance. Several COVID-19 outbreaks have been documented in Canadian prisons³ and concerns have been raised over the lack of transparency in monitoring outbreaks within the mental health detention system.⁴

¹ For example, increases to the legal aid tariffs provided for lawyers representing clients in criminal, refugee and child welfare hearings in 2019, see British Columbia Attorney General, *Greater stability for legal aid* (October 15, 2019), online: <https://news.gov.bc.ca/releases/2019AG0113-001973>. Budget 2020 committed a further \$57 million for legal aid services, see British Columbia, *Budget and Fiscal Plan 2020/21-2022/23* (18 February 2020) at 15, online (pdf): https://www.bcbudget.gov.bc.ca/2020/pdf/2020_budget_and_fiscal_plan.pdf.

² Raisa Patel, “Minister says COVID-19 is empowering domestic violence abusers as rates rise in parts of Canada”, CBC News (April 27, 2020), online: <https://www.cbc.ca/news/politics/domestic-violence-rates-rising-due-to-covid-19-1.5545851>.

³ Craig Desson, “Canada’s prison watchdog calls out federal corrections for ‘extreme’ confinement as COVID-19 cases surge”, CBC News (April 25, 2020), online: <https://www.cbc.ca/news/canada/montreal/canada-prison-conditions-covid-19-human-rights-1.5545303>.

⁴ Health Justice, Letter to Dr. Bonnie Henry and others, re: Protecting Involuntary Mental Health Act Patients and Staff During COVID-19 (May 12, 2020), online: https://static1.squarespace.com/static/5e34ed207332cf46d561c2da/t/5eba2cf600fe7c3639adc0f3/158925951182/4/Lt_Ministers+Dix+and+Darcy+and+Dr.+Henry+re+COVID-19+and+psychiatric+settings_FINAL.pdf.

We note that the court and library closures resulting from COVID-19 have further restricted access to justice, for vulnerable persons interacting with the justice system, to timely hearings and the ability of self-represented litigants to access public resources to assist in the preparation of their matters. These new restrictions profoundly impact access to justice across legal areas, and further increases to legal aid (in LUBC's identified areas for concern and others) are necessary to compensate for these general COVID-19 deficits.

These are only a few of the myriad examples of new COVID-19 access to justice inequities that require further financial resources and policy development to combat. Funding should be expanded to combat these newly apparent inequities stemming from long known problems with family law, human rights law, mental health law, and prison law funding, however, further resources should be devoted to investigating how COVID-19 impacts upon other legal areas and whether further resources are necessary to meet emerging human rights challenges in other areas covered by legal aid.

Recommendations for Expansion of Legal Services to Address COVID-19

The LUBC recommends that funding be increased generally across all eligible areas, including funding increases for the four areas where ongoing access to justice deficits exist:

1. Family Law Legal Aid;
2. Human Rights Law;
3. Mental Health Law; and,
4. Prison Law.

Increasing Family Law Funding

The current state of legal aid tariff funding for family law matters was not adequate to meet pre-COVID-19 demands and ensure access to justice for domestic violence survivors. Without additional funding to meet growing demand due to the unfortunate uptick in domestic violence from COVID-19, the gap in access to justice for predominantly women and other disadvantaged groups suffering domestic violence will widen. Further, the capacity for *pro bono* and low fee services provided by counsel is diminished in COVID-19 as a result of loss of other economically more viable work, which served to subsidize lower paying work.

To alleviate this added strain on family law access to justice, this government should consider providing sufficient family law legal aid funding, as called for by groups such as West Coast LEAF, so that the cap of 35 hours imposed on family matters under the tariff system can be removed so that sufficient legal aid tariff funding can be provided that is proportionate to the complexity and actual counsel time expended on these important matters.⁵ Further, a child

⁵ West Coast LEAF, BC Gender Equality Report Card 2019/2020 (May 2020) at 17, online: <http://www.westcoastleaf.org/wp-content/uploads/2020/05/West-Coast-LEAF-gender-equality-report-card-2020-May-26-web-lower-resolution.pdf>.

protection legal clinic supporting parents who are fighting to prevent state removal of their children remains necessary in BC and sufficient resources should be allocated to allow for the creation of such an agency.⁶

Need for Adequate BCOHRC Funding and Capacity to Ensure Independence and Efficacy

BC was without a human rights commission from 2013 to 2019, denying the province of an independent publicly funded watchdog for systemic human rights challenges. The BCOHRC is still in a startup phase and is already facing an unprecedented expansion of potential systemic human rights challenges in the wake of the global COVID-19 pandemic. The Premier has recently called on the BCOHRC to study the potential human rights concerns involved with collecting health data based on race and ethnicity in the wake of COVID-19, highlighting the importance of this independent public watchdog in helping to solve some of the emerging human rights challenges in the wake of COVID-19.⁷

