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Standing Senate Committee on Legal and Constitutional Affairs
Ottawa ON
K1A 0A4

Dear Honourable Committee Members,

Re: Bill S-230 - An Act to amend the *Corrections and Conditional Release Act*

I am the president of the Canadian Prison Law Association ("CPLA"), an organization of lawyers, academics, and other professionals who work on behalf of people in prison, and who seek to protect and promote the constitutional rights, interests and privileges of people in prison.

The CPLA strongly supports Bill S-230, which responds to several pressing problems in the federal correctional system, including overreliance on segregation, lack of support for prisoners with mental health conditions, overincarceration of people from marginalized populations, and the absence of meaningful judicial remedies for prisoners.

Segregation is a practice that can be incredibly damaging to prisoners' wellbeing, and Bill S-230 provides a layer of protection to prisoners held in restrictive conditions outside of Structured Intervention Units. People with mental health conditions and individuals from marginalized populations are overrepresented in the correctional system, and Bill S-230 gives more flexibility to respond to the unique needs of these groups and to facilitate their rehabilitation. The rule of law has not taken hold within prison walls, and the remedy created by Bill S-230 is an important step towards achieving the rule of law and creating a correctional system that takes prisoners' rights seriously.

Again, the CPLA strongly supports Bill S-230 in its current form, and we offer the following comments and suggestions for the Committee's consideration.

1. Protection of people held in restrictive settings

Section 2 states:

> Subsection 2(1) of the *Corrections and Conditional Release Act* is amended by adding the following in alphabetical order:
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> *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
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> (b) a penitentiary or any area in a penitentiary that is designated under section 31.

We agree that it is critically important to establish oversight over all forms of isolation in prison, which is happening in a variety of forms outside of designated structured intervention units. We welcome the broadening of the definition of structured intervention unit, which helps protect people who are held in highly restrictive conditions outside of a structured intervention unit.

Following successful constitutional challenges, Parliament replaced the legislation on administrative segregation.[1] The existing legislation provides rights to people who are held in structured intervention units (e.g. a minimum of four hours per day outside of their cell and at least two hours of interaction with others), imposes obligations on Correctional Service Canada (e.g. to provide ongoing monitoring of prisoners' health), and requires that placement in a structured intervention unit be regularly reviewed.[2] However, under the existing legislation, people who are held under highly restrictive conditions outside of a designated structured intervention unit are not entitled to the same protections. Isolation can be extremely damaging to mental and physical wellbeing, and it is therefore important that anyone who is held in a highly restrictive setting is entitled to the same protections.

Section (a) provides protection for people who are isolated from the mainstream population and receive less time out of their cells than the mainstream population. This amendment does not address the abusive use of lockdowns or restrictive movement routines that apply to the mainstream population. Correctional Service Canada regularly uses lockdowns and restrictive movements that result in people being kept in their cells with minimal human contact and access to programming, school, religious and spiritual services, visits, etc. Lockdowns and restrictive movements are serious infringements of prisoners' residual liberty interests. We are concerned

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[1] See *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228; *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243.
[2] *Corrections and Conditional Release Act*, S.C. 1992, c. 20, ss 32-37 ("*CCRA*").

that providing a layer of protection only to those who suffer more restrictive conditions relative to the mainstream population can incentivize maintaining austere conditions for the mainstream population, rather than abiding by the legislative standard of using "the least restrictive measures."[3]

Accordingly, the CPLA submits that the following section should be added:

> (c) any type of custody where an inmate is held in highly restrictive conditions for 22 to 24 hours per day, does not receive a minimum of two hours of meaningful social interaction each day, or does not receive a minimum of one hour of outdoor activity that includes the ability to touch earth and plants and to see sky.

This would ensure that anyone being held under highly restrictive conditions is entitled to certain protections, regardless of whether they are placed in a designated structured intervention unit or elsewhere.

