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Testimony of Prisoners' Legal Services regarding
103 CMR 900-979: County Correctional Facilities

Thank you for this opportunity to testify regarding the changes being made to 103 CMR 900-979: County Correctional Facilities. As a preliminary matter, we would encourage the DOC and all County Sheriffs to begin using "people first" language. We have heard from numerous currently and formerly incarcerated people that the language of "inmate" is dehumanizing and degrading, and that they prefer the use of terms similar to "incarcerated person". There is no penological purpose served by utilizing language that dehumanizes the people in the care, custody, and control of our state prisons and county jails, and we suggest that it is time to move forward to using language that will lift up the humanity of those who are incarcerated.

103 CMR 920.00- PHYSICAL PLANT

920.17: Provisions for Inmates with Disabilities. We appreciate the change in language from 'handicapped disabled persons' to 'inmates with disabilities'. This is a welcome shift from the outdated terminology 'handicapped'. However, as stated above, the term 'persons' should replace the term 'inmate'. The most appropriate terminology would be 'persons with disabilities'.

103 CMR 924.00- SECURITY AND CONTROL

PLS encourages the DOC to incorporate the elements included in currently proposed legislation, S. 1541 and H. 2480, with respect to the use of force, use of firearms, kinetic impact weapons, restraint chairs, electronic control devices, and chemical agents. Many counties have extreme and outlying practices related to use of force, including overuse of K9s, restraint chairs, chemical agents, and kinetic impact weapons. For example, Essex County Correctional Facility has K9 units that respond to every use of force, and uses K9s to break up one on one fights that do not involve weapons. Suffolk County uses the restraint chair automatically after every planned use of force, whether or not there is any need. Worcester County brings the FN303, a kinetic impact weapon that killed a woman in Boston, to every planned cell extraction and shoots it at distances of less than 5-10 feet away from incarcerated people who are locked inside their cells and who cannot create distance. These regulations offer an opportunity to create baseline standards and uniform expectations with respect to use of force.

924.06: Searches (3). The provision that gender non conforming or intersex people, or people

diagnosed with gender dysphoria have the option to choose the sex of the staff that is conducting their strip search is appreciated by PLS. We also acknowledge and support the regulation restricting body cavity searches to be done by trained and qualified health care personnel only and not by correctional personnel.

The provision that videotaping of strip-searches shall be done only by a member of the same sex as the person being strip searched, except as otherwise requested by gender non-conforming and intersex people, and those with gender dysphoria, should be eliminated in its entirety. Videotaping of strip-searches is not a generally accepted practice, and it is thankfully rare in the Commonwealth and in corrections nationwide. Incarcerated people's (especially women's) fear and trauma of being videotaped naked in such a highly vulnerable state, and the anxiety induced from the worry that the recording will be wrongly disseminated or viewed, far outweigh any perceived security rationale. By referring to strip searches' being recorded without stating under what circumstances this might occur (even the example provided, "during a use of force," is not clear), or whether video recording is subject to any limitations besides the gender of the recorder, the provision unwittingly endorses a practice that should be rejected, or, at most, allowed only under narrow, clearly defined, emergency situations.

924.07: Firearms, Ammunition, Electronic Control Devices and Chemical Agents. Chemical agents should not be used on persons with intellectual disabilities, respiratory illnesses, and cardiac diseases. They should also not be used on a person experiencing acute mental health crisis, including someone who is attempting suicide. Use of chemical agents in these circumstances may exacerbate the person's distress and result in decompensation, which is counterproductive to de-escalation and restoration of order. All counties should be required to establish protocols for decontamination, including a shower and an eye flush.

Kinetic impact weapons should only be used if necessary, as part of a coordinated response by a tactical team to a major disturbance, defined as a riot situation or hostage situation, where there is an immediate threat of imminent harm. They should never be used in any planned or emergency cell entrance as close range usage is likely to seriously harm and be potentially lethal to any person targeted.

Guns and electronic control devices should be barred from correctional facilities. To our knowledge, correctional facilities have managed to utilize less than lethal weapons other than electronic control devices to effectively maintain order for many years, and we would encourage DOC and the counties to continue to do so in order to minimize harm and loss of life.

This proposed regulation does not specify instances of inappropriate usage of chemical agents, kinetic impact weapons, or electronic control devices, leaving accidents of geography to dictate when and under what circumstances incarcerated people may be subjected to these potentially harmful and traumatizing use of force tools.

