Testimony of Phillip Kassel, Executive Director, Mental Health Legal Advisors Committee, to the Massachusetts Joint Committee on the Judiciary, at its Hearing of June 19, 2017, Regarding H. 74, *An Act Implementing the Joint Recommendations of the Massachusetts Criminal Justice Review*, as Well as S.1296/H.2248, S.1297/H.2249, S.1286/H.3071, Regarding the Use of Solitary Confinement in Massachusetts Prisons and Jails.

Mental Health Legal Advisors Committee is a state agency that provides legal and policy advocacy throughout the Commonwealth for persons with mental health challenges. We support reforms designed to reduce recidivism in Massachusetts prisons and jails contained in H 74.[1] We also support a number of bills that would require data gathering, authorize study, and curb the use of solitary confinement on persons with serious mental illness in Massachusetts' prisons and jails.[2]

H.74 would begin the process of instituting reforms of criminal justice policies that have caused incarceration in this Commonwealth to mushroom,[3] at great expense and without generating gains in public safety.[4] These sentencing policies are, in part, responsible for the phenomenon often referred to as the "criminalization of mental illness."[5] In fact, our jails and prisons are our largest mental health facilities.[6] More than 50% of all prisoners have been identified as having current or past mental health problems.[7] 60% of jailed prisoners, and 49% of those in state prisons, have symptoms of mental health disorders.[8] Reducing the imprisoned population will begin to address the criminalization phenomenon by disproportionately benefitting the same group of MHLAC clients that is now disproportionately disadvantaged.[9]

We urge the Committee to bear in mind, as it deliberates over H. 74 and in its work on criminal justice reform generally, that persons with mental illness, perhaps the most vulnerable and least culpable members of the imprisoned population, are not only incarcerated to an extent that far exceeds their presence in the general population, they are disproportionately damaged. They are maintained in solitary confinement to an extent that exceeds even their inflated numbers in jails and prisons.[10] Study after study confirms that persons with mental illness suffer serious harm from prolonged confinement in solitary confinement.[11] Our own Supreme Judicial Court, in *Haverty v. Commonwealth*,[12] credited testimony describing the severe damage suffered by persons with mental illness detained in solitary confinement.[13] This damage may be permanent and irreversible. [14]

MHLAC clients are unduly maintained under segregation conditions in Massachusetts jails and prisons. Correctional authorities routinely fail to factor mental illness in either assessments of culpability or appropriate sanction when imposing segregation as discipline.[15] MHLAC advocates have seen numerous examples of persons punished for sometimes petty institutional rule infractions, initially, for 30 days. Prisoners with mental illness decompensating from 22 – 24 hour cell confinement often cannot avoid new infractions charged by correctional staff with little or no insight into mental illness and are further sanctioned for cumulative periods of sometimes years.

The axiom: "We send persons to prison *as* punishment and not *for* punishment," suggests that the experience of being locked up is punishment enough. Unfortunately, in many if not most cases, the most onerous punishment is what happens to boot, after the onset of incarceration. This applies doubly to MHLAC clients, whose penalty is the most severe. It is a practical and moral imperative that we take steps to lock up vulnerable persons less often and minimize the damage when they are sent to jails and prisons.[16] We urge the Committee to release H 74 and the solitary confinement bills from Committee with favorable recommendations.

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[1] H.74 would mandate significant increases in the amount of "good time," and newly devised "completion credits," that a prisoner can earn for participation in rehabilitative programming (including some of those serving minimum mandatory sentences), and establish a new entitlement to conditioned release on parole for some prisoners. These, and other features of the bill, should have the effect of reducing the prison population. Additionally, H. 74 gives courts authority to divert persons charged with crime into pre-trial services programs that can tap on community corrections' resources, which ought to prevent the incarceration of some offenders.

