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PUBLIC COMMENTS FOR PROPOSED SOLITARY CONFINEMENT REGULATIONS BY THE CORRECTIONAL ASSOCIATION OF NEW YORK

December 12, 2017

To: Deborah Slack-Bean
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Alfred E. Smith Building
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Re: I.D. No. CMC-44-17-00012-P
“[Incarcerated Person] Confinement and Deprivation”

Please accept the following as public comments pursuant to the State Administrative Procedure Act in response to the Notice of Proposed Rule Making as published in the New York State Register on November 1, 2017.

INTRODUCTION

The Correctional Association of New York (“the CA”) opposes the proposed rule changes as woefully insufficient toward ending the torture of solitary confinement in New York given the scope. Solitary confinement is torture, remains widespread in New York prisons and jails, and must end. At a time when New York State needs to be a progressive leader in national efforts to curtail solitary confinement, the proposed rule changes do not limit the use of solitary confinement in a meaningful way. Rather, they memorialize some of the worst practices and need to go much farther to be the type of bold and fundamental changes that are necessary in New York and that are being implemented in other jurisdictions. While the proposed regulations attempt to increase the amount of out-of-cell time for people in solitary is positive, the potential positive impact is significantly undermined by other serious flaws in the proposed regulations. To take meaningful steps toward ending the torture of solitary confinement and creating more humane and effective alternatives, Governor Cuomo and New York State must adopt – through amending these regulations or otherwise – the provisions of the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act, A. 3080 / S. 4784.

The CA is an independent, non-profit organization founded by concerned citizens in 1844 and granted unique authority by the New York State (“NYS”) Legislature to inspect prisons and report its findings and recommendations to the legislature, the public and the press. Through prison monitoring, research, public education and policy recommendations, the CA strives to make the administration of justice in NYS more fair, efficient and humane. Our unique access to

NYS's prisons and the information garnered from incarcerated persons and prison staff, combined with our policy and legislative expertise, informs these public comments.

The CA has long investigated and reported on the use of solitary confinement in New York's prisons,¹ and has extensive expertise on the use of solitary confinement, limitations on that practice, and more humane and effective alternatives to its use. Although the CA does not directly monitor conditions in local jails, our findings from the state prisons provide us with direct insight into comparable conditions, services, programs, and housing unit options. Moreover, the CA has been involved in many efforts at the local (including related to NYC jails), state, and national level examining the horrific practice of solitary confinement and efforts to implement more humane and effective alternatives. Based on this longstanding expertise, these public comments will outline the failures and limitations of the proposed regulations and the need for dramatic and fundamental change in revised regulations to address the current horrific practices.

The CA is grateful for the opportunity to provide recommendations for revisions to the proposed rules, along with many other concerned community members. The CA is concerned that it does not appear that (and the CA is not aware that) the proposed regulations were put together in consultation with people who have been in solitary confinement or their loved ones, or other advocates or experts. As such, we hope that the Governor and the State Commission of Correction ("SCOC") will seriously consider and follow progressive recommendations of those submitting comments, including the recommendations below. We also urge that the Governor,

¹ See, e.g., *1845 Report of the Prison Association of New York* (later to become the Correctional Association of New York) (cited in Alan K. Reich, *A Citizen Crusade for Prison Reform*, 1994, available at: <http://www.correctionhistory.org/html/chronicl/cany/html/cany01a.html>); *Prison Association of NY, Ninety-Ninth Annual Report*, p. 23, 1943 (cited in Reich at p. 45 and Ronald J. Rychalk, *The Right to Remain Silent in Light of the War on Terror*, 663 *Chapman Law Review* 692 at 686, available at: https://www.chapman.edu/law/_files/publications/CLR-10-ronald-rychlak.pdf) (reporting on use of solitary confinement and other practices); Correctional Association, *Mental Health in the House of Corrections*, June 2004 and *Lockdown New York*, Oct. 2003; *Testimony before the NYS Assembly Hearing re Mental Health Services in NY Prisons*, Dec. 6, 2011, available at: http://www.correctionalassociation.org/wp-content/uploads/2012/05/12-6-2011_beck-testimony-mental-health1.pdf; *Testimony before the Senate Judiciary Committee*, June 19, 2012, available at: <http://www.correctionalassociation.org/wp-content/uploads/2012/10/testimony-solitary-confinement-june-2012.pdf>; *Testimony before the Senate Judiciary Committee*, Feb. 25, 2014, available at: <http://solitarywatch.com/wp-content/uploads/2014/02/Correctional-Association-testimoney-for-Congressional-Hearing-2-25-14-with-attachment.pdf>; *The Torture of Solitary Confinement in the United States: The Example of New York State*, Shadow Report to the UN Committee Against Torture, available at: <http://www.correctionalassociation.org/wp-content/uploads/2014/11/Correctional-Association-2014-Submission-to-CAT-re-Solitary.pdf>; *Testimony before the New York Advisory Committee to the US Commission on Civil Rights*, Aug. 11, 2014, available at: <http://www.correctionalassociation.org/wp-content/uploads/2014/10/CA-Testimony-to-New-York-Advisory-Committee-Aug-11-2014.pdf>; *2014 Updated Correctional Association Report on Attica Correctional Facility*, p. 11-14, available at: <http://www.correctionalassociation.org/wp-content/uploads/2015/02/Attica-2014-CA-Updated-Report-Final.pdf>; *Testimony before the NYS Assembly re Mental Health Services*, Nov. 13, 2014, available at: <http://www.correctionalassociation.org/wp-content/uploads/2014/11/Testimony-by-Jack-Beck-11-13-2014-re-Mental-Health-Services-FINAL.pdf>; *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, A Report of the Women in Prison Project of the Correctional Association of NY, p. 145-158, Feb. 11, 2015, available at: <http://www.correctionalassociation.org/wp-content/uploads/2015/03/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf>; *Voices from Clinton*, Correctional Association, p. 23-24, June 5, 2016, available at: <http://www.correctionalassociation.org/wp-content/uploads/2016/05/Voices-From-Clinton-FINAL-6-2016.pdf>.

the SCOC, and other policy-makers hold a hearing on the topic of solitary confinement, that the SCOC utilize and adopt the provisions of the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act, A. 3080 / S. 4784 as a basis for its regulations changes, that the Governor implement the provisions of HALT administratively, and that the Governor and New York Legislature pass HALT to end the torture of solitary for all people and create more humane and effective alternatives.

THE PROPOSED REGULATIONS ARE FLAWED AND SANCTION THE TORTURE OF SOLITARY CONFINEMENT FOR CHILDREN, PREGNANT WOMEN, AND ALL PEOPLE. NEW YORK MUST ADOPT REAL CHANGES TO END THIS TORTURE

Rather than curtailing the use of solitary confinement in New York, the proposed regulations legitimize its ongoing use by further codifying the worst practices into New York's regulations. The proposed regulations essentially allow and sanction people – including children and pregnant women – being held in solitary confinement 24 hours a day, without any meaningful human contact or programs, indefinitely. New York State is in a crisis that requires bold progressive action, rather than the regressive changes in the proposed regulations. Solitary confinement is torturous and counterproductive, and Governor Cuomo and New York State must stop this torture and create more humane and effective alternatives. This section will outline the key flaws in the proposed regulations, followed by the Correctional Association's main proposals for addressing these flaws.

1. The proposed regulations do not apply to prisons, leaving thousands of New Yorkers each day to suffer the torture of solitary confinement – for months, years, and decades. Instead, the regulations must make bold progressive change in prisons as well as jails.

