

***Charter Rights and Structured Intervention Units:  
Have Rights Abuses of Administrative Segregation Been Corrected?***

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## Executive Summary

In 2019, two appeal court decisions found that the administrative segregation regime used in Canada's federal corrections system violated prisoners' constitutional rights. While the two decisions differed in their analyses, some key points emerged: a constitutional system for segregating prisoners would need to ensure prisoners did not experience prolonged periods of severe isolation, and would need independent review of decisions to isolate prisoners.

In response to these decisions, Bill C-83 was introduced. Among other changes, this bill aimed to abolish administrative segregation and replace it with a new system of structured intervention units (SIUs), intended to allow more humane separation of prisoners in line with the constitutional requirements identified by the appeal court decisions. However, this bill was criticized by many experts from the beginning of the legislative process as making insufficient change to truly vindicate the rights in question. Many worried that SIUs would be, in effect, administrative segregation under a new name.

Now, as the five-year review of Bill C-83 approaches, there is an opportunity to assess whether SIUs have met the constitutional standards they were intended to realize. Through examination of the available data on SIUs – including documents from the Implementation Advisory Panel and Correctional Service Canada itself – this report examines the ongoing and serious violations of prisoners' *Charter* rights under this system. The documented failures of the SIU regime in allowing these violations to continue highlights the urgency with which the review of Bill C-83 should be conducted.

Under the SIU system, prisoners still experience a problematic degree of isolation. Many prisoners do not receive adequate time outside of their cells or engaged in meaningful human contact. Legislative standards for these activities are framed as obligations to provide opportunities rather than to ensure these standards are met, meaning that isolation can occur even when there is legislative compliance. However, prisoner refusals of offered opportunities cannot fully explain the degree of isolation present in SIUs, indicating that noncompliance with the legislation is a factor as well. These continuing conditions of severe isolation demonstrate that the holdings of the appeal court decisions relating to the duration of isolation and procedural fairness around isolation decisions cannot be dismissed as limited in relevance only to the former system of administrative segregation.

Prisoners also continue to experience extended stays in SIUs. While the *CCRA* requires that prisoners be transferred out of the SIU as soon as possible, there is no cap on the duration of SIU stays to prevent prolonged isolation. A portion of the prisoners experiencing prolonged SIU stays also experience significant isolation caused by not receiving their entitlements to time outside of their cells and time in meaningful human contact. Under the *Mandela Rules*, the international standards for the treatment of prisoners accepted by Canada, this group of prisoners is experiencing torture.

While Bill C-83 introduced a mechanism for review of SIU decisions by Independent External Decision Makers (IEDMs), this system contains serious flaws that impede its ability to provide

adequate procedural fairness. This problem is particularly urgent given the findings that prisoners continue to experience the very serious threats to life, liberty, and security of the person presented by the harmful degree of isolation faced in SIUs. In particular, IEDM review occurs after long periods of confinement in the SIU, and is reliant on information provided by Correctional Services Canada. This information has not been consistently complete or accurate, presenting a significant barrier to fair review. Even worse, many prisoners face delays in being referred to IEDM review at all, as well as delays in implementation of IEDM decisions.

Finally, the SIU system has implications for the s. 15 *Charter* equality rights of particularly vulnerable groups of prisoners. Black and Indigenous prisoners are significantly overrepresented in the SIU population, meaning that these marginalized groups are placed at a heightened risk of experiencing the negative effects of SIU residence. Prisoners with mental health needs are also overrepresented in SIUs, despite their unique vulnerability to the psychological harms of isolation. The system of IEDM review has not succeeded in returning members of these groups to the general prison population, in part due to inconsistent provision of information about prisoners' mental health status and social history factors to IEDMs.

In combination, these problems indicate that serious violations of prisoners' *Charter* rights remain prevalent in the SIU system. Bill C-83 cannot be said to have resolved the constitutional problems identified by the appeal courts of Ontario and British Columbia in their examination of the administrative segregation regime. As such, a thorough and expeditious five-year review of Bill C-83, involving civil society and aimed at reconsidering all aspects of SIUs, including compliance and enforcement, is imperative. In addition to the need to approach this review with urgency, this paper identifies further recommendations key to creating a system that can adequately respect prisoners' *Charter* rights, including the following:

- Amend the *CCRA* to define "solitary confinement" in line with the international standards set out in the Mandela Rules,
- Prohibit prolonged solitary confinement (solitary confinement lasting over 15 days),
- Prohibit solitary confinement for prisoners with serious mental health issues,
- Mandate improved data-sharing with the public and civil society, and
- Provide special attention to other key sources of constitutional violations, including ensuring prisoners receive adequate time outside of their cells, that IEDM decisions meet fairness standards, and that the needs of Indigenous and Black prisoners are prioritized.

## 1 Introduction

Bill C-83, among its numerous reforms to the correctional system, introduced a system of structured intervention units (SIUs) as a replacement for administrative segregation. Throughout the legislative process, experts raised concerns that SIUs would not resolve the constitutional problems that administrative segregation had been found to produce. As the five-year review of Bill C-83 approaches, it is clear that many of these concerns have materialized. Moreover, these problems have been consistently and thoroughly documented throughout the period of SIU operation, with little or no progress made towards solutions that respect prisoners' constitutional rights. SIUs continue to impose harmful solitary confinement-like conditions on the prisoners they house, for durations in excess of constitutional limits, through a process that does not possess an adequate standard of procedural fairness. As such, the violations of sections 7 and 12 of the *Canadian Charter of Rights and Freedoms (Charter)* found in the administrative segregation regime continue to occur in SIUs. Moreover, while the appeal court decisions did not find section 15 violations in the administrative segregation regime, data on the experiences of marginalized prisoners in SIUs suggest that disproportionate harms are occurring and could ground such claims in the future. After an overview of the constitutional decisions and the legislation itself, each of these problems will be discussed, along with what must be done to bring this legislative scheme into alignment with constitutional requirements. It will be of crucial importance to approach the five-year review of Bill C-83 with the urgency that these constitutional problems necessitate, and to make full use of this opportunity to resolve these wrongs.

## 2 Context: The Constitutional Decisions

Two challenges to the constitutionality of administrative segregation succeeded at the appeal court level in two different provinces in 2019. While the decisions did not entirely overlap in their holdings, common themes emerged, including s. 7 *Charter* violations based on procedural fairness issues, given the absence of independent review mechanisms for decisions exerting a strong effect on prisoners' liberty and security interests. Both courts also considered extended placement in solitary confinement-like conditions to be unconstitutional, although their reasoning and resulting standards differed.

### 2.1 Canadian Civil Liberties Association v Canada (Attorney General), 2019 ONCA 243

In this decision, the Ontario Court of Appeal found that placement of inmates in administrative segregation for more than 15 consecutive days was a violation of s. 12 of the *Charter*, and could not be justified under s.1.<sup>1</sup> The court noted that prolonged conditions of solitary confinement had the potential to cause serious and even permanent psychological harm.<sup>2</sup> The lower court decision found that these harms could be offset by some aspects of the legislation, including monitoring requirements and s. 87(a) of the *Corrections and Conditional Release Act (CCRA)*,

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<sup>1</sup> *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243, at paras 119, 126 [CCLA ONCA].

<sup>2</sup> *Ibid*, at para 99.

which mandates considering an inmate's health in segregation decisions.<sup>3</sup> However, on appeal, the court found that the former of these mechanisms can only intervene once harm has already occurred, while the latter requires only consideration, without requiring that health take precedence over other factors.<sup>4</sup> Similarly, s. 69 of the *CCRA* prohibits "cruel, inhumane or degrading treatment or punishment" but does not include any standards operationalizing this ban.<sup>5</sup> As such, these legislative controls do not adequately prevent cruel and unusual treatment. Furthermore, legislative controls such as requirements that administrative segregation be terminated "at the earliest appropriate time" cannot provide a sufficient limit on use, since under these provisions it is still possible to determine that solitary confinement conditions may be appropriate for periods longer than 15 days.<sup>6</sup>

At the Superior Court level, the lack of independent review present in the administrative segregation regime was found to constitute a violation of s. 7.<sup>7</sup> This finding was not appealed, leaving independent review as an undisputed requirement for constitutionality.<sup>8</sup> The lack of independent review was found to be both arbitrary, in that it did not advance the purposes of the administrative segregation scheme, and procedurally unfair.<sup>9</sup> The duty of procedural fairness required is "robust", meaning that a system allowing the Institutional Head to review their own segregation decisions was inadequate.<sup>10</sup> The court noted that the independent review required would not necessarily need to be conducted outside of the Correctional Service Canada (CSC) structure, given the concerns about timeliness such a requirement could import.<sup>11</sup> Instead, the court set out criteria for sufficiently independent internal review, including a reviewer who is outside of the initial decision-maker's influence and neither chosen by nor reporting to them, and who has the power to substitute their decision for the one under review.<sup>12</sup> However, it should be noted that the British Columbia Court of Appeal expressed skepticism that an internal review process, even one meeting these conditions, could adequately meet the level of independence needed.<sup>13</sup>

Other aspects of the challenge to the administrative segregation regime were not successful. The appeal court agreed with the decision below that there was insufficient evidence available to establish that detention of young adults (ages 18 to 21) in administrative segregation was a violation of s. 12.<sup>14</sup> While the court accepted that, in principle, s. 12 should prohibit placing

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<sup>3</sup> *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491, at para 269 [CCLA ONSC].

<sup>4</sup> *CCLA ONCA*, *supra* note 1, at paras 79, 105.

<sup>5</sup> *Ibid*, at paras 114-115.

<sup>6</sup> *Ibid*, at para 113.

<sup>7</sup> *CCLA ONSC*, *supra* note 3, at para 167.

<sup>8</sup> *CCLA ONCA*, *supra* note 1, at para 2.

<sup>9</sup> *CCLA ONSC*, *supra* note 3, at paras 106-108, 155.

<sup>10</sup> *Ibid*, at paras 146, 155.

<sup>11</sup> *Ibid*, at paras 171-173.

<sup>12</sup> *Ibid*, at para 175.

<sup>13</sup> *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228, at para 194 [BCCLA BCCA].

<sup>14</sup> *CCLA ONCA*, *supra* note 1, at para 61.

inmates with mental illnesses in solitary confinement conditions where this would worsen their conditions, the court did not view the evidence presented as adequately establishing which inmates might fall into this category.<sup>15</sup> Finally, the court did not consider segregation a further form of punishment that would change the nature of the sanction imposed and thereby create a situation of double jeopardy as prohibited by s. 11(h).<sup>16</sup>

## **2.2 British Columbia Civil Liberties Association v Canada (Attorney General), 2019 BCCA 228**

The British Columbia Court of Appeal found several aspects of the administrative segregation regime to be unconstitutional under s. 7. This Court's analysis focused on the problematic nature of prolonged and indefinite administrative segregation, as well as several procedural fairness concerns, including the lack of external review available in decisions relating to administrative segregation. This decision found that the prolonged and indefinite confinement permitted by the legislation at the time was grossly disproportionate to its aims, and so in violation of s. 7.<sup>17</sup> However, instead of finding a need for a 15 day limit specifically, the Court chose not to decide whether another solution could be acceptable, such as a soft 15 day limit with the potential for extensions under particular circumstances.<sup>18</sup>

In this case as well, there was no appeal of the finding at the Supreme Court of British Columbia that the ability of an Institutional Head to review their own decision on segregation was a violation of s. 7.<sup>19</sup> The lower court noted that this arrangement would at the very least create the appearance of bias, and so could not provide sufficient procedural fairness for a decision with such serious effects on s. 7 rights.<sup>20</sup> As noted above, on the issue of the degree of independence required, the British Columbia decision could not agree with the Ontario decision's finding that internal review could provide sufficient procedural fairness under given conditions, and was skeptical that external decision-making would necessarily involve any trade-off with timeliness.<sup>21</sup> Instead, the court held that for a system where prisoners experience solitary confinement conditions, external review is necessary for fair decisions, particularly in light of the history of inefficacy of CSC's internal procedural safeguards.<sup>22</sup>

The court also discussed prisoners' right to counsel at segregation review hearings, finding that this too is required by the needed level of procedural fairness for segregation decisions.<sup>23</sup> As the legislative scheme was simply silent on this point, the Court responded with declaratory relief rather than striking down any related provisions.<sup>24</sup> This approach is consistent with the results of an interim application heard by the Court relating to access to counsel, which found that

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<sup>15</sup> *Ibid*, at para 66.

<sup>16</sup> *Ibid*, at paras 136, 143.

<sup>17</sup> *BCCLA BCCA*, *supra* note 13, at para 167.

<sup>18</sup> *Ibid*, at para 151.

<sup>19</sup> *Ibid*, at para 101.

<sup>20</sup> *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62, at para 355 [*BCCLA BCSC*].

<sup>21</sup> *BCCLA BCCA*, *supra* note 13, at paras 194, 197.

<sup>22</sup> *Ibid*, at paras 192, 194.

<sup>23</sup> *Ibid*, at para 206.

