The Commonwealth of Massachusetts
HOUSE OF REPRESENTATIVES
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Secretary Terrence Reidy
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Dear Mr. Secretary,

In addition to considering and making recommendations on the legislation referred to it, the Joint Committee on the Judiciary is entrusted with oversight authority over the entities and subject areas within its purview.

As you and I have discussed, the Committee's oversight duty is crucial to the proper functioning of our state government and should work in harmony with the Executive and Judicial branches. At my instruction, Committee staff has undertaken a review of the implementation and operation of major statutory overhauls of our criminal justice system as well as areas of concern with the operations of the Department of Corrections ("DOC"). This ongoing review includes, but is not limited to, the practices and policies followed by our courts, correctional agencies, law enforcement professionals and prosecutors.

This review has, to date, identified what appear to be some disturbing instances of noncompliance with both legal obligations and deadlines as well as outright resistance to clear statutory requirements and policy objectives. The Administration has been clear about some of its resistance. For example, the Legislature is well aware of the Governor's objections to certain aspects of recent landmark laws, both through the amendments he returned to bills as well as through legislation the Administration later filed.

Of course, policy disagreements do not give the Administration leave to ignore the laws actually on the books. While I believe the need for a formal legislative response to certain actions and inactions is clear in some areas, I also recognize that your ability to address some of these concerns may obviate the need for other formal oversight or legislative actions.

In that spirit, I ask that you review and respond to the requests for information below, which I have broken out into broader categories for your convenience. Please provide us with responses to these questions by April 11, 2022. Committee staff and I stand ready to work with you in clarifying these requests as needed.

1) CRIMINAL JUSTICE REFORM ACT QUESTIONS

Chapter 69 of the Acts of 2018, *An Act relative to Criminal Justice Reform* (the "CJRA") was a comprehensive reform of many facets of the Commonwealth's criminal justice system. At the time he signed the bill into law, Governor Baker noted "serious concerns" and offered a companion piece of legislation seeking to undo many of the measures he had just enacted into law. The Governor wrote:

> "There are, however, some aspects of An Act Relative to Criminal Justice Reform which I believe require significant modification. There are also other provisions that may have unintended, negative consequences that should be corrected. In view of all of the urgently needed reforms this bill entails, I believe it is appropriate to avoid the delay in enactment that would result if I were to return the legislation with proposed amendments. Accordingly, I signed the legislation and am submitting for your consideration 'An Act Building on Criminal Justice Reform' to address these issues."

In reviewing the issues outlined below, the history of the law and what appear to be subsequent efforts to erode its efficacy, the Committee has grave concerns regarding the Administration's willingness to implement the CJRA, as well as questions regarding policy objectives.

A. Data Reporting

In its July 2021 report, the Justice Reinvestment Policy Oversight Board ("JRPOB") stated that EOPSS had not yet implemented a statewide uniform cross-tracking system for individuals involved with the criminal justice system as required. This uniform tracking system was intended to be the backbone of the robust data reporting requirements contained in the CJRA. Without it, may of the impacts of the CJRA will remain unknown. As you are aware, the District Attorneys ("DAs"), our courts and their related agencies (e.g., parole, probation, etc.) are unable to coordinate their data collection efforts. As a result, reporting has been nearly impossible to track.

The JRPOB also reported that, as of the fall of 2021, EOPSS had not even promulgated regulations to establish common definitions for the data required for the uniform tracking system. Furthermore, paragraph 12 of G.L. c. 6A, §18¾ requires that available electronic files be made publicly available through an application programming interface. The Committee understands that there is no data currently available to the public through an application programming interface as required. These failures are unacceptable and obstruct much of the modernization of our criminal justice system.

1) **Nearly four years after the CJRA became law, the Administration remains noncompliant with its data reporting requirements. Please provide us with your plan to implement the technology needed to allow the Legislature and the public to access the required data. Kindly include in your response any notable benchmarks or expected obstacles in this plan.**

2) **What has prevented the Administration from promulgating regulations to establish common definitions for the data required for the uniform tracking system?**

3) **What resources does the Administration expect it needs to devote to this the implementation of a statewide uniform tracking system in order to bring the Commonwealth into compliance with the CJRA?**

B. Restrictive Housing

The CJRA included provisions designed to modernize the Commonwealth's carceral restrictive housing practices, defined by M.G.L. c. 127 § 1 as a housing placement confining a prisoner to a cell for more than 22 hours per day. The law provides inmates placed in restrictive housing with certain review rights and access to resources and treatment. The CJRA also mandates that placement in restrictive housing triggers regular reporting requirements, subject to overview by the Restrictive Housing Oversight Committee that it created.

