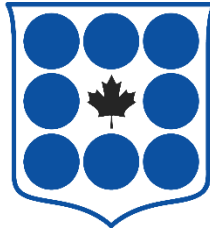


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Submission to the Ministry of the Solicitor General

Comments on proposed amendments to Regulation 778 under the
Ministry of Correctional Services Act, 1990

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Canadian Civil Liberties Association

The Canadian Civil Liberties Association (“CCLA”) is an independent, national, nongovernmental organization that was founded in 1964 with a mandate to defend and foster the civil liberties, human rights, and democratic freedoms of all people across Canada. Our work encompasses advocacy, research, and litigation related to the constitutional rights of incarcerated persons as well as, specifically, the human rights concerns that are frequently raised by regulatory regimes pertaining to the practice of solitary confinement in Canadian prisons and jails.

Overview

The CCLA makes this written submission to the Ministry of the Solicitor General regarding the proposed amendments to Regulation 778 under the *Ministry of Correctional Services Act, 1990* [the “Act”].

We welcome the ministry’s intention to address the harmful impacts of segregation, establish a more procedurally fair and clearer inmate discipline process, and enhance staff training. A number of the proposed provisions are clear steps in the right direction, including:

- The inclusion of a fifteen-day limit on segregation;
- Requirements for institutions to have specialized care and appropriate medical isolation placements that reflect the needs of their populations;
- A recognition of the serious and immediate harms flowing from the isolation of seriously mentally ill individuals;
- Efforts to establish an alternative dispute resolution process for issues of misconduct;
- Recognition of the need to provide a more thorough and expansive review process for the disciplinary adjudication process; and
- Enhanced training requirements.

Although we support the stated intention of many of the proposed changes, a number of the specific provisions present significant concerns. As detailed in the remainder of our submissions, CCLA is concerned that the provisions regarding segregation reviews and the regulatory limits on the use of solitary confinement are less robust than previous legislative proposals and are ultimately insufficient to remedy the well-documented, ongoing rights violations in Ontario’s jails and correctional centres. We also outline below our recommendations for clearer guarantees of procedural fairness in the inmate misconduct process.

1. Proposed regulatory changes to segregation are insufficient to remedy ongoing rights violations

Context: Solitary confinement in Ontario’s jails and correctional facilities

A series of reports and court decisions have repeatedly found that Ontario’s use of solitary confinement violates individuals’ rights under the *Ontario Human Rights Code* and the *Constitution*.¹ Most recently, in March 2021, the Court of Appeal for Ontario affirmed that:

¹ *Francis v Ontario*, 2021 ONCA 197 [Francis]; *R v Capay*, 2019 ONSC 535 (CanLII) [Capay]; *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243 [CCLA]; *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491, 140 OR (3d) 342, [Corp. of the CCLA, 2017]; Ontario Human Rights Commission, “Submission of the Ontario Human Rights Commission to the Ministry of the Solicitor General on the proposed amendments to the segregation provisions in Regulation 778 under the Ministry of Correctional Services Act” (24 September 2019), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/news_centre/submission-ontario-human-rights-commission-ministry-solicitor-general-

- any confinement of SMI [seriously mentally ill] Inmates in administrative segregation violated their rights under ss. 7 and 12 of the *Charter*;
- the confinement of any inmate in administrative segregation for more than 15 consecutive days infringed their rights under ss. 7 and 12 of the *Charter*; and
- absent an independent timely review procedure, confinement in administrative segregation of any inmate violated procedural due process rights under s. 7 of the *Charter*.²

Some of the proposed regulatory changes appear to be an attempt to respond to these clear court rulings. Unfortunately, it is our view that the ministry's current proposals are insufficient to guarantee individuals' constitutional rights are respected.

