PRISONERS' LEGAL SERVICES OF MASSACHUSETTS
50 Federal Street, 4th Floor • Boston, MA 02110
www.plsma.org
fb.me/prisonerslegalservices
@PLSMA
Main: 617-482-2773
Fax: 617-451-6383
State prisoner speed dial: 9004 or 9005 • County prisoner collect calls: 617-482-4124

Testimony of Prisoners' Legal Services regarding S.2820
An Act to reform police standards and shift resources to build a more equitable, fair and just commonwealth that values Black lives and communities of color

We write today with concerns about this bill moving forward as it is currently written and to urge you to make significant improvements. Before outlining what we believe those improvements should include, it is worth taking a moment to point out that the only reason we are having this debate right now in the midst of the worst global pandemic the planet has seen in a century, is because those who carry the pain of generations of institutional violence and those who stand with them took to the streets and ignited an international movement to prioritize the end to structural racism and the institutional violence it sustains. To advance legislation that largely fails to value those voices enough to have them at the table will have lasting and detrimental effects for the legislature and the work I believe it truly intends to do. Those who most understand and who have witnessed and endured the practices lawmakers aim to address are best positioned to ensure that the legislation is not another failed effort that will require decades of fixing, but a true beginning with a solid foundation for an ongoing commitment to eradicate institutional racism from the Commonwealth.

Most striking to PLS is that policing behind the wall is completely and intentionally left out of the policing provisions of S2820. Prisons and jails are undoubtedly some of the most archaic and damaging examples of institutions that perpetuate racial inequality. The Massachusetts population is approximately 27% people of color, and yet the DOC population is 57% people of color. 11.4% of African American children have an incarcerated parent, whereas only 1.8% of white children have a parent who is incarcerated. Our policing systems lead directly to black and brown people being disproportionately imprisoned and our communities and families bearing the brunt of the traumatic impacts of incarceration.

Further, the expanse and frequency of violence in this system is a public health crisis in and of itself. To draft a bill that says those in our prisons and jails, 70% of whom were victims of trauma before they were incarcerated, are not deserving of protection from state violence is to truly misunderstand why policing is at the heart of the racial justice conversation right now. The fact that law enforcement is allowed to act with impunity at the expense of Black and Brown lives is why we are having this moment. Behind the prison walls, there is far less transparency, a dehumanizing culture, and little accountability. We simply cannot be serious about a racial justice policing bill if we leave out prisons and jails.

With that said, our concerns with S2820 stem from three overarching problems: (1) a lack of community engagement in the process; (2) a failure to protect incarcerate people and eliminate unnecessary barriers to reentry; and (3) a need for strengthening the policing provisions.

I. A lack of community engagement in the process.

We would encourage the Legislature to engage with leadership from impacted communities who can lead in the visioning for change and the drafting or amending of specific provisions. Having those who have been at the center of this movement at the table will give the bill credibility and is more likely to result in meaningful change. We understand that this is a process and a beginning, but it must be inclusive and it must center those whose vision and voices have brought tens of thousands of people out to protest for months.

II. A failure to protect those incarcerated

A) Use of Force

The policing provisions must apply to all public safety officers, including correctional officers. Correctional staff are currently excluded from the definition of "Law enforcement officer" or "officer" in this bill. The Department of Correction and the Sheriff's Departments are all widely considered to be law enforcement agencies with the attendant legal rights and responsibilities. There is simply no reason to exclude them from this bill, especially if we are serious about racial justice.

Correctional staff use force against incarcerated people on a regular basis. PLS receives over 200 complaints of excessive use of force by officers against prisoners every year. **This year, however, has undoubtedly been the worst year for prison brutality our office has seen since the 1970s.** In January and February of 2020, correctional staff engaged in wide-scale and orchestrated brutality against incarcerated people at Souza Baranowski Correctional Center. In a period of approximately four-six weeks, PLS received 126 complaints of use of excessive force by correctional staff, and 74 complaints related to other extreme conditions of confinement. PLS staff members interviewed close to 100 prisoners about their experiences. Incarcerated people provided consistent reports of assaults by correctional staff with little or no provocation, typically by the Tactical Team and almost always while individuals were locked in their cells or physically restrained. They described being shot with pepper balls and taser guns, sprayed with chemical agents, bitten by dogs, being physically beaten, and being forced to kneel on the ground for hours with no relief. The violence was racialized, with white officers targeting prisoners of color and using racial slurs against them. There has been no accountability for these systematic assaults.