The Flaws:

The changes that would be made by the proposed regulations do not apply to prisons, and only apply to jails. The failure to propose regulations that address solitary confinement in the state prisons is of deep concern to the Correctional Association because our monitoring continues to show that thousands of people are suffering grave harm in solitary confinement in the state prisons. Although the Governor claims that these proposed regulations overall “build on the progress” of changes made in the state prisons due to the settlement of litigation brought by the NYCLU and others,² the changes in the state prisons themselves – while positive – do not go anywhere near as far as they need to, and the Governor and the SCOC should utilize their powers to end the torture of solitary in prisons as well as jails.

In the state prisons, although there have been some positive reductions in the use of solitary confinement, on any given day there still remain nearly 2,900 people in Special Housing Units (SHU), and an additional estimated 1,000 people in keeplock – another form of solitary where people still spend 23-24 hours a day alone in their cell.³ After a reduction in the number of

² See Governor Cuomo Announces New Regulations to Enhance Oversight of Solitary Confinement in All Local Jails, Oct. 17, 2017, available at: <https://www.governor.ny.gov/news/governor-cuomo-announces-new-regulations-enhance-oversight-solitary-confinement-all-local-jails>.

³ The Correctional Association has, through the Freedom of Information Law (FOIL), made requests for information on the number of people held in keeplock in the state prisons. The state Department of Corrections and Community

people in SHU in 2016 and early 2017, the number of people in SHU has remained relatively stable over the last few months. These numbers mean that New York State's rate of solitary confinement in its prisons – nearly 8% if including keeplock and over 5.7% if only SHU – is much higher than the national average of 4.4% and four or more times higher than some states – like Colorado, Washington, and Connecticut – that have less than 1% or 2% of incarcerated people in solitary.⁴ Plus, in New York prisons, there remains no total limit on how long a person can spend in solitary confinement, people continue to regularly spend months and years in solitary, and some people have spent decades (upwards of more than 30 years).⁵ New York prisons have a long way to go to implement fundamental change to the use of solitary confinement and end this torture for all people, and the proposed regulations should be bringing changes to the prisons as well as the jails toward that end.

It must also be noted that, in many respects, although Governor Cuomo states that the proposed regulations build off of the reforms made in the state prisons, and in some respects the proposed changes go beyond current DOCCS practices (such as generally requiring four hours out-of-cell per day for people in solitary), in many other respects the proposed regulations for the jails do not go as far as the limited changes required in the state prisons by the *Peoples* litigation settlement referenced in Governor Cuomo's statement. Just as a few examples, the settlement places some restrictions (though not nearly enough) on what conduct can result in solitary, places some limits on how long a person can be sent to solitary for an individual rule violation (although not enough limits and no limit on the total amount of time a person spends in solitary), and creates some (not enough) alternative units to solitary that require rehabilitative programming, whereas the proposed regulations for the jails (as will be discussed further below) do not adopt any of those changes.⁶

The Solutions:

The proposed regulations must apply the bold, progressive changes described below to both prisons and jails.

Supervision (DOCCS) refuses to provide that information, indicating that it does not have records responsive to the request. The CA makes the estimate of around 1,000 people in keeplock based on older data the CA collected through individual prison visits to prisons around the state. Particularly at a time that the Governor is stating that there is a substantial reduction in the use of solitary confinement in New York's prisons, it is imperative that DOCCS or other state officials report on the number of people who are held in keeplock – one form of solitary – and any other form of solitary confinement. Otherwise, it is difficult to assess the full significance of the reduction in the number of people held in SHU in New York's prisons. While people in keeplock are often able to retain their property while in keeplock, conditions are otherwise almost identical to conditions in SHU – with people held 23-24 hours a day without any meaningful human contact or out-of-cell programs. Are the number of people in keeplock and people's length of stay in keeplock also declining? Or are they increasing? Or remaining the same? Since keeplock is another form of 23-24 hour a day solitary confinement that can also cause devastating harm, the answers to these questions are necessary to understand if, and how much, solitary is being reduced in the state prisons.

⁴ See, e.g., *Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Number of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms*, Association of State Correctional Administrators (ASCA) and The Arthur Liman Public Interest Program, Yale Law School (2016).

⁵ See, e.g., William Blake, *Voices from Solitary: A Sentence Worse than Death*, Solitary Watch, Dec. 24, 2014, available at: <http://solitarywatch.com/2014/12/25/voices-from-solitary-a-sentence-worse-than-death-2/>.

⁶ *Peoples v. Fischer*, Settlement Agreement, Dec. 16, 2015, available at: https://www.nyclu.org/sites/default/files/releases/20151216_settlementagreement_filed.pdf.

2. *The proposed regulations will sanction the use of solitary confinement that will cause horrific suffering and serious harm under medical and human rights standards. Instead, the regulations should adopt more humane and effective alternatives to solitary confinement.*

The Flaws:

While the proposed regulations purportedly seem to make the conditions in which people spend their time in solitary confinement more humane by extending the amount of out-of-cell time per day, in fact the regulations sanction the use of 24-hour-lockdown and fail to require any meaningful time out of cell. Currently, whether for disciplinary confinement, administrative segregation, or protective custody reasons, people in either SHU or keeplock in NYS prisons and jails generally spend 22 to 24 hours per day locked in a cell, without any meaningful human interaction, programming, therapy, or generally even the ability to make regular phone calls, and often being allowed only non-contact visits if they receive visits at all. The sensory deprivation, lack of normal human interaction, and extreme idleness that result from the conditions in solitary confinement have long been proven to lead to intense suffering and physical and psychological damage,⁷ and to increase the risk of suicide and self-harm.⁸ Moreover, solitary is also recognized as causing a deterioration in people's behavior, while restrictions on the use of solitary have had neutral or positive effects on institution safety.⁹ As renowned correctional and psychiatric experts/administrators Dr. James Gilligan and Dr. Bandy Lee wrote in their seminal report on mental health care in NYC jails:

The use of prolonged solitary confinement can only be seen by both [incarcerated people] and staff as one of the most severe forms of punishment that can be inflicted on human beings short of killing them; that it can precipitate and/or exacerbate the symptoms of mental illness; that it can provoke suicidal, assaultive and homicidal behavior, self-mutilation, and other pathologic behaviors; and that it has been more or less universally recognized among the civilized nations of the earth as a form of torture and thus a most serious violation of human rights; that it therefore should not be imposed upon any [incarcerated people] in the jail, whether they have yet shown signs and symptoms of mental illness or not; and that it is not enough merely to liberate an [incarcerated person] from this form of torture only after he has already been tortured to the point of experiencing emerging symptoms of psychosis and/or suicidality. From a

⁷ See, e.g., <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>; Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, *Journal of Law & Policy*, Vol. 22:325 (2006), available at: <http://law.wustl.edu/journal/22/p325grassian.pdf> ("*Psychiatric Effects of Solitary*"); Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 *Crime & Delinq.* 124 (Jan. 2003), available at: <http://www.supermaxed.com/NewSupermaxMaterials/Haney-MentalHealthIssues.pdf>; Stuart Grassian and Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, *Correctional Mental Health Report*, Vol. 13, No. 1 (May/June 2011); Sruthi Ravindran, *Twilight in the Box: The suicide statistics, squalor & recidivism haven't ended solitary confinement. Maybe the brain studies will*, *Aeon Magazine*, Feb. 27, 2014, available at: <http://aeon.co/magazine/living-together/what-solitary-confinement-does-to-the-brain/>; Joseph Stromberg, *The Science of Solitary Confinement*, *Smithsonian Magazine*, Feb. 19, 2014, available at: <http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/#.Uwoq5RsSWaQ.email>.

⁸ Homer Venters, et. al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, *American Journal of Public Health*, Mar. 2014, Vol. 104, No. 3, available at: <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742>.

⁹ http://www.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf.

