Submission in response to the Ministry of the Solicitor General's consultation on proposed changes to Regulation 778

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Introduction

1 Thank you for the opportunity to comment on the Ministry of the Solicitor General's proposed amendments to Regulation 778 related to segregation, inmate discipline and misconduct, and mandatory training for correctional officers.

The Ombudsman's role in improving correctional oversight

2 The Office of the Ontario Ombudsman has unique expertise and insight into these matters due to our role overseeing more than 1,000 public bodies, including the Ministry of the Solicitor General and Ontario's correctional facilities. In the 2019-2020 fiscal year, my Office received 6,000 complaints about adult correctional facilities, including 162 about segregation and 120 about discipline and misconduct.

3 In addition to resolving individual complaints, my Office has long recommended systemic improvements in the province's corrections system. In 2013, my Office investigated the Ministry of Community Safety and Correctional Services' response to allegations of excessive use of force against inmates, making 45 recommendations for improvement.[1] In 2016, my Office made 28 recommendations in response to the Ministry's consultation on its segregation policies.[2] In 2017, my Office conducted a systemic investigation into how the Ministry tracks the admission and placement of segregated inmates, and the adequacy and effectiveness of the review process for such placements. The resulting report – *Out of Oversight, Out of Mind* – made 32 recommendations for improvement, all of which were accepted.[3] More recently, my Office responded to the Ministry's 2019 consultation regarding proposed changes to segregation review provisions in Regulation 778.

4 Throughout these myriad reports and submissions, my Office has consistently highlighted the importance of clear policies, rigorous oversight, and comprehensive staff training within Ontario's correctional facilities. These factors benefit both staff and inmates.

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[1] *The Code*, <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2013/the-code>.
[2] "Segregation, Not an Isolated Problem," <https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/submissions-to-government/2016/segregation-not-an-isolated-problem>.
[3] *Out of Oversight, Out of Mind*, <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2017/out-of-oversight,-out-of-mind>.

5 I welcome many of the Ministry's proposed amendments to Regulation 778, especially those relating to segregation, and note that they are generally consistent with the recommendations my Office has made over the years. I applaud amendments that would require that correctional staff receive training in human rights and systemic racism, as well as in de-escalation and the use of force. My Office's 2013 investigation into the Ministry's response to allegations of excessive use of force against inmates emphasized the importance of staff training and made 12 specific recommendations for improvement.[4] I am heartened to see the Ministry has proposed codifying further training requirements in law.

6 However, I wish to highlight the following areas where the proposed regulatory amendments may fall short of my Office's previous recommendations, or may not address issues my Office has identified in our review of individual complaints.

Independent and meaningful segregation reviews

7 The Ministry's proposed amendment would extend the existing segregation review process to include disciplinary segregation placements, with a focus on harm reduction and monitoring for deterioration. My Office has previously called for meaningful, independent reviews of all segregation placements, and I am supportive of this proposed change.

8 However, I remain deeply concerned about the independence of the existing review process, which we have been told consists of forms filled in by facility staff that are "reviewed" by the regional office or Assistant Deputy Minister's office. This process falls well short of the independent oversight panels that my Office recommended the Ministry establish in 2016, 2017, and 2019. It is beyond dispute that segregation causes serious harm to segregated inmates, and the Ontario court has found as a fact that "a placement in administrative segregation can and does cause physical and mental harm, particularly to inmates that have serious pre-existing psychiatric illness."[5]

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[4] *The Code*, Recommendations 26-37, <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2013/the-code>.
[5] *Francis v. Ontario*, 2020 ONSC 1644 at para 269, <https://canlii.ca/t/j6l4t>, upheld on appeal 2021 ONCA 197, <https://canlii.ca/t/jf0jh>.

