THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

October 13, 2022

Via email: mcu@justice.gc.ca marco.mendicino@parl.gc.ca;

The Honourable David Lametti P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

The Honourable Marco Mendicino, P.C., M.P
Minister of Public Safety
269 Laurier Avenue West
Ottawa, ON K1A 0P8

Dear Ministers:

Re: Support for Senate Bill S-230, *Providing Alternatives to Isolation and Ensuring Oversight and Remedies in the Correctional System Act (Tona's Law)*

I am writing on behalf of the Canadian Bar Association Criminal Justice Section and its Committee on Imprisonment and Release (CBA Section) to express our support for Bill S-230, *Providing Alternatives to Isolation and Ensuring Oversight and Remedies in the Correctional System Act (Tona's Law),* which amends *the Corrections and Conditional Release Act* (CCRA). We urge the federal government to introduce a bill similar to Bill S-230 with the changes suggested below.

The CBA is a national association of 37,000 lawyers, notaries, law teachers and law students with a mandate to protect the rule of law, promote access to justice and equality, and seek improvements to the law and the administration of justice. The CBA Section includes lawyers specializing in the areas of criminal law from all parts of Canada, and a balance of Crown and defence lawyers. The Committee consists of lawyers specializing in prison law and sentencing.

CBA Section members have many clients who remain subject to long periods of isolation without meaningful human contact, despite changes to Canada's segregation regime with the 2019 adoption of Bill C-83*, An Act to amend the Corrections and Conditional Release Act and another Act*[1]and its Structured Intervention Units (SIU). Many clients with mental health disabilities languish in maximum security prisons where they are routinely subject to force and isolation, which creates and exacerbates trauma. The federal government has committed to ending the practice of solitary confinement, but further legislative changes are needed to make this a reality. Bill S-230, Senator Kim Pate's Private Members Bill, would go a long way to improving *Charter* oversight and compliance in Canada's prisons.

[1] Received Royal Assent on June 21, 2019: S.C.2019, c. 27.

We include and comment on Bill S-230 relevant amendments to the *CCRA* which do not require amendments to other statutes.

Oversight

> 2 Subsection 2(1) of the *Corrections and Conditional Release Act* is amended by adding the following in alphabetical order:
> *structured intervention unit* means
>
> a. any area of a penitentiary where a person is separated from the mainstream population and is required to spend less time outside their cell or engaging in activities than is a person in the mainstream population; or
>
> b. a penitentiary or any area in a penitentiary that is designated under section 31.

We agree it is critical to establish oversight over all isolation forms in prisons which are a variety of forms outside of SIUs. However, this amendment does not address the abusive use of lockdowns or restrictive movement routines which apply to the mainstream population. We are concerned that this will result in the mainstream population having their liberty restricted to levels comparable to SIU, rather than the legislative standard of "least restrictive measures".

We recommend further CCRA amendments that prohibit prolonged and indefinite lockdowns and restrictive movement routines that require holding people in their cells during waking hours, other than for count.

Transfers

We support Bill S-230's provisions about transfers of people with disabling mental health issues to community-based facilities. However, we propose amending the Bill to include facilities that are not hospitals. Not everyone with a disabling mental health issue is a suitable patient in a "hospital." Transfers should be tailored to facilities that meet the person's individual needs.

We suggest changing s. 20.02 to read:

> 29.02 If a mental health assessment or an assessment by a registered health care professional concludes that a person who is sentenced, transferred or committed to a penitentiary has disabling mental health issues, the Commissioner must authorize that person's transfer to a hospital, ~~including~~ or any mental health facility, in accordance with an agreement entered into under paragraph 16(1)(a) and any applicable regulations. <u>The person must be transferred only if they consent, unless provincial laws permit their involuntary medical treatment in the circumstances.</u>

This would require an additional amendment to the *Corrections and Conditional Release Act*:

> 29 The Commissioner may authorize the transfer of a person who is sentenced, transferred or committed to a penitentiary
>
> a. to a hospital, ~~including~~ <u>to</u> any mental health facility, or to a provincial correctional facility, in accordance with an agreement entered into under paragraph 16(1)(a) and any applicable regulations;
>
> b. within a penitentiary, from an area that has been assigned a security classification under section 29.1 to another area that has been assigned a security classification under that section, in accordance with the regulations made under paragraph 96(d), subject to section 28; or
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> c. to another penitentiary, in accordance with the regulations made under paragraph 96(d), subject to section 28.

Structured Intervention Units

Bill S-230 amends CCRA provisions on SIUs, requiring them to be reviewed by a superior court judge after 48 hours.

> 5 Section 33 of the Act is replaced by the following:
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> Duration
>
> 33 (1) Any confinement in a structured intervention unit is to end as soon as possible.
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> Duration
>
> (2) A person's confinement may not have a duration of more than 48 hours unless authorized by a superior court under subsection (3).
>
> Extended duration
>
> (3) On application by the Service, a superior court may extend the duration of a person's confinement in a structured intervention unit beyond 48 hours if, in the court's opinion, the extension is necessary for a purpose described in subsection 32(1).

