



• August 2022

Alternatives to Detention Program

CCR input into the review of the program

A. Preamble

In June 2018, the Canada Border Services Agency (CBSA) launched an expanded Alternatives to Detention (ATD) program “to provide risk-based, nationally consistent programming to individuals deemed suitable for release from detention”. The enhanced ATD program is a key pillar of the National Immigration Detention Framework (NIDF) which is designed to create “a better, fairer immigration detention system that supports the humane and dignified treatment of individuals while protecting public safety.”¹

The Alternatives to Detention Program is currently under review by the CBSA. These comments are a contribution by the Canadian Council for Refugees (CCR) to that review.

B. CCR’s longstanding concerns

The CCR has long been concerned about the use of immigration detention in Canada. Liberty is a fundamental right and can only be taken away in limited, legally prescribed circumstances. As affirmed in the [UNHCR Detention Guidelines](#), detention of asylum-seekers should normally be avoided. Detention under immigration legislation should therefore only be used as a last resort and after alternatives to detention have been explored.²

The CCR is concerned that non-citizens’ fundamental right to liberty is not respected when laws and practices give priority to the government’s enforcement objectives. Many of those in

¹ <https://www.cbsa-asfc.gc.ca/security-securite/detent/nidf-cndi-eng.html>

² An overview of CCR’s concerns about immigration detention can be found at <https://ccrweb.ca/en/overview-ccr-positions-detention>

immigration detention in Canada are people who have fled persecution or other forms of oppression in their home countries, or who have experienced violence and abuse in Canada. A very high proportion of those in detention live with particular vulnerabilities such as mental health and addiction conditions, and poverty. Numerous children suffer profound negative effects of detention – either because they are themselves in detention (legally detained or housed with a family member), or because a family member, such as a parent, has been detained.

Detention is harmful to the health and well-being of individuals, is expensive for the government, and is often counterproductive to case resolution. The CCR calls for immigration detention to be reduced to a minimum. Where detention is found to be necessary, alternative non-custodial measures must always be considered before resorting to detention.

The CCR's positions on detention are informed by the deep experience of our members, who bring forward the realities of immigration detention in different parts of the country. We hear from people who have been detained, as well as from people who represent or support people in detention. Some of our members provide specialized services to people in detention.

C. CCR's input into the ATD program

The CCR engaged actively with the CBSA while the expanded ATD Program was in development. We participated in numerous discussions, and provided extensive feedback on CBSA plans.

In May 2017 we submitted a proposed model for a community-based alternatives to detention program, attached as Appendix "A". In drafting these comments, we are guided by the principles and the community-based ATD model set out in that brief.

In January 2018, the CCR provided written comments on "CBSA plans for Alternatives to detention", attached as Appendix "B". We raised concerns in the following areas:

1. The need to respond to the majority of non-dangerous detainees
2. The need for ATDs for persons detained on identity grounds
3. Over-emphasis of a corrections perspective
4. Over-emphasis of enforcement approach
5. Lack of clear plans to measure impacts on restrictions on liberty
6. Community Liaison Officers
7. Role of community, including CCR members
8. Need for a CBSA accountability mechanism

D. Key areas of concern with the ATD Program as implemented

Nearly 5 years later, the CCR's concerns with the ATD Program continue to be similar to those raised in 2018. In what follows we provide updates to areas of concern we have raised in the past as well as new areas of concern.

1. Need for a culture change within the CBSA

In discussions leading to the adoption by the CBSA of the expanded ATD program, the CCR and the CBSA agreed that a culture change was necessary within the CBSA to ensure the success of the program.

Unfortunately, it appears to us that culture change has for the most part not been achieved. While members certainly report welcome instances of CBSA officers working to facilitate access to ATDs, more often it appears that officers are focused narrowly on the "public safety" aspect of the NDIF's goal, rather than on "the humane and dignified treatment of individuals". Instead of working to achieve realistic ATDs that suit the realities of the individual and of the community supports available, too often officers limit themselves to identifying the requirements that they believe should be met for an ATD to be acceptable, and leave the person concerned or their counsel to assume responsibility for finding an ATD that meets those requirements.