The BCOHRC has several ongoing restrictions that compromise its independence and ability to effectively combat systemic human rights challenges, including a legislative inability to file BC Human Rights Tribunal complaints and the denial of the BCOHRC's full requested budget for 2020/21 by this Committee.⁸ The full funding request of the BCOHRC should be honored in order to ensure that the independence of this vital office is maintained and that it is adequately resourced to respond to the emerging and complicated human rights challenges caused by COVID-19. Further, there should be latitude for upward revision of the operating budget on a frequent basis should COVID-19 human rights challenges intensify. Further, the BCOHRC's inability to file systemic human rights complaints in the BC Human Rights Tribunal should be reconsidered and amendments made to the BC *Human Rights Code* to facilitate such a power as COVID-19 presents further challenges with newly emerging human rights dilemmas and the reduced capacity of many counsel to take on systemic human rights challenges, which often require considerable *pro bono* or reduced fee services. Should the BCOHRC be granted this complaint filing capacity, further financial resources should be granted to it, as its existing operating budget only contemplates its current more limited scope of advocacy and public education.

⁶ *Ibid* at 18. It is worth noting that New Brunswick's failure to provide adequate state resources to support parents in navigating the child protection system has previously drawn constitutional scrutiny, see *New Brunswick (Minister of Health and Community Services) v GJ*, [1999] 3 SCR 46, [1999 CanLII 653 \(SCC\)](#).

⁷ BC Office of the Human Rights Commissioner, Letter to Premier Horgan re Collection and Use of Disaggregated Data (June 23, 2020), online: <https://bchumanrights.ca/letter-to-premier-horgan-from-bcs-human-rights-commissioner-on-the-collection-and-use-of-disaggregated-data/>.

⁸ The BCOHRC was only awarded an operating budget of \$5.5 million for the 2020/21, 2021/22, and 2022/23 fiscal years, despite initial requests for \$6.210 million, \$6.815 million, \$6.589 million, for each of those years, see Select Standing Committee on Finance and Government Services, Annual Review of the Budgets Of Statutory Offices (December 2019) at 14-16, online: https://www.leg.bc.ca/content/CommitteeDocuments/41st-parliament/4th-session/fgs/reports/FGS_2019-12-16_AnnualReview-BudgetSOs-Report.pdf.

Lack of Legal Information for Involuntary Mental Health Detainees

In the past decade, the number of persons involuntarily detained under the *Mental Health Act* (“Involuntary Patients”) has nearly doubled from from at least 11,937 to 20,008 detentions *per year*.⁹ Although the *Mental Health Act* and the *Canadian Charter of Rights and Freedoms* require that individuals deprived of their liberty in the mental health context are provided immediate and ready access to legal counsel upon detention, such access is not the norm in British Columbia, with only 53.5% of Involuntary Patients reporting that they know their legal rights.¹⁰ Only 31.5% of Involuntary Patients reported being notified of their rights by medical staff upon admission to hospital, the remainder of those who knew their rights reported learning of them through other sources, like advocates.¹¹ The BC Ombudsperson recently investigated whether detention facilities were complying with law in providing detainees with required rights-informing documentation upon intake. The result was deeply concerning, with only 49% of patients having received required rights-informing documentation.¹²

The COVID-19 pandemic likely exacerbates this problem, as detaining wards and facilities are prohibiting visitors and further restricting detainees’ ability to have communication with their relatives and other supports outside the facility.

Even where Involuntary Patients are informed of their rights, they often do not have the opportunity to consult with independent legal counsel, instead receiving advice and information from the same health care professionals who are responsible for overseeing the detention process.¹³ In nearly every other context where an individual is forcibly denied liberty as a result of government action – for instance, criminal or immigration proceedings – that individual is immediately provided with access to independent legal counsel. In BC, Legal Aid BC funds various options for criminal and immigration detainees to access legal advice, however, no such service is available for mental health detainees.¹⁴

Funding an independent legal advice hotline through Legal Aid BC is a minimum requirement to ensure that Involuntary Patients are given the ability to understand and exercise all rights available to them by law.

An even more significant investment would be the establishment of an Independent Mental Health Advocacy service, as called for by groups such as Health Justice, to provide full-time legal advice and information to Involuntary Patients. Such a system exists in numerous other

⁹ Community Legal Assistance Society (CLAS), “Operating in Darkness: BC’s Mental Health Act Detention System,” (November 2017) [CLAS, Operating in Darkness] at p 23.

¹⁰ The Adult Mental Health Division, BC Ministry of Health and Ministry Responsible for Seniors, “Impact Assessment of the Amendments to the Mental Health Act of British Columbia”, by Ayne Meiklem (Victoria: March 31, 2000) at 20.

¹¹ *Ibid.*

¹² Ombudsperson’s Special Report No. 42, Committed to Change: Protecting the Rights of Involuntary Patients under the Mental Health Act (March 2019) at pp 61-62.

¹³ CLAS, Operating in Darkness, *supra* note 9 at p 68.

¹⁴ *Ibid* at p 61.