Additionally, following a two-year investigation the US Department of Justice ("USDOJ") released its November 2020 report entitled *"Investigation of the Massachusetts Department of Corrections"* in which it found a number of constitutional violations, administrative oversights and systemic failures relating to the DOC's use of solitary confinement practices. Specifically, the report stated that the DOC's "use of prolonged mental health watch under restrictive housing conditions, including its failure to provide adequate mental health care, violates the constitutional rights of prisoners in mental health crisis." This finding was consistent with the Legislature's decision to reform the Commonwealth's restrictive housing practices.

While we have not seen any formal agreement between the USDOJ and the DOC in the wake of the November 2020 report, we do note that on June 29, 2021 the DOC announced that over the next three years it would "...develop a comprehensive implementation schedule; eliminate restrictive housing as currently defined; dissolve the Department Disciplinary Unit; assess clinical and criminogenic needs of disruptive individuals; and expand services, treatments, and programming that demonstrate success." The significance of this announcement, however, is effectively rendered meaningless if the DOC simply modifies its current solitary confinement practices to evade the CJRA's legal requirements.

The Committee is concerned that the DOC is skirting the intent of the CJRA in practice. For example, the Committee has learned that a number of DOC facilities and Houses of Corrections have now instituted housing practices which result in the solitary confinement of inmates for up to 21 ½ hours a day, thereby evading the protections, limits and transparency required for inmates held for just 30 minutes longer. This practice is especially concerning when viewed in the context of the DOC's treatment of individuals living with serious mental illnesses ("SMI"). Section 39A of M.G.L. Chapter 127 forbids individuals with SMI from being subject to

restrictive housing conditions, but the law is silent on their assignment to identical conditions for just 30 fewer minutes.

1. **Since December 2020, how many inmates has the DOC restricted to in-cell time for greater than 20 hours a day but less than 22 hours a day for more than two consecutive days? If the DOC does not track that data, please identify how it tracks in-cell time for all inmates.**

2. **How did the DOC develop its sub-22 hour housing placement policies and practices?**

3. **Beyond the three-year plan the DOC announced in June 2021 with respect to restrictive housing, what steps has the DOC undertaken in response to the USDOJ's findings? Please include in this response any agreements the Commonwealth, the Administration, the Executive Office of Public Safety and Security ("EOPSS") or the DOC has entered with the USDOJ relating to the November 2020 report referenced above.**

C. Sexual Assault Evidence Kits

Section 11 of the CJRA reformed how the Commonwealth tracks and tests sexual assault evidence kits and was a significant, trauma-informed step forward for survivors of sexual assault. Starting on the date of enactment, the CJRA required the Massachusetts State Police Crime Laboratory ("MSPCL") to process and test all kits collected within thirty days of receipt, and the Legislature appropriated $8 million dollars to the MSPCL in fiscal year 2019 to cover the financial impacts of that requirement. The Committee appreciates the MSPCL meeting this deadline for kits collected following the enactment of the CJRA.

However, as we have discussed on numerous occasions, the Administration failed to meet other statutorily imposed deadlines regarding the processing and testing of older kits in the MSPCL's possession. In response to explanations from EOPSS as to why the older kits remain untested, the Legislature included, and the Governor enacted, language in the FY22 budget requiring the MSPCL and relevant DAs offices to work together to test the kits and to contact survivors to inform them of the status of the kits. As of FY21, the MSPCL had a remaining balance of $4,495,177 in unexpended funds from the original FY19 appropriation.

Soon after passage, EOPSS informed the Judiciary Committee that it would not meet the new statutory deadlines. In its most recent update in December 2021, EOPSS stated that it had analyzed 5,947 kits and submitted them to the relevant DAs for review. As of that report, EOPSS stated that the DAs had only advised on testing for 1,157 of the kits.