The onus on the CBSA to seek out ATDs is set out in the IRB *Chairperson Guidelines 2: Detention*. See for example:

A heightened obligation to consider ATDs also applies to cases involving vulnerable persons such as persons with mental illness, minors, the elderly, individuals with diverse sexual orientation and gender identity and expression, survivors of torture, survivors of genocide and crimes against humanity, survivors of gender-related violence, and survivors of violence based on sexual orientation and gender identity. As the onus on the Minister is heightened, a member should also actively question the steps that the Minister has taken to make an ATD available in the circumstances of these cases. (3.1.15)

The Federal Court recently affirmed this point in *Lee 2022 FC 383* at para. 68:

As counsel for Ms. Lee properly emphasizes, there is a heightened obligation on the part of the ID to consider alternatives to detention for vulnerable persons such as persons with mental illness (a point I will return to below). Related to this is a heightened onus on the Minister to justify the detention of such persons, as reflected in paragraph 3.1.15 of the Guideline. Consequently,

as the Guideline also notes, a member should “actively question” the steps that the Minister has taken to make an alternative to detention available when the person concerned is a vulnerable person. [...] Given this, I fully expect the question of whether the CBSA is being diligent in identifying and supporting alternatives to detention to be front and centre at the next detention review.

As well as clarifying the CBSA’s role in seeking ATDs, we believe that strong leadership is needed to ensure that the CBSA lives up to its aspiration of “humane and dignified treatment of individuals” throughout the detention process. Too often we have reports of persons treated, and spoken to or about in ways that are extremely disrespectful, and anything but humane and dignified. Immigration detention is not supposed to be punitive – yet those detained are frequently made to feel that they have done wrong and are not worthy of respect and ordinary human kindness. Even if there are risk factors, even if individuals are not cooperative, everyone deserves to be treated with respect.

Treating people with respect will reduce the trauma caused by arrest and detention. It will also in many cases facilitate the resolution of the issues leading to detention. Bad cop tactics are usually counterproductive. When CBSA officers explain the situation in a calm and respectful way, people are far more likely to cooperate. They will also be less traumatized by the experience.

Among the measures we suggest to address the need for culture change are the following:

- Provide strong, consistent and regular messaging from the senior leadership about the need for culture change and the expectations of the Agency with respect to “humane and dignified treatment of individuals”.
- Provide strong support and training to officers so they understand there is an onus on the CBSA to actively seek out and work towards ATDs, particularly in cases where there are identified vulnerabilities.
- Provide guidance and training to officers about effective and respectful investigative and other strategies. The approaches should be trauma informed, taking into consideration that many people in detention have suffered extreme violence in the past.
- Provide in-depth guidance and training to officers on respectful and effective treatment of people with serious mental health problems, taking into consideration that a high proportion of people in detention are so affected.

- Provide training to officers on the realities people in detention are going through (such as hardships in flight, or the challenges that led to them being out of status) as well as the hardships of detention, especially for the vulnerable, so that they can better understand the perspective of people in detention and how officers' behaviour affects them. NGOs should be involved in the training.

2. Remain open to a diversity of ATDs

The CCR has always been concerned that the existence of specialized ATD service providers elevate expectations about features that must be present for an ATD to be considered acceptable. Even before the expanded ATD program was launched in 2018, we raised this concern with respect to the Toronto Bail Program – see [Alternatives to detention: CCR comments regarding the Toronto Bail Program](#). We said then:

- There is a tendency for a program such as Toronto Bail Program to become normative, rather than being seen as exceptional. Such a program should be available as a last resort for people who have no other options for release.
- In practice, it seems that the Immigration Division in Toronto looks for supervision by the program when considering release. This can mean that it is more difficult for people who do not meet the program's criteria to be released. The fact that the program has considered and refused a person may count against the person being released despite other assurances being offered.
- Similarly, alternative proposals for individual bondspersons or organizational programs may be judged against the standards set by the resources and capacity of the Toronto Bail Program (which include access to CBSA data and a signed agreement with CBSA). There are reports of alternative offers being found inadequate in Toronto because they don't provide the same guarantees or level of supervision of the Toronto Bail Program.

We encourage the CBSA, as part of its review of the ATD program, to analyze the ways in which the existence of the Community Case Management and Supervision (CCMS) service providers affects the openness and recourse to other Alternatives to Detention.

More generally, we believe that the CBSA should be guided by the following principles:

- Alternatives to detention should be based on a case management model, not an enforcement model. Experience and research in other countries show that providing case management is the most effective way to mitigate risk.

