

British Columbia Schizophrenia Society Position

BC Government's Response to the Ombudsperson's Report

Committed to Change: Protecting the Rights of Patients under the Mental Health Act

Executive Summary¹

The British Columbia Schizophrenia (BCSS) is dedicated to upholding the right to health and the legal rights of persons suffering from schizophrenia and other serious mental (brain) illnesses. These rights can be lost because severe mental illness often robs people of the awareness that they have a harmful but treatable illness. These people often refuse voluntary treatment needed to restore their health and rights. The only alternative for restoring rights is involuntary mental health treatment under the BC Mental Health Act (MHA). The MHA has a number of protections for involuntary patients which require processes and forms to be correctly completed.

The Ombudsperson conducted an investigation in 2017 on the completion of legal forms required by the MHA. His Report outlines many serious deficiencies and makes 24 recommendations.

BCSS commends the Ministries and Health Authorities for already acting on 20 of the 24 recommendations, which will help reach 100% compliance. BCSS believes that these actions alone will meet the requirements of the MHA and the Canadian Charter of Rights and Freedoms.

BCSS strongly rejects the recommendation to create a new, add-on, very expensive, outside, so-called "independent" rights advisor service, with expanded mandate and powers. This new add-on service will not meet the timelines required by the MHA. The current system will therefore have to continue unless the add-on service is funded for 24 hour 7 day access which is now provided by professional hospital staff. The proposed legal service is not required by the MHA or the Charter.

Although finding serious compliance issues pertaining to the MHA, the Ombudsperson clearly understands the critical importance of the current Act (page 1, 9). BCSS commends him for this:

¹ This is a 4 page Executive Summary of the full position statement that follows.

The Ombudsperson's criticism of the current system and rationale for recommending an add-on service and BCSS responses, in summary form, are: (Page 83)

1. "First, the information is not provided to the patient by an arm's-length or neutral body". BCSS response. *This situation is no different than that of a police officer providing rights information. Neither the Charter nor the courts require a whole "independent" system of rights advisors for police officers who tell an arrestee of their rights, even though officers have a potential "conflict of interest" and "power imbalance" with the person. Also being at arm's length does not rule out bias.*
2. "The relationship between the person providing the rights information and the facility may influence the patient's willingness to ask questions, challenge the basis for the detention or seek advice." BCSS response. *A patient may feel much more comfortable asking questions of a health professional trained to communicate with someone in an agitated or psychotic state, rather than with a non-clinically trained stranger.*
3. "Second, it does not provide for a patient who has questions or who, on receiving the rights information, asks for certain steps to be taken". BCSS response. *The Form that is read to patients specifically states, "You may ask me questions at any time." It also provides the detailed steps for applying to the Review Panel for discharge.*
4. "Thus, individuals providing the information may be unfamiliar with the purpose of providing the information and might not be trained in or familiar with the rights notification role". BCSS response. *We doubt this claim and, if it is valid, then the Ombudsperson's recommendations for the retraining of staff, already being implemented by Health Authorities, will address it. This issue does not need an add-on rights advisor service to address it.*
5. "Fourth, the notice that the director is required to provide to involuntary patients is limited to specific information: there is no obligation on the director, or any other entity, to provide patients with advice about the various avenues of legal recourse that are available to them and whether, given their particular circumstances, those avenues are likely to be successful." BCSS response. *The Charter requires information on rights but it does not require advice on options or their likely success. A lawyer is qualified to do this but are para-legals licensed to do this? That is why, presumably, the Charter and MHA require the person to be informed of a right to instruct counsel without delay. This greatly expanded mandate will be costly and disruptive for patients and families.*

Problems with the proposed add-on service:

1. Cannot meet MHA timelines unless 24/7 availability. The MHA require rights notification “on” detention (admission). Admissions occur any time. Therefore the current criticized system will have to continue and be duplicated when the outside rights advisor arrives after admission.

2. Duplication of service: costs and confusion. Hospital costs will not decrease with the new service. Staff will be confused as to who does what when. Patients will be confused: “why does a person tell me the same thing as my nurse. Should I not trust my nurse?”

3. Increased direct costs. (The Ombudsperson did not address costs). Approximately 33,000 visits covering 75 hospitals and 3000 community homes (extended leave) will be required each year. Costing estimated at \$200 per visit yields a cost of \$6,600,000. Management and lawyers costs, rent and other support costs are included in that figure.

There will be additional Review Panel hearings at \$2,310 per hearing (see Mental Health Review Board 2017/2018 Annual Report) and additional court applications and additional legal aid costs.

4. Uncompensated Costs. Hospitals should be compensated for the considerable clinical time that will be diverted from patient care to rights advisors questions, additional review panel and court hearings.