9 Given these serious consequences, independent, external oversight of all segregation placements is imperative. In my Office's 2017 investigation of segregation in Ontario, I found that the Ministry has often failed to provide meaningful oversight of segregated inmates, and that in some cases the reviews conducted by Ministry staff simply rubber-stamped inadequate reporting by facilities. The proposed amendments do not address these concerns, so I am once again urging the Ministry to establish independent oversight of segregation placements.

Recommendation 1

The Ministry should create a truly independent oversight panel for segregation, with members appointed by the Minister.

10 My previous submissions and report set out a detailed vision for how an independent hearing process should function. I again reiterate those recommendations here:

11 The independent panel appointed by the Minister should hold administrative hearings within the first five days of each segregation placement. The inmate should be allowed to attend in person or through video conferencing with a representative of his or her choosing. The inmate should be given the opportunity to prepare and to know the case that he or she will have to meet. The Ministry should provide inmates with access to duty counsel. The hearing should be held in as neutral a venue as possible, and never in an inmate's cell or on a living unit.

12 Before the review hearing, a segregated inmate should be required to meet with a rights advisor who can inform the inmate of his or her rights, including the right to obtain legal representation.

13 At the segregation review hearings, the burden of proof must be on the facility and the Ministry to show that the inmate's temporary placement in segregation is justified.

14 At the segregation review hearings, the independent panel should evaluate the mental and physical well-being of each inmate, and the panel's decision should take these factors into account.

15 The independent panel should issue a decision within one day. Written reasons will be issued if any of the parties request them within 30 days of the hearing.

16 The independent panel should be empowered to remove inmates from segregation immediately, as well as grant a broad range of other remedies.

17 The independent panel should be empowered to recommend that Superintendents initiate investigations and discipline proceedings, as appropriate, for correctional staff found to have violated the segregation regulation and policy.

18 The independent panel appointed by the Minister should be subject to the Ombudsman's jurisdiction.

19 I once again urge the Ministry to incorporate these recommendations into the Regulation to ensure a meaningful, independent, and administratively fair hearing process.

Recommendation 2

The Ministry should incorporate my Office's recommendations regarding the structure and process for independent segregation hearings. Details of the hearing process should be set out in full in the amended Regulation.

Limitations of segregation and creating alternative placements

20 I welcome the new limits the Ministry has proposed on the length of segregation placements, including the 15-day limit on consecutive days in administrative segregation. Enshrining this limit in law highlights its importance and the Ministry's commitment to ensuring that inmates do not exceed this threshold.

21 I also welcome the Ministry's proposed regulatory requirement that segregation be used only as a last resort, as well as the specific prohibition on the use of segregation for those with serious mental illness.

22 However, I am concerned that the proposed definition of "serious mental illness" requires the inmate be symptomatic and have a diagnosis from a regulated health professional in order for the prohibition to apply. In my Office's experience, it can be challenging for inmates, even severely ill ones, to receive diagnoses for their mental illnesses due to the type and length of clinical observation typically

required. Existing Ministry policy speaks to “suspected or known” mental illness, giving staff more flexibility when working with inmates who may not have a formal diagnosis. In addition, it is not clear why inmates who are currently non-symptomatic should be excluded from the definition. Given recent jurisprudence[6] that found placing seriously mentally ill inmates in administrative segregation violated the *Charter,* the Ministry may wish to reconsider the proposed definition and specifically indicate that “suspected or known diagnoses,” whether or not currently symptomatic, can qualify as “serious mental illness.”

Recommendation 3

The Ministry should reconsider the proposed definition and specifically indicate that “suspected or known diagnoses”, whether or not currently symptomatic, can qualify as “serious mental illness.”

23 I am also concerned about some of the other exceptions that the Ministry has proposed regarding segregation placement safeguards. While the regulation would require a five-day break once an inmate reaches the 15-day placement limit, the proposed amendment would allow the Superintendent to keep the inmate in segregation if “other options are exhausted” and the Superintendent believes that “immediate safety or security concerns” require the inmate to stay in segregation. A similar exception exists when an inmate reaches 60 aggregate days in segregation for the year. While these grounds must be documented, it is not clear what would be considered an “immediate safety or security concern.”

