July 2, 2020

Via email

Hon. Judy Darcy
Minister of Mental Health and Addictions
Room 346 Parliament Buildings
Victoria, BC V8V 1X4

Dear Minister Darcy,

Re: Bill 22 – 2020: *Mental Health Amendment Act, 2020*

We write in response to Bill 22 – 2020: *Mental Health Amendment Act, 2020* (the "Bill").

We share the view that there is an urgent need to improve care for all people in need of mental health and substance use care in BC, and particularly those using substances in light of the toxic drug supply. However, we believe there is insufficient justification to introduce another form of health care detention in a province where there is a well-documented overreliance on involuntary mechanisms and insufficient voluntary services.

We are concerned that there is a significant disconnect between government's publicly stated intentions behind the Bill and the current text of the draft Bill. We appreciated the opportunity to hear more about the intentions behind the Bill in a briefing with Deputy Minister of Mental Health and Addictions, Neilane Mayhew, late last week. Based on the information provided, we believe the Bill as currently drafted may lead to consequences that do not align with government's goals. Specifically:

1) While it appears government's goal is that involuntary mechanisms should be used as a last resort, the Bill does not create a last resort standard for detention;
2) While it appears the intention of the Bill is to apply to youth who are incapable of making a health care decision post-overdose, the Bill departs from established health care consent principles by creating contradictory capacity standards;
3) While it seems the government does not intend to allow involuntary treatment and recognizes the importance of increased family involvement, the Bill actually mandates a new scope of involuntary health care beyond that authorized under the current *Mental Health Act* and may actually reduce parental involvement in care decisions;
4) While it appears government intends this new form of detention to contain robust procedural safeguards, the Bill fails to include the procedural safeguards that are constitutionally necessary and would ensure the experience of involuntary health care is as dignified and minimally harmful as possible; and

5) Despite the fact that government has already committed to implement it, the Bill fails to recognize the significant benefit and need for independent, child and youth-centered legal advice and advocacy.

(1) The Bill introduces a new form of detention that fails to ensure involuntary mechanisms are a last resort

As you are no doubt aware, there is no evidence to suggest that legislation that imposes involuntary health care is more effective than providing voluntary health care services. It is not clear to us why government is moving to introduce another mechanism of involuntary health care before first ensuring voluntary services are available to every youth. We echo the disappointment expressed by the Representative for Children and Youth at the introduction of a new form of involuntary health care absent adequate investments in voluntary services.

We were relieved to see the Bill did not propose to introduce police involvement or apprehension from the community. Despite this, any form of involuntary health care comes with risks. There are significant dangers that the mechanisms introduced with this Bill will deter youth from seeking emergency health care for fear of being detained. Having an experience with involuntary health care, or hearing about others who have, may alienate youth from services in the longer term. These risks appear to contradict much of the provincial and federal government's work to destigmatize substance use and encourage connection with emergency health services in instances of overdose.

Respecting bodily integrity and choice for people who have experienced trauma are fundamental preconditions to providing trauma-informed and culturally competent care. Any deprivation of freedom or consent in delivering health care risks re-traumatization and alienation from health care services, regardless of its form or duration.

While we were informed in the briefing that government's intention is that the proposed new form of detention would be a measure of last resort, we see no such requirement in the Bill. This apparent omission raises compliance issues with section 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), which requires any deprivation of liberty and security of the person to be as minimal as possible, and Article 37 of the United Nations Convention on the Rights of Children, which requires state parties to ensure that detention of a child is used only as a measure of last resort.

Statutes authorizing health care detention and other involuntary interventions generally include the safeguard that voluntary services have been considered and exhausted. For example, the BC *Adult Guardianship Act* requires that adults with health conditions and disabilities should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection and that involuntary interventions should not be used unless alternatives have been tried or carefully considered (s. 2). The BC *Mental Health Act* currently only permits involuntary admission when a youth or adult cannot suitably be admitted as a voluntary patient (s. 22(3)(c)(i)). Bill M 207 – 2019: *Safe Care Act, 2019* only permits detention when no less intrusive measure is available or adequate to sufficiently reduce the risk to the child's health or safety (ss. 9, 13, 14).

We do not believe there is sufficient justification for introducing another form of health care detention in a province where there is a well-documented overreliance on involuntary mechanisms and insufficient voluntary services. However, if another form of health care detention is introduced, at minimum Bill 22 should be amended to include a requirement that voluntary options of delivering health care services have been first exhausted before a youth may be detained.

