Health Justice

September 9, 2024

Via online portal

Committee on the Elimination of Discrimination against Women (CEDAW) Human Rights Council and Treaty Mechanisms Division Office of the United Nations High Commissioner for Human Rights (OHCHR) Palais Wilson - 52, rue des Pâquis CH-1201 Geneva (Switzerland)

RE: NGO Submission re Canada's CEDAW Review

We write to provide submissions on Canada's implementation of CEDAW, with a specific focus on the issue of gender-based violence and discrimination during detention and involuntary psychiatric treatment in British Columbia (BC), Canada.

Who we are

Health Justice was established in 2020 to undertake research, education, and systemic advocacy to improve the laws and policies that govern coercive mental health and substance

use health treatment in BC. We bring together legal, human rights, lived experience, cultural, clinical, family, and community-based expertise to inform our work.

We work using a participatory engagement governance model that centres those most impacted by our work. In addition to our Board of Directors, our work is governed by the Lived Experience Experts Group (individuals with lived experience of involuntary treatment) and the Indigenous Leadership Group (individuals with expertise in the impacts of our work on First Nations, Métis, and Inuit people).

From 2021-2024, Health Justice carried out a project focused on documenting the gender-based human rights impacts experienced during detention and involuntary psychiatric treatment under BC's Mental Health Act.

To complete the project, which is the basis for this submission, we:

conducted interviews with people who have directly experienced involuntary treatment in BC;

carried out interjurisdictional mental health legislation comparisons;

completed domestic case law and human rights research, including international human rights research; and

undertook significant policy and literature research.

The project report will be released on September 18, 2024: https://www.healthjustice.ca/gender-equity

Background

Civil mental health laws fall under provincial jurisdiction in Canada's system of federalism, so each province and territory has its own distinct statutory approach. BC's Mental Health Act authorizes civil detention in facilities and involuntary psychiatric treatment in BC. It is a law that grants far-reaching state power over the people subject to it because it allows the health care system to detain a person in one of over 70 facilities throughout BC and to administer involuntary psychiatric treatment against a person's wishes while someone is in a facility or on leave in the community.

BC's Mental Health Act takes several approaches that are relevant to its gender-based impacts:

Breadth of authority: The Act authorizes detention and involuntary treatment if a doctor or a nurse practitioner believes that four criteria are met. In particular, they must believe that the person "requires care, supervision, and control in a facility or on extended leave to protect them or other people or to prevent their mental or physical health from substantial deterioration." In other words, the Act's scope of legal authorization for detention and involuntary treatment goes beyond situations related to safety or dangerousness. The scope includes situations where a doctor or nurse practitioner believes the individual's mental or physical health may worsen without intervention.

Police powers: The Act authorizes police to apprehend people and transport them to a doctor or nurse practitioner for examination if the police officer is satisfied from personal observations, or information received from third parties, that the person is acting in a manner likely to endanger that person's own safety or the safety of others, and is apparently a person with a mental disorder. These apprehensions typically occur via uniformed officers in marked police cars, with restraining devices like handcuffs.

Capacity is irrelevant: The Act does not require a person be assessed and found to be incapable of making their own health care treatment decisions in order to be treated involuntarily. Instead, the law states that any treatment authorized by the health care team is "deemed to be given with the consent of the patient." This approach is unique in Canada.

No right to supported or substitute decision-making: BC has a robust statutory scheme that governs health care consent decisions for adults. This law confirms that:

adults have a right to provide, refuse, or revoke consent to any health care even if it will result in death;

adults are presumed capable of making health care consent decisions until the contrary is demonstrated; and

if an adult is assessed as incapable of making a health care consent decision, a number of supported or substitute decision-making processes are available to them (including the right to make an advance directive outlining wishes regarding health care, or to select a representative to support with decision-making).

However, all of these rights are removed from involuntary patients for psychiatric treatment decisions under BC's Mental Health Act. As a result, even if a person has a legal plan in place regarding their psychiatric treatment, the Mental Health Act overrides any legal obligation of health care providers to respect those instruments.

Discipline is authorized: The Act expressly states that every involuntary patient under the Act "is, during detention, subject to the direction and discipline of the director and the members of the staff." The law authorizes the use of physical, mechanical, or chemical restraints without any criteria or limits, and solitarily confining patients in seclusion rooms in situations where there is no therapeutic value or safety risk.

No automatic, independent oversight: There is no automatic, independent oversight over the powers authorized under the Act. The only review mechanisms are tribunal or court processes that an involuntary patient must learn about and initiate themselves. Less than 3.4% of detentions are ever subject to such a review and it is well documented that health care providers involved in detention routinely fail to comply with legal requirements to notify patients about their legal rights.