The proposed reforms regarding limits to segregation and segregation reviews

The ministry is proposing several changes to Regulation 778 imposing limits to the use of, and reviews of, segregation. These include:

- Requiring a five-day break from placement in segregation conditions if the 15-day limit has been reached, “with an exception if other options are exhausted and the Superintendent has reasonable grounds to believe placement in segregation conditions is needed to address immediate safety or security concerns”;
- The expansion of existing “independent” reviews conducted by ministry staff outside the institution to include disciplinary segregation placements;
- Limits on the number of aggregate days a person can spend in segregation within certain time period, with an exception if “other options are exhausted and the Superintendent has reasonable grounds to believe placement in segregation conditions is needed to address immediate safety or security concerns”;
- Requiring “independent” reviews after an individual has spent a certain number of aggregate days in segregation in various time periods; and
- Prohibiting the use of segregation for those with a “serious mental illness”, which is defined as individuals “who were diagnosed by a Regulated Health Professional before or during their incarceration or supervision order with at least one of a list of Diagnostic and Statistical Manual for mental Disorders-defined disorders”, and who, in addition, present at least one of the following symptoms as a result of the disorder:
 - Significant impairment in judgment;
 - Significant impairment in thinking;
 - Significant impairment in mood;
 - Significant impairment in behaviour and communications that interferes with their ability to effectively interact with other people, including staff;
 - Hallucinations; delusions; or, severe obsessional rituals that interfere with their ability to effectively interact with other people, including staff;
 - Chronic and/or severe suicidal ideation resulting in increased risk for suicide attempts; or

proposed-amendments> [OHRC Submissions on Regulation 778, 2019]; Howard Sapers et al., *Segregation in Ontario: Independent Review of Ontario Corrections* (Toronto: Queen's Printer for Ontario, March 2017) at 101, online (pdf): *Ontario Ministry of the Solicitor General* https://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/IROC%20Segregation%20Report%20ENGLISH%20FINAL_0.pdf [IROC Report], Justice David P. Cole “Final Report of the Independent Reviewer on the Ontario Ministry of the Solicitor General's Compliance with the 2013 'Jahn Settlement Agreement' and the Terms of the Consent Order of January 16, 2018 Issued by the Human Rights Tribunal of Ontario” (25 February, 2020), online: *Ontario Ministry of the Solicitor General* <https://www.mcscs.jus.gov.on.ca/english/Corrections/JahnSettlement/FinalReportIndependentReviewer.html>

²Francis, *ibid* at para 33.

- Chronic and/or severe self-injury.

Process for review of segregation placements must be independent from the ministry

While the CCLA supports changes in law that would increase the degree of independent oversight afforded to all segregation placements, the proposed review process is not sufficiently independent.

The ministry has had various versions of internal “independent” reviews of administrative segregation placements for several years. A requirement to conduct independent regional segregation reviews was instituted first through ministry policy, and some form of regional review has been part of the *Institutional Services Policy and Procedures Manual* since at least March 2011.³ In November 2019, Regulation 778 of the *Ministry of Correctional Services Act* (“the Act”) was amended to require that segregation placements under 34(1) of the Act (administrative segregation) receive “independent” review by the Minister or designate, once every five-day period (s 34.0.1 (2)).

The ministry’s various models of internal review have been repeatedly found to be inadequate safeguards against the harms of segregation,⁴ and numerous bodies have repeatedly called for independent, external oversight of segregation.⁵ The government itself has recognized the importance of external oversight, and incorporated provisions to put in place such oversight in the *Correctional Services Transformation Act* which was passed by the Ontario Legislative Assembly in May of 2018.⁶ It is deeply disappointing that the ministry is now proposing a less robust oversight mechanism for persons subject to solitary confinement.

The continued lack of independent, external oversight raises constitutional concerns. In 2019 the Ontario Court of Appeal affirmed that a “robust duty of fairness applies to the decision to maintain an inmate in administrative segregation.”⁷ The British Columbia Court of Appeal, considering a similar model of internal review, concluded that: “once an inmate has been placed in administrative segregation, the

³ *Capay*, *supra* note 1 at 147.