(2) The Bill departs from established health care consent principles by creating contradictory capacity assessments

Government communications indicate that the goal of the Bill is to infringe on the decision-making rights of youth as minimally as possible and that, as soon as youth are capable of making decisions, they will no longer be detained. However, the Bill appears to depart from established health care consent principles on capacity in a way that unnecessarily infringes on decision-making rights.

Capacity plays a crucial role in the Bill in the definition of "stable" because a youth may only be detained if they are unstable. Section 48 of the Bill sets out that youth will be stable, and therefore no longer subject to detention, when they:

- understand that the youth is engaged in severe problematic substance use;
- understand the consequences of that use continuing; and
- has the capacity to make decisions about health care and community supports in relation to the youth's engagement in severe problematic substance use.

The Bill's framing of capacity as the ability to make a broad range of different decisions is troubling. Although historically the law used to approach people with health issues and disabilities as wholly incapable or capable, advances in understanding and human rights principles have led to the recognition that global capacity assessments do not accurately reflect individual ability and unnecessarily infringe on autonomy.

Capacity to make health care consent decisions is decision-specific under current BC law. Determining whether someone is capable of making a health care decision requires providing information related to the specific health care decision being made (which includes the nature of the health care issue at hand, the benefits and risks of the specific care being proposed, and alternative courses of health care[i]). Someone could very well be capable of making a decision about oral vs topical anti-biotics to treat an infection at a wound site, but incapable of making a decision about benzodiazepine administration to manage alcohol withdrawal, or visa versa.

However, the Bill proposes to assess stability by assessing capacity to make many different decisions about health care and community supports in relation to problematic substance use. Within this broad ambit could be anything from remaining in hospital immediately following an overdose to arranging housing options to managing a time period on residential treatment waitlists to opioid substitution therapy to finding counselling to accessing safe supply prescriptions. These decisions all require different levels of capacity.

The Bill's proposed reintroduction of a more global assessment of an individual's capacity moves us away from decision-specific capacity assessments, which better protect individual's rights to participate to the greatest degree possible in decision-making. The departure from

current health care consent principles is also confusing and introduces the potential for conflicts in laws with other provincial statutes governing health care, such as the *Infants Act* and the *Health Care (Consent) and Care Facility (Admission) Act*.

In departing from capacity assessments grounded in understanding information and consequences about each specific health care decision, the Bill leaves much open to clinician subjectivity. Despite best intentions, an overreliance on subjective assessment increases the likelihood of unconscious bias and paternalism operating in decisions. This can contribute to documented phenomenon like disproportionate rates of detention for Indigenous and racialized youth and girls.[ii] At minimum, the Bill should be amended to approach capacity as a decision-specific assessment that accords with current BC laws and infringes autonomy as minimally as possible.

(3) The Bill broadens involuntary health care and may reduce parental involvement in care

We understand from government communications that government does *not* intend for the Bill to authorize involuntary treatment and the goal is to connect youth with voluntary health care services and supports. However, our understanding of the Bill as currently drafted is that it does authorize provision of involuntary health care.

First, admission to a health care setting like a public hospital is a health care decision. To remove that decision from youth and their parents/guardians by authorizing detention is a form of involuntary health care. In addition, detention of a youth engaged in severe problematic substance use entails that decisions be made about the substances the youth uses. Their access to substances will be interrupted by the detention. In the absence of access to the substances, youth will detox, which has serious impacts on physical and psychological wellbeing. Decisions about accessing or no longer accessing substances, for example, through safe supply prescribed by a health care provider, are health care decisions.

In addition to that, section 54 of the Bill grants power to a director providing stabilization care to "provide the care without the consent of the youth or any other person". Stabilization care includes providing "health care to the youth for the purposes of addressing immediate medical needs and managing acute withdrawal symptoms". Health care is defined by section 1 as "anything that is done for a therapeutic, preventive or diagnostic purpose, and a course of care".

On our reading, the nature and scope of the involuntary health care that would be permitted by the Bill is extensive; it includes involuntary health care in relation to acute withdrawal symptoms, but also a wide range of physical and mental health care as long as it is tied to an immediate medical need. The only limits placed on the health care that can be provided without consent are that the care must address an "immediate medical need" and long-term substance use treatment cannot be commenced without consent. For example, it appears that a detained youth who had an immediate medical need like a sexually transmitted infection could be provided with a diagnostic pelvic exam without consent under the Bill.