Finally, in addition to the express legal provision in the Mental Health Act, its practical application is also relevant. The powers exercised under the Act are being used at rapidly growing rates in recent decades, and they do not impact all communities equally. In particular:

BC has seen dramatic growth in the use of detention and involuntary treatment under BC's Mental Health Act in recent years. Between 2010/11 and 2020/21, involuntary admissions increased by approximately 83%.

The fastest-growing group to experience detention and involuntary treatment is girls and young women. While accurate, reliable data is hard to come by, it appears that between 2008/09 and 2017/18, involuntary treatment of girls and young women between the ages of 10 and 19 increased by approximately 222%. Boys and young men in the same age group experienced an increase of 58% over the same period.

What we heard

While BC's Mental Health Act does not have any identified purposes, it is frequently used with the goal of protecting people from harm. However, our research illustrated that detention and involuntary treatment does not always protect people from gender-based violence and harms despite this objective. Further, we heard that:

The Mental Health Act itself, and related policies, authorize gender-based violence by (a) authorizing and failing to restrict the use of force and coercion and (b) failing to expressly protect human rights related to gender, sex, and gender expression, in addition to other identity characteristics;

The Mental Health Act does not adequately prevent gender-based violence or respond appropriately to it when it occurs; and

Involuntary treatment in BC does not adhere to principles of trauma- and violence- informed care and often results in discrimination that intersects with gender.

These findings reveal significant human rights violations that may be occurring during detention and involuntary treatment in BC. These range from failures to adhere to existing judicial guidance on constitutional compliance during state-authorized detention, to failures to accommodate intersectional gender-based needs, to failures to adhere to obligations set out in international human rights agreements.

Specific findings include:

Stereotypes about gender and sexuality are often relied upon when Mental Health Act powers are exercised by police or the health care system. This is particularly true in the context of situations of gender-based violence, when the Mental Health Act may be weaponized to further abuse. For example, abusers may threaten to or actually contact authorities to report a person is mentally unstable, and their response to abuse may be pathologized and presumed to show they require detention and involuntary treatment.

The Mental Health Act authorizes physical force in police apprehensions, seclusion, restraints, and the administration of involuntary treatment. There are no statutory safeguards or independent oversight mechanisms to ensure these authorities are not exercised in a discriminatory manner. For example, government data demonstrates that female involuntary patients have been administered electroconvulsive therapy at rates that are approximately two to three times higher than male patients. For women and gender-diverse people who have previously experienced gender-based violence, these actions can be especially traumatizing.

Detentions under the Mental Health Act often involve the forced removal of all personal clothing. This is usually done by facility staff and a group of security guards, who are typically men. There is nothing in the Mental Health Act to protect privacy and dignity during this process, and patients are not granted a choice of the gender of the person removing their clothing, even though the Supreme Court of Canada has provided clear guidance and limitations on clothing removal/strip searches in the criminal justice context. There is also nothing in the Mental Health Act clarifying when people can have access to their own clothing, including undergarments; access to clothing is often used as a method of gaining behavioral compliance.

We heard about widespread failure to respect gender identity and the withholding of gender-affirming treatments, clothing, and gear for gender-diverse people. For example, people who had been previously taking hormone replacement therapies were prohibited from accessing those treatments during detention with no consultation with their relevant specialists. In addition, patients are often housed in binary gendered double occupancy rooms during detention, and non-binary patients reported being housed in seclusion rooms because staff did not know which gender to house them with. BC's Mental Health Act has no protections for gender-specific accommodations or rights.

Many people reported being separated from their children during Mental Health Act apprehension and detention. This included the forced separation of new birth mothers and their newborn infants, the forced apprehension of children by child welfare authorities during a police apprehension, and ongoing restrictions on visits with children during detention. BC's Mental Health Act does not protect any right to contact with children and there is no consideration of post-natal needs. BC has no mother-baby psychiatric units that can house new birth mothers and infants together when it is safe to do so.

Unaddressed power imbalances between health care providers/security guards and patients heighten the risk of violence and harassment. One person reported ongoing sexual abuse by a health care provider during her detention. Her trauma responses were then pathologized as a mental health crisis and she was solitarily confined in a seclusion room.

The Mental Health Act does not mention or require any consideration of violence or mandate any minimum standards for violence prevention and response policies. Based on our research, detaining facilities do not have any policies or procedures in place to prevent or respond to gender-based violence despite that fact that sexual

harassment and violence occur during detention. When violence or harassment occurs, there is no independent reporting or investigation completed and detained victims may be prohibited from accessing victims support services until they are released.

The Mental Health Act does not contain any minimum facility standards or best practices for facility design. The physical design of psychiatric detaining facilities often exacerbates the risk of violence. Patients and clinicians alike reported that housing people two-to-a-room, shared bathrooms, and unlocked doors can exacerbate a lack of safety and forced patient interactions that can lead to gender-based harassment. People typically do not have access to any private space to seek refuge if they are being harassed or feel unsafe.

