Prisoners' Legal Services
A Project of the West Coast Prison Justice Society

May 1, 2019

VIA EMAIL

Senate of Canada
Ottawa ON
K1A 0A4

Dear Honourable Committee Members:

RE: Bill C-83

I am the executive director of Prisoners' Legal Services, a legal aid clinic for prisoners in British Columbia. I write to provide the Senate Committee with the submissions made to the Standing Committee on Public Safety and National Security on Bill C-83 by Prisoners' Legal Services on November 19, 2018, which are attached, as well as the following submissions that address the amendments that have been made to the Bill since that date.

While we are pleased with the reintroduction of least restrictive measures in the amended Bill, we remain concerned that the Bill will still allow solitary confinement of prisoners, which the United Nations and the Ontario Court of Appeal consider to be in violation of the right to be free from cruel treatment, and the BC Supreme Court considers to be a violation of liberty and equality rights.

Increased securitization of prisons

On January 17, 2019 I attended a stakeholder roundtable regarding Bill C-83 hosted by Correctional Service Canada (CSC) Commissioner, Anne Kelly. During the roundtable there was discussion of the need for additional security staff in order to facilitate meaningful human contact without a barrier, and additional interventions and movements under the Bill. Prisoners' Legal Services is concerned that much of the $448 million that will be invested in Structured Intervention Units (SIUs) over the first six years will go to security staff.

We are concerned that the new legislation is being used to further securitize prisons, which will result in more restrictive measures taken against all prisoners in general. For prisoners in SIUs,

having correctional officers present for interactions with mental health care professionals negates meaningful human contact and violates the confidentiality of mental health services. Investments should be made to increase the role of mental health care professionals working with prisoners to address trauma and make people well.

Many of our clients are waiting in prison after being granted conditional release to a halfway house, but there are no beds available for them in the community. Investments should also be made to community corrections to allow prisoners to be successful in their community reintegration.

Solitary confinement (SIUs)

The UN defines solitary confinement as isolation for 22 or more hours per day without meaningful human contact. Bill C-83 requires prisoners in SIUs to receive only two hours of meaningful human contact each day. The amendments made to Bill C-83 have not taken SIUs out of the UN definition of solitary confinement, which according to the UN, constitutes torture or cruel treatment for those with mental disabilities or who have been in for more than 15 days.

Recent Canadian case law confirms that CSC's use of solitary confinement violates ss 7, 12 and 15 of the *Charter*.[1] Nothing in Bill C-83 would ensure that prisoners will not continue to be held in indefinite and prolonged solitary confinement and would therefore not withstand a *Charter* challenge.

Under the January 7, 2019 order of the BC Court of Appeal in *BC Civil Liberties Association v Canada*,[2] CSC is required to allow prisoners the right to legal representation at in-person segregation review hearings. This includes fifth working day reviews. This is a far greater procedural fairness protection that the review procedures offered to prisoners in SIUs through the amended Bill C-83.

Under Bill C-83, after the initial fifth working day determination, a warden is required to review an SIU placement only after 30 days, unless a health care professional *voluntarily* recommends removal for health reasons, or if the prisoner is denied or refuses meaningful human contact or time out of cell for five consecutive days or 15 days out of 30. Although the warden is required to meet with the prisoner, there is no oral hearing and no right to counsel as part of this review.

A second internal review is conducted by the Commissioner after 30 days and then every 60 days. This is a paper review. There is no oral hearing or right to counsel for these reviews.

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[1] *BC Civil Liberties Association v Canada*, 2018 BCSC 62; *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243; *Brazeau v Canada*, 2019 ONSC 1888.
[2] *BC Civil Liberties Association v Canada*, 2019 BCCA 5.

It would be a serious violation of *Charter* rights if a prisoner were to be maintained in solitary confinement for 30 or 60 days, with no limits on how many days they may be kept in an SIU.

If the warden continues the SIU placement after a removal recommendation by a health professional, a second review by another health professional is conducted, who provides advice to a committee established by the Commissioner. The committee's review is a paper review. There is no requirement to meet with the prisoner, no oral hearing and no right to counsel.

The most recent amendment to the Bill includes provisions for review by an external decision maker. This external decision maker is not truly independent – they are appointed by the Minister of Public Safety. A truly external review would be by an office of the legislature. Again, this is a file review. There is no requirement for an in-person meeting, no oral hearing and no right to counsel.

The external decision maker reviews placements in SIU when the prisoner has been there for 90 consecutive days. This far surpasses the UN and case law limits of 15 days in solitary confinement.

In *Canadian Civil Liberties v Canada*, 2019 ONCA 243, the Ontario Court of Appeal found that "prolonged administrative segregation of any inmate, which is segregation for more than 15 consecutive days, does not survive constitutional scrutiny under s. 12." This finding is based on the facts that demonstrate that "prolonged administrative segregation causes foreseeable and expected harm which may be permanent and which cannot be detected through monitoring until it has already occurred. Legislative safeguards are inadequate to avoid the risk of harm. In my view, this outrages standards of decency and amounts to cruel and unusual treatment."