*medical/psychiatric standpoint, no one should be placed in prolonged solitary confinement, as it is inherently pathogenic – it is a form of causing mental illness.*¹⁰

Incarcerated women face additional special issues related to solitary confinement¹¹ and its impact on emotional and physical health.¹² For example, isolation can have particularly damaging effects on survivors of domestic violence and abuse, which represents the overwhelming majority of incarcerated women. Extended isolation may trigger symptoms of Post-Traumatic Stress Disorder (PTSD) such as flashbacks, self-destructive acts, emotional dissociation, difficulty sleeping, and irritable and aggressive behavior. In addition, isolation greatly limits women's access to their children and loved ones, and can have a devastating effect on women's sense of self-worth and ability to access needed supports, as women often place particular importance on sustaining relationships and community.¹³ Moreover, isolation can compromise women's ability to fulfill their particular needs related to reproductive health care, for instance by limiting women's access to sanitary pads and toilet paper, impeding pregnant women's access to critical obstetrical services, preventing them from getting the regular exercise and movement vital for a healthy pregnancy,¹⁴ or increasing the likelihood of postpartum depression by leaving women in a horrible environment for postpartum recovery.¹⁵ Similarly, women in isolation may be dissuaded from requesting care related to sensitive gynecological issues because they are required to inform correction officers about details of their medical problem, may have serious difficulty accessing appropriate medical staff when they do reach out, may be shackled during gynecological appointments that do occur, and will often interact with medical providers in full view of correction officers and/or receive superficial evaluations through closed cell doors.

Despite the well-known harm of solitary confinement, the proposed regulations grant broad discretion to the chief administrative officer at each individual local jail to determine that any person – including a child under age 18 or a pregnant woman – can be held 24 hours a day in their cell. While the proposed regulations purport to provide that any person who is in solitary confinement have at least four hours out-of-cell per day, and children and pregnant women have six hours out of cell per day (four hours plus two hours of recreation), in both instances the “chief administrative officer” of any local jail can deny those hours at their full discretion.

Making things worse, the language granting the chief administrative officer such discretion is very broad, allowing such denials if the jail administrator determines that the time out of cell “would cause a threat to the safety, security, or good order of the facility, or the safety, security, or health of the [incarcerated person], staff or other [incarcerated persons].” Based on the CA's

¹⁰ James Gilligan and Bandy Lee, *Report to the New York City Board of Correction*, p. 3, Sept. 5, 2013, available at: <http://solitarywatch.com/wp-content/uploads/2013/11/Gilligan-Report.-Final.pdf>

¹¹ Bedford Hills and Albion are the only two women's facilities with a SHU – Bedford's unit has 24 cells and Albion's has 48 – and all facilities have a Keeplock area.

¹² See *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*, A Report of the Women in Prison Project of the Correctional Association of NY, p. 145-158, Feb. 11, 2015, available at: <http://www.correctionalassociation.org/wp-content/uploads/2015/03/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf>.

¹³ Barbara Bloom, Barbara Owen, and Stephanie Covington, *Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders*, the National Institute of Corrections.

¹⁴ See *Reproductive Injustice*, at 145-158.

¹⁵ See *Reproductive Injustice*, at 149.

experience investigating conditions in New York's prisons, such broad language will likely allow a jail administrator to deny out-of-cell time and thus keep someone in solitary 24 hours a day for almost any reason, or no reason, at all, thereby causing all of the harm and suffering noted above. While the proposed regulations positively do require the jail administrator to put in writing the facts and reasons underlying the determination to deny out-of-cell time, the CA's experience reviewing disciplinary tickets, administrative segregation reviews, and mental health alternative program denials in the prison system indicate that requiring written reasons justifying solitary place little check on administrators' use of solitary.¹⁶

In addition to the likelihood that some people in solitary will continue to be held in their cells 24 hours a day, the proposed regulations are silent on the nature of out-of-cell activities and therefore would not prohibit a jail from only offering out-of-cell activities that involve placing a person alone in a separate cage without providing any meaningful human contact or programs. The regulations do not provide any requirements for what is to take place during the time people spend outside of their cell or sleeping area. There does not appear to be anything in the regulations that would prevent a local jail to just hold a person in another cell or cage alone during the requisite four hours, leaving a person in isolated confinement – albeit in multiple locations – for 24 hours a day. Based on the CA's experience investigating conditions in New York's prisons, and its understanding of conditions in solitary confinement units in local jails (as well as other jurisdictions around the country), for the one or two hours that people currently receive out of their cells for recreation that time is spent alone in another cage, typically without any equipment. The regulations do not seem to provide any requirement that the mandated four hours be any different, or that there be any congregated interactions with other people or any programs or activities. Also, the CA's experience investigating conditions in prisons indicates that very frequently people do not go out to the required one hour of recreation – due to officer discretion denying that hour, cold or other inclement weather conditions without being given requisite attire, the need to be shackled in order to go to recreation, or fear of having interactions with staff in order to go to recreation. For example, an average of 70% to 85% of people at Southport C.F. do not go to recreation each day and thus spend 24 hours a day in their cell.¹⁷

Moreover, even if people do spend time outside of their cells four hours a day, they are still locked down at least 20 hours per day. That number of hours per day alone in a cell can still amount to extreme isolation, have devastating negative impacts on people, and be counterproductive for any attempts at improving safety or people's preparedness for the outside community. When Colorado Corrections Commissioner Rick Raemisch voluntarily placed himself in solitary confinement in 2014, he only lasted 20 hours before asking to be removed.¹⁸ That was under the circumstances in which he voluntarily placed himself there, knew he would

¹⁶ See, e.g., *Five Points Correctional Facility: 2013-2016*, Correctional Association of NY, p. 28, available at: <http://www.correctionalassociation.org/wp-content/uploads/2017/03/Five-Points-Report-2013-2016-Final.pdf>.

¹⁷ Correctional Association, *Testimony before the NY Assembly re Oversight and Investigations*, p. 73, Dec. 2, 2015, available at: <http://www.correctionalassociation.org/wp-content/uploads/2015/12/CA-Testimony-re-Oversight-of-DOCCS-Dec-2-2015-with-Appendix.pdf> (documenting that people at Southport report that they often do not go to recreation because they are denied recreation by staff or choose not to go because of such factors as abuse faced by staff on the way to recreation, harsh weather conditions, and/or the fact that recreation only takes place alone in another cage without any equipment).

¹⁸ See Rick Raemisch, *My Night in Solitary*, New York Times, Feb. 20, 2014, available at: https://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html?_r=0.

be getting out and could get out any time he wanted, and spent just one day in solitary. Imagine if someone spent days, weeks, months, or years in such 20-hour-a-day confinement – as people regularly currently spend in solitary in jails and prisons throughout New York. Being held 20 hours a day in a cell alone, for months and years can cause immense suffering and harm.

The Solutions:

The proposed regulations should create more humane and effective alternatives to solitary through expanded amounts of required time out-of-cell and clear requirements that out-of-cell time involve meaningful human contact and therapeutic and rehabilitative programming. Specifically, moving beyond the proposed four hours out-of-cell that could involve only idle time in isolation, at a minimum the regulations should require – particularly for any person separated from the general prison population for more than 15 days – that people spend at least seven hours out-of-cell per day with opportunities for at least six hours of daily congregate therapeutic and rehabilitative programming.