24 The Ministry should consider setting additional boundaries around the interpretation and use of these exceptions to ensure they do not become routine. For instance, the Regulation could further define what is considered an “immediate safety or security concern” and specify what options the Superintendent must exhaust prior to continuing the segregation placement. In addition, the Regulation could require that all such exceptions must be approved by the Minister or their delegate.

[6] *Ibid.*

Recommendation 4

The Ministry should consider setting additional boundaries regarding the exceptional circumstances that permit inmates to be placed in segregation for longer than 15 consecutive or 60 aggregate days in a 365-day period.

25 The proposed amendments speak to the creation of "specialized care placements" that reflect the needs of each facility's inmate population, and I am hopeful this will provide meaningful alternatives to administrative segregation for inmates who cannot be placed in general population units. The proposed changes would also require medical isolation placements, which may serve as an alternative to segregation in some instances.

26 In creating these specialized units by Regulation, the Ministry must be careful to ensure that it does not create new segregation-like placements under another name. While the regulation's proposed definition of segregation is intended to address this concern, it is premised on being able to accurately track how much meaningful social interaction and non-restricted movement an inmate receives each day.

27 In my 2017 report, I identified serious deficiencies in the tracking of inmate placements and movement and recommended that the Ministry explore technological solutions to automate this process and reduce the possibility of human error. With the further focus on conditions of confinement and the emphasis on alternative placements, this type of tracking is vital to ensuring that all inmates in segregation-like conditions receive the procedural protections to which they are entitled.

Recommendation 5

The Ministry should ensure it consistently and accurately tracks inmate movement and social interaction so that all inmates in segregation-like conditions of confinement receive the procedural protections afforded by the segregation review process.

Safeguarding procedural fairness in misconduct adjudication

28 The Ministry's proposed amendments would implement various changes to the existing misconduct process and create an alternative resolution process separate from the existing adjudication process.

Alternative resolution processes

29 While I applaud the Ministry's focus on alternatives to discipline and the formal adjudication process, I am concerned about the potential erosion of existing procedural safeguards. My Office often receives complaints from inmates who feel that existing safeguards to ensure fairness in the misconduct adjudication process were not followed. These include complaints that the inmate was not told the reason for the misconduct, was not provided with required paperwork (such as misconduct notices and/or dispositions), or that misconducts were adjudicated by staff involved in the incident. A particular issue that inmates often raise is that they were not able to present arguments and explanations to dispute an allegation or call witnesses.

30 Some of the proposed amendments are responsive to these concerns, such as a requirement that the inmate be provided a record of the adjudication outcome for formal adjudications and that the decision-maker not be directly involved in the alleged misconduct.

31 It does not appear that these same procedural protections would exist in the alternative resolution process, which instead would be based on an inmate agreeing to a particular disciplinary measure as a result of a misconduct. I am concerned about the inherent power imbalance between an inmate and correctional staff, and question whether an inmate should be allowed to agree to a disciplinary measure and thus forgo the procedural protection of formal adjudication. The Ministry should consider how it will ensure that an inmate's decision to participate in the alternative resolution process is informed and voluntary.

Recommendation 6

The Ministry should consider how it will ensure that an inmate's decision to participate in the alternative resolution process is informed and voluntary.

Minister's review process

32 The proposed amendments would modify the existing Ministerial review regime in section 33 to require misconduct reviews where an inmate alleges a procedural concern or where the discipline involved forfeiting remission or eligibility for remission. While I am supportive of this requirement, the regulatory amendments do not address the key issues my Office has identified in the existing review process – delay and lack of meaningful reasons.

33 My Office has received complaints from inmates about delays in the Minister's review process. In particular, inmates are often concerned that a misconduct currently under review will affect their security classification when transferring within the provincial system or to the federal level, potentially causing them to be placed in a higher-security facility long-term.

