**Testimony of Designees to the Restrictive Housing Oversight Committee**

**on the Department of Corrections’ Proposed Regulations 103 CMR 179 regarding the Restrictive Housing Oversight Committee**

As members of the Restrictive Housing Oversight Committee (RHOC), we welcome this opportunity to comment regarding the Department of Corrections’ (DOC) proposed RHOC regulations, 103 CMR 1789.00, et. seq. We were named by organizations appointed by the Legislature to help oversee the use of restrictive housing in prisons and jails in the Commonwealth as well as the implementation of the CJRA restrictive housing provisions. Another primary function of the Oversight Committee is to make meaningful recommendations for further reforms.

As we begin the work of visiting prisons and jails and reviewing correctional practices throughout the state, we are deeply concerned by the limitations that these proposed regulations would place on the authority and power of the committee and its members. These restrictions go well beyond the regulatory authority of the DOC and contradict the intent of the Legislature to establish independent oversight and encourage evidence based reform of solitary confinement.

1. **The DOC Has Overstepped Its Regulatory Authority**

The DOC does not have legal authority to promulgate regulations that are in conflict with the law. The RHOC was established as part of restrictive housing reforms in the Criminal Justice Reform Act (CJRA), with a mandate to “gather information regarding the use of restrictive housing in correctional institutions to determine the impact of restrictive housing on inmates, rates of violence, recidivism, incarceration costs and self-harm within correctional institutions.” The committee “shall be provided access to all correctional institutions consistent with their duties and shall be allowed to interview prisoners and staff.” Annually, the committee shall “submit to the house and senate chairs of the joint committee on the judiciary and the house and senate chairs of the joint committee on public safety and homeland security a report offering its recommendations on the use of restrictive housing in the commonwealth, including ways to minimize its use and improve outcomes for prisoners and facility safety.” Mass. Gen. Laws. ch. 127 §39G. The proposed regulations obstruct the work of the RHOC in direct conflict with the letter and intent of the RHOC provisions of the CJRA.

1. Prohibition on Public Comment by Committee Members

The regulations (103 CMR 179.11) state that committee members may not make any statements to the public or the press regarding matters pending before the committee, unless approved by the Chair. This is a violation of the members’ first amendment rights to free speech. The RHOC is a public body, subject to the Open Meeting Law, and all matters pending before the committee are matters of public interest. While this law provides that a quorum of members may not deliberate amongst themselves except in public, it does not limit the ability of individual members to share information regarding matters pending before the committee with the public. The prohibition on public comment in the proposed regulations clearly contravenes the purpose of the open meetings law to ensure that the business of public bodies is conducted in a transparent and publicly accessible way. It also frustrates the intent of the Legislature to create meaningful oversight and public accountability in the area of restrictive housing.

1. Restricting Access of Committee Members to Information

The core responsibility of the RHOC is to gather information regarding restrictive housing and to annually submit a report to the Legislature with recommendations regarding the use of restrictive housing in the Commonwealth. It is mandated to “gather information regarding the use of restrictive housing in correctional institutions to determine the impact of restrictive housing on inmates, rates of violence, recidivism, incarceration costs and self-harm within correctional institutions.” It is required to submit a report to the legislature by January 31, 2020 “offering its recommendations on the use of restrictive housing in the commonwealth, including ways to minimize its use and improve outcomes for prisoners and facility safety.” It is also required to report on:

* existing criteria for placing an inmate in restrictive housing;
* the extent to which staff who work with prisoners in restrictive housing receive specialized training;
* the results of evaluations of the process of restrictive housing in the commonwealth and other states;
* the impact of use of restrictive housing on prison order and control in correctional facilities;
* the cost of housing an inmate in restrictive housing compared with the cost of housing an inmate in general population; and
* the conditions of restrictive housing in the commonwealth.

*See* M.G.L. c. 127 § 39G.

Several provisions in these regulations hamstring the Committee’s ability to do this work effectively.