1) **How many sexual assault evidence kits remain with the DAs for a disposition decision, and how many kits does the MSPCL currently have in queue for testing?**

2) **What is the current expected timeline for testing all of the kits for which the DAs have authorized testing?**

3) **Please identify any factors that are currently preventing the MSPCL from testing all remaining sexual assault evidence kits in its possession.**

2) BRIDGEWATER STATE HOSPITAL QUESTIONS

After learning that the DOC repeatedly denied the Disability Law Center ("DLC") access and information while DLC attempted to conduct its oversight responsibilities at Bridgewater State Hospital ("BSH"), the Legislature specifically expanded DLC's authority in Line Item #8900-0001 in the FY2022 Budget. The DLC's subsequent findings, detailed in a January 2022 report, raise myriad concerns about the legality of the operations at BSH, including the improper and rampant administering of what are supposed to be rarely used chemical restraints on inmates as well as the apparent refusal or inability to mitigate mold and asbestos exposure issues at the facility. The DLC report paints a clear picture of chronic failures in the operation of BSH by the DOC and recommends shuttering the facility and moving its control over to the Department of Mental Health.

A. Chemical Restraints

DLC reported that both the DOC and Wellpath LLC (its contracted service provider at BSH) are administering chemical restraints to inmates at BSH frequently, illegally and without properly documenting these instances. According to the DLC report, from June through November 2021 Wellpath did not order a single Medication Restraint, which would have triggered substantive documentation and overview for each incident. However, over the same period of time Wellpath administered at least 370 "Emergency Treatment Orders" permitting the administering of involuntary chemical restraints on inmates without reporting to the DOC. Based on this snapshot, it appears clear that the usage of Emergency Treatment Orders is simply a way to circumvent the legal protections and reporting requirements that should be triggered with the use of chemical restraints on BSH inmates.

1) **Identify any policies and all practices that allowed Wellpath to administer 370 Emergency Treatment Orders during a period in which zero Medication Restraints were ordered and reported.**

2) **Do you disagree with the DLC's finding that the DOC and Wellpath's Medical Restraint and Emergency Treatment Order practices are in violation G.L. c. 123 § 21 and 104 CMR 27.12? If so, why?**

3) **What steps, if any, has the Administration taken to reform the chemical restraint practices at BSH since DLC reported on them?**

B. Mold Mitigation and Physical Plant Issues

In the same report, DLC stated that the DOC had "refused to conduct comprehensive mold sample swab testing throughout the facility." This moved the Legislature to directly appropriate funding to DLC and authorize it to hire an independent mold testing laboratory to test the facility. After finding the "presence of mold in almost every single area swabbed by the expert" in 2019 and making extensive remediation recommendations in 2020, DLC returned in December 2021 for an inspection of the same areas previously tested.

Following that analysis, the DLC reported that the DOC has chronically failed and refused to assess and adequately mitigate significant mold problems found throughout its BSH buildings. In fact, DLC states that the DOC failed to demonstrate that it undertook proper mold and asbestos remediation efforts at the facility and, in some cases, either painted over visible mold or failed to mitigate ongoing mold problems altogether. According to DLC, "the continuing presence of mold growth in BSH buildings and HVAC systems on the same sources identified in 2019 'indicates that the necessary mold remediation, cleaning, and maintenance actions have not been performed (or kept up with as regularly as they need to be).'" The DLC also found that, as a result of this inaction, the DOC has failed to protect the health and safety of BSH staff and inmates alike.

1) **Does the Administration disagree with DLC's mold assessment and conclusions about DOC mitigation efforts (or lack thereof)? If so, why?**

2) **How many staff or inmate complaints have been made in the past year regarding mold and/or asbestos issues at BSH?**

3) **What steps, if any, has the Administration taken to address any mold and/or asbestos issues at BSH in the past six months? What new measures, if any does it plan to implement in the next six months?**

4) **Has the Administration implemented health screenings of BSH staff and inmates for symptoms of mold and/or asbestos exposure? If so, please provide the details of those screenings. If the Administration has plans to implement those types of health screenings, please provide the details of those plans, including implementation dates.**

5) **What is the Administration's response to DLC's recommendation that the Commonwealth commit to shutter the BSH and construct a new facility?**

3) POLICE REFORM LAW QUESTIONS

The Legislature passed, and Governor Baker signed into law, Chapter 253 of the Acts of 2020, also known as the Police Reform Law ("PRL"). This comprehensive law modernized the training, oversight and accountability of our law enforcement professionals throughout the Commonwealth, empowered the Municipal Police Training Committee ("MPTC") to establish training standards for all Massachusetts law enforcement professionals and created, among other

things, the Peace Officer Standards and Training ("**POST")** Commission to oversee certification and decertification processes. The law imposed strict deadlines on multiple agencies and departments throughout Massachusetts to implement statewide training and certification standards.