There needs to be a fundamental transformation in how New York jails and prisons respond to people's needs and/or alleged problematic behaviors. People who have allegedly engaged in the most egregious conduct should not be subjected to inhumane and counterproductive isolation and deprivation that will only exacerbate their needs or behaviors. Rather, these individuals need additional support, programs, and therapy that are both humane and effective. Thus, if there are people who are such a risk to others that they need to be removed from the general prison or jail population, they should be separated, rather than isolated, into safe, secure therapeutic and rehabilitative environments that have substantial out-of-cell time and meaningful human interaction, programs, and therapy. As an example in New York State prisons of what such an environment could look like, the now closed Merle Cooper program at Clinton Correctional Facility had a positive program-focused culture and environment with little violence and abuse by staff or incarcerated persons.¹⁹ An example outside of New York, the Resolve to Stop Violence Project in San Francisco Jails also shows the effectiveness of intense program-based environments – the opposite of isolation – at reducing violence, reducing the number of people returning back to jail after release, and saving money.²⁰ As an example internationally, in Norway – where there has been a recent transformation in the 1990s and 2000s in the incarceration system from a punitive focus to a rehabilitative focus and where there are currently no life sentence and a maximum sentence of 21 years – solitary confinement is rare and there is an intense focus on rehabilitation and reintegration.²¹ The purpose of incarceration at the Halden

¹⁹ See *Clinton Correctional Facility*, Correctional Association of New York, 2012-2014.

²⁰ Bandy Lee and James Gilligan, *The Resolve to Stop the Violence Project: Transforming an in-house culture of violence through a jail-based programme*, *Journal of Public Health*, Vol. 27, No. 2, p. 149-155, at 152; James Gilligan and Bandy Lee, *The Resolve to Stop the Violence Project: Reducing Violence in the Community Through a Jail-Based Initiative*, *Journal of Public Health*, Vol. 27, No. 2, p. 143-148, at 145 (2005); James Gilligan and Bandy Lee, *Beyond the Prison Paradigm: From Provoking Violence to Preventing It by Creating "Anti-Prisons" (Residential Colleges and Therapeutic Communities)*, *Ann. N.Y. Acad. Sci.* 1036: 300-324, 307 (2004).

²¹ See Dashka Slater, *North Dakota's Norway Experiment*; See Erwin James, *The Norwegian prison where [incarcerated people] are treated like people*, *The Guardian*, Feb. 25, 2013, available at: <http://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people> (documenting conditions at Bastoy prison) (*hereinafter* "Treated like People").

prison, for example, is “wholly focused on helping to prepare [people] for a life after they get out.”²²

3. The Proposed Regulations Fail to Follow International Standards, UN Guidelines, and More Progressive Practices of Other States. Instead, they should adopt a 15-day limit on solitary.

The Flaws:

The proposed regulations are deeply flawed in that they do not place any limitation for how long a person can spend in solitary. Based on the CA’s knowledge of what happens in the prisons and in jails across the state, people regularly spend months and years in solitary (and decades in the state prisons). The proposed regulations will continue to allow those extreme lengths of time in solitary to happen, despite the fact that international standards state that no person should be held in solitary beyond 15 days because it otherwise can amount to torture.

More specifically, the Mandela Rules – adopted by the entire United Nations General Assembly, supported by a US delegation consisting of corrections administrators, and voted for by the US government – prohibit solitary beyond 15 consecutive days. Given that the UN Special Rapporteur on Torture has defined any use of solitary beyond 15 days to amount to torture or cruel, inhuman or degrading treatment,²³ and the entire United Nations (including the US) thus supported a ban beyond 15 days of solitary in the Mandela Rules,²⁴ 15 days should be the absolute limit for isolated confinement in New York prisons and jails.

Colorado has already implemented a 15-day limit on solitary and has seen positive results.²⁵ That state reduced the number of people in solitary confinement in its prisons from 1,500 people (almost 7% of the prison population – on par with New York’s current rate) to 18 people.²⁶ Similarly, New York’s lengths of time in solitary are incredibly far outside the norm of the international community and many other countries’ practices. For example, the Netherlands legislatively prohibits anyone from being placed in solitary confinement for more than two weeks in an entire year, Germany has a similar limit of four weeks annually, and in practice

²² Jessica Benko, *The Radical Humaneness of Norway’s Halden Prison*, New York Times Magazine, March 26, 2015, available at: http://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html?_r=0. (hereinafter “*Radical Humaneness*”).

²³ United Nations General Assembly, *Interim Report of the Special Rapporteur of the Human rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, p. 21, 23, Aug. 2011, available at: <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf> (The United Nation’s Special Rapporteur on Torture has concluded that “any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment” and called for “an absolute prohibition” on isolation beyond 15 days for all people).

²⁴ United Nations Standard Minimum Rules for the Treatment of [Incarcerated Persons] – otherwise known as the “Nelson Mandela Rules” or “Mandela Rules”, Rules 43-45, available at: https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf. These rules are the product of five years of negotiation and deliberation involving UN member countries (including the United States, whose delegation included corrections commissioners), intergovernmental organizations, civil society groups, and independent experts.

²⁵ Rick Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, Oct. 12, 2017, available at: <https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html>.

²⁶ *Id.*

prisons in both countries rarely utilize any solitary confinement and only use it for *hours* at a time.²⁷

The Solutions:

In contrast to the lack of any time limit in the current proposal, the proposed regulations should have a total limit of at most 15 consecutive days that any person can spend in solitary, and 20 days total in any 60 day period (to prevent people cycling back and forth in and out of solitary). Such regulations would follow what is mandated by the Mandela Rules and what Colorado has already implemented. No person should be subjected to the torture of solitary confinement in New York, and the proposed regulations should adopt this limit for both prisons and jails.

4. The Regulations Leave Too Much Room for Discretion, and thus Abuse and Racial Bias, by Officers and Other Staff and Officials. The regulations should greatly restrict the criteria for conduct that can result in solitary, expand staff capacities, and enhance procedural protections.

The Flaws:

In addition to the broad discretion granted jail chief administrators described above, the proposed regulations do not do anything to limit the vast discretion of correctional officers, other staff, and hearing officers to impose solitary confinement, thereby perpetuating abuse and racial bias in the infliction of solitary. Specifically, the proposed regulations fail to provide any restrictions on what conduct can result in the placement in solitary confinement, thereby continuing to allow any officer or staff person to cause almost any person to be put into solitary for almost any reason/rule violation. Based on the CA's investigations in prisons, people regularly are sent to solitary confinement for petty or minor, non-violent rule violations or even as a way to cover-up officer misconduct or as a tool for officer oppression of people who are incarcerated. Contrary to popular belief, isolated confinement is not primarily used to address chronically violent behavior or serious safety or security concerns, but often comes in response to non-violent prison rule violations, or even retaliation for questioning authority, talking back to staff, or filing grievances.²⁸

Moreover, lengthy solitary confinement sentences are frequently imposed using assault on staff allegations after staff have brutalized an incarcerated person.²⁹ In fact, staff too often use force, discipline, punishment, and isolation in response to problems that arise inside of prisons and jails. The CA's investigations have found that officer brutality is rampant in the prison system

²⁷ Ram Subramanian and Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States*, p. 13, Oct. 2013, available at:

<http://www.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf>. See also, *Deep Custody: Segregation Units and Close Supervision Centres in England and Wales* (2010) (By the Prison Reform Trust. Reports there are about 1500 segregation cells for a prison population of 85,000, they are never at capacity, and 71% of people in segregation spent less than 14 days there, and 91% less than 42 days. Also reports there are only 50 people in longer-term segregation, and even they have some congregate activities), available at: <http://solitaryconfinement.org/uploads/DeepCustodyShalevAndEdgar.pdf>.

²⁸ See, e.g., Correctional Association of NY, *Voices from Attica*, 2014, p. 24-25, 32-40, available at: <http://www.correctionalassociation.org/wp-content/uploads/2014/10/Voices-From-Attica-2014.pdf>.

