



## PRISONERS' LEGAL SERVICES OF MASSACHUSETTS

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### **Testimony of Prisoners' Legal Service on the Department of Corrections' Proposed Regulations 103 CMR 423, 425, and 430, Related to Restrictive Housing**

Prisoners' Legal Services (PLS) welcomes this opportunity to comment regarding the Department of Corrections' (DOC) proposed regulation changes related to restrictive housing, also known as solitary confinement. It is PLS' understanding that the proposed regulations 103 CMR 423, 425, and 430 are in response to the recently enacted Criminal Justice Reform Act (CJRA) requirements with respect to solitary confinement conditions, diversion, programming, and due process. During the debates and legislative hearings that surrounded the CJRA, advocates, experts and survivors of solitary confinement repeatedly pointed to the growing body of evidence that solitary confinement amounts to torture, and does little if anything to protect public safety, increase institutional security, or decrease violence. The DOC's position has been that solitary confinement is a necessary correctional tool. The Legislature sought to strike a balance between these two positions by attempting to reduce the use of solitary confinement to circumstances where a prisoner poses an unacceptable risk to safety or security, exclude certain vulnerable populations from solitary, and ease conditions in solitary in order to decrease the cruelty inherent in lock down and isolation.

### **Failure to Live Up To the Spirit of the CJRA and Subverting the Intention of the Law**

The intent of the legislature was clear: it called on the DOC to change its culture of reliance on solitary, while still permitting the DOC to utilize solitary in very limited circumstances. This was a necessary step in the right direction that gives the DOC an opportunity to shift resources away from the outdated vestiges of the "tough on crime" era and towards programming, rehabilitation, education, and re-entry work that is necessary to increase public safety and reduce harm. While implementation is not yet complete, these regulations make clear that, rather than seize this opportunity, the DOC intends to continue to rely on solitary confinement as a linchpin of its management practices and find new ways to weave it into the fabric of the state correctional system.

These regulations evidence that the DOC intended to comply, perhaps, with the letter of the law, while subverting the intention of the law. In the CJRA, the legislature utilized the term "restrictive housing" to stand in for "solitary confinement," and defined it as being confined more than 22 hours a day in one's cell. In response to the CJRA's mandate to reduce the use of restrictive housing, DOC has created a new type of unit they are calling either "Secure

Adjustment Units or Non-Restrictive Housing Units. Prisoners may be diverted to these units from solitary confinement because they fall under a vulnerable persons category or may be sent to these units when they are released from restrictive housing because they are found to no longer pose an unacceptable risk. In Secure Adjustment Units, prisoners will be out of their cells only 3 hours daily, technically removing them from the definition of restrictive housing, and depriving them of the protections afforded by the CJRA, including placement reviews, conditions requirements, and monitoring provisions. While this set up may technically comply with the letter of the CJRA, it undoubtedly undermines its intent by creating a new category of housing with one more hour a day out of cell than the definition of restrictive housing requires.

For the DOC to continue this approach is to fly in the face of the many months of arduous drafting and negotiating conducted by the legislature in crafting something they believed would result in a significant evidence-based reform of solitary confinement practices in Massachusetts. The efforts of the legislature should instead be taken, as they have in other states<sup>1</sup>, as an opportunity for the DOC to work towards moving its institutional culture away from punitive lock down and isolation, and instead in the direction of rehabilitative efforts.<sup>2</sup> Colorado is a useful example of a state that has undertaken systemic culture change, substantially reduced the population in solitary, increased access to programming, and sought to ameliorate conditions, with positive results. Restrictive housing for punishment is limited to 15 days in Colorado and conditions are supposed to resemble general population as much as possible.<sup>3</sup> They also have close custody units, which appear similar to the proposed Secure Adjustment Units, except prisoners in those units get four hours daily out of cell, which is the equivalent of most of the population currently housed at Souza Baranowski Correctional Center.<sup>4</sup> Where reforms have been made, staff report they are much safer and happier working in less punitive, more rehabilitative, segregation settings.<sup>5</sup>

There is increasing awareness among correctional professionals that solitary confinement creates a culture of harm that is destructive to prisoners, staff and public safety. Massachusetts should embrace, not resist, reform. States that have greatly reduced their reliance on solitary have seen no increase in violence and, in some cases, substantial decreases.<sup>6</sup> Evidence also

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<sup>1</sup> See *Rethinking Restrictive Housing*, Vera Institute, (May 2018) for examples of other state reforms.