Under Bill C-83, the external decision maker also reviews decisions of the committee, established by the Commissioner, not to follow recommendations of health care to remove the prisoner from SIU or alter their conditions of confinement. There are no time limits on when these reviews must take place. They are to be done "as soon as practicable".

The external decision maker also reviews a placement in SIUs if the prisoner has not received or accepted out of cell time or meaningful human contact for five consecutive days or 15 days in 30. In this case, the external decision maker can only remove the prisoner from the SIU if CSC fails to demonstrate that it has *offered* meaningful human contact and time out of cell, regardless of the reasons a prisoner may decline. For instance, if a prisoner is so depressed that they refuse meaningful human contact, the Bill seems to turn a blind eye to this underlying issue and allows the person to be isolated indefinitely, placing them at risk of further psychological harm and suicide.

The grounds for all levels of review are that the decision maker believe on reasonable grounds that allowing reintegration would jeopardize the safety or security of the penitentiary or interfere with an investigation. These are the same criteria for placement in administrative segregation under the current s. 31(3) of the *Corrections and Conditional Release Act* (CCRA)

that have been found unconstitutional. In *Canadian Civil Liberties Association v Canada*, the Ontario Court of Appeal found that s. 31 of the CCRA can allow a prisoner to be held in segregation for more than 15 consecutive days, and therefore it violates s. 12 of the *Charter* as it allows prisoners to be subjected to "grossly disproportionate treatment".

The decision to maintain or remove someone from an SIU is based on the prisoner's correctional plan, the appropriateness of their confinement in the prison, the appropriateness of their security classification and any other factors considered relevant. The health of the prisoner or the harm caused by isolation is not listed as a factor in making the determination.

This would also violate the prisoner's s. 12 rights under the *Charter*. In *Canadian Civil Liberties Association v Canada*, the Ontario Court of Appeal found:

> Under s. 87(a) the institutional head need only "consider" the inmate's health in deciding whether to place an inmate in, or remove an inmate from, administrative segregation. The word "consider" is significant. It implies that the inmate's health is merely one consideration among others. It is not the paramount consideration. By structuring the institutional head's discretion in this way, s. 87(a) authorizes prioritizing other considerations over the inmate's health, so long as the inmate's health forms part of the decision-making process. Thus, even when properly applied, s. 87(a) does not protect against the risk of an inmate suffering cruel and unusual treatment. (At ¶ 105.)

PLS is concerned that without stronger safeguards of prisoners' procedural fairness rights, and protections against torture or cruel treatment, CSC will continue to violate these fundamental rights of prisoners.

Even under the BC Court of Appeal's January 7, 2019 order to provide enhanced access to legal counsel for representation at segregation review hearings, PLS is facing considerable obstructionism by CSC in facilitating access to counsel. Following the order, Kent Institution cancelled PLS' bi-monthly legal clinics in its segregation unit. These clinics are essential to ensure that segregated prisoners are aware of our services and are able to access them. Kent Institution also refuses to provide segregated prisoners consent forms with segregation review documents. This would allow PLS to receive documents in time to appoint counsel for fifth working day segregation review hearings. Instead, Kent requires prisoners to:

1) put in a request form to phone PLS which Kent says is normally facilitated the next day but can take longer;
2) call PLS, during which call we tell the client to put in a request form to sign a consent form (PLS then contacts the institution to advise that our client is requesting Kent to share their segregation documents with us);
3) put in a request form for a consent form;
4) sign the consent form, which usually takes two to three days (PLS usually receives the documents two to three additional days after the client signs the form);

5) put in a request form to call PLS (which is facilitated one or more business days later); and
6) phone PLS after we have received and reviewed their documents for legal advice or to learn if PLS is appointing a lawyer for their review hearing.

It is very unlikely that this can happen before the fifth working day review.

We also have many reports of prisoners being denied legal calls during our business hours and being denied request forms. This obstructionism makes it very difficult for prisoners to exercise their right to counsel at segregation review hearings.

Bill C-83 *reduces* the level of procedural fairness that prisoners are entitled to. Legislation is needed to ensure that prisoners' rights to procedural fairness are protected and that they are not held in conditions of isolation that constitute torture or cruel treatment.

We call for the abolition of solitary confinement in any circumstance. There is no reason why any human should be subjected to psychologically harmful isolation while under the care of the state.

***Gladue* factors**

The amended Bill C-83 includes a provision that *Gladue* factors are not to be taken into consideration for decisions respecting the *assessment of risk* posed by Indigenous inmates (s. 79.1(2)). This provision will not prohibit Indigenous prisoners from being classified to higher levels of security based on *Gladue* factors contributing to a higher institutional adjustment rating under s. 18 of the *Corrections and Conditional Release Regulations*. An assessment of institutional adjustment problematically does not consider risk in the assessment under the current legislation or policy.

New legislation should be clear that *Gladue* factors must not be used to increase the security classification of a prisoner, and should be considered only as a mitigating factor in decisions regarding liberty rights. Legislation should require CSC to use *Gladue* factors to identify and address the needs of Indigenous prisoners.

Thank you for your consideration of these and our attached submissions.

Yours truly,

PRISONERS' LEGAL SERVICES

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