5. Disruption to patient and family lives. With more legal resources supporting an involuntary patient’s desire to leave the hospital, it is highly likely that more patients will be discharged prematurely in part for clinicians to avoid Review Panels. These patients are more likely to become ill and be re-hospitalized. This not only disrupts their lives, their loved ones’ lives and adds cost to the system, it also impairs prognosis leading to even more readmissions.

6. Bias and lack of independence of proposed rights advisor agency. The proposed agency is the Community Legal Assistance Society (CLAS). It is the BCSS opinion that for this particular service CLAS is biased against involuntary treatment and is not independent. Anti-psychotic medication is the main treatment for involuntary patients to restore their health, liberty and legal rights all over the world. It is taken voluntarily by millions. Hundreds of scientific studies and national drug licensing bodies show it is safe and effective. Length of detention has been reduced from years to weeks since these drugs have been invented. Despite this evidence, CLAS bias shows through. They write:

“While many people use the term “medications” to describe a type of psychiatric treatment, others find that term misleading or offensive, because many

psychiatric treatments do not have a curative or therapeutic effect, but rather have a sedative effect that alters behaviour.” Then disingenuously add: “This report takes no position on the benefits, efficacies, or safety of psychiatric treatments.”) *Operating in Darkness*

What clear thinking CLAS rights advisor would not make every legal effort to get an involuntarily detained psychiatric patient out of hospital because of the belief that psychiatric medications are generally doing the patient more harm than good?

We believe CLAS advisors have clear conflicts of interest and would not be “independent”. CLAS advisors will likely advise patients to consult with CLAS lawyers, not other legal firms. Similarly, a CLAS advisor will likely be the person’s advocate if they go to the Review Panel. As well, CLAS advisors will likely recommend CLAS lawyers when patients are advised to use court avenues for discharge or seek legal remedies for allegedly invalid certificates.

The most important “conflict” though is between the objectives and values of families, government, health facility and staff to ensure that the person’s health rights are protected with due regard for other rights versus the legal rights advisor concern about legal rights (not health) and in facilitating the patient’s wishes to be discharged no matter what the consequences for the patient or family or society.

Conclusion. BCSS is confident that the comprehensive system of training, auditing, and other measures recommended by the Ombudsperson that are being implemented by the health Ministries and Health Authorities will meet the requirements of the MHA and Charter. We believe a so called independent rights system will be very expensive and reduce clinical time for patients. CLAS is too biased to provide independent rights advice.

Recommendation. BCSS recommends that consideration of an additional rights advisor service be delayed until the work already being undertaken by the health Ministries and Health Authorities to comply with the Ombudsperson’s 20 recommendations has been completed. At that time a re-evaluation of the need for the proposed additional service could be undertaken.

June 6, 2019

Continued

British Columbia Schizophrenia Society Position Statement re:

BC Government's Response to the Ombudsperson's Report

Committed to Change: Protecting the Rights of Patients under the Mental Health Act

(March 7, 2019)

INTRODUCTION

The British Columbia Schizophrenia (BCSS) is dedicated to upholding the right to health and the legal rights of persons suffering from schizophrenia and other serious mental (brain) illnesses. These rights are often lost because of active delusions, hallucinations and thought disorders, common symptoms of severe mental illness. The brain illness often robs people of the awareness that they have a harmful but treatable illness (anosognosia). Many people therefore refuse voluntary treatment needed to restore their health and rights. If necessary treatment is refused, the only alternative for restoring rights is involuntary mental health treatment under the BC Mental Health Act (MHA).

Involuntary admission and treatment is restricted under the MHA to those who have a severe mental disorder, and require safe and effective psychiatric treatment without which they are likely to harm themselves or others or suffer substantial deterioration. They must not be suitable as a voluntary patient. All these stringent criteria must be certified by two independent physicians. The MHA has a number of protections for involuntary patients which require processes and forms to be correctly completed.

The Ombudsperson conducted an investigation in 2017 on the completion of legal forms required by the MHA. His Report outlines many serious deficiencies and makes 24 recommendations.

BCSS commends the Ministries and Health Authorities for already acting on 20 of the 24 recommendations, which will help reach 100% compliance. BCSS has been informed that these actions alone will meet the requirements of the MHA and the Canadian Charter of Rights and Freedoms (Charter).

BCSS strongly rejects the recommendation to create a new, add-on, very expensive, outside so-called "independent" rights advisor service, with expanded mandate and

powers. This new add-on service will not meet the timelines required by the MHA. The current system will therefore have to continue unless the add-on service is funded for 24 hour 7 day access which is now provided by hospital staff. This new service is not required by the MHA or the Charter nor would it advance the purpose of the MHA as found by BC Courts (McCorkell, Mullins)

A “test” for funding any new service over and above those required by the Charter is “Does it conform with the purpose of the MHA?” A charter challenge court stated “The context of the purpose of the *Act* and *Regulations* is detention of persons only for the purpose of treatment” (Mullins 2014).

