



CANADIAN HUMAN RIGHTS COMMISSION

Protecting Their Rights

A Systemic Review of Human Rights in
Correctional Services for Federally
Sentenced Women

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Table of Contents

Preface

Acknowledgments

Introduction 1

Chapter 1

A Profile of Federally Sentenced Women: Who Are They? 5

- 1.1 Basic Characteristics of the Inmate Population 5
- 1.2 Aboriginal Status 6
- 1.3 Age 6
- 1.4 Family Status 6
- 1.5 Abuse 6
- 1.6 Social Condition 7
- 1.7 Health and Disability 7

Chapter 2

An Overview of Federal Correctional Facilities for Women 9

- 2.1 Five New Facilities 9
- 2.2 Women Offenders in Collocated Units 10
- 2.3 Regional Psychiatric Centre 10
- 2.4 Intensive Intervention Strategy 10
 - 2.4.1 Structured Living Environment 10
 - 2.4.2 Secure Environment 10
- 2.5 Provincial Facilities (Exchange-of-service Agreements) 11
- 2.6 Minimum Security Facilities 11
- 2.7 Section 81 Option for Aboriginal Offenders 11
 - Map of the Facilities for Federally Sentenced Women 12

Chapter 3

Ensuring Human Rights in the Provision of Correctional Services 13

- 3.1 How Human Rights and Correctional Services Fit Together 13
- 3.2 The Link Between Protecting Human Rights and Effective Corrections 14
- 3.3 Protecting Human Rights in the Provision of Correctional Services 14
 - 3.3.1 Definition of Discrimination 14
 - 3.3.2 Identifying Discrimination Against Federally Sentenced Women 16
 - 3.3.3 When Differential Treatment May Be Allowed 18

| | | |
|-------|--|----|
| 3.3.4 | Ensuring That Differential Treatment in Correctional Services Is the Exception . . . | 18 |
| 3.3.5 | Compound or Multiple Discrimination | 20 |
| 3.3.6 | Using Comparisons to Achieve Human Rights for Federally Sentenced Women . | 20 |
| 3.4 | Enforcing Human Rights in the Provision of Correctional Services | 21 |
| 3.4.1 | Guiding Principles for a Human Rights Analysis | 21 |

Chapter 4

Human Rights in the Assessment and Classification of Need and Risk23

| | | |
|---------|--|----|
| 4.1 | Offender Intake Assessment | 23 |
| 4.1.1 | Dynamic Risk Assessment | 23 |
| 4.1.1.1 | A Human Rights Analysis | 24 |
| 4.1.2 | Security Classification and the Custody Rating Scale | 27 |
| 4.1.2.1 | A Human Rights Analysis | 28 |
| 4.2 | Classification of Offenders Serving Life Sentences | 31 |
| 4.2.1 | A Human Rights Analysis | 32 |

Chapter 5

Human Rights and Safe and Humane Custody and Supervision for Federally Sentenced Women35

| | | |
|---------|---|----|
| 5.1 | Health | 35 |
| 5.1.1 | A Human Rights Analysis | 37 |
| 5.1.2 | Mental Health | 39 |
| 5.2 | Supervision and Inmate Management | 41 |
| 5.2.1 | Issues Concerning Male Guards | 41 |
| 5.2.1.1 | A Human Rights Analysis | 42 |
| 5.2.2 | Segregation | 44 |
| 5.3 | Facilities | 46 |
| 5.3.1 | Minimum Security Facilities for Women | 46 |
| 5.3.2 | Women in Maximum Security | 47 |

Chapter 6

Human Rights and the Duty to Assist Federally Sentenced Women with Rehabilitation and Reintegration49

| | | |
|-------|---|----|
| 6.1 | Meeting the Rehabilitation Needs of Federally Sentenced Women. | 49 |
| 6.1.1 | A Systemic Flaw in Identifying Program Needs | 49 |
| 6.1.2 | Poor Access to Programming | 50 |
| 6.1.3 | The Promise of an Aboriginal Program Strategy for Federally Sentenced Women | 50 |
| 6.1.4 | Progress in Substance Abuse Programming | 51 |
| 6.1.5 | The Need for Improved Employment and Employability Programming | 53 |

| | |
|---|----|
| 6.1.6 Meeting the Need for Violent Offender Programming for Federally Sentenced Women | 54 |
| 6.2 Ensuring the Reintegration of Federally Sentenced Women | 54 |
| 6.2.1 Appropriate and Adequate Community Housing | 55 |
| 6.2.2 Community Programs and Services | 56 |
| 6.2.3 Community Release Options for Federally Sentenced Women | 57 |

Chapter 7

| | |
|---|-----------|
| Strengthening Internal Responsibility for Human Rights | 59 |
| 7.1 Coordinating Efforts to Enhance Human Rights Protection | 59 |
| 7.2 The Need for an Anti-harassment Policy for Inmates | 60 |
| 7.3 The Need for a Comprehensive Accommodation Policy for Inmates | 61 |
| 7.4 Human Rights Education and Training for Staff and Inmates | 61 |
| 7.5 Mechanisms for Informal Dispute Resolution | 62 |
| 7.6 Formal Dispute Resolution Mechanism | 63 |
| 7.7 Human Rights Audits | 65 |

Chapter 8

| | |
|--|-----------|
| Protecting Human Rights Requires Effective External Redress | 67 |
| Conclusions | 71 |
| Annex A | 73 |
| Annex B | 81 |

Preface

In March 2001, the Canadian Human Rights Commission was approached by the Canadian Association of Elizabeth Fry Societies, the Native Women's Association of Canada and other organizations, including the Canadian Bar Association, the Assembly of First Nations and the National Association of Women and the Law regarding concerns about the treatment of federally sentenced women in federal institutional and community correctional services. Of particular importance to the Elizabeth Fry Societies and the Native Women's Association was the treatment of incarcerated Aboriginal women and women with cognitive and mental disabilities.

Given the wide range of concerns raised, the Canadian Human Rights Commission agreed to conduct a broadly based review of the treatment of federally sentenced women on the basis of gender, race and disability, rather than dealing with individual complaints. The Correctional Service of Canada on behalf of the Government of Canada has a mandate to provide correctional services. The exercise of its mandate is at the core of our review. Our focus has been on understanding the extent to which federal correctional services have achieved the goal of providing correctional services relating to custody, supervision, rehabilitation and reintegration that are responsive to the situation of all federally sentenced women. The objective of the Commission's review was to identify ways of bringing the correctional system into line with the purpose of the *Canadian Human Rights Act*.¹

The Commission used several sources of information to prepare this report. Initial discussions were held with the Correctional Service of Canada, the Elizabeth Fry Societies and the Office of the Correctional Investigator to clarify the scope of the review. Then on February 25, 2002, the Commission held a workshop consisting of three plenary and three concurrent sessions with 20 presentations on key issues. It was attended by about 60 people from a range of non-governmental organizations and government departments, as well as women who had served time in federal prisons. On November 8, 2002, a roundtable was held with 20 experts to address the question of appropriate redress and accountability procedures for alleged breaches of inmate rights.

The Commission also met individually with key stakeholders and experts. It conducted interviews with women inmates and staff at all regional facilities for women, at men's facilities where federally sentenced women are collocated and at the healing lodge in southern Saskatchewan. Interviews were also conducted with staff and residents at different types of community release facilities.

In January 2003 the Commission sent a discussion paper to 100 organizations and individuals working with or on behalf of federally sentenced women. To enable key stakeholders to participate fully in the review, the Commission also supported an application by the Elizabeth Fry Societies for funding under the Voluntary Sector Initiative.² The Elizabeth Fry Societies received funding to carry out its own consultations and to help non-governmental organizations engage in policy dialogue and prepare policy submissions. In addition to its own work, the Canadian Association of Elizabeth Fry Societies submitted papers prepared by: DisAbleD Women's Network of Canada; National Association of Women and the Law; Native Women's Association of Canada; Strength in Sisterhood; and Women's Legal Education and Action Fund. See Annex B for more information on this aspect of the review. The following organizations and individuals responded directly to the Commission's consultation paper with written submissions: Correctional Service of Canada; Joliette Local of the Union of Canadian Correctional Officers; Office of the Correctional Investigator; Sarah J. Rauch; St.

¹ *Canadian Human Rights Act*, Revised Statutes of Canada, 1985, c. H-6.

² For more information, see their site at <http://www.vsi-isbc.ca>

Leonard's Society of Canada; Union of Solicitor General Employees–PSAC; West Coast Prison Justice Society; Amnesty International; Canadian Federation of University Women; and National Council of Women of Canada.

Acknowledgments

The Commission would like to acknowledge the assistance we received from the Canadian Association of Elizabeth Fry Societies, the Correctional Service of Canada and the Office of the Correctional Investigator, the workshop and roundtable participants and those individuals and organizations that took the time to prepare submissions. We are particularly grateful to the federally sentenced women, correctional staff and service providers who volunteered to be interviewed. We were impressed by their ideas for ways the correctional system could more effectively respond to the unique needs of women offenders. Many of the women indicated that, although they expected to be released soon, they wanted to be interviewed in the hope of improving the situation for women entering the federal correctional system in the future. We are also indebted to the wardens and their assistants who welcomed us into their facilities and did everything possible to accommodate us.

Introduction

Historically, correctional philosophy, law and practice were developed to control and manage a predominantly male inmate population. Extensive reforms to federal correctional legislation in 1992 gave the Correctional Service of Canada an explicit mandate to provide programming and other correctional services that were sensitive to the needs of women offenders, Aboriginal offenders and other offenders with special needs. Despite the legislative amendments, observers have noted that conditions for federally sentenced women have been slow to change. This may be because the basic principles and practices underlying the correctional system, including those based on the assessment of women offender's risk and their criminogenic factors have not been challenged. This despite research in Canada and the United States that shows that the security risks posed by most women offenders and some of the factors that lead to their offending and re-offending are different than men's.³

In 1990 the Task Force on Federally Sentenced Women signalled the start of a new era in corrections for women serving federal sentences. In its report *Creating Choices*, the Task Force concluded, "[t]he ability of CSC [Correctional Service of Canada] to meet its responsibility for federally sentenced women has been eroded by trying to fit a small, diverse relatively low-risk group of women with multi-faceted needs into a system designed for a large, more homogeneous and high-risk population. In the process, inequality and insensitivity to the needs of federally sentenced women have become unanticipated consequences of our current system." *Creating Choices* articulated a new vision intended to transform a correctional system based largely on male norms into one that was responsive to the needs of female offenders. It outlined a model for women-centred corrections based on five principles, namely empowerment; meaningful and responsible choices; respect and dignity; a supportive environment; and shared responsibility.⁴ The model promised to deliver a correctional system that would respect the dignity, rights, needs and hopes of women.

The ground-breaking nature of *Creating Choices*, which had been commissioned by the Correctional Service of Canada, made the Service's response to the events leading up to the *Commission of Inquiry into Certain Events at The Prison for Women in Kingston* particularly disappointing. The Honourable Louise Arbour, then a Justice of the Court of Appeal of Ontario, headed up the inquiry into events at the Prison for Women in April 1994 that culminated in a cell extraction and strip search of eight women in segregation by a male Institutional Emergency Response Team. Justice Arbour's report, released in April 1996, confirmed not only that the Correctional Service of Canada was not fulfilling the promise of *Creating Choices*, but also that the path to achieving a women-centred correctional system would be longer and more difficult than the Task Force had contemplated. The report concluded that fundamental and systemic changes to the correctional system were needed to bring it "into the fold of two basic Canadian constitutional ideals...: the protection of individual rights and the entitlement to equality."⁵

Notable events in the federal correctional system for women since then include the closure of the Prison for Women in Kingston and the opening of four regional facilities and a healing lodge. Many

³ Barbara Bloom, Barbara Owen and Stephanie Covington. *Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders*, Washington, National Institute of Corrections, U.S. Department of Justice, June 2003, at 11. Available: <http://www.nicic.org/pubs/2003/018017.pdf>

⁴ Correctional Service of Canada. *Creating Choices: The Report of the Task Force on Federally Sentenced Women*. Ottawa, Supply and Services Canada, April 1990, at 125–135. Available: http://www.csc.scc.gc.ca/text/prgrm/fsw/choices/toce_e.shtml

⁵ Louise Arbour. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, Ottawa, Public Works and Government Services Canada, 1996, at xi. Available: http://www.sgc.gc.ca/publications/corrections/pdf/199681_e.pdf

Aboriginal women prisoners now have the option of serving their sentences in an environment that is respectful of their culture. Most federally sentenced women are housed in community-like accommodations that permit them to take more control of basic activities such as cooking and cleaning. And the content of programming for women inmates is increasingly sensitive to the reality that women's needs are different from those of men.

Yet many of the underpinnings of a correctional system designed for white male inmates have remained unchanged and hinder its capacity to be truly gender-responsive. Although both *Creating Choices* and Justice Arbour's report pointed to research showing that women inmates generally pose a lower security risk, have a much lower risk of re-offending, and have different needs than men, the Correctional Service of Canada continues, for the most part, to use the same risk and needs assessment tools for both populations. This results in the incarceration of women offenders in a facility with a higher security level than required and less access to corrections programming that could advance their rehabilitation and their reintegration into society.

In the meantime, Canada's understanding of what equality and human rights mean and how they can be achieved continues to evolve. Not only have developments in human rights law in Canada moved beyond procedural equality (an approach to equality in which everyone is treated the same), but achieving equality is now understood to require the transformation of systems, practices and policies to make them fully inclusive. Inclusion demands responsiveness — responsiveness to gender, to race, to disability and to all other prohibited grounds of discrimination, as well as to their combined effects.

Against this backdrop, this report reviews the treatment of federally sentenced women. Federally sentenced women are women offenders serving federal terms of imprisonment of two or more years. They are a small minority of all federal offenders in Canada. Many of the difficulties they face in prison are also faced by men inmates. Regardless of gender, "doing time" involves many hardships, some of which flow from the deprivation of liberty that is part of being sentenced to a correctional institution.

The men and women who become offenders tend to be people who are at risk of becoming marginalized even before their contact with the criminal justice system. But the very factors that set these people at a disadvantage in the first place — lack of education, low employability — tend to be disproportionately prevalent among women inmates, Aboriginal inmates and inmates with disabilities, and when these factors are present, their impact can be even more acute on women than it is on men. To help rehabilitate and reintegrate offenders, the correctional system must address these factors and their unique impact on identifiable groups of offenders, including women, Aboriginal inmates and inmates with disabilities.