- There should be a variety of different ATDs and case-specific ATDs, rather than a single ATD.
- Preference should be given to ATDs offered by community organizations, who are best placed to develop a relationship of trust necessary to effective case management (and are cost-effective). Community organizations should not be asked to support any enforcement measures (such as monitoring).
- Specialized referrals should be made where there are significant vulnerabilities (e.g. unaccompanied child, person with mental illness, LGBT person).³

Unfortunately, in our observation, the CBSA tends to restrict their approach to ATDs to organizations with whom they have contracts.⁴ The CBSA must broaden the scope of ATDs beyond those organizations with whom they have an existing contractual relationship because they exclude many detainees who live with vulnerabilities. For example, the CBSA partner organizations do not provide services people living with complex mental health conditions. The Salvation Army Bunton Lodge program for people who live with addiction is only available to men, is limited to 8 beds, and is only available in the GTA. None of the CBSA's contractual partners provide services or supports for people who are LGBTQ.

We urge that the CBSA make available discretionary funds to assist in making non CCMS ATDs available. Often there are relatively small expenses necessary to make an alternative available – for example, transportation to the ATD or a per diem to cover costs of a residence until the person can receive social assistance. Compared to the costs to the CBSA of CCMS ATDs, financial contributions from the CBSA like this would be small, but could make all the difference in ensuring release for some people through an ATD.

3. Need to respond to the majority non-dangerous detainees

In 2018, the CCR raised the concern about the CBSA's ATD model being built on the assumption that many detainees are dangerous, when the majority of detainees at that time were detained on appearance or identity grounds. We continue to share that concern now that the ATD program has been implemented. The ATDs that have been developed appear to be based on a criminal model, which is not appropriate for immigration detainees. Detention is only authorized under the *IRPA* for administrative purposes and ATDs must be built with that in mind. Currently,

³ Proposed CCR model for community-based alternatives to detention, May 2017

⁴ We raised this issue recently in our brief regarding Community Liaison Officers (see Appendix "C")

ATDs are not responding to the situations of most refugee claimants, and their families. Many detainees in the Central Region live with mental health conditions, often including addiction, with limited supports in the community. Rather than an approach to ATDs that focuses solely on supervision to mitigate 'risk,' greater effort and resources need to be spent towards creating ATDs that focus on building supports in the community to address the underlying reason(s) for past or future non-compliance with the Act.

4. ATDs should reflect what is necessary and available

We are concerned that the CBSA is too often seeking ATDs that are excessive in relation both to the level of risk and to what is available to the individual and in the community.

When a person does not represent a danger, it is not clear to us why the CBSA should be pushing for burdensome requirements. Often, the non-compliance issue is relatively minor, such as an unintentional issue with a student visa. In many cases, the fault is attributable to the person's mental health problems.

We note that some people do not have family or friends who can post a bond or provide them with a place to live. They should not remain in detention solely for that reason.

It is important to take account also of the limited resources in the community. We are in the midst of a housing crisis across Canada – the CBSA should not be demanding what is not available for the majority population.

More consideration should also be given to the burdens on family and friends. They are under a lot of pressure to step up so that the person can be released from a traumatizing experience in detention. But often the conditions imposed have important negative consequences in their own lives, especially when they remain in place for a long time, as is often the case.

We encourage the CBSA to take a more flexible and creative approach in arriving at solutions that are accessible, proportionate to the risk and not excessively burdensome for anyone.

5. Role of community, including CCR members

As we said in the context of the development of the ATD Program, we would like to see the model include clearer plans for engaging the community, including CCR members who currently serve people who are or were in detention, or who provide informal alternatives to detention. We believe that the community could give useful feedback on how the new model is working out, what the gaps are and what could be improved.

We recommend an advisory committee with community involvement, both regional (to address local realities and resources) and nationally (to ensure consistency across regions).

6. Focus on community based models

As a member of the International Detention Coalition, the CCR has benefitted from the Coalition's guidance on the best way forward. They have convincingly shown that a case management model is better than an enforcement approach. CCR would prefer to see the government look at ways to develop a trusting relationship between service providers and the individuals being released from detention, to ensure greater compliance to conditions of release. For more details, please see at Appendix "A" the community-based ATD model and guiding principles we presented in our May 2017 consultation brief.