BCSS believes the treatment purpose of the Act will not be advanced if a new ‘rights advice’ service is created. Instead many millions of dollars will be spent on lawyers, para legals, increased review panel hearings, court costs, legal aid and indirect costs. Such taxpayer-funded extra expenses will *not* help treat any ill person who is suffering from terrifying but treatable psychotic symptoms, nor will it advance the recovery and health rights of involuntary patients. In fact it is likely to interfere with patient’s recovery and postpone release from detention. New money for such a scheme could be much better used to provide more and better patient care and treatment— including much-needed clinical and other recovery services in hospitals and the community.

BCSS urges the government to carefully consider our concerns since the Deputy Attorney General has responded to the Ombudsperson:

“The Ministry is supportive of developing a service that provides independent rights advice and advocacy for involuntarily admitted patients in all designated facilities. As a service of this nature is not currently provided, the provision of this service is dependent upon the approval of Cabinet and the availability of funding. The Ministry is prepared to seek appropriate approvals subject to legislation and funding from Cabinet and Treasury Board in order to develop and fund the services you are recommending government deliver (Letter in Ombudsperson’s report page 101)

BCSS believes the government should reject the recommendation to create or fund this proposed additional service or at least delay a decision until the other 20 recommendations, which have been accepted by government have been implemented and shown not to meet the requirements of the MHA and Charter.

OMBUDSPERSON’S VIEW OF THE MENTAL HEALTH ACT

Although finding serious compliance issues pertaining to the MHA, the Ombudsperson clearly understands the critical importance of the current Act. BCSS commends him for this:

“The people admitted to a mental health facility – our friends, our children, our siblings, our parents, and grandparents – are at significant risk because of their illness. They are suffering and in need of immediate treatment but, perhaps because of that illness, are unwilling or unable to accept it. In these situations, the state can step in with the greatest power it has – the right to remove a person’s liberty by detaining and treating them.” (Page 1).

On page 9, “The existence of a legislated process for involuntary admissions reflects the value that our society places on ensuring that people with mental disorders receive treatment when they are too ill to seek help on their own. (see also page 5)

CURRENT SYSTEM (IMPROVED BY OMBUDSPERSON’S RECOMMENDATIONS 1-20).

The current system of providing MHA rights information correctly applied, which BCSS contends meets the requirements of the MHA and the Charter, are as follows:

Section 34.1 of the MHA requires that “on the patient’s detention” i.e. when admitted to the hospital following the first medical examination and certificate, the patient must be informed of their MHA and Charter rights. Staff read Form 13, “Notification to Involuntary Patient of Rights under the *Mental Health Act*” and “answers questions”. The patient signs the form to indicate it has been read to them and questions addressed. The name of the person who provided the information is added. A blank copy of the form is given to the patient and signed copy placed on the clinical file. A form is also posted in the ward. If a patient is not capable of understanding the information on admission the information must be given again when the patient is capable of understanding (s. 34(3)). This process must be repeated for every renewal certificates (e.g. after one month in hospital), transfer and in the community if the person is on extended leave.

Form 13 provides further information about rights including “You may contact any lawyer or advocate you choose”. On information about applying for discharge by the Review Panel it states “...or you can contact the Mental Health Law Program [operated by CLAS] at any time”.

The current system for providing rights information on admission, repeating it if patients cannot understand and answering questions is carried out by on-duty trained professional mental health staff, usually Registered Psychiatric or Registered Nurses or social workers. Staff are available “on” admission, trained in providing the straightforward information on Form 13 and trained to assist people in psychosis or agitation.

The Ombudsperson’s criticisms of these policies and procedures, are presented below. The Ombudsperson’s recommendation is that rights advisors outside the hospital repeat this information and provide additional services including consideration of the patient’s circumstances and providing options and advice. BCSS concerns about that are below.

BCSS is convinced that the Form 13 policy and procedures comply with the Charter because it provides for notification of rights. The Charter s. 10 requires: “Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right”; and c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.”

BCSS also believes that, with the improvements in training and procedures, the current system of clinical staff providing rights information is more cost effective and less disruptive to patient recovery than the creation of an expensive, outside “rights advice” model with greatly expanded powers. The outside agency is likely to have an “anti-psychiatry” bias, i.e. “I will get you out because you have asked me even though I know you have active harmful psychotic symptoms.”

(In addition to the patient being told of their rights, Form 16 must be provided to their near relative. This informs the near relative of the patient’s rights and that the near relative can apply for a review panel on behalf of the patient and participate in hearings. See below the discussion on “additional pressures for legal funding”)

OMBUDSPERSON REPORT: CRITICISM OF THE CURRENT SYSTEM AND BCSS RESPONSES.

The Ombudsperson’s objections to the current system are four-fold. He writes: (underlining added)

Ombudsperson page 83. “...the existing rights information process is limited in four key ways.

