

# Solitary Watch

## Criminal Justice Issues and Prisoners' Rights

<https://solitarywatch.org/2019/11/20/massachusetts-department-of-correction-gives-a-lesson-in-how-to-get-around-solitary-confinement-reforms/>

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by [Katie Rose Quandt](#) | November 20, 2019

In April 2018, advocates in Massachusetts celebrated the signing of the [Criminal Justice Reform Act \(CJRA\)](#), which mandated changes throughout the states criminal justice system. Included among the reforms were some new restrictions on the use of solitary confinement, set to go into effect at the beginning of 2019.

But advocates say that instead of following the laws provisions in earnest, the Massachusetts Department of Correction (DOC) has done its best to circumvent the solitary reforms and weaken the laws oversight mechanisms.

Theyre not complying with the letter of the law in some regards, and theyre avoiding the spirit of the law in other regards, said Bonnie Tenneriello, a staff attorney at Prisoners Legal Services of Massachusetts (PLS). Her organization is pushing back against the DOCs weak application of the CJRAs solitary rules, alongside other advocacy organizations and some legislators.

The ongoing story in Massachusetts highlights a larger concern in the movement against solitary confinement and in fact, in any effort to change the nations notoriously harsh prison conditions. Can legislative reforms actually be enforced when local corrections leadership and culture are determined to undermine them?

### Incremental Reforms

Along with increasing diversion programs, reforming bail, limiting mandatory minimums for minor drug offenses, and lessening the consequences for some low-level crimes committed by youth, the CJRA included some modest reforms designed to make the use of solitary confinement in Massachusetts somewhat less frequent, lengthy, arbitrary, and severe.

At a public hearing in February, Nicholas Gomes, who spent 30 years in Massachusetts prisons, [described](#) the widespread use of a punishment that has widely been denounced as torture. If you have a disagreement with a [corrections officer] and they dont like you, youre going to the hole, he said. They tell you to do something and you dont do it fast enough, youre going to the hole. They come to do the county you dont stand up quick enough, later that night theyre coming to your cell, and youre going to the hole. Often, time in solitary could stretch to months or years.

The new law requires regular placement reviews (every 90 days for many people in solitary), and mandates that people in solitary receive certain basic services, including equivalent meals to those served in general population, three showers a week, canteen access, visitation and phone rights that cannot be revoked for more than 15 days at a time, and access to radio and television. Individuals held for 60 days or more are also supposed to have access to a range of educational and rehabilitative programming. In addition, the CJRA outright prohibits solitary for pregnant women, and limits it to 72 hours for people with serious mental illnesses. For administrative purposes, the bill defines solitary confinement as at least 22 hours a day inside a cell.

When he signed the bill into law in April 2018, Republican Governor Charlie Baker expressed concern that some parts of the law [placed unnecessary burdens on the DOC](#), and that he hoped to more narrowly define serious mental illness for purposes of solitary diversion.

Despite the governors reservations, legislators who had pushed for the bill [celebrated its passage as a sign that](#) Massachusetts is leading the way forward to a better society and serves as a model for the rest of the nation.

In fact, the solitary confinement provisions would be more accurately characterized as an effort to catch up to far more substantial reforms in other states. Colorado, for example, has [come close to implementing](#) the United Nations [Nelson Mandela Rules](#), which ban all solitary confinement beyond 15 days. In Massachusetts, people can be sent to the Departmental Disciplinary Unit (DDU), a long-term segregation unit, for up to [ten years for a single disciplinary offense](#). For people in this unit, the new law does not even require a status review for the first six months in solitary.

### Sidestepping the Law

Despite the limited scope of the CJRA solitary reforms, the Massachusetts DOC under Governor Baker has spent the past year working to bypass them.

Early this year, just one month after the CJRAs mandated start date, the DOC proposed an emergency regulation that introduced a brand-new housing category called the Secure Adjustment Unit (SAU). By definition, the new unit is intended to hold members of vulnerable populations as a solitary diversion, as well as to act as an intermediary step for people moving out of solitary confinement.

Many states undertaking solitary reform have created special units or step-down programs that provide a level of confinement somewhere between complete isolation and the general prison population but the best of these include substantial out-of-cell time, congregate activities, and quality programming. The SAU, however, held people in-cell for up to 21 hours a day one fewer hour than the 22 used to define restrictive housing in the CJRA.

Yet this one extra hour out-of-cell supplied the DOC with the technicality it needed to deprive people in the newly created SAU of the protections afforded by the CJRA to individuals held in solitary, including placement reviews and guaranteed access to programs and services. Over the objections of advocates, the DOC made the unit permanent in August.

It is counterproductive and harmful for people to be locked in a cage for 22 or even 21 hours a day, Prisoner Legal Services testified at a DOC hearing last February, in [testimony](#) cosigned by 15 other organizations. These regulations make clear that, rather than seize this opportunity, the DOC intends to continue to rely on solitary confinement as a linchpin of its management practices and find new ways to weave it into the fabric of the state correctional system.