Although Canada's correctional system may not be particularly effective in addressing social disadvantage and exclusion, it tends, for the most part, to be gender neutral. But because women and men are different, a one-size-fits-all approach is bound to create greater hardship for some inmates than for others. A system fashioned to rehabilitate able-bodied white men may ill-serve female inmates or inmates with disabilities or members of racialized groups. Canada needs a correctional system that is equally responsive to the needs of men and women and that recognizes the equality rights of all offenders be they members of racial minorities or persons with disabilities.

Similarly, the human rights of individuals and groups other than federally sentenced women, including men inmates, correctional staff and victims of crime, are not directly or comprehensively

addressed in this report. This should not be taken to mean that they are not of equal importance, or that others in the correctional system are without need or disadvantage. Rather, in response to the concerns brought to us, our report focuses on a small but diverse group with unique and pressing needs: federally sentenced women.

A Profile of Federally Sentenced Women: Who Are They?

... understanding the contexts of women's lives, both in the general population and in the criminal justice system, is an important first step in developing gender-responsive policy and practice.⁶

Canada's prison population is largely unseen and unknown. Women prisoners in particular tend to be invisible to society, both because of their relatively small numbers and because their crimes are rarely reported in the news. Some observers have also noted that federally sentenced women are largely "invisible" to prison administrators in critical ways and that their needs and interests continue to be unmet in a correctional system designed primarily for federally sentenced men.

However, it is increasingly being recognized that some of the needs of women in conflict with the law are different from those of their male counterparts. The *Canadian Human Rights Act* requires federally regulated organizations such as the Correctional Service of Canada to accommodate individual needs and differences, rather than treating people identically or responding to them based on stereotypes and perceptions. For federally sentenced women, this is impossible without a clear understanding of their needs and how they are different from male offenders. This chapter therefore presents a profile of Canadian women offenders serving federal sentences.

A Snapshot of Federally Sentenced Women

- Disproportionately Aboriginal women.
- First-time offenders.
- Under thirty-five years of age.
- Survivors of physical and sexual abuse.
- Single mothers with one or more children.
- Women with significant substance abuse problems.

1.1 Basic Characteristics of the Inmate Population

The difference in the relative size of the male and female inmate populations is striking. Women account for less than 5% of all federal offenders and proportionately more women offenders are newcomers to the federal correctional system. In 2001, 82% of federally sentenced women were serving their first federal sentence, compared with 62% of federally sentenced men.⁷

As of July 2003, 45% of federally sentenced women (374 out of 822) were in prison and 55% (448) were out on bail or under community supervision.⁸ By contrast, 61% (12,221 out of 20,029) of federally sentenced men were incarcerated in institutions. The proportion of federally sentenced Aboriginal inmates in prison is higher than for non-Aboriginal inmates. As of July 27, 2003, 60% (110 out of 184) of federally sentenced Aboriginal women offenders and 69% (2,158 out of 3,143) of federally sentenced Aboriginal male offenders were in prison.⁹

⁶ Barbara Bloom, Barbara Owen & Stephanie Covington. *Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders*, supra note 3, at vii.

⁷ Correctional Service of Canada. *Basic Facts about Federal Corrections*. Ottawa, Public Works and Government Services Canada, 2001, at 20-21. Available: http://www.csc_scc.gc.ca/text/faits/pdf07/07_e.pdf

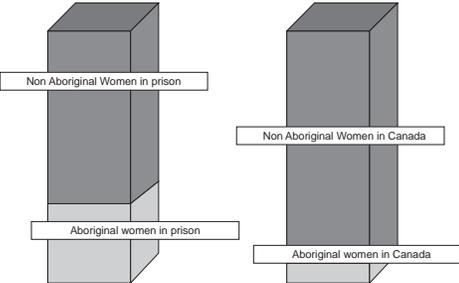
⁸ Data obtained from Correctional Service of Canada.

⁹ Data obtained from Correctional Service of Canada.

Because of the nature of their crimes, women offenders tend to receive shorter sentences than their male counterparts: during the same period in 2000-2001, 36% of federally sentenced women were serving sentences of three years or less compared with 19% of federally sentenced men.¹⁰

1.2 Aboriginal Status

The most disturbing statistics relate to the disproportionate number of Aboriginal women in federal prisons. Although Aboriginal women account for only 3% of the female population in Canada, on July 27, 2003, they made up 29% of the women in federal correctional facilities.¹¹ Aboriginal men are also over-represented in federal correctional facilities, but their relative disproportion is much smaller. As of July 27, 2003, they represented 18% of male offenders in federal prison facilities.¹²



Meanwhile, the number of Aboriginal women sentenced to federal institutions is increasing, and at a rate that exceeds that of Aboriginal men. From 1996-1997 to 2001-2002, the number of federally sentenced Aboriginal women increased by 36.7%, compared with 5.5% for Aboriginal men.¹³

These statistics are of particular concern because, as the Aboriginal Initiatives Branch of the Correctional Service has noted, the Aboriginal population is the fastest growing population in Canada. Many services, including correctional services, must respond to this demographic trend.

1.3 Age

The majority of federal offenders are admitted to prison in their 20s and 30s, but the average age of admission is younger for Aboriginal offenders, including Aboriginal women: 66% of Aboriginal women in federal prisons are between the ages of 20 and 34 compared with 56% of federally sentenced women as a whole.¹⁴

1.4 Family Status

Two-thirds of federally sentenced women are mothers and they are more likely than male offenders to have primary childcare responsibilities.¹⁵

1.5 Abuse

Both male and female inmates tend to have histories of childhood trauma and abuse. But among women, Aboriginal offenders make up a far higher proportion of the abused.

¹⁰ Correctional Service of Canada. *Basic Facts about Federal Corrections*, supra note 7, at 20-21.
¹¹ Data obtained from Correctional Service of Canada.
¹² Data obtained from Correctional Service of Canada
¹³ Solicitor General Canada. *Corrections and Conditional Release Statistical Overview*, Ottawa, Public Works and Government Services Canada, November 2002, at 57. Available: http://www.sgc.gc.ca/publications/corrections/pdf/StatsNov2002_e.pdf
¹⁴ Correctional Service of Canada. *Basic Facts about Federal Corrections*, supra note 7, at 21-22. for *Women in Kingston*, supra note 5, at 201.
¹⁵ Louise Arbour. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, supra note 5, at 201.

A 1989 survey found an overwhelming proportion of federally sentenced women reporting prior abuse (80%).¹⁶ But in that population, Aboriginal women offenders made up a disproportionate share of the abused; 90% of Aboriginal women in prison reported having been physically abused, compared with 68% of federally sentenced women. And the proportion of federally sentenced women reporting prior sexual abuse was 53%.

The rate of sexual abuse for federally sentenced Aboriginal women was 61%.¹⁷

1.6 Social Condition

Federally incarcerated women and men tend to have lower educational attainment than the Canadian adult population as a whole. While more than 80 percent of adult females have progressed beyond Grade 9, for female offenders the figure is closer to 50 percent.¹⁸

Female offenders have much lower employment rates than male offenders: in 1996, 80% of the women serving time in a federal facility were unemployed at the time of admission compared to 54% of the male offenders.¹⁹

Although there is no data on the proportion of federally sentenced women who have worked in the sex trade, it is widely accepted that many do or have done so. Prostitutes protecting themselves against assault or unwanted sexual advances by a customer are among the 9% of federally sentenced women who commit homicide as an act of self-defence.²⁰

1.7 Health and Disability

Drug and alcohol addictions are widespread among federally sentenced offenders. Almost 70% of male and female offenders have problems with alcohol or drug abuse.²¹ But alcohol and drugs tend to figure more prominently in the lives and criminal offences of incarcerated women, for whom income-generating crimes such as fraud, shoplifting, prostitution and robbery are often perpetrated to support their addictions.²²



¹⁶ Correctional Service of Canada. *Creating Choices: The Report of the Task Force on Federally Sentenced Women*, supra note 4, at 51.

¹⁷ Louise Arbour. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, supra note 5, at 201.

¹⁸ Shelley Trevethan. "Women in federal and provincial-territorial correctional facilities," *Forum on Corrections Research*. Ottawa: Research Branch, Correctional Service of Canada, Volume 11, Number 3, Women Offenders, 1999, at 10. Available: http://www.csc_scc.gc.ca/text/pblct/forum/v11n3/v11n3a3e.pdf

¹⁹ *Ibid*

²⁰ Correctional Service of Canada. *Women convicted of homicide serving a federal sentence*, Ottawa, Correctional Service of Canada, October 1998, in the Details of the homicide section under context of the homicide. Available: http://www.csc_scc.gc.ca/text/prgrm/fsw/homicide/toc_e.shtml

²¹ Ralph C. Serin and Colette Cousineau. "Programs for substance abusing offenders in Canada: A national survey", *Forum on Corrections Research Focusing on Alcohol and Drugs*, Ottawa: Research Branch, Correctional Service of Canada, January 2001, Volume 13, Number 3, at 58.

²² Auditor General of Canada. Report. "Correctional Services Canada - Reintegration of Women Offenders", *Chapter 4*, Ottawa, Public Works and Government Services Canada. April 2003, at para. 4.23. Available: http://www.csc_scc.gc.ca/text/pblct/forum/v13n3/v13n3a18e.pdf

Some of the most significant differences between female and male inmates are the prevalence of diagnosed mental illness, self-abuse and suicide attempts. Federally incarcerated women are three times as likely to suffer from depression as are their male counterparts.²³ Women are also more likely than men are to take part in self-destructive behaviours such as slashing and cutting.²⁴

²³ Jane Laishes. *The 2002 Mental Health Strategy for Women Offenders*. Ottawa: Women Offender Program, Correctional Service of Canada, 2002, at App. D. Available: http://www.csc_scc.gc.ca/text/prgrm/fsw/mhealth/toc_e.shtml

²⁴ *Ibid.* at 7.

An Overview of Federal Correctional Facilities for Women

As already discussed, correctional facilities for women have changed dramatically in the past eight years. Many of the horrors associated with the physical layout and age of the former Prison for Women in Kingston, Ontario, have been addressed by the construction of new facilities. The majority of women inmates are now housed in cottage-style buildings that foster community living, rather than in ranges of cells. Concerns remain, however, for the women who are still incarcerated in the predominantly male Regional Psychiatric Centre in Saskatchewan.

| Regional Facility | # inmates |
|-------------------|------------|
| Edmonton | 89 |
| Grand Valley | 82 |
| Joliette | 73 |
| Nova | 42 |
| Healing Lodge | 23 |
| TOTAL | 309 |

Correctional Service of Canada data as of July 27, 2003

2.1 Five New Facilities

Between 1995 and 1997, the Correctional Service of Canada opened four regional facilities for women: Edmonton Institution for Women, Grand Valley Institution, Joliette Institution, Nova Institution. The Okimaw Ohci Healing Lodge, a unique facility primarily for Aboriginal women, was also opened (see map on page 12).

With the exception of the Healing Lodge, the regional facilities provide detached houses in which 6 to 10 women with minimum- or medium-security classifications share a living space, a kitchen, a dining area, bathrooms and a utility/laundry room. The women in each house are responsible for their own cooking, cleaning and laundry. Each regional facility has a perimeter fence with a detection system, and the doors and windows of the houses have alarms.²⁵

Okimaw Ohci Healing Lodge is located in the territory of the Nekaneet First Nation, in southern Saskatchewan.²⁶ It is a 30-bed facility containing both single and family residential units that can accommodate children.²⁷

The Healing Lodge was developed with and for the First Nations community. The majority of the staff, including the Kikawinaw (the director of the institution) are of Aboriginal descent.²⁸ The operational philosophy is based on Aboriginal teachings and traditions. The focal point is the Spiritual Lodge, where Elders are involved on a full-time basis in all aspects of the Healing Lodge's holistic programs.²⁹ Women must apply to go to the Healing Lodge, which accepts offenders with minimum- and medium-security classifications. All applicants must demonstrate their commitment to Aboriginal philosophy. Non-Aboriginal women wishing to practise a traditional Aboriginal holistic way of life are also eligible for admission to the Healing Lodge.

²⁵ Correctional Service of Canada. *Speakers' Kit — Module 10 Women Offenders*, Ottawa, Correctional Service of Canada, August 2001, at 3. Available: http://www.csc_scc.gc.ca/text/pubed/skit/skit10_e.shtml

²⁶ Correctional Service of Canada. *Healing Lodges for Aboriginal Federal Offenders*, Ottawa, Correctional Service of Canada, May 2003, at 3. Available: http://www.csc_scc.gc.ca/text/prgrm/correctional/abissues/pdf/hl_e.pdf

²⁷ *Ibid.*

²⁸ Correctional Service of Canada. *Speakers' Kit — Module 10 Women Offenders*, supra note 25, at 3.

²⁹ *Ibid.*

2.2 Women Offenders in Collocated Units

After a series of incidents at Edmonton Institution for Women in 1996, a decision was made to remove all the women classified as maximum security and those with high mental health needs from the regional facilities.³⁰ These women were collocated in specially constructed women's units in three men's institutions. Some of the women were sent to the Regional Psychiatric Centre in Saskatoon.

These women have been or are in the process of being repatriated to the regional facilities to be incarcerated in recently constructed "secure units" or in special houses for women with mental health concerns (known as Structured Living Environments).

2.3 Regional Psychiatric Centre

Saskatoon's Regional Psychiatric Centre is a forensic mental health hospital operating in a multi-level security setting. It began admitting male offenders in 1978 and female offenders in 1991. The overwhelming majority of inmates are male offenders.³¹ On July 27, 2003, there were seven federally sentenced women at the Regional Psychiatric Centre.

2.4 Intensive Intervention Strategy In 1999 the Correctional Service of Canada announced an Intensive Intervention Strategy.³² It consists of two components: the Structured Living Environment and the Secure Environment. The former is a residential treatment program for women with significant cognitive limitations or mental health concerns that have been classified as minimum or medium security. The Secure Environment is the operational plan for managing maximum security women and involves increased static or physical security and increased dynamic security or staff-offender interaction.

2.4.1 Structured Living Environment

Structured Living Environment houses have been opened at Nova, Joliette, Grand Valley and Edmonton institutions. These buildings are residential duplexes that resemble the other living units and blend with the overall appearance of the facility.

2.4.2 Secure Environment

The existing enhanced units at Nova, Joliette, Grand Valley and Edmonton institutions have been or are being renovated to create secure units for women with maximum security classifications.³³ The secure units are divided into pods of four to six cells each. Each pod has a secure door, a common living/dining area, washer/dryer, a bathroom and a lunch counter. The cells can be locked, and each is equipped with its own toilet and sink. One cell on each pod is accessible for people with disabilities.