We support faster and more meaningful external review of SIU placements. However, this amendment does not address our main concern with those placements – that a review body can order alternatives beyond SIU removal to the mainstream population of a maximum security prison. Since maximum security prisons often represent comparable isolation levels, an unsafe environment due to frequent uses of force by correctional officers and a culture that condones other forms of violence, a return to the mainstream population of a maximum security prison is not a meaningful remedy.

Whether a judge or an Independent External Decision Maker reviews SIUs, the CCRA should be amended to require compliance with SIU removal orders, and to allow external decision makers the authority to order appropriate alternatives to a return to maximum security, such as a community based hospital, community based assisted living, a Correctional Service Canada (CSC) Regional Treatment Centre, a medium or minimum security penitentiary, a healing lodge (with their consent), and other services or interventions.

External Decision Makers must also have the resources to complete reviews as soon as they are referred to them. They must have the resources to obtain independent psychiatric or psychological needs assessments and other expert advice when they believe this would assist them in making a decision or recommendation.

If Independent External Decision Makers are to continue reviewing SIU placements (as opposed to judges), legislation should include a right of appeal on the merits to a court within 24 hours.

Sentences through community organizations

We support Bill S-230 permitting disadvantaged or minority populations to serve sentences through community organizations under s. 81 and for release plans to be established under s. 84 with the support of community organizations. (underlining in original)

> Indigenous and Marginalized Populations
>
> 8 Section 79 of the Act is amended by adding the following in alphabetical order:
>
> *disadvantaged or minority population* includes any population that is or has been the subject of direct or indirect discrimination on the basis of race, national or ethnic

origin, colour, religion, age, sex, sexual orientation, gender identity or expression, or disability. (*population défavorisée ou en situation minoritaire*)

9 Section 81 of the Act is replaced by the following:

Agreements

81 (1) The Minister or a person authorized by the Minister may, for the purposes of providing correctional services, enter into an agreement with

a. an Indigenous organization;

b. an Indigenous governing body;

c. a community group or organization that serves a disadvantaged or minority population; or

d. any other entity that provides community-based support services.

Agreement re cost

(2) An agreement under subsection (1) may provide for payment by the Minister or a person authorized by the Minister in respect of the provision of those services.

Transfer of care and custody

(3) In accordance with any agreement entered into under subsection (1), the Commissioner may transfer a person who is committed to a penitentiary to the care and custody of an entity described in that subsection with the consent of that person and the entity.

Transfer of care and custody

(4) The Commissioner must take all reasonable steps to

a. identify entities described in subsection (1) for the purpose of entering into agreements; and

b. seek to transfer a person who is committed to a penitentiary to an entity with which such an agreement exists.

Transfer of care and custody

(5) The Commissioner must not deny the transfer of a person committed to a penitentiary to an entity with which an agreement exists if the person and the entity consent unless the transfer is, as determined by a court of competent jurisdiction, not to be in the interests of justice.

10 Section 84 of the Act is replaced by the following:

Release into community

84 (1) If a person committed to a penitentiary requests the support, on being released, of an entity referred to in subsection (2), the Service must provide that entity with an opportunity to propose a plan for the person's release and integration into the community in which the person is to be released.

Relevant entities

(2) The following are relevant entities for the purposes of subsection (1):

a. the community's Indigenous governing body, if applicable;

b. an Indigenous organization that is active in the community;

c. a community group or organization that serves a disadvantaged or minority population; or

d. any other entity that provides community-based support services.

Obligation

(3) The Service must

a. take all reasonable measures to inform persons committed to a penitentiary about the entities described in subsection (2) that may be relevant to them; and

b. give every entity that has proposed a plan for the release and integration of a person under subsection (1) adequate notice of that person's parole review or their statutory release date, as the case may be.

Written reasons

(4) If the Parole Board of Canada makes any decision that is inconsistent with a plan proposed by an entity for the release and integration of a person under subsection (1), it must provide written reasons for its decision.

The existing provisions related to Indigenous people serving sentences have been underutilized and ineffective, despite the role of incarceration in perpetuating Canada's colonial and genocidal legacy against Indigenous people, and Indigenous peoples' rights to self-determination. The failure of this provision to make any difference in the lives of Indigenous people serving sentences has been because of the lack of funds for alternatives to incarceration.

An expansion of these provisions to apply to other marginalized groups will also be hollow without a shift of resources from CSC to community-based services.

Cost of amendments

Although these amendments require investment in community-based alternatives to imprisonment, they also result in significant cost-savings and a corresponding reduction in the number of people incarcerated in prisons. We urge the federal government to reduce its investment in the punitive and abusive prison system while making significant investments in the community to offer alternatives to incarceration, which will also ultimately be to the benefit of public safety.

We would be happy to meet with you to discuss Bill S-230 at your convenience. We urge the federal government to introduce a bill similar to Bill S-230 with the changes we suggested.

Yours truly,

(*original letter signed by Julie Terrien for Kevin Westell and Jen Metcalfe)*

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Chair, Criminal Justice Section

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