7. Community Liaison Officers (CLO)

We understand that the CBSA created the new role of Community Liaison Officers CLOs in order to support access to an expanded Alternatives to Detention (ATD) program. In our view, the CLO role has not been implemented in a manner that allows it to meet the objective. In practice, we observe some of the work of CLOs failing to support the goals of the NIDF and adding no value, or even in some cases undermining the NIDF goals. At the same time, there is an unexploited opportunity for the CLOs to play a more constructive role through proactive liaison with the community to search for alternatives. We recommend that the CLOs be directed to collaborate with persons detained, their representatives, NGOs, etc in finding alternatives to detention (CCMS and other).

In July 2022 we provided detailed input on the ways in which we suggest the CLOs might usefully be redirected – see "Comments on CLOs' job description" at Appendix "C".

8. Children

The CCR continues to be particularly concerned about the detention of minors. The detention of children for immigration purposes is never in their best interests – nor is it in their best interests to be separated from a detained family member, especially a parent or legal guardian. Community-based alternatives should always be found, including in order to preserve family unity.

The [Ministerial Direction to the Canada Border Services Agency: Minors in Canada's Immigration Detention System](#), issued by the Minister of Public Safety and Emergency Preparedness in

November 2017, articulates several principles that speak to the best interests of the child, family unity and separation of a child from one or both parents:

- The well-being of children, family unity and the use of ATDs shall be core tenets underpinning policy direction, in accordance with the expectations and values of Canadians;
- The BIOC [best interests of a child] shall be a primary consideration to be assessed against other primary and mandatory factors in legislation;
- Stop the detention or housing minors and family separation, except in extremely limited circumstances;
- Actively and continuously seek ATDs when unconditional release is inappropriate for the purpose of the above;
- Preserve the family unit;
- Ensure that the detention or housing of a minor or the separation of a minor from his/her detained parent(s) or guardian(s) is for the shortest time possible.

The Canada Border Services Agency's "[National Directive for the Detention or Housing of Minors](#)" provides more detailed guidance on the operationalization of these principles. Its objectives include:

- To stop detaining or housing minors and family separation, except in extremely limited circumstances.
- To actively and continuously seek ATDs when unconditional release is inappropriate for the purpose of the above.
- To preserve the family unit for overall well-being and continuity of care.

Unfortunately, the Ministerial Direction and National Guideline are not consistently applied. As we showed in our 2019 report [Immigration detention and children: Rights still ignored, two years later](#), many children continue to experience grave suffering as a result of their own detention or the detention of one or both parents.

In our observation, the ATD program has been of little or no benefit to children detained, or affected by a detained parent.

Most children, or parents with children who are facing detention, are low risk, according to CBSA criteria. Yet the measures in the ATD program are not well-adapted to low risk individuals. This is particularly the case with the Community Case Management and Supervision (CCMS) programming. We are not aware of many cases of children, or parents facing potential separation from their child due to detention, who have benefitted from CCMS programming.

We had hoped that the newly created position of Community Liaison Officer (CLO) would provide an opportunity to develop and maintain lists of community options for release, for situations where children are or may be detained or housed, or separated from a parent who is detained.⁵

We note that many cases of children affected by detention involve refugee claimants detained on the basis of identity.⁶

In early 2018, the CCR was concerned that the CBSA's plans for ATDs excluded people detained on identity grounds. The CCR raised concerns about this exclusion in written comments in January 2018.

We note that excluding people detained on the basis of identity is also inconsistent with the November 2017 Ministerial Direction to the CBSA on "Minors in Canada's Immigration Detention System", and the accompanying CBSA National Directive. Children are regularly detained on identity grounds (particularly in Montreal and in Vancouver). The Directive proposes to keep children out of detention in part through pursuing ATDs. If the CBSA's ATD model excludes detention based on identity, it seems that children will be detained, contrary to the goal of the Ministerial Direction.

In February 2018, the CBSA responded to the CCR comments by clarifying the framework to state that ATDs may be appropriate for individuals detained on the grounds of identity.

Despite this clarification, messaging from the CBSA on this matter has continued to be inconsistent, and ATDs provided by CCMS partners have rarely, if ever, been used for parents detained on identity grounds.

⁵ See our July 2022 "Comments on CLOs' job description" at Appendix "C".

⁶ This is particularly the case in Montreal. For decades, Montreal has consistently detained many more people on identity grounds than other regions, highlighting the arbitrary nature of decision-making.

