



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
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Consultation on Commissioner's Directive 711 – Structured Intervention Units

**CANADIAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION AND THE IMPRISONMENT AND RELEASE COMMITTEE**

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Criminal Justice Section and its Imprisonment and Release Committee with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Criminal Justice Section and the Imprisonment and Release Committee.

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Consultation on Commissioner's Directive 711 – Structured Intervention Units

I. INTRODUCTION

We are writing on behalf of the Canadian Bar Association's Criminal Justice Section and its Committee on Imprisonment and Release (CBA Section) in response to draft Commissioners' Directive 711 and Guidelines 711-1, 711-2 AND 711-3 issued by Correctional Service Canada (CSC) on August 22, 2023. We are concerned CSC's proposed policy does not meet international standards surrounding solitary confinement, nor the *Canadian Charter of Rights and Freedoms* (*Charter*).

The CBA is a national association of 37,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. Criminal Justice Section members include prosecutors, defense counsel and legal academics specializing in criminal law. The Committee on Imprisonment and Release consists of lawyers specializing in prison law and sentencing.

A. Preliminary comments

The United Nations *Mandela Rules* define solitary confinement as 22 or more hours each day in isolation without meaningful human contact.¹ Legislation governing Structured Intervention Units (SIU) requires that people receive at least four hours out of cell each day, with two of those hours involving meaningful human contact: *Corrections and Conditional Release Act* (CCRA)². Therefore, SIUs are still permitted to constitute solitary confinement under legislation. These are minimum legislative standards. The CBA Section believes that policy can go further.

¹ United Nations General Assembly, *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*: resolution/adopted by the General Assembly, 17 December 2015, A/RES/70/175, Rule 44. [The *Mandela Rules*.], [online](#):

² S.C. 1992, c. 20.

Many people held in SIU have already suffered prolonged periods of time in isolation, which is known to negatively impact mental health. Many engage in self-harm – one of the well-known symptoms of prolonged isolation.

As set out in the Ontario Court of Appeal decision *Canadian Civil Liberties Association v Canada*, the impacts of solitary confinement include:

- depression;
- stress, anxiety and panic;
- increased risk of panic attacks and a sense of impending emotional breakdown;
- hatred, bitterness, anger and rage;
- loss of control;
- depersonalization;
- paranoia;
- hallucinations;
- self-mutilation;
- increased rates of suicide and self-harm;
- increased level of violence against other;
- frustration;
- boredom;
- loss of the sense of reality;
- trouble sleeping;
- impaired concentration;
- confusion;
- declines in mental functioning;
- delusions;
- difficulty solving interpersonal problems;
- unawareness of the consequences of actions;
- inability to make positive choices;
- impulsivity;
- loss of the ability to control behaviour (relying on prison structure to manage conduct);
- severe apathy; and
- lethargy.³

³ *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243, at ¶¶ 73-77.

Many people held in SIU have been exposed to trauma, including uses of force by prison officers or violence from other people in prison, which is sometimes facilitated by officers.⁴ The symptoms of trauma include:

- Always being on guard for danger;
- Self-destructive behaviour;
- Irritability, angry outbursts or aggressive behaviour;
- Negative thoughts about yourself, other people or the world;
- Hopelessness about the future;
- Memory problems, trouble concentrating;
- Difficulty maintaining close relationships; and
- Feeling detached, lack of interest in activities.⁵

The CBA Section argues that the CSC's policy governing SIUs should recognize this context. The behavior that SIUs address are often not within the control of the person and are normal responses to cruel treatment. When the draft policy outlines "Inmate expectations," it does not consider this reality.

If one of the purposes of SIU is to meet the needs of people placed there, we believe policy should go further than encourage people to have more than two hours of time interacting with others each day. It should ensure that people held in SIU have access to full days of meaningful human contact, including access to independent services like counselling aimed at addressing the impact of prolonged isolation and trauma.

