August 7, 2020

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

Honourable Adrian Dix
Minister of Health Room 337
Parliament Buildings
Victoria, BC V8V 1X4

VIA EMAIL

RE: Bill 22 – Mental Health Amendment Act, 2020

Dear Ministers,

I am writing on behalf of the BC Civil Liberties Association about the amendments to the *Mental Health Act* tabled in Bill 22. We are extremely disappointed that your government has disregarded our previous calls to modernize the Act[1] and is instead prioritizing changes that violate the rights of youth, introduces a regime of involuntary treatment that is not evidence-based, and unnecessarily over-rides privacy protections for detained youth.

As an organization committed to civil liberties and human rights, we join many other organizations and individuals in requesting that you immediately withdraw this bill from future consideration in the legislature. We are deeply concerned for the many youth, especially

[1] We wrote to you on June 27, 2019, asking for an independent review process to reform the BC *Mental Health Act* to align it with national and international human rights principles that require laws to treat people with mental health and addiction issues in a dignified and non-punitive manner that promotes self-determination: https://bccla.org/wp-content/uploads/2019/06/Open-Letter-re-MHA-Reform_June-27-2019.pdf We also wrote to you on May 12, 2020 regarding Protecting Involuntary Mental Health Act Patients and Staff During COVID-19: https://bccla.org/wp-content/uploads/2020/05/Lt_MinistersDixandDarcyandDr.HenryreCOVID-19andpsychiatricsettings_FINAL.pdf

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Indigenous youth who use substances, who would be impacted by these amendments, and we caution that simply taking a "pause" - so that the government can consult further – cannot remedy the fundamental defects of this bill.

Lack of Access to Legal Counsel and Oversight of Decisions

It is disappointing that the bill fails to include a provision to guarantee access to independent legal advice and advocacy. 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. Access to independent legal advice when the state authorizes detention is also required by s 7 of the Charter. Failure to provide such access can lead to unlawful detentions and grave rights violations of vulnerable people.

Further, the review of the decision to maintain a youth in a stabilization facility is procedurally unfair and contrary to the principles of fundamental justice, such that it engages s 7 of the *Charter*. The review scheme under s 63(3)(b) permits the recommending physician to be the final and sole decision maker for admission, maintenance, and early release of a youth from their detention. Providing for an independent review of the recommending physician's decisions would in no way increase any risk to that youth's health and safety, and, as such, the review scheme as it exists currently does not appear to minimally impair the youth's right to procedural fairness.

The bill's lack of procedural fairness is particularly alarming because of the absence of an independent hearing for youth to challenge detention decisions. In neglecting to set up a mechanism for review by an independent adjudicator, Bill 22 would contribute to the ongoing access to justice crisis, and abandon youth undergoing stabilization treatment within a system that lacks transparency.

Insufficient Safeguards against Use of Restraints and Seclusion

The limitation on stabilization care regarding restraints and seclusion is deficient and unacceptable. There is an increased medical and psychological risk that seclusion poses for children and adolescents compared to other populations.[2] This inherent risk of harmful impacts on youth will be exacerbated for those who have a mental illness; there "is a greater vulnerability of the mentally ill in general to stressful, traumatic conditions. Social contact and interaction play a critical role in maintaining psychological equilibrium, and thus its absence is very psychologically destabilizing."[3]

While s 55 of the bill purports to limit measures to control or restrict the free movement of youth, the exceptions provided for are so broad that they could easily undermine the very

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[2] British Columbia Ministry of Health: Secure Rooms and Seclusion Standards and Guidelines: A Literature and Evidence Review, September 2012 at page 10: https://www.health.gov.bc.ca/library/publications/year/2012/secure-rooms-seclusion-guidelines-lit-review.pdf

[3] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, at para 194.

objective of s 55(1). From our reading of the section, youth will have to be restrained in locked hospital wards or other locked areas if the available hospital facilities already have such features.