Refugees, including refugee claimants

The CCR continues to be particularly concerned about the detention of refugees (including refugee claimants), and minors. As affirmed in the UNHCR Detention Guidelines, detention of asylum-seekers should normally be avoided and be a measure of last resort.⁷

A significant proportion of refugee claimants in detention are detained on identity grounds. As noted above, there is contradictory messaging on whether ATDs provided by CCMS partners are available to people detained on identity grounds. In practice, it appears that they are generally not considered eligible.

9. People with mental health including addiction issues

Persons living with mental health conditions are found disproportionately in immigration detention. Furthermore, there is often a failure to appreciate that addiction is a form of mental illness. Detention – above all in jails – is not the right response for people suffering from mental illness including addiction, and it only aggravates their disabilities. Yet they often face extra difficulties in securing release because their mental health issues may impact their ability to comply with standard conditions for release. If they are released, they often lack the support necessary to manage their condition. Those with addictions will often have relapses, despite their best intentions – this is a normal pattern for people dealing with addictions. Failure to comply with conditions tends to be interpreted by the CBSA not as the understandable result of their health condition, but rather as a refusal to cooperate and a sign of bad character.

The current CCMS service providers are limited and deficient in their supports for mental health and addiction issues which often lead to non-compliance with the *Act*. For example, in the GTA, the Salvation Army Bunton Lodge program has only 8 beds available to detainees who live with addiction – the need is much greater than beds available, leading to six-month wait times. The beds are only available to men and there is no CCMS residential treatment program for women. The Toronto Bail Program does not have strong partnerships with addiction and mental health service providers. In the Ottawa region, there is a single bed available at the John Howard Society – and no beds available for women. In Montreal there has been a welcome increase in the CCMS bed capacity from what was originally available, but it remains inadequate to the need and is mostly adapted for high risk people.

⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>

This results in detainees who are vulnerable and live with disabilities experiencing lengthier detentions.

In some cases, a consultation with a psychiatrist is needed in order for an ATD to be explored. Some psychiatrists will not enter provincial facilities to do an assessment and need the person to be escorted to meet with them. While those on criminal hold are provided this service, it is not done for immigration detainees. The CBSA should facilitate this – and in some cases does, but not consistently. Similarly, the CBSA should be proactive in assisting in meeting the requirements to access an ATD - sometimes this might mean intervening with another government agency to get necessary documents.

In [2022 FC 344](#), the Federal Court recently found that the CBSA was failing to facilitate access to health services through an ATD for a person suffering from mental health issues:

Ms. Lee does not need to be removed from Canada in order to be released from detention or to access mental health supports. A removal as a means to end a person's suffering while in detention is not the only option. Ms. Lee is not a threat to the public; she is a person desperately in need of mental health supports – supports which are available here in Canada. The Respondent's arguments show a lack of consideration for the sensible option put forward by Ms. Lee's counsel: that Ms. Lee be released from detention, where her mental health state is clearly worsening, and be permitted to access the mental health care she requires while remaining in Canada, pending fair proceedings.

Unfortunately, the situation described by the Court is only too familiar to our members who work with people with mental health issues in detention.

We are also concerned that medical services offered within detention to people with mental health issues may be improperly geared towards making them “suitable” for ATDs, rather than being guided by the health needs of the individual.

As part of its efforts to address mental health issues more effectively, the CBSA should also consider how to better guide officers in interviewing and using statements from people with serious mental health issues. For example, it is not fair or helpful to rely on statements taken from a person going through withdrawal. We have seen how such statements – presented as reflecting the genuine point of view of the person – make it difficult for ATDs to be found for the person.

10. Gender-Based Violence

In January 2021, CCR prepared a submission: “CBSA and Gender-Based Violence: Recommendations on policies and operations”. The recommendations for changes in the areas of policy and operations were prepared in the context of the CBSA’s review of the immigration enforcement framework with a focus on the needs of victims of gender-based violence. The CBSA has been moving forward since then with plans for changes to improve responses to victims of gender-based violence.