<sup>2</sup> Last year, only 4% of the direct appropriations in the DOC budget were for re-entry programming. See [https://budget.digital.mass.gov/bb/h1/fy18h1/brec\\_18/dpt\\_18/hdoc.htm](https://budget.digital.mass.gov/bb/h1/fy18h1/brec_18/dpt_18/hdoc.htm)

<sup>3</sup> Colorado Restrictive Housing Regulations: <https://drive.google.com/file/d/13O-CxCgjp7V7EZjUPTJECaVKDMK78qIc/view>

<sup>4</sup> Colorado Close Custody Unit Regulations: <https://drive.google.com/file/d/1xH7zWWN4zRk15fyit9IL1ULjqdfiKC9T/view>

<sup>5</sup> Video of staff talking about how reform benefits both staff and prisoners: <https://www.safealternativestosegregation.org/webinar/rethinking-restrictive-housing-whats-worked-in-colorado/>

<sup>6</sup> The General Accounting Office in 2013 reported that it had interviewed officials in five states that have reduced reliance on segregation -- Maine, Colorado, Kansas, Mississippi and Ohio --and learned that in all five states there was no increase in violence when prisoners were moved to less restrictive housing. After Mississippi reduced the population in its supermax segregation unit by 85 percent, a study showed a 70 percent reduction in prison

shows that solitary confinement causes severe psychological harm and trauma.<sup>7</sup> The National Commission on Correctional Health Care, the American Public Health Association, and the American Psychiatric Association have all recognized its harmful effects.<sup>8</sup> Supreme Court Justice Kennedy affirmed in his concurring opinion in *Ayala v. Davis*, “research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.”<sup>9</sup> But in Massachusetts, rather than follow best practices of striving for the least restrictive conditions possible, the DOC is trying to ameliorate conditions as little as possible without directly violating the CJRA.

It is counterproductive and harmful for people to be locked in a cage for 22 or even 21 hours a day. People who are incarcerated need programming, education, and meaningful activity. All prisoners must have the opportunity to cultivate pro social community contacts through open visitation and affordable telephone calls. They need access to proper mental health, substance use disorder and medical care. They need comprehensive re-entry services. DOC should stop mispending resources on lockdown conditions, regardless of what that lockdown is called.

### **The Departmental Disciplinary Unit (DDU)**

In addition to violating the spirit of the law, in at least one key respect, the DOC is failing to follow the letter of the CJRA. Until now, Massachusetts has been one of the only states in the country with long term solitary confinement sentences for disciplinary offenses, with sanctions of up to ten years per major disciplinary offense. Prisoners serve these long term sanctions in the Departmental Disciplinary Unit (DDU). The CJRA sought to move away from this cruel practice by ensuring that after six months of any sanction served, and every 90 days thereafter, prisoners in the DDU would be provided a Placement Review in order to determine if they continue to pose an unacceptable risk that justifies holding them in restrictive housing. If they do not, they must be released from restrictive housing.

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violence. Maine has cut its solitary confinement population in half and found no rise in violence and even a decline by some measures. Colorado closed a 316-bed solitary confinement facility and reduced the population in solitary by 36.9 percent. As a result the state saved an estimated \$4.5 million in 2012-13 and \$13.6 million in 2013-14 -- and prisoner-on-staff assaults there have been at their lowest since 2006. See *Solitary Confinement: A Case For Change in Massachusetts* (PLS, 2016) [http://www.plsma.org/wp-content/uploads/2017/02/PUBLIC\\_Solitary-Confinement-The-Case-for-Change-in-MA\\_Nov.-2016.pdf](http://www.plsma.org/wp-content/uploads/2017/02/PUBLIC_Solitary-Confinement-The-Case-for-Change-in-MA_Nov.-2016.pdf)

<sup>7</sup> David H. Cloud, et al., *Public Health and Solitary Confinement in the United States*, 105 Am. J. Public Health (Jan. 2015) (“[e]very scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies.”)

<sup>8</sup> See National Commission on Correctional Health Care, Position Statement, Solitary Confinement, available at <http://www.nccchc.org/position-statements>; American Public Health Association, Policy Statement, “Solitary Confinement as a Public Health Issue,” available at <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue>; American Psychiatric Association, Position Statement on Segregation of Prisoners with Mental Illness (December 2012)

<sup>9</sup> 135 S. Ct. 2187, 2210, 192 L. Ed. 2d 323 (2015)

The law provides that all placement reviews, for prisoners in the DDU as well as all other restrictive housing, must be in front of a "multidisciplinary panel." While DOC plans to offer most prisoners in non-disciplinary restrictive housing the full reviews in front of the panel that are required by law, it plans to limit DDU prisoners to only written submissions and deny them the chance to meet with the panel.<sup>10</sup> The CJRA says even those who commit serious disciplinary offenses deserve a chance to explain in person why they no longer pose a threat, but the DOC has severely hindered their ability to do so. Further, if the multidisciplinary panel does determine that the prisoner no longer poses an unacceptable risk and that they should be released from the DDU, the DOC, under 103 CMR 430.29, has authorized the Deputy Commissioner to determine that any time remaining on a prisoner's DDU sanction at the time of their release is merely suspended, conditional upon the prisoner's subsequent disciplinary behavior, with the original termination date of their DDU sanction remaining in effect. This leaves open the possibility that a prisoner may be returned to the DDU for a minor disciplinary infraction, regardless of whether they pose the requisite unacceptable risk to safety or security that is required once they have served the first six months of a punitive sentence.