924.09: Use of Force (1). Use of force regulation should require correctional officers to employ de-escalation tactics and techniques prior to using physical force, a crucial step to preventing unnecessary pain and suffering. Further, physical force should only be used to prevent the escape from custody of an incarcerated person or prevent imminent harm to an identifiable person where the amount of force used is proportional to the threat of imminent harm. The current regulation allows for use of force in much broader circumstances. We suggest further that the use of a chokehold by a correctional officer against any incarcerated person should be prohibited as it has been for other law enforcement officers pursuant to "An Act relative to justice, equity and accountability in law enforcement in the Commonwealth." This is a dangerous practice we unequivocally condemn.

924.10: Use of K-9 (3). The proposed regulation seeks to create a baseline standard for use of force by K-9s in the facility and we appreciate that this effort is limiting use of force by K-9s, in part, to (i) search for fleeing escapees, (ii) for crowd control and use of force only if necessary as part of a critical incident and/or major disturbance; and (iii) search and detection of contraband. We suggest that (ii) should be further limited as the current language still allows for use of K-9s in circumstances where they are unnecessary. We suggest that K-9s should only be allowed in use of force if necessary as part of a coordinated response by a tactical team to a major disturbance, defined as a riot situation or hostage situation where there is an immediate threat of imminent harm. We further suggest that with respect to (iii), incarcerated people should be removed from any area where K-9s are conducting contraband searches, and all other reasonable efforts shall be made to minimize contact incarcerated people have with K-9s, except where K-9s are being trained by incarcerated persons to be service dogs.

Unfortunately, part four of the proposed regulation permits the use of K-9s to monitor outdoor movement between physical buildings within the perimeter of the prison. This undermines the goal of minimizing contact with K-9s to the greatest extent possible, creating an atmosphere of unnecessary fear and intimidation as well as a higher likelihood of people being bitten.

924.10: Use of K-9 (7). PLS supports and appreciates the continued prohibition of the use of K-9s in cell extractions.

924.12: Use of Restraint Equipment (1). The proposed regulation prohibits the application of restraint equipment for longer than necessary but we believe that the regulations should more specifically prohibit the use of restraint equipment for any longer than necessary to <u>prevent harm.</u>

924.12: Use of Restraint Equipment (2). PLS is aware that several county jails and houses of correction currently use restraint chairs automatically following every planned use of force, whether or not it is necessary to prevent harm. We suggest that the regulations should prohibit the use of four and five point restraints except when they are the least restrictive means available to prevent substantial threat of imminent harm. A restraint chair is a traumatic and dehumanizing

experience that can cause lasting physical and psychological damage. It must only be used as a last resort.

924.12: Use of Restraint Equipment (4). The proposed regulation requires that incarcerated people who are restrained must be assessed by medical staff every two hours, absent any extraordinary circumstances. Given the punishing stress that being restrained can cause, we believe the restrained person must be checked on by medical staff and offered an opportunity to exercise every 30 minutes for the wellbeing of both their mental and physical condition.

924.12: Use of Restraint Equipment (5). The proposed regulation requires a mental health assessment be conducted and documented and that the Sheriff/Facility Administrator be notified if an incarcerated person is restrained for greater than eight hours. Eight hours is an extremely long time to be left in restraints, and may cause psychological and physical harm. We note that the Bridgewater State Hospital (BSH) seclusion and restraint policy prohibits restraint for more than three hours without personal examination of the person by a physician, a registered nurse, or a certified physician's assistant and we recommend that the BSH policy should be followed at all prisons and jails. Due to the physical and mental toll of being restrained, we believe every person who is restrained should be offered a mental health assessment concluding their period of restraint.

103 CMR 902.01 and 103 CMR 926- RESTRICTIVE HOUSING

PLS acknowledges and appreciates the Department's codification in regulations of statutory reforms to restrictive housing enacted in 2018 that are applicable to the counties. It is clear that many counties have ignored compliance with these provisions and it is our hope that DOC, in its periodic inspections of counties and otherwise, will provide much-needed oversight. We encourage DOC to include as much as possible in these regulations that reflect the findings of the Falcon report, specifically, that restrictive housing is harmful and unnecessary and that a shift from a punitive model to a rehabilitative one is called for. We further encourage DOC to include the principles that are encapsulated in legislation filed this session, H. 2574 and S. 1578. We believe that CJRA protections should apply to all segregated confinement, and that they should not be limited to units that meet the technical definition of "restrictive housing". Segregation is typically characterized by punitive conditions that deprive incarcerated people of community connections, programming, education, work experience, and property. All efforts should be made to keep people in general population.

