THE CANADIAN
BAR ASSOCIATION
Northwest Territories Branch

September 11, 2015

Sent by: Email

Mr. Alfred Moses
Northwest Territories Legislative Assembly
Standing Committee on Social Programs
alfred_moses@gov.nt.ca

Dear Ms. Moses;

Re: Bill 55 – the Mental Health Act

Thank you for this opportunity to provide submissions to the Standing Committee on Social Programs in respect of Bill 55 ("Bill 55"), which would amend the *Mental Health Act,* R.S.N.W.T. 1988, c. M-10 (the "*Mental Health Act*"). We are appreciative of the positive history of dialogue that exists between the Government of the Northwest Territories ("GNWT") and the Canadian Bar Association ("CBA") and trust that the enclosed response will be of assistance to you.

The CBA is a professional, voluntary organization representing more than 37,000 lawyers, judges, notaries, law professors and law students from all over Canada, that practice in all areas of law. The CBA promotes fair justice systems and effective law reform. The CBA is also devoted to the elimination of discrimination and to the promotion of access to justice.

Overall, we wish to commend the GNWT for engaging in this exercise to modernize the existing *Mental Health Act*. In particular, we look forward to the establishment of a community centered approach to treatment. We trust that future governments will continue to ensure that these forward-thinking efforts receive the necessary resources to in fact make these aspects of Bill 55 a reality. We have some comments and recommendations that we wish to express to the Standing Committee on Social Programs. We have organized these comments by area of law: (1) criminal law; and (2) health law.

1. Criminal Law Perspective

We are concerned about the rights of individuals who are or may be suffering from an acute mental illness and the intersection between treatment efforts versus criminal law-like powers. Criminalization of mental illness already occurs when someone who is ill comes into conflict with the law by virtue of their illness and then is placed in a correctional institution rather than a medical facility. It is in the best interests of those patients as well as public safety to keep the criminal law and mental health processes as separate as possible and thereby reduce the criminalization of mental illness.

A Lacking Requirement for Immediate Transfer to a Medical Facility

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It is imperative that every effort be made not to criminalize or appear to criminalize mental illness. At present, section 12 permits a peace officer to arrest and detain a person suspected of being mentally ill with no express direction that the person be taken to a medical facility.

As noted above, from the perspective of a person detained under the authority of Bill 55, their apprehension will be no different than an arrest. The fact that they may be taken to a jail cell pending travel arrangements will only accentuate their sense of criminalization. It is critically important that every effort be made to ensure that someone who is ill is provided every possible opportunity to understand that they are not being criminally arrested or detained but rather that medical treatment is being sought on their behalf.

The CBA proposes that the authority of a peace office to detain a person under the Act ought to include an express indication of the need to immediately seek the assistance of a medical professional and to convey a detainee to an appropriate medical facility without delay. Section 12 could, for example, be amended as follows: "A peace officer may, without an order issued under subsection 11(6), apprehend a person and *forthwith* convey him or her to a health facility…" and, "Subject to the regulations, the authority under this section to convey a person to a health facility and detain the person expires 24 hours after he or she is apprehended *and presumes that the peace officer shall make best efforts to convey the person without delay.*"

Section 52 provides a similar authority to a peace officer to detain an involuntary patient who is being treated in the community for the purpose of an assessment absent independent judicial review or authorization where the peace officer determines that there are exigent circumstances making it impractical to obtain an order. This power is also not subject to any directive for urgency in seeking the involvement of a medical professional. We raise the same concerns at the lack of any clear imperative for prompt conveyance of a patient to a health facility.
We urge these amendments to avoid the criminalization of the mentally ill.

Patient Rights

From the perspective of the individual being detained under Bill 55, their apprehension and detention will appear no different than a criminal-law arrest and detention. Individuals detained in custody because they are suspected of having a mental illness share many of the same, if not more, vulnerabilities as a person detained on suspicion of having committed a crime. A person arrested for a suspected crime has the right to be informed *upon detention* of their legal rights including the reason for their detention and their right to counsel. They also have the right to exercise their right to counsel without delay.

Under Bill 55, an individual need only be informed of their "Patient Rights," *after* their admission to a designated facility. A person detained under the authority of Bill 55 need not be explained their fundamental rights at the time of their detention.

The CBA is concerned that in the Northwest Territories where many communities lack access to medical facilities and require significant travel to arrive at an appropriate facility, an individual could be detained for a lengthy period of time before being informed of their rights or have an opportunity to exercise them.