“First, the information is not provided to the patient by an arm’s-length or neutral body. Under the current model, the director is responsible for providing the

patient with rights information. The director is also the person who exercises the authority to involuntarily admit and detain the patient. While the director must ensure that the patient is provided with information about their right to legal advice and their ability to challenge the validity of the detention, the director has also already concluded that the involuntary admission is appropriate and exercised their authority accordingly.”

And “The relationship between the person providing the rights information and the facility may influence the patient’s willingness to ask questions, challenge the basis for the detention or seek advice.”

BCSS Response

(1) This situation is no different than that of a police officer, who has a huge power imbalance with an arrestee. The law and Charter require the arresting officer to provide rights information to the person they just arrested. Neither the Charter nor the courts require a whole “independent” system of rights information for police officers, even though officers have a potential “conflict of interest”. The system trusts trained police officers. Similarly, it should trust trained health care professionals to provide unbiased rights information.

(2) Contrary to the Ombudsperson’s speculation, a patient may feel more comfortable asking questions of a health professional trained to communicate with someone in an agitated or psychotic state, rather than with a non-clinician stranger who may not be comfortable or skilled in communicating with individuals who are acutely mentally ill.

Ombudsperson Page 83. “Second, it does not provide for a patient who has questions or who, on receiving the rights information, asks for certain steps to be taken. The director’s duties are completely discharged on providing the rights notification, and any further steps must be initiated by the patient. This is a heavy burden to place on individuals who are detained in a psychiatric facility and receiving treatment for a mental disorder.

BCSS Response

Contrary to the Ombudsman comment, the MHA addresses the issue of answering questions, providing assistance and steps that can be taken. Form 13 reads, “You may ask me questions at any time.”

Steps are also provided. For example, Form 13 provides steps for applying to the review panel, which is by far the most common way to apply for discharge against medical advice. It reads:

“You or someone on your behalf may apply to the review panel by filling in a form 7, Application for Review Panel Hearing. This form is available on the nursing unit. The review panel must decide within 14 days to continue your hospitalization or discharge you. There is no cost. Information about how a review panel works can be provided by your nurse or you can contact the mental health law program directly. At (604) 685-3425 or toll free at 1-888- 685-6222”
.[This is CLAS, the Community Legal Assistance Society]

And if the patient decides to apply to the Review Panel, Form 7 provides the steps to be taken:

“As the patient you may choose to: Attend the Review Panel Hearing without a representative; Ask a family member, friend or near relative to represent you; Hire a lawyer in private practice to represent you; or request free legal representation from the Mental Health Law Program (MHLP) [operated by CLAS]. If you choose this option, the Mental Health Review Board will submit your request directly to the MHLP, who will contact you to discuss the availability of an advocate at your hearing. If the MHLP is able to represent you, you understand that you consent to the release of your health records to the MHLP. For further information, please contact MHLP at 604-685-3425 or toll free 1-888-685-6222”. (Form 7)

As an analogy, even though an arrestee is impaired mentally by the stress of arrest or drugs that person has a “heavy burden” to understand and activate their options, no “independent” advice is required by the Charter.

Ombudsperson Page 83. *“Third, providing rights information is not a function assigned to a single person in many facilities. Thus, individuals providing the information may be unfamiliar with the purpose of providing the information and might not be trained in or familiar with the rights notification role. Further, carrying out this responsibility may be well outside of their area of expertise or training.*

BCSS Response

Several of the 20 recommendations made by the Ombudsperson are designed to address this training issue. Non clinical staff (para-legals) may also have difficulty carrying out this task due to lack of training and experience working with agitated people in a psychotic state and in a hospital setting.

Ombudsman page 83. *“Fourth, the notice that the director is required to provide to involuntary patients is limited to specific information: there is no obligation on the director, or any other entity, to provide patients with advice about the various*

avenues of legal recourse that are available to them and whether, given their particular circumstances, those avenues are likely to be successful.

BCSS Response.

(1) Neither the Charter nor the MHA require anyone to provide patients with options and advice on the various avenues of legal recourse that are likely to be successful. That is, presumably, why the Charter requires a person to be told of their right to “to retain and instruct counsel without delay and to be informed of that right”. Form 13 states that right: to “contact a lawyer...any time”.

The great majority of patients wanting discharge against medical advice do, in fact, apply for a review panel. It is true that lawyers, including legal aid lawyers contacted by eligible patients, may advise on various other avenues of legal recourse, like habeas corpus, suing for release and false imprisonment, but are paralegals licensed to give legal advice?

(2) This fourth Ombudsperson’s recommendation greatly expands the scope and costs of providing the Charter and MHA required information. In order to advise the patient on their legal options “given their particular circumstances”, the new rights advisors have to determine what those circumstances are. Costs for this will likely include time needed to read files, examine all forms required by the MHA for completeness and legal action if incomplete, obtain information from physicians involved in the certification including emergency room physicians, treating physicians, nurses, and any police officers, families or others involved in bringing the patient to medical attention.”