<sup>24</sup> *Ibid*, at paras 202, 270.

many desired orders, such as that CSC facilitate legal calls for prisoners, were already within CSC's legislative obligations, although these obligations were not always being adequately fulfilled.<sup>25</sup>

On the other hand, not all of the constitutional claims succeeded. Equality rights claims relating to inmates with mental illnesses and Indigenous inmates were dismissed as rooted in maladministration, rather than in the legislation itself.<sup>26</sup> There was no appeal of the finding that in practice prisoners from both of these groups experienced discrimination in CSC's application of the administrative segregation regime.<sup>27</sup> However, for both of these groups of prisoners, the British Columbia Court of Appeal found that the lower court decision did not provide adequate discussion of which provisions might create these discriminatory effects or how.<sup>28</sup> Similarly, the court found that the trial reasons did not set out with sufficient precision how the group of mentally ill prisoners who should not be placed in segregation ought to be defined, a problem the Court noted had arisen in the Ontario decision as well.<sup>29</sup> The Court also held that the "individualized" decision-making process for administrative segregation was in fact responsive to mentally ill prisoners' particular needs, rather than being discriminatory.<sup>30</sup> However, the court did provide a declaration that CSC in practice had not been adequately complying with aspects of the legislation providing protection for mentally ill prisoners, although it did not make a similar declaration applying to Indigenous prisoners due to the extent of the vagueness issues.<sup>31</sup>

### **2.3 Connections to International Legal Standards**

In addition to domestic sources of law such as the *Charter*, international instruments and bodies are also highly relevant to the problem of solitary confinement. Documents such as the Mandela Rules provide important benchmarks for the appropriate treatment of prisoners, while reports of Special Rapporteurs and international bodies monitoring compliance with declarations and conventions can highlight where further action is needed to bring Canada in line with these standards and its international commitments. International standards are particularly key given the rich history of influence of these standards on *Charter* interpretation.<sup>32</sup> As such, it is unsurprising that both of the appeal court decisions on administrative segregation made use of these documents.

#### **2.3.1 The Mandela Rules**

Both judicial decisions referred to the *Mandela Rules*, an international document setting out basic minimum standards for treatment of prisoners, including in relation to solitary confinement. While the *Mandela Rules* are not binding on Canada, and violations of the

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<sup>25</sup> *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 177, at para 20.

<sup>26</sup> *BCCLA BCCA*, *supra* note 13, at paras 216, 231.

<sup>27</sup> *Ibid*, at para 210.

<sup>28</sup> *Ibid*, at paras 215, 231.

<sup>29</sup> *Ibid*, at paras 228-230.

<sup>30</sup> *Ibid*, at para 236.

<sup>31</sup> *Ibid*, at paras 269, 272.

<sup>32</sup> *R v Hape*, 2007 SCC 26, at para 55.



*Mandela Rules* do not necessarily constitute a violation of Canada's international commitments, the *Mandela Rules* do provide widely accepted minimum standards for the treatment of prisoners in the international community.<sup>33</sup> Furthermore, Canada has joined the Group of Friends of the *Nelson Mandela Rules*, thereby committing to promoting both awareness and application of the *Mandela Rules* internationally.<sup>34</sup> As such, the *Mandela Rules* are a persuasive factor in considering the extent of *Charter* protections for prisoners. Notably, the Supreme Court of British Columbia chose not to decide whether the *Mandela Rules* are also principles of fundamental justice due to a status as peremptory norms of international law.<sup>35</sup>

The *Mandela Rules* define solitary confinement as confinement without meaningful human contact for 22 hours or more each day.<sup>36</sup> The *Mandela Rules* prohibit prolonged (that is, over 15 days) or indefinite solitary confinement.<sup>37</sup> The *Mandela Rules* also mandate a prohibition on the use of solitary confinement for persons with disabilities that would be worsened by such conditions.<sup>38</sup> Finally, the *Mandela Rules* provide the general guidance that solitary confinement should only be used exceptionally and for the briefest periods possible, and should include independent oversight.<sup>39</sup>

Findings affirmed by the appeal courts indicate that administrative segregation was not compliant with the *Mandela Rules*. The Ontario decision noted that brief instances of contact, including through food slots, could not be considered meaningful human contact as described in the *Mandela Rules*, and that avoiding 22 hours of confinement by only the length of a shower could not realistically be seen as conformity.<sup>40</sup> The British Columbia decision also agreed that the administrative segregation regime resulted in prisoners experiencing solitary confinement as defined in the *Mandela Rules*.<sup>41</sup>

### **2.3.2 The Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

Another international document that the judicial decisions make repeated reference to is the *2011 Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>42</sup> This report, published before

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<sup>33</sup> *CCLA ONCA*, *supra* note 1, at para 29; *CCLA ONSC*, *supra* note 3, at para 56, 61; *BCCLA BCCA*, *supra* note 13, at para 71.

<sup>34</sup> United Nations Office on Drugs and Crime, "The Group of Friends of the Nelson Mandela Rules," online: <<https://www.unodc.org/unodc/en/justice-and-prison-reform/nelsonmandelarules-GoF.html>>.

<sup>35</sup> *BCCLA BCSC*, *supra* note 20, at para 314.

<sup>36</sup> *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution adopted by the General Assembly, GA Res A/RES/70/175, UNGAOR, 70th Sess (2016), r 43(1)(a) and (b), r 44 [Mandela Rules].*

<sup>37</sup> *Ibid*, r 44.

<sup>38</sup> *Ibid*, r 45(2).

<sup>39</sup> *Ibid*, r 45(1).

<sup>40</sup> *CCLA ONCA*, *supra* note 1, at para 25.

<sup>41</sup> *BCCLA BCCA*, *supra* note 13, at para 90.

<sup>42</sup> *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, A/66/268, UNHRCOR (2011) [2011 Report].*

the reformulation of the *Mandela Rules* to their current standards, affirmed that solitary confinement can cause serious mental and physical harms, and in some circumstances can reach the level of cruel, inhuman and degrading treatment or punishment, or even torture.<sup>43</sup> The report called for solitary confinement to be used only in exceptional circumstances, restricted in duration and made subject to procedural safeguards, including adequate access to counsel, independent review, and the ability to appeal decisions judicially where administrative review does not resolve a dispute.<sup>44</sup> With regard to persons with mental disabilities, the report suggested that physical segregation without social isolation would be a more appropriate means of protecting these individuals in the prison context when needed.<sup>45</sup>

### 2.3.3 Reports of International Bodies

Finally, it is worth noting that in addition to the judicial decisions described above, international bodies such as the Committee against Torture and the Human Rights Committee have identified problems with Canada's administrative segregation system, related to prolonged periods of segregation and the use of segregation for prisoners with mental illnesses.<sup>46</sup> The Committee against Torture also noted its concerns about the SIU system, including the absence of a limit on duration, the lack of special measures or prohibitions for particularly vulnerable groups, and the significant amount of discretion inherent in the justifications available for SIU usage.<sup>47</sup> In anticipation of its next report on Canada, the Committee against Torture has requested information about the continued existence of solitary confinement in Canada and "measures taken to address concerns about [SIUs]."<sup>48</sup>

## 3 Context: Bill C-83

Among other reforms, Bill C-83 aimed to replace administrative segregation with a new system of structured intervention units (SIUs). Prisoners may be placed in these units where a staff member is "satisfied there is no reasonable alternative" and one of the listed grounds is met.<sup>49</sup> These grounds include where the prisoner's continued presence in the general population is thought to be a risk to an ongoing investigation, the institution's security, or a person's safety, whether their own or another's.<sup>50</sup> Key differences between the two systems include new requirements for conditions of confinement as well as a new system of review for decisions to place or maintain a prisoner in an SIU.<sup>51</sup>

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<sup>43</sup> *Ibid*, at paras 79-80.

<sup>44</sup> *Ibid*, at paras 88-89 et seq.

<sup>45</sup> *Ibid*, at para 86.

<sup>46</sup> *Concluding observations on the seventh periodic report of Canada*, CAT/C/CAN/CO/7, UNCATOR, 65th Sess (2018), at paras 14-15 [*CAT Concluding Observations*]; *Concluding observations on the sixth periodic report of Canada*, CCPR/C/CAN/CO/6, UNHRCOR, 114th Sess (2015), at para 14.

<sup>47</sup> *CAT Concluding Observations*, at para 14.

<sup>48</sup> *List of issues prior to submission of the eighth periodic report of Canada*, CAT/C/CAN/QPR/8, UNCATOR, 72nd Sess (2022), at para 14.

<sup>49</sup> *Corrections and Conditional Release Act*, SC 1992, c 20, s 34(1) [CCRA].

<sup>50</sup> *Ibid*, s 34(1).

<sup>51</sup> Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, 1st Sess, 42nd Parliament, Canada, 2019, at cl 10 (assented to 21 June 2019).

The primary way in which conditions of confinement are changed is that Bill C-83 introduced requirements related to time spent outside of the prisoner's cell and time spent in meaningful human contact. CSC must offer SIU prisoners 4 hours of the former and 2 hours of the latter, and these opportunities must be made available between 7 am and 10 pm.<sup>52</sup> However, there are exceptions to the requirements for unusual circumstances, such as natural disasters or epidemics, as well as where a prisoner refuses the opportunities provided or is unwilling to comply with reasonable instructions.<sup>53</sup>

The new review system comprises multiple layers of review, including both internal processes and a process of review by Independent External Decision-Makers (IEDMs). Review by the Institutional Head occurs at 5 days and at 30 days post-placement, as well as where a health care professional makes a recommendation related to the conditions of confinement or removal from the SIU.<sup>54</sup> If the Institutional Head decides the prisoner should remain in the SIU, then additional internal reviews will occur. In the case of a health care professional's recommendation, follow-up review will be performed by a committee advised by a senior health care professional.<sup>55</sup> In other cases, follow-up review will be performed by the Commissioner or their delegate.<sup>56</sup>

If these layers of review do not lead to decisions to remove the prisoner from the SIU, the case will be referred to an IEDM.<sup>57</sup> Cases will also be referred to an IEDM where an SIU prisoner has not received their entitlements to time outside their cell or meaningful human contact.<sup>58</sup> In these situations, the IEDM will be able to make recommendations related to the prisoner's conditions of confinement.<sup>59</sup> After 7 days, the IEDM will be able to rule on whether CSC has taken all reasonable steps to improve the prisoner's conditions, or alternatively whether the prisoner should be removed from the SIU.<sup>60</sup> If an IEDM finds that CSC has taken all reasonable steps but a prisoner has still not received their legislative entitlements to time outside of their cell and meaningful human contact for 10 consecutive days, this also triggers a determination of whether the prisoner should be removed from the SIU.<sup>61</sup> Finally, IEDMs also review cases and make recommendations where requested by CSC or where a prisoner has been transferred to an SIU 4 times within 180 days.<sup>62</sup>

During the legislative process, there was significant discussion of whether Bill C-83 would adequately respond to the constitutional problems identified by the judicial decisions relating to

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<sup>52</sup> *CCRA*, *supra* note 49, s 36(1).

<sup>53</sup> *Ibid*, s 37(1).

<sup>54</sup> *Ibid*, ss 29.01(2), 37.2, 37.3(1).

<sup>55</sup> *Ibid*, ss 37.31, 37.32.

<sup>56</sup> *Ibid*, s 37.4; *Corrections and Conditional Release Regulations*, SOR/92-620, s 5(1)(b.1) [*CCRR*].

<sup>57</sup> *CCRA*, *supra* note 49, ss 37.8, 37.81.

<sup>58</sup> *Ibid*, s 37.83(1).

<sup>59</sup> *Ibid*, s 37.83(2).

<sup>60</sup> *Ibid*, s 37.83(3).

<sup>61</sup> *CCRR*, *supra* note 56, s 23.06(1).

<sup>62</sup> *Ibid*, s 27.03(1).

solitary confinement. The government's view was that SIUs constituted a drastic departure from the former administrative segregation system.<sup>63</sup> From this viewpoint, many of the courts' comments on necessary safeguards and limits would no longer apply to this new system, as SIUs would not involve the solitary confinement-like conditions that created the harms these safeguards were aimed at.<sup>64</sup> In particular, the requirements for time spent outside of SIU cells and engaging in meaningful human contact could, in combination with an anticipated expansion of mental health services, provide sufficient social stimulation and assistance to prisoners that time in an SIU could be more akin to a therapeutic period than a psychologically damaging one, in the government's view.<sup>65</sup>

Beyond this means of avoiding disproportionality,<sup>66</sup> the Department of Justice pointed to the fact that the legislation set out the circumstances in which SIU usage would be permitted as a bulwark against overbreadth.<sup>67</sup> Concerns about procedural fairness would, in this view, be addressed by the new review system, including the addition of IEDMs, which amendment was made after several experts expressed trepidation about the constitutionality of a system lacking a form of external review.<sup>68</sup> Finally, in the government's view, any equality rights problems could be assuaged by the anticipated individualized nature of the decision-making process, as well as specific protections such as daily check-ins with health professionals and a new requirement to consider Indigenous social history factors in correctional decisions.<sup>69</sup>

However, these reassurances did not fully resolve the concerns of many of the experts consulted during the legislative process. In general, many experts expressed skepticism that SIUs would truly be as large a departure from the administrative segregation system as had been suggested, due to factors such as a problematic institutional culture within CSC and use of

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<sup>63</sup> See for example "Bill C-83, An Act to amend the Corrections and Conditional Release Act and another Act" 2nd reading, *House of Commons Debates*, 42-1, vol 148, No 337 (18 October 2018) at 22533 (Hon Ralph Goodale).

<sup>64</sup> See for example House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 135 (6 November 2018) at 1535 (Hon Ralph Goodale); Senate, Standing Committee on Social Affairs, Science and Technology, *Evidence*, 42-1, No 59 (8 May 2019) (Dan Moore).

<sup>65</sup> Government of Canada, "Bill C-83: An Act to amend the Corrections and Conditional Release Act and another Act" (7 May 2019, last updated 1 September 2021), online: <<https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c83.html>> [DOJ Charter Statement]; House of Commons, *Debates*, 42-1, vol 148, No 387 (26 February 2019) at 1245 (Julie Dabrusin); House of Commons, *Debates*, 42-1, vol 148, No 437 (26 February 2019) at 1720 (Francesco Sorbara).

<sup>66</sup> Section 7 of the *Charter* prohibits laws that deprive persons of life, liberty, or security of the person without complying with the principles of fundamental justice. One such principle of fundamental justice is that these laws should not be arbitrary, overbroad, or grossly disproportionate. As discussed on pages 2-3, the British Columbia decision found that the harms produced by the administrative segregation regime drastically outweighed its purported benefits and goals, leading to grossly disproportionate effects and violation of s. 7 of the *Charter*.