First, 103 CMR 179.10 states that the Committee may request that the Commissioner or the Sheriffs provide “**existing** documents and data regarding the use of restrictive housing” (emphasis added). The RHOC is authorized by statute to request the data and information needed to provide oversight. Limiting access to only documentation that already exists is likely to prevent the committee from developing a full analysis and making the most effective recommendations.

Second, 103 CMR 179.13 seeks to limit the RHOC’s broad authority to visit prisoners. The statute provides, “[t]he committee shall be provided access to all correctional institutions consistent with their duties and shall be allowed to interview prisoners and staff.” The DOC seeks to limit access by stating that the RHOC must appoint specific committee members who will access correctional institutions, identify the specific correctional institutions that will be accessed, and specify the dates and timeframes during which the designated members may seek access. Furthermore, the regulations state that committee members will only be permitted to enter correctional institutions with prior appointment and plans approved by the Commissioner, Sheriff, or designee. These requirements would prevent committee members from making unannounced visits and visits outside of regular visiting hours, which are essential to effective oversight. They also unreasonably limit the facilities that each Committee member may visit.

Likewise, 103 CMR 179.14 limits the authority of Committee members to interview and obtain information regarding prisoners and staff. It states that Committee members are not entitled to any non-public information or records without a written release and that they are categorically barred from any personnel information regarding public employees. This is far more restrictive than the access that has been granted to bodies such as the Department of Mental Health in its oversight of restrictive housing units or past bodies like the Governor’s Commission on Corrections Reform (the “Harshbarger Commission”), which reviewed prisoner records with no release.

These requirements obstruct the Committee’s ability to gather the information required by the law. We are tasked with writing a report that includes information regarding staff training, the impact of restrictive housing on prison order and control, the criteria for placing an inmate in restrictive housing, and conditions in restrictive housing. To be effective in this work, we cannot have our access to information hampered. If the Committee members are subjected to the power of the Commissioner, Sheriffs and correctional administrators to limit contact with prisoners, staff, and information, then it simply will not have the ability to serve as an “oversight” body.

103 CMR 179.13 further provides that no Committee member may enter a prison or jail for any reason other than to conduct Committee business. While it may not have been intended in this way, the plain language of the proposed regulation denies access to prisons for members of the Committee who are also on the staff of organizations charged with representing prisoners such as PLS and DLC, or for members who may visit prisoners for other personal or professional reasons.

Finally, 103 CMR 179.15 states that Committee members are not entitled to access “non-public” policies and procedures without approval by the Commissioner or relevant Sheriff. And if approval is granted, the Committee is not permitted to rely on such documents in its meetings, even in executive session. While we fully understand that we have a duty to protect confidential documents from public disclosure, this broad restriction on access to policies and procedures unreasonably limits the ability of the Committee to fulfill its mandate.

**Conclusion**

The restrictive housing provisions in the CJRA were designed to reform practices in state and county prisons and jails. The clear and broad mandate given to the Oversight Committee demonstrates the Legislature’s intent to ensure that the Commonwealth implements these reforms and continues to move towards evidence based practices.

It is a strength of the RHOC that it brings together members from a variety of backgrounds. Because the Committee is charged with understanding an issue that is out of public view it is critical that the Committee maintain the authority it was afforded to fully access prisons and jails, to speak directly with incarcerated people about their experiences, to gather the information it needs, and to include the public in its work. However, under these regulations, the non-correctional members of the RHOC will be denied access to information that is readily available to the correctional members of the Committee, who make up five of the eleven members. This would create imbalance on the committee and strip us of our ability to to fulfill our mandate. The RHOC it would no longer be truly an “oversight” committee.

We look forward to continuing the spirit of cooperation with which the RHOC has been operating, and sincerely hope that the Department will take seriously these concerns and revise its proposed regulations accordingly.

Respectfully submitted,

Marlene Sallo, on behalf of the Disability Law Center

Robert Fleischner, on behalf of the Massachusetts Association for Mental Health

Bonita Tenneriello, on behalf of Prisoners’ Legal Services of Massachusetts

National Association of Social Workers, Massachusetts Chapter