³⁰ Correctional Service of Canada. *Regional Women's Facilities Operational Plan*, Ottawa: Office of the Deputy Commissioner for Women, Correctional Service of Canada, 2002, at 5.

³¹ Correctional Service of Canada. *Institutional Profiles — Regional Psychiatric Centre*, Ottawa, Correctional Service of Canada, 2002, at 2-3. Available: http://www.csc_scc.gc.ca/text/facilit/institutprofiles/rpcprairie_e.shtml.

³² Correctional Service of Canada. *Regional Women's Facilities Operational Plan*, *supra* note 30, at 49.

³³ Correctional Service of Canada. *Secure Unit Operational Plan — Intensive Intervention in a Secure Environment*, Ottawa: Office of the Deputy Commissioner for Women, Correctional Service of Canada, September 2003, at 3.

Inmates in the secure units are kept separate from the other inmates and from the rest of the institution. Inmates can move out of a unit only under staff supervision/escort. Women with a maximum security classification use the other areas of the institution at times when they are not being used by the main population. Each unit has two multi-purpose rooms for programming, spiritual activities, hobby crafts, exercise, etc. Areas such as the gymnasium, private family visiting rooms and facilities for visits and correspondence are used by both the general inmate population and the maximum-security inmates, but at different times.

Edmonton Institution has an additional Spiritual Room because it has a significant Aboriginal population and integrates Aboriginal spirituality in its programming, including an enhanced Elder role. The Spiritual Room is shared by all denominations for ceremonies, teachings and one-to-one work with the Elder/Chaplain. Correctional Service of Canada encourages the regional facilities to use one room as an interfaith spiritual space, but space constraints sometimes make this impossible.

Each secure unit also has a segregation unit to be used for inmates from both the main population and the secure unit.

2.5 Provincial Facilities (Exchange-of-service Agreements)

Federally sentenced women in British Columbia are incarcerated in the Provincial Correctional Centre for Women in Burnaby under an exchange-of-service agreement with the Province of British Columbia.³⁴ As of July 27, 2003, 37 federally sentenced women were incarcerated there. The Correctional Service of Canada is modifying its Fraser Valley Community Correctional Centre to accommodate all federal women offenders in the Pacific Region, including those currently in Burnaby. Fraser Valley will be a multi-level security facility.

As of July 27, 2003, there were also six federally sentenced women serving their sentences in other provincial institutions under exchange-of-service agreements.³⁵

2.6 Minimum Security Facilities

There is only one minimum security facility for federally sentenced women in Canada. Isabel McNeill House is located in Kingston, Ontario, and is a residential facility providing accommodation and services. It also provides women offenders with employment opportunities.³⁶ As of July 27, 2003, there were seven minimum security women at Isabel McNeill House.

2.7 Section 81 Option for Aboriginal Offenders

Section 81 of the *Corrections and Conditional Release Act*³⁷ provides for the transfer of an offender to the care and custody of an Aboriginal community. If the offender is interested in this option, the first step is for the Aboriginal community to prepare a plan for the offender's supervision and integration into the Aboriginal community. An agreement is signed between the Correctional Service of Canada and the Aboriginal community. The offender is then released to the community that has committed itself to providing long-term supervision. No section 81 agreements for Aboriginal women are currently in place.

³⁴ Correctional Service of Canada. *Speakers' Kit — Module 10 Women Offenders*, supra note 25, at 3.

³⁵ Information provided by Correctional Service of Canada.

³⁶ Correctional Service of Canada. *Institutional Profiles — Isabel McNeill House*, Ottawa, Correctional Service of Canada, 2002, at 1. Available: http://www.csc_scc.gc.ca/text/facilit/institutprofiles/isabelmcneil_e.shtml.

³⁷ *Corrections and Conditional Release Act*, (1992, c. 20).

Facilities for Federally Sentenced Women



Ensuring Human Rights in the Provision of Correctional Services

A prison sentence deprives an inmate of her or his right to liberty, but it should not deprive an inmate of other rights. Infringements of other rights, including human rights, can be justified only if they are necessary to give effect to the sentence. This principle is reflected in section 4(e) of the *Corrections and Conditional Release Act*, which states: "offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence."

When a right has been granted by law, it is no less important that such right be respected because the person entitled to it is a prisoner.

Louise Arbour. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, *supra* note 5, at 182.

Whether they are in an institutional or a community facility, federally sentenced offenders have a right to treatment that is consistent with the *Canadian Human Rights Act*. They have the right not to be discriminated against or harassed because, for example, they are Aboriginal or have cognitive limitations. Federally sentenced women and men have the right to correctional services that respond appropriately to the different factors that led to their criminality and that respect their needs and differences. Making these important goals a reality in the correctional context requires understanding what human rights are.

3.1 How Human Rights and Correctional Services Fit Together

The right to equality in Canada in federal jurisdiction is protected by the *Canadian Human Rights Act*, the *Canadian Charter of Rights and Freedoms* and international human rights instruments that Canada has signed. This legal framework protects the right that all individuals, including federally sentenced women, have to make a life for themselves without being disadvantaged by discrimination because of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.³⁸ The *Canadian Human Rights Act* is the statute that governs federally regulated enterprises and prohibits them from discriminating against individuals in employment or service provision, based on the prohibited grounds. As a federally regulated service provider, the Correctional Service of Canada is subject to the *Canadian Human Rights Act*.

The purpose of the federal correctional system is to carry out sentences imposed by courts through the safe and humane custody and supervision of offenders, and to assist in the rehabilitation of offenders and their reintegration through the provision of programs in penitentiaries and in the community. The Correctional Service of Canada is required by federal law to provide correctional services to federally sentenced women. Its activities are governed by the *Corrections and Conditional Release Act*, as well as a policy framework that includes *Commissioner's Directives* and *Standard Operating Procedures*.³⁹ These laws and policies regulate many, if not most aspects of correctional

³⁸ CHRA, *supra* note 1, s. 3.

³⁹ CCRA, *supra* note 37, ss. 97. and 98.

activities. For the most part, the Correctional Service of Canada decides what correctional services are necessary.

But as a service provider, the Correctional Service also has human rights obligations to inmates. It must accommodate individual needs and differences relating to prohibited grounds of discrimination. Given the concerns raised by the Association of Elizabeth Fry Societies and others, the treatment of federally sentenced women on the basis of their sex, race and disability are the focus of this report.⁴⁰

3.2 The Link Between Protecting Human Rights and Effective Corrections

The Correctional Service of Canada's duty to protect and promote human rights is reiterated throughout the *Corrections and Conditional Release Act*. Several principles set out in the Act link correctional activities with human rights values, making the protection of human rights integral to effective corrections. These principles include using the least restrictive measures consistent with the protection of the public, staff members and offenders; ensuring that correctional programs and practices respect gender, ethnic, cultural and linguistic differences; and responding to the needs of women, Aboriginal peoples and offenders with special requirements.⁴¹

But the protection of society is identified as the paramount consideration in the correctional system. This raises the potential for conflict between measures that are perceived as necessary for public safety and those needed to protect the human rights of inmates. The challenge is to give effect to the principles that guide the correctional system, including human rights and public safety, while resolving the inevitable tension between those principles in the correctional context. This conflict also gives rise to an opportunity to create an organizational structure, a culture and practices that are consistent with human rights principles and that enhance safe and secure operational effectiveness.

3.3 Protecting Human Rights in the Provision of Correctional Services

Since the late 1990s there have been significant developments in human rights law in Canada that provide useful guidance for sound human rights practice. There is a growing recognition that preventing discrimination requires proactive measures that transform systems in ways that ensure the inclusion of individuals and groups. Instead of piecemeal, after-the-fact adaptations that attempt to rectify faulty systems, these systems should be conceived and built with individual needs and differences in mind.

This section sets out a framework for analyzing whether correctional services are respecting the human rights of federally sentenced women.

3.3.1 Definition of Discrimination

Discrimination can occur even though there is no intent to treat someone unfairly. The defining feature of discrimination is its effect.

Section 5 of the *Canadian Human Rights Act* provides a broad definition of what constitutes discrimination in the provision of services. It states as follows:

⁴⁰ CHRA, *supra* note 1, s. 15.

⁴¹ CCRA, *supra* note 37, s. 4.

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

- (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
- (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

The prohibited grounds of discrimination are enumerated in section 3, and section 3.1 provides that a denial of services may be based on more than one prohibited ground.

3.(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

Sections 5 and 3 must be interpreted and applied in light of the purpose of the *Canadian Human Rights Act*, which is found in section 2. It states:

The purpose of this Act is to extend the laws in Canada to give effect... to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices... .

Section 5 prohibits direct and systemic discrimination in the provision of correctional services. Direct discrimination is the term used to describe what happens when an individual or group is treated differently in an adverse way based on characteristics that are related to the prohibited grounds of discrimination including gender, race and disability. This kind of discrimination tends to be easy to identify. When a guard uses racial slurs or when a policy unjustifiably singles out offenders with disabilities, we call this direct discrimination.

Systemic discrimination, on the other hand, is the creation, perpetuation or reinforcement of persistent patterns of inequality among disadvantaged groups. It is usually the result of seemingly neutral legislation, policies, procedures, practices or organizational structures. Systemic discrimination tends to be more difficult to detect.

Correctional practices and policies that exclude individuals and groups or treat them based on stereotypes and perceptions can result in either direct or systemic discrimination. Organizations can prevent both kinds of discrimination by designing and implementing practices and policies that are inclusive of all people and their needs.

Discrimination may not result in the exclusion of all members of an identifiable group. A correctional practice or procedure may appear to be neutral, but can have adverse effects on some inmates. For example, discrimination could be a consequence of security practices intended to

ensure safe custody and supervision that lead to heightened states of anxiety or trauma for offenders who are survivors of sexual abuse, a characteristic that tends to be disproportionately related to gender.

The failure to take positive steps to ensure that individuals or groups benefit equally from correctional services may also constitute discrimination.⁴² Such discrimination may occur if correctional practices developed for and tested on male inmates are used on female inmates without adequate testing or validation. This kind of discrimination can be avoided if correctional services for federally sentenced women are designed to supervise, rehabilitate and reintegrate women offenders.

Preventing discrimination requires addressing differences rather than treating people the same. Providing equal opportunities to all offenders to benefit from safe and secure custody, rehabilitation and reintegration requires providing correctional services that address their unique needs. Preventing discrimination by providing equal opportunities for federally sentenced women requires a proactive approach that asks not how federally sentenced women can fit into and benefit from existing correctional services, but rather "what correctional services are necessary to respond to the needs of women offenders?"

The duty to take positive measures under the *Canadian Human Rights Act* is not inconsistent with the fiduciary duty that is advocated by representatives of federally sentenced women. From the perspective of the Elizabeth Fry Societies and others, the Government of Canada, including the Correctional Service of Canada, owes a fiduciary duty or a duty of care to federally sentenced women, particularly Aboriginal women. Women, particularly Aboriginal women, are vulnerable not only because they lack power in the prison context, but also because of the economic, social and political realities of women's lives. This is particularly true for Aboriginal women who, as the data in Chapter 1 reveal, are being incarcerated in increasing numbers. The disadvantage they experience is multi-layered both in the society and the correctional system. From this perspective, the fiduciary duty on the Government of Canada augments the human rights obligations of the Correctional Service to these vulnerable groups.⁴³

3.3.2 Identifying Discrimination Against Federally Sentenced Women

Service providers, including the Correctional Service of Canada, need to know both how to recognize discrimination in the provision of correctional services once it has occurred and how to prevent it before it happens.

The first step is to look for differential treatment, including lack of access to or denial of correctional services, or the failure of correctional services to meet the needs of individuals or groups.⁴⁴ A lack of access to programming for federally sentenced women that is available to federally sentenced men may indicate differential treatment. But differential treatment can also occur if federally sentenced women are unable to benefit from programming that has been designed for men, or where women's security risks are assessed using a tool that does not reflect their unique characteristics.

⁴² See for example: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 78.

⁴³ Patricia Monture-Angus. *The Lived Experience of Discrimination: Aboriginal Women Who Are Federally Sentenced*, submitted to the Canadian Human Rights Commission by the Canadian Association of Elizabeth Fry Societies (CAEFS), Ottawa, CAEFS, May 2003. Available: <http://www.elizabethfry.ca/submitn/aborigin/1.htm>

⁴⁴ *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

Differential treatment is discriminatory if it is linked with one or more prohibited grounds of discrimination listed in the *Canadian Human Rights Act*, such as sex, race and disability.⁴⁵ The link may not always be direct or obvious. Identifying the link may require developing an understanding of how the characteristics of individuals and groups relate to the prohibited grounds of discrimination in the correctional context. It may require, for example, understanding how women's criminogenic factors differ from men's criminogenic factors in order to assess whether policies and practices intended to address criminogenic factors provide federally sentenced women with equal opportunities to benefit from reintegration programming.

Understanding how a failure to benefit from correctional services, for example, may relate to prohibited grounds of discrimination may require dedicated research by the Correctional Service of Canada, including consultation with inmates, advocacy groups and other experts. This is one reason why it is important that the Service support the capacity of inmates and others to participate meaningfully in consultations. New policy tools and practices can also assist in understanding how differential treatment may relate to prohibited grounds of discrimination, such as corporate data systems that collect and report data, including budget and financial information, in ways that reflect the population and individuals intended to benefit from correctional services. These kinds of policy tools and practices can help to track access to correctional services, as well as identify gaps in correctional services.

At times it may not be possible to attribute or link the differential treatment to only one ground of discrimination. Federally sentenced Aboriginal women, for example, may experience different forms of exclusion than non-Aboriginal women and Aboriginal men. The reasons why Aboriginal women do not benefit from programming may be different than non-Aboriginal women. And the experiences of individuals who are part of an identifiable group, such as, for example, Aboriginal women, are not necessarily the same. Linking grounds of discrimination to differential treatment must be done flexibly, based on the recognition that the grounds of discrimination listed in the *Canadian Human Rights Act* are intended to mark interests and needs that are vulnerable to being overlooked.

Once a link between the differential treatment and one or more prohibited grounds of discrimination is made, a service provider has an obligation to act effectively, both proactively and reactively. Reacting effectively to redress discrimination requires a fair, efficient and responsive system for addressing problems, complaints and grievances. This should begin within the Correctional Service, always recognizing the importance of having external avenues of redress, including the Office of the Correctional Investigator and the Canadian Human Rights Commission and the kind of external redress set out in Recommendation 19. Proactive measures may include conducting human rights audits, considering human rights impacts in the development of new policies or the review of existing ones, and ongoing human rights education and training.