2. Access to community-based mental health services

Section 4 of Bill S-230 states:

> 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 any mental health facility, in accordance with an agreement entered into under paragraph 16(1)(a) and any applicable regulations.

We agree that there are many people in prison with mental health conditions who should not be in a punitive prison environment, and we would welcome this amendment and support a broad application of section 29.02.

That said, there is no definition of "disabling mental health issues", and it cannot be said that everyone with a mental health condition should be detained in a hospital. Transferring people with non-psychotic mental health conditions to a hospital does not align with community mental health perspectives, which often emphasize non-institutional and non-coercive options. The CPLA submits that this section of Bill S-230 should be expanded to include community-based mental health services, such as assisted living. This would allow people with a broader range of mental health disabilities to be placed in whichever environment would be most appropriate for them.

While the CPLA appreciates that section 29.02 is trying to provide more appropriate alternatives to incarceration for people with mental health conditions, the more fundamental problem is the way that prisons create and exacerbate mental health issues. Imprisonment isolates people from their friends, families, and communities, and people are often exposed to cruel, degrading, and unhygienic conditions. On top of this, many people experience traumatic events in custody: uses

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[3] *CCRA*, s 4(c).

of force, segregation, dry celling, strip searches, etc. All of this can exacerbate the mental health issues that people already have when they enter custody, and it can also create new mental health issues like post-traumatic stress disorder. More needs to be done to mitigate the negative impact of incarceration on mental health. Some steps that should be taken include providing independent health services, not having correctional officers regularly in therapeutic units, and expanding mental health services, which should be provided by health authorities independent of CSC.

We recommend modifying the amendment as follows:

> 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.

3. Reviews of structured intervention unit placements

Section 5 of Bill S-230 states:

> 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).

The CPLA supports faster and more meaningful external review of structured intervention unit placements. Following successful constitutional challenges, the legislation regarding administrative segregation was replaced with a new system that introduced review by Independent External Decision Makers ("IEDMs") after about 60 days. Given how damaging isolation can be for physical and mental wellbeing, people in SIU need access to much more timely review than this. Moreover, judicial oversight is needed, not just review by an IEDM. Even with IEDMs, there are still systemic disparities in structured intervention unit placements, and 10% of stays amount

to torture and 28% as solitary confinement. [4] In addition, prisons often obstruct the right to counsel by refusing to facilitate calls with counsel and not giving lawyers documents and the date and time of hearings. Greater judicial oversight is needed to protect the rights of people in SIU and ensure that Correctional Service Canada is abiding by the legislative standard of using the least restrictive measures.

That said, this provision does not address the main concern with structured intervention unit placements: the inability to order a remedy beyond removal from the structured intervention unit to the mainstream population of a maximum security prison. With maximum security prisons often representing comparable levels of isolation, and 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. A review body must be able to order alternatives beyond removal from a structured intervention unit to the mainstream population of a maximum security prison, such as a review of security classification so that the person could have access to a lower level of security, to a community-based mental health facility, or to a healing lodge with the healing lodge's support.

Decision makers must also have the ability 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.

4. Alternative correctional services for prisoners who are Indigenous or from disadvantaged or minority populations

Section 8 of Bill S-230 reads:

> 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;

[4] See Jane B Sprott, Anthony N Doob, & Adelina Iftene, "Do Independent Decision Makers Ensure that 'An Inmate's Confinement in a Structured Intervention Unit Is to End as Soon as Possible'?" (May 10, 2021), 9, online: https://www.crimsl.utoronto.ca/sites/www.crimsl.utoronto.ca/files/SIU_Report4-IEDM%28SprottDoobIftene%2910May21.pdf.

(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.

…

The CPLA supports these amendments that would provide alternative correctional services for marginalized populations. People in prison from marginalized populations suffer distinct barriers in traditional carceral settings and have distinct needs. This amendment is consistent with the principle that "correctional policies, programs and practices respect gender, ethnic, cultural, religious and linguistic differences, sexual orientation and gender identity and expression, and are responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring mental health care and other groups."[5]

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 peoples, and Indigenous peoples' rights to self-determination. The failure of this provision to make any difference in the lives of Indigenous peoples serving sentences has been in Canada's failure to fund alternatives to incarceration.