⁴ See, for example: *Capay*, *supra* note 1 (the Court found that it was “obvious that the segregation review process in the case of the accused was meaningless at the institutional and regional levels” at para 386; reviews were regularly missed by institutional staff and ministry officials, and when they were completed, they always supported the continued segregation of Mr. Capay even after years of his being kept in isolation, at 386-389; Officials testified that they were “unable to recall a single time that he failed to support the continued segregation of an inmate when conducting a segregation review” at 392). Ombudsman of Ontario, “Out of Oversight: Out of Mind: Investigation into how the Ministry of Community Safety and Correctional Services tracks the admission and placement of segregation inmates, and the adequacy and effectiveness of the review process for such placements” (Toronto: Office of the Ombudsman of Ontario, 2017), online (pdf): *Ombudsman Ontario* https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Reports-on-Investigations/Out_of_Oversight-with_appendices-EN-accessible.pdf (concluding at p. 43 that the Ministry’s internal reviews were inadequate: “Our investigation found that these mandated reviews often fail to rigorously evaluate an inmate’s placement and instead become *pro forma* exercises...Senior Ministry officials failed to consistently review the 30-day reports generated by correctional facilities and regional Ministry staff”). IROC Report, *supra* note 1, at 101 (“[s]egregation placements must be accompanied by robust, effective and procedurally-fair oversight and review mechanisms. Ontario’s current segregation review and oversight framework fails to meet this standard.”) Most recently, Justice David P. Cole, the ministry’s Independent Reviewer appointed pursuant to the *Jahn* settlement, wrote: “While external oversight does not guarantee that the kind of egregious fact pattern so sadly and graphically displayed in the *Capay* case will not happen again, I am concerned that, once the reforms instituted by this *Jahn* settlement have become “routinized” both in ministry policy and in practice, the “internal oversight” regime envisaged by Marrocco A.C.J (Associate Chief Justice) may over time simply prove to be inadequate to ensure that another *Capay* case will not arise.”

⁵ OHRC Submissions on Regulation 778, 2019, *supra* note 1 at 4.

⁶ *Correctional Services Transformation Act*, 2018, SO 2018, c 6 [CSTA].

⁷ *CCLA*, *supra* note 1 at paras 2 and 68; *Corp. of the CCLA*, 2017, *supra* note 1 at paras 155-156.

procedural safeguards in place do not, in practice, work to prevent the individual from languishing in solitary confinement.”⁸ The Court went on to note that “a well-informed member of the public could not reasonably conclude that internal review of segregation decisions will be done fairly. That is so even if those decisions are made by [Correctional Service Canada] officials who are neither subordinate to nor within the circle of influence of the institutional head whose decision is being reviewed.”⁹

In our view, the review process detailed in Regulation 778 is not one capable of satisfying the requirement for effective, independent review as required under s. 7 of the *Charter*.

Broad exceptions to “caps” on segregation placements should be eliminated

As summarized above, the ministry proposes to allow segregated prisoners to be exempted from the required five-day break after 15 days of segregation, as well as exceed the various limits on aggregate placements in segregation, where “other options are exhausted and the Superintendent has reasonable grounds to believe placement in segregation conditions is needed to address immediate safety or security concerns.”

The CCLA is concerned that this exception is so broad that it will render any “caps” on segregation illusory.

In 2016 the ministry instituted a policy requirement that segregation be used as a measure of “last resort”.¹⁰ Similarly, other than inmates who request to be held in segregation conditions, Regulation 778 already requires that the Superintendent be of the opinion that an “inmate is in need of protection” or segregation is necessary to protect “the security of the institution or the safety of other inmates” prior to placing a person in administrative segregation.¹¹ As a result, the prerequisites for placing a person in administrative segregation, and continuing to hold them in those conditions, largely mirror the proposed test for exemptions to the limits on segregation. Under this legal framework, it is foreseeable that the aggregate limits on placement in segregation will routinely be exceeded. Similarly, with no meaningful break between segregation placements the 15-day cap is also illusory.