<sup>67</sup> DOJ Charter Statement, *supra* note 65.

<sup>68</sup> *Ibid*; House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 137 (20 November 2018) at 1535 (Dr Ivan Zinger); House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 137 (20 November 2018) at 1645 (Noa Mendelsohn Aviv).

<sup>69</sup> DOJ Charter Statement, *supra* note 65.

the same infrastructure for the new system.<sup>70</sup> Experts also raised many specific criticisms. For example, some pointed out that even if the new time requirements were perfectly complied with, prisoners could still experience solitary confinement conditions. Since solitary confinement is defined as 22 hours per day of isolation, and the meaningful human contact requirement only mandates 2 hours per day, prisoners could receive precisely their legislated entitlement and yet still experience conditions of solitary confinement.<sup>71</sup> Others noted that the list of permitted justifications for SIU use were very similar to those under the administrative segregation regime, and were vague enough to leave significant room for potentially problematic discretion.<sup>72</sup> The absence of a limit on duration was also an important point of contention. While some suggested a mandatory limit on duration would be logistically challenging, many experts pointed out that a 15 day limit was a component of both the *Mandela Rules* and one of the judicial decisions, and that its absence could leave the new system open to challenge.<sup>73</sup>

Finally, the addition of the IEDM system, while clearly an important step towards compliance with the appeal court decisions, did not fully resolve all experts' concerns about procedural fairness. Experts' specific concerns included that IEDM decisions occur much later than the 5 day point identified by the BCCA, come only after layers of internal review, and for some situations only involve a determination as to whether CSC acted reasonably, rather than a power to remove the prisoner from the SIU.<sup>74</sup> Several experts identified judicial review as a more appropriate mechanism for the type of review required.<sup>75</sup>

#### **4 Does the SIU Regime Adequately Address the Constitutional Problems?**

Given the numerous constitutional failings of administrative segregation and the lingering concerns around the constitutionality of the SIU regime, it is important to examine how this system has operated in practice. As surveyed in this section, the operation of SIUs has exhibited many of the flaws and violations that were present under administrative segregation. Prisoners

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<sup>70</sup> House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 139 (22 November 2018) at 1530 (Josh Paterson); Senate, Standing Committee on Social Affairs, Science and Technology, *Evidence*, 42-1, No 59 (9 May 2019) (Diana Majury); *Debates of the Senate*, 42-1, vol 150, No 301 (26 February 2019) at 1745 (Hon Kim Pate); *Debates of the Senate*, 42-1, vol 150, No 283 (2 May 2019) at 1740 (Hon Kim Pate).

<sup>71</sup> House of Commons, *Debates*, 42-1, vol 148, No 437 (19 June 2019) at 2220 (Matthew Dubé).

<sup>72</sup> House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 139 (22 November 2018) at 1600 (Josh Paterson); House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 139 (22 November 2018) at 1635 (Prof Debra Parkes).

<sup>73</sup> House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 136 (8 November 2018) at 1725 (Jason Godin); House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 136 (8 November 2018) at 1545 (Savannah Gentile); Senate, Standing Committee on Social Affairs, Science and Technology, *Evidence*, 42-1, No 59 (9 May 2019) (Michael Rosenberg).

<sup>74</sup> Senate, Standing Committee on Social Affairs, Science and Technology, *Evidence*, 42-1, No 59 (9 May 2019) (Michael Rosenberg); Senate, Standing Committee on Social Affairs, Science and Technology, *Evidence*, 42-1, No 59 (9 May 2019) (Josh Paterson); Senate, Standing Committee on Social Affairs, Science and Technology, *Evidence*, 42-1, No 59 (9 May 2019) (Prof Debra Parkes).

<sup>75</sup> Senate, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 60 (15 May 2019) (Marie-Claude Landry); *Debates of the Senate*, 42-1, vol 150, No 301 (12 June 2019) at 1750 (Hon Kim Pate).

in SIUs experience inappropriate levels of isolation, contrary to the *Mandela Rules* and the dictates of the appeal court decisions. SIU stays frequently last longer than the 15-day limit set out in both of these sources. The system of IEDMs in place to review SIU-related decisions cannot provide adequate procedural fairness, due to problems with the timing of reviews, transparency, and a lack of cooperation from CSC. Finally, SIUs continue to enact disproportionate harm on marginalized groups of prisoners, including prisoners with mental illnesses, Indigenous prisoners, and Black prisoners. This confluence of problems indicates that the SIU regime has not successfully resolved the constitutional problems identified by the Ontario and British Columbia appeal courts, and that as a result violations of prisoners' *Charter* rights continue to occur.

#### **4.1 Prolonged and Indefinite Conditions of Solitary Confinement**

##### **4.1.1 Time Outside of the Cell**

Data on SIU usage have consistently indicated that many prisoners are not receiving the minimum standard of 4 hours per day outside of their cells. In fact, these data have also suggested that some portion of SIU prisoners are not even receiving the opportunities for 4 hours per day outside of their cells. While the majority of prisoners in SIUs do receive offers for time outside of their cells on the majority of days, the Implementation Advisory Panel found that 8.3% received such offers on less than half of the days of their SIU stay, and only 34.5% received such offers on every day of their time in SIU.<sup>76</sup> This represents a significant degree of noncompliance with the legislation.

The focus in both the legislation and CSC's record-keeping on the provision of opportunities for time outside of the cell rather than the actual time spent outside of the cell raises further issues. As will be discussed below, many prisoners may refuse some opportunities for a variety of reasons, including conflicts with other activities or problems with the specific activities offered. While these prisoners may have received what they are entitled to according to the legislation, it is artificial to consider them as having become any less isolated or any more shielded from the psychological harms concomitant with isolation. As such, this focus may obscure ongoing constitutional violations.

With regard to actual time spent outside of SIU cells, many prisoners do not receive time outside on at least some days of their SIU stay. The Implementation Advisory Panel found that in total 64% of prisoners in SIUs missed the 4 hour target on over  $\frac{3}{4}$  of their days in the SIU.<sup>77</sup> This proportion differed by the length of the SIU stay, with 71.6% of prisoners staying under 15 days missing their entitled time on over  $\frac{3}{4}$  of days, as compared to 58% of prisoners experiencing longer periods in the SIU.<sup>78</sup> Only 17.9% of short-stay prisoners and 25% of long-stay prisoners missed their time outside of their cells on less than half of their days in the SIU.<sup>79</sup> While some

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<sup>76</sup> Canada, Structured Intervention Unit Implementation Advisory Panel, *2021/22 Annual Report*, (Ottawa: Public Safety Canada, September 2022) (Howard Sapers), at 124 [*IAP Sept 2022*].

<sup>77</sup> *Ibid*, at 107.

<sup>78</sup> *Ibid*, at 107.

<sup>79</sup> *Ibid*, at 107.

data have suggested that the proportion of SIU prisoners receiving their allotted time outside of their cells may have improved over time, the most recent data indicate that 34.2% of long-stay prisoners still missed their allotted time on over ¾ of their days in the SIU.<sup>80</sup> As such, in addition to the clear need for further progress on this measure, more recent data are needed to evaluate whether apparent improvements have continued, stagnated, or retrogressed.

The 4 hour standard is intended to act as a minimum. However, even for prisoners who meet this standard, few receive significantly more than the minimum amount. Internal surveys of the Prairie region institutions suggest significant variation in how long SIU prisoners spend outside of their cells, ranging from an estimated 5% spending more than 5 hours outside at Edmonton Institution to an estimated 90% spending more than 8 hours outside at Bowden Institution.<sup>81</sup> However, nationwide data show that only 5% of long-stay SIU prisoners receive a 4 hour period outside of their cells every day of their stay, suggesting that longer periods outside of cells as at Bowden Institution must be very rare in general.<sup>82</sup> Similarly, for prisoners who are not meeting the 4 hour standard, many are missing it by a large amount. For example, the Implementation Advisory Panel found that 69.6% of long-stay SIU prisoners received 2 hours of time outside or less, and 26.9% received 1 hour or less.<sup>83</sup>

In addition to the problems meeting the legislative requirements that CSC's own data reveal is the question of the quality of CSC's record-keeping on this topic. Problems with record-keeping around time spent outside of SIU cells have been reported by prisoners, who allege that CSC records do not correspond with their own records of when they have been permitted to leave their cells.<sup>84</sup> In internal documents, CSC has also acknowledged problems with record-keeping, attributing some negative IEDM decisions to inadequate records of conditions of confinement rather than actual poor conditions.<sup>85</sup> Finally, IEDMs have also encountered documentation gaps and inconsistencies, as will be explored more fully below. Altogether, these warnings raise concerns that, due to inconsistent record-keeping, the true extent of prisoners not receiving adequate time outside of their cells is not known, and may be greater than reported.

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<sup>80</sup> *Ibid*, at 66.

<sup>81</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 3)* (23 July 2021), at 44, 54, online: <https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part3-b.pdf>.

<sup>82</sup> *IAP Sept 2022*, *supra* note 76, at 108.

<sup>83</sup> *Ibid*, at 109.

<sup>84</sup> West Coast Prison Justice Society, "Solitary by another name: The ongoing use of isolation in Canada's federal prisons" (2020), at 48, online (pdf): *West Coast Prison Justice Society* <<https://prisonjustice.org/wp-content/uploads/2020/11/Solitary-by-another-name-report.pdf>> [*Solitary by Another Name*].

<sup>85</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 2)* (21 June 2021), at 5, 18, online: <https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-02-b.pdf>.

#### 4.1.2 Meaningful Human Contact

Closely linked to the issue of whether SIU prisoners are receiving adequate time outside of their cells is the problem of whether they are engaging in or receiving opportunities to engage in 2 hours of meaningful human contact per day. Data suggest that many SIU prisoners do not experience this minimum period of meaningful human contact every day that they are in the SIU. The Implementation Advisory Panel found that, in total, 34.9% of prisoners in SIUs missed the 2 hour target on over  $\frac{3}{4}$  of their days in the SIU.<sup>86</sup> This proportion differed by the length of the SIU stay, with 46.4% of prisoners staying under 15 days missing their entitled time on over  $\frac{3}{4}$  of days, as compared to 25.8% of prisoners experiencing longer periods in the SIU.<sup>87</sup> Only 18.9% of short-stay prisoners and 24.2% of long-stay prisoners missed their allotted human contact time on less than  $\frac{1}{5}$  of their days in the SIU.<sup>88</sup> The most recent data indicate that 60.6% of long-stay prisoners missed their allotted meaningful human contact time on  $\frac{1}{5}$  or more of their days in SIU, a drop from the first month of SIU operation, in which the corresponding figure was 83.1%.<sup>89</sup> However, this figure remains sufficiently high as to cause concern about the degree of isolation SIU prisoners experience. Additional data are needed to assess whether further improvements have indeed been made, or whether this measure has plateaued or even worsened.

In addition to concerns regarding CSC's record-keeping, there are further potential problems with the meaningful human contact standard and its implementation. Firstly, as with time spent outside of the cell, there is a focus on provision of opportunities rather than ensuring prisoners do in fact receive adequate human contact, which may obscure the degree to which prisoners continue to be isolated to an unconstitutional degree. Beyond this problem, what can be considered meaningful human contact is not entirely clear. While judicial decisions have established that, for example, a brief exchange through a food slot is insufficient, relatively little information is available about how CSC counts this requirement.<sup>90</sup> Institutional surveys on the implementation of SIUs provide some insight into which activities may be offered. For example, at Bowden Institution, listed activities include education, spiritual activities with chaplains or Elders, correctional programs, social programs, structured leisure, and interactions with staff or the Inmate Wellness Committee.<sup>91</sup> However, little information is available about the precise content of each of these activity types, making it difficult to assess how well these activities may correspond with the *Essex Paper* description of meaningful human contact as genuine dialogue allowing for empathetic interpersonal connection.<sup>92</sup>

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<sup>86</sup> *IAP Sept 2022, supra* note 76, at 108.

<sup>87</sup> *Ibid*, at 108.

<sup>88</sup> *Ibid*, at 108.

<sup>89</sup> *Ibid*, at 73.

<sup>90</sup> *BCCLA BCSC, supra* note 20, at paras 138-139.

<sup>91</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 3)* (23 July 2021), at 43-44, online:

<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part3-b.pdf>.

<sup>92</sup> Penal Reform International and the Essex Human Rights Centre, *Essex paper 3: Initial guidance on the interpretation and implementation of the UN Nelson Mandela Rules*, (April 2016), at 89 [*Essex Paper*].



Further to the question of the quality of human contact available in SIUs is the nature of the correctional programs available. As discussed above, SIUs were proposed as a means of targeting individualized interventions to prisoners in need of assistance. However, it is not clear to what extent this has occurred. Procedures exist for prisoners moved to SIUs to continue previously-begun correctional programs or to start new ones.<sup>93</sup> However, all prisoners transferred to SIUs, regardless of what correctional needs they may have, are considered for participation in the Motivational Module-SIU or the Motivational Module-SIU-Indigenous.<sup>94</sup> Motivational Module programming also exists for prisoners who have refused or dropped out of other correctional programs.<sup>95</sup> The two SIU-specific streams of the Motivational Module contain content related to challenges identified as common in the population of prisoners who were transferred to administrative segregation, under the assumption that the SIU population will have similar needs.<sup>96</sup> The Motivational Module-SIU-Indigenous covers material similar to the Motivational Module-SIU, but uses more culturally-specific methods, including incorporation of Indigenous ceremony and teachings.<sup>97</sup> The streaming of all prisoners transferred to the SIU towards these two programs is not suggestive of the anticipated high degree of individualization of programming within these units.