34 In one case, an inmate complained that he had requested a review in October 2018 but had not received a decision more than a year later, despite reaching out to the Ministry to inquire about the status a number of times. He was concerned that the misconduct remained on his record in the meantime, as he said he is transferred frequently and the misconduct affected his classification. My Office was advised that the review was complex and staff had to review many files. A decision was sent to the inmate in February 2020.

35 In reviewing complaints, we have observed delays occurring for many reasons, including that the institution did not forward the request for review to the Ministry, and that the misconduct appeal information package was not prepared in a timely manner (often due to limited resources). We understand that recently there also has been a backlog of review applications, due to office closures and difficulties obtaining files remotely during the pandemic.

36 Given the serious consequences of a misconduct finding, I encourage the Ministry to establish clear timelines by regulation for Minister's reviews and to ensure that the process is sufficiently resourced to meet these timelines.

Recommendation 7

The Ministry should establish clear timelines by regulation for Minister's reviews and ensure sufficient staff are in place to meet these timelines.

37 In reviewing complaints from inmates who have requested Ministerial review of their misconduct, my staff have observed that the letters sent to inmates advising of the Minister's decision are brief and do not explain the reasons for the decision. The Ministry has advised us that specific reasons are not provided to inmates. Rather, the letter will typically indicate that based upon review of the inmate's file, a decision has been made to either rescind the misconduct, or uphold it. For example, in a case where the inmate requested a review because he was not notified of the misconduct within the required timeframe and it was adjudicated by an officer involved in the incident, the Ministry informed him that the misconduct was rescinded based on "technicalities."

38 The current Regulation requires the Minister or their designate to notify the inmate and Superintendent of the review decision "and the reasons therefor." Providing reasons for these decisions is important because it allows inmates, my Office, and facilities to understand why the misconduct was upheld or rescinded. It demonstrates transparency and helps ensure that the outcome is based on the available evidence and consistent with applicable law and policy. I would encourage the Ministry to amend the Regulation to further specify the type of information that must be included in the Minister's written reasons. For instance, the Regulation could specify that the Minister's reasons must set out the issue on review, relevant facts, applicable law or policy, details about how the evidence was considered, and a specific conclusion that flows from the application of law and policy to the facts.

Recommendation 8

The Ministry should specify in the Regulation what information the Minister must provide in their reasons for upholding or rescinding a misconduct decision on review.

Concurrent or consecutive penalties

39 Although the proposed amendments make changes regarding the imposition of regular and "serious" disciplinary measures, they do not address how these penalties apply when an inmate receives multiple misconducts.

40 My staff previously brought a case to the attention of the Ministry where an inmate received two misconducts related to separate incidents in the space of three days, each leading to a suspension of canteen privileges for 120 days. The facility determined that these would be served consecutively (i.e., 240 days

without canteen) rather than concurrently. My Office's review found that there was no guidance or policy about consecutive disciplinary measures in this circumstance. While the amended regulation would provide for "key factors" that must be considered when imposing discipline, the amendments do not directly address this issue. Given the interests at stake and the serious consequences that disciplinary measures can have, I encourage the Ministry to clarify in regulation whether disciplinary measures for separate incidents apply concurrently or consecutively.

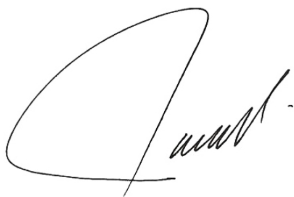
Recommendation 9

The Ministry should clarify in the Regulation whether disciplinary measures for separate incidents apply concurrently or consecutively.

Conclusion

41 I am encouraged by the incremental changes reflected in the Ministry's proposed amendments and am happy to see that some are directly responsive to recommendations I have made. However, key recommendations of my Office related to segregation remain outstanding and I once again call on the Ministry to commit to improving its practices.

42 My staff would be pleased to meet to provide further information and answer questions regarding this submission.



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