Provinces, with significant success reported in patients' understanding of their legal rights.¹⁵ The Attorney General of BC agreed to establish such a service in March 2019, but to date no action has been taken towards its implementation.¹⁶

The Law Union of British Columbia urges the Select Standing Committee on Finance and Government Services to recommend adequate funding be provided in the 2021 budget to enable British Columbia to take the critical step of establishing an Independent Mental Health Advocacy service (IMHA) for Involuntary Patients. Further, it is recommended that additional funding be provided to detainees for further legal actions taken to preserve their liberty (be it to an IMHA or the existing legal aid provider for *Mental Health Act* review hearings), to ensure legal aid funding in this area is commensurate with legal aid tariff rates provided in the other areas of law that recently saw tariff rate increases.

Increasing Funding for Prisoners' Legal Services

Prisoners' Legal Services (PLS) is a key figure in access to justice for incarcerated people in BC. PLS is currently facing a funding crisis, and addressing this crisis in the 2021 Budget is crucial for upholding the rule of law for some of the most marginalized people in BC. Despite significant increases in other areas of legal aid, PLS's core funding has not been increased since 2012, yet the demand for their services has increased 105% since 2015.¹⁷

The legal aid tariff was increased following negotiations between the Association of Legal Aid Lawyers and the Ministry of the Attorney General in 2019 with further increases planned for 2021.¹⁸ PLS' funding, however, has not increased in proportion, leaving them unable to pay lawyers at the new tariff rate. This creates challenges in attracting members of their referral bar to represent prisoners at disciplinary hearings and parole board hearings. PLS' funding must be increased to ensure representation at a fair rate.

Prisoners' legal aid is an Indigenous rights issue. Indigenous people are dramatically overrepresented in prisons across Canada, including in BC.¹⁹ This provincial government recently took the unprecedented step of implementing the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP) through the *Declaration on the Rights of Indigenous Peoples Act*. Article 2 of UNDRIP states that "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin

¹⁵ *Ibid* at pp 62-64.

¹⁶ Health Justice, "Overview of Independent Mental Health Advocacy Services," (June 2020).

¹⁷ Letter from Jennifer Metcalfe (Executive Director, Prisoners' Legal Service) to Select Standing Committee on Finance and Government Services (6 June 2020) Re: BC Budget Consultations.

¹⁸ Legal Services Society, "Legal Aid Brief" (Oct 2019), online: <https://legalservicesociety.cmail19.com/t/ViewEmail/d/22A545CCC00DDA862540EF23F30FEDED/C09073F726569A65C35B3650D253B2D9>

¹⁹ Canada, Department of Justice, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* by Scott Clark (Ottawa: Research and Statistics Division, 2019).

or identity.”²⁰ Inadequacies in legal aid funding for prisoners will disproportionately affect Indigenous peoples, and limit their ability to exercise their right to counsel.

Prisoners’ legal aid is also a human rights issue, particularly for individuals with mental illness and other health issues. Mental and physical disabilities are enumerated grounds under section 15 of the *Charter*.²¹ Prisoners’ section 7 rights to life, liberty, and security of person²² may be engaged by prison practices.²³ The COVID-19 pandemic has highlighted the urgency of providing adequate legal aid for vulnerable prisoners. People in prison have worse overall health than the general population, and are therefore at an increased risk of developing life-threatening symptoms from COVID-19.²⁴ Studies have also found most people in correctional institutions have a diagnosed mental illness.²⁵ Lockdowns risk replicating the harms of segregation for prisoners with mental illness that have been recognized as unconstitutional.²⁶ These factors make adequate legal aid funding for prisoners an urgent necessity in protecting the section 7 and 15 rights of high-risk individuals in the pandemic.

Conclusion and Summary

The Law Union of BC remains highly concerned at ongoing deficits in access to justice in British Columbia, specifically in contexts where individuals are denied liberty as a result of state action.

We call upon the Select Standing Committee on Finance and Government Services to recommend adequate funding in the 2021 BC Budget to achieve the following objectives:

1. Ensuring family law legal aid adequately allows full representation, especially in child protection matters;
2. Ensuring the BC Office of the Human Rights Commissioner is able to fulfil its mandate, especially in light of increased human rights violations as a result of COVID-19;
3. Establishing an Independent Mental Health Advice service to enable persons involuntarily detained under the *Mental Health Act* to have independent legal advice and full knowledge of their legal rights; and,
4. Ensuring persons who are detained in a correctional facility have full access to legal counsel when their rights may be unlawfully restricted.

²⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UNGAOR, 61st Sess, No 49, Vol III, UN Doc A/61/49 (2008) 15, art 2.

²¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24), s 15.

²² *Ibid* at s 7.

²³ *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228 [BCCLA].

²⁴ Aaron Orkin (5 April 2020) City of Toronto (affidavit), online: <https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Aascds%3AUS%3Aa9ecea53-cd4c-4ccb-9f00-d8899fbd35f2> at para 16.

²⁵ Fiona Kouyoumdjian et al, “Health status of prisoners in Canada: Narrative review” (2016) 62:3 *Canadian Family Physician* 215 at 217.

²⁶ BCCLA at para 172.

We thank the Committee for their due consideration of our comments and recommendations.

Sincerely,

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