We understood from the briefing that one of the intentions behind the Bill was to stop the application of the "full force" of the *Mental Health Act* to youth engaged in problematic substance use, which as it currently stands includes serious infringements of health care consent rights through provisions like deemed consent (s. 31). However, our understanding is that the Bill's approach to involuntary health care has the potential to be even more invasive

than the deemed consent provision under some circumstances. Deemed consent only applies to psychiatric treatment and leaves all other health care consent rights intact. Aside from long-term substance use treatment, the Bill as currently drafted would authorize any form of involuntary health care provided it is tied to an immediate medical need. The Bill also provides no opportunity to challenge or seek review of the involuntary health care being administered.

We have also heard from government communications that government recognizes the vital role that parents and guardians play in a youth's health care. However, section 46 proposes to give directors the power to select which adults in a youth's life to designate as "responsible adults" to notify of a youth's detention. While a director may designate parents/guardians as the responsible adult to notify, directors could choose not to notify a child's parents/guardians of their detention if they are of the view that the parent/guardian will not act in the youth's best interests. Failing to notify a parent/guardian of a child's detention is a sweeping decision for a director to make with very little information and procedural fairness to the family. In addition, even when a parent/guardian is notified, section 54 of the Bill would exclude parents/guardians from health care decisions and instead place authority to make these decisions with the facility.

These changes would introduce significant incursions on the health care consent rights of youth and their families. Youth who are capable of making a proposed health care decision should be allowed to make their own decision. Youth who are not capable of making a proposed health care decision should be allowed to have their loved ones who know them best make the decision. Health outcomes are promoted by respecting autonomy in health care decision-making. At minimum, the Bill should be amended to preserve the health care consent rights of youth and their families to the greatest degree possible.

(4) The Bill fails to include constitutionally necessary procedural protections and safeguards that would ensure the experience of involuntary health care is as dignified and minimally harmful as possible

We understand based on public comments and the briefing that one of the intentions of the Bill was to protect the rights of youth that are currently being subject to serious rights deprivations under the *Mental Health Act* and protect against the possibility that rights deprivations could be introduced through potential future secure care legislation. We believe there are more effective responses to legislation that is causing or may cause harm through unnecessary rights infringements, such as reforming the existing provisions of the *Mental Health Act*.

However, even accepting the introduction of a new form of detention, the Bill as currently drafted does not have sufficient procedural safeguards that are necessary to ensure compliance with international human rights treaties, *Charter* rights, or modern approaches to involuntary health care. The most stark example of this is the absence of an independent hearing to review detention. This is particularly troubling given that research shows that access to dignified and fair procedures, like a hearing to challenge detention, can reduce perceptions of coercion and improve therapeutic outcomes.[iii]

Article 37 of the United Nations Convention on the Rights of the Child requires state parties to ensure that every child deprived of liberty has the right to challenge the legality of the detention before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. Section 7 of the *Charter* guarantees everyone the right to due process when deprived of liberty. This basic principle has a number of facets: it includes the

right to a hearing, it requires that the hearing be before an independent and impartial adjudicator, and it requires a decision by that adjudicator on the facts and the law. Precisely how these requirements are met will vary with the context, but the *Charter* requires each element to be met in substance.[iv] Bill M 207 – 2019: *Safe Care Act, 2019*, for example, would guarantee a full and fair hearing in BC Provincial Court where any proposed detention or detention extension would be carefully considered before being acted on (ss. 9, 13, 14).

Bill 22's review set out in section 63 clearly meets none of these international human rights or constitutional requirements. It places the onus on the detained youth or an adult in their life to request review, rather than building in an automatic review process. It does not grant a hearing, let alone a hearing in front of an independent and impartial adjudicator. The review can be conducted by any physician who is not the physician who recommended detention, which permits close colleagues at the same facility to conduct a review. Even more egregiously, the Bill would permit the same physician to review his/her own decision if another physician is not reasonably available.

It is essential that any form of state detention is reviewed by an independent adjudicator, such as a judge or tribunal, to provide guidance to detaining authorities in the interpretation and application of the criteria for detention. With no access to an independent decision-maker like a tribunal or court, Bill 22 would essentially create a system of detention completely shut off from transparent review and guidance from the justice system.

(5) The Bill does not establish independent legal advice and advocacy despite well-established need

We are deeply disappointed that the Bill omitted provisions to guarantee access to independent legal advice and advocacy, despite BC's commitment to introduce such a service under the *Mental Health Act*.