[2] S.1296/H.2248, *An Act to Promote Humane Conditions of Confinement* (sponsored by Senator Cynthia Creem and Representative Ruth Balser), requires that vulnerable populations, such as those with mental illness, not be placed in solitary confinement and have access to mental health treatment and services. S.1297/H.2249 (also by Senator Creem and Representative Balser), *An Act Relative to Segregation Oversight*, would create a segregation oversight committee to gather information regarding the use of disciplinary and non-disciplinary segregation in Massachusetts in order to determine the effects of institutional confinement on prisoners' violence toward themselves and others, recidivism, and incarceration costs. S.1306/H.3071, *An Act Reducing Recidivism, Curbing Unnecessary Spending, and Ensuring Appropriate Use of Segregation* (by Senator Jamie Eldridge and Representative Russell Holmes), would mandate protective procedures to reduce arbitrariness in, and set time limits on, the imposition of both disciplinary and administrative segregation. Finally, S.1286/H. 3092, *An Act To Collect Data Regarding the Use of Solitary Confinement in Massachusetts Prisons and Jails* (by Senator Chang-Diaz and Representative Chris Markey), would require the quarterly reporting and public dissemination of data regarding the use of disciplinary and non-disciplinary segregation of prisoners, including, among other things, the number of Massachusetts prisoners in solitary confinement; the length of time spent in solitary confinement; and the number of Massachusetts prisoners with serious mental illness who are in solitary confinement.

[3] There were three times more people incarcerated in Massachusetts in 2010 than in 1980. Jeff Bernstein, *Incarceration Trends in Massachusetts: Long-term Increases, Recent Progress*, Massachusetts Budget and Policy Center (2016). http://www.massbudget.org/reports/pdf/Incarceration%20Trends%20in%20Massachusetts%20Long-term%20Increases,%20Recent%20Progress%201-26-2016.pdf.

[4] *See* Brennan Center for Justice at New York University School of Law, *Update: Changes in State Imprisonment* (2016) (increased incarceration does not reduce crime rates). In Massachusetts, persons with previous convictions are responsible for 75% of new crimes. CSJ Justice Center-Massachusetts Criminal Justice Review, *Working Group Meeting 6 Interim Report*, 9 (Dec. 2016), https://csgjusticecenter.org/wp-content/uploads/2016/12/JR-in-Massachusetts_Key-Findings-and-Policy-Options.pdf. Further, within three years of release, 66% of people leaving the House of Corrections and more than 50% of people leaving the Massachusetts Department of Corrections have new involvement with the criminal justice system. *Id. See also* David Lovell et al., *Recidivism of Supermax*

Prisoners in Washington State, 53 CRIME & DELINQUENCY 633 (2007) (prisoners released from supermax prisons directly into the community commit new felonies and at higher rates than prisoners who were not isolated).

[5] Individuals with mental illness are three times more likely to be incarcerated in a jail or a prison than in a hospital. Treatment Advocacy Center, *More Mentally Ill Persons are in Jails and Prisons than Hospitals: A Survey of the States* (May 2010), http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf. *See also* Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, PSYCHIATRIC SERVS., June 2009, at 761.

[6] Steven W. Thompkins, Suffolk County Sheriff, in an Opinion piece in the Boston Globe (*Criminal justice reform? It's complicated*, BOSTON GLOBE, (May 23, 2017), at https://www.bostonglobe.com/opinion/2017/05/23/criminal-justice-reform-complicated/zOu98KNjP6zJgWRN5bFKOP/story.html)stated:

> One need not look further than my department's admissions data to understand the breadth and depth of the crises we contend with. In 2016, we processed 11,000 unique admissions. Over 67 percent of our population suffers from a co-morbidity of mental illness and addiction. I often tell people my department is the largest de facto social service provider to the most marginalized residents in Suffolk County. The reality: We are not just a social service provider . . . [w]e are a . . . mental health counseling center. . . . And while we take our fiduciary responsibility to taxpayers seriously, we take the needs of the individuals in our care equally seriously. To deny them that care would be immoral, and ultimately terrible for public safety.