As with CJRA, the Governor returned the legislation with amendments and a signing statement expressing his disagreement with certain provisions of the bill sent to his desk and specifically noting, "I am not proposing to amend most of these provisions, even where I disagree with the individual policy decisions they reflect." Here, again, the Committee expects that those measures signed into law are given full effect in its implementation. The Committee has and will continue to closely follow the implementation of the PRL, which has now been in effect for more than a year. Based on some early observations, the Committee requests clarity on the areas of concern outlined below.

A. Use of Force Policy

On November 4, 2021, EOPSS and members of the POST Commission hosted the Committee Chairs and staff, along with other legislators, at a briefing detailing the use of force regulations contained in 550 CMR § 6.04(6) ("Use of Non-deadly Force"). At that briefing, I expressed my concern about that specific regulatory change that now permits a law enforcement professional to intentionally sit, kneel or stand directly on an individual's head and/or neck.

As I expressed during the November 4, 2021 meeting and subsequently in written communications, the regulation is contrary to both the letter and the spirit of the PRL. Specifically, G.L. c. 6E, § 1 defines a chokehold as any "action that involves the placement of a law enforcement officer's body on or around a person's neck in a manner that limits the person's breathing or blood flow with the intent of or with the result of causing bodily injury, unconsciousness or death." G.L. c. 6E, § 14 flatly prohibits a law enforcement officer from using a chokehold. This regulation, however, now specifically empowers a law enforcement officer *to intentionally* kneel, sit or stand on a detainee's neck in order to gain, regain or maintain control if that officer does not intend to – or does not actually – proximately cause injury to the detainee.

After first identifying this issue to you and POST Commission Executive Director Enrique Zuniga, I wrote to follow up on January 3, 2022 to express my concern that neither the MPTC nor the POST Commission had exercised their powers under G.L. c. 30A to promulgate emergency corrective regulations changing the language of 550 CMR § 6.06(6), which is a clear subversion of the PRL's prohibition on chokeholds. I also asked why the regulations empowered an officer to utilize tactics when the law and the very regulations allowing that action specifically prohibit training on the safe use of that physical practice.

In response, EOPSS informed Committee staff that both "EOPSS and POST appreciate the concerns raised by Chair Day and have taken immediate steps to begin the process of bringing the joint working group together to review his concerns and once complete will present to MPTC and POST." We are not aware of any further actions relating to this regulation.

1) **What steps have EOPSS and the POST Commission taken to address the language contained in 550 CMR § 6.04(6) that currently allows a law enforcement professional to intentionally sit, kneel or stand directly on an individual's head and/or neck?**

2) **Why did the MPTC not exercise its authority to work with the POST Commission to implement emergency regulatory changes to 550 CMR § 6.04 (6) as requested in my letter of January 3, 2022?**

B. Certification and Decertification

A central tenet of the PRL was to create and empower the POST Commission, a statewide, independent authority charged with the responsibility to determine who may exercise police powers and who may not. The foundation of this work required every existing law enforcement agency and office to submit their individual officers' training credentials to the MPTC by July 1, 2021 and the disciplinary records to the POST Commission by September 30, 2021.

In addition to collecting and reviewing the training documentation provided to it, the MPTC also created a "Bridge Academy" to provide officers who did not meet full-time training standards the opportunity to bring themselves up to the base statewide level of training compliance. The POST Commission missed its September 30, 2021 statutory deadline for collection of all disciplinary records and unilaterally extended that date to December 31, 2021. By now, it should be in possession of all training credentials and disciplinary records of all current law enforcement professionals in the Commonwealth.

1) **How many law enforcement professionals failed to meet initial certification requirements because of training deficiencies? Of those, how many have been granted an opportunity to enroll in a Bridge Academy?**

2) **How many law enforcement professionals have declined to enroll in a Bridge Academy? Has the POST Commission informed you of any actions it has taken with respect to these individuals? If so, please describe what those actions are and when you understand the POST Commission will take them.**

3) **Has the POST Commission informed the MPTC or EOPSS that it intends to or already has decertified any law enforcement professionals as a result of its review of disciplinary records? If so, please provide the information the POST Commission has conveyed to either MPTC or EOPSS.**

On behalf of the Committee, I appreciate your expected attention and diligence in responding to these requests for information. I believe the information you provide will help to address some of the concerns and will fill in some information gaps we have as we continue our review of the implementation and impacts of the CJRA and PRL, among other laws. I look forward to continuing our dialogue as partners in government.

Sincerely,

Michael S. Day