The Ontario Court of Appeal has determined keeping a person in prolonged solitary confinement for a period beyond fifteen days constitutes cruel and unusual punishment and is a violation of that individual’s ss. 7 and 12 *Charter* rights. Nothing in the jurisprudence supports the constitutionality of broad exceptions to this prohibition.

The regulations must include a broader definition of “Serious Mental Illness”

CCLA strongly supports a prohibition on placing individuals with serious mental illness in conditions that amount to solitary confinement. Unfortunately, the definition of “Serious Mental Illness” in the ministry’s regulatory proposal is too narrow to provide robust protection for the mental health and *Charter* rights of vulnerable prisoners.

As reviewed above, the ministry’s proposed definition has two prongs: 1) the person must have a formal diagnosis of least one among list of Diagnostic and Statistical Manual for Mental Disorders-defined disorders and; 2) the must *also* be contemporaneously presenting one of a number of listed severe symptoms of that disorder.

⁸ *British Columbia Civil Liberties Association v Canada*, 2019 BCCA 228 at para 186.

⁹ *Ibid* at 194.

¹⁰ Solicitor General, “Ontario to Begin Overhaul of the Use of Segregation in the Province” (17 October 2016), online: *Government of Ontario: Newsroom* <<https://news.ontario.ca/en/release/42236/ontario-to-begin-overhaul-of-the-use-of-segregation-in-the-province>>

¹¹ RRO 1990, Reg 778, s 34(1)(a) and (b).

The definition provided in these proposed amendments appears to have been crafted to align with the class definition in *Francis*. The definition of a particular class for the purposes of class action litigation, however, will almost always be crafted to capture a subset of the individuals who have experienced rights violations. In this case, the ministry’s proposed definition would not, in practice, include all, or even most, people whose mental health status increases their vulnerability to the harms of isolation.

Individuals who are seriously mentally ill will suffer the negative impacts of solitary confinement regardless of whether or not they have a confirmed diagnosis of their mental illness from a medical provider. Many incarcerated people face significant barriers accessing the kind of health care and medical support that would lead to a diagnosis prior to a period of incarceration.¹² Regulations that would require an inmate have a pre-existing mental health diagnosis as a threshold to be protected from an unconstitutional and medically dangerous segregation placement is not sensitive to the unique and pernicious barriers to accessing health care that the incarcerated population face. Even if a pre-existing diagnosis exists, incarcerated persons will likely face significant difficulty “proving” they have an acceptable diagnosis once they are admitted to an institution.

Many acutely ill individuals without a pre-existing diagnosis will remain undiagnosed by health care professionals during their incarceration. As explained in a 2016 report on healthcare in Ontario correctional facilities:

Mental health issues that do not present as suicidality or create institutional management concerns are unlikely to be effectively or appropriately triaged at admission...resources to follow through with in-depth assessments and interventions remain limited.¹³

Under the proposed definition, an individual who is clearly seriously ill—delusional, suicidal, or exhibiting serious self-harming behaviour, for example—could continue to be held in solitary confinement simply because they had no accurate, formal medical diagnosis. The baseline requirement for a diagnosis will subject many individuals with serious mental illness to solitary confinement, resulting significant harm and serious widespread violations of constitutional rights.

The additional threshold requirement that an individual contemporaneously present at least one among a list of symptoms is also concerning. In *CCLA*, the Court of Appeal indicated that “monitoring for deterioration” was an ineffective means of protection from the undue harms of solitary confinement as this type of supervision was only capable of recognizing damage to individual’s health after it had already been caused.¹⁴ Similarly, regulations that would allow an individual with a known, severe mental illness to be placed in solitary conditions until such time that symptoms—like suicidal ideation, self-harm, and

¹² As reported by the John Howard Society Ontario in its 2016 report *Fractured Care: Public Health Opportunities in Ontario’s Correctional Institutions*, “Marginalized populations face a multitude of barriers to accessing health services in our communities, and those entering correctional institutions are more likely to have undiagnosed or unmanaged health conditions. Factors such as economic and social disadvantage, unstable housing, addiction, and mental health conditions not only make individuals more likely to come in contact with police and the criminal justice system, but also have a direct impact on health outcomes and access to health services. Incarcerate populations reflect a disturbing overrepresentation of those with mental health issues, those with a history of sexual and/or physical abuse, and individuals with addiction and substance use issues. A recent study in an Ontario correctional institution found that 32.2% of incarcerated individuals did not have access to primary care providers 12 months prior to their incarceration, compared to the general rate in Canada of only 15%.”

