THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

November 19, 2018

Via email: john.mckay@parl.gc.ca

The Honourable John McKay, M.P.
Chair, Standing Committee on Public Safety and National Security
House of Commons
Ottawa, Ontario K1A 0A6

Dear Mr. Chair:

Re: Bill C-83, *Corrections and Conditional Release Act amendments*

The Canadian Bar Association Criminal Justice Section and its Committee on Imprisonment and Release (CBA Section) appreciate the opportunity to comment on Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*. The CBA is a national association of over 36,000 lawyers, notaries, law students and academics, with a mandate that includes seeking improvement in the law and the administration of justice. The Criminal Justice Section represents specialists in criminal law from across Canada, and a balance of Crown and defence lawyers. The Committee on Imprisonment and Release is a committee of academics and lawyers specializing in prison law and sentencing.

The CBA Section is encouraged that the government is committed to ending the practice of solitary confinement in Canada. Bill C-83 signals a promising new direction in correctional law, with a focus on reintegration and meaningful human contact, greater independence of health care providers and enhanced consideration of the intergenerational trauma of Indigenous prisoners. Removing segregation as punishment for breaching institutional rules is a welcome amendment, and consistent with international legal standards.

We are concerned though about the degree of discretion in Bill C-83 for correctional administrators to deprive prisoners of basic rights and the lack of independent oversight to ensure that discretion is properly used. The Bill does not adequately safeguard the independence of prisoners' health services or ensure *Gladue* factors are used only as *mitigating* factors in administering Indigenous prisoners' sentences, with the goal of reducing current rates of over-incarceration of Indigenous people.

In the recent past, important correctional legislation has often been rushed through Parliament[1], without sufficient time for comment from non-governmental organizations, including the CBA. Given the significance of this Bill and the government's wish to signal a different direction, we urge that sufficient time be allowed for careful study. Parliamentary Committees in particular should allow time to hear from prison lawyers and other specialists in the field.

[1] See, as one important example, the CBA's submission on Bill C-10, *Safe Streets and Communities Act* (Ottawa: CBA, 2011), and our comments at 1 and 2 of that submission.

Least restrictive measures

The most significant change to the *Corrections and Conditional Release Act* (CCRA) in recent years was removal of the principle requiring *(d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders*.[2] Since then, lawyers practicing in this area have seen a shift in the culture of corrections toward "prisoner accountability", requiring that prisoners earn even basic rights and privileges.

Some entire institutions are now administered similar to a segregation unit. Many penitentiaries have experienced more frequent lockdowns, for extended periods of time, where prisoners are held alone in their cells for 23 or more hours per day. The United Nations terms this solitary confinement and considers it torture or cruel treatment for prisoners with mental disabilities or for anyone after 15 days.

The concept of least restrictive measures is constitutionally derived and mandated by the principle of "retained rights" endorsed by the Supreme Court of Canada.[3] The CBA Section urges that Bill C-83 be amended to re-establish the guiding principle of least restrictive measures, with additional provisions to ensure that prisoners are out of their cells and allowed to interact with others as much as possible and for the majority of each day. We have previously stressed the importance of this principle, including in our 2011 submission in response to Bill C-10, the *Safe Streets and Communities Act*:

> Given the waning commitment for respect for human rights within prisons, the principle should actually be enhanced. It is not difficult to combine this principle with the language proposed in such a way as to strengthen, rather than undermine the Rule of Law. The CBA Section recommends that section 4 of Bill C-10 be amended to read, "the Service uses the least restrictive measures that are consistent with the protection of society, staff members and offenders and are limited to only what is necessary and proportionate to purposes of the Act."[4]

Legislation is also required to protect prisoners' rights during lockdowns and to limit the use of lockdowns. Without these important safeguards, we caution that efforts to end the use of administrative and disciplinary segregation would be ineffective and meaningless.

Transfers and Classification of penitentiaries or areas

Under section 29 and 29.1 of the Bill, areas would be designated by different security levels within an institution, raising concerns about more beds being designated to higher security levels and more restrictive measures imposed on more prisoners. This would run contrary to the principle of using the least restrictive measures, which encourages prisoners to cascade to lower levels of security and eventually to conditional release in the community. It is inconsistent with an evidence-based approach to corrections[5], which can promote lower recidivism rates and better protection of public safety.