The *Mandela Rules* state that prolonged solitary confinement (in excess of 15 days) constitutes torture or cruel treatment and prohibits the use of solitary confinement for people with mental health disabilities when their conditions are exacerbated by its use.⁶

The Ontario Court of Appeal found in *Canadian Civil Liberties Association v Canada*⁷ that placement in administrative segregation for more than 15 days violates s 12 of the *Charter*. The Court of Appeal states: "I reach this conclusion because prolonged administrative segregation [defined as more than 15 days] causes foreseeable and expected harm which may be

⁴ Office of the Correctional Investigator of Canada, Annual Report 2021-22, [online](#).

⁵ Mayo Clinic, *Post Traumatic Stress Disorder*, [online](#).

⁶ The *Mandela Rules*, Rules 32, 34, 43, 44 and 45(2).

⁷ 2019 ONCA 243.

permanent and which cannot be detected through monitoring until it as already occurred...In my view, this outrages standards of decency and amounts to cruel and unusual treatment.”⁸

The CBA Section is concerned about the *2021-2022 Annual Report* of the Structured Intervention Unit Implementation Advisory Panel (Panel Report), which indicates that 8.4% of people in CSC’s custody were held in SIU during the first 21 months of SIU implementation, and that 57% of SIU stays exceeded 15 days.⁹ The report indicates systemic failure to meet the legislative requirement of providing people in SIU with at least two hours of meaningful human contact each day, and that “refusals” do not explain CSC’s failure to provide opportunities for meaningful human contact in the majority of cases of long-term SIU placements.¹⁰ We recommend that policy prohibit use of SIU for more than 15 days for anyone.

In our view, the SIU policy should address these failures. Instead of focusing on the failure of people held in SIU to participate in programs and services, the policy should address the root causes of refusal to comply. It should acknowledge the harms that people suffer in prison and not treat SIU placement as a personal failure. This analysis should also inform the search for SIU alternatives, with an understanding that people in maximum security are more likely to experience the most harmful characteristics of prison, such as isolation and violence.

B. Definition of meaningful human contact

The CSC policies do not use the internationally recognized phrase “meaningful human contact.” Instead, they use the phrase “opportunities to interact with others.” This removes the essential component of the concept that the interactions be “meaningful” to the person who is being held in isolation. Policy should require that opportunities to interact with others be those the person wants, that are “meaningful” to them. If opportunities for *meaningful* human contact are offered, by definition, they would be accepted, and CSC staff would not record that a person “refused” opportunities to interact with others.

Our members tell us that their clients frequently report harassment from SIU officers, making them unwilling to leave their cells for opportunities to interact with others. Our members have

⁸ At para 5.

⁹ Howard Sapers, Chair, Structured Intervention Unit Implementation Advisory Panel, *2021/22 Annual Report* (2 September 2022) at 6 and 10. [SIU Implementation Advisory Panel *2021/22 Annual Report.*], [online](#).

¹⁰ SIU Implementation Advisory Panel *2021/22 Annual Report* at 12 and 70. Data reveals that 75% of people in SIU for more than 15 days missed getting two hours of meaningful human contact in over 21% of their days.

heard recent reports from people in SIU that officers call them names (including the N word and “little bitches”). Our members also witness reports of officers in SIU encouraging people known to be at risk of self-harming to cut themselves with razors or expressing indifference when someone tells an officer they are going to self-harm, by saying “go ahead.” It is understandable why people refuse to leave their cells for “opportunities to interact with others” when these are the kinds of interactions that are offered. Policy should implement zero tolerance for staff abuse of people in SIU and anywhere in prison.

Many people held in SIU are on handcuff status/threat risk assessment and are not permitted to associate with others in the yard or on units. CSC policy should require staff to make every effort to ensure that people who are compatible with each other have opportunities to associate with each other.

The policy refers to community partners who provide volunteer programs with people in SIU. We encourage CSC to pay for community organizations to offer services to people in SIU to ensure a consistent and high quality of services, including counselling services.