¹³ Howard Sapers et al., “Corrections in Ontario Directions for Reform: Independent Review of Ontario Corrections” (September 2017) at 113-114, online (pdf): *Ontario Ministry of the Solicitor General* <<https://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/Corrections%20in%20Ontario%2C%20Directions%20for%20Reform.pdf>>

¹⁴ *CCLA*, *supra* note 1, at paras 79 & 81.

disassociation from reality—begin to emerge, is policy that permits institutions to cause foreseeable, potentially permanent, harm to vulnerable and disabled people.

More is necessary to take meaningful steps towards the elimination of solitary confinement

Even if fully implemented, the proposed regulatory framework would continue to allow thousands of people in Ontario's jails to be locked in a cell for days, weeks, and even months on end in highly restrictive conditions.

Several of the currently-proposed regulatory reforms could be strengthened to guard against this outcome. The following recommendations, suggested by a range of stakeholders and advocacy groups including the John Howard Society of Ontario and the Canadian Prison Law Association, could assist in ensuring that the ministry's goal of reducing solitary confinement and the harms that flow from it are achieved:

- Eliminate disciplinary segregation;
- Strengthen the requirement that segregation be used as a last resort measure by also explicitly stating that its use should be exceptional and for the shortest time necessary to serve an imminent risk to health or safety;
- Include an expanded definition of segregation to clearly include restricted movement and/or social contact;
- Strengthen the mandate that segregation be used exclusively as a last resort by establishing clear regulatory guidelines around possible alternatives and require staff to explain and document any instances wherein those alternatives have not been afforded;
- Greater specificity and clarity regarding the meaning of "meaningful social interaction": The reasonableness of social contact must be determined in the context of incarcerated persons and must be culturally safe for the individual in quest; and
- The inclusion of a requirement under section 32 that the decision-maker imposes the "least restrictive measure" in determining disciplinary consequences.

Ultimately, however, the government will have to take stronger action to address the profound over-use and harmful impacts of solitary confinement. Other jurisdictions have recently passed legislative amendments that are much more robust than what the ministry is currently proposing. The definition of "segregated confinement" recently adopted by New York state law, for example, defines segregation as "any form of cell confinement for more than seventeen hours a day." Likewise, The *Promoting Responsible Oversight and Treatment, and Ensuring Correctional Transparency ("PROTECT") Act*—a Connecticut State Senate bill which received overwhelming bipartisan support by the legislative Judiciary Committee in April 2021—defines "isolated confinement" as "a means confinement of an incarcerated person in a cell, alone or with others, for more than sixteen hours per day."

Addressing the issue of solitary confinement in this more comprehensive way has the practical effect of making it more difficult for maladministration of the policy to effectively keep someone isolated while technically avoiding the safeguards imposed by law (i.e., holding someone in solitary for 21.75 hours a day). It also makes the general practice of segregation, when administered correctly, less harmful.

Finally, we would note that, while legislative and regulatory reform is an essential piece of eliminating solitary confinement, legal reform alone is insufficient. The ministry must, in partnership with staff, stakeholders, and impacted communities, develop a comprehensive plan to reduce overall reliance on incarceration, increase services and supports to those behind bars, and fundamentally shift the culture of correctional services. This is a project that will not be achieved through legal reform alone.

2. Inmate disciplinary process must satisfy minimum procedural fairness requirements

The amendments to the disciplinary procedures under section 31 do not outline several key procedural fairness elements within the disciplinary process.