Structured Intervention Units

The CBA Section supports the stated purpose of the new "Structured Intervention Units" as including "an opportunity for meaningful human contact and an opportunity to participate in programs and to have services that respond to the inmate's specific needs". However, these sections are too vague and do not provide the necessary procedural safeguards to address any abuse of this new configuration of conditions of confinement.

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2 *Corrections and Conditional Release Act*, section 4, *Principles that guide Service*, from 2002-12-31 to 2012-06-12.

3 See Michael Jackson and Graham Stewart, *A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety* (2009) at XIV, 47-48. Available online.

4 *Supra*, note 1, at 34 on.

5 See, CBA Resolution, Advancing Public Safety.

Canada's correctional system has previously sought alternatives to segregation, formerly under the rubric of Special Handling Units and special housing units. Unfortunately this did not generate real reform of the conditions of confinement but rather what the Correctional Investigator has called, "segregation lite".[6] Overly restrictive conditions were only marginally improved for those in segregation units, without the procedural protections of the *CCRA,* the *Charter of Rights and Freedoms* and the duty to act fairly.

Structured Intervention Units do not address the constitutional deficiencies of the existing administrative segregation route regime.[7] The Bill allows discretion to keep a prisoner in a Structured Intervention Unit for an unlimited duration under section 33 (it is to end "as soon as possible"). The Bill also omits procedural fairness rights for prisoners under the regime. We recommend that the right to counsel, to an oral hearing, to make representations, to disclosure and to reasons be specified in the CCRA and in accompanying regulations.

While a guarantee of four hours out of cell per day, with two of those involving meaningful human contact, would be a vast improvement from current administrative segregation provisions, most prisoners would benefit from more than these minimum requirements. The United Nations considers confinement of prisoners for 22 hours or more per day without meaningful human contact as constituting solitary confinement. Section 36(1) of Bill C-83 would not take Structured Intervention Units from this definition, as it would still allow prisoners to be isolated (in or out of their cell) for 22 hours per day. Exceptions to the requirement for time out of cell and meaningful human contact under section 37 would again allow correctional administrators too much discretion.

We support the requirement to keep a record of refusals or denials of time out of cell and meaningful human contact, under section 37(2). This accountability is essential, and we recommend that the reasons for any refusal or denial also be included in that record. We further recommend that this record, as well as conditions of confinement in Structured Intervention Units, be reviewed by an independent external body.

Section 37.2 of the Bill should be consistent with the United Nations *Mandela Rules* to require health care providers to recommend that conditions of confinement be altered, or placement in a structured intervention unit be terminated if the prisoner's mental health is deteriorating due to isolation. Subsection 37.3(b) should be amended to require the warden to alter conditions or remove a prisoner from a Structured Intervention Unit if a health care professional so recommends. The Bill should require that prisoners removed from the units due to mental health deterioration be placed in a psychiatric hospital for assessment and treatment.

The CBA Section supports requiring a review of placement in Structured Intervention Units if a prisoner refuses or is denied time out of cell and meaningful human contact for five consecutive days or 15 days in a 30-day period. However, in our view, an independent decision-maker must do this review, and any reviews at the 30-day mark and subsequently. The independent decision-maker's decision should be binding.

We support requiring the warden to update prisoners' correctional plans to ensure they receive the most effective programs at the appropriate time, to prepare them for reintegration into the inmate population. The CBA Section urges the government to strengthen these provisions to ensure that prisoners with mental health needs get the services recommended as beneficial by independent medical professionals. Most prisoners suffer from past trauma, and approximately 80% suffer from

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6 Correctional Investigator (CI) Report, 2011-2012.

7 See, *BC Civil Liberties Association v AG Canada*, 2018 BCSC 62, where Justice Peter Leask addressed issues of indeterminacy of confinement and the lack of independent adjudication in reviewing placement.

addictions.[8] The Bill should require that prisoners with these diagnoses be offered regular independent and confidential counselling services to avoid their deterioration in prison, and the subsequent perceived need for solitary confinement. The high rates of self-harm and suicide that accompany solitary confinement stem from an earlier failure to identify and treat prisoners appropriately for past trauma and addiction.