²⁹ See, e.g., Correctional Association of NY, *Clinton Correctional Facility: 2012-2014*, p. 10, available at: <http://www.correctionalassociation.org/wp-content/uploads/2015/03/Clinton-Correctional-Facility-Final-Draft-2.pdf> (documenting how incidents involving alleged assaults on staff resulted in no injury to staff in 72% of the UIRs and only minor injury in just under 25%, while resulting in injury to incarcerated persons in 87% of the incidents).

(and others have documented similar brutality in jails), and that solitary is often used as a cover-up for such brutality by throwing people in solitary after staff has beaten them.³⁰

In turn, after an officer or other staff member issues a disciplinary ticket, hearing officers have wide discretion in determining whether someone is found guilty of a rule violation and sent to solitary confinement. Currently, the CA has analyzed disciplinary decisions and roughly 95% of disciplinary hearings that could lead to solitary confinement result in guilty findings,³¹ which means that if a staff member issues a ticket that can result in solitary, the person who receives the ticket will almost certainly end up in solitary. Under the proposed regulations, individual officers will continue to have such near unfettered discretion to issue to any person for any reason a disciplinary ticket that results in solitary confinement.

Of deep concern, as the *New York Times* recently documented, and as the CA has long reported, that amount of discretion by staff and hearing officers leads to a “scourge of racial bias” in the infliction of solitary confinement.³² Solitary is clearly disproportionately imposed on Black and Latino people. While 13% of people in all of New York State are Black people, nearly 50% of people in prison are Black, and nearly 60% of people in long-term solitary are Black.³³ At Southport – one of New York’s supermax prisons dedicated to solitary confinement – 62% of people held in solitary are Black and nearly 90% of people in solitary are Black or Latino, while only 2% of officers are people of color.

Also of concern regarding how the regulations sanction negative jail practices and give broad discretion ripe for abuse, though not limited just to solitary confinement units, the proposed regulations give jail administrators the ability to turn off the toilets and sinks people have in their cells and leave people at the whim of staff to flush the toilet or allow the sink to be on. While the regulations state that the toilets should be flushed and people have “brief access” to a sink every two hours, it is unclear what “brief access” means and in practice the additional power given to staff for such basic functions is disturbing and likely to be very easily abused. Similarly, the regulations – again not limited to people in solitary confinement units – explicitly legitimize people being mechanically restrained during recreation. Rather than placing any limits on the use of restraints (other than the use has to be documented) or requiring adequate exercise space or equipment, the regulations just add in an allowance that people be mechanically restrained during what is supposed to be exercise.

The Solutions:

The proposed regulations should, at a minimum, restrict the criteria that can result in placement in solitary confinement or alternative environments to the most violent or egregious conduct. Restricting the criteria will help limit who is placed in solitary confinement, and will limit the

³⁰ See, e.g., *CA Testimony re Oversight* at p. 70-74, *Voices from Clinton, Voices from Attica, Clinton Correctional Facility 2012-2014* at p. 10.

³¹ This percentage is calculated based on Correctional Association analysis of DOCCS data obtained through FOIL.

³² Michael Schwartz, Michael Winerip and Robert Gebeloff, *The Scourge of Racial Bias in New York State’s Prisons*, *The New York Times*, Dec. 3, 2016, available at: https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html?_r=0.

³³ The percentage of people in prison and solitary confinement are based on data analysis conducted by the CA of Department of Corrections and Community Supervision (DOCCS) data obtained through the Freedom of Information Law (FOIL).

discretion, and in turn abuse and racial bias, of officers, staff, and hearing officers to inflict solitary. At the very least, punishment, deprivation, and isolation, and even separation to alternatives to solitary, should no longer be the response to most purported justifications for solitary confinement given by prisons and jails, whether they be alleged rule violations or certain classifications or designations. If there are people who truly need to be separated because they pose such a risk to others, then the focus should be on those individuals who are actually in need of an intensive rehabilitative and therapeutic intervention in order to decrease the risk posed and help those individuals be better prepared to return to the general population and ultimately the outside community. A person who talks back to an officer or who has too many postage stamps or has been beaten by staff, for example, or indeed who engages in the bulk of non-violent rule violations or classifications that result in isolation, does not require an intensive intervention, so resources should be focused on those who need and could benefit from such an intervention. Specifically, at most the criteria should be restricted for more serious acts of physical injury, forced sexual acts, extortion, coercion, inciting serious disturbance, procuring deadly weapons or dangerous contraband, or escape.

In addition, to limit staff and official bias and abuse, the regulations should substantially change the environment and processes that surround the use of solitary confinement, including with respect to the capabilities of staff to effectively work with incarcerated persons and protections during proceedings resulting in solitary. While addressing staff brutality and misconduct will require a comprehensive approach that involves addressing underlying racism, transforming a culture of punishment and brutality, closing abusive prisons and jails, creating different staff recruitment policies and qualification requirements, creating effective oversight mechanisms, and so forth, the current regulations should take some steps in that direction by providing staff with additional training and skills related to working with the people under their watch. At a minimum, the regulations should require extensive training (on the order of 40 hours of initial training and 24 hours of annual training thereafter) related to trauma-informed programs and care; the practices and goals of mental health treatment and cognitive and behavioral therapy; inter-personal and communication skills; and de-escalation techniques, dispute resolution, and methods to diffuse difficult situations and to interact in a diffusing, non-confrontational way.

Also, the regulations should create additional procedural protections in the hearings and administrative proceedings that result in solitary confinement. Rather than the current practice that gives prison and jail staff who conduct hearings wide discretion in decisions, such procedures should be conducted by neutral-decision makers, provide meaningful due process, and allow incarcerated persons to be represented by legal counsel, including lawyers, law students, or approved paralegals or incarcerated peer advocates. Similarly, once someone is in isolated confinement or otherwise separated from the general population, that person should be provided specific plans for how s/he can earn release, and there must be meaningful mechanisms of review to determine whether an individual must remain separated or should return to the general population.

5. The proposed regulations do not protect people particularly vulnerable to harm in solitary and in prisons or jails. Instead, the regulations should ban even one day of solitary for certain groups of people, end the practice of solitary confinement for protective custody, and ensure safe and humane protective custody units.

The Flaws:

The proposed regulations do not protect people who are particularly vulnerable to the harmful impacts of solitary confinement or who face additional abuse while in solitary. As noted above, even kids who are 16- or 17-years-old, and pregnant women, will still be able to be held in 24-hour-a-day solitary confinement under the proposed regulations. Moreover, the regulations do not offer any protections to other categories of people, including young people in their later teens and early twenties, elderly people, people with physical, mental, or medical disabilities, new mothers, and members of the LGBT community, many of whom are sent to solitary at disproportionate rates and including at times purportedly for their own protection³⁴ The lack of greater protections will cause devastating harm.