Currently, section 31 provides that inmates accused of misconduct may, upon request, attend an “interview” with the Superintendent regarding incident prior to being subject to disciplinary consequences. The proposed amendments would introduce the requirement for disciplinary charges to be “adjudicated” by a correctional employee at the rank of operational manager or above. These amendments also require quarterly statistical reporting to the Assistant Deputy Minister regarding the adjudications.

Processes like inmate misconduct adjudications must be procedurally fair. Basic elements of procedural fairness, required by s. 7 of the *Charter*, include:

- notice of the case against them and the criteria they have to meet;
- the opportunity to respond; and
- the right to have decisions affecting an individuals’ rights and interests made in a fair, impartial, and open process, “appropriate to the statutory, institutional, and social context of the decision.”

The specific elements required to satisfy be determined with reference to the context of the matter being decided. In the segregation context, for example, the Ontario Court of Appeal has stated that the level of duty of fairness owed to incarcerated, and particularly segregated, people is “robust”. In circumstances where inmates face repercussions that might include placement in disciplinary segregation, a loss of earned remission, and significant losses of residual liberties, a high degree of procedural fairness is required.

With this in mind, the CCLA submits the following, non-exhaustive list of procedural protections should be incorporated into the ministry’s regulations:

- The applicable policies and guidelines, as well as an explanation of an incarcerated person’s rights, must be provided in a manner that is clear, must be available without having to place a request via institutional staff, and be readily accessible to all people housed in the institution, including those in segregation;
- Accused incarcerated persons should be notified as soon as possible of any allegation of misconduct, and be informed, in detail, about any procedures to decide the outcome of the allegation to follow;
- The accused should be entitled to a decision rendered by an independent and external adjudicating body;
- Accused should have the right to an interpreter, if necessary, and the right to representation or assistance of their choice;
- The accused should be provided disclosure of all information and submissions that will be provided to the adjudicator, including any evidence against them;
- The accused should be provided the opportunity to make oral and written submissions, and to have the adjudicator consider those submissions;
- The accused should be provided with meaningful, substantive reasons that explain how the criteria for determining that a serious breach in conduct were met, as well as substantive reasons as to why the particular disciplinary consequence chosen was deemed appropriate;
- The accused should be provided with clear information about the processes for requesting a review of the decision; and
- The available scope of the review must go beyond mere allegations of procedural inadequacies.

Many of these guarantees of procedural fairness were more robustly incorporated into the *Correctional Services Transformation Act* which was passed by the Ontario Legislative Assembly in 2018.¹⁵ That legislation can be used as a model to begin work on incorporating the constitutionally-required elements of due process.

3. *Regulatory changes should address the disproportionate impacts of incarceration on racialized persons and other over-incarcerated groups*

The ministry's regulations should specifically address the over-incarceration of Black and other racialized persons, as well as Indigenous people. Studies of Canadian correctional systems have shown that, not only are these populations incarcerated at much higher rates, they are also subjected to higher levels of restricted confinement and punishment once behind bars.

The changes to the regulatory provisions governing segregation and inmate misconducts must grapple with the discrimination faced by these and other over-incarcerated segments of the population by including an explicit requirement for correctional authorities to take systemic discrimination into consideration in all correctional decisions. This may mean requiring that the disciplinary process take into account *Gladue* factors and consider culturally appropriate alternative resolution processes for Indigenous inmates. Similarly, criminal courts have started to explicitly discuss the impact of systemic, anti-Black racism in sentencing hearings. Similar considerations must be incorporated into all aspects of correctional decision-making and adjudication.

Thank you for the opportunity to comment on the proposed changes to Regulation 778. We would welcome the opportunity to discuss our recommendations if you have any questions.

¹⁵ *CSTA*, *supra* note 6 (Details protocols around ensuring that inmates have access to necessary information, including inmate rights and entitlement, and institutional rules and procedures [regarding discipline, complaint process, etc.], as well as accessibility mandates ensuring information is provided in a format intelligible to each inmate with sensitivity to any language, literacy, or access needs based on disability that inmate may face. It required the information is continuously displayed in the common areas and in the units of the correctional institution and shall be made available in the institution's library" at s 40).