#### 4.1.3 Refusals

Both time outside of cell and meaningful human contact requirements are framed in the legislation as rights to opportunities for these activities, rather than direct rights to a certain amount of time engaging in the activities.<sup>98</sup> As a result, CSC's tracking of its compliance with these provisions may not provide a full picture of conditions of confinement in SIUs. For both of the legislative requirements, there appears to be a significant problem of prisoners refusing the opportunities they are offered. For example, at Saskatchewan Penitentiary, internal documents from May 2020 indicate that on average 75-80% of SIU prisoners refused the activities they were offered.<sup>99</sup> Nationwide Implementation Advisory Panel data on refusals of time outside of

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<sup>93</sup> Correctional Service Canada, "Structured Intervention Units," Commissioner's Directive No 711 (Ottawa: CSC, 30 November 2019), Annex D [CD 711].

<sup>94</sup> *Ibid*, Annex D, at para 135.

<sup>95</sup> Correctional Service Canada, "National Correctional Program Management Guidelines," Guidelines No 726-3 (Ottawa: CSC, 8 November 2021), at para 43.

<sup>96</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 3)* (23 July 2021), at 8, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part3-b.pdf>>.

<sup>97</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 3)* (23 July 2021), at 8, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part3-b.pdf>>.

<sup>98</sup> *CCRA*, *supra* note 49, s 36(1).

<sup>99</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 3)* (23 July 2021), at 48, online:

cells are consistent with this statistic, indicating that 72.3% of SIU prisoners take advantage of these offers on less than half of the days of their SIU stays, and only 3.2% of SIU prisoners accept these offers every day.<sup>100</sup> Comparison of refusal rates over time has indicated that there has been a minor decrease in refusals between 2020 and 2022, but that this progress has been limited in scope and inconsistent over time.<sup>101</sup> The scale of the problem also varies by region and by institution, but its presence is consistent.<sup>102</sup> Refusals represent an urgent problem, given that if they occur consistently they can lead to prisoners experiencing psychologically harmful levels of isolation.

Prisoners' reasons for refusing the activities offered are of key importance in understanding this issue. Both Parliamentarians and the Implementation Advisory Panel have raised concerns about the possibility of offers of clearly unsuitable activities, such as outdoor recreation in hazardous weather.<sup>103</sup> Such offers would not be in the spirit of the legislation. Interviews with prisoners by the Implementation Advisory Panel have suggested some offers could be of this type, as prisoners have cited timing and bad weather as contributing factors.<sup>104</sup> However, other reasons cited include simple preferences as between activities.<sup>105</sup> This is borne out by internal institutional surveys, which note that different activities vary significantly in refusal rates. For example, Stony Mountain Institution noted a group of prisoners who are much more interested in Indigenous cultural activities than other pursuits, and Edmonton Institution has noted that prisoners are generally more interested in recreation and correctional programs than in social programs.<sup>106</sup> Some institutions have implemented strategies to try to increase uptake of offered opportunities, such as providing well-liked activities as a second offer or consulting prisoners on new activities that could be offered.<sup>107</sup> However, there is little available information about the

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<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part3-b.pdf>>.

<sup>100</sup> *IAP Sept 2022*, *supra* note 76, at 126.

<sup>101</sup> Canada, Structured Intervention Unit Implementation Advisory Panel, *Structured Intervention Units Implementation Advisory Panel Update #3-2023: Structured Intervention Units and Indigenous Prisoners*, (Ottawa: Public Safety Canada, March 2023) (Howard Sapers), Appendix Tables 20, 21 [*IAP Indigenous Prisoners Update*].

<sup>102</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 3)* (23 July 2021), at 43-44, 48, 53, 60, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part3-b.pdf>>; *IAP Sept 2022*, *supra* note 76, p 69, 128.

<sup>103</sup> House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 135 (6 November 2018) at 1725 (Matthew Dubé); *IAP Sept 2022*, *supra* note 76, at 58.

<sup>104</sup> *IAP Sept 2022*, *supra* note 76, at 86.

<sup>105</sup> *Ibid*, at 86.

<sup>106</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 3)* (23 July 2021), at 54, 61, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part3-b.pdf>>.

<sup>107</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 3)* (23 July 2021), at 44-45, 55, online:

efficacy or uptake of these strategies, and the variable refusal rates across regions and limited progress in reducing refusals over time suggest there is not an effective national strategy directed at this problem, despite its key importance in avoiding harmful isolation of SIU prisoners.<sup>108</sup>

Internal documents suggest that another important reason for refusals may be simultaneous offers of multiple activities. Stony Mountain Institution has specifically noted that overlapping offers led to prisoners consistently selecting yard time over correctional programming, which led to an effort to alter the schedule so that these activities would no longer overlap.<sup>109</sup> However, it seems that not all issues with simultaneous offers have been resolved. As of February 2021, IEDMs had flagged that simultaneous offers were sufficiently common and poorly recorded in the information they received so as to create difficulties in assessing whether prisoners were in fact receiving offers for their full legislative entitlements, or whether offers were structured in such a way as to completely overlap and leave prisoners with no way to reach the 4 or 2 hour mark.<sup>110</sup>

Finally, it is important to note that refusal rates do not fully explain the extent to which prisoners do not actually receive their allotted time outside of their cells and meaningful human contact. For both of these entitlements, data have demonstrated that there are prisoners who rarely or never refuse offers, but nonetheless have missed much of the time they are meant to receive. With regard to time outside of SIU cells, of the prisoners who refused only one or zero times, 40.9% still missed their allotted time on over half of the days comprising their SIU stays.<sup>111</sup> Similarly, with regard to meaningful human contact, of the prisoners who refused only one or zero times, 35.2% still missed their allotted time on over 1/5 of the days comprising their SIU stays.<sup>112</sup> As such, while resolving the problems that have led to high refusal rates is of key importance, this will not be sufficient on its own to ensure prisoners are not subjected to harmful conditions of isolation.

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<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part3-b.pdf>.

<sup>108</sup> *IAP Sept 2022*, *supra* note 76, at 13, 55, 69; *IAP Indigenous Prisoners Update*, *supra* note 101, Appendix Tables 20, 21.

<sup>109</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 3)* (23 July 2021), at 61-62, online:

<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part3-b.pdf>.

<sup>110</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 8.1)* (21 June 2021), at 42-43, online:

<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-08-1-b.pdf>.

<sup>111</sup> *IAP Sept 2022*, *supra* note 76, at 111.

<sup>112</sup> *Ibid*, at 112.

#### 4.1.4 Exceptions

As discussed in the summary of the SIU system introduced by Bill C-83, the legislation contains several exceptions allowing CSC to not offer prisoners time outside of their cells or engaged in meaningful human contact in exceptional circumstances. These exceptional circumstances include natural disasters, power failures, certain kinds of work stoppages, and, notably given the early history of SIU implementation, epidemics.<sup>113</sup> While an internal CSC memo from March 2021 instructed staff not to use the epidemic exception indiscriminately and instituted regular review procedures, other groups have reported significant restrictions justified by the COVID-19 pandemic in SIUs specifically and in the correctional context more generally.<sup>114</sup>

CSC emails have also mentioned that the exceptions should not be used for events such as routine bad weather, apparently in response to IEDM decisions criticizing the use of this designation during a snow storm.<sup>115</sup> While this email was sent only shortly after implementation of the SIU system, it suggests the existence of at least some instances of legislative exceptions being used inappropriately to deny SIU prisoners their entitlements. The exceptions have been used in a disputed fashion in at least one other more recent instance, where an IEDM found that an institution had not met its obligations by invoking the exception in relation to COVID-19 staffing reductions and damage to yards.<sup>116</sup>

While the types of situations envisioned in the legislative exceptions may undoubtedly render it extremely challenging to ensure every prisoner receives their time entitlements, the use of these exceptions may nonetheless lead to conditions of confinement similar to those deemed unconstitutional. Genuine uses of the exceptions might be justified under s. 1, particularly given that epidemics have been acknowledged as a possible rationale for s. 7 violations.<sup>117</sup> On the other hand, no cases of s. 12 violations have been found justifiable under s. 1, and courts have

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<sup>113</sup> *CCRA*, *supra* note 49, s 37(1)(c); *CCRR*, *supra* note 56, s 19(1).

<sup>114</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 11)* (3 June and 9 June 2021), at 4, 9-10, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11415639/11415639/CorrectionalServiceCanada-11-b.pdf>>; *Solitary by Another Name*, *supra* note 84, at 31, 33; Office of the Correctional Investigator, *COVID-19 Status Update* (23 April 2020), at 3-6; Office of the Correctional Investigator, *Third COVID-19 Status Update* (23 February 2021), at 11.

<sup>115</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 1)* (23 July 2021), at 37-38, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part1-b.pdf>>.

<sup>116</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 2)* (21 June 2021), at 31, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-02-b.pdf>>.

<sup>117</sup> *Ref Re BC Motor Vehicle Act*, [1985] 2 SCR 486, at para 85.

expressed some skepticism that such a thing is possible.<sup>118</sup> Improper use of the legislative exceptions, of course, would be even more difficult to justify.

The numerous problems around time spent outside of cells and experiencing meaningful human contact indicate that SIUs have not succeeded in the goal of transforming the administrative segregation system into one where prisoners do not encounter solitary confinement-like conditions. Instead, many prisoners continue to experience a problematic degree of isolation beyond what courts have deemed acceptable. Prisoners placed in SIUs can still experience the serious psychological harms that form the basis of constitutional violations.<sup>119</sup> This continuation of solitary confinement-like conditions means that the other holdings of the appeal court decisions, relating to duration of isolation and procedural fairness around isolation decisions, cannot be dismissed as limited in relevance only to the former system. As such, it is necessary to assess these factors as they apply to the SIU regime.

#### **4.1.5 Length of Time in SIU**

A significant portion of SIU stays exceed 15 days. The most recent data currently available, from the Implementation Advisory Panel Report of September 2022, indicates that 56.5% of SIU stays exceeded 15 days, and 23.2% of SIU stays lasted over 2 months.<sup>120</sup> These numbers are consistent with those found in earlier examinations of SIU data.<sup>121</sup> In fact, the Implementation Advisory Panel found that the proportion of SIU stays lasting over 15 days did not appear to be improving between the initial implementation of SIUs in November of 2019 and the end of their data collection period in November 2021, and data comparing lengths of stays in 2020, 2021, and 2022 found an increase in the proportion of stays lasting more than 15 days (respectively, this proportion was 51.3%, 62.7%, and 63.5%).<sup>122</sup> Moreover, a comparison between lengths of stays in SIUs and lengths of stays in the former administrative segregation system demonstrates that the new system may have worsened this problem: approximately 72-75% of administrative segregation stays lasted less than 30 days, while the corresponding proportion in SIU stays is 59.8%.<sup>123</sup>

These data also do not account for the possibility that some prisoners may experience repeated SIU stays in close temporal proximity. It is clear that there is a subset of prisoners who experience multiple SIU stays over time: over the period between November 2019 and February 2022, 46% of SIU prisoners experienced 2 or more stays, and 8.4% of prisoners experienced 5 or more stays.<sup>124</sup> However, without information on the relative timing of these stays, it is not clear

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<sup>118</sup> *CCLA ONCA*, *supra* note 1, at paras 124-125.

<sup>119</sup> *Ibid*, at para 126.

<sup>120</sup> *IAP Sept 2022*, *supra* note 76, at 58.

<sup>121</sup> Jane B Sprott & Anthony N Doob, "Solitary Confinement, Torture, and Canada's Structured Intervention Units" (23 February 2021) at 11 [*Sprott & Doob Feb 2021*]; Canada, Structured Intervention Unit Implementation Advisory Panel, *Preliminary Observations of the Operation of Correctional Service Canada's Structured Intervention Units*, (Ottawa: Public Safety Canada, October 2021) (Howard Sapers), at 2, 9 [*IAP Preliminary Observations*].

<sup>122</sup> *IAP Sept 2022*, *supra* note 76, at 58-59; *IAP Indigenous Prisoners Update*, *supra* note 101, Appendix Table 9.

<sup>123</sup> *IAP Sept 2022*, *supra* note 76, at 58-59.

<sup>124</sup> *Ibid*, at 16.

whether they should be considered meaningfully separate from one another. For example, if a prisoner is removed from an SIU for only one day before being returned to the SIU, it is unlikely that this would provide sufficient time to recover from the psychological hardships experienced during the initial stay, which could magnify the harm suffered during the second stay in a way that the data on stay duration alone would not illustrate. This type of rapid removal and return took place in the administrative segregation regime, particularly in the context of transfers between institutions, as notoriously occurred in the tragic case of Ashley Smith.<sup>125</sup> Since the implementation of the SIU regime, transfers have remained common among prisoners experiencing multiple SIU stays, and particularly so for prisoners experiencing mental health challenges.<sup>126</sup> However, more information is required to determine the extent to which transfers in particular, and rapid exit from and re-entry to SIUs in general, mask the true lengths of SIU stays.

Alarming, a subset of the prisoners experiencing stays over 15 days also experience conditions of severe isolation. Sprott and Doob, respectively professor and professor emeritus of criminology, have found that 9.9% of SIU stays were both longer than 15 days and isolating in nature, in that prisoners averaged 2 hours or less outside of their cells per day and had no days at all where they reached 4 hours.<sup>127</sup> These conditions amount to torture under the *Mandela Rules*, and do not meet constitutional standards. It is important to note that Sprott and Doob's approach produced a relatively conservative estimate, as due to the difficulty of extracting information on the meaningfulness of human contact from the available data, any activity other than showering was counted as meaningful human contact.<sup>128</sup> As discussed above, there is reason to doubt that all out-of-cell activities allow for contact that is genuinely meaningful. This analysis also revealed that SIU stays classifiable as torture were not primarily close to the margin: 54.9% of stays classified as torture lasted longer than 32 days, and 24.6% exceeded 62 days.<sup>129</sup> This group of prisoners' experiences cannot be fully explained by refusals, as 64.1% of this group refused time out of their cell on half or fewer of their days in the SIU.<sup>130</sup> Additional data are needed to assess whether CSC has made any progress on reducing the numbers of prisoners experiencing conditions of torture over time. It is clear that at worst, CSC is not meeting the legislative requirement to offer these prisoners opportunities for human contact. At best, this group may face technically permissible use of the legislative exceptions, but still does not receive fulfillment of their constitutional right to protection from prolonged isolation. Similarly, even in the case of prisoners who frequently refuse, CSC may meet legislative standards by offering opportunities, but it nevertheless does not meet constitutional standards where prisoners experience extended periods of isolation.