Proposed 902.01: The definition of Restrictive Housing must be clarified. 103 CMR 902.01 follows the statutory definition of restrictive housing as housing with over 22 hours in-cell. G.L. c. 127, § 87. The clear intent of the statute is to protect people who are locked in a cell for 22 hours a day, a definition of restrictive housing that is consistent with every major national and

international organization and with case law. Accordingly, DOC considers 22-hour confinement to be restrictive housing and regulates it as such. However, counties currently insist that 22-hour cell confinement is not restrictive housing because it is not "over" 22 hours. Therefore the regulations should clarify that anyone held in cell for 22 hours a day is entitled to the protections that apply to restrictive housing.

Proposed 926.02 (2): training. The draft regulations specify structured on-the -job training for staff in restrictive housing units in a variety of matters. Understanding and responding to manifestations of mental illness, self-harm and suicidality should be added to this list. People held in restrictive housing are known to be susceptible to psychological decompensation, and suicides are far more common in restrictive housing than in the general population.

Proposed 926.02 (6): property in cell. This proposed regulation governs the removal of an item or activity from an incarcerated person when "inconsistent with the security of the unit." In order to ensure that property items or activities are not arbitrarily removed by corrections officers or other staff, we propose that in all instances advance approval shall be obtained from the Facility Administrator or designee unless there is an immediate danger of self-injury. The proposed regulations require this approval only if all personal items are removed.

Proposed 926.03(5) and (6): certifications for persons held in restrictive housing for protection and persons who have serious mental illness. It is clear that most counties are entirely non-compliant with the statutory provisions requiring these certifications. PLS urges that the Counties be required to maintain rosters of all persons held for protection and all who have SMI who are held in restrictive housing for 72 hours or longer and copies of all certifications issued. Regulations should also require that these certifications be individualized and not pro-forma.

Proposed 926.04 (1): reviews of people in disciplinary restrictive housing. This proposed regulation provides for reviews of persons in restrictive housing for "disciplinary detention" no later than six months after placement and every 90 days thereafter. However, people in county custody may not be held in disciplinary restrictive housing. The law defines disciplinary restrictive housing as applying only to state facilities, *see* G.L. c. 127, §§ 1 and 86. "Disciplinary detention" is not defined or anticipated by law. The Criminal Justice Reform Act of 2018 supplanted the former G.L. c. 127, § 41, which authorized disciplinary detention of up to 10 days in county facilities. (Disciplinary detention in the DOC was limited to 15 days.) Consistent with the former law, the new statute permits confinement to a restrictive housing unit for discipline, G.L. c. 127, § 39(a), and provides that when being disciplined certain privileges may be diminished for up to 10 days in a county facility and 15 days in a state facility. G.L. c. 127, § 39(b). These time limits clearly form the boundary of disciplinary restrictive housing in the counties. Longer-term "disciplinary restrictive housing" is allowed only in the DOC, and only

under the enhanced procedures required for commitment to the Departmental Disciplinary Unit. The legislature clearly did not overturn decades of practice and allow prolonged disciplinary detention in counties, with no enhanced procedural protections.

Proposed 926.03 (7): pregnant and post-partum persons. We acknowledge and appreciate the exclusion of postpartum persons from restrictive housing. However, the proposed regulation allows the use of restrictive housing if there is an individualized, documented determination of serious risk of harm to self or others. A person who has just given birth in prison is almost certainly in a precarious mental state, and any risk of harm to self or others must be addressed in a treatment setting rather than restrictive housing. If a postpartum person cannot safely be housed in the general population she should be transferred to a treatment unit in the facility, or if none is available, should be committed for treatment.

Proposed 926.05 (3): opportunities for communication. The proposed regulations allow the right to written correspondence, visitation and telephones to be curtailed in ways that the statute does not permit. The statute provides that "visitation and communications" may be diminished only for disciplinary purposes, up to 10 days per offense in a county facility. G.L. c. 127, § 39(b)(iii). However, the proposed 926.05(3)(a) allows for written correspondence to be curtailed in restrictive housing if "clinically contraindicated." This restriction is inconsistent with § 39(b)(iii), and also unnecessary, since mental health watch is currently excluded from the definition of restrictive housing. *See* G.L. c. 127, §§ 1 and 86.

