



David Asper Centre for Constitutional Rights
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David Asper Centre for Constitutional Rights

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David Asper Centre for Constitutional Rights

The David Asper Centre for Constitutional Rights is a centre within the University of Toronto, Faculty of Law devoted to advocacy, research and education surrounding constitutional rights in Canada. The Centre houses a unique legal clinic that brings together students, faculty and members of the legal profession to work on significant constitutional cases. Through the establishment of the Centre the University of Toronto joins a small group of international law schools that play an active role in constitutional debates of the day. It is the only Canadian Centre in existence that attempts to bring constitutional law research, policy, advocacy and teaching together under one roof.

INTRODUCTION¹

The continued use of administrative segregation in Canadian correctional facilities, whether in structured interventions units or otherwise cannot be justified. The evidence that segregation causes serious and potentially irreversible harm without serving a legitimate rehabilitative purpose overwhelmingly supports its abolition. While those in disciplinary segregation are separated from other inmates after being found guilty of a serious disciplinary offence, those in administrative segregation are separated for their safety, or that of the penitentiary. While the proposed amendments to the *Act* under Bill C-83 are more robust than those suggested in the earlier Bill C-56, the presumptive limits on administrative segregation in Bill C-83 do not protect vulnerable populations from harm to their mental and physical health. Further, they are not reflective of the professional and scientific consensus that segregation should only be used in the rarest and most limited of circumstances.

SOCIAL SCIENCE EVIDENCE ON ADMINISTRATIVE SEGREGATION

There is a growing scientific and professional consensus that segregation exacerbates mental illness and does not contribute to the rehabilitation of inmates. Experts agree that the deleterious effects of segregation are more extreme for individuals already facing mental illness, a group that is over-represented and under-resourced in the corrections system. Further, research makes clear that inmates are at risk for negative health effects, it cannot be predicted how individuals will react to segregation, and at what duration of segregation the risks of harm may become irreversible.²

Social isolation, reduced stimulation, and a severe loss of control create a “potent mix”³ that all empirical studies have shown results in isolated inmates being exposed to “a significant risk of serious harm.”⁴ Reviewing the literature, Scharff Smith writes that “negative (sometimes severe) health effects can occur after only a few days of solitary confinement”, with the health risk

¹ This is a shortened version of a longer brief that canvases the legal issues and social science evidence. That longer brief will be available on the Asper Centre’s website.

² S Shalev, *A Sourcebook on Solitary Confinement* (London: Mannheim Centre for Criminology, London School of Economics, 2008) at 10, 22.

³ *Ibid* at 17.

⁴ Craig Haney, “Restricting the Use of Solitary Confinement” (2018) *Annu Rev Criminol* at 21.2 (forthcoming).

growing with each subsequent day in segregation.⁵ These effects may result in chronic health problems even after release.⁶ Some of these effects are life-threatening: a severely increased risk of suicide and self-harm is associated with inmates placed in segregation, as demonstrated in a New York study showing that half of incidents of self-harm occurred in segregation, despite only 7.8% of individuals being segregated.⁷

This risk has materialized in Canada: between 2011 and 2014, nearly half of federally detained inmates who died by suicide were in segregation at the time of their death.⁸ Of the thirty inmates who died by suicide during this period, three died within the first five days of being placed in segregation.⁹ This is despite corrections officials having been aware of serious mental health issues in almost all the inmates who died by suicide.¹⁰

Reflecting the broad consensus that the use of solitary confinement must be kept to “an absolute minimum,”¹¹ Craig Haney writes that:

[...] virtually every mental health, legal, and human rights standard and set of recommendations concerning solitary confinement acknowledge that because the risk of psychological harm from isolation is significant, consequential, and substantial, it should be imposed, if at all, only as infrequently [as] possible—i.e., under extraordinary circumstances, when there is literally no other alternative available to accomplish a legitimate penological goal that is not less intrusive or less dangerous to the person on whom it is imposed.¹²

⁵ Peter Scharff Smith, “The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature” (2006) 34 *Crime & Justice* 441 at 495.

⁶ *Ibid.*, at 497.

⁷ Fatos Kaba *et al.*, “Solitary confinement and risk of self-harm among jail inmates” (2014) 104:3 *Am J Public Health* 442 at 442.

⁸ Office of the Correctional Investigator, *A Three Year Review of Federal Inmate Suicides (2011–2014)* (Ottawa: Office of the Correctional Investigator of Canada, 2014), online: < <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20140910-eng.aspx>> at 10 [*OCI Three Year Review*].