For example, regarding children and young people, children have been shown to both have less decision-making ability to allow them to avoid the actions that, in the current system, often lead to the imposition of solitary confinement, and suffer greater physical, emotional, and psychological harm from being placed in isolation.³⁵ If a parent inflicted this kind of treatment on her/his 16- or 17-year-old child, it would be considered child abuse and it is likely that all children in the parent's home would be removed by child welfare authorities, and that the parent would be criminally prosecuted. Moreover, the regulations do not say anything about protecting other young people, aged 18 and older. While it is crucial that 16- and 17-year-olds never be placed in solitary confinement or in adult prisons or jails, it is also essential that *no young person*, including those into their mid-twenties, be subjected to solitary confinement. Brain and youth development research has recognized that young people continue to develop mentally, emotionally, and socially into their mid-twenties, and beyond.³⁶ Indeed, 16- and 17-year-olds will very quickly become 18-, 19-, 20-, 21-, 25-year-olds.³⁷ The Correctional Association's investigations of prisons such as Greene C.F. in the past and Hudson C.F. more recently, indicate the devastating harm caused to teenagers and other young people into their mid-twenties who are

³⁴ For greater explanation of the particularly damaging effect of isolation on children, *see, e.g.*, Preet Bharara, *CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island*, US Department of Justice, US Attorney, Southern District of NY, p. 46-47, Aug. 4, 2014, *available at*: <http://www.justice.gov/usao/nys/pressreleases/August14/RikersReportPR/SDNY%20Rikers%20Report.pdf>; Human Rights Watch/American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, 2012 ("*Growing Up Locked Down*"), p. 15-16, 20-32, *available at*: <https://www.aclu.org/files/assets/us1012webwcover.pdf>; New York State Bar Assoc, Committee on Civil Rights, Report to the House of Delegates Solitary Confinement in New York State, 2013, p. 8-9, *available at*: <https://www.nysba.org/solitaryreport/>. For greater explanation of the greater risk of harm to members of the LGBT community by being placed in solitary, *see* Aviva Stahl, *Transgender Women in New York State Prisons Face Solitary Confinement and Sexual Assault*, Solitary Watch, August 7, 2014, *available at*: <http://solitarywatch.com/2014/08/07/transgender-women-in-new-york-state-prisons-face-solitary-confinement-and-sexual-assault/>.

³⁵ *See, e.g.*, *Growing Up Locked Down*, p. 15-16, 20-32,. *See also* New York State Bar Assoc, Committee on Civil Rights, Report to the House of Delegates Solitary Confinement in New York State, 2013, p. 8-9, *available at*: <https://www.nysba.org/solitaryreport/>.

³⁶ *See, e.g.*, Vincent Schiraldi, Commissioner, NYC Department of Probation, *What about Older Adolescents?*, p. 3-5, Nov. 19, 2013, *available at*: http://johnjayresearch.org/pri/files/2014/01/Vincent-Schiraldi-speech_11.19.13.pdf.

³⁷ *See, e.g.*, JB Nicholas, *Parents of Young Man Who Died in Prison: It's Disgraceful that Republicans Haven't Raised the Age*, The Village Voice, Jan. 25, 2017, *available at*: <https://www.villagevoice.com/2017/01/25/parents-of-young-man-who-died-in-prison-its-disgraceful-that-state-republicans-havent-raised-the-age/>; Lisa Armstrong, *A Teen-ager in Solitary Confinement*, The New Yorker, Dec. 4, 2017, *available at*: <https://www.newyorker.com/news/news-desk/a-teen-ager-in-solitary-confinement>.

placed in solitary.³⁸ These young people into their mid-twenties should never be subjected to solitary confinement, and all young people should be in an environment with age- and developmentally-appropriate support and programs that involve a restorative and therapeutic youth development approach, aim to support young people to grow and attain their potential, and help address underlying issues facing these youth.³⁹

For people with pre-existing mental health needs, solitary has long been known to have particularly devastating effects and to exacerbate people's mental health issues. In the state prisons, New York recognized the harm caused by solitary when it passed the SHU Exclusion Law in 2008, intended to divert people with the most serious mental illness from solitary to alternative, more therapeutic units. Still, even in the prisons, hundreds of people with mental health needs are in solitary on any given day, people often go into mental health crisis and after a few days in crisis units are sent directly back to solitary, people in the alternative units face an overly punitive and solitary-like environment, and, as noted above, suicide rates in solitary are much higher than for the rest of the prison population.⁴⁰

Regarding members of the LGBT community, people who are LGBT and gender nonconforming are considered especially vulnerable populations for sexual abuse in prison.⁴¹ Research shows that transgender women face substantial risks for sexual abuse; a study of California prisons found that transgender women in men's prisons were 13 times as likely to be sexually abused as

³⁸ See, e.g., Correctional Association *Testimony before the New York Advisory Committee to the US Commission on Civil Rights*, Aug. 11, 2014, available at: <http://www.correctionalassociation.org/wp-content/uploads/2014/10/CA-Testimony-to-New-York-Advisory-Committee-Aug-11-2014.pdf>; *Greene Correctional Facility*, Correctional Association of NY, 2012-2014, available at: <http://correctionalassociation.org/wp-content/uploads/2014/10/Greene-C.F.-Report-Final.pdf>.

³⁹ See, e.g., *OCFS: New York Model* (endorsing a least restrictive setting approach, aiming to best prepare young people to return to the community, providing a trauma sensitive culture, and utilizing “three fundamental principles to provide strength-focused services, supports and interventions”: 1) Safety (“safe, predictable and nurturing environment”), 2) Engagement (adopting concepts from the Missouri Youth Services Institute to help staff and youth work together in therapeutic communities), and 3) Skillful Behavior (“Dialectical Behavior Therapy (DBT) as a skills-focused, behaviorally-based treatment program to assist staff and youth in acquiring and using interpersonal and emotional and behavioral self-regulation skills”); *The Missouri Model: Reinventing the Practice of Rehabilitating Youthful Offenders*, The Annie E. Casey Foundation, p. 13-14, 2010, available at:

http://www.aecf.org/~media/Pubs/Initiatives/Juvenile%20Detention%20Alternatives%20Initiative/MOModel/MO-Fullreport_webfinal.pdf (outlining six core characteristics of the Missouri Model: 1) placing youth in smaller facilities closer to home; 2) using supervised small groups with a rigorous treatment process and individual attention; 3) emphasizing keeping youth safe from physical and emotional abuse through constant staff supervision and supportive peer relationships; 4) developing academic and communication skills, as well as insights into themselves and their behavior; 5) involving family members as partners in the treatment process and allies for aftercare transition; and 6) providing considerable support for youth transitioning home).

⁴⁰ See, e.g., *CA Testimony re Oversight* at p. 83-85; Correctional Association *Testimony before the NYS Assembly's Corrections and Mental Health Committees*, Nov. 13, 2014, available at: <http://www.correctionalassociation.org/wp-content/uploads/2014/11/Testimony-by-Jack-Beck-11-13-2014-re-Mental-Health-Services-FINAL.pdf>.

⁴¹ Just Detention International, *Incarcerated Youth at Extreme Risk of Sexual Abuse*, fact sheet (Just Detention International, March 2009), available at: http://www.prearesourcecenter.org/sites/default/files/library/94-incarceratedyouthatextremriskofsexualabusemarch2009_0.pdf; National Center for Transgender Equality, *LGBT People and the Prison Rape Elimination Act* (National Center for Transgender Equality, July 2012), available at: http://www.transequality.org/Resources/PREA_July2012.pdf.

other people incarcerated in those prisons.⁴² A study from the Bureau of Justice Statistics found that LGB incarcerated people are ten times more likely to be sexually abused than heterosexual people.⁴³ Consistently, a 2014 investigation of the experiences of transgender women in men's prisons in New York revealed disturbing examples of transgender women facing long-term solitary confinement and suffering sexual assault while in solitary.⁴⁴

The Solutions:

The proposed regulations should expand the categories of people who receive additional protection from the regulations and ban any time in solitary for these groups of people while again creating more humane and effective alternatives for these individuals. Specifically, the regulations should go beyond the focus on children under 18 and pregnant women, and place a ban on any length of solitary for any person: (a) 21 years of age or younger; (b) 55 years of age or older; (c) with a physical or mental disability as defined in existing law; or (d) who is pregnant, in the first eight weeks of the post-partum recovery period after giving birth, or caring for a child in a correctional institution. As noted above, a young person who is 19 years old, for example, should not ever be placed in isolation because of the particularly negative effects on that person's psychological and social development. Similarly, a person who has mental health needs or physical disabilities that are only going to be exacerbated by being placed in isolation should not ever be subjected to such confinement. In the same vein, pregnant women and new mothers should not be held in such extreme physical and social isolation that would have negative impacts on the women themselves and their unborn or newly born children.