C. Indigenous people in SIU

The Panel Report indicates that Indigenous people are grossly over-represented in SIU. Indigenous people represent 4.2% of the population in Canada, 32% of people in federal prisons, and 40% of people in SIU. Indigenous women are highly over-represented in SIU at 76%.¹¹ Indigenous people are also more likely to be held in SIU for longer periods of time.¹²

The draft policy includes numerous references to decision-makers’ obligation to document “how [Indigenous inmates’] Indigenous Social History (ISH) factors influenced their behaviour, leading to a transfer to an SIU” (for example CD 711, paragraph 42(f)(i)). This is contrary to s. 79.1(2) of the (CCRA)¹³, which prohibits Indigenous Social History factors from being “taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous offender unless those factors could decrease the level of risk.”

¹¹ SIU Implementation Advisory Panel *2021/22 Annual Report* at 7.

¹² SIU Implementation Advisory Panel *2021/22 Annual Report* at 11.

¹³ S.C. 1992, c. 20.

The CBA Section believes the draft policy should be amended to refer to Indigenous Social History only to address need through alternatives to SIU, to decide against transfer to SIU, or to remove someone from SIU to comply with s 79.1(2) of the CCRA.

D. Independent review of SIU placement

The legislation provides for independent review of SIU placements by Independent External Decision Makers (IEDM). Our members report that IEDM reviews are not an effective oversight mechanism to prevent torture or cruel treatment of people in SIU. As stated above, we recommend that policy prohibit SIU placements for more than 15 days. This could eliminate the need for many of the reviews that take place well past the point of torture or cruel treatment.

Although the UN considers 15 days as the threshold for when isolation becomes torture or cruel treatment for healthy people, the first SIU routine review does not take place until at least 90 days have passed in SIU, and the first binding IEDM decision about lack of meaningful human contact is at 60 days, with an additional 30 days to report a decision.

The Panel Report notes a huge variance between IEDMs in decisions to remove a person from SIU based on length of stay. If Canada's regime is to prevent torture or cruel treatment, everyone held in isolation for 22 or more hours per day should be removed from SIU at 15 days. However, in only 14% of reviews did IEDMs decide that the person should not remain in SIU. Even when an IEDM decided the person should be removed from SIU, many were not returned to a general population for some time, and in some cases for months.¹⁴

The Panel is concerned that anonymized IEDM decisions are not being shared, despite the authority to do so under s 37.77 of the CCRA. The Panel is further worried that CSC is failing to refer cases for IEDM review as required by legislation. It points to "an overly complex policy framework, limited and conflicted administrative support" as concerns.¹⁵ Although the issue of IEDMs not being resourced to have their own independent administrative support is outside of CSC's policy mandate, we recommend that CSC recommend to the Ministry of Public Safety that this conflict be addressed.

¹⁴ SIU Implementation Advisory Panel *2021/22 Annual Report* at 10 and 49.

¹⁵ SIU Implementation Advisory Panel *2021/22 Annual Report* at 53.

E. Health care issues

The CBA Section recommends that policy prohibit placement of people with mental health disabilities in SIU, in compliance with the UN *Mandela Rules*, which prohibits placement where mental or physical disabilities are exacerbated by such measures (Rule 45(2)). The *Mandela Rules* require health care professionals to report and advise the warden if they consider it necessary to terminate or alter conditions for physical or mental health reasons (Rule 46(2)). Under the *Mandela Rules*, non-medical staff may not override medical decisions (Rule 27(2)).

A prohibition to transfer people with mental health disabilities to SIU would also comply with the Ontario Court of Appeal's ruling in *Francis v Ontario*¹⁶. The Court there upheld the trial judge's finding that Ontario's use of segregation of seriously mentally ill people violated ss .7 and 12 of the *Charter*.¹⁷

In August 2011, Professor Mendez, the then Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment concluded that the imposition of solitary confinement "of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment and violates article 7 of the Covenant [*International Covenant on Civil and Political Rights*] and article 16 of the Convention [*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*]." ¹⁸

CD 711, paragraph 42(h) requires decision-makers to consider "the inmate's state of health and/or health care needs, as identified by a registered health care professional...and if any health care needs preclude remaining in an SIU." A Health Committee (made up of non-health care staff) decides on the implementation of health care professionals' recommendations when the Institutional head does not fully implement a recommendation. In our view, this policy does not go far enough to protect people with mental health disabilities from abuse in SIU.