Proposed 926.05 (5): out of cell time. The proposed regulation maintains a minimum of only 5 hours a week out of cell (excluding showers and phone calls), though it does require facility administrators to assess the feasibility of further out of cell time for recreation and programming. Currently proposed legislation provides a minimum of 4 hours daily out of cell time in segregated confinement. We urge that minimum out of cell time in restrictive housing be at least 2 hours per day, 7 days a week. Even 2 hours a day extracts a psychological toll; 5 hours a week is unconscionable.

Secondly, the CJRA requires that regulations "maximize out-of-cell activities in restrictive housing and outplacements from restrictive housing consistent with the safety of all persons." The proposed regulation requires an assessment of what each administrator considers consistent with the safety and security of staff and incarcerated people, but nowhere does it mandate that this maximal possible out of cell time actually be implemented. We urge DOC to require that each county facility conduct this assessment periodically, such as every six months; require that it be reported in writing; and require that it be implemented.

Proposed 926.05 (6)(h): radio or television. The proposed regulation specifies that it shall be the Sheriff's choice whether to provide a radio or television. G.L. c. 127, § 39(b)(v) requires that

persons in restrictive housing over 30 days have access to a radio or television but nowhere does it say that administrators decide which shall be provided. The language stating that the choice shall be the Sheriff's should be removed.

Proposed 926.06: alternative units for persons with serious mental illness. We appreciate that the counties are directed to establish such units. We propose that additional language be added to require a needs assessment and ensure that each facility has adequate capacity. In addition, treatment units should be required to provide clinically appropriate mental health treatment, programming, out of cell time, educational opportunities, programming and other services. All clinical treatment and supervision of people placed in secure treatment units should be provided by qualified clinical mental health providers.

Data reporting. Notably absent from these regulations is a requirement that each county comply with the annual data reporting required by G.L. c. 127, § 39D(b). This statute requires that the counties provide annually, and DOC report, detailed data related to the use of restrictive housing. The Counties have yet to provide this data for 2019 or 2020. DOC, through its regulatory oversight of the counties, must ensure compliance.

103 CMR 928- FOOD SERVICES

928.05: Medical Diets (Required). PLS supports the addition of the requirement that pregnant people receive a medically appropriate diet approved by a licensed dietitian or nutritionist. This requirement should be extended to all medical diets to ensure that such diets are consistent with national standards developed by the American Dietetic Association. See 103 CMR 761.06(1)(setting forth this requirement for all DOC facilities). For example, PLS frequently hears from incarcerated persons with diabetes who do not receive appropriate diabetic nutrition, leading to medical complications. We recommend that correctional facilities be required to consult with licensed nutritionists/dieticians to ensure that the diabetic diet is consistent with national standards.

103 CMR 932- HEALTH CARE SERVICES

932.06: Admission medical screening (Required). Subsection (2)(a)(5) appropriately adds "allergies/dietary restrictions" to the list of items to be screened for. The words "designated by a responsible physician" should be stricken, however. They are ambiguous (who is "responsible" in this context? And what does "designated" mean?), and they impose provider-type restriction and apparent verification requirements for "other" health problems, including allergies/dietary restrictions, that do not exist for items 1-4. Medical screening, like all clinical practice, necessarily and appropriately relies on patients' self-reporting; some matters may later be documented by outside medical records, but these may not exist and/or may not be obtained by

the facility. Incarcerated people from communities of color may be less likely to have a well-documented medical history than others, leading to disparate racial impact in the screening process. The screening for other health problems, and allergies/dietary restrictions should not discount people's reports of such problems and restrictions. Nor should any such problems and restrictions be considered by the facility only if diagnosed by a "physician"; another type of qualified health provider may have been providing treatment for the matter in the community.

932.13 Mental Health Services: The addition of Subsection (3)(a), requiring a postpartum mental health evaluation of incarcerated people upon their return to the prison, is welcome and important. As this addition reflects, people who have just given birth are in a unique and vulnerable mental state. Proposed Subsection (3)(b), therefore, should be amended to prohibit postpartum people from being subject to isolation in all circumstances, not merely upon an "individualized, documented determination that the inmate poses a serious risk of harm to herself or others." As stated in PLS's comments to proposed Subsection 926.03, any risk of harm to self or others must be addressed in a treatment setting rather than restrictive housing. If a postpartum person cannot safely be housed in the general population they should be transferred to a treatment unit in the facility, or if none is available, should be committed for treatment.