As we have pointed out in previous correspondence, our province unfortunately has no legally binding criteria governing the use of restraints and seclusion, nor any oversight of such decisions. This means that youth undergoing stabilization treatment could be tied to their beds using mechanical restraints and solitarily confined in small, locked rooms with no statutory limit on when it can be used and how long it can last.

Since the use of restraints and seclusion exacerbate trauma and mental health problems, we ask that the province join other jurisdictions that have completely prohibited the use of restraints and seclusion for youth under the age of 16, or, in the minimum, restrict it to instances where it is the only means to prevent serious and imminent physical harm. Failing broader prohibitions on the use of restraints, we ask that the *Mental Health Act* be amended to include a restriction on the use of restraints and seclusion as a punitive measure or for staff convenience, analogous to but broader than that in S 26.1 of BC's *Health Care (Consent) and Care Facility (Admission) Act*.

Bill 22 is not Evidence-Based and will Increase Harm to Youth

We are disturbed that the proposed amendments in Bill 22 entrench a policy approach that is not supported by robust research and evidence into harm reduction and will likely increase the risk of harm to youth amidst an already deadly opioid crisis. We are in complete agreement with experts who have already articulated their concerns that the bill will increase the risk of negative health impacts for youth, including fatal overdoses. Such experts include the Chief Coroner,[4] Representative for Children and Youth,[5] Health Justice,[6] British Columbia Centre on Substance Use,[7] Harm Reduction Nurses Association, Pivot Legal Society and the Canadian Drug

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[4] Chief coroner's statement on proposed amendments to the Mental Health Act, June 23, 2020: https://news.gov.bc.ca/releases/2020PSSG0035-001150?fbclid=IwAR28J1RTMHS2uXkt964MR_TqKFBI2MM1Yp5QxohgE2P-H-FOSchjPHQvnNU

[5] Letter to Minister Darcy from Dr. Jennifer Charlesworth re: Bill 22, June 23, 2020: https://rcybc.ca/wp-content/uploads/2020/06/Stabilization-statement.June_.2020.pdf

[6] Kendra Milne and Laura Johnston, "Detaining youth for problematic substance use. New Bill 22 is more of the same," Vancouver Sun, June 27, 2020: https://vancouversun.com/opinion/kendra-milne-and-laura-johnston-detaining-youth-for-problematic-substance-use-new-bill-22-is-more-of-the-same.

[7] BC Centre on Substance Use statement on proposed amendments to the Mental Health Act, June 29, 2020: https://www.bccsu.ca/blog/news-release/bc-centre-on-substance-use-statement-on-proposed-amendments-to-the-mental-health-act/?fbclid=IwAR3ohunKw7J1wBlxkIM3eneXJa3oHKiJPsGiQpfGHQE2NuALznGNfIlyo5Q

Policy Coalition,[8] Disability Alliance BC,[9] Community Legal Assistance Society,[10] and Moms Stop the Harm[11].

We are also concerned this bill will disproportionately affect Indigenous youth, who are already the most marginalized by healthcare, child welfare, and criminal justice systems. As the First Nations Leadership Council, Union of BC Indian Chiefs, First Nations Directors Forum, and BC Association of Aboriginal Friendship Centres have all articulated, this bill will further harm, marginalize, and criminalize Indigenous youth. Further, we echo their call for a focus on voluntary and culturally appropriate wrap-around health services.

Bill 22 supersedes rules in the *Freedom of Information and Privacy Act* about sharing the personal information, thus undermining the privacy of youth

An individual's right to have their personal information protected by a public body - unless they consent to disclosure to a third party - is a fundamental privacy principle that is well recognized in law. This approach underlies the provisions of the *Freedom of Information and Protection of Privacy Act* (FOIPPA) which is the law that generally applies to personal health information collected at hospitals in BC.