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<sup>125</sup> Canada, Office of the Correctional Investigator, *A Preventable Death* (Ottawa, 20 June 2008), at paras 18-19, 42-43.

<sup>126</sup> *IAP Sept 2022*, *supra* note 76, at 90-91; *Mental Health and the SIUs: An Update for the Structured Intervention Unit Implementation Advisory Panel*, (Ottawa: Public Safety Canada, January 2023) (Howard Sapers), Appendix Table 2 [*IAP Mental Health Update*].

<sup>127</sup> *Sprott & Doob Feb 2021*, *supra* note 121, at 24.

<sup>128</sup> *Ibid*, at 24.

<sup>129</sup> *Ibid*, at 24.

<sup>130</sup> *Ibid*, at 25.

#### 4.1.6 Prisoners Who Do Not Want to Leave

Several sources, including judicial decisions, note the existence of a population of prisoners who prefer to remain within SIUs.<sup>131</sup> As one example, regional data from Ontario notes a specific prisoner who remained in administrative segregation through the transfer to SIUs in November 2019, until July 2021.<sup>132</sup> More recently, the Office of the Correctional Investigator's 2021-2022 Annual Report has referred to the existence of this population as well.<sup>133</sup> Internal documents suggest that CSC has faced considerable difficulty in developing a strategy for returning these prisoners to the general population, including going so far as to suggest that the use of force may, in rare cases, be necessary to remove certain individuals from SIUs.<sup>134</sup> The Implementation Advisory Panel has found that some institutions may implement useful strategies to promote reintegration, such as involvement of Elders or Inmate Committees in the formation of exit or case management plans, but that these initiatives are not consistent across CSC.<sup>135</sup>

It is important to note that the existence of prisoners who prefer to reside in SIUs does not necessarily speak in favour of SIU conditions so much as raise concerns about the conditions in the general population.<sup>136</sup> While some prisoners have reported a preference for SIUs because of increased attention from or good relationships with staff, others have noted less positive reasons, including concerns about personal safety and the conditions of confinement in the general population.<sup>137</sup> General population conditions have been particularly problematic during COVID-19.<sup>138</sup> Furthermore, serious issues have been identified with general conditions at specific institutions, such as the frequency of lockdowns at Kent Institution leaving many general population prisoners' time outside of their cells at levels even more restricted than what occurs in SIUs.<sup>139</sup> The Office of the Correctional Investigator has also found that many institutions operate non-SIU areas under conditions even more restrictive than those present in

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<sup>131</sup> *BCCLA BCSC, supra* note 20, at para 71.

<sup>132</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Parts 2 and 3)* (21 June 2021), at 52, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-02-b.pdf>> and at 53, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-03-b.pdf>>.

<sup>133</sup> Canada, Office of the Correctional Investigator, *Annual Report 2021-2022* (Ottawa, 2022) at 16 [*OCI Report 2021-2022*].

<sup>134</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 2)* (23 July 2021), at 69, 78-79, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part2-b.pdf>>.

<sup>135</sup> *IAP Sept 2022, supra* note 76, at 54.

<sup>136</sup> *Ibid*, at 55; House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 137 (20 November 2018) at 1640 (Hon Kim Pate).

<sup>137</sup> *IAP Sept 2022, supra* note 76, at 86.

<sup>138</sup> *OCI Report 2021-2022, supra* note 133, at 16.

<sup>139</sup> *Solitary by Another Name, supra* note 84, at 11.



the SIU, due to pressure to keep SIU numbers low and a lack of clear legislative requirements around conditions of confinement in non-SIU units.<sup>140</sup> Given these problems, it is unsurprising that prisoners may prefer to remain in SIUs, even where their conditions entail significant isolation.

## **4.2 Procedural Fairness**

Given the serious problems present in the conditions of confinement in SIUs outlined in the previous section, it is clear that prisoners kept in SIUs face a very high risk of violations of their *Charter* rights. The serious effects of SIU placement on life, liberty, and security of the person create the need for robust procedural safeguards, to ensure that such placements occur in a manner consistent with the principles of fundamental justice. The appeal court decisions emphasized both prompt access to counsel and independent review of decision-making as key aspects of procedural fairness needed to constitutionalize the administrative segregation scheme. This section will discuss the shortcomings of the SIU legislative scheme on both of these issues. In particular, the lack of concrete obligations relating to access to counsel for prisoners in the SIU, as well as the timing, transparency, and implementation problems in the IEDM scheme, create significant obstacles to procedural fairness and do little to alleviate the risk of violations of prisoners' *Charter* rights.

### **4.2.1 The Right to Counsel**

While neither judicial decision struck any provisions related to access to counsel, they did affirm that access to counsel is required for a procedurally fair process. The courts dealt with this issue primarily from the perspective of procedural fairness under s. 7 of the *Charter*, but isolation also engages s. 10 rights. Placement in isolating conditions, including administrative segregation under the former regime, restricts residual liberty and so constitutes a new detention that engages the rights outlined in s. 10, such as access to habeas corpus and the right to counsel.<sup>141</sup> The trial court in British Columbia affirmed this point, noting that prisoners placed in the isolating conditions of administrative segregation are entitled to access to counsel that is both timely and private.<sup>142</sup> However, the court also noted that violations of these rights may be better suited to individual s. 24 claims by affected prisoners.<sup>143</sup>

The legislative scheme post-Bill C-83 requires that CSC provide prisoners sent to SIUs with “a reasonable opportunity to retain and instruct legal counsel,” and that where a prisoner has the opportunity to make representations, they may receive assistance from counsel in doing so.<sup>144</sup> The former legislative scheme offered similar rights to prisoners transferred to administrative segregation, albeit phrased more forcefully.<sup>145</sup> However, under the new legislative scheme, CSC's concrete obligations remain vague. Non-binding policy documents such as the relevant

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<sup>140</sup> *OCI Report 2021-2022*, *supra* note 133, at 78, 81.

<sup>141</sup> *R v Miller*, 1985 CarswellOnt 124, at para 35.

<sup>142</sup> *BCCLA BCSC*, *supra* note 20, at para 437.

<sup>143</sup> *Ibid*, at para 437.

<sup>144</sup> *CCRR*, *supra* note 56, ss 97(2)(a), 97(4).

<sup>145</sup> *BCCLA BCSC*, *supra* note 20, at para 413.



Commissioner's Directive largely focus on indicating that CSC staff should facilitate completion of consent forms releasing prisoners' information to their counsel.<sup>146</sup> These policy documents lack clear standards for what constitutes a private meeting, and do not contain timelines within which meetings with counsel should occur.<sup>147</sup>

It appears that the lack of firm obligations in the legislative scheme has contributed to prisoners experiencing difficulties in accessing counsel. During the period of the suspension of invalidity of the former legislative scheme, there were documented cases of undue delays in access to counsel.<sup>148</sup> During this period CSC also ended their former practice of allowing a regular legal clinic at one institution's segregation unit.<sup>149</sup> Since the introduction of SIUs, the West Coast Prison Justice Society has documented numerous problems prisoners have encountered in accessing counsel, including issues around contact with counsel being impeded or delayed, provision of insufficiently private locations for meetings, lack of disclosure of the case prisoners must meet, and poor or absent communication of the timing of hearings.<sup>150</sup> Furthermore, prisoners are required to submit a request for the presence of counsel 3 days prior to a hearing, which can create significant logistical challenges, as prisoners are often only informed of the timing of a hearing on this same day.<sup>151</sup> These issues have led to prisoners facing hearings with crucial effects on their residual liberties without the assistance of counsel, despite the acknowledgement by courts and the legislature of the importance of counsel for procedural fairness in these decisions.<sup>152</sup>

#### 4.2.2 Independent Review

While SIUs contain a form of independent review of confinement decisions through the IEDM system, several concerns remain about this system's adequacy in meeting procedural fairness requirements. Crucially, and as many have pointed out, IEDM review occurs well after the 5 day mark identified as key by the BCSC.<sup>153</sup> While different types of review occur at different timepoints, length of stay reviews, as one example, largely occur in the range of 55-62 days and after several layers of internal review, while conditions of confinement reviews include a 7 day period for CSC to implement any recommendations before an IEDM can order the prisoner in question removed from the SIU.<sup>154</sup> The focus of conditions of confinement reviews on whether CSC has made all reasonable efforts to comply with the legislation, rather than the prisoner's actual experience of isolation, raises similar concerns to the above-mentioned focus of the

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<sup>146</sup> *CD 711*, *supra* note 93, at para 152.

<sup>147</sup> *Ibid*, at paras 150-155; Correctional Service Canada, "Structured Intervention Unit (SIU) Transfer Procedures – SIU Sites," Guidelines No 711-1 (Ottawa: CSC, 30 November 2019), at para 47 [*GL711-1*].

<sup>148</sup> *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 177, at para 18.

<sup>149</sup> *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 177, at paras 26-28.

<sup>150</sup> *Solitary by Another Name*, *supra* note 84, at 54-56.

<sup>151</sup> *CCRR*, *supra* note 56, s 20(2)(b); *GL711-1*, *supra* note 147, s 54; *ibid*, at 55.

<sup>152</sup> *Solitary by Another Name*, *supra* note 84, at 54-56.

<sup>153</sup> *BCCLA BCSC*, *supra* note 20, at para 410; Senate, Standing Committee on Social Affairs, Science and Technology, *Evidence*, 42-1, No 59 (9 May 2019) (Josh Paterson).

<sup>154</sup> *CCRA*, *supra* note 49, s 37.83(3); Jane B Sprott, Anthony N Doob, and Adelina Iftene, "Do Independent External Decision Makers Ensure that 'An Inmate's Confinement in a Structured Intervention Unit Is to End as Soon as Possible'?" (10 May 2021) at 7 [*Sprott Doob Iftene May 2021*].

legislation on opportunities rather than actual time outside of SIU cells.<sup>155</sup> In particular, where CSC can present an argument that reasonable attempts have been made to provide appropriate conditions, this focus may lead to prisoners remaining in the SIU even where they are experiencing an unconstitutional degree of isolation.

True independence of IEDM decision-making, and the perception thereof, have been raised as a potential problem, as IEDMs are appointed by the Minister of Public Safety and are allocated staff by CSC.<sup>156</sup> The problems in the flow of information to IEDMs, as described below, could be influenced by this structure, in which CSC staff are responsible for providing the information necessary to hold CSC accountable. In addition to administrative support, IEDMs also receive training from CSC.<sup>157</sup> The Implementation Advisory Panel has identified several flaws in this training, such as an absence of information on what elements an IEDM decision should include, as well as noting the potential for conflicts of interest to arise from the training occurring under CSC's aegis at all.<sup>158</sup> However, even beyond these issues, there are additional concerns around CSC's information sharing with IEDMs, use of referrals to IEDMs, and implementation of IEDM decisions.

#### **4.2.2.1 Problems with Transparency and Information Sharing**

The process of IEDM decision-making raises several concerns around transparency and consistency. Decisions are not made publicly available, despite a legislative regime that explicitly contemplates this, albeit as an option available at individual IEDMs' discretion rather than in a regularized or mandated fashion.<sup>159</sup> Even the Implementation Advisory Panel has only been able to review a "small sample" of IEDM decisions.<sup>160</sup> Furthermore, little information is available on what documentation IEDMs receive and base their decisions on.<sup>161</sup> What is known about the information IEDMs receive is not promising: for example, emails from December 2020 note that information regarding prisoners' mental health diagnoses had only begun to be included at that point, about a year after implementation of SIUs and after repeated requests,<sup>162</sup> and IEDM requests to be given additional information about prisoners' health were ongoing at least as of

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<sup>155</sup> *CCRA*, *supra* note 49, s 37.83(3).

<sup>156</sup> Senate, Standing Committee on Social Affairs, Science and Technology, *Evidence*, 42-1, No 59 (9 May 2019) at 1725 (Prof Debra Parkes); *IAP Sept 2022*, *supra* note 76, at 44-45; House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 10)* (23 July 2021), at 55, online: <<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part10-b.pdf>>.

<sup>157</sup> *IAP Sept 2022*, *supra* note 76, at 46.

<sup>158</sup> *Ibid*, at 46.

<sup>159</sup> *CCRA*, *supra* note 49, s 37.77; *CCRR*, *supra* note 56, s 23.02; *Ibid*, at 47-48.

<sup>160</sup> *IAP Sept 2022*, *supra* note 76, at 47.

<sup>161</sup> *Ibid*, at 47.

<sup>162</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 2)* (23 July 2021), at 8-9, online: <<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part2-b.pdf>>.

April 2021.<sup>163</sup> While IEDMs are required to consider Indigenous Social History factors, this information is not always consistently provided.<sup>164</sup> IEDMs have also reported delays in receiving documents and challenges in assessing whether they have received all relevant information.<sup>165</sup> CSC itself has acknowledged a lack of proactivity in providing IEDMs with relevant information, and has suggested that many negative IEDM decisions result from information gaps rather than poor conditions.<sup>166</sup> Moreover, several regions have experienced challenges in finding a procedure that would allow prisoners to communicate confidentially with IEDMs, which could present a significant obstacle for subjects of reviews wishing to present their version of events.<sup>167</sup>

The accuracy of the information IEDMs do receive may also pose a problem. Internal documents indicate that data IEDMs received on time spent outside of SIU cells and meaningful human contact were notably inaccurate, to the point that several IEDMs had apparently stopped using these data at all in their decisions.<sup>168</sup> The inaccuracies were seemingly centred around overlapping offers, where a prisoner might be offered, for example, a choice between two different activities occurring at the same time. Even though the prisoner could only participate in one activity, both would be counted towards the time offered to the prisoner for that day.<sup>169</sup>

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<sup>163</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 9)* (21 June 2021), at 87, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-09-b.pdf>>.