In addition to diminishing the prospects of release from the DDU and increasing the likelihood of return, the DOC has failed to properly implement the CJRA provisions that sought to improve conditions in DDU. There has been no change made to the number of visits prisoners may receive and the number of phone calls they may make (4 per month maximum for each). There has been no change to canteen access. Many prisoners who have been deemed Seriously Mentally Ill have remained in the DDU itself, but have been placed in a unit together that is presumably considered a Secure Adjustment Unit, or a Special Treatment Unit, though prisoners and staff are calling it the SMI-wing of the DDU. In that unit they are being permitted 1.5 hours of recreation and 1.5 hours of programming daily, however, they are receiving none of the enhanced clinical care that is provided in the Secure Treatment Units, and they remain subject to the overall extraordinarily isolated conditions of the DDU.

### **Diversion of Prisoners with Serious Mental Illness**

It appears that the provisions in 103 CMR 430.30 and 103 CMR 430.23 governing the diversion of prisoners who are determined to be "Seriously Mentally Ill" (SMI), may violate the law. The law requires that in order to hold a prisoner with SMI in restrictive housing, the Commissioner must certify in writing every 72 hours (i) the reason why the prisoner may not be safely held in the general population; (ii) that there is no available placement in a secure

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<sup>10</sup> The DOC has also limited prisoners who are entitled to a placement review every 72 hours and every 15 days to written participation. This is also arguably in violation of the law. Likewise, DOC has provided that these hearings may be completely waived by the prisoner. 103 CMR 423.09(3)(B)(ii) and (iii). If the waiver provision is interpreted to waive the review itself, rather than simply permitting the prisoner to choose not to participate, then this is also a violation.

treatment unit; (iii) that efforts are being undertaken to find appropriate housing and the status of the efforts; and (iv) the anticipated time frame for resolution. The regulations provide for this certification after the first 72 hours, but fail to require the necessary certifications thereafter. It is our hope that this is merely a drafting error.

### **Prisoners with Disabilities**

The law requires the commissioner to promulgate regulations regarding the placement or preclusion of prisoners with permanent disabilities in restrictive housing. Other than providing that prisoners with disabilities in restrictive housing will be provided with reasonable accommodations and that prisoners in administrative restrictive housing will be screened for medical contraindications, including permanent disabilities, there are no regulations regarding the placement or preclusion of prisoners with permanent disabilities in restrictive housing. There is no indication that prisoners will be screened for permanent disabilities prior to placement in the DDU.

### **Secure Treatment Unit Placement Reviews**

The law requires that prisoners in Secure Treatment Units (STUs) shall receive placement reviews at intervals not less than as frequently as if the prisoner were confined to restrictive housing. The DOC has responded by creating a separate regulation, 103 CMR 425, governing placement reviews for prisoners in STUs. This regulation provides none of the procedural protections required by the law for placement reviews, nor does it require a determination that the prisoner poses an unacceptable risk in order to continue their restricted confinement. Prisoners in the STUs are also being told that since they do not meet the technical definition of living in restrictive housing, they will not be receiving the benefits of any of the CJRA protections afforded for those in restrictive housing.

### **Out of Cell Time, Outplacements, and Programming**

Finally, the law requires the commissioner to promulgate regulations to maximize out of cell time and out placements from segregation, and to maximize programming. It reflects the fundamental principle that DOC should operate restrictive housing using the least-restrictive conditions possible. The DOC has failed to propose such regulations. This is not only a violation of the law, but also evidences the DOC's refusal to take the needed steps to change the internal culture of the state prison system away from punishment and towards rehabilitation. Maximizing out of cell time should, at the very least, mean permitting prisoners 14 hours a week out of their cells. If the DOC cannot manage this extremely low threshold, the burden should be on the DOC to explain why it cannot.

## Conclusion

I want to close with some words directly from a prisoner currently in solitary. He has been housed in the DDU for the past two years. He is locked in a 9 x 7 foot cell at least 23 hours a day, 7 days a week. He recently sent me a letter saying this: "Ever since I've been in DDU, I just gave up! My cell is always full of dead people. I have attacks. I've been getting locked and trapped in the walls. I've tried to commit suicide plenty of times." In two years, nothing has changed for this man. Since the DOC began implementing these emergency regulations, nothing has changed for him.

The Criminal Justice Reform Act should be a bellwether for a culture change in the Massachusetts Department of Correction. The Legislature, following the will of the people, and a groundswell of reform that is taking place in correction departments across the country, asked the DOC to substantially reduce the number of our incarcerated community members who are subject to the torture of solitary conditions. To do as little as what is in these proposed regulations is not only to defy the spirit of the CJRA and the will of the people, but it will allow solitary confinement to wreak havoc on some of the most vulnerable citizens of the Commonwealth.

Prisoners' Legal Services, February 19, 2019

### Cosigned In Support:

American Civil Liberties Union of Massachusetts

Criminal Justice Reform Task Force of Congregation Dorshei Tzedek

The Real Cost of Prisons Project

Unitarian Universalist Mass Action

EMIT - End Mass Incarceration Together

Massachusetts CURE

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Mass Incarceration Working Group of the First Parish Unitarian Universalist of Arlington

Dianne Zimbabwe, Through Barbed Wire

Charles Hamilton Houston Institute for Race and Justice

National Association of Social Workers- Mass. Chapter

Black and Pink, Boston Chapter

Stone Speakers Bureau

Coalition for Effective Public Safety (CEPS)

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