GL 711-1, paragraph 6(a) requires a Correctional Manager to ensure that the "Immediate Needs Checklist – Suicide Risk" be completed. The policy should prohibit anyone at risk of suicide or self-harm from being placed in SIU.

¹⁶ 2021 ONCA 197.

¹⁷ At para 16.

¹⁸ United Nations General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment* (5 August 2011).

S. 37.2 of the CCRA states that a health care professional “may, for health reasons, recommend to the institutional head that the conditions of confinement of the inmate in a structured intervention unit be altered or that the inmate not remain in the unit.” It is not mandatory.

The Panel Report states that 29% of men and 64% of women in SIU are identified by CSC as having mental health challenges. The report describes the same practice that was common under the unconstitutional administrative segregation regime – of transferring people with mental health disabilities across Canada to different SIU sites. Its data review revealed that people with mental health disabilities were being held in SIU for longer stays and more frequently than others.¹⁹

The CBA Section is concerned that the draft policy allows people to be held in conditions that the United Nations considers to be torture or cruel treatment and fails to direct health care professionals to comply with their ethical obligations under the Canadian Medical Association’s (CMA) *Code of Ethics and Professionalism*, Canadian case law and the *Mandela Rules* that require them to report signs of torture or cruel treatment and to recommend against it. We are also concerned that the draft policy allows non-medical staff to override medical decisions about SIU removal if it is considered damaging to a person’s health.

The *CMA Code of Ethics and Professionalism* prohibits physicians from participating in or condoning “the practice of torture or any form of cruel, inhuman, or degrading procedure.”²⁰

The *Mandela Rules* also prohibit health care professionals from “engaging, actively or passively, in acts that may constitute torture or other cruel, inhuman or degrading treatment or punishment” and require health care professionals to document and report any signs of torture or cruel treatment.

By requiring health care staff to assess the health of people in SIU, but not to recommend removal from SIU after 15 days or if the person has a pre-existing mental health disability, CSC health staff make fitness assessments for torture or cruel treatment prohibited under international law.

CSC health care staff are influenced by dual loyalties. According to the February 23, 2021 report of the former Chair of the SIU Implementation Advisory Panel, Dr. Anthony Doob, and

¹⁹ SIU Implementation Advisory Panel *2021/22 Annual Report* at 14.

²⁰ Canadian Medical Association, *CMA Code of Ethics and Professionalism*, December 2018 at para. 10, [online](#).

Dr. Jane Sprott, *Solitary Confinement, Torture, and Canada's Structured Intervention Units*, out of 1,983 people in SIU in 2020, mental health care professionals made recommendations that the person be removed from SIU in only three cases.²¹

Clients of our members report that if they are on handcuff status, mental health staff come to visit them with an officer present, so people do not interact with health care staff. Policy should require access to independent mental health professionals (who would not be influenced by dual loyalties) in a private setting.

The CBA Section also recommends that the policy require proactive consent from people in SIU to share their health care information. The policy indicates repeatedly that private health care information will be sought, without addressing the issue of consent. We acknowledge the importance of health care information being considered in SIU reviews, but suggest this should be done with the person's informed consent.

We believe references in the draft policy to reasons for transfer to SIU including "drug involvement" and "substance use" should be removed. If someone is transferred to SIU for reasons related to addiction, it constitutes discrimination based on a disability contrary to human rights law.

F. Alternatives to SIU

The CBA Section believes CSC challenges finding alternatives to SIU because the only real alternative for most people is placement in the general population of a maximum-security prison. This represents a choice between the frying pan and the fire.