Sections 52 and 61 of the Bill require the director to notify youth of their rights, including their *Charter* rights to access independent legal advice and *habeas corpus* review. These sections are substantively similar to section 34 of the current *Mental Health Act*, however, the Ombudsperson of BC has documented wide-spread non-compliance among facilities, with statutory requirements to notify detainees of their rights unmet in over half of files reviewed.[v] Compliance rates for children were especially low – BC Children's Hospital had not complied with statutory notification requirements in 90% of files reviewed.[vi]

As a result of that investigation, the Ombudsperson recommended, and the government committed to, implementing an independent legal advice and advocacy service for those detained under the *Mental Health Act*.[vii] BC is one of the few provinces in Canada that provides no form of independent legal advice and advocacy service to *Mental Health Act* detainees, which has led to a stark access to justice crisis.[viii] While everyone who is detained by the state must be able to access independent legal advice, there is an exceptional need for children and youth who may face more barriers in raising their voice and exercising their rights. Article 37 of the United Nations Convention on the Rights of the Child requires state parties to ensure that every child deprived of liberty shall have the right to prompt access to legal and other appropriate assistance.

Ensuring access to independent legal advice and advocacy is also a constitutional requirement under s. 7 of the *Charter* when the state authorizes detention. When this obligation is neglected it leads to unlawful detentions and egregious rights violations of marginalized people, as demonstrated by two recent court decisions in which Indigenous people were detained illegally in the health care system because they did not have access to legal services.[ix]

Evaluations of independent mental health advocacy services in other jurisdictions have found many benefits, including reducing isolation, improving communication, and promoting well-being and recovery goals.[x] Independent advice and advocacy services can also contribute towards efforts to improve equitable access to health care for Indigenous and racialized people. In other jurisdictions, it has been documented that Indigenous and racialized people are more likely to experience coercive, involuntary mental health treatment against their wishes,[xi] a particular concern in relation to Bill 22 that is noted above.

Conclusion

We regret that there has been no opportunity for public consultation on something as serious as introducing a new form of detention in this province. Given that the amendments proposed in this Bill have been considered and prepared over several years, it is particularly disappointing that there was no consultation with advocacy organizations and experts on mental health law and human rights. We would have been more than happy to provide this feedback on the Bill to enhance government's goals prior to its introduction in the Legislative Assembly.

We believe we are all aligned in the desire to improve care and outcomes for everyone accessing mental health and substance use health care in this province, including young people experiencing overdoses, and we would welcome the opportunity to discuss this with you further.

Kind regards,

Kendra Milne
Executive Director

Laura Johnston
Legal Director

cc Neilane Mayhew, Deputy Minister of Mental Health and Addictions

---

[i] *Infants Act*, RSBC 1996, c 223, s 17; *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181, ss 6-7.

[ii] Andreas Pilarinos, Perry Kendall, Danya Fast, Kara Debeck (2018), "Secure care: More harm than good" CMAJ 190(41); Jennifer Koshan, "Alberta (Dis)Advantage: The Protection of Children Involved in Prostitution Act and the Equality Rights of Young Women" (2003) 2 LJ & Equality 210.

[iii] See for instance, Bruce J. Winick "A Therapeutic Jurisprudence Approach to Dealing with Coercion in the Mental Health System" (2008) 15:1 Psychiatry, Psychology and Law 25; The Right to Be Heard: Review of the Quality of Independent Mental Health Advocate (IMHA) Services in England, University of Central Lancashire (June 2012) [The Right to Be Heard].

[iv] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, paras 28-29.

[v] Ombudsperson's Special Report No. 42, *Committed to Change: Protecting the Rights of Involuntary Patients under the Mental Health Act*, March 2019 [Ombudsperson's Special Report No. 42], p. 61.

[vi] Ombudsperson's Special Report No. 42, p. 62.
[vii] Ombudsperson's Special Report No. 42, pp. 82-89; 100-102.
[viii] Operating in Darkness: BC's *Mental Health Act* Detention System, Community Legal Assistance Society (November 2017).
[ix] *AH v Fraser Health Authority*, 2019 BCSC 227;*JH v Alberta Health Services*, 2019 ABQB 540
[x] The Right to Be Heard, p. 4, 9, 20-21, 25-27, 83-84, 192-202; ; Evaluation of the Independent Mental Health Advocacy Service (IMHA), Social and Global Studies Centre, RMIT University, (March 2019), p. 2, 9, 13, 15, 38-39, 169-170.
[xi] "Count me in 2010" (June 2010) Care Quality Commission and National Mental Health Development Unit (UK), p. 22-25.