FOIPPA has the flexibility to accommodate the various contexts contemplated by Bill 22; it allows for hospital staff to share information about a patient without their consent if "compelling circumstances exist that affect anyone's health or safety" and notice of disclosure is mailed to the last known address of the individual.[12] This would enable parents or guardians to be notified of a youth's overdose if they arrive unconscious. Furthermore, FOIPPA would enable the youth undergoing stabilization care to consent to any disclosure of their personal information unless they were incapable of such consent, in which case their parent or guardian would have the right to make a decision on their behalf.[13]

The provisions of Bill 22 provide a more expansive framework for disclosure of personal information that indefensibly undermines the ability of youth to control how their personal information is used while detained for stabilization treatment. Bill 22 presumes that a youth that does not have the capacity to "make decisions about health care and community supports

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[8] Letter to BC Ministers Urging Against Bill 22's Passage into Law, July 3, 2020.
[9] Disability Alliance BC Letter Regarding Bill 22-2020, Mental Health Amendment Act, July 2, 2020: https://disabilityalliancebc.org/wp-content/uploads/2020/07/2020July2-Letter-to-A-Dix-J-Darcy-Re-Bill-22.pdf?fbclid=IwAR0dPg_sIjXJSoupr1n5vaHFnejiYo8q7WHav9L2B1WFxb0-V9l4Ok_XGx0
[10] Community Legal Assistance Society, Letter to Minister Dix and Minister Darcy Regarding Bill 22 – 2020 – Mental Health Amendment Act, July 3, 2020, https://clasbc.net/wp-content/uploads/2020/07/Bill-22-Community-Legal-Assistance-Society-3-July-2020.pdf
[11] Moms Stop the Harm families strongly object to proposed involuntary care of youths in BC, July 9, 2020, https://www.momsstoptheharm.com/personal-blog/2020/7/9/msth-families-strongly-object-to-proposed-involuntary-care-of-youths-in-bc
[12] Freedom of Information and Protection of Privacy Act, s 33.1(m).
[13] Freedom of Information and Protection of Privacy Regulation, s 3.

in relation to the youth's engagement in severe problematic drug use" also has no capacity to make decisions about their privacy.

The fact that the Bill departs from the consent-based model underpinning FOIPPA is especially troubling to us given the wide array of third parties with whom personal (and potentially very stigmatizing) information may be shared. Once a youth is deemed not to be stable, Bill 22 would authorize hospital staff to collect and disclose a youth's personal information to a broad assortment of third parties: anyone accompanying the youth on admission, anyone visiting the youth while they are detained, a responsible adult, other hospital staff, a health care provider, a service provider, a person or body named in the discharge plan, a parent or guardian of the youth, and a ministry or a government agent.

The only restriction on these wide-ranging authorities to disclose is that it must not be contrary to the youth's best interests. While the "best interests" test in the bill includes a consideration of the "youth's views," we assert that this is an inadequate safeguard to protect the youth's privacy interests. FOIPPA's approach, which is centred on consent, is a much better model in which to consider disclosures related to youth and their substance use.

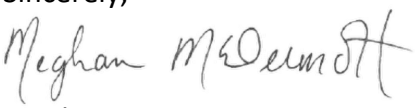
Summary

It is deeply concerning the government has taken a coercive approach that seeks to deprive youth who use substances of their fundamental rights related to liberty, procedural fairness and privacy. Moreover, it is incredibly irresponsible to enact such a strong-armed approach devoid of any robust research and evidence illustrating the effectiveness of these extreme and invasive measures. .

Finally, we want to express our disappointment that Bill 22 was developed without the input of the very communities of people it seeks to help: Indigenous nations; youth, particularly Indigenous youth, who use substances; and others with lived experience of substance use. These are the experts that need to be consulted before developing any law that purports to help them.

Thank you for your attention to these serious matters. We look forward to your response.

Sincerely,



Meghan McDermott, Senior Staff Counsel

Cc: Hon. John Horgan, Premier and President of the Executive Council
Hon. Mike Farnworth, Minister of Public Safety and Solicitor General
Dr. Charlesworth, Representative for Children and Youth
Lisa Lapointe, Chief Coroner of BC