As Howard Sapers said in the Panel Report, "Should SIUs be less accommodating and supportive, or should the general population accommodation and support be enhanced so that SIUs are not seen as offering preferential treatment?... It is not hard to conclude that even if SIUs were perfectly operated, without significant changes in correctional policy and practices throughout, this state of affairs [long stays in SIU, extended time locked up without meaningful human contact, over-representation of Indigenous people and people with mental health concerns] will persist."²²

²¹ Dr. Anthony Doob, and Dr. Jane Sprott, *Solitary Confinement, Torture, and Canada's Structured Intervention Units* (23 February 2021) at 22.

²² SIU Implementation Advisory Panel 2021-22 Annual Report at 96-97

In our view, CSC must change its policy of responding to self-harm with force by correctional officers. It should implement a trauma informed health care driven response to people in emotional distress, so that peoples' traumas are not compounded by uses of force. Trauma results in a host of mental health responses, listed above, that are then used to justify further isolation.

People at risk of self-harm or suicide must not be placed in SIU or other forms of isolation.

If CSC wants to get people out of SIU, it must address the concerning staff culture among officers in maximum security and SIU.

CSC must also offer alternatives to people in SIU other than maximum security open population. It must revise its policy on "institutional adjustment" as a criterion for security classification and make security classification based on a person's risk to the safety of others, rather than having a mental health need or being Indigenous as per the current policy.

The CBA Section believes that CSC must also amend its policy to allow Indigenous people to access healing lodges despite their security classification, if Indigenous operated healing lodges or Elders at CSC operated healing lodges are willing to accept them.

Policy should also emphasize community-based alternatives to SIU that are better equipped to provide for the needs of people than prisons, such as temporary absences to treatment centres or psychiatric hospitals.

GL 711-1, paragraph 57(c) and other sections in the policy states that if someone "identifies integration risk(s) with an identified alternative, such as compatibility concerns or threatens to utilize violence if forced to integrate due to perceived risk, the alternative should be re-evaluated to determine the level of risk associated with proceeding with the identified alternative..." This draft policy should be amended to respect the right of a person not to be forced to live in an environment where they fear for their safety.

We appreciate the draft policy sections which require staff to meet with the person who is recommended for transfer or is in SIU, to learn about their wishes, concerns and needs.

We question how a disciplinary charge can be considered an alternative to SIU if the SIU regime is not intended to constitute punishment.

G. Right to counsel

The CBA Section argues that policy references to the right to counsel should state that people have a right to retain and instruct counsel when they are the subject of an authorization to transfer to SIU under *Corrections and Conditional Release Regulations* 97(2)²³. This is a higher standard than “reasonable access to legal counsel” or a “right to contact, communicate and meet with legal counsel” as this right is stated in the draft policy.

Our members who represent clients in SIU report that their clients have great difficulty contacting them by phone and sharing documents with them for counsel to competently represent them in SIU reviews.

Although the policy states that the Assistant Warden of Operations must ensure that “documents are shared with an inmate’s legal counsel when the inmate provides a Consent for Disclosure of Personal Information (Inmate) form,” (CD 711, paragraph 41(d)), GL 711-3, paragraph 37(a) and (d)(i) indicate that it is the responsibility of the person in SIU to identify which documents to share with their legal representative. GL 711-1 Annex C uses similar language of “your case management team will assist you in sharing your information with your legal counsel.” This is not consistent with the right to counsel, which requires CSC to offer disclosure and other information directly to legal representatives, as discussed in the CBA’s recent letter to CSC Commissioner Anne Kelley and Parole Board Chairperson Jennifer Oades²⁴.

The right to counsel requires CSC to communicate directly with a person’s legal representative. It should not require the person to fill out consent for disclosure forms, or to identify which documents to share with their counsel. People in SIU may feel hopeless and may not read their documents or understand what is required of them to be represented by counsel. As in other legal arenas, CSC should share all the recommendations, determination, disclosure and decisions to a person’s legal representative.