If the amendments are made to expand these provisions to apply to other marginalized groups, they will also be hollow without a shift of resources from Correctional Service Canada to community-based services.

Moreover, Correctional Service Canada should respect the self-determination of Indigenous peoples by providing equitable funding for section 81 arrangements, and by ensuring that existing CSC operated healing lodges are transferred to the authority of Indigenous bodies.

5. Sentence reductions for unfairness in the administration of a sentence

Section 11 of the Bill S-230 states:

198.1 (1) A person sentenced to a period of incarceration or parole ineligibility may apply to the court that imposed the sentence for an order reducing that period as the court considers appropriate and just in the circumstances if, in the court's opinion, a decision, recommendation, act or omission of the Commissioner or any person under the control and management of — or performing services for or on behalf of — the Commissioner that affected the person was

[5] *CCRA*, s 4(g).

(a) contrary to law or an established policy;
(b) unreasonable, unjust, oppressive or improperly discriminatory;
(c) in accordance with a rule of law or a provision of any Act or a practice or policy that is or may be unreasonable, unjust, oppressive or improperly discriminatory;
(d) based wholly or partly on a mistake of law or fact; or
(e) an exercise of a discretionary power

(i) for an improper purpose,
(ii) on irrelevant grounds,
(iii) on the taking into account of irrelevant considerations, or
(iv) without reasons having been given.

Application for reduction of sentence

(2) An application under subsection (1) must be made

(a) no later than 60 days after the later of the day on which
(i) the decision, recommendation, act or omission occurred,
(ii) the Service provided to the person who is sentenced to a period of incarceration or parole ineligibility a report or other document related to the decision, recommendation, act or omission, and
(iii) the person was informed of

(A) a decision by the Correctional Investigator under section 175,
(B) a conclusion by the Correctional Investigator under section 176, or
(C) an opinion indicated by the Correctional Investigator under section 178,

in relation to the decision, recommendation, act or omission; or

(b) within any other period of time that the court may establish, at its discretion and at any time, if that period is longer than the period referred to in paragraph (a).

We strongly support this amendment that would allow people to apply to the court for a reduction in their sentence where Correctional Service Canada has failed to appropriately administer their sentence. The lack of an effective remedy for violations of rights has been a long-standing issue. About 27 years ago, Justice Arbour recommended that people in prison who had experienced illegalities, gross mismanagement, or unfairness in the administration of their sentence be able to ask the court for a sentence reduction.[6] This amendment is an important step for ensuring that rights are protected and that the rule of law runs within prison walls.

To the extent that coordinating amendments may be required to allow sentence reductions, those coordinating amendments should be done. There must a remedy for violations of rights, and

[6] The Honourable Louise Arbour, Commission of Inquiry Into Certain Events at The Prison for Women in Kingston (Ottawa: Public Works and Government Services Canada, 1996), pp 183-185.

sentence reductions are the only meaningful way to remedy issues with the administration of a person's sentence. It may take effort to complete any necessary coordinating amendments, but this should not be a reason to deny a remedy that is needed to ensure that officials respect the rights of people in prison.

The CPLA is, however, concerned about the 60-day time limit. It is inappropriate to limit claims in this way. For example, people might fear retaliation, they may be experiencing trauma and unable to proceed with a claim within the time frame or have difficulty finding counsel. Moreover, while some claims may involve a single decision, the 60-day limit is unworkable when a claim involves an accumulation of issues over months or even years. In many cases, specific decisions or incidents might not meet the criteria of section 198.1 and warrant a sentence reduction, but cumulatively they would. There is no need for a time limit, and a court should be free to consider all the issues that have occurred in a person's sentence.

Thank you for considering these submissions.

Sincerely,

Tom Engel
President of the Canadian Prison Law Association