Brutality is not just a state prison phenomenon. Excessive force, often causing permanent damage, happens at the hands of correctional officers in county jails as well. In July of 2019 PLS did a public records request to obtain use of force numbers from the County Sheriffs' Departments for the previous year, and these were the results:

Agency	# of uses of force	# of uses of force with Chemical agents	# of uses of force with restraint chair	# of uses of force with kinetic/ less than lethal weapons	# of uses of force with K9
Barnstable	74	18	43	0	0
Berkshire	220	14	18	0	0
Bristol	Denied All				

	Data				
Dukes	5	0	0	0	0
Essex	938	28	91 (10 4-5 pt restraints)	0	0
Franklin	30	23	0	2	0
Hampden	27	75-89	46	0	0
Hampshire	38	10	2	0	0
Middlesex	No response				
Nantucket	0	0	0	0	0
Norfolk	51	7	21	0	1
Plymouth	83	37	6	No data	No data
Suffolk	Nashua St. Jail: 255 South Bay: 225	Nashua St. Jail: 7 South Bay: 6	Nashua St. Jail: 21 South Bay: 44	No Data	Nashua St. Jail: 1 South Bay: No Data
Worcester	220	45	"Humane restraints" -- 40	6	No information

Excluding correctional officers from the definition of law enforcement and use of force protections will result in greater impunity and confusion under the law. Does exclusion of correctional officers mean that they may use force without attempting de-escalation? May they use disproportionate force? Are choke holds permissible without restriction where they are used against an incarcerated person? Do correctional staff not have a duty to intervene where they observe excessive force against a prisoner?

Distinguishing between police law enforcement and corrections law enforcement sends a message that use of force inside correctional settings does not warrant the same scrutiny as use of force by police. This distinction is being made in spite of the fact that use of force inside prisons and jails is just as harmful, causes just as much trauma, and has even less accountability. Persons subjected to use of force inside prisons and jails are captive. They are often locked in their cells with nowhere to run and no way to create space between themselves and officers. And when they are assaulted, they have to continue living in close quarters with the person or people who assaulted them and who exercise near total power and control over their daily lives.

B) Barriers to Safety and Reentry that Disproportionately Impact Black and Brown Communities

In addition to use of force matters, this legislation fails to address a number of issues that are fundamental to pursuing racial justice in the Commonwealth and eliminating barriers to reentry which disproportionately impact black and brown prisoners and their loved ones. We strongly encourage the house bill to include provisions that protect communication and community support through better visitation systems (S2662). We should also put an end to financial exploitation which results from fees for telephone calls (S1372). We should ensure that prisoners have baseline entitlements to programming and education (S1391/H2127). These matters are racial justice matters. Families and communities of color are disproportionately low resourced. They are often unable to travel to the remote prisons due to lack of public transportation to those areas or the inability to visit during the limited hours available because of inflexible work schedules or other demands. Many are also excluded from visitation based on current policy due to past arrest records. Similarly, the exorbitant cost of calls is financially burdensome and drives a wedge between families. Maximizing communication with support systems is positively correlated with lower recidivism rates and positive reentry. Likewise, so long as programming and education are considered privileges rather than entitlements, we will continue to see opportunities doled out along racialized lines, excluding prisoners of color who are overclassified into maximum security environments and policed into solitary confinement. If we want to invest in community safety, we must do that within prisons as well as outside them.

III. The bill's policing provisions must be strengthened.

The current bill does not go far enough to scale back police impunity in a meaningful way. We would suggest the following changes, as a start.

A) Qualified Immunity:

While we appreciate the current provisions in the bill which would modify the qualified immunity standard so that it would only apply to officer misconduct where "at the time the conduct complained of occurred, no reasonable defendant could have had reason to believe that such conduct would violate the law," they do not go far enough. Qualified immunity is currently described under federal law as warranted if "a reasonable officer could have believed his conduct was lawful." *Olmeda v. Ortiz-Quinonez*, 434 F.3d 62, 65 (1st Cir. 2006). Modification to the standard in the current legislation does not eliminate qualified immunity, but clarifies it and lessens the burden that plaintiffs currently must meet.

Qualified immunity should simply be eliminated. Officers are already protected from reasonable mistake via the underlying legal standard which provides that their actions must be reasonable under the circumstances that face them. Correctional officers are provided even greater legal protection, as they are only barred from using force against convicted prisoners when they act "maliciously and sadistically for the purpose of causing harm." Qualified immunity provides no function other than removing cases against law enforcement from the scrutiny of juries, where they rightfully belong in our legal system. PLS recently had a case dismissed on qualified immunity grounds where the prisoner provided evidence that an officer directed his K9 to bite the prisoner repeatedly while he laid on the ground, not posing any threat to anyone. The judge determined that although a jury could have found excessive use of force, the way the law existed (as it does today) did not clearly establish if unleashing an untrained dog to subdue a

prisoner was sufficiently unreasonable. *Couchon v. Cousins*, No. CV 17-10965-RGS, 2018 WL 4189694, at *4 (D. Mass. Aug. 31, 2018). Qualified immunity deprived our client of the ability to present his case to a jury of his peers to determine if the officer's conduct was reasonable under the circumstances.