The CCR’s recommendations in relation to detention included the following:

- Amend the law (or at a minimum adopt policy) to exclude detention in cases of people who have suffered gender-based violence. If necessary use alternatives to detention.
- Alternatives to detention (if used) should be in a suitable setting where victims of violence will receive appropriate support, e.g. with an NGO experienced in the specific situation of the person. Victims of violence should not be referred to alternatives to detention where they will be in the same place as people that may be threatening to them.
- Ensure ready access to NGOs and counsel for any victims of gender-based violence who are detained.

Currently, we do not see that the expanded ATD Program is responding adequately to the needs of victims of gender-based violence. The CBSA should work with relevant NGOs to ensure access to appropriate and realistic ATDs for this population. It should be noted that NGOs working in this sector will almost never be willing to participate in enforcement action, such as reporting on compliance, since to do so would be to break the relationship of trust which is essential to effective services for victims of gender violence.

11. Electronic monitoring

The CCR has always maintained that attention must be paid to restrictions of liberty imposed on individuals as an alternative to detention.

Electronic monitoring is a particularly serious restriction of liberty.

We are concerned that what was presented as a two-year pilot project in the GTA was subsequently expanded to Montreal, without any public evaluation of the project.

Due to the expense involved in the ankle bracelets, it does not appear that the use of electronic monitoring is widespread. However, we are concerned that there is no publicly disclosed policy on the circumstances in which electronic monitoring may be used, and for how long.

In our 2019 report, [Immigration detention and children: Rights still ignored, two years later](#), we provided a case example of two young children – twins – whose parents were detained by the CBSA and eventually released on conditions requiring them to wear ankle bracelets and stay at home, apart from limited exceptions such as taking the children to school. These are severe restrictions on their parents' liberty, for an indefinite period. Those impacted are not only the parents, but also the children.

We reiterate the need for an evaluation of electronic monitoring, which takes into consideration the impacts on the persons subject to the monitoring, as well as on their family.

12. Voice reporting

The expanded ATD program announced in 2018 included a “national [Voice Reporting program](#) that will enable individuals to comply with reporting conditions imposed by the CBSA or the Immigration and Refugee Board (IRB), by using voice biometrics to report to the CBSA at a prescribed interval.”

Voice reporting offers a welcome alternative to in-person reporting, which involves enormous expense and disruption of a person's life. Many forms of employment are inaccessible to a person who is required to report in person.

We would welcome an update on the roll out of plans for voice reporting using voice biometrics.

During the COVID pandemic, different alternatives to in-person reporting seem to have introduced in various regions. It is not clear to us what the policies are and whether there is national consistency.

With regard to email reporting, we are concerned that this requirement, while certainly less demanding than travelling to a CBSA office, is often difficult to manage for people who are living in extreme poverty, with little or no regular access to the internet.

Despite the promise of voice reporting, we are disappointed to see that it does not seem to be made available as an alternative to a person in detention. Instead, it is more usually offered by the CBSA after in-person reporting conditions have been complied with for a certain period of time.

We are also concerned that the availability of voice reporting should not lead to it being applied more broadly. Although it is much less restrictive of liberty, it is nevertheless an imposition on people and makes them less than fully free.

13. Bonds

The CBSA can and sometimes does offer release on a bond before the 48 hour review.

This is a good option, but more attention needs to be paid to tying the amount to the capacity of the individual and their network to pay (as is done in the case of bail). In the GTA, the standard rate seemed to be \$5,000 until it was recently observed to have increased to \$10,000. Many newly arrived people in Canada have family and friends, who like them, have very limited financial means.

We also note a continuing concern at what seems, anecdotally, to be inconsistency in bond amounts across regions. This is a matter that the CCR has raised for many years. It would be simple for the CBSA to do a statistical analysis on bond levels by region. A more sophisticated analysis, comparing similarly-situated individuals in different regions, would be enlightening.

We are also concerned at the requirement often imposed that a person live with their bondsperson. This is a significant burden, both to the person and the bondsperson, especially when it is maintained over a long period of time. In some cases, an unhealthy relationship may develop, and even lead to abuse. The fact that there is no end date in sight makes it more difficult to find bondspersons willing to step forward.

Similarly, the potential for one's money being held indefinitely by the CBSA discourages people from offering to pay a bond.

14. Disclosure

An ongoing concern that has implications on access to ATDs is last minute disclosure by the CBSA, including on the day of the detention review. There are instances of the CBSA disclosing shortly before the review a plan for release to a CCMS service provider, based on acceptance of certain conditions. The person may be put in the difficult situation of not being fully comfortable with the conditions and yet preferring to accept them in order not to delay release.