⁴⁵ CHRA, *supra* note 1, at ss. 3 and 3.1.

3.3.3 When Differential Treatment May Be Allowed

Human rights laws recognize that there may be limits on what a service provider such as the Correctional Service of Canada must do to promote and protect the human rights of federally sentenced offenders. But because of the importance of equality in our society, these limitations or exceptions to human rights are few and are interpreted very narrowly.⁴⁶

"(Human rights legislation) is often the final refuge of the disadvantaged and the disenfranchised."

Supreme Court of Canada in *Zurich Insurance Co. v. Ontario Human Rights Commission*, infra note 46, at para. 18.

Generally, to prove that differential or adverse treatment in correctional services is not discrimination under human rights legislation, the Correctional Service must show that there is no other way to provide the service short of "undue hardship" related to considerations of health, safety and cost.⁴⁷ It is at this stage of the analysis that the public safety considerations identified as "paramount" in section 4 of the *Corrections and Conditional Release Act* may come into conflict with human rights values and practices. This signals the importance of searching for ways to resolve this conflict that do not minimize the human rights of inmates but that ensure the accommodation of individual needs and differences.

3.3.4 Ensuring That Differential Treatment in Correctional Services is the Exception

To ensure equality in the provision of correctional services where questions about limits on human rights arise, it is necessary to apply the three-part test that has been established by the Supreme Court of Canada.⁴⁸ The test proceeds based on three questions:

1. Is the limitation on human rights for a purpose or goal that is related to the provision of correctional services?
2. Has the limitation on human rights been adopted with no intent to discriminate?
3. Is the limitation on human rights reasonably necessary to accomplish the purpose or goal, or can the need or difference be accommodated without undue hardship?

It is difficult to answer these questions unless the policy or practice has a clearly defined goal. If the goal is unclear, then it may not be possible to know whether a restriction on equality is really necessary to achieve it. For example, if the purpose of segregation is to ensure safety, then what level of risk to safety is tolerated, and whose safety is being protected? When developing new correctional policies and practices, or reviewing existing ones, it is important to be clear and precise about what the goal is.

The first question or branch of the test considers whether the goal or purpose has a legitimate or rational relationship to the activity being carried out. In the correctional context, the purpose must be related to the mandate and mission of the Correctional Service of Canada. Policies or practices that discriminate against individuals or groups and that have no rational relationship to the Service's purpose will not be justified.

⁴⁶ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, at para. 18.

⁴⁷ *CHRA*, supra note 1, s.15(1)(g).

⁴⁸ See the analysis established by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3; and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (also known as *Meiorin* and *Grismer*).

The second part of the test asks why the discriminatory policy or practice was adopted or continues to be used. An intent to discriminate will render a policy or practice that has adverse effects unlawful. But even if there was no intent to discriminate when the policy or practice was first adopted, a failure to update policies or practices in the face of changing knowledge about how policies or practices affect individuals may raise questions about why the policy or practice continues to be used.

The third part of the test asks whether the limitation, restriction or exclusion is reasonably necessary. It must be clear that the policy or practice contributes to achieving the legitimate goal, notwithstanding its adverse effects. A policy or practice that is ineffective will not be reasonably necessary. Even if the policy or practice is reasonably necessary in that it makes a positive contribution to achieving the legitimate goal, the service provider must consider whether there are any less discriminatory alternatives. The goal is to ensure that the policy or practice is as inclusive as possible.⁴⁹ Individual accommodation to the standard must still be considered, where necessary. Filtered throughout the third part of the test is the requirement for meaningful individual assessment. Individual assessment is part of ensuring that the policy or practice is as inclusive as possible, and it is also part of the process of individual accommodation.

Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics.

Supreme Court of Canada in *Grismer*, supra note 48, at para. 19.

This three-part test identifies when existing discrimination is not justified. The test can help pinpoint where systems and practices failed to respond to legitimate needs in an unjustifiable manner, and can assist in determining how those policies and practices can be changed to avoid similar results in the future. But the test can also be used to prevent discrimination by applying it during a review of existing policies and practices or during the development of new policies and practices. To meaningfully explore alternative policies and practices that do not lead to discrimination, it is necessary to use assessment tools or processes that make visible the needs and differences of individual inmates. For example, assessment tools that help in identifying the programming needs of non-Aboriginal inmates may not be appropriate for use with Aboriginal inmates.

Examining alternatives is part of accommodating legitimate individual needs and differences. The Correctional Service of Canada has a duty to accommodate individuals and groups up to the point of "undue hardship." Undue hardship is reached when the Correctional Service has done all that it can without unduly compromising the health or safety of staff, federally sentenced offenders or the public. Sometimes cost may be a factor justifying discrimination, but it is exceptional for cost to justify an infringement of human rights.

Given the centrality of safety concerns in the correctional system, it is important to ensure that when these concerns come into conflict with the human rights of federally sentenced offenders, they are measured and balanced in a systematic and consistent fashion. Clearly, this is a challenge in the correctional context, where safety concerns may emerge quickly and unpredictably. This points to the importance of having established policies and procedures that are based on a

⁴⁹ *Grismer*, supra 48, at para. 22.

consistent view of the factors affecting safety in the correctional context. Determining these factors in advance will minimize the extent to which safety considerations compromise human rights protections.

3.3.5 Compound or Multiple Discrimination

Federally sentenced women experience discrimination in various ways, and in ways that are different from how federally sentenced men experience discrimination. Like people's lives and experiences, discrimination is multi-faceted. A federally sentenced woman may experience discrimination because she is a woman, because she is disabled or because she is both. This is why it is important to think about discrimination in ways that reflect the entire context of people's lives. A contextualized approach to discrimination is called an "intersectional analysis." It recognizes that just as the characteristics and needs of individuals are diverse and multi-faceted, their experience of differential treatment may be as well. It requires identifying differential treatment that relates to more than one ground of prohibited discrimination, as well as preventing discrimination on the same basis.

An intersectional analysis can also help to avoid a tendency to "categorize" inmates. This can happen when it is assumed, for example, that the needs of all Aboriginal federally sentenced women inmates are the same.⁵⁰ It may be true that Aboriginal women have more in common with each other than with non-Aboriginal women, but there are differences among them. This is one of the reasons why "Aboriginal programming" may meet the needs of some Aboriginal offenders but not all.

One characteristic that most federally sentenced offenders share is economic disadvantage. Although social condition (including economic status) is not a prohibited ground of discrimination under the *Canadian Human Rights Act*, it is important to remember that poverty, illiteracy and poor life skills can compound the vulnerability associated with the prohibited grounds of discrimination. This has implications for the effective rehabilitation and reintegration of all federally sentenced offenders. It has unique implications for federally sentenced women, whose low rates of employability relative to men, for example, suggest that employment programming for women is particularly vital to their effective reintegration.

3.3.6 Using Comparisons to Achieve Human Rights for Federally Sentenced Women

Equality has been described as a comparative concept.⁵¹ To some extent there is a tendency to want to measure equality by comparing women with men: do federally sentenced women receive correctional services that are equal to those received by federally sentenced men? This approach can be helpful in identifying gaps in correctional services in areas where the characteristics, interests and needs of federally sentenced women and men are the same or similar. But where the two populations differ, comparisons tend not to be useful because they do not promote substantive equality. Substantive equality is based on the recognition that treating people the same does not necessarily result in equality. Similar treatment may in fact produce unequal results and reinforce discriminatory patterns and outcomes. Substantive equality requires taking into account the

⁵⁰ Wendy Chan and Kiran Mirchandani (eds.). *Crimes of Colour: Racialization and the Criminal Justice System in Canada*, Peterborough, Broadview Press, Ltd., 2002, at 79.

⁵¹ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

differences between individuals and groups in order to ensure that everyone benefits from the purpose of the *Canadian Human Rights Act* — to have the opportunities that everyone has a right to regardless of characteristics that include their gender, race or disability.

There are other instances where it may not be helpful to use comparisons as the foundation of an equality analysis. For example, the disadvantage that can result from the compound effects of more than one ground of discrimination (e.g., gender and race, or gender, race and disability) does not lend itself readily to comparison-based approaches to equality. Who is the appropriate comparator in the case of differential treatment against a woman who is both a member of a racialized group and a person with a disability? Where there is more than one potential ground of discrimination, which ground should drive the human rights analysis?

A better practice for protecting human rights is to use comparisons where possible and meaningful, along with individual assessment, to identify real needs relating to real people. The process of individual assessment can include assessment tools that are properly responsive to the population to which they are applied, as well as interviews and consultations with knowledgeable persons, including those directly affected. This process must continue over time, and must be augmented by an ongoing assessment of the impact and effectiveness of correctional services in meeting the legitimate needs of the federally sentenced population.

3.4 Enforcing Human Rights in the Provision of Correctional Services

Currently the inmate complaint and grievance system, as well as the complaint process under the *Canadian Human Rights Act*, provides an opportunity to enforce human rights in the provision of correctional services one complaint at a time. Although the complaint procedure is an important human rights enforcement mechanism, it rarely leads to sweeping changes in the systems, practices and policies of an organization. Nor does it necessarily prevent discrimination from happening again in future. The inmate complaint and grievance system, in particular, rarely leads to the design of modified policies and practices that ensure inclusion and this is why proactive approaches are so important.

3.4.1 Guiding Principles for a Human Rights Analysis

Several principles emerge that are useful in ensuring that the treatment of federally sentenced women is consistent with human rights laws:

1. Federally sentenced women have a substantive right not to be discriminated against and a right to correctional services as effective as those received by men.
2. Equality is based on the real needs and identities of federally sentenced women, not on stereotypes, perceptions or generalizations. A contextual approach is necessary to understand and respond to the needs of federally sentenced women for correctional services.

3. The Correctional Service of Canada's duty to promote and protect the human rights of federally sentenced women in the provision of correctional services is immediate, proactive and ongoing.
4. Justifications for discriminatory treatment in the delivery of correctional services are limited to arguments about safety, health and cost, and the Correctional Service of Canada must demonstrate how ensuring that the characteristics and needs of federally sentenced offenders that relate to prohibited grounds creates undue hardship under one of these three headings.
5. A proactive approach requires Correctional Service of Canada to put tools and policies in place to support the development and delivery of correctional services that are consistent with human rights. These include: adequate data collection and reporting, meaningful consultation processes, appropriate individual assessment processes, education and training, and program assessment (including gender-based budget reporting) that addresses human rights impacts.

Human Rights in the Assessment and Classification of Need and Risk

The classification and assessment of federally sentenced offenders' programming needs and security risk have a critical impact on decisions about where they are incarcerated, how they are managed and supervised, what kind of programming is available to them, and the conditions under which they are released. The upshot of these decisions can be far-reaching.

The case management process for managing the reintegration of offenders begins with an assessment of the offender's security risk and an identification of the factors that led to their criminal behaviour. If these processes are flawed, then some inmates will be classified incorrectly and their correctional plans, including decisions about the kinds of programming that would be most suited to their needs, will be flawed, jeopardizing their chances of successful reintegration. If the flaws relate to prohibited grounds of discrimination, there is also a chance that they run afoul of the *Canadian Human Rights Act*. It is therefore important to examine whether existing assessment and classification processes are appropriate for the purpose and the populations they are intended to serve.

4.1 Offender Intake Assessment

All new offenders go through an initial assessment process. Introduced in 1994, the offender intake assessment is intended to identify the factors that led to an individual's criminal behaviour, information that forms the basis of the correctional plan that prescribes programs that are designed to address the risk factors identified. Intake assessment generates a profile for each inmate that includes an assessment of an inmate's dynamic risk factors and a security classification developed using the custody rating scale. An assessment of dynamic risk factors or criminogenic factors is used to identify the level and kind of intervention required to achieve the safe and timely reintegration of the offender. It assigns a rating of low, medium or high to those factors that require improvement. The custody rating scale which assesses security risk results in a security classification level of minimum, medium or maximum.

The rest of this section addresses some of the human rights implications of these two assessment processes.

4.1.1 Dynamic Risk Assessment

The assessment of dynamic risk factors is used to identify the reintegration or programming needs of offenders.⁵² The theory behind the assessment process is that dynamic risk factors are those factors that led an individual to crime and that can be addressed through programming to reduce the risk of re-offending.

Seven areas or "domains" are assessed to identify the interventions or programming that may effect a change in

Dynamic factors can be addressed through appropriate programs or other interventions to effect change in the offender's behaviour.

Correctional Service of Canada.
Offender Intake and Assessment
Planning SOP 700-04, infra note
52 at 16.

⁵² Correctional Service of Canada. *Offender Intake Assessment and Correctional Planning SOP 700-04*, at 16-18
Available: http://www.csc-scc.gc.ca/text/plcy/sop/doc/700-04_e.pdf

behaviour. They are: employment, marital/family, associates/social interaction, substance abuse, community functioning, personal/emotional orientation and attitude. The same assessment instrument is used for both women and men.

4.1.1.1 A Human Rights Analysis

Because the assessment of dynamic risk factors is used to identify an offender’s programming needs, it also determines how they are "labelled" and assisted with reintegration. A faulty assessment may generate a correctional plan that requires an offender to participate in a program that is of little or no assistance, or prevents her from participating in one that would advance her chances of rehabilitation. Given the critical role of the correctional plan and programming in obtaining the earliest possible release, a flawed assessment could result in significant burdens, barriers or missed opportunities for some inmates.

It is widely recognized that women commit crimes for different reasons than men do.⁵³ Using the same tool to assess their needs for reintegration programming will not assist women as much as a gender-responsive tool would. An assessment tool or instrument that is incapable of addressing the full range of federally sentenced women’s criminogenic factors is inconsistent with the *Canadian Human Rights Act*.

(Women’s) crimes are different, their criminogenic factors are different, and their correctional needs for programs and services are different.

Louise Arbour. Commission of Inquiry into Certain Events at the Prison for Women in Kingston, supra note 5, at 228.

A review of the tool used for dynamic risk assessment indicates it does not include some gender-responsive variables such as prior victimization.⁵⁴ Although past or present spousal abuse and witnessing spousal abuse during childhood are risk indicators under the "marital/family" domain, childhood sexual or physical abuse is not included as an indicator anywhere in the needs assessment process. Yet these factors are relevant to the lives of federal offenders, and especially to women (see statistical profile in chapter 1). Research conducted in the United States suggests a link between women’s criminal behaviour and prior experiences of victimization. This research also suggests that the interplay between the factors leading to criminality may be different for men and women.⁵⁵ The Correctional Service of Canada should undertake further research to clarify how factors such as prior abuse affect

... victimization and self-esteem require further research before they can be ruled out as predictors of female offending. Although problematic for both males and females, abuse and neglect seem to be more predictive of the future offending of females than males.