103 CMR 943.00 INMATE RULES AND DISCIPLINE

Section 943.06 (2-a): Procedures for Disciplinary Hearings. This regulation provides that an individual can be excluded from their own disciplinary hearing if the department deems they are a security risk, or due to behavior. We believe it is necessary for an individual charged with rule violations to be present at their own hearing in order to protect their due process rights. We suggest that counties be required to accommodate the presence of the incarcerated person charged with the offense.

Section 943.06 (5): Procedures for Disciplinary Hearings. This proposed regulation extends the timeline for a disciplinary hearing decision from within 48 hours, to within 10 days (excluding weekends and holidays) if a "good cause" extension is required. Because incarcerated individuals can remain in restrictive housing while awaiting the decision of their disciplinary hearing, we advise against the exception which would allow for this extension of up to ten days. This proposed change could unnecessarily extend an individual's stay in restrictive housing for 10 days, plus weekends and holidays, when previously the decision would be made within two days.

Section 943.07 (1-b): Appeal process. Originally this regulation stated an appeal should be decided within 5 business days, and the incarcerated individual should be notified within 24 hours of that decision. The proposed change extends the timeline for a disciplinary hearing appeal decision to within 10 days (excluding weekends and holidays) if a "good cause" extension

is required. Because incarcerated individuals can remain in restrictive housing while awaiting the decision of their appeal, we advise against the exception. This proposed change could unnecessarily extend an individual's stay in restrictive housing and have a chilling effect on exercising the right to appeal.

If an individual is found guilty at their disciplinary hearing after a good cause extension is granted, then appeals the decision and another good cause extension is granted, the result could be an extra 24 days in restrictive housing (12 days for disciplinary hearing if over a weekend, and 12 for appeals decision if over a weekend). Previously this process would have taken a maximum of 10 days (48 hrs for disciplinary hearing decision and 8 days for appeals decision if over the course of a weekend and including the 24 hrs to notify the individual).

If a good cause extension is to remain in the regulations, then PLS requests that the regulations specify what constitutes good cause for such an extension.

103 CMR 950- VISITING

950.03: Identification and Sign-In Visitor Approval Process. This section allows the Sheriff/Facility Administrator unfettered discretion to implement additional policies and procedures for approving visitors to enter a county correctional facility at any time without notice or process. Given the critical importance of visitation to the maintenance of community connections, successful rehabilitation and re-entry, PLS recommends that Sheriffs be required to provide notice regarding any proposed changes to visitor approval processes with an obligation to first consider input from incarcerated people and other stakeholders.

950.04 (2): Searches of Visitors. There is a strong likelihood of racial bias in search procedures that are left entirely to the discretion of correctional staff. PLS requests that language be added to prevent determinations from being discriminatory, for example, by requiring that at least one BIPOC (Black, Indigenous or Person of Color) staff person be assigned to process visitors during visiting hours and that a chain of command be implemented for more intrusive searches.

This section allows for searches of visitors by use of drug sniffing dogs. PLS opposes the use of drug sniffing dogs to search visitors. Search by use of a K-9 is intrusive and intimidating for visitors, especially children. PLS has heard accounts that visitors subject to use of the K-9s have suffered anxiety and panic when the dogs sniff them, sometimes in an extremely invasive manner, including sniffing their private parts. Visitors who are afraid of or allergic to dogs fear retaliation if they ask correctional staff for an accommodation of their needs.

The phenomenon of false K-9 alerts is well known. False alerts may result from traces of drugs on clothing as the result of incidental contact in recent days, or they may result from handler

error, including misinterpretation of the dog's signals, or consciously or unconsciously signaling the dog where the handler suspects. The potential for a K-9 to falsely alert as the result of unconscious signaling or "cueing" from its handler can also lead to racial bias in searches.

Even a low rate of error may result in an unacceptable number of false positives, which can create a hostile or intimidating visitation environment likely to deter visitation. The population being screened is likely to have a very low rate of drug possession as the vast majority of visitation is legitimate and not for the purpose of transmitting contraband. Even if someone is cleared of drug possession, once they have alerted the dog they are likely to have justifiable fears that they will be viewed with hostility or suspicion going forward.

The use of drug sniffing K-9s creates an environment that may further deter and decrease visitation, which is known to be critical to successful rehabilitation and re-entry.

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