In addition, the proposed regulations should prohibit any people from being placed in solitary confinement for purposes of protective custody, and instead require that any location used for protective custody be in a separate, safe environment that is *not* isolation but involves meaningful human contact and programs, including again at a minimum opportunities for at least seven hours out-of-cell per day with at least six hours of meaningful congregate programming. People should not have to choose between being in a safe environment or being in a torture-free environment. There is no reason why protective custody has to involve the type of extreme isolation of 22 to 24 hours a day alone in a cell that is generally the case in jails and prisons across the state. People in protective custody should be able to have opportunities for meaningful human interaction and access to programs with staff and other incarcerated persons who do not pose a threat of harm.

For example, the Sylvia Rivera Law Project (SRLP) documented in July 2016 that at that time “no individual housed in the Transgender Housing Unit [THU] has reported sexual violence to SRLP during the period in which they were housed in the THU. Every TGNCI individual housed

⁴² Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (Center for Evidence-Based Corrections, April 27, 2007), available at: <http://www.justdetention.org/pdf/VJReport2007.pdf>.

⁴³ Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12* (Bureau of Justice Statistics, U.S. Department of Justice, n.d.), available at: <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

⁴⁴ Aviva Stahl, *Transgender Women in New York State Prisons Face Solitary Confinement and Sexual Assault*, Aug. 7, 2014, available at: <http://solitarywatch.com/2014/08/07/transgender-women-in-new-york-state-prisons-face-solitary-confinement-and-sexual-assault/>.

outside of the THU has reported sexual violence to SRLP.”⁴⁵ Thus, transgender women in NYC jails who voluntarily chose to live in the THU for their own protection, are separated from the rest of the jail population to live in that separate unit, but are not held in extreme isolation and rather reside in a separate unit that affords them protection and provides access to meaningful human contact and programs. As SRLP reported, while there remain problems with the operation of the THU, “it is fulfilling its basic purpose of drastically reducing sexual violence against TGNCI women.”⁴⁶ That same approach – of separation for protection with meaningful human contact and programs rather than isolation – should be applied statewide for people in protective custody in jails and prisons.

6. The Proposed Regulations Fail to Provide for Meaningful Transparency or Oversight over the Use of Solitary. The regulations should require public reporting, outside access, and stronger oversight.

The Flaws:

While Governor Cuomo has claimed that the proposed regulations will “enhance oversight of solitary confinement,” the proposals provide very little additional oversight, or even transparency. Specifically, the proposed regulations would require that each jail document when a person is placed in solitary and other related decisions, maintain some centralized record of all written documentations, and report individual instances of cell confinement to the SCOC. However, the regulations do not require any compiled reporting or analysis on the use of solitary by individual jails or by the SCOC as a whole. Moreover, the regulations also do not require any public reporting whatsoever. It is currently very difficult to obtain information on how many people are in solitary confinement in jails across the state, let alone more in depth information such as about how long people have spent in solitary in jails or prisons and for what rule violations. These regulations provide an opportunity to provide meaningful reporting on the use of solitary, any alternatives, any restrictions on out-of-cell time or programming, reasons for placement in solitary, how long people are spending in solitary, and other related information.

The Solutions:

The regulations should require much greater transparency and accountability for how isolation and separation are used.⁴⁷ At a minimum, the regulations should require mandatory quarterly and annual public reporting by all jails and the state prison system on how many people in each jail or prison are isolated or separated, how long they have been isolated or separated, the demographics of who is being isolated or separated, the justifications for isolation or separation, any restrictions on out-of-cell time or programming, and the impacts of the use of isolation and separation on costs, safety, self-harm, and recidivism. In turn, the SCOC should publically report on its website or otherwise all of the data in those categories, in an easily accessible format, and should conduct analyses, assessments, and recommendations on the use of solitary in the local jails and state prison system. Beyond this basic minimum of public reporting, the regulations

⁴⁵ Sylvia Rivera Law Project Testimony before the NYC Board of Correction, p. 7, July 26, 2016, *available at*: http://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/written-comments/slyvia_rivera_law_project.pdf.

⁴⁶ *Id.*

⁴⁷ For much more detailed analysis of ways to bring transparency, accountability, and oversight, *see CA Testimony re Oversight*, *available at*: <http://www.correctionalassociation.org/wp-content/uploads/2015/12/CA-Testimony-re-Oversight-of-DOCCS-Dec-2-2015-with-Appendix.pdf>.

should require enhanced access of the media and of members of the public to jails and prisons to assess what is happening with respect to the use of solitary and otherwise.⁴⁸ Moreover, apart from the regulations themselves, the SCOC needs to utilize its vast powers to thoroughly investigate and enforce whatever rules and regulations regarding solitary it puts in place.⁴⁹

CONCLUSION

Overall, the proposed regulations do not even attempt to limit the ongoing widespread use of solitary in state prisons; fail to prohibit the use of solitary confinement by jail administrators for children, pregnant women, and all people; do not provide for any required human contact or programs for people in solitary who are granted out-of-cell time; fail to place any limits on how long someone can spend in solitary or what conduct can result in solitary; fail to provide protections for people who are even more vulnerable to the impacts of isolation or additional abuse while in isolation; and fail to provide meaningful oversight or transparency. Ultimately, the proposed regulations will continue to allow thousands of our fellow New Yorkers in jails and prisons across the state to be subjected to the torture of solitary confinement for months, years, and decades.

If Governor Cuomo and New York State want to come in line with what other states are already implementing and what international standards require, the proposed regulations should require much more fundamental change in both local jails and state prisons as described above. At a minimum, the regulations should utilize the HALT Solitary Confinement Act, A. 3080 / S. 4784 (pending in the New York legislature) as a model and implement its provisions through regulations to, as described in various sections above:

- 1) place a limit of 15 days on the total amount of time a person can spend in solitary;
- 2) create meaningful therapeutic and rehabilitative program-based alternatives;
- 3) restrict the criteria that can result in solitary or alternatives forms of separation;
- 4) ensure that certain groups of people do not spend any time in solitary and are in appropriate settings;
- 5) enhance staff capabilities, due process, and transparency and accountability.

There is a growing trend and consensus around the country and internationally toward ending the torture of solitary confinement.⁵⁰ President Obama, Supreme Court Justice Kennedy, and the

⁴⁸ For more information on the need for access by the media and the public to prisons and jails, see *CA Testimony re Oversight*, p. 63-66, 68-69.

⁴⁹ The SCOC also has significant powers to facilitate its exercise of its duties. Specifically, it has access to any facility at any time, to documents, records and data from the correctional system, and any information from any officer or employee of the correctional facility. It can also issue a subpoena and administer oaths and examine persons under oath. The SCOC can also go to the state supreme court to force the correctional facilities to comply with its rules and regulations about the conditions within the facilities or the care of any incarcerated person. N.Y. Correction Law §§ 40 - 48. For a description of how the SCOC has been limited in carrying out its oversight mandate, see Correctional Association, *Testimony before the NY Assembly re Oversight and Investigations*, p. 42-45.

⁵⁰ See, e.g., *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives*, Vera Institute of Justice Safe Alternatives Segregation Project (2015) (A brief report that debunks myths about solitary and refers to alternatives instituted in a number of states), available at: https://storage.googleapis.com/vera-web-assets/downloads/Publications/solitary-confinement-common-misconceptions-and-emerging-safe-alternatives/legacy_downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf.