Bonnie Tenneriello told Solitary Watch that when the SAU opened, some people held there found it indistinguishable from solitary. People keep calling us, and they're like, 'I'm here. How come they're not giving me my hearing that I'm supposed to have, to see if I need to be here?' she said. And we have to keep saying, 'Well, you're not in Restrictive Housing. But it sure feels like restrictive housing to them.'

Those units fall outside the CJRA. So it's like this whole new beast that they're responsible for regulating with no law to check it, said Michael Cox, Policy Director at Black & Pink, which advocates for the rights of incarcerated LGBTQ+ and HIV-positive individuals. So I'm not sure, in the long run, if we've done more harm than good. Because if someone's going to go to solitary, and then they'll go to the SAU as a step-down now how long have they spent in total time out of general population?

The DOC does not have an official policy governing hours out-of-cell in the SAU. When asked about SAU policies, a DOC spokesperson pointed Solitary Watch to a July [letter to the editor](#) in the *Boston Globe*, in which DOC Commissioner Carol Mici disputed the *Globe's* earlier coverage of the SAU. Mici stated that the SAU is distinct from restrictive housing, and that inmates placed in the Concord Secure Adjustment Unit, for example, are allowed up to 35 hours per week out of their cells unrestrained to congregate and engage in classroom education, mental health counseling, and other social activities. The DOC did not clarify whether people at Concord, or any other SAU, regularly do receive all of the allowed out-of-cell hours.

But advocates say these distinctions over hour counts miss the point: That the SAU is being used to house people in restrictive environments instead of in general population.

The SAU may be a little better than [the DOC's solitary confinement units], but the problem overall is that they are still using restrictive housing in some form to control prisons, said Tenneriello. What they really need to be doing is investing in mental health care, in programs, in employment. They need to be investing in education. They need to be investing in stuff that makes prisons safer, not just trying to manage the problem with restrictive units. Whether it's solitary, technically, or just more restrictive units. To me, that's the real issue here.

## Undercutting Oversight

Advocates point out that the DOC is also skirting the CJRAs intent when it comes to providing placement reviews for people in the DDU, the state's long-term disciplinary segregation unit. Tenneriello noted that this population is supposed to receive multi-disciplinary examinations after six months, and then every 90 days after that. The review must include a correctional officer, a mental health clinician, and a program officer.

So you would think that would be a hearing, she said. A fair reading [of the law] is that it's a hearing. Instead, she explained, the DOC's multi-disciplinary committee makes review decisions for people in the DDU on paper, without meeting with the individuals even though some people spend years in the unit and the reviews are their only way out. They are taking as narrow an interpretation as they can.

Another oversight mechanism set forth in the CJRA has been even more effectively undermined by the DOC. The law mandated the creation of a 12-member solitary confinement oversight committee that must include a mix of both correctional staff and representatives from nonprofits and social service organizations (notably, none of the committee members have personally experienced solitary). These committee members are vested with the authority to visit prisons and jails to interview incarcerated people and staff, and are tasked with submitting an annual written report of their findings and recommendations.

In June, the DOC instituted another emergency regulation that drastically limited the power of the oversight committee. Specifically, the new DOC regulation [prohibited oversight committee members](#) from making surprise visits to prisons and jails, and banned them from speaking to the press or public without permission from the committee chair, who is the public safety secretary appointed by the governor.

The DOC's policy change was dubbed a gag rule [by advocates](#) and by a July [Boston Globe editorial](#), which also said the DOC's conduct made a mockery of the legislative reforms, and was embarrassing for a state that was once a leader in prison reform.

Senate Judiciary Committee Chair Jamie Eldridge (D-Middlesex and Worcester) who [advocated to include the solitary confinement restrictions](#) in the CJRA wrote a [letter to the public safety secretary](#), calling the gag order a blatant violation of Committee members First Amendment rights that serves no purpose beyond stifling dissent and impeding effective oversight.

In August, when the emergency regulation expired, the DOC ended the gag order that banned committee members from speaking to the press. It did, however, continue the ban on unannounced visits to prisons and jails, over the objections of PLS and other advocates.

In a statement, the DOC told Solitary Watch that The DOC is proud of the progress we have made internally and with outside stakeholders to implement modern, effective policies that support the successful re-entry of those in our custody.

### **Advocates and Lawmakers Push Back**

Founded two and a half years ago, [Massachusetts Against Solitary Confinement](#) is a growing coalition of nonprofit organizations, including Prisoners Legal Services and Black & Pink, and concerned individuals. Some members have personally experienced solitary confinement or have loved ones who have endured solitary.

It's a big activist community, said Tenneriello. It's really an issue that's built momentum in the last couple years. And people don't want to let it go. They don't want to settle for something that leaves people with terrible suffering. People are still continuing to suffer terribly. I mean, we still have the DDU. We still have years of solitary! We still have solitary sentenced up to ten years.

In August, Sen. Eldridge filed [legislation to close some of the loopholes](#) in the CJRA. His bill would officially define segregated confinement as any housing placement where a prisoner is separated from the general population, and would prohibit the DOC from creating additional categories of segregated confinement.

The Department of Corrections under Governor Baker, they've created these slightly differently named units and made the argument that somehow these prisoners are not in solitary confinement. Which I find very disturbing, Sen. Eldridge told Solitary Watch.