<sup>164</sup> *CCRR*, *supra* note 56, s 23.03; *IAP Sept 2022*, *supra* note 76, at 88.

<sup>165</sup> *IAP Sept 2022*, *supra* note 76, at 45-46.

<sup>166</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 1)* (23 July 2021), at 1, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part1-b.pdf>>.

<sup>167</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 9)* (21 June 2021), at 97-100, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-09-b.pdf>>.

<sup>168</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 8.1)* (21 June 2021), at 42-43, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-08-1-b.pdf>>.

<sup>169</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Parts 8.1 and 9)* (21 June 2021), at 42-43, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-08-1-b.pdf>> and at 86, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-09-b.pdf>>.

Beyond this, the data also included ambiguities concerning durations of activities offered and reasons activities ended.<sup>170</sup>

Further heightening concerns about decision-making is the fact that individual IEDMs have notably different rates of possible decision outcomes. In an examination of length of stay decisions, the Implementation Advisory Panel found that individual IEDM rates of decisions to remove a prisoner from an SIU varied from 0% to 50% of their decisions (setting aside cases where a prisoner was removed from the SIU before a decision was rendered).<sup>171</sup> The range was similarly variable when excluding the IEDMs with only a small number of decisions made (0% to 46.7%).<sup>172</sup> Of the 14 IEDMs, 9 had a removal decision rate under 10%.<sup>173</sup> There are also substantial regional variations in IEDM decision outcomes, with the proportion of length of stay reviews resulting in a decision to remove the prisoner from the SIU ranging from 20.9% in Ontario to 3.0% in the Pacific region.<sup>174</sup> These inconsistencies, in combination with the inaccessible nature of IEDMs' reasons for decisions, suggest that different IEDMs could be basing their decisions on different criteria or standards, creating a situation where prisoners may have difficulty determining how to effectively meet the case against them.<sup>175</sup>

#### 4.2.2.2 Problems with Referrals to IEDMs

Some types of IEDM review have seen little use. For example, as of June 2023, there had only been 4 cases referred to an IEDM by CSC staff, and no cases of review following non-implementation of a health care professional's recommendations regarding conditions of confinement or release from an SIU.<sup>176</sup> This absence of referrals could reflect compliance with health care professionals' recommendations, or could suggest that not all referrals to IEDMs are occurring as they should.

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<sup>170</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 9)* (21 June 2021), at 86, 88, online:

<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-09-b.pdf>.

<sup>171</sup> *IAP Sept 2022*, *supra* note 76, at 49-50.

<sup>172</sup> *Ibid*, at 50.

<sup>173</sup> *Ibid*, at 50.

<sup>174</sup> *Independent Oversight of Structured Intervention Units in Canada's Penitentiaries: An Update - Structured Intervention Unit Implementation Advisory Panel*, (Ottawa: Public Safety Canada, December 2022) (Howard Sapers), Table 3 [*IAP Oversight Update*].

<sup>175</sup> *Sprott Doob Iftene May 2021*, *supra* note 154, at 14-15.

<sup>176</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Parts 8.1, 8.2, and 12)* (21 June 2021), at 51, online:

<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-08-1-b.pdf> and at 1, online:

<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-08-2-b.pdf> and at 1, 36, online:

<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11454475/11454475/CorrectionalServiceCanada-2021-06-21-12-b.pdf> [*CSC IEDM Data*]; Access to Information Request #A-2023-00110.

An absence of referrals to IEDMs in situations where such referrals seem to be indicated has been found in the context of length of stay reviews. Specifically, data on these reviews have indicated that some cases involving very long SIU stays never result in a referral to an IEDM. For example, of the prisoners kept in SIUs for over 120 days, 32.3% had not been sent for IEDM review.<sup>177</sup> A comparison between data from November 2019 through March 2021 and April 2021 through July 2022 showed that in both time periods, about a third of SIU stays over 75 days were not referred to IEDMs, even though by the latter period CSC was undoubtedly aware of this problem.<sup>178</sup> Sprott, Doob and Iftene have suggested that some portion of this group may be prisoners who have received a release decision from one of CSC's layers of internal review, but that CSC may be slow to implement such decisions.<sup>179</sup> It has also been suggested that some portion of this group are prisoners who do not wish to leave SIUs.<sup>180</sup> However, even as applied to this special population, this lack of oversight is risky given the poor conditions many SIU prisoners face.

#### **4.2.2.3 Problems with Implementation of IEDM Decisions**

Analysis of data on length of stay IEDM decisions specifically has revealed problems in implementation of IEDM decisions. This dataset indicates that an IEDM decision that a prisoner should be removed from the SIU does not appear to result in any faster a removal from the SIU than a decision that they should remain there. Few prisoners, regardless of the decision made, are released within 30 days of the decision (for example, between May 2021 and September 2022, these figures were 16.0% for remain decisions and 17.4% for release decisions).<sup>181</sup> The Implementation Advisory Panel's first Annual Report revealed that of the prisoners who receive a remain decision, 8.8% are only released after the 60 day-post decision mark, while a startling 35.3% of prisoners who receive a release decision are released after this point.<sup>182</sup> More recent data show that this problem has not been resolved: during the period between May 2021 and September 2022, 2.7% of prisoners with a remain decision were released from the SIU after more than 61 days, while 39.1% of prisoners with a remove decision remained in the SIU this long.<sup>183</sup> This may occur, at least in part, because of logistical delays around transferring prisoners to different institutions.<sup>184</sup> Nonetheless, as was pointed out in a June 2020 email within CSC: "This is a significant risk to the SIU scheme as well as government and CSC reputation if it is perceived CSC 'ignores' the IEDM decisions."<sup>185</sup> Beyond reputational risks,

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<sup>177</sup> *IAP Sept 2022*, *supra* note 76, at 53; for a similar trend found in earlier data see *Sprott Doob Iftene May 2021*, *supra* note 154, at 17.

<sup>178</sup> *IAP Oversight Update*, *supra* note 174, Table 1.

<sup>179</sup> *Sprott Doob Iftene May 2021*, *supra* note 154, at 17.

<sup>180</sup> *IAP Sept 2022*, *supra* note 76, at 53.

<sup>181</sup> *IAP Oversight Update*, *supra* note 174, Table 5.

<sup>182</sup> *IAP Sept 2022*, *supra* note 76, at 52.

<sup>183</sup> *IAP Oversight Update*, *supra* note 174, Table 5.

<sup>184</sup> *IAP Sept 2022*, *supra* note 76, at 51; *Sprott Doob Iftene May 2021*, *supra* note 154, at 16-17.

<sup>185</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 1)* (23 July 2021), at 1, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part1-b.pdf>>.

these delays call into serious question the efficacy of the IEDM system in restraining CSC and providing recourse to prisoners.

Finally, the broader efficacy of the IEDM system over time is not clear. A comparison of IEDM decision data between the initial period of SIU operation (November 2019 to April 2020) and a more recent period (November 2020 to April 2021) shows that the numbers of IEDM decisions across most review types have increased, although these numbers appear to have decreased in the following years.<sup>186</sup> However, proportions of different review outcomes generally do not appear to have changed in a consistent direction over this period.<sup>187</sup> As such, even if we assume that IEDM decisions are perfectly accurate, they do not appear to be exerting a consistent pressure on CSC towards compliance (which would look like all decision types converging towards very high proportions of remain and no recommendations outcomes). Interestingly, IEDM reviews on the grounds of 4 SIU stays within 180 days have demonstrated the opposite pattern, with increasing proportions of reviews with recommendations made over time.<sup>188</sup> While caution is warranted in interpreting these results given the relatively small number of these reviews overall, these data could signal worsening compliance by CSC over time in the realm of repeated use of shorter SIU stays.

### **4.3 Equality Issues**

Neither appeal court decision found that the administrative segregation regime violated s. 15 of the *Charter* on the grounds of Indigeneity, race, or disability. However, the Department of Justice's *Charter* statement on Bill C-83 acknowledged that administrative segregation could have implications for equality on these protected grounds.<sup>189</sup> In line with this acknowledgement, it is well-known that people experiencing mental illness or disability and people of colour, including in particular Indigenous people, are over-represented in Canada's prisons, and are therefore at risk of particular exposure to systems within prisons such as SIUs. As such, it is worthwhile to assess any disparate impacts of the new SIU system on these groups.

#### **4.3.1 Mental Disability**

The Ontario Court of Appeal, while not finding a s. 15 violation, noted that the serious psychological harms caused by solitary confinement render such conditions inappropriate for prisoners with significant mental illnesses or disabilities.<sup>190</sup> The court refrained from finding a s. 12 violation based on the use of administrative segregation for this group of prisoners due to a lack of evidence available to establish criteria for exactly which prisoners a prohibition on this basis might apply to, but noted this might be determined in future litigation.<sup>191</sup> Subsequent class actions have successfully defined a class of prisoners experiencing serious mental illnesses who would be harmed by solitary confinement-like conditions, and found breaches of their

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<sup>186</sup> *CSC IEDM Data*, *supra* note 176; Access to Information Request #A-2023-00110.

<sup>187</sup> *CSC IEDM Data*, *supra* note 176; Access to Information Request #A-2023-00110.

<sup>188</sup> Access to Information Request #A-2023-00110.

<sup>189</sup> *DOJ Charter Statement*, *supra* note 65.

<sup>190</sup> *CCLA ONCA*, *supra* note 1, at para 66.

<sup>191</sup> *Ibid*, at para 66.

sections 7 and 12 rights.<sup>192</sup> Similarly, the Department of Justice has recognized that SIUs require safeguards to ensure mentally ill prisoners are not subjected to disparate harms.<sup>193</sup>

Unfortunately, data on the implementation of SIUs show that many prisoners placed in SIUs have mental health flags within CSC's records, including 32.5% of SIU prisoners during the period from January 2020 to July 2022.<sup>194</sup> This figure may be worsening over time, as data from the first year of SIU operations indicate the proportion of SIU prisoners with mental health needs was 28%.<sup>195</sup> Prisoners with mental health needs are particularly likely to experience multiple periods in SIUs, and are more likely to experience SIU stays of over 15 days than prisoners without identified mental health challenges.<sup>196</sup> Prisoners with mental health needs are also less likely to receive their legislated time outside of their cells, with 61% of this group receiving less than 4 hours on at least ¾ of their days in an SIU, as compared to 51% of prisoners without an identified mental health challenge.<sup>197</sup> In addition, prisoners identified as experiencing worsening mental health appear to be held in SIUs for longer periods than other groups, with 40.5% of prisoners with deteriorating mental health staying in SIUs for over 61 days, as compared to 21.7% and 17.5% for prisoners with constant low- or high-needs designations, respectively.<sup>198</sup> These tendencies run precisely counter to what might be expected from a system designed to accommodate this group's unique needs. The Implementation Advisory Panel has noted that it does not have sufficient evidence to determine whether or not SIU stays have a therapeutic effect for prisoners.<sup>199</sup> However, CSC has found a decrease in mental health needs during only 2.3% of SIU stays.<sup>200</sup>

Another key factor in assessing the SIU system's effects on prisoners with mental illnesses is to consider how the review process, including IEDM decisions, handles their cases. This is particularly helpful given the BCCA's view that the "individualized" decision-making process from the former administrative segregation system was responsive to mentally ill prisoners' needs.<sup>201</sup> However, emails between CSC and Senior IEDMs have indicated that during approximately the first year of SIU implementation, IEDMs did not receive information on mental health diagnoses of prisoners whose cases they were reviewing, despite repeated

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<sup>192</sup> *Brazeau v Attorney General (Canada)*, 2019 ONSC 1888, at paras 17, 308, 310, 371 (aff'd *Brazeau v Canada (Attorney General)*, 2020 ONCA 184); *Francis v Ontario*, 2021 ONCA 197, at para 49.

<sup>193</sup> *DOJ Charter Statement*, *supra* note 65.

<sup>194</sup> *IAP Mental Health Update*, *supra* note 126, Appendix Table 1; see *IAP Sept 2022*, *supra* note 76, for similar data pertaining to the period between November 2019 and February 2022, at 78.

<sup>195</sup> *Sprott & Doob Feb 2021*, *supra* note 121, at 20-21.

<sup>196</sup> *IAP Sept 2022*, *supra* note 76, at 78-79, 115; *IAP Mental Health Update*, *supra* note 126, Appendix Tables 1, 4.

<sup>197</sup> *IAP Mental Health Update*, *supra* note 126, Appendix Table 8.

<sup>198</sup> *Ibid*, Table A; see for a similar trend with less recent data *IAP Sept 2022*, *supra* note 76, at 61-62.

<sup>199</sup> *IAP Sept 2022*, *supra* note 76, at 80.

<sup>200</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 4)* (3 and 9 June 2021), at 164, online:

<<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11415639/11415639/CorrectionalServiceCanada-04-b.pdf>>.

<sup>201</sup> *BCCA BCCA*, *supra* note 13, at para 236.



requests.<sup>202</sup> The effect of this lack of information is illustrated by IEDM decision outcomes in length of stay reviews, which do not appear to be affected by the presence or absence of mental health needs.<sup>203</sup> When an IEDM does decide a prisoner should be removed from the SIU, the presence or absence of a mental health need also does not affect the timeliness with which this decision is carried out.<sup>204</sup>

Also concerning is the fact that as of June 2023, there had been no recorded uses of referrals to IEDMs upon recommendation by a health care professional, and only 4 referrals by other CSC staff.<sup>205</sup> While this could also reflect a situation where recommendations of health care professionals are consistently followed, this interpretation appears less plausible in light of the above-mentioned data indicating the presence of many prisoners with mental health challenges, including challenges that are worsening, within SIUs. Relatively little information is available regarding the requirements for assessment of SIU prisoners by health care professionals, and the Implementation Advisory Panel has noted an absence of data on the implementation of this measure, rendering accountability on this point even more difficult.<sup>206</sup>

#### **4.3.2 Indigeneity and Race**

The Department of Justice has acknowledged that systems administering isolation within prisons have the potential to exert disproportionately negative effects on racialized prisoners.<sup>207</sup> Neither appeal court decision found a s. 15 violation on the grounds of race. However, data on SIU usage indicate that Black and Indigenous prisoners experience disproportionate effects of the SIU system.