Classification of Women Offenders: A National Assessment of Current Practices, infra note 55, at 7.

⁵³ Tim Brennan. "Institutional Classification of Females: Problems and Some Proposals for Reform", *Female Offenders: Critical Perspectives and Effective Interventions*, in Ruth T. Zaplin, ed., Gaithersburg, Maryland, Aspen Publishers, Inc., 1998, at 181. See also: Kelly Hannah-Moffat & Margaret Shaw. *Taking Risks: Incorporating Gender and Culture into the Classification and Assessment of Federally Sentenced Women in Canada*, Ottawa, Status of Women Canada, March 2001, at 64. Available: http://collection.nlc-bnc.ca/100/200/301/swc-cfc/taking_risks-e/010514-0662654323-e.pdf

⁵⁴ Tim Brennan. "Time to think about Cognitive Behavioural Programmes", *Female Offenders: Critical Perspectives and Effective Interventions*, supra note 53, at 203. See also Kathleen Kendall, in *Women and Punishment: The Struggle for Justice*, edited by Pat Carlen, Portland, Or., Willan Pub., 2002, at 191.

⁵⁵ United State Department of Justice, National Institute of Corrections. *Classification of Women Offenders: A National Assessment of Current Practices*, Department of Justice, Washington, DC, U.S., August 2001, at 7-9. Available: <http://www.nicic.org/pubs/2001/017082.pdf>

recidivism so that women inmates, in particular, may benefit fully from correctional programming that addresses the full range of their criminogenic factors.

The dynamic risk assessment tool discriminates on its face by identifying disability as a risk/need indicator that "interferes" with employment. Yet it is unclear how this indicator reliably contributes to predicting the risk of recidivism for offenders with disabilities.⁵⁶ From a human rights perspective, low employment rates among persons with disabilities tend to reflect the failure of employers to adopt workplace standards that are inclusive of people with disabilities, resulting in their exclusion from many workplaces. If the Correctional Service of Canada continues to use "disability" as a factor in the needs assessment process, it needs to define how disability contributes to recidivism and develop programming that meets those needs, particularly the employability and employment needs of offenders with disabilities. The Service must also address accessibility issues with prospective employers when it goes out into communities to do job development for offenders on work releases or conditional release.

The dynamic risk assessment also uses risk/need indicators based on other prohibited grounds of discrimination, including religion and ethnicity.⁵⁷ Again, it is unclear how indicators such as these reliably predict risk for offenders, nor is it clear how these factors can meaningfully be assessed in the context of the offender intake assessment. The manual that accompanies the assessment tool offers little guidance to Correctional Service staff on how to apply these potentially discriminatory factors.

This gives rise to concerns relating to the assessment of federally sentenced Aboriginal offenders and other racialized groups. If a needs-assessment tool is not capable of measuring unique factors that may contribute to Aboriginal people coming into conflict with the law, then it is unlikely to adequately identify programming needs as well as other measures that will prevent this conflict. At the same time, if the tool assesses Aboriginal offenders on the basis of stereotypes and perception, this hinders Aboriginal offenders in realizing their potential for reintegration.

Using indicators that relate to prohibited grounds of discrimination to assess potential recidivism has human rights implications that must be scrutinized closely. In the same way that society and social norms can create barriers for people with disabilities that are unrelated to their true abilities, offenders with disabilities or perceived disabilities are poorly served by correctional services that use assessment tools that presumptively link disability with increased risk.⁵⁸ Ethnicity or race may have one meaning for one offender, but may mean something different to another. The impact of these characteristics may have more to do with how society perceives or responds to a person's race or ethnicity — particularly a person with a history of criminal activity — than with the person's self-perception or conduct.

The Correctional Service of Canada needs to exercise caution in using characteristics such as race, ethnicity or disability as indicators of programming needs. Instead, indicators of programming

⁵⁶ The low employment rates of women with disabilities tend to result from systemic, not individual factors. Women with disabilities have higher rates of unemployment, lower employment earnings and higher rates of poverty overall than their male counterparts. Status of Women Canada. *The Dynamics of Women's Poverty in Canada*, Ottawa, Status of Women Canada, March 2000, at 9. Available: http://www.swc_cfc.gc.ca/pubs/0662281594/200003_0662281594_e.pdf

⁵⁷ Examples: For the employment domain, the assessment indicators include: "Has physical problems that interfere with work?" For the domain of personal/emotional orientation, the indicators include: "Ethnicity is problematic? Religion is problematic?" See *SOP 700-04*, Annex 700-04C, supra note 52.

⁵⁸ "... discriminatory acts may be based as much on perception and myths and stereotypes as on the existence of actual functional limitations. ..." *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City) et al.*, [2000] 1 S.C.R. 665, at para. 39.

needs must be carefully designed to respond to unique needs and backgrounds. It is important to avoid assessing offenders based on a perception that those with a disability or those who are members of racialized groups, for example, pose increased risk. While some offenders with these characteristics may be at increased risk of recidivism, certainly not all will be. Clearer guidance must be provided to Correctional Service staff to clarify these aspects of the programming needs assessment, and assessment tools must be carefully designed to avoid differential treatment.

For all these reasons, it is clear that some of the indicators used in the dynamic risk assessment tend to treat certain individuals and groups differently for reasons that are linked to prohibited grounds of discrimination. The instrument used to assess criminogenic factors or programming needs is discriminatory on its face. It is therefore necessary to turn to the three questions that ask whether the discrimination is justified, and that can help in developing less discriminatory alternatives.

The first question asks for what purpose the dynamic risk assessment was adopted, and whether that purpose is related to a legitimate function carried out by the Correctional Service. The process appears to have been adopted for the purpose of assessing the factors that contribute to recidivism and that can be addressed through programming. This is rationally related to the Service's mandate, and if implemented properly, should assist federally sentenced offenders.

In respect of the second question — the reason why the practice was adopted — there is no suggestion that the dynamic risk assessment was adopted with any discriminatory intent. However, it does concern the Commission that the Correctional Service has continued to use the same tool for women and men with little regard for the research demonstrating that women's criminogenic factors are different from men's. Some of this research has been available for more than a decade and was referred to in both the report of the Task Force on Federally Sentenced Women in 1990 as well as in the 1996 *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*.

The final question is whether the dynamic risk assessment is reasonably necessary to accomplish the Correctional Service's purpose. The inquiry here focuses on whether the dynamic risk assessment actually achieves what it sets out to do for federally sentenced women and, if so, what alternatives may exist to modify or replace the assessment process, and what individual accommodation is possible.

Based on what we were told by the women we interviewed, we suspect that the assessment is not meeting the needs of federally sentenced women (nor those of men inmates) with disabilities or who are members of racialized groups. Many of the women who were interviewed for this report talked about how programming did not meet their needs and how some essential programs simply did not exist. In particular, women said they needed more help dealing with the effects of prior abuse, effects that also prevented them from being able to progress with other programming.

More effort needs to be made to look at the underlying causes of a woman's offence.

Former inmate now on community release

Because the dynamic risk assessment is a form of individual assessment, it is important, from a human rights perspective, to ensure that it is suited to its intended subjects. In her recent report on the reintegration of women offenders, the Auditor General expressed concern about the lack of adequate validity testing of the assessment tool being used for women.⁵⁹ Nor has the dynamic risk assessment tool been validated for an Aboriginal inmate population. Given the over-representation of Aboriginal people in federal correctional institutions, particularly among federally sentenced women, the Correctional Service's failure to adequately test this important assessment tool is of serious concern to the Commission.

Most instruments do not assess the specific needs of women that are tied to their pathways to offending, and, specifically, the intersecting problems of substance abuse and victimization.

Gender-Responsive Strategies, supra note 3, at 18.

As we have noted, human rights law requires that assessment and testing processes be responsive to the populations to which they are applied and properly crafted to meet the purpose they are intended to achieve. Where assessment tools do not meet these requirements, they are blunt instruments that tend to lead to unjustifiable differential treatment. In the absence of adequate testing and modification, these instruments should not be used on women or Aboriginal offenders.

Unlike the custody rating scale, which will be addressed below, the dynamic risk assessment is a policy instrument with no explicit statutory basis. This offers the Correctional Service considerable scope to reform both the process and the instrument to accommodate the needs of all federally sentenced offenders.

Recommendation No.1

It is recommended that the Correctional Service of Canada develop and implement a needs-assessment process that responds to the needs of federally sentenced women, including Aboriginal women, women who are members of racialized groups and women with disabilities.

4.1.2 Security Classification and the Custody Rating Scale

The *Corrections and Conditional Release Act* imposes a duty on the Correctional Service of Canada to assign a security classification of minimum, medium or maximum to each offender in accordance with a detailed legislative and policy framework.⁶⁰ The classification turns on an assessment of an offender's probability of escape and risk to public safety, as well as her need for supervision within the penitentiary.⁶¹ Two kinds of risk are assessed: risk to the public in the event of escape; and risk to staff, other inmates and self caused by problems relating to institutional adjustment. The Act prescribes factors to be taken into consideration in determining the security classification, including the inmate's social history and any physical or mental illness suffered by her.⁶²

⁵⁹ Auditor General of Canada. Report "*Correctional Services Canada - Reintegration of Women Offenders*", Chapter 4, *supra* note 22, at para. 4.38.

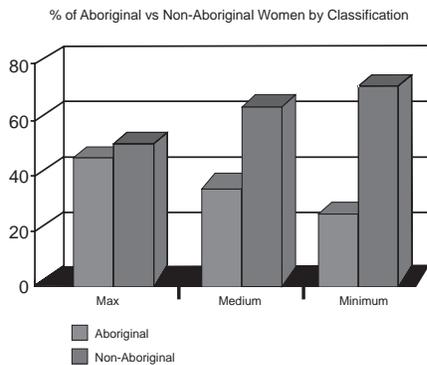
⁶⁰ *CCRA*, *supra* note 37, at s. 30.

⁶¹ Corrections and Conditional Release Regulations, SOR/92-620, s. 18. Available: http://laws.justice.gc.ca/en/C_44.6/SOR_92_620/index.html

⁶² *Ibid.* at s. 17.

4.1.2.1 A Human Rights Analysis

The custody rating scale, which is the foundation of the security classification system was developed for men in 1987. It has many shortcomings. It makes explicit distinctions on the basis of mental and physical disability. It was not designed to identify, reflect or accommodate the needs, capacities and circumstances of federally sentenced women or members of racialized groups, nor has it been adequately validated for these populations. Given the role of a security rating in determining placement and programming within prison, these are serious shortcomings.



It is of great concern to the Commission that data from the Correctional Service consistently show a disproportionately high percentage of federally sentenced Aboriginal women classified at the maximum security level and a disproportionately low percentage of Aboriginal women at the minimum level. As of July 2003, Aboriginal women accounted for 46% of the federally sentenced women classified as maximum security, 35% of medium security women and only 23% of the women classified as minimum security. Non-Aboriginal women, on the other hand, accounted for only 54% of the maximum security women, 65% of the medium security women and 77% of the minimum

security women. Women with mental health issues, cognitive limitations and substance dependency are also disproportionately classified as maximum security. These data raise concerns about the impact of the custody rating scale on protected groups. Almost six years ago, Justice Arbour identified problems with the rating scale, especially for Aboriginal women. In particular, she noted that the cumulative effect of longer offence histories, more violent offences and greater numbers of previous incarcerations among Aboriginal women (compared with non-Aboriginal women) results in higher security classifications and higher risk assessments for Aboriginal women. She noted that this situation "... is heightened by the tensions and misunderstandings between Aboriginal cultures and that of criminal justice and penal settings."⁶³

In her April 2003 report, the Auditor General of Canada also highlighted the negative repercussions of the Correctional Service's failure to test the validity and reliability of the tools it uses to assess federally sentenced women. "In the short term, this testing is fundamental to making the right decision about an offender's security level and her program needs for successful rehabilitation," the report said. "In the longer term, incorrect assessment could lead to reoffending and the social costs it brings."⁶⁴

Because the custody rating scale is not designed to assess federally sentenced women, it misclassifies too many of them as high security risks. Among the hardships imposed by this are the fact that maximum security inmates, unlike their minimum and medium security counterparts, are not eligible to participate in work-release programs, community release programs or other supportive programming designed to enhance their chances of reintegration. In fact, half of all maximum security women are now being released directly from maximum security incarceration into the community after serving two-thirds of their sentence, without the benefit of preparatory programming.

⁶³ Louise Arbour. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, supra note 5, at 221.

⁶⁴ Auditor General of Canada. Report. "Correctional Services Canada — Reintegration of Women Offenders", Chapter 4, supra note 22, at para. 4.2.

We also note with concern the adverse impact of the classification system on women with cognitive limitations. Some cognitive limitations prevent offenders from adequately managing their anger and may therefore present true risks. But not all cognitive limitations affect anger management. The current system fails to capture this distinction.

Women who are illiterate or do not function at a high level or have anger management issues tend to be classified higher.

Member of a Citizens' Advisory Committee

Federally sentenced women and some Correctional Service officials at the regional facilities stated that, in their opinion, the custody rating scale fails to take gender differences into account, and Correctional Service officials voiced concern that the current system classifies women at a higher security rating than is appropriate.

Most of the organizations we consulted raised concerns about the discriminatory impact of the classification system. The Office of the Correctional Investigator voiced serious objection to the use of a classification system "that has been designed for men, that is designed primarily to assess public risk, and which does not meet the unique and individual needs of female offenders."⁶⁵

... by equating "mental disability" with risk, the classification system perpetuates the negative stereotype that women with mental illness are dangerous or violent.

Peters, Yvonne. *Federally Sentenced Women with Mental Disabilities: A Dark Corner in Canadian Human Rights*, prepared for DisAbled Women's Network (DAWN), February 2003, at 10. Available: <http://www.elizabethfry.ca/submissn/dawn/1.htm>

Many organizations, including the Native Women's Association of Canada, emphasized that the adverse impact of this classification system on women is even more pronounced for women with disabilities and Aboriginal women. The Committee pointed to the disproportionate classification of Aboriginal women as maximum security with "the harsh treatment this entails."⁶⁶ One of the most serious adverse impacts of a maximum security rating for Aboriginal women is that they are not permitted to live at the Healing Lodge. Justice Arbour referred to this unfortunate consequence in her 1996 Report: "Maximum security women who would benefit most from the philosophy, programs and

overall environment (of the Healing Lodge)" are denied access to it.⁶⁷

The Commission agrees that the general purpose of the security classification system — the identification and assignment of a security level based on potential risk and the need for supervision — is rationally connected to the function being performed by the Correctional Service of Canada. Security considerations are important to ensuring the safety of everyone involved with the correctional system. However, we are concerned about the ongoing use of the current custody rating

"If risk prediction and security concerns are less central for females, then current classification systems are arguably focused on inappropriate goals."