These additional activities to determine the patient’s circumstances, outline options and give advice, will not likely be accomplished by the new rights advisor service on admission and could violate the MHA requirement that information must be provided “on” detention. That also means a second, third or more visits to the patient will be required to assess their circumstances and provide options and advice. This expanded mandate will be time consuming and will also divert medical and clinical staff time from patient care because patient’s circumstances will have to be determined by the advisor and because more Review Board and court hearings will demand more clinical staff time.

However regarding these concerns the Ombudsperson concludes:

“The existing notification process needs to be complemented by a robust system of independent rights advisors who meet with patients soon after they have been involuntarily admitted and detained, assess the patient’s circumstances and advise on remedies and options, and, where directed by the patient, resolve procedural matters or make referrals to legal counsel.” (Page 84)

PROBLEMS WITH A PROVINCE-WIDE EXTERNAL RIGHTS ADVICE SYSTEM

This section examines what will happen if the current system, which uses on-duty hospital professional staff, is replaced by “independent rights advisors” not on duty or on the hospital grounds. Or if the recommendation is to require the hospital to continue to provide the current level of timely rights information that adds a whole new level of duplication and confusion over roles and responsibilities. However, cost estimates for the new service would not change. This duplicate service option will not be examined here.

1. Timelines Demanded by Mental Health Act Likely to be Breached

The Report (page 8) recommends a the new service that “...can provide timely, in-person advice...”. Presumably “timely” means the advice must be provided in time to meet the MHA requirements. Generally it will not be able to do so.

The MHA requires rights notice to be given to the patient “on” the patient’s admission. Hospital staff on duty can easily fulfil this requirement. If the proposed outside organization cannot that would breach the MHA requirement, possibly leading to an unlawful admission. The patient may then seek legal redress against the outside agency, potentially be discharged for lack of due process, and sue for wrongful imprisonment.

To meet the requirements for information on admission the outside agency would have to administer and pay for a 24 hours 7 day week on-call system for the 75 psychiatric units throughout the province.

2. Duplication of services: cost and confusion.

It appears that because of the time limits the current system of hospital-provided information will have to continue and any new services added. There will be no savings to the hospital in fact more costs as the Rights Advisor takes clinical time to obtain information about the patient’s circumstances.

There likely will be role confusion for hospital staff who provide the rights information and then the Advisor will provide the same information. If the Rights Advisor is available will that person provide the information and not the hospital staff?

Having two people provide the same information to the patient will likely confuse many patients. “If someone else must tell me the same thing, do I trust my nurse?”

3. Vastly Increased Costs for Outside Rights Advisor Service

These outside agency costs must be compared to *no additional costs* where on-duty staff already provide the information as required by the MHA and the Charter. The Ombudsperson did not cost the recommendations. However, governments do assess the cost/benefit of proposed programs. Costs of a new outside rights advisor service include:

(i) Direct advisor numbers and costs

Rights information must be provided for every patient on admission, on all renewal certificates and transfers, and on extended leave in the community. The estimated numbers of instances where the Advisor must provide information and also “assess the patient’s circumstances and advise on remedies and options, and, where directed by the patient, resolve procedural matters or make referrals to legal counsel.” (Page 84) are as follows;

There are 75 units in the province and all will have to be served. The Report found “In the 2016/17 fiscal year, these facilities discharged 20,483 patients who had been involuntary admitted under the Mental Health Act. The 20,483 discharges involved 14,980 unique patients – meaning that many individuals were involuntarily admitted more than once.”(page 14). That is an astonishing involuntary re-hospitalization rate in one year of 37%!

Added to this figure of 20,483 discharges about half would have at least one renewal certificate, for an additional 10,000 instances. Add to that about 3000 people on continuous extended leave. The total is about 33,000 instances where the MHA requires rights information in a year. This does not include repeat visits when a patient is not capable of understanding or when they need more information which may well be substantial.

A BCSS estimate is that each interaction with a patient with the including the expanded mandate recommended by the Ombudsperson would cost about \$200.

The \$200 cost per patient includes paying salary and benefits for the time the advisor takes getting to and from the hospital and spends directly with the patient providing the required information and answering patients' questions and necessary required repeat visits for a patient. This estimate also includes the additional responsibilities of the advisor, over and above providing rights information. The expanded mandate is to

“assess the patient’s circumstances and advise on remedies and options, and, where directed by the patient, resolve procedural matters or make referrals to legal counsel.” (Page 84)

These additional duties will take considerable advisor time. They likely would include interviewing physicians involved in the certification including emergency room physicians, treating physicians and nurses and any police officers, families or others involved in bringing the patient to medical attention. Reading files and documenting interviews also take time.