We would like to see the CBSA systematically take a more collaborative approach in working with the person and their counsel (and DR if any) to agree on an ATD.

15. Transparency

We urge the CBSA to ensure that there is greater transparency in the ATD program. There should be clarity on the criteria and process for determining whether a person is admissible for a specific ATD. In the absence of transparency, there may be suspicions that decisions are made based on arbitrary factors.

There also appear to be a number of real or de facto rules that have emerged, or are extrapolated by the counsel and NGO community – such as no referrals before admissibility hearing, or no ATDs for people detained on identity grounds.

16. Data tracking of restrictions on liberty in the community

In 2018 we raised the concern about the lack of a clear plan to measure the impacts of ATDs on liberty restrictions. Nearly 5 years later, there continues to be no plan to collect data and measure the impact of liberty restrictions in the community. We are more concerned than ever.

While the CBSA publishes statistics on persons in detention, there is nothing equivalent for those subject to restrictions on liberty in the community, such as electronic monitoring, or required residence with a bondsperson, or in-person reporting. There are questions about whether overall there could now be more people under more restrictions to their liberty for longer periods of time, even while fewer people may be in detention. Release into the community with conditions is still a restriction on one's liberty – and often a restriction that continues for a very lengthy period of time.

We called for plans to collect and analyze data relating to use of enforcement measures, both detention and alternative restrictions on liberty, and recommend that there be clear targets for reducing enforcement measures. There must be consistency across regions, and a plan to allow measurement of whether the targets are being reached.

Data tracking should also be used to monitor and take action in situations where conditions remain in place for a long time. One member reported recently discovering a woman had been reporting weekly since 2013! It appeared that she had been forgotten and no one thought to intervene.

17. Regional variation

CCR continues to have concerns around regional variations as revealed in the IRB audit. There is significant regional variation in many aspects of decisions to detain and release. This includes

the availability of the CBSA's CCMS programs, the types of programs available, and the wait times for the programs offered, whether bonds are required and if so, at what levels.

18. Cases with criminality

For cases where the person detained has past or ongoing criminal proceedings, they will likely be subject to court conditions such as bail or probation conditions. These conditions often have built in supervision, reporting, and programming requirements as well as other restrictions. More often than not, those with criminality face lengthier detentions than those who do not have a criminal component, despite having been released by the criminal courts. The CBSA should proactively work with the person's counsel and probation officer to create a release plan that complements the release conditions already imposed by the criminal courts. The CBSA should not normally be imposing greater requirements than a court imposed in setting bail.

In the GTA, many of these individuals are not eligible for the Salvation Army Bunton Lodge residential treatment program because that organization does not accept people with certain types of outstanding criminal charges. The Toronto Bail Program requires a CBSA management referral for persons with certain convictions or outstanding charges. While the criminal courts have imposed conditions sufficient to offset concerns they may have if the person is released, they often unfairly face a lengthier time on immigration hold due to their criminality.

19. Identity cases

In 2018 we raised concerns about the CBSA excluding people detained on identity grounds from their low risk ATD model. We continue to be concerned about the CBSA's treatment of identity cases as we have reports of the CBSA not referring identity cases to their low risk ATD programs. Section 3.1.16 of the *Chairperson Guidelines 2: Detention* expressly directs members of the Immigration Division that "the lack of an established identity does not mean that a member may not consider alternatives to detention." However, there is inconsistent messaging around the availability of ATDs on identity grounds when the CBSA's CCMS are sought.

There is particular concern around identity cases in Montreal which maintains a high number of detentions on the basis of identity and the CBSA's ATDs are not made available. This is despite many of these cases involving the separation of parents from their children.

20. Access to legal counsel

Access to legal counsel should be of pivotal importance and made a priority for persons who are in detention. The Central Region has been able to ensure almost every person in detention has

access to counsel through Legal Aid Ontario's Immigration Detention Representation Program. Counsel have been largely responsible for creating ATDs which are often opposed by the CBSA when they do not involve the CBSA's contractual partners. However, other regions have not been resourced to undertake ensuring detainees are represented at such a large scale. In regions where detainees go unrepresented, the CBSA must understand they have a heightened onus to seek out ATDs. Persons should not face lengthier detentions because they face barriers in obtaining counsel who can create an ATD.