⁹ *Ibid.*, at 11.

¹⁰ *Ibid.*, at 10-11.

¹¹ Haney, *supra* note 3 at 21.14-21.15.

¹² *Ibid.* at 21.16.

Although the Corrections and Conditional Release Act (*CCRA*) states that administrative segregation should only be used when there is no reasonable alternative, Correctional Service of Canada (CSC) has repeatedly shown itself averse to considering and creating alternative measures.

BILL C-83'S PROPOSED AMENDMENTS ARE CONSTITUTIONALLY PRECARIOUS

The Asper Centre submits that, as with the overturning of Canada's prostitution laws and prohibition on physician-assisted dying, the Supreme Court is likely to overturn old precedent sanctioning administrative segregation. The *Charter* is a living document. Changing social norms, international human rights law, and social science evidence all weigh in favour of finding that administrative segregation constitutes cruel and unusual punishment and deprives inmates of their *Charter* rights of life, liberty, and security of the person.

Two recent judgments have found aspects of administrative segregation unconstitutional. *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*¹³ (“*CCLA*”) handed down by the Ontario Superior Court and *British Columbia Civil Liberties Association v Canada (Attorney General)*¹⁴ (“*BCCLA*”) from the Supreme Court of British Columbia evince a paradigm shift in the constitutionality of administrative segregation. In *CCLA*, the Ontario Superior Court found ss. 31-37 of the *CCRA* to be unconstitutional based on a s. 7 infringement to the rights to liberty and security of the person.¹⁵ Similarly, the Supreme Court of British Columbia, in *BCCLA*, found ss. 31-33 and 37 of the *CCRA* to be unconstitutional owing to ss. 7 and 15(1) *Charter* infringements.¹⁶

Bill C-83 does not address the gross disproportionality of administrative segregation, caused by its serious deleterious health effects and lack of rehabilitative function. Moreover, Bill C-83 does not remedy the existing *CCRA*, and administrative segregation's abrogation of the principal of procedural fairness. Pending its abolition, the decision to impose administrative segregation even in the rarest of cases must be removed from administrators within CSC. External review of administrative segregation must be binding and conducted by an independent and

¹³ *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491 [*CCLA*].

¹⁴ *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 [*BCCLA*]

¹⁵ *CCLA*, *supra* note 12 at paras 272–273

¹⁶ *BCCLA*, *supra* note 13 at paras 609–610.

impartial adjudicator. Since administrative segregation constitutes such a serious deprivation of life, liberty, and security of the person, this state action can only be justified if judicial safeguards take effect within hours of segregation. The abolition of administrative segregation is the only reasonable alternative to a system of near-contemporaneous judicial decision-making that sufficiently protects inmates' *Charter* rights.

BILL C-83 & INTERNATIONAL LEGAL STANDARDS

International law has undergone rapid progression from initial toleration of administrative segregation to tightly restricting it and closely scrutinizing its use. This progression culminated in the General Assembly's December 2015 adoption of the Nelson Mandela Rules that prohibit administrative segregation for more than 15 days. The Mandela Rules provide the most progressive treatment of administrative segregation in any international legal instrument thus far.¹⁷ The Rules prohibit administrative segregation that lasts for more than 15 consecutive days.¹⁸ The Assembly adopted the 15-day threshold because the Special Rapporteur on Torture's review of the social science evidence concluded that the harmful psychological effects of isolation could become irreversible at this point.¹⁹ According to the Supreme Court of British Columbia "the 15-day maximum prescribed the Mandela Rules are a generous standard."²⁰ The Rules also require that administrative segregation only be imposed in exceptional cases as a last resort.²¹

The Mandela Rules are minimum standards for states to build on as international law continues to progress. For the Ontario Superior Court, the Mandela Rules signify an international consensus on prison management and the treatment of inmates.²² The Rules embody the progressive development of international law on the treatment of prisoners and encourage states to go beyond minimum standards.²³ Successive Special Rapporteurs on Torture have recognized

¹⁷ Andrea Huber, "The Relevance of the Mandela Rules in Europe" (2016) 17 ERA Forum 299. at 299-300, 306, 309.

¹⁸ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, annex, adopted on 17 December 2015, Rules 43 & 44 [Mandela Rules].

¹⁹ Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at 9.

²⁰ *BCCLA*, *supra* note 13 at para 250.

²¹ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, annex, adopted on 17 December 2015, Rule 45(1).

²² *CCLA*, *supra* note 1 at para 61.