B) Use of Force:

The current bill requires that de-escalation must be utilized unless it has failed or is not feasible and force is necessary to (i) effect the lawful arrest of a person; (ii) prevent the escape from custody of a person; or (iii) prevent imminent harm to a person and the amount of force used is proportional to the threat of imminent harm. De-escalation and proportionality are both important principals in use of force, and rules around both already exist through case law and in the vast majority of trainings and policies that govern law enforcement. In order to push the envelope forward the bill must start from a recognition that in spite of rules and law that already bar excessive force, excessive force is pervasive.

Prisoners' Legal Services investigates approximately 60-100 use of force incidents each year which occur in correctional settings. We speak to the prisoners involved, document their injuries, read the reports, watch the videos, review the investigations, and observe the patterns. We have identified a number of substantive areas for change which would immediately improve use of force matters in correctional settings and we would urge that those be included in this bill.

H.D. 5128, "An Act relative to saving black lives and transforming public safety," filed by Representative Miranda, would take important and meaningful steps in the right direction. This bill includes correctional officers in the definition of law enforcement and its protections would apply to incarcerated people. Furthermore, the bill provides specific and concrete reforms that would meaningfully change existing law and increase accountability with respect to use of force matters.

We recommend the following additional changes: First, the bill should require that restraint chairs only be used in correctional settings when they are necessary to prevent harm. Right now, correctional facilities often strap prisoners into restraint chairs as a matter of routine after use of force incidents, a practice that is degrading and traumatic. Second, we recommend that in planned uses of force de-escalation include substantive intervention by a third party who the individual has a positive relationship with, such as a clinician, a program mentor, or clergy. Finally, we recommend the establishment of an independent civilian oversight board, with full authority to enter prisons and jails, review all use of force matters, and weigh in on the discipline of staff.

We encourage the drafters of the house bill to include protections for incarcerated people as mentioned above, including the substantive reforms in H.D. 5128 and amendments 113 and 133 in S2820.

C) Commissions and Transparency

i. Commission related to corrections use of force and transparency:

While we appreciate the effort in S2820 to establishes a commission to review and make recommendations related to use of force and transparency in correctional settings, there are ways we can achieve more transparency now and improve the commission so that it is empowered to effectuate further change in this area.

We urge the House to adopt meaningful transparency mechanisms that can be immediately implemented by the Department of Correction and County Sheriffs with respect to use of force. There is an excellent model available in the data and transparency provisions of H.2087 and S.1362 (An Act to

create uniform standards in use of force, increase transparency, and reduce harm, see last two paragraphs) which would, for the first time, ensure public data reporting with respect to use of force and its application against incarcerated persons including race, disability, gender and sexuality, and age information. It also would ensure that incarcerated people and their legally designated representatives would have access to use of force records involving the prisoner, and that such records be considered public records save for the redaction of identifying information.

Prisons and jails do not have the same natural (albeit inadequate) mechanisms of public accountability as police do. Prisoners are unable to utilize cell phones to film incidents and they do not have access to public forums to discuss their experiences with excessive force. Often prisoners are sent to solitary confinement in the immediate wake of use of force incidents, further decreasing opportunities for transparency and accountability. We urge the House to pass these basic transparency mechanisms rather than relegating them to being studied in a commission.

We also suggest that the commission be reconstituted so that it include more than one formerly incarcerated woman, as well as formerly and currently incarcerated men and women. It should be explicit that it includes people who are directly impacted and who are Black and Latinx. Finally, it should ensure that a greater number of community experts have a seat at the table and that they have leadership roles.

ii. Commission related to structural racism

We further appreciate and support the establishment in S2820 of a commission to study structural racism in corrections; this is a step in the right direction. We suggest that this commission be reconstituted to include and elevate to leadership more community groups and members who are not law enforcement but who are nonetheless experts in matters relating to incarceration and who do not have the same investments in maintaining the status quo of the current system.

Conclusion

Incarcerated people cannot be left behind in our struggles towards racial justice. They are among the most dispossessed in the Commonwealth and harmed by a system that is fundamentally interwoven with racism in this Country. We are happy to discuss the contents of this testimony and other meaningful reforms to conditions of confinement and use of force that you may be considering. You may contact me (Elizabeth Matos) at any time, including this weekend, by email or phone. Thank you for the opportunity to submit this testimony regarding "An Act to reform police standards and shift resources to build a more equitable, fair, and just commonwealth that values Black lives and communities of color." We look forward to working with you on a bill that truly moves the Commonwealth forward towards eliminating structural racism from its institutions.

Jesse White
Pro Bono and Policy Counsel
jwhite@plsma.org

Elizabeth Matos
Executive Director
617-416-1175
lmatos@plsma.org