Our members report that the Consent for Disclosure of Personal Information is not treated by CSC as sufficient to share documents on an ongoing basis for clients in SIU, and that they must also fill out an “Addendum A.” form. The process is not well communicated or understood by people in SIU, and negatively impacts their right to counsel.

²³ SOR /92-620)

²⁴ Right to counsel, CBA 2023 submission: [online](#).

The “Addendum A” form indicates that individuals are responsible for the cost of sending documents to their legal counsel, except when fees have been expressly waived by the relevant authority. Although faxing is currently free, CSC may charge the individual a fee for faxing in the future. Policy should make it clear that no fee will be charged as part of the right to counsel.

People in SIU report to our members that they have very limited access to phones to make legal calls and must put in request forms to do so. These bureaucratic hurdles interfere with the right to counsel. People in SIU should be given access to a legal call immediately upon verbal request. We believe CSC should ensure that there are enough phones available to make this is possible.

People in SIU also report to our members that when a lawyer places a call-back request for them, they often do not receive it for many days, or at all. This creates access to counsel barriers, especially given the tight time frames for reviews.

Members report sometimes being unable to speak with clients after receiving documents and prior to reviews, and that requests for a brief adjournment to receive instructions from the client in private at the commencement of the review are generally denied. Policy should require a brief adjournment for this purpose in these circumstances.

Where the draft policy states that a person is entitled to receive documents, recommendations or decisions, it should be clear that their legal representative is also entitled to receive a copy.

Policy should also require CSC staff to communicate the date and time of reviews. In some cases when a review date is changed, legal representatives are not notified of the change.

The right to counsel is usually illusory for people’s initial five-day review because of the challenges in receiving documents in a timely way and challenges contacting clients by phone. Policy should be clear that if a person indicates they are represented by counsel, CSC must share documents immediately to their legal counsel as the legal representative is acting on the clients’ behalf.

IEDMs rely on CSC staff for administrative tasks, including scheduling SIU reviews. IEDMs refuse to share documents with legal representatives as they have been told by CSC that they are not permitted to do so. The hurdles people in SIU experience to identify the relevant documents and request that those documents be shared with their legal representatives also

impacts their right to counsel for IEDM reviews. IEDMs should have their own independent support staff with the authority to communicate directly with legal representatives.

Members have also reported that SIU sites place unreasonable limits on legal visits. Policy should require SIU sites to facilitate legal visits at any time during business hours, or at least for most business hours in a day.

H. Difference between SIU in institutions designated for men and institutions designated for women

There draft policy identifies different SIU administration in institutions designated for men and institutions designated for women. The approach in institutions designated for women is more positive in our view. We wonder why the same approach is not taken for anyone held in SIU.

I. Restrictive Movement

Policy could prevent people from being transferred to SIU from restrictive movement by using it to resolve immediate issues at non-SIU sites. People may need a short “time out,” and could be returned to the open population in a few hours, rather than be subjected to an SIU transfer to another institution that could result in weeks or months of isolation.

II. CONCLUSION

We recommend that CSC amend its draft policies on SIU by ensuring that people’s experiences there do not constitute torture or cruel treatment. We recommend prohibition of transfers to SIU of people with mental health disabilities or people who have a history of suicidal ideation or self-harm, and a limit on the duration in SIU to 15 days for anyone, in compliance with the *Mandela Rules*. People who have experienced long term isolation and trauma should be provided “the opposite of solitary” with day-long opportunities for meaningful human contact including counselling to address those effects. We recommend that policy give clear direction to staff and assign responsibility to ensure that people in SIU are provided a robust right to counsel including assignment of the duty of providing all necessary documents and notices directly to legal representatives, and unobstructed access to legal visits and phone calls for people in SIU. Most importantly we recommend that CSC policy implement zero tolerance of staff misconduct and abuse of people in SIU and anywhere in prison. The CBA Section appreciates the opportunity to comment on the draft policy. We trust our comments are helpful and would be pleased to offer further clarification.