In addition, the rights advisor will require time to consult with a lawyer on legal remedies for issues like incomplete certificates or other legal matters which arise when examining the patient’s circumstances. Answering questions from family caregivers and others may require considerable time. Other related costs such as management, office expenses and human resource expenses are discussed below as support costs.

The cost for this new service will be approximately \$6,600,000 which includes administrative and support costs for an outside agency, described next.

(ii) Administrative and support costs for an outside rights advisor service

Considerable management and legal resources will be needed to run such a complex operation. Even more costs will be incurred if a 24/7 province-wide service is to meet the MHA timelines. To begin with, there are the logistics of reaching the 75 separate facilities in BC, plus 3,000 patients on extended leave who live in scattered private accommodation throughout the province.

In addition, a partial list of some of the tasks required would involve recruiting, hiring, training and monitoring the work of new advisory staff, many of whom will be part-time; managing and paying for a 24/7 standby services with call outs (if that is required), office rental and costs, training hospital and community mental

health staff regarding the new role of the advisors; responding to legal and ethical questions raised by professional staff; fielding enquiries from patients, staff and families about processes.

(iii) Review Panel costs will likely increase

Review panels costs are considerable at \$2,310 per hearing. (see Mental Health Review Board 2017/2018 Annual Report). Each hearing by a panel requires a lawyer, a physician and a lay person as members and support staff. Cost for witness such as physicians, nurses and relatives are borne by their funders, not the Review Panel.

Given that most involuntary patients by definition do not believe they should be in hospital, and also that “independent” advisors have an ethical requirement to follow their client’s wishes—it is likely that many more review panels will be held. This contrasts with the current neutral system where patients are provided with rights information by mental health professionals and assistance to apply to the Review Panel if the patient wishes. Again, more panels will involve more direct and indirect costs.

Given the experience in Ontario with a similar system of advisors, the length and therefore the cost of Review Panel hearings will increase as more lawyers tend to take adversarial stands, so hearings can take days in Ontario. This is not the case in BC at present.

At present the physician who is responsible for the patient’s continued detention is not represented by legal counsel in Review Panels but the patient often is. Over the years psychiatrists have recommended that to balance things they be represented. That pressure is likely to increase as more legal resources are put into the system aimed at facilitating the patient’s instruction to be discharged against their responsible physician’s advice.

(iv) Court costs will likely increase

- Detention review costs

In addition to providing for patient discharge via a Review Panel, the MHA allows for two options through the courts. Although now seldom used because the Review Panel is free, these options are described on Form 13. However, given the new mandate to find the legal options to meet the individual circumstances needs, advisors may advise patients to use these expensive but possibly faster

court options. (see Report recommendation 24) It would appear that the move for more court hearings suggested by the Ombudsperson runs counter to the Provincial Government policy of reducing court hearings in favor of adjudicative hearings like happens now with the Review Panel.

-Appeal costs

There is a right to appeal a review panel decision to the Courts in BC. However, it is very seldom used. But in Ontario where an outside advisory service exists (as the Ombudsperson is recommending for BC), there are many such appeals to the Courts. Decisions are not only appealed to the first level of court, but also to the Ontario Court of Appeal. Given the likely activism of an outside well-funded rights advisory service in BC, there will probably be more and more appeals of Review Panel decisions to the courts. Court trials consume huge amounts of government funds plus taking the time of physicians and other mental health staff, detracting from patient care. BCSS is not in a position to estimate how much these court process might be used or might cost, but these factors should also be considered and analysed by government in their decision-making process.

-Court cases involving incomplete certificates

As the Ombudsperson notes there is at present virtually no recourse for a patient whose admission certificates have so little information on them as to be invalid, or where other required certificates or notifications are missing. Indeed the Review Panel must ignore “defects or apparent defects” (s. 25(2.2)) and make a determination on the day of the hearing. The Review Panel has no jurisdiction over other apparently invalid admission or other forms. These failures could be adjudicated in court which conceivably may declare the admission invalid and award damages for false imprisonment.

With 231,000 forms (33,000 patients, 7 forms including two Form 4s) in a year that are required to be correctly completed for valid detention and treatment, it is to be expected that rights advisors investigating the circumstances will find some forms incomplete and which potentially invalidate the admission. A suit for habeas corpus or some other legal remedy may be an option for the patient to obtain discharge and seek damages for false imprisonment or violation of other rights. How many cases will occur is unknowable, but with legally oriented resources devoted, in part, to this issue, it is certainly much more likely to happen than in the current system. The Ombudsperson has recommended this avenue to address incomplete forms.

-Charter of Rights and Freedoms Challenges

While not frequent in BC Charter challenges are a legal remedy that patients can and have pursued. These are much more likely with added legal and para legal resources. If CLAS wins the current appeal it would allow not just patients but CLAS or any other advocacy public interest group without a patient applicant, to launch a Charter challenge. These are extremely expensive of court, legal and clinical time.