In response, as the Senate Chair of the Judiciary, which is my new appointment for this session, I filed this bill, just to make it clear the legislature's intent, as well as to provide more protections for prisoners.

Cox said the proposed bills' broad catch-all definition of segregated confinement would prevent the DOC from creating new units that bypass the CJRA's reforms. We don't want to play this game, he said. It's sad that we have to try to outfox them. It's really sad that there's no institutional will to make this happen or to acknowledge that this is even a problem.

Cox, who sits on the Special Commission on LGBTQI Health and Safety of Prisoners, told Solitary Watch he also supports another pending bill in the state senate one that would [collect data on LGBT people in restrictive housing](#) for the first time. Cox is intimately familiar with the Department's disproportionate use of solitary confinement for LGBT populations: During his own incarceration, he was [sent to solitary twice](#) once for reporting an act of sexual violence, and again for giving someone a hug.

Attorney Patricia DeJueas [told the Boston Globe](#) about her client, who was put in solitary for seven months after reporting his sexual assault by an officer. Unfortunately, the Department of Correction routinely fails to protect the prisoners in its care and routinely takes the word of correction officers over prisoners, even when all the evidence is to the contrary, she said. Individual complaints are ignored, or worse, DOC staff retaliates against those prisoners who dare to complain.

In May 2019, local advocates challenging solitary confinement found an unlikely ally in the federal government. The Civil Rights Unit of the US Attorneys Office for the District of Massachusetts, the top federal law enforcement agency in the state, launched an investigation into the DOC's policy of putting people in solitary for months or years, as well as its treatment of incarcerated people who are elderly or have serious illness. That investigation remains ongoing.

### **The Pitfalls of Enforcement**

Solitary confinement reformers often look to legislation as an especially solid route toward reform. Unlike changes internally enacted by corrections departments, reforms mandated by the legislature are less subject to shifting political winds, and can theoretically survive even as DOC leaders and governors turn over.

But the situation in Massachusetts highlights the challenge of actually implementing and enforcing solitary reform legislation. Despite careful crafting, the wording of the CJRA left loopholes that allowed the DOC to get around legislators' intended outcomes.

Sen. Eldridge said that after the 2018 signing of the CJRA, he was cautiously optimistic that the Department of Correction would fully implement the law. But when the DOC started announcing emergency regulations that chipped away at the reforms, from a legislative point of view, I felt that Gov. Baker was thumbing his nose at the legislative intent. You know, the Governor signed the bill. The legislature was clear what it wanted to do. So that was very troubling.

Eldridge says his concerns only grew in September, when he visited several people housed in restricted housing and other non-general population units. Certainly, some said they now had access to a tablet or counseling, but others said nothing had changed or they hadn't received any educational materials, he said. Some said that they were now out of their cells three hours a day, but others said it was just the same. I would generally say the prisoners had not seen much change since the bill became law.

The devil is in the details with implementation, especially by the executive branch, said Sen. Eldridge.

Tenneriello said the bill was negotiated and passed very quickly after years of drafting. It was really strong in some ways, but left a lot of room for evasion, which we're seeing more and more clearly, she said. Every law we've ever seen has some kind of escape valve that allows for solitary. And it's extremely hard to [restrain] that in a meaningful way unless the administration is really committed to it.

I think it points to some things that, my guess is, haunt solitary nationally, she added. Which is, how do you force change when you don't have buy-in in the administration? How do you get buy-in? How do you define solitary for legislative purposes, in a way that lets people get out of [their] cells more, but keeps some of the protections? We are now in this kind of nether zone, where if you get out just a little bit more, you lose everything.

In other states, departments of correction have similarly been accused of circumventing legislation in order to keep up the same old behaviors. In New York, after the [2008 SHU Exclusion Act](#) prohibited solitary confinement for people with serious mental illness (SMI), the number of incarcerated people given SMI diagnoses dropped 36 percent over the following six years. The Correctional Association of New York [testified in 2014](#) that this drop raised serious concerns about whether the specifics of the law are leading to improper diagnoses.

We've seen this over and over with all sorts of reforms, said Cox. Even the Prison Rape Elimination Act. That was meant to be very benevolent legislation, and then we see the DOC get their hands on it, and we see LGBT prisoners being persecuted for things like their legs touching and being sent to solitary over that. And so, we see these reforms over and over and they just co-opt them into ways that serve their own interests, and not for the betterment of incarcerated populations.

Tenneriello pointed out that it can be hard to get any solitary reforms passed even imperfect ones. Where we were a year or two ago was so far from getting anything passed. Our statehouse and our administration have been so far behind. So just opening the door at the time this passed felt like and it still feels like an important step forward. Even with all the shortcomings. But she says advocates will continue fighting for more sweeping reforms, as well as for enforcement of existing legislation.

At last February's hearing, solitary survivor Nicholas Gomes said that in order to give up its heavy reliance on solitary confinement, he believes the Massachusetts DOC needs to change the way it thinks about the people it incarcerates. It's easy for prison officials to think, "Okay, we can just put this person in that room and leave him there," Gomes said, because this [is a] system that doesn't look at other people like they're humans.

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