²³ *Supra* note 20, preamble & Preliminary Observation 2(2).

that administrative segregation is an intrinsically “harmful regime” and that negative health effects can occur after only a few days and rise with each additional day.²⁴

Substantively, Bill C-83 does not meet the minimum international standards embodied in the Mandela Rules because it permits the institutional head to impose administrative segregation for more than 15 consecutive days. Permitting administrative segregation for more than 15 days would violate Canada’s international obligations not to engage in torture or cruel, inhuman, or degrading treatment or punishment. Procedurally, Bill C-83’s remedial framework is seriously deficient from the perspective of international law. Specifically, it lacks an external review process that could serve as an effective remedy. Rather, it provides for the possibility of a non-binding recommendation by a health care professional and review by the Commissioner only after a period of 30 days in segregation.

OFFICER SAFETY & ALTERNATIVES TO SEGREGATION

The safety of correctional officials will not be compromised by the end of administrative segregation. Experience in the United States demonstrates that rates of violence have not decreased with the use of administrative segregation, and that rates of violence against staff have actually increased with its use in some American institutions. Ending the use of administrative segregation also protects the Canadian public, as studies have shown that inmates released from segregation have higher post-release recidivism rates than inmates from the general prison population.

Canada has an opportunity to be a global human rights leader by going beyond the fifteen-day United Nations limit for administrative segregation and abolishing it altogether. Nonetheless, Bill C-83 falls short of even that bare minimum required by Canada’s international human rights commitments. By abolishing the use of administrative segregation, Canada can protect the rule of law in prisons, ensure that inmates’ *Charter* rights are not hidden from justice, and reaffirm its global reputation in the vanguard of human rights.

²⁴ *Supra* note 18 at 9; *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/63/175 (2008) at 18, 20-21 at 21; Istanbul Statement on the use and effects of solitary confinement, adopted 9 December 2007 at the International Psychological Trauma Symposium, Istanbul at 2.

RECOMMENDATIONS

The Asper Centre makes the following recommendations to ensure a *Charter*-compliant system of administrative segregation:

1. Canada must immediately take steps to eliminate the use of administrative segregation, including an inmate's confinement in a structured intervention unit, except in the rarest and shortest of occurrences.
2. Any decision to place an inmate in a structured intervention unit must be justified by CSC staff within 48 hours before an impartial and independent decision-maker. The onus of proving the lawfulness of the deprivation of liberty imposed by administrative segregation must be on the state, in this case, CSC.
3. The impartial decision-maker selected to review all decisions to confine an inmate in a structured intervention unit must be independent from the CSC. A judge of the superior court of the province in question is best positioned to fill this role. Alternatively, an independent tribunal adjudicator could be appointed by the Governor-in-Council with a fixed time period to avoid an apprehension of bias in decision-making.
4. Each hearing to review a decision to confine an inmate in a structured intervention unit must be fair and provide the segregated inmate with the right to counsel, disclosure of relevant documents and the ability to present and cross examine witnesses.
5. Placements of inmates into structured intervention units must be reviewed on an ongoing basis. A review must be conducted before an independent and impartial decision-maker and provide the same procedural rights and safeguards as the initial segregation review hearing. Based on evidence that segregation is often used pending the outcome of other alternatives for ensuring the safety of an inmate or the institution, placement reviews should be conducted every 24 hours. This will require CSC to provide ongoing feedback on the progress of implementing such alternatives as well as the need for continued segregation as emergency situations dissipate.
6. The duration of an inmate's administrative segregation must not exceed 72 hours. This presumptive cap would end the on-going review of an inmate's administrative segregation and

result in their immediate return to the general inmate population. This would require any alternative to have been put in place within the 72 hour-period.

7. No inmate's cumulative time in a structured intervention unit within a calendar year may exceed 15 days.

8. Disproportionately represented in segregation, mentally ill and First Nations, Métis and Inuit inmates (and particularly women in both groups) must have access to adequate programming to prevent the use of segregation. This would include ensuring a proper ratio of elders to First Nations, Métis and Inuit inmates.

9. Inmates with mental health challenges or mental illness must not be placed in a structured intervention unit under any circumstances. However, the definition of "mental illness" must be wide enough to encompass various types of conditions listed in the DSM-5. The health care professional authorized to make a finding must have the diagnostic tools within their profession and training to make proper diagnoses of mental health.

10. The regime implemented must be reviewed by Parliament within three years. The review ought to entail independent research and evaluation to ensure that its administration is compliant with the *Charter* and has reduced or eliminated the use of segregation within Canadian penitentiaries.