Indigenous prisoners have made up a disproportionately large share of SIU prisoners since the system's implementation.<sup>208</sup> Indigenous women are even more starkly overrepresented.<sup>209</sup> Indigenous prisoners are also more likely to experience SIU stays longer than 15 days, a trend that has worsened during the time SIUs have been in operation.<sup>210</sup> While Indigenous prisoners seem to be more likely to receive their entitlements to time outside of their cells and meaningful human contact, the Implementation Advisory Panel has suggested that this may be an artifact of regional variation across institutions rather than an ameliorative effort by CSC.<sup>211</sup> It is also important to note that despite this artifactual effect, Indigenous prisoners in SIUs still

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<sup>202</sup> House of Commons, Standing Committee on Public Safety and National Security, *Documents submitted pursuant to the motion adopted by the committee on Wednesday, May 5, 2021, Correctional Service of Canada (Part 2)* (23 July 2021), at 8-9, online:

<https://www.ourcommons.ca/content/Committee/432/SECU/WebDoc/WD11469999/11469999/CorrectionalServiceCanada-2021-07-23-Part2-b.pdf>.

<sup>203</sup> *IAP Mental Health Update*, *supra* note 126, Appendix Table 11.

<sup>204</sup> *Ibid*, Appendix Tables 11, 12.

<sup>205</sup> *CSC IEDM Data*, *supra* note 176; Access to Information Request #A-2023-00110.

<sup>206</sup> *IAP Sept 2022*, *supra* note 76, at 40; see also *CD 711*, *supra* note 93, at paras 98-100.

<sup>207</sup> *DOJ Charter Statement*, *supra* note 65.

<sup>208</sup> *IAP Indigenous Prisoners Update*, *supra* note 101, Appendix Table 2.

<sup>209</sup> *Ibid*, Table A.

<sup>210</sup> *Ibid*, Table B, Appendix Table 9.

<sup>211</sup> *Ibid*.



miss a significant portion of their time outside of the cell and their meaningful human contact time: for example, 45.5% of Indigenous prisoners experiencing a long SIU stay missed reaching a full 4 hours outside of their cells on more than  $\frac{3}{4}$  of their days in the SIU, and 20.3% of Indigenous prisoners experiencing a long SIU stay missed reaching a full 2 hours of meaningful human contact on more than  $\frac{3}{4}$  of their days in the SIU.<sup>212</sup> As in the SIU population as a whole, these data cannot be fully explained by prisoners refusing opportunities, as many Indigenous prisoners refuse these opportunities only rarely.<sup>213</sup> As described by the Implementation Advisory Panel, these data are indicative of an urgent problem in how CSC treats Indigenous prisoners in the SIU context.<sup>214</sup>

The Office of the Correctional Investigator has also noted the Black prisoners are disproportionately likely to be placed in SIUs, and to experience very long stays.<sup>215</sup> In data covering the period between November 2019 and September 2020, 26.8% of Black prisoners' stays in SIUs lasted longer than two months, as compared to 19.5% of white prisoners' SIU stays.<sup>216</sup> Black prisoners are more likely to receive multiple IEDM length of stay reviews: of Black prisoners receiving length of stay reviews, 45.2% received more than one, as compared to 31.7% for white prisoners.<sup>217</sup> These data suggest that not only are Black prisoners experiencing longer SIU stays, but that the IEDM system is not adequately resolving this problem.<sup>218</sup>

## 5 Conclusion

As this report has confirmed, the new SIU regime retains many of the constitutional violations that its predecessor, administrative segregation, was found to possess. The significant qualitative differences between administrative segregation and SIUs anticipated by the government do not appear to have materialized. A full comparison between the promises of the *Charter Statement* produced by the Department of Justice and the realities of SIU implementation can be found in Annex I.

Overall, despite legislative standards requiring daily opportunities for time spent outside of cells and engaging in meaningful human contact, many prisoners do not consistently receive these entitlements. In fact, framing these entitlements as based around providing opportunities, rather than required amounts of time, diminishes accountability and makes it possible for CSC to fulfill their legislative requirements on this issue while still leaving prisoners no less vulnerable to substantial psychological harm. Furthermore, many prisoners remain in SIUs for periods exceeding 15 days, surpassing the constitutional limit on exposure to such conditions. As a result of these long-lasting conditions of isolation, a significant portion of prisoners in SIUs experience conditions that fall under the definition of solitary confinement, and a subgroup of

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<sup>212</sup> *Ibid*, Appendix Tables 12, 13.

<sup>213</sup> *Ibid*, Appendix Tables 22, 23.

<sup>214</sup> *Ibid*.

<sup>215</sup> *OCI Report 2021-2022*, *supra* note 133, at 17.

<sup>216</sup> *Sprott Doob Iftene May 2021*, *supra* note 154, at 10-11.

<sup>217</sup> *Ibid*, at 9-10.

<sup>218</sup> *Ibid*, at 9.

these prisoners experience conditions of torture. While an external review mechanism exists, it is lacking in transparency and is in many cases ineffective, with many IEDM decisions complied with only after significant delays. Initial layers of review occur internally and in an insufficiently independent fashion, and external review occurs only after extended periods, in contravention of the constitutional requirement for external review at the 5 day mark. Each of these problems prevents vindication of prisoners' constitutional right to procedural fairness in the SIU context. In line with these flaws, the review system for SIUs has not succeeded in eliminating unconstitutional conditions of isolation or in ending overrepresentation of prisoners who are Indigenous or who are experiencing mental illnesses.

Altogether, as many experts predicted during the legislative process for Bill C-83, these flaws contribute to a system that perpetuates the violations of sections 7 and 12 of the *Charter* identified by the two appeal court decisions. This report has further identified some of the discriminatory effects of the SIU regime relevant to section 15 equality arguments. SIUs cannot be said to have resolved the problems that rendered administrative segregation unconstitutional. These constitutional violations, and the SIU system that permits them, should not be permitted to continue. As the five-year review of Bill C-83 approaches, it is clear that a new approach that respects the rights of prisoners both on paper and in practice is urgently needed.

Significant changes to the SIU regime are needed to bring it in line with constitutional requirements. The following list outlines a set of recommendations that would promote constitutional compliance and which should be considered as starting points for amendment as the five-year review of Bill C-83 proceeds.

- Ensure that the five-year review of Bill C-83 is both expeditious and thorough, so as to fully address the ongoing *Charter* violations identified in this paper. This review should include participation by civil society, and should be given a mandate to make recommendations related to all aspects of these problems, including those connected to compliance and enforcement.
- Amend the *CCRA* to define “solitary confinement” in line with the *Mandela Rules* definition.
- Prohibit prolonged solitary confinement by creating a cap on the duration of SIU stays of 15 days. This limit should ideally be combined with additional limits on the frequency with which a prisoner can be returned to the SIU after release and/or the total amount of time a prisoner can spend in the SIU on a yearly basis.
- Prohibit the use of SIUs for prisoners experiencing serious mental health challenges.
- Mandate improved data-sharing with the public and civil society, including by requiring publication of IEDM decisions with redactions as needed to address privacy and security concerns, to promote transparency and consistency in decision-making.
- Provide special attention to other key sources of constitutional violations, including ensuring prisoners receive adequate time outside of their cells, that IEDM decisions meet fairness standards, and that the needs of Indigenous and Black prisoners are prioritized.

## **Annex I: Comparison of DOJ Charter Statement and Current Knowledge on SIU Implementation**

The *Charter Statement* on Bill C-83 prepared by the Department of Justice sets out numerous claims about the constitutionality of the SIU regime, with the aim of indicating the government's reasoning in considering the bill constitutionally compliant.<sup>219</sup> Many of the arguments presented in this document were echoed by the government during the legislative process. However, many of these claims have not corresponded well to the realities of the legislative scheme as written or the implementation of the SIU system in practice. This Annex sets out each statement about the constitutionality of SIUs made in the *Charter Statement*, and provides information about the problems that have arisen on each of these points, both within the legislation itself and based on the available implementation data. These explanations are accompanied by references to the pages of this report discussing these problems in further detail. Each statement is also accompanied by a description of additional data needed to more fully assess how CSC has performed in implementing the goals of the SIU system.

### **Sections 7 and 12**

**DOJ:** "First, the provisions specify the safety- and security-related reasons why designated staff members can transfer inmates to an SIU. They also require regular review of an inmate's confinement in an SIU in light of these permissible reasons, and require the confinement to end as soon as possible. The inclusion of these provisions proscribes arbitrary or overbroad impacts on liberty and security of the person, by requiring that an inmate's confinement in an SIU always has a rational connection to the objectives of the SIU scheme."<sup>220</sup>

**Current Knowledge:** The specified reasons for use of SIUs are very similar to the permitted reasons for the use of the former administrative segregation system. While safety and security are important, the courts have found that keeping prisoners in conditions of extended isolation does not support these goals, and instead detracts from them. As such, in a system that continues to allow extended and severe isolation, the justifications for SIU use present in the legislation are not sufficient to prevent overbroad effects on prisoners' s. 7 *Charter* rights. See pages 2-3, above.

**Further Information Needed:** The degree to which SIU stays contribute to or detract from institutional safety and security goals could be illuminated with further information on the frequency with which individual prisoners undergo repeated SIU placements. Frequent returns to SIUs by the same individuals would suggest that SIUs do not successfully rehabilitate prisoners from posing future safety and security risks, and that their use may therefore be overbroad.

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<sup>219</sup> Government of Canada, "Bill C-83: An Act to amend the Corrections and Conditional Release Act and another Act" (7 May 2019, last updated 1 September 2021), online: <<https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c83.html>> [DOJ *Charter Statement*].

<sup>220</sup> *Ibid.*

**DOJ:** “Second, the decision whether to continue an inmate’s confinement in an SIU can be made in a procedurally fair manner. The provisions require the initial transfer decision to be made by a designated staff member who holds a position lower in rank than the institutional head. The staff member must maintain a record of the transfer, including the reasons for it and any alternative measures that were considered. Notice of the authorization to transfer and the reasons must be provided to the inmate orally within one working day of the initial transfer, and in writing within two working days. Then, the institutional head must decide, within five working days of the transfer, whether the inmate should remain in SIU. The provisions define the grounds for the institutional head’s decision (again related to safety and security), along with some factors that must be taken into account. This decision-making process respects impartiality and independence requirements by ensuring that in conducting the fifth working day review, the institutional head is neither chosen by the staff member whose initial transfer decision is under review, nor reporting to or otherwise in the sphere of influence of that staff member. Procedural aspects of this decision-making process will be further prescribed by law in regulations made by the Governor in Council.”<sup>221</sup>

**Current Knowledge:** The scheme of internal reviews prior to IEDM involvement described by the Department of Justice and set out in the legislation does not provide sufficient independence or procedural fairness, according to the standards found necessary by the British Columbia Court of Appeal. See page 3, above.

**Further Information Needed:** Despite a right to counsel acknowledged in both the judicial decisions and the *CCRR*, it is not clear to what extent prisoners are afforded a right to counsel within this decision-making process in practice. Notably, there have been reports of prisoners facing obstacles in receiving timely and private legal advice, as well as barriers to participation of counsel in hearings. Information clarifying the extent of these problems and whether their prevalence has changed over time could provide a better picture of whether CSC is meeting the promise of procedural fairness in SIU decision-making.

**DOJ:** “Third, the provisions set out several requirements for the conditions of detention in SIUs, and seek to ensure accountability in meeting those requirements. The provisions state the general principle that an inmate in an SIU has the same rights as other inmates, except for those that cannot be exercised due to limitations specific to the SIU or security requirements. The provisions require that inmates in an SIU be afforded the opportunity to have a minimum of four hours a day outside of their cell. Time spent taking a shower will not count towards the four hours. There is also a requirement to afford the opportunity to have meaningful human contact: a minimum of two hours a day interacting with others, including leisure time and rehabilitation programs. Every reasonable effort must be made to ensure that the meaningful human contact is not mediated or interposed by physical barriers. For each instance where such barriers exist, a record must be kept.

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<sup>221</sup> *Ibid.*

“These required daily opportunities must take place between the hours of 7:00 am and 10:00 pm. The requirements are subject to defined exceptions, for example where the inmate refuses the opportunity or does not comply with reasonable instructions to ensure safety. However, a record must be kept of any instance where these exceptions are relied on. Further, if for five consecutive days or for a total of 15 days during any 30-day period, an inmate has not spent a minimum of four hours a day outside the cell or interacted for a minimum of two hours a day with others, an independent external decision-maker is to determine, as soon as practicable, whether the Correctional Service of Canada has taken all reasonable steps to provide, and to encourage the inmate to avail themselves of these opportunities. Upon determining that the Service has not taken all reasonable steps, the independent external decision-maker may make any recommendation they consider appropriate to remedy the situation. If, within seven days of receiving recommendations, the Service fails to satisfy the decision-maker that it has taken all reasonable steps to provide the inmate with such opportunities, the decision-maker is to direct the Service to remove the inmate from the SIU.”<sup>222</sup>

**Current Knowledge:** Standards for time spent outside of the SIU cell and time spent in meaningful human contact are both framed as requirements for opportunities, rather than direct requirements for receipt of a certain amount of time. As such, CSC may be in compliance with the legislation even where prisoners receive no time outside of their cells at all, so long as offers are made. Similarly, this type of IEDM review focuses on CSC’s efforts, rather than the effects on the prisoner. Framing the requirements for the conditions of confinement in this manner leaves significant room within the legislative scheme for prisoners to continue experiencing harmful isolation that violates their constitutional rights. IEDM decision-making on conditions of confinement is also dependent on information received from CSC, which, along with diminishing independence, imports the risks associated with the known inaccuracies in CSC record-keeping on this topic. See pages 9, 11, and 20-21, above.