We propose that section 8 of Bill 55 expressly include a provision that *upon detention*, all reasonable efforts be made to provide detainees with an explanation of their rights including the reason for their detention, their right to counsel and their right to their substitute decision maker. We further propose that section 12 be amended to include that a peace officer shall without delay inform a person detained under the authority of the Act with that person's legal rights including an explanation of the reasons for that person's detention and their right to access legal counsel.

These simple additions will provide a clear indication of the importance of preserving the rights of people who may be suffering from a mental illness in accordance with the *Canadian Charter of Rights and Freedoms*.

2. General Health Law Perspective

The Right to Refuse Treatment

We were pleased to see the inclusion of section 26 of Bill 55, which allows patients (subject to the Bill and other exceptions under the law in respect of the requirement for consent to medical treatment) the right to refuse psychiatric and other medical treatment. Maintaining the right for competent patients to refuse treatment represents support for the principle of individual autonomy. We were further pleased to see the inclusion of a provision that requires substitute decision-makers to make treatment decisions in accordance with the patient's prior competent, informed and expressed wishes.

Most importantly, we commend the inclusion of an override of a patient's prior competent refusal if it is determined that following those instructions would endanger the physical or mental health or safety of the patient or another person [s. 32(2)(b)]. This is a positive step forward in safeguarding individual autonomy while also recognizing that at times, following prior competent wishes can result in an inadvertent "warehousing" of ill patients who refused treatment at a time of competence and cannot now be treated even though a substitute decision-maker now believes that had the patient been competent, he or she would have changed their wishes. Overall, we applaud the clarification of these provisions.

Grounds for Psychiatric Assessment

We also commend the amendments to the grounds for the court order of a psychiatric assessment (section 9 in the *Mental Health Act* and section 11 in Bill 55). The existing *Mental Health Act* requires that in order for a judge to order a psychiatric assessment, that there be grounds that either the person is likely going to seriously harm themselves or another, or that the person is at risk of imminent and serious physical impairment. An unfortunate experience for many of those who live and work with persons with serious mental health issues is watching a patient refuse to take medications and begin to spiral into incompetence but not being able to have that patient involuntarily admitted and provided medications because the resulting physical impairment is not "imminent", but would instead likely cause a deterioration in condition likely to occur over several weeks. This is often referred to as the "revolving door patient".

Courts have interpreted the use of the word "imminent" in legislation to require just that – that the deterioration cannot be over a period of several weeks or months, but instead must be "imminent". Other jurisdictions, such as Ontario, have amended their legislation to remove the term imminent because of this interpretation. In our view, removing the word "imminent" in Bill 55 is a positive step forward in protecting both the mental health and the autonomy of mental health patients.

Ontario has taken this idea one step further by including section 20(1.1) in its *Mental Health Act*, R.S.O. 1990, c. M.7, which reads:

> The attending physician shall complete a certificate of involuntary admission or a certificate of renewal if, after examining the patient, he or she is of the opinion that the patient,
>
> (a) has previously received treatment for mental disorder of an ongoing or recurring nature that, when not treated, is of a nature or quality that likely will result in serious bodily harm to the person or to another person or substantial mental or physical deterioration of the person or serious physical impairment of the person;
>
> (b) has shown clinical improvement as a result of the treatment;
>
> (c) is suffering from the same mental disorder as the one for which he or she previously received treatment or from a mental disorder that is similar to the previous one;
>
> (d) given the person's history of mental disorder and current mental or physical condition, is likely to cause serious bodily harm to himself or

herself or to another person or is likely to suffer substantial mental or physical deterioration or serious physical impairment;

(e) has been found incapable, within the meaning of the *Health Care Consent Act, 1996*, of consenting to his or her treatment in a psychiatric facility and the consent of his or her substitute decision-maker has been obtained; and

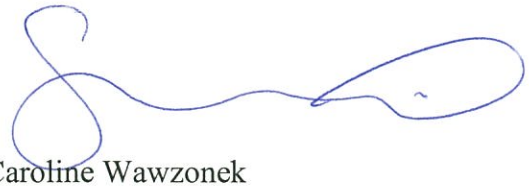
(f) is not suitable for admission or continuation as an informal or voluntary patient.

One suggestion that we have is the Committee may wish to include a similar provision in the Bill as section 20(1.1) of Ontario's *Mental Health Act* to further clarify the treatment of those patients who are often in and out of facilities based on non-medication compliance.

Conclusion

Once again we thank you for the opportunity to provide these submissions. We are aware of that the very thorough public consultation process is drawing to its conclusion but we remain available and welcome any questions or requests for clarification that we can provide.

All of which is respectfully submitted,



Caroline Wawzonek
Chair, CBA-NWT Criminal Law Section

cc: D. Mager