[7] U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf.

[8] *Id*. at note 7. An estimated 20% of all incarcerated persons have mental health conditions meeting the more stringent definition of "seriously mentally ill" (e.g. psychotic, hearing voices). AMERICAN PSYCHIATRIC ASSOCIATION, PSYCHIATRIC SERVICES IN JAILS AND PRISONS (2nd ed. 2000).

[9] This assumes that diminution of time incarcerated is spread out evenly, and might depend, ultimately, on the implementation of other aspects of CSG recommendations that are not addressed in H. 74 (e.g. collecting criminal justice data, providing user-friendly entry to mental health systems, and expanding priority service definitions to include more people with mental illness at risk of criminal justice involvement). Counsel of State Governments: Criminal Justice/Mental Health Consensus Report (2002), https://csgjusticecenter.org/wp-content/uploads/2013/03/consensus-project-full-report.pdf.

[10] *See* Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003) at 147-49. One expert testified that prisoners with mental illness ". . . are almost three times more likely to be found in administrative segregation than they are in general population." *Id*. at 487, n. 505, quoting from New Jersey Prison System Report of Dr. Dennis Koson, *C.F. v. Terhune*, Civil Action No. 96-1840 (D.N.J., September 8, 1998), p. 6.

[11] *See* Bruce Arrigo & Jennifer Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT. J. OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY (2008) (prisoners with preexisting mental illnesses are especially vulnerable to the destructive psychological effects of long-term isolation).

[12] 437 Mass. 737 (2002).

[13] *Id*. at 752. The Court quoted the testimony of Stuart Grassian, Harvard Psychiatrist:

> [P]rolonged solitary confinement is highly toxic to psychological functioning. Inmates go into a kind of stupor, and some even become actively psychotic, agitated and paranoid. Difficulties with concentration and memory, and even overt confusional symptoms, are quite common. Intense anxiety, agitation, and panic attacks occur frequently. Many inmates become overtly paranoid—fearful and preoccupied with the ominous significance of every noise he hears and every shadow that passes his cell. Some inmates become unable to form any coherent string of thoughts; others become progressively, and obsessively, preoccupied with a particular thought or fear, entirely unable to quiet the thought or pay attention to anything else. Many inmates develop severe perceptual disturbances, including perceptual distortions and overt hallucinations."

437 Mass. 737 (2002).

[14] *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement* 22 W ASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY, 354 (2006) at http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1362&context=law_journal_law_policy (". . . the harm caused by such confinement may result in prolonged or permanent psychiatric disability, including impairments which may seriously reduce the inmate's capacity to reintegrate into the broader community upon release from prison"). *See also* Brandon Keim, *The Horrible Psychology of Solitary Confinement,* SCIENCE (2013) at https://www.wired.com/2013/07/solitary-confinement-2/, quoting psychiatrist and solitary confinement expert Terry Kupers of the Wright Institute of Berkeley, California.

[15] Based on extensive interviewing of prisoners in certain jails and prisons. A bright spot is the creation, by virtue of the settlement in *Disability Law Center v. Commonwealth*, of treatment units housing persons with serious mental illness that would otherwise be maintained in sensory deprivation conditions for 10 year terms in the draconian DOC Departmental Disciplinary Unit. There are only, however, 29 such beds in the whole state prison system.

[16] 95% of persons incarcerated are released. Timothy Hughes & Doris J. Wilson, *Reentry Trends in the United States*, U.S. Department of Justice, Bureau of Justice Assistance (2002), bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf. Persons that are damaged by the experience of imprisonment are less likely to recover and become contributing residents – paying taxes and not disproportionately using public benefit programs. Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, U.S. DEP. OF HEALTH AND HUMAN SERV. (2001) (for some prisoners, incarceration is so psychologically painful that it produces posttraumatic stress reactions upon release that negatively impact successful reintegration into social networks, employment, and family relations).