Body scan searches /Detention in dry cell

The CBA Section supports the use of body scanners in sections 48.1 and 51 as an alternative to strip searches and dry cells. However, Bill C-83 provides for body scans in addition to strip searches and dry cells, not as an alternative. It should be clear that body scans are the preferred option, when available.

Health care

Bill C-83 includes several positive health care obligations in sections 86.1-89.1. We support the legislative requirement that CSC recognize the professional autonomy and clinical independence of health care professionals. However, these sections are too vague and do not establish enforceable standards.

In our view, providing health care independently of CSC would ensure that health care providers can practice without undue influence. We recommend that the CCRA be amended to require health care to be provided independently through a partnership between the federal, provincial and territorial Ministries of Health.

The Correctional Investigator has called for "full clinical and professional independence"[9] in accordance with the *Mandela Rules*, which require clinical decisions to be taken only by health care professionals without the influence or interference of prison administrators. We recommend that the Bill be amended to include these safeguards in the CCRA.

Bill C-83 proposes that health care can be provided by people under the supervision of registered health care providers. The CBA Section recommends that the Bill be amended to clarify that this cannot include correctional staff.

Legislation is also needed to ensure confidentiality between health care providers and prisoner patients so prisoners can trust their health care providers. There is a great (unmet) need for psychological counseling for prisoners to be able to understand the root of their offending so they can be rehabilitated. Effective counseling requires a trusting relationship between therapist and the patient. Trust cannot be established without a guarantee of confidentiality, except in limited and prescribed circumstances.

Indigenous prisoners

The CBA Section supports the inclusion of *Gladue* factors to be considered in the CCRA to codify existing case law. However, the Bill should also require that the intergenerational trauma experienced by Indigenous people be considered as a *mitigating factor only* in decisions regarding liberty rights. *Gladue* factors are too often used against Indigenous prisoners in correctional decision-making. Stronger provisions will be required to reduce the number of Indigenous prisoners in custody and at higher security levels, in keeping with the recommendations of the Truth and Reconciliation Commission.

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8 See, CI, (2011) Mental Health and Corrections.

9 Annual Report of the Office of the CI, 2016-2017.

Bill C-83 does not address the under-use of sections 81 and 84, which has been highlighted by the Correctional Investigator's 2012 report *Spirit Matters* and in Annual Reports. The new language in section 84 of "Indigenous governing body" may result in further restrictions on the use of section 84 releases.

More should be done to support Indigenous communities' self-determination by ensuring sufficient community and mental health resources to avoid Indigenous people becoming involved in the justice system in the first place.

Patient advocacy services and legal aid

The CBA Section supports establishing patient advocacy services, but again the Bill should clarify that these advocates must be independent from CSC. In addition to health care advocates, there is a great need for legal aid services to prisoners across Canada.

For years there has been wide variation in the levels of legal aid for prisoners in each region of Canada. None is adequate to meet the needs of prisoners. In some regions, such as the Prairies and Maritimes, there is almost no legal aid for prison issues.

The CBA Section recommends that the federal government ensure independent legal aid is available to all prisoners under the CCRA, and earmark new legal aid funding to the provinces and territories for this purpose through the Canada Social Transfer. Legal aid for prisoners adds an independent, objective perspective to ensure better chances of peaceful resolution of disputes between parties who must often continue to interact with each other on a daily basis for many matters.

Prisoner pay

Bill C-83 does not address the urgent need to legislate fair pay rates for prisoners. Prisoners must pay for necessary items such as food to supplement what is provided by CSC, telephone calls to families and community supports, and other essentials like pain relievers. Pay rates were established based on the cost of living, minus room and board, in 1981 and have not been increased since. In 2013, room and board was deducted from prisoner pay[10] resulting in pay rates so low that prisoners must choose between going hungry or sending a birthday card to a child.[11] This adds significantly to the stress of prisoners, and puts safety at risk.

Thank you for considering the views of the CBA Section.

Yours truly,

(original letter signed by Gaylene Schellenberg for Ian Carter)

Ian Carter
Chair, Criminal Justice Section

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10 See, CSC Commissioner's Directive (2014), available online. See also, Federal inmates go on strike to protest pay cuts.

11 See, Jarrod Shook and Bridget McInnis, "More Stormy Weather or Sunny Ways? A Forecast for Change by Prisoners of the Canadian Carceral State" 26:1,2 (2017) Journal of Prisoners on Prisons at 289.