(v) Legal Aid Costs will increase dramatically

The Ombudsperson recommendation 24 is that the Ministry of the Attorney General increase legal aid funding for “patients who wish to apply to the court to exercise legal rights arising from their involuntary admission and detentions ...”. At the present time this option cost nothing because the Review Panel option is used not the courts. But MHA court options like habeas corpus may be faster and with the help of rights advisors patients are more likely to take a court option. This will be much more expensive than Review Panels and divert even more clinical time from addressing patients’ health rights. If a Charter challenge is launched by a patient or others who qualify for legal aid that will also increase legal aid costs.

In addition, legal aid and court costs will be increased when patients are advised to seek legal redress for incomplete forms or other matters. Legal aid funding will probably also be sought to launch appeals against Review Panel decisions. That does not happen now,

(4) Uncompensated Costs

When a rights advisor in the proposed new system seeks to understand the circumstances of a patient, more time will be required of clinical or other service staff. Funding for time normally devoted to treating patients and helping them recover will be diverted. Patients will receive less mental health care services. If review panel and court case numbers increase they will also absorb considerable clinical time.

Summary: costs of a new rights advisor service and BCSS recommendations.

BCSS estimates that the costs of implementing the new outside rights advisor system to be approximately \$6,600,000. This does not include increased numbers of Review Panel and Court cases the new system is likely to generate. Increased legal aid costs are not included.

BCSS recommends that the government recognizes that considerable clinical resources will be diverted from mental health services for patients if the proposed rights advisor service is adopted. BCSS recommends that mental health agencies be funded to compensate for that lost clinical and service time.

BCSS respectfully asks the following question: With the improvements already underway in the present system—could this extra money not be better spent on actual health care resources to reduce the very high involuntary hospital readmission rate and the desperate need for more and better mental health services in the community?

(5) Disruption of patients' lives because of premature discharge

With more legal resources supporting an involuntary patients desire to leave the hospital it is highly likely that more patients will be discharged prematurely and more likely to become ill and be re-hospitalized. This not only disrupts their lives, their loved ones lives and adds cost to the system it impairs prognosis leading to even more readmissions.

Premature discharge is more likely to happen because the extra time, effort and stress a psychiatrist endures at Review Boards or the court. While within the law physicians appear to discharge earlier than they would have following their professional medical best practices. The Review Panel of report of 2017/18 shows, for example, that of the 2234 applications 391 were decertified (18%) before the hearing. With additional legal representation Review Panel discharges may well increase.

(6) Extra pressures on families and advocates protecting the patient's health right

Families and advocates have often spent months trying to convince a person with a severe mental illness to get help voluntarily. When that fails and involuntary admission is the only humane option, the family want the person to stay in hospital long enough to get well. There can be a clear conflict between the family's desire to get the person well and the person's desire to get out of hospital as soon as possible aided by the "independent" rights advisor. Ontario has a similar outside system. While not representative, these comments by a mother and service director are worth considering in the evaluation of the recommendation:

Unfortunately, I have not heard anything good about the rights advising of the PPAO [Psychiatric Patient Advocacy Office]. When my own son was hospitalized involuntarily at [hospital], I visited him in Emergency, and there was a card on his side table from the rights advisor. My son was in no position to

know what that was about and was preoccupied with his "thoughts" at that time. Another mom had her son hospitalized at [hospital] and was horrified that the rights advisor came and told her son when he was in a vulnerable frame of mind that he could leave the hospital and did not have to accept treatment.... the rights advisor from the PPAO do not appear to have any training in the nuances of schizophrenia or sensitivity about the difficulty that they cause families.

Kathy Mochnecki MSW RSW, President of the Board of Directors, Home on the Hill, Toronto.

With the expanded legal rights service there is a clear imbalance between the patient with an advisor and the relative who has no legal assistance.

BCSS is recommending against outside provision of information for patients but if that occurs then the same type of resource should be available to families or others in facilitating the involuntary admission.

BCSS CONCERNS: PROPOSED AGENCY TO PROVIDE INDEPENDENT RIGHT ADVICE SERVICE

Although the rights advisor program run by Community Legal Assistance Society (CLAS) in several lower mainland hospitals were discontinued it operates at the Forensic Psychiatric Institute (page 85). It might seem therefore that if an "independent" organization is to be funded to operate a new independent rights advisor service in the 75 psychiatric units in the province, that CLAS would be the obvious choice. BCSS strongly disagrees. In our experience, CLAS has developed anti-psychiatry attitudes, and has taken advocacy positions against measures such as extended leave, which help keep people from being involuntary hospitalized. CLAS rights advisors are likely to reflect these attitudes, and to advise patients to leave hospital against medical advice using review panels, courts, or other legal proceedings.