Brennan, *supra* note 53, at 186.

⁶⁵ Office of the Correctional Investigator. *Response to the Canadian Human Rights Commission's Consultation Paper for the Special Report on the Situation of Federally Sentenced Women*, Ottawa, May 2003, at 4.

⁶⁶ Sharon D. McIvor and Ellisa C. Johnson. *Detailed Position of the Native Women's Association of Canada on the Complaint regarding the Discriminatory Treatment of Federally Sentenced Women by the Government of Canada filed by the Canadian Association of Elizabeth Fry Societies*, Ottawa, May 2003, at 13. Available: <http://www.elizabethfry.ca/submissn/nwac/1.htm>

⁶⁷ Louise Arbour. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, *supra* note 5, at 224.

scale for federally sentenced women in light of research indicating that they pose less of a security risk than men. On the basis of this research, Justice Arbour argued for a security classification system tailored to women: "the risk that they pose to the public, as a group, is minimal, and considerably different from the security risk posed by men."⁶⁸ Since then, commentators have pointed out that an emphasis on risk is fundamentally misaligned with the profile of female offenders, an overwhelmingly high-need population.⁶⁹ This suggests that the Correctional Service has not adequately explored alternatives to the current custody rating scale for federally sentenced women.

The effectiveness of the custody rating scale in differentiating levels of risk in the federally sentenced women population is also questionable because it does not seem to have much impact on how minimum and medium security women are housed and supervised. For most of the women who are classified as medium and minimum security, there is little difference in the conditions under which they serve their sentences. In fact, at many regional facilities, women classified as medium security live in the same houses as those with a minimum security classification. This brings into question the capacity of the custody rating scale to guide decisions about the "least restrictive" means of imprisonment.

In her 2003 report, the Auditor General of Canada raised several concerns about the custody rating scale, many of which are inconsistent with best practices for human rights compliance. Relying on research demonstrating that "there are several factors (such as physical, mental, and sexual abuse; severity of the current offence; and employment history) that may need to be considered differently when dealing with women offenders," the report concluded that further validation testing of the rating scale was needed.⁷⁰ The Auditor General also found that the Correctional Service had not tested the reliability, including inter-rater reliability, of the custody rating scale for classifying women offenders.

There is a clear parallel between the Correctional Service's failure to adequately test its assessment tools and the concerns that preoccupied the Supreme Court of Canada when it struck down a fitness standard for firefighting that tended to exclude women because it found the testing procedures flawed.⁷¹ On this basis alone, the Commission strongly urges the Correctional Service of Canada to develop ways of classifying offenders that respect and are responsive to the prohibited grounds of discrimination, while ensuring that everyone in the federal correctional system is not exposed to undue safety risks.

⁶⁸ Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, *supra* note 5, at 228.

⁶⁹ Tim Brennan, *Female Offenders: Critical Perspectives and Effective Interventions*, *supra* note 53, at 186.

⁷⁰ Auditor General of Canada. Report. "Correctional Services Canada — Reintegration of Women Offenders", Chapter 4, *supra* note 22, at para. 4.41.

⁷¹ Meiorin, *supra* note 48, at paras. 74-77.

Recommendation No. 2

It is recommended that the Correctional Service of Canada:

- a. create a security classification tool explicitly for federally sentenced women, one that takes into consideration the low risk posed to public safety by most women, within one year;
- b. commission an independent study of the possible discriminatory impact of section 17(e) of the *Corrections and Conditional Release Regulations* on federally sentenced offenders with disabilities;
- c. act immediately to address the issues concerning the disproportionate number of federally sentenced Aboriginal women classified as maximum security by:
 - i. immediately reassessing the classification of all Aboriginal women currently classified as maximum security using a gender-responsive reclassification tool;
 - ii. changing the blanket policy of not allowing maximum security women at the Healing Lodge to a policy that is based on individual assessment.

4.2 Classification of Offenders Serving Life Sentences

On February 23, 2001, the Correctional Service of Canada issued *Policy Bulletin No. 107*, which requires that federally sentenced offenders serving a minimum life sentence for first- or second-degree murder be classified as maximum security for at least the first two years of federal incarceration.⁷² The policy states that proposed overrides shall be exceptional and must be approved by the Assistant Commissioner, Correctional Operations and Programs. As well, the frequency of review of the security classification of affected inmates has been reduced to every two years, rather than a minimum of once yearly, as is the case for other offenders.

This policy change has serious consequences that implicate the protection of human rights. Security levels determine many of an offender's living conditions including supervision levels, and eligibility for work releases, unescorted temporary absences and conditional releases. Despite this, all women serving the first two years of a life sentence will be classified as maximum even though the Correctional Service acknowledges that some of them "... have more moderate risk and need."⁷³

Despite objections from the Office of the Correctional Investigator,⁷⁴ the Correctional Service of Canada has to date not rescinded the policy, stating that the determination of the initial security level reflects the seriousness of the crime committed, and that the two-year period provides an opportunity to observe an offender's behaviour, motivation and adaption to prison life.⁷⁵ During

⁷² Correctional Service of Canada. "Security Classification of Offenders Serving a Minimum Life Sentence for First or Second Degree Murder", *Policy Bulletin No. 107*, Ottawa, Correctional Service of Canada, February 2001, at para 1. Available: http://www.csc_scc.gc.ca/text/plcy/cdshtm/b107_70014_e.shtml

⁷³ Correctional Service of Canada. *Secure Unit Operational Plan*, *supra* note 33, at 13.

⁷⁴ Canada. Office of the Correctional Investigator. *Annual Report of the Correctional Investigator 2001-2002*, Ottawa, Public Works and Government Services, 2002, at 33; *Annual Report of the Correctional Investigator 2002-2003*, Ottawa, Public Works and Government Services, 2003, at 41. Available: http://www.oci_bec.gc.ca/reports/pdf/AR200102_e.pdf and http://www.oci_bec.gc.ca/reports/pdf/AR200203_e.pdf

⁷⁵ Correctional Service of Canada. *National Response to the Canadian Human Rights Commission, Consultation Paper*, Ottawa, April 2003, at 3.

our interviews with Correctional Service officials, a number commented that, in their view, the rule may make sense for men offenders, but it is not fair to women, whose crimes tend to be less violent and less premeditated.

In its submission to the Commission, the Canadian Association of Elizabeth Fry Societies noted several shortcomings in this policy, including a failure to recognize the context of women's crimes: "Many women prisoners serving life sentences for murder have been charged, convicted and sentenced as a result of their involvement in defending themselves and/or their children against violent partners."⁷⁶ The Joliette Local of the Union of Canadian Correctional Officers also called the policy discriminatory since it hinges only on the sentence and not the risk that the inmate presents.⁷⁷ The St. Leonard's Society of Canada indicated that this policy has a disproportionately negative impact on Aboriginal offenders since they are more likely than non-Aboriginal offenders to be given a harsher sentence for charges based on similar facts.⁷⁸

4.2.1 A Human Rights Analysis

A blanket policy that imposes an automatic two-year maximum security classification on all offenders serving life sentences is unfair. It also adversely affects federally sentenced women and Aboriginal offenders. Women who commit crimes that merit a life sentence rarely pose a risk to public safety in the way that many men who commit such crimes do. The policy fails to acknowledge the important differences in the reasons why men and women commit crimes that lead to life sentences.

To the extent that the justice system tends to hand out harsher sentences for Aboriginal offenders, the policy results in a disproportionate disadvantage to these offenders without regard to the actual risk that these individuals present. The policy fails to consider the individual circumstances underlying offences among Aboriginal offenders. This failure translates systemic discrimination in sentencing into direct discrimination against individual Aboriginal offenders. A fair and balanced individualized assessment process would be more consistent with good human rights practice.

On its face, *Policy Bulletin No. 107* is intended to assign a risk rating, a purpose that is rationally connected to the organization's function. However, the stated rationale for the policy suggests that its purpose is not to assess the *actual* security risk of a particular offender, but rather to reinforce the social disapprobation of the crime of murder:

Since first and second degree murder are the most serious crimes that can be committed in Canada, and are subject to the most severe penalty in the Criminal Code, CSC's policies and procedures must more clearly reinforce this aspect of our criminal justice system.⁷⁹

This rationale belies the notion that the policy was adopted because of the need to assess an individual's security risk. It also misconstrues the respective purposes of the *Criminal Code* and the *Corrections and Conditional Release Act*. The former, by delineating criminal offences, designating sentences and determining parole eligibility, serves to signal societal disapprobation of a crime. Meanwhile, the latter seeks to rehabilitate offenders thus reducing recidivism and contributing to

⁷⁶ CAEFS. *Response to the Canadian Human Rights Commission's Consultation Paper for the Special Report on the Situation of Federally Sentenced Women*, Ottawa, May 2003, at 12. Available: <http://www.elizabethfry.ca/sentence/1.htm>

⁷⁷ Marie-Josée Prévile. *Union of Canadian Correctional Officers - Joliette Local. Comments for the Special Report on the Situation of Federally Sentenced Women*, Quebec, April 2003, at para. 3.2.3.

⁷⁸ St. Leonard's Society of Canada. *Comments*, Toronto, April 2003, at para 6.

⁷⁹ Correctional Service of Canada. *Policy Bulletin No. 107*, supra note 72, at para. 1.

public safety. The Correctional Service is mandated to carry out the sentence *imposed by courts* using the least restrictive measures consistent with the protection of the public, staff members and offenders. Adding a retributive element to the carrying out of the sentence is not rationally related to the legitimate purpose of assessing risk. It is in fact contrary to the intent of both the *Corrections and Conditional Release Act* and the *Canadian Human Rights Act*.

We note that the Correctional Service has recently indicated that it is conducting an evaluation of this policy in order to determine whether any changes are required. In our view, further evaluation is not required. The human rights impact alone of this policy suggests that it should be revoked. If further evaluation is deemed necessary by the Service, it is imperative that it include an evaluation of the policy's impact on human rights.

Recommendation No. 3

It is recommended that *Policy Bulletin No. 107*, which requires offenders serving a minimum life sentence for first or second degree murder to be classified as maximum security for at least the first two years of federal incarceration, be rescinded immediately in favour of fair and balanced individual assessment.

Human Rights and Safe and Humane Custody and Supervision for Federally Sentenced Women

Incarceration poses hardships and risks for women that are different from those faced by men, and men and women respond differently to custody and supervision. Incarceration has many collateral costs for women; they are more likely than men to lose their children or be abandoned by a spouse. And social stigma and shame may impede their reintegration to a greater extent than the reintegration of men.⁸⁰ Prison can also create risks for some women or increase risks they already face — the risk of self-harm, of contracting communicable diseases (particularly for intravenous drug users) or of deteriorating mental health. While men offenders are not immune to these risks, the risk of self-harm and other issues relating to mental health is especially high for women.

5.1 Health

The health needs of federally sentenced women and their access to necessary and appropriate health services must be looked at in the context of how women's health issues differ from men's: "... (w)omen experience more sickness, more disability and more psychological distress (than men)."⁸¹ Health inequality can be particularly serious for Aboriginal women who have higher rates of suicide and substance abuse. These patterns are mirrored in the lives of women incarcerated in federal correctional facilities.

Because they are in custody, federally sentenced women are not generally eligible for health services provided under provincial health insurance plans. Instead, under sections 86 and 87 of the *Corrections and Conditional Release Act*, the Correctional Service of Canada has a duty to provide essential health care services to inmates in accordance with professionally accepted standards. What health care services are "essential" has been interpreted very broadly in the human rights context.⁸²

Although many women told us that they were satisfied with Correctional Service of Canada's health care services, the level of services appears to be uneven across the different facilities. In some facilities there were complaints about concerns such as pain management being ignored by staff, or having to wait for long periods before being referred by Correctional Service of Canada staff to a doctor or dentist. Two women told us about having to wait to see a doctor and ending up in hospital with problems that might have been avoided with earlier medical intervention. Other women had no choice but to endure dental pain after being told that a root canal is not considered essential dental care.

Almost all of the complaints reflected the sense that women did not feel that they were being listened to or taken seriously: "They don't listen to what you have to say and they assume that you are trying to scam." What these experiences point to is the ongoing need to ensure that federally sentenced women have prompt

The HIV infection rate among women offenders in 2001 was higher than among male offenders. (4.7% v. 1.7%).

Correctional Service of Canada data

⁸⁰ Mary Dodge and Mark R. Pogrebin. "Collateral Costs of Imprisonment for Women: Complications of Reintegration", *The Prison Journal*, Volume 81, Number 1, 2001.

⁸¹ Esyllt Jones and Anna Ste. Croix Rothney. *Women's Health and Social Inequality*, Winnipeg, Canadian Centre for Policy Alternatives — Manitoba, 2001, at 3. Available: <http://www.policyalternatives.ca>

⁸² *Canada (Attorney General) v. Canada (Canadian Human Rights Commission)*, [2003] F.C.J. No. 117, at paras. 49–52.

access to doctors and dentists for essential health and dental care, and that the screening function performed by Correctional Service of Canada staff not inhibit this process.

All inmates face serious health risks resulting from the transmission of communicable diseases, including HIV and hepatitis C. However, in Canada, women and Aboriginal persons have been identified as vulnerable populations for contracting HIV and hepatitis C.⁸³ Women who work in the sex trade, or have unprotected sex with intravenous drug users are particularly at risk. Sixty-five per cent of HIV transmission to Aboriginal women in the general population results from intravenous drug use.⁸⁴ Based on this, it is not surprising that the rate of HIV infection among federally sentenced women is higher than that of their male counterparts, and higher than that of women in the general population. Infection rates among offenders serving federal sentences may be even higher than reported because not all of them have been tested. There are no data available on the rates of HIV and hepatitis C infection among Aboriginal women offenders. Nor is risk factor information such as intravenous drug use by offenders collected. However, it is reasonable to assume that trends and risk profiles among federally sentenced women are similar to those in the general population.