Pope have all strongly denounced the use of solitary confinement.⁵¹ The National Commission on Correctional Health Care has called for a ban on solitary confinement beyond 15 days.⁵² The NY Catholic Conference,⁵³ NY Bishop Scharfenberger,⁵⁴ the UN Special Rapporteur on Torture,⁵⁵ the NY Association of Psychiatric Rehabilitation Services,⁵⁶ faith institutions and mental health organizations across New York, thousands of New Yorkers, and over 130 organizations and groups specifically support the HALT Solitary Confinement Act.⁵⁷

As noted above, Colorado has implemented a 15-day limit, in line with the international Mandela Rules, and drastically reduced the number of people in solitary.⁵⁸ The NJ legislature passed a bill based off of the HALT Solitary Confinement Act,⁵⁹ and although it was vetoed by Republican Governor Chris Christie, it will be introduced again this year and may pass with a new Governor now in place. North Dakota, under a Republican administration, has dramatically reduced the use of solitary confinement after the North Dakota prison chief traveled to Norway and observed that country's prison practices and realized how much more effective they were.⁶⁰ Similarly, Washington State has also drastically reduced the use of solitary.⁶¹ Maine, Mississippi, Connecticut, and many other jurisdictions around the country are all taking steps to reduce the use of solitary confinement.⁶²

⁵¹ See, e.g., <http://solitarywatch.com/2015/07/14/obama-in-criminal-justice-speech-denounces-the-overuse-of-solitary-confinement-in-u-s-prisons/>; <http://solitarywatch.com/2015/06/23/supreme-court-justice-kennedy-denounces-human-toll-of-solitary-confinement-and-invites-constitutional-challenge/>; <http://solitarywatch.com/2014/10/26/pope-francis-denounces-solitary-confinement-calls-for-prison-conditions-that-respect-human-dignity/>.

⁵² National Commission on Correctional Health Care Position Statement on Solitary Confinement, available at: <https://www.ncchc.org/solitary-confinement>.

⁵³ Edward B. Scharfenberger, *Albany Bishop: Solitary Confinement Needs Reform: Prolonged Isolation Works Against Rehabilitation, Restorative Justice*, Albany Times Union, April 9, 2016, available at: <http://www.nyscatholic.org/wp-content/uploads/2016/02/2016-LEGISLATIVE-AGENDA-HALT-Act-FINAL.pdf>.

⁵⁴ <http://www.timesunion.com/tuplus-opinion/article/Albany-bishop-Solitary-confinement-needs-reform-7238837.php>.

⁵⁵ <http://nycaic.org/wp-content/uploads/2013/02/UN-Special-Rapporteur-on-Tortures-Statement-on-Solitary-in-NY-State.pdf>.

⁵⁶ <http://www.nyaprs.org/e-news-bulletins/2017/015454.cfm>.

⁵⁷ See, e.g., <http://nycaic.org/campaign-members/>.

⁵⁸ See Rick Raemisich, *Why We Ended Long-Term Solitary Confinement in Colorado*; see also *Open the Door: Segregation Reforms in Colorado* (2015) (By the Director and Deputy Director of the Colorado DOC. Describes how they reduced the number of people in long-term solitary, and created alternatives such as mental health units and step-down units), available at: <https://drive.google.com/file/d/0B30yL10I1yBRY2h2UDBCZ0Q5WIE/view>

⁵⁹ See Mark Joseph Stern, *New Jersey Legislature Passes Landmark Bill Strictly Limiting Solitary Confinement*, Oct. 24, 2016, available at: http://www.slate.com/blogs/xx_factor/2016/10/24/new_jersey_legislature_passes_bill_limiting_solitary_confinement.html.

⁶⁰ See Dashka Slater, *North Dakota's Norway Experiment*, Mother Jones, July/August 2017 Issue, available at: <http://www.motherjones.com/crime-justice/2017/07/north-dakota-norway-prisons-experiment/>.

⁶¹ See *More Than Emptying Beds: A Systems Approach to Segregation Reform (Washington State)* (2016) (By the former Director of the Washington DOC and a Policy Advisor to the Governor. Summarizes how they reduced the number of people sent to solitary, provide monitoring and programming for those in solitary, and get people out of solitary. Note: Washington State has one of the lowest rates of solitary in the country), available at: <https://www.bja.gov/publications/MorethanEmptyingBeds.pdf>.

⁶² See, e.g., *Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Number of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms*, Association of State Correctional Administrators (ASCA) and The Arthur Liman Public Interest Program, Yale Law School (2016)

New York State should be leading that effort and making bold progressive policy changes that will end the torture of solitary confinement in its prisons and jails. The proposed regulations need to be vastly modified in the ways described above in order to help move New York in the right direction. The Governor and the SCOC should utilize the HALT Solitary Confinement Act, A.3080/S.4784, and implement its provisions administratively thorough the current regulation process for both prisons and jails. In addition – or if the regulations do not take that approach – the Governor and the New York Legislature should pass HALT to ensure that these necessary changes are enshrined into legislation.

Moreover, the Governor and the SCOC, as well as the legislature, prison and jail administrators and officials, and other policy-makers must recognize that solitary is but one problematic aspect that is interconnected with the overall abusive, racist, and punitive incarceration system in this state. From the epidemic of brutality plaguing prisons and jails across the state, to the over-incarceration and mistreatment of young people and people with mental health needs, to the high incarceration rate and extreme sentence lengths, to the denial of parole release to elderly people and others who pose little risk and have demonstrated their release readiness, to the racism that drives the entire system, New York must make fundamental changes to its incarceration system.

The SCOC itself must take more action through these rulemaking procedures and its other powers. For example, the SCOC has the authority to promulgate rules and regulations establishing minimum standards for the "care, custody, correction, treatment, supervision, discipline, and other correctional programs for all persons confined in correctional facilities."⁶³ Further, the SCOC has the authority and indeed the mandate to close any correctional facility which is "unsafe, unsanitary or inadequate to provide for the separation and classification of [incarcerated persons] required by law or which has not adhered to or complied with the rules or regulations promulgated with respect to any such facility by the commission."⁶⁴ Epicenters of racism, brutality, and torture like Attica and Clinton are long overdue for closure because of their "unsafe, unsanitary, and inadequate" conditions, and the SCOC should be taking action to shut these institutions down.

Beyond that, the legislature and the Governor must take bold action on a slate of additional policy changes, including the Domestic Violence Survivors Justice Act; dramatic increases in parole release rates and parole policy changes; restoration of Tuition Assistance Program (TAP) eligibility for people incarcerated to attend college; bail, speedy trial, and discovery reform; dramatic reductions in prison sentence lengths and increased diversion opportunities for young people, people with mental health needs, and all people; restoration and expansion of visit opportunities and the reinstatement of the free bus visiting program; racial impact statements for

(Pages 55 - 59 provide an overview of the types of reforms being made around the country, and pages 60 - 71 provide details on reforms made in the federal Bureau of Prisons and five states), *available at*: <https://www.law.yale.edu/system/files/area/center/liman/document/aimingtoreducetic.pdf>

⁶³ *N.Y. Correction Law*, §§ 45(2), (3) and (6).

⁶⁴ *N.Y. Correction Law*, § 45(8).

any future legislation; and reparations for the past and ongoing racial oppression in New York from slavery to segregation to incarceration.⁶⁵

Now is a moment for bold progressive leadership. The CA urges Governor Cuomo and the SCOC to end the torture of solitary confinement through these regulations as one important step in that direction. Thank you for your consideration.

⁶⁵ See, e.g., Prioritized Platform of Challenging Incarceration: A Movement for Community Empowerment, Racial Justice, and an End to Mass Incarceration and State Violence, *available at*: <https://nationinside.org/campaign/challenging-incarceration/facts/>.