CLAS recently produced a document called *Operating in Darkness*, which is a critique of the MHA and of scientifically proven psychiatric treatments. Writing about anti-psychotic medications, the scientifically proven effective mainstay for helping millions of patients worldwide get well and be discharged from involuntary detention, the CLAS lawyers conclude:

"While many people use the term "medications" to describe a type of psychiatric treatment, others find that term misleading or offensive, because many psychiatric treatments do not have a curative or therapeutic effect, but rather have a sedative effect that alters behaviour. For example, many point out that the

term “anti-psychotics” is a misnomer because these pharmaceutical agents do not combat psychosis like antibiotics combat bacteria and instead call these pharmaceutical agents “neuroleptics”, as they depress neurological function” ((Although later on this same page, page 12, the authors disingenuously add: “This report takes no position on the benefits, efficacies, or safety of psychiatric treatments.”))

What clear thinking CLAS rights advisor would not make every legal effort to get an involuntarily detained psychiatric patient out of hospital because—as their organization believes— psychiatric medications are generally doing the patient more harm than good? These anti-psychiatry beliefs will bias rights advisors managed by CLAS against involuntary hospitalization and treatment. It should also be noted that prior to the introduction of anti-psychotic medication, patients were often detained for years. With effective anti-psychotic treatment, this is now days or as the Ombudsperson noted, an average of 14 days.

Some advocacy positions of CLAS demonstrate a bias against health rights measures that in fact reduce the need for hospital detention. For example, CLAS vigorously opposed the use of extended leave, which actually keeps people out of hospital. Currently, CLAS is involved in a court case which argues that involuntarily detained patients should be able to refuse the treatment necessary for their recovery and release. BCSS does not want BC citizens to be held in seclusion for 404 days or detained for years, which is what happens in Ontario because involuntary treatment can be and is refused as CLAS wants. (See *Treatment Delayed-Liberty Denied*)²

We believe CLAS, or organizations with similar views, have clear conflicts of interest and would not be “independent”. CLAS advisors will likely advise patients to consult with CLAS lawyers, not other legal firms. Similarly a CLAS advisor will likely be the person’s advocate if they go to the Review Panel. As well CLAS advisors will likely recommend CLAS lawyers when patients are advised to use court avenues for discharge or seek legal remedies for allegedly invalid certificates.

The most important “conflict” though is between the objectives and values of families, society, and facility staff to ensure that the person’s health rights are protected with due regard for other rights. These values can conflict with those of the legal rights advisor who is concerned about ensuring legal rights (not health) are enforced and in facilitating the patient’s wishes to be discharged no matter what the consequences for the patient or family or society. As Mrs Shirley Chan a mother of a person with schizoaffective disorder who deteriorates after decertification writes

² Solomon, R., O’Reilly, R., Gray, J. and Nikolic, M. Treatment Delayed - Liberty Denied. The Canadian Bar Review. 2009, 87, 679-719.

“Adding more lawyers to the process by CLAS (Community Legal Assistance Society) will not improve [adult child’s] rights but will certainly make timely treatment more difficult to access by someone who desperately needs it and could mean life or death.”³

If, despite the evidence and arguments presented in this BCSS position paper, the government decides to go ahead and hire an outside organization like CLAS then education about serious brain disorders that cause psychosis, scientific treatments available, medical prognosis without treatment, how to communicate with people in a psychotic crisis, how to be supportive of people trying to advance patient’s health rights including families and related topics must be addressed.

3. SUMMARY

BCSS commends the Ombudsperson’s first 20 recommendations and commends the Ministries and Health Authorities for already beginning to implement them. BCSS believes that these actions will address the rights requirements of the Mental Health Act and the Charter.

Therefore BCSS recommends that the proposed outside independent rights advisor service not be implemented for a saving to the taxpayer of approximately \$6,600,000. In addition, as we have noted, such a proposed service would divert clinical time from patients, and that would require even further financial compensation. Extra funding would also be needed to address the increased numbers of Review Panel hearings and court cases generated from this expanded mandate.

Given the bias against psychiatric treatment shown by CLAS and their potential conflicts of interest, it is recommended that if the proposed “independent rights advice” scheme is funded by government, that it not be operated by CLAS or an organization with similar views on these matters. Given the importance of understanding psychiatric patients’ need for treatment and support systems in providing advice, it is imperative that any outside agency staff be trained to address these needs, including communications issues.

4. RECOMMENDATION.

BCSS recommends that consideration of an additional rights advisor service be delayed until the work already being undertaken by the health Ministries and Health Authorities

³ Quoted with permission from a letter from Shirley Chan to the Hon. David Eby, MLA

to comply with the Ombudsperson's 20 recommendations has been completed. At that time a re-evaluation of the need for the proposed additional service could be undertaken.

June 6, 2019