This means that federally sentenced women who are both Aboriginal and intravenous drug users have an increased risk of transmission of HIV and other blood-borne diseases, particularly hepatitis C, than do other offenders. Existing HIV education and prevention programs are not targeted to the special needs of Aboriginal women and this may be one reason why harm-reduction strategies available in prison tend not to benefit Aboriginal women as much as they could. Aboriginal women inmates say that access to relevant community-based programs and the involvement of more knowledgeable Elders might better meet their needs.⁸⁵

Illegal drug use is a challenging issue in the prison environment. Substance abuse is a criminogenic factor for both men and women and this is the starting point for Correctional Services' zero tolerance policy. Nevertheless, widespread drug use in prisons indicates that this policy has been unenforceable. At the same time, many of the risks of drug use are amplified in the prison environment as shown by several Canadian studies that point to the risk of transmission of HIV and hepatitis C from the sharing of needles among inmates.⁸⁶ In light of this, Correctional Service of Canada has implemented some harm-reduction measures such as providing bleach for cleaning needles. However, prisoner advocacy groups and others point out that bleach is "suboptimal at best in preventing disease transmission"⁸⁷, and lobby for the introduction of further harm reduction measures in prison, including needle exchange.

Although the utility of needle exchange as a harm reduction measure is supported by Canada's Drug Strategy as a way to slow the spread of HIV that "in no way (leads) to an increase in drug

⁸³ Correctional Service of Canada. *Infectious Diseases Prevention and Control in Canadian Federal Penitentiaries 2000–2001*, Ottawa, 2003 at 26. A Report of the Correctional Service of Canada's Infectious Diseases Surveillance System, 2003, at 26. Available: http://www.csc_scc.gc.ca/text/pblct/infectiousdiseases/en.pdf

⁸⁴ Andre Picard. "Native Drug Users Hardest Hit by HIV," *Globe and Mail*, Toronto, *Globe and Mail*, January 7, 2003, at A7.

⁸⁵ Anne Marie DiCenso, Giselle Dias and Jacqueline Gahagan. *Unlocking Our Futures: A National Study on Women, Prisons, HIV, and Hepatitis C*, Toronto, Prisoners' HIV/AIDS Support Action Network (PASAN), March 28, 2003, at 53 and 55-56. Available: http://www.pasan.org/Publications/Unlocking_Our_Futures.pdf

⁸⁶ Canadian HIV/AIDS Legal Network. *HIV/AIDS in Prisons: High-Risk Behaviours behind Bars - Info Sheet 2*, Montreal, Canadian HIV/AIDS Legal Network, 2001. Available: http://www.aidslaw.ca/Maincontent/issues/prisons/e_info_pa2.htm

⁸⁷ Anne Marie DiCenso, Giselle Dias and Jacqueline Gahagan. *Unlocking Our Futures: A National Study on Women, Prisons, HIV, and Hepatitis C*, *supra* note 85, at 29.

use⁸⁸, needle exchange in prison is troubling to many. For some, the idea of providing the equipment necessary to engage in illegal activity within correctional institutions is fundamentally at odds with a mandate to prohibit and reform criminal behaviour. The Commissioner of the Correctional Service of Canada recently recognized the Services's obligation to make harm reduction measures available that are in keeping with community health standards.⁸⁹ However, concerned that a needle exchange program might compromise its zero-tolerance policy, increase drug use and threaten institutional safety,⁹⁰ the Correctional Service of Canada has not to date taken steps to implement a pilot needle exchange program.

5.1.1 A Human Rights Analysis

The high rate of drug use and HIV infection means that the lack of clean needles in prisons has an adverse impact on drug dependent inmates. Although sharing dirty needles poses risks for any inmate, the impact on women is greater because of the higher rate of drug use and HIV infection in this population. This impact may be particularly acute for federally sentenced Aboriginal women.

The human rights analysis starts from the fact that Parliament chose to include protection against discrimination on the basis of substance dependence in the *Canadian Human Rights Act*.⁹¹ Harm reduction measures are a benefit available to drug dependent persons outside prison. Denying harm reduction measures that are consistent with accepted community health standards to incarcerated drug dependent inmates exposes them to increased risk.⁹²

Discouraging drug use among inmates and enhancing institutional safety are laudable goals. These goals are undeniably legitimate and important in the correctional context given the relationship between drug use and criminal activity. However, it is not clear that limiting the availability of harm reduction measures that are consistent with community health standards discourages drug use among drug dependent inmates or contributes to the safety of staff, inmates or the public.

Drug use in federal prisons continues to be widespread and that means that inmates use dirty needles. Studies have shown that the availability of needle exchange does not lead to an increase in drug use,⁹³ nor does a lack of clean needles discourage drug use in prison, even first-time use.⁹⁴

People are sharing needles — a needle exchange would really cut the risk (of infection).

A woman inmate

⁸⁸ Health Canada. *Canada's Drug Strategy*, The Office of Alcohol, Drugs and Dependency Issues, Ottawa, Public Works and Government of Services Canada, 1998, at 9. Available: http://www.hc-sc.gc.ca/hecs_sesc/cds/pdf/englishstrategy.pdf

⁸⁹ Correctional Service of Canada. *Making a Sustainable Difference in Corrections*, Remarks by Lucie McClung, Commissioner's Speeches, Commissioner of the Correctional Service of Canada, Ottawa, Correctional Service of Canada, November 8, 2003. Available: http://www.csc-scc.gc.ca/text/speeches/commish/03-11-08_e.shtml

⁹⁰ Correctional Service of Canada. "Correctional Service of Canada Releases Results of Inmate Survey at Joyceville Institution near Kingston, Ontario", *News Release*. June 5, 1998. Available: http://www.csc-scc.gc.ca/text/releases/98_06_05_e.shtml

⁹¹ CHRA, *supra* note 1, s. 25.

⁹² The Commission has previously expressed its support for a pilot needle exchange program in federal prisons. Canadian Human Rights Commission. *Annual Report*, Ottawa, Supply and Services Canada, 1995, at 34; Ottawa, Public Works and Government Services Canada, 1996, at 38–39; 1997, at 31–32; and 1998, at 27–28.

1996 - Available: http://www.chrc_ccdp.ca/ar_ra/ar1996/conteng.html

1997 - Available: http://www.chrc_ccdp.ca/ar_ra/ar1997/a_disable_e.html

1998 - Available: http://www.chrc_ccdp.ca/public/ar98_ra98/ar98_complete.pdf

⁹³ F/P/T Advisory Committee on Population Health, F/P/T Committee on Alcohol and Other Drug Issues, F/P/T Advisory Committee on AIDS and F/P/T Heads of Corrections Working Group on HIV/AIDS. *Reducing the Harm Associated with Injection Drug Use in Canada*, for the meeting of Ministers of Health, St. John's Newfoundland, Health Canada, Public Works and Government Services Canada, September 2001, at 10. Available: http://www.hc-sc.gc.ca/hecs_sesc/cds/pdf/injectiondrug_e.pdf

⁹⁴ *Ibid.* at 4

Zero tolerance is currently unenforceable, and this fact is being tacitly acknowledged by the Correctional Service when it provides bleach for needle cleaning or creates drug-free ranges and houses.

It is unlikely that Correctional Service's current practice of limiting the availability of harm reduction measures can be justified on the basis of undue hardship arising from safety, increasing as it does the risk of infection to inmates and, probably, to the public as well. The Federal/Provincial/Territorial Committee on Population Health has noted the risk to public safety that arises from the high rates of HIV amongst the prison population:

Large numbers of prisoners flow back and forth between the prison systems and the community. The presence of injection drug use in prisons and the behaviour of prisoners make it likely that blood-borne pathogens such as HIV, hepatitis B and hepatitis C will spread within that setting and to communities as well. Given the increased risk to communities from released prisoners who may have become infected with HIV, hepatitis C and other diseases while incarcerated, the prevention and treatment of harmful consequences arising from injection drug use in prisons represent important public health issues for all citizens.⁹⁵

A consideration of risk to public safety is currently absent from the Service's policy limiting the availability of harm reduction measures. Best practices for human rights compliance require a thorough consideration of all risks to safety arising from the introduction of additional harm reduction measures. This is necessary in order to ensure a complete and balanced analysis of undue hardship.

Although some correctional staff working in institutions have opposed needle exchange citing a concern of increased risk of needle sticks, studies of needle exchange programs in prisons elsewhere do not support this apprehension.⁹⁶ It is not clear that a needle exchange would increase risk and, in fact, pilot projects elsewhere show that a clean needle exchange program may make it easier to control the number of needles in an institution.

Given the benefit of harm reduction measures for drug dependent inmates, it is time to explore the introduction of additional measures that are consistent with community health standards.⁹⁷ We agree with the recent report of the Office of the Correctional Investigator that there is a need for the implementation of further harm-reduction measures that include needle exchange.⁹⁸

Recommendation No. 4

It is recommended that the Correctional Service of Canada implement a pilot needle exchange program in three or more correctional facilities, at least one of which should be a women's facility, by June 2004. The results of the pilot project should be monitored, disclosed and assessed within two years.

⁹⁵ *Reducing the Harm Associated with Injection Drug Use in Canada*, *supra* note 93, at 24–25.

⁹⁶ Canadian HIV/AIDS Legal Network. "Update on Needle and Syringe Exchange in Swiss Prisons" *Canadian HIV/AIDS Policy and Law Newsletter*, Volume 1, Number 4, Montreal, Canadian HIV/AIDS Legal Network, July 1995. Available: <http://www.aidslaw.ca/Maincontent/otherdocs/Newsletter/July1995/04SWITZE.html>

⁹⁷ Canada's Solicitor General says that the government is open to the idea of needle exchange programs in federal prisons. Canadian Broadcasting Corporation, "Ottawa considers needle exchange in prisons" *CBC News*, May 2003. Available: http://www.cbc.ca/stories/2003/05/17/wayneeaster_030517 See also: Canada. Parliament House of Commons. Standing Committee on Health. Report. *Strengthening the Canadian Strategy on HIV/AIDS*, Ottawa, Communication Canada, June 2003, Rec. 4. Available: <http://www.parl.gc.ca/InfoComDoc/37/2/HEAL/Studies/Reports/hearlp03-e.htm>

⁹⁸ Canada. Office of the Correctional Investigator. *Annual Report of the Correctional Investigator 2002-2003*, *supra* note 74, at 53.

5.1.2 Mental Health

The mental health issues faced by some federally sentenced women are considerable and tend to be different than those of their male counterparts. Many women are survivors of prior abuse, and the present effects of that abuse may impact on their mental health. More federally sentenced women than men have received a diagnosis of mental illness (schizophrenia, depression, etc.), and the Correctional Service of Canada's *2002 Mental Health Strategy for Women Offenders* (hereinafter, the Mental Health Strategy) notes that women in federal correctional institutions have a higher rate of self-mutilation and attempted suicide than their male counterparts.⁹⁹ It is estimated that almost half of all women prisoners have attempted suicide at some point in their lives.¹⁰⁰

More than two thirds (71%) of the women in maximum security had previously attempted suicide compared with 21% of the maximum security males.

Kelley Blanchette and Lawrence L. Motiuk. *Maximum-security Female and Male Federal Offenders: A Comparison*, Ottawa: Research Branch Correctional Service of Canada, March 1997, at 6. Available: http://www.csc_scc.gc.ca/text/rsrch/reports/r53/r53e_e.pdf

The gender-specific nature of some mental health issues and their associated behaviours require a gender-responsive approach. Among other things, this is what the Mental Health Strategy is intended to deliver. The Mental Health Strategy promises a coordinated continuum of care based on five key principles: wellness, access, women-centered, client participation and least restrictive means.¹⁰¹

The high incidence of self-mutilation and previous suicide attempts among women inmates can be indicators of problems that are intensified for some women in the correctional environment. Maximum security women who harm themselves and some medium and minimum security women incarcerated in the Structured Living Environment receive Dialectical Behaviour Therapy (DBT). This form of therapy targets the development of skills to identify and change behavioural, emotional and thinking patterns associated with significant problems in daily living. However, research has shown that for some women, self-abusive behaviour is a way of surviving the emotional pain and distress which is rooted in traumatic childhood and adult experiences of abuse and violence.¹⁰² This is one of the reasons why prisoners' rights advocates and others have questioned the appropriateness of the therapy in cases where women are harming themselves primarily as a means of coping with the distress caused by incarceration.¹⁰³ Instead they advocate more effective interventions such as peer support, training that continues into the community, harm reduction measures and non-judgmental counselling.¹⁰⁴

⁹⁹ Jane Laishes. *The 2002 Mental Health Strategy for Women Offenders*, supra note 23, at 7.

¹⁰⁰ Marc Daigle, Mylène Alarie and Patrick Lefebvre. "The problem of suicide among female prisoners," *Forum on Corrections Research*. Ottawa: Research Branch, Correctional Service of Canada, Volume 11, Number 3 - Women Offenders, September 1999, at 41. Available: http://www.csc_scc.gc.ca/text/pblct/forum/v11n3/v11n3a11e.pdf

¹⁰¹ Jane Laishes. Mental Health, Health Services, *The 2002 Mental Health Strategy for Women Offenders*, supra note 23, at 11-12.

¹⁰² Anita Dockley. "Suicide and Self-harm Prevention: Repetitive Self-harm among Women in Prison," *Prison Service Journal*, Issue 138, 27-29.

¹⁰³ Cathy Fillmore, Colleen Anne Dell and Elizabeth Fry Society of Manitoba. *Prairie Women, Violence and Self-Harm*, *Prairie Women's Health Centre of Excellence*, Winnipeg, August, 2000, at 72. Available: http://www.pwhce.ca/pdf/self_harm.pdf

¹⁰⁴ *Ibid.* at 84.

I can't trust my CO [corrections officer] because everything gets written down.

Woman inmate

Psychological counselling is one way of addressing mental health issues. According to federally sentenced women, individual counselling has proven helpful in dealing with the effects of past physical and sexual abuse.¹⁰⁵ The Correctional Service of Canada has acknowledged the importance of access to counselling in its Mental Health Strategy, noting that "[p]sychological and individual counselling services should be available on a voluntary basis to deal with personal issues", although the Strategy appears to focus on the use of DBT not counseling for "intensive" intervention.¹⁰⁶ But effective counselling requires a relationship of trust and a guarantee of confidentiality, features often absent in the prison setting, where many federally sentenced women fear that whatever they say may end up recorded in their file.¹⁰⁷

Although the Correctional Service's Mental Health Strategy recognizes the importance of counselling at least for intermediate care, women inmates at two institutions told the Commission that their access to the psychologist was restricted to eight to ten sessions per year. This was confirmed by a Correctional Service official at one of the institutions. Some women said the restriction was particularly difficult for them because they did not have enough outlets to deal with issues concerning prior sexual abuse and that this interfered with their ability to benefit from other programs. Some Correctional Service officials also said that many women are not ready for programming until they have begun to deal with the effects of past abuse. At the same time, we recognize that some experts in this field suggest that the development of coping skills should precede intensive counselling for past trauma and victimization. However, it remains important to provide support to women who articulate and demonstrate the need to deal with the present effects of past trauma and victimization. Failing to do so may create or contribute to the barriers federally sentenced women face to successful reintegration.