In practice, many prisoners do not meet the 4 hour and 2 hour daily standards, whether because they are not offered sufficient opportunities or because they do not accept the opportunities that are offered. See pages 9-11, above.

The legislation does not include any limit on the duration of SIU stays, in contravention of the Ontario Court of Appeal’s finding that a 15 day limit is necessary. Many prisoners experience stays longer than 15 days. A subset of these prisoners also experience so little meaningful human contact that their conditions of confinement fall under the *Mandela Rules*’ definitions of solitary confinement and torture. Where SIUs expose prisoners to such conditions, they are not compliant with the constitutional standards set out in the judicial decisions on solitary confinement. See pages 1 and 16-18, above.

**Further Information Needed:** More recent information is needed to assess whether any progress has been made in affording prisoners adequate time outside of their cells and in

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<sup>222</sup> *Ibid.*

meaningful human contact. More recent information is also needed to assess whether lengthy SIU stays continue to be commonplace. Similarly, further information about the dynamics of individual prisoners' entries and exits from SIUs is needed to assess whether the available data on stay lengths form a meaningful representation of duration of SIU stays, or whether these figures are artificially low thanks to rapid re-entry into SIUs. Finally, updated information is urgently needed to assess the extent to which prisoners in SIUs continue to experience solitary confinement and torture. Information solely focused on whether CSC is improving its ability to meet legislative requirements by offering daily opportunities for outside time and meaningful human contact is not sufficient to assess whether prisoners are being subjected to unconstitutional and psychologically harmful prolonged isolation.

With regard to IEDM decisions on conditions of confinement, it would be useful to receive information clarifying how IEDMs arrive at their recommendations, as well as the timeliness and extent to which CSC fulfills these recommendations and whether these have changed over time. This information would help to illuminate the IEDM system's ability to provide a meaningful check on poor conditions in SIUs.

**DOJ:** "Fourth, the provisions require regular review of the necessity and appropriateness of each inmate's continuing confinement in an SIU. If the outcome of the fifth working day review is to continue the SIU confinement, then the institutional head must reconsider the inmate's case within 30 calendar days after the inmate was first transferred to an SIU. The institutional head is required to visit the inmate in question before making this determination. If that visit is not face to face or takes place through a door hatch, a specific record of those circumstances is required.

"Thereafter, the inmate's continued confinement in an SIU is to be reviewed every 30 calendar days. At day 60 it is reviewed by the Commissioner or a designate, as set out in regulations. Thirty calendar days after any decision by the Commissioner that the inmate should remain in an SIU, an independent external decision-maker is to determine whether the inmate should remain in the SIU and this decision is binding. A review follows every thirty calendar days that the inmate remains in the SIU, to be performed by the Commissioner (or a designate) and the independent external decision-maker on an alternating basis.

"Review of the inmate's case is also required if the inmate has been repeatedly authorized to be transferred to an SIU within a certain period of time. This review scheme, including the number of authorizations required to "trigger" the mandatory review, will be prescribed by law in regulations."<sup>223</sup>

**Current Knowledge:** The scheme of internal reviews prior to IEDM involvement described by the Department of Justice and set out in the legislation does not provide sufficient

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<sup>223</sup> *Ibid.*

independence or procedural fairness, as set out by the British Columbia Court of Appeal. See page 3, above.

In the scenarios described here, IEDM review occurs significantly later than the 5 day point prescribed by the British Columbia Court of Appeal, meaning that independent review is occurring after too long a delay to meet constitutional requirements. Moreover, many prisoners experience SIU stays longer than the timeframe set out here without ever receiving an IEDM review. See pages 20 and 23, above.

The scheme of review by IEDMs contains numerous flaws that diminish its ability to prevent or remedy harm to prisoners confined in SIUs. There is an absence of clear legislative standards for what information IEDMs should receive, and in practice not all information that they do receive is accurate or complete. The legislative scheme does require that IEDM decisions be made public, and individual IEDMs appear to approach their decision-making in different ways. Furthermore, despite the assertion that IEDM decisions are binding, in practice many IEDM decisions are not enforced in a timely manner. For example, where an IEDM determines a prisoner should remain in the SIU, that prisoner is likely to be released sooner than a prisoner whom an IEDM has determined should be removed from the SIU. See pages 20-24, above.

**Further Information Needed:** As mentioned above, more recent information on current lengths of SIU stays would help to determine whether CSC has made any progress on reducing stay lengths below a 15-day standard, as well as on whether IEDM supervision has had an effect on CSC's decision-making on stay lengths. Further to this, more information is needed on CSC's implementation of IEDM decisions, including the most recent information on how long removal of a prisoner from an SIU takes upon receipt of a removal decision.

More recent and detailed information on IEDM decision-making is also crucial to assess the efficacy of this process. Increased transparency about what information IEDMs receive and how they come to decisions would increase confidence in their independence and fairness, as well as ensuring that they are able to take into account particular vulnerabilities of prisoners, including Indigeneity and mental health status. Additional information about what information IEDMs receive should include an assessment of the data quality and whether previously-identified inaccuracies, such as those around overlapping offers, have been resolved.

**DOJ:** "Fifth, the provisions enhance the role of registered health care professionals, by requiring that they regularly monitor the well-being of inmates in SIUs and have their views in this regard considered by the institutional head. The provisions require that a registered health care professional visit each inmate in an SIU at least once a day. That professional is specifically authorized to make recommendations to the institutional head that a particular inmate's conditions of confinement be altered, and the institutional head is required to consider such recommendations as soon as practicable. The professional is also authorized to recommend that the inmate not remain in SIU. Such a recommendation requires the institutional head to conduct, as soon as practicable, a full review of the inmate's continuing confinement. The

institutional head is required to visit the inmate in question before making this determination. If that visit is not face to face or takes place through a door hatch, a specific record of those circumstances is required.

“If the institutional head, after performing the requisite review, does not follow the recommendations, this automatically triggers a review and determination by a committee of staff members who hold a position higher in rank than that of institutional head. If the committee agrees with the recommendations, its determination is binding on the institutional head. If the committee disagrees with the recommendations, an independent external decision-maker is to determine, as soon as practicable, whether the conditions of confinement should be altered or the inmate not remain in the SIU, in accordance with the recommendations of the registered health care provider, and this decision is binding.

“In any of the above instances triggering a determination by an independent external decision-maker, the Service must provide the decision-maker with all information under its control that is relevant to the determination and allow the decision-maker to communicate with the inmate in question. Further, the decision-maker must provide the inmate, in writing, the information that is to be considered in making their determination, or a summary thereof, and must ensure that the inmate is given an opportunity to make written representations concerning the determination.”<sup>224</sup>

**Current Knowledge:** The scheme of internal reviews prior to IEDM involvement described by the Department of Justice and set out in the legislation does not provide sufficient independence or procedural fairness, as set out by the British Columbia Court of Appeal. As of June 2023, no prisoners had been referred to IEDMs following recommendations by health care professionals, even though many prisoners enter SIUs with mental health challenges, and many experience deteriorating mental health during their SIU stays. Little information is available about the requirements for or quality of the visits performed by healthcare professionals. See pages 3, 23, and 26, above.

There have been significant problems around IEDMs receiving all relevant information from CSC. While this is a legislative requirement, there is a lack of clear standards for what information qualifies, and it is difficult for IEDMs to identify when key information is missing. In practice, IEDMs have not always consistently received information on topics as crucial as prisoners’ Indigenous Social History and mental health. Furthermore, not all information IEDMs have received has been reliable, including data on time spent outside of the cell. CSC has also encountered difficulties developing a procedure for prisoners to communicate confidentially with IEDMs. Given these challenges, it is unsurprising that individual IEDMs have variable decision outcome rates and that important factors such as mental health status do not appear to alter IEDM decision outcomes. See pages 21-23 and 26, above.

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<sup>224</sup> *Ibid.*



**Further Information Needed:** It would be useful to receive updated information on referrals to IEDMs after health care professional recommendations, as well as information on why such referrals have been so rare up to this point. This would help clarify whether this safeguard is functioning unusually well, or whether it is simply not being used.

As mentioned above, significant further information is needed to better assess the IEDM process, particularly in relation to what information IEDMs receive about each case they review. Similarly, more information is needed about prisoners' ability to communicate with IEDMs and whether a sufficiently confidential communication process has been developed. Finally, updated information is needed to clarify whether data reliability problems, including those related to overlapping offers, have been resolved satisfactorily.

**DOJ:** "Finally, the provisions proposed by Bill C-83 will be applied within the framework of generally applicable safeguards under the *Corrections and Conditional Release Act*, including:

- Clause 2, amending paragraph 4(c), to require that the Service use the least restrictive measures consistent with the protection of society, staff members and offenders;
- Existing paragraph 4(g), requiring respect for various forms of difference and responsiveness to the special needs of certain groups, which is expanded by Clause 2 to explicitly require responsiveness to the special needs of visible minorities, and respect for religious differences as well as sexual orientation and gender identity and expression;
- Existing section 69, which prohibits cruel, inhumane or degrading treatment or punishment of an offender;
- Clause 23 enacts a new section 79.1 (discussed further below), which requires that Indigenous social history be taken into account in decisions affecting an Indigenous offender, including any decision relating to an SIU (except for decisions respecting the assessment of the risk posed by an Indigenous inmate); and
- Existing paragraph 87(a), requiring consideration of an inmate's state of health and health care needs, is amended by Clause 29 so that it specifically applies to decisions relating to confinement in an SIU."<sup>225</sup>

**Current Knowledge:** (1) This provision allows for significant discretion without objective standards for what the "least restrictive measures" in a given situation would be. While this is a helpful principle, it is unlikely to prevent misuse of the SIU system, much like the other declaratory provisions in the *CCRA*. See page 1, above.

(2) Vulnerable groups, including Black prisoners and Indigenous prisoners, continue to be disproportionately harmed by SIUs. See page 27, above.

(3) This pre-existing provision does not set out a standard for prohibited treatment, and did not successfully prevent unconstitutional and cruel, inhuman or degrading treatment or

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<sup>225</sup> *Ibid.*

punishment prior to the development of SIUs, as was found by the Ontario Court of Appeal. See page 1, above.

(4) While consideration of Indigenous Social History factors is now mandatory, in practice it does not always occur. For example, IEDMs have not consistently received this information. Furthermore, this measure has not abolished the overrepresentation of Indigenous prisoners in SIUs. See pages 21 and 27, above.

(5) The Ontario Court of Appeal decision found that s. 87(a), while requiring consideration of prisoners' health needs, did not provide an adequate safeguard against harm to mentally ill inmates. This provision leaves a prisoner's health as one consideration among many instead of giving it an overriding role. See page 1, above.

**Further Information Needed:** While it is clear that some vulnerable groups of prisoners have faced disproportionate harms from SIUs, updated information is required to assess the degree to which this problem is ongoing and whether any progress has been made. Both updated data on overrepresentation and stay lengths, as well as updated information on what documentation is provided to IEDMs, would help to illuminate this issue.

Even less is known about other vulnerable groups, such as religious, sexual orientation, and gender identity minorities. A better understanding of these groups' experiences with SIUs, including whether they are overrepresented in SIU populations generally or in long stays particularly, would help to clarify whether these groups may be experiencing violations of their equality rights. Information on how IEDMs assess the cases of members of these groups would also help to understand their SIU experiences.

## Section 15

**DOJ:** "Bill C-83 includes safeguards to avoid such adverse impacts. These safeguards, which were described in more detail above, include: (1) regular individualized assessment of each inmate's circumstances and experience of SIU confinement; (2) consideration of the unique circumstances of Indigenous inmates (Indigenous social history); (3) the enhanced role of registered healthcare professionals; and (4) existing paragraph 87(a), requiring consideration of an inmate's state of health and health care needs, which is amended by Clause 29 to specifically apply to decisions relating to confinement in an SIU."<sup>226</sup>

**Current Knowledge:** (1) Vulnerable groups, including Black prisoners, Indigenous prisoners, and prisoners with mental health challenges continue to be disproportionately harmed by SIUs. IEDMs have not consistently received information on SIU prisoners' mental health concerns, and, connectedly, mental health status has not played a discernible role in IEDM decisions to remove prisoners from the SIU, undermining any claim that such decisions are truly individualized to prisoners' needs. See pages 21 and 26-27, above.

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<sup>226</sup> *Ibid.*

(2) While consideration of Indigenous Social History factors is now mandatory, in practice it does not always occur. For example, IEDMs have not consistently received this information. Furthermore, this measure has not abolished the overrepresentation of Indigenous prisoners in SIUs. See pages 21 and 27, above.

(3) As of June 2023, no prisoners had been referred to IEDMs following recommendations by health care professionals, even though many prisoners in SIUs experience mental health challenges and a declining mental health status. See pages 23 and 25, above.

(4) The Ontario Court of Appeal decision found that s. 87(a), while requiring consideration of prisoners' health needs, did not provide an adequate safeguard against harm to mentally ill inmates. This provision leaves a prisoner's health as one consideration among many instead of giving it an overriding role. See page 1, above.

**Further Information Needed:** Newer data on points 1 through 3 could clarify whether problems with overrepresentation of and disproportionate harm to marginalized groups such as Black, Indigenous, and mentally ill prisoners have been reduced. However, even if overrepresentation ceased and IEDMs received the necessary information and referrals to police this issue, s. 87(a) would remain an inadequate safeguard to protect against future inappropriate use of SIUs for prisoners experiencing mental health challenges.