Finally, we heard about widespread failures to accommodate intersecting sex- and gender-based needs, including needs related to reproductive health care, menstrual products, as well as access to tools that people often use to protect themselves from gender-based violence and harassment, and access to cultural supports for Indigenous patients.

Solutions

BC can take significant action to work towards the progressive realization of CEDAW commitments. In particular, BC can establish an independent review of the Mental Health Act to reform the law to better respect the rights of women, girls, and gender diverse people. This review should be co-developed and led by people with lived and living experience and consider ways that BC can take steps and provide dedicated resources towards ensuring that BC's mental health law:

Recognize and protect the right to equal access to mental health services that respect a person's gender and sex, and the right to be free from discrimination on the basis of gender, gender identity, gender expression, and sex, as well as other intersecting aspects of identity.

This could include, but is not limited to:

Prohibiting the use of detention, involuntary treatment, seclusion, or restraint on the basis of someone's gender, sex, or gender expression (in addition to other protected characteristics);

Ensuring access to and continuity in gender-affirming treatment during detention;

Ensuring reproductive and sex-based health care needs are met during detention;

Requiring that facilities and service providers respect a person's gender identity and expression, including pronouns and chosen name;

Developing and ensuring access to a specialized province-wide perinatal psychiatric program for birth mothers and infants to remain together during crucial bonding periods, including specialized units and remote specialist support and private rooming policies for areas of the province without access to specialized units; and

Respecting and protecting the intersection of gender, sex, caregiving, and family status by facilitating access to children and other family members.

Implement provincial oversight over gender-based violence prevention and response in detaining facilities.

This could include, but is not limited to:

Requiring that all mental health services be provided in a trauma and violence-informed way that includes consideration of both individual and structural violence;

Developing a province-wide standard that sets out minimum requirements for facility-specific policies to prevent gender-based violence and respond to it when it occurs;

Employing provincial oversight to monitor the implementation and effectiveness of these standards and policies;

Creating a process for reporting incidents of violence that is independent from the facility and health authority; and

Collecting, monitoring, and publicly reporting data related to incidents of gender-based violence.

Reduce or eliminate the gender-based harm connected with the use of physical force, seclusion and restraint, clothing removal, and forced treatment.

This could include, but is not limited to:

Continuing the development of non-police community mental health crisis response services to replace police as the primary responders;

Progressively eliminating the use of seclusion and restraints during police apprehension, detention, and involuntary treatment, including using these practices as a last resort and only using the least restrictive measure;

Ensuring that any clothing removal occurs only as a last resort and meets at least the minimum standards for Charter compliance; and

Revisiting provincial guidelines that mandate the attendance of multiple security guards regardless of whether that level of non-health staff response is required or warranted.

Develop provincial minimum facility standards to support gender– and sex–related human rights and to reduce the risk of violence and conflict.

This could include, but is not limited to:

Developing provincial standards for psychiatric units, psychiatric emergency departments, and psychiatric assessment units that ensure access to single, private rooms;

Developing provincial standards for psychiatric units that ensure access to private washrooms;

Implementing emerging international guidance by co-developing, piloting, and evaluating “gender safe spaces where service users can spend time away from others whose presence can lead to them feeling unsafe, or to potential revictimization, harassment or abuse;” and

Establishing specialized units and telehealth support to meet the needs of birthing parents and infants and allow them to remain together during treatment.

Develop a human rights-based approach to accessing personal belongings, clothing, and communication technology.

This could include, but is not limited to:

Ensuring that access to personal belongings, clothing, and communication technology is restricted only as a last resort and is never restricted as a default practice or a behavioural modification mechanism;

Ensuring that all people experiencing detention and involuntary treatment have access to safe and appropriate clothing and gear based on their sex- and gender-based needs during hospitalization and upon discharge; and

Recognition that access to personal belongings, clothing, and communication technology can prevent violence, increase safety, and accommodate gender- and sex-based needs.

Develop and implement mandatory, province-wide training for all staff using powers authorized under the Mental Health Act. Training should be co-developed with people

with lived experience of involuntary treatment and evaluated and updated regularly.

This training should include, but is not limited to:

evidence-based de-escalation;

best practices in gender-affirming care;

preventing and responding to gender-based violence; and

non-discrimination and the duty to accommodate gender and sex-related needs.

Develop a robust, independent process for systemic monitoring and oversight of compliance with human rights during detention and involuntary treatment.

This could include, but is not limited to:

Authorizing proactive inspections for the monitoring, evaluating, and reporting on efforts to reduce gender- and sex-related harms connected to detention and involuntary treatment.

Establishing independent investigation of reported incidents of violence and discrimination against people experiencing detention and involuntary treatment; and

Developing a transparent process to monitor the gender- and sex-based impacts of detention and involuntary treatment, in addition to impacts related to other protected characteristics.

This submission may be published on the OHCHR website for CEDAW for public information purposes.

Yours truly, Kendra Milne, Executive Director Health Justice Society