What we were told about the lack of sufficient individual counselling for federally sentenced women reveals a significant flaw in the successful implementation of the Mental Health Strategy. It does not appear to provide for a means of ensuring compliance with the services it prescribes. The same concern was raised by the Board of Investigation in its report on the tragic suicide of an Aboriginal woman at the Women's Unit of Saskatchewan Penitentiary on February 5, 2000. "[T]here does not appear to be any action plan to either adopt or ensure compliance of the mental health strategy..." the Board said.¹⁰⁸ Nor was the Commission able to determine whether resource indicators, which determine the per capita ratio of psychologists to women inmates for various facilities, are adhered to in the regions. Wardens have some discretion to decide how resources will be allocated, and there are facilities that have too few psychologists based on the per capita ratio.

No matter how good a strategy may be on paper in responding to the needs of federally sentenced women, it is unlikely that the Correctional Service of Canada will be able to protect human rights without enough resources applied appropriately in carrying out the strategy. This will require

¹⁰⁵ Correctional Service of Canada. *Creating Choices: The Report of the Task Force on Federally Sentenced Women*, supra note 4, at 51.

¹⁰⁶ Jane Laishes. *The 2002 Mental Health Strategy for Women Offenders*, supra note 23, at 20-33.

¹⁰⁷ We support the recent suggestion of the Office of the Correctional Investigator that a distinction be made between information acquired for diagnosis and treatment purposes, and information necessary to assess risk. See Canada. Office of the Correctional Investigator. *Annual Report of the Correctional Investigator 2002-2003*, supra note 74, at 46.

¹⁰⁸ Decision of the Board of Investigation. *Board of Investigation into the Suicide of a Segregated Inmate in the Female Unit at the Saskatchewan Penitentiary on February 5, 2000*, File 1410-2-413. Performance Assurance Sector, Correctional Service of Canada, August 2000, at para. 35.

resources and the proper allocation and monitoring of those resources. Although the Mental Health Strategy was first introduced in 1997 and revised in 2002, it has not yet been fully implemented due to challenges that include fiscal limitations and difficulties in recruiting qualified staff. Both of these barriers must be addressed by the Correctional Service and the Government of Canada.

The Strategy also identifies gaps in mental health interventions, including the need for research into the assessment and management of federally sentenced offenders with Fetal Alcohol Spectrum Disorder (FASD). The Solicitor General has expressed deep concern about the role of FASD in criminal behaviour and recidivism, and the Correctional Service has already begun work in this area in order to identify what intervention is required.¹⁰⁹ The Commission encourages the Service to give priority to this research so that assessment, management and programming strategies can be operationalized as soon as possible.

5.2 Supervision and Inmate Management

Women respond differently than men to supervision and conditions of incarceration. In some instances, women respond differently because of unmet needs, for example, needs stemming from earlier trauma. In other cases, women respond differently because they relate to others differently than men. The way women inmates relate to others prompted some correctional staff to describe them as needy and difficult to work with. More and better education and training of correctional staff would contribute to countering this perception. It must also be noted that not all correctional staff who spoke to us shared this view of working with federally sentenced women.

I like working with women... early contact and building good rapport are critical.

A primary care worker

More and better education and training of correctional staff would contribute to countering this perception. It must also be noted that not all correctional staff who spoke to us shared this view of working with federally sentenced women.

... standard policies and procedures in correctional settings (e.g., searches, restraints, and isolation) can have profound effects on women with histories of trauma and abuse, and they often act as triggers to retraumatize women who have PTSD (post traumatic stress disorder).

Gender-Responsive Strategies, supra note 3, at 25.

The Commission is concerned that a number of Correctional Service practices relating to the supervision and management of inmates may unjustifiably discriminate against women. However, this report addresses only two such practices, namely the use of male guards and segregation.

5.2.1 Issues Concerning Male Guards

Interviews with federally sentenced women suggest that harassment by male guards is not widespread. And some of the incidents reported involved outside contractors brought in to repair facilities, rather than corrections staff. However, in the Commission's view, even isolated incidents warrant attention. Harassment is particularly devastating for women with histories of abuse. As noted in Chapter 1, more than 80% of federally sentenced women have such histories, and more than half are survivors of sexual abuse. This is why it is particularly disturbing that one woman reported that a guard had offered her leave passes in exchange for sex, and another woman told us that she was observed by male guards when showering and dressing.

¹⁰⁹ Correctional Service Canada. *Working Together*, CSC National Headquarters Working Group on Fetal Alcohol Syndrome/Fetal Alcohol Effects (FAS/E), Ottawa: Aboriginal Initiatives Branch, Correctional Service of Canada Available: http://www.csc_scc.gc.ca/text/prgrm/correctional/abissues/challenge/3_e.shtml

Although the Correctional Service of Canada has implemented some safeguards to mitigate the potential risk of abuse and reduce the vulnerability of female inmates, incidents of harassment by male guards continue and inmates do not believe that the current grievance system will help them. One measure implemented by the Service is a protocol for front-line male staff working at women's facilities.¹¹⁰ Among other rules, the protocol bars male workers from access to women's living quarters when they are most likely to be showering and dressing, and night rounds are to be done by two guards, only one of whom can be male. However, a Cross-Gender Monitor appointed by the Correctional Service in 1998 to monitor implementation of the protocol found extensive violations of the protocol. And despite the interest of many female inmates in having male guards, her final report recommended that men not be employed as front-line primary care workers.¹¹¹

During our interviews, many women inmates confirmed that the protocol was not always followed. Fearful of reprisal, many of them did not complain about inappropriate behaviour by guards. However, many women, even some of the women who had complaints about violations of the protocol, wanted the male guards to be there, citing as beneficial the opportunity to see men in a positive role, to improve how they relate with them, along with an acceptance of the necessity of dealing with men on release. This information is consistent with the results of a survey conducted by the Cross-Gender Monitor in which 82% of federally sentenced women and 78% of staff supported the use of male guards.

Consistent with the Correctional Service's gender-neutral staffing policy, there are currently men employed in front-line positions in all the regional facilities for women. This policy is supported by the union. The Correctional Service of Canada has also implemented policies and practices that seek to ensure that qualified staff are hired and trained, but advocacy groups argue that the selection criteria are ignored when male staff transfer to the women's facilities and that the number of training days has been cut. Some prisoners' rights advocates, including the Elizabeth Fry Societies, strongly argue that men should not be permitted to guard women.

5.2.1.1 A Human Rights Analysis

"... the effect of cross-gender searching is different and more threatening for women than for men."
Weatherall v. Canada (Attorney General), [1993] 2 S.C.R. 872, at para. 4.

The deployment of male guards in front-line positions adversely affects some federally sentenced women because women inmates are more likely than men inmates to be survivors of sexual abuse. In some circumstances, courts have recognized that the psychological effects of some forms of intervention, including strip searches, may be traumatic for individuals who have been subjected to abuse and this effect can be particularly acute for women.¹¹²

These considerations raise questions about whether the Correctional Service's gender-neutral staffing policy strikes the proper balance between the right of male guards not to be discriminated

¹¹⁰ Correctional Service of Canada. *CSC Women's Institutions and Maximum Security Units: National Operational Protocol — Front Line Staffing*, Ottawa, Correctional Service of Canada.

Available: http://www.csc_scc.gc.ca/text/pblct/nopfrontlinestaffing/index_e.shtml

¹¹¹ Thérèse Lajeunesse and Associates. *The Cross Gender Monitoring Project Federally Sentenced Women's Facilities: Third and Final Report*, Ottawa, Correctional Service of Canada, September 2000, Recommendation #1.

Available: http://www.csc_scc.gc.ca/text/prgrm/fsw/gender3/toc_e.shtml

¹¹² *R. v. Golden*, [2001] 3 S.C.R. 679, at para. 90.

against in employment and the right of federally sentenced women not to be discriminated against in correctional services relating to custody.

We start by considering why the gender-neutral staffing policy was adopted and its purpose. In 1989, following the decision of the Public Service Commission Appeal Board¹¹³ that ruled that there was no *bona fide* occupational requirement for a correctional supervisor to be female, the Correctional Service decided to allow men to work in the facilities for women. It is important to note the decision of the Appeal Board was based on the fact that the duties of the position in question did not include searching women or being present when women were being searched. Based on this, it appears that the Service adopted the gender-neutral staffing policy for non-discriminatory reasons rationally related to an aspect of its operations, the safe and humane supervision of female offenders. We must also note that the gender neutral staffing policy contributes to a benefit identified by most of the federally sentenced women we interviewed, the positive contribution of male staff to women's rehabilitation. While leaving open the possibility that this positive aspect may prove to be outweighed by the policy's discriminatory impact, its value signals the importance of looking for alternatives short of excluding men from employment at the regional facilities.

The third branch of the test asks whether there are any alternatives to the gender neutral staffing policy. As implied above, the most obvious alternative would be a prohibition against men being employed in front-line positions in facilities for women. This would result in a blanket rule denying men employment as primary workers based on their gender, although they could continue to work in programming, teaching, maintenance, supervision, etc. While such a dramatic measure may eventually prove to be necessary, the Commission believes that the Correctional Service of Canada must vigorously pursue other alternatives before impairing the employment rights of men in such a fashion.

To date, Correctional Service has attempted to minimize the impact of men in front-line positions by implementing a protocol, offering training and improving its staff selection process. We note that the protocol has achieved some success in mitigating the negative effects of the presence of male guards on women inmates at risk, but it could be improved. One woman inmate told us that restricting access by male guards to women inmates' quarters between 10 pm and 7 am is not working: some women are in their beds before 10 pm and after 7 am. Extending the hours of restricted access from 9:30 pm to 7:30 am may improve the effectiveness of the protocol.

It is also imperative that the Correctional Service follow the protocol in its scheduling practices. During our visits to the regional facilities, male guards expressed concern about being assigned duties that were in clear violation of the protocol, while at the same time feeling powerless to challenge the assignment because of possible discipline or other adverse career consequences. The protocol should be amended to include protection for staff who refuse to perform duties that are assigned in violation of the protocol.

¹¹³ *King v. Canada* (unreported) July 5, 1989 - File: 89-21-PEN-11.

Other avenues intended to support compliance with the protocol need to be improved, including training and education. Although the content of the Women-Centred Training for front-line correctional staff in women’s facilities is very good, we agree with advocacy groups that an abridged form of the training should be offered annually as a refresher, and that taking the training should be a strict requirement for all staff transferring from a male correctional facility. This, coupled with making a clearer link between staff compliance with the protocol and performance expectations,¹¹⁴ would likely contribute to the protocol’s effectiveness.¹¹⁵ We recommend that the protocol be elevated to the status of a formal policy through the issuance of a Commissioner’s Directive or Standard Operating Procedure so that staff compliance with the protocol will become an integral part of performance appraisals.

Recommendation No. 5

It is recommended that the CSC take immediate steps to ensure the *National Operational Protocol — Front Line Staffing* be strictly respected, viz:

- a. the *National Operational Protocol — Front Line Staffing* be made into a formal policy in the form of a Commissioner’s Directive or Standard Operating Procedure;
- b. that the ten-day Women-Centered Training be mandatory for everyone who works in a women’s facility;
- c. that a refresher course on the Women-Centered Training for Correctional Service front line staff be offered annually; and
- d. that the implementation of the National Operational Protocol be assessed by an independent external evaluator after two years.

5.2.2 Segregation

Segregation is an old correctional practice that is currently justified on administrative or disciplinary grounds. The Correctional Service of Canada’s power to segregate inmates on administrative grounds is set out in section 31 of the *Corrections and Conditional Release Act*. It can only be

In 2002–2003, for a population of 376 women, there were 265 admissions to administrative segregation, of which 83 were for a period of more than 10 days.

Data provided by Correctional Service of Canada

exercised where there is no other reasonable alternative and where there are reasonable grounds for believing an inmate may jeopardize the safety of the penitentiary or a person, the inmate’s own safety will be jeopardized, or that the continued presence of the inmate in the general population would interfere with the investigation of a criminal or serious disciplinary offence.

¹¹⁴ Correctional Service of Canada. "Code of Discipline", *Commissioner’s Directive 060*, Ottawa, Correctional Service of Canada, March 1994. Available: http://www.csc.scc.gc.ca/text/plcy/doc/060_cd.pdf

¹¹⁵ Note the Correctional Service of Canada’s own research indicating that more empathic and non-punitive attitudes on the part of correctional officers could be fostered by "a reward system that is based more fully on correctional orientations". Michel Larivière. "Antecedents and Outcomes of Correctional Officers’ Attitudes Towards Federal Inmates: An Exploration of Person–organization Fit", *Forum on Corrections Research*, Volume 14, Number 1, Academic Contributions, Ottawa: Research Branch, Correctional Service of Canada, January 2002, at 23.

There are good reasons to be concerned about the negative impact of administrative segregation on all inmates, but research shows that women are even more deeply affected by separation from the general inmate population than men are.¹¹⁶ Women tend to experience segregation as rejection, abandonment, invisibility and a denial of their existence.¹¹⁷ Segregation does not further women's rehabilitation and it often jeopardizes a woman's safety and mental health by exacerbating her distress. The devastation caused by segregation was made poignantly real by a federally sentenced woman who made a submission to the Commission: "*This (segregation) has affected me greatly as now I see or perceive myself to (sic) being a monster and rejected.*"

There are also indications that Aboriginal federally sentenced women and other racialized women are singled out for segregation more often than other inmates. Data from Correctional Service of Canada show that although Aboriginal women comprised 28% of all incarcerated women in February 2003, they accounted for 35.5% of all involuntary admissions to administrative segregation.¹¹⁸ Correctional Service officials and women inmates alike told us that, based on their observations, Aboriginal women are segregated more frequently and for longer periods. Data made available by the Correctional Service indicate that, as of March 31, 2003, one Aboriginal federally sentenced woman had been in segregation for 587 days.

This is of concern to the Commission because segregation imposes an even greater hardship on some Aboriginal women inmates than it does on non-Aboriginal women inmates as it may sever community ties, disrupt healing opportunities and diminish access to spiritual and cultural resources, practices and programming.¹¹⁹

Other women reported that there is a different standard for white and black women; for example, a white woman received 24 hours in segregation for the same action that resulted in a black woman being segregated for three weeks.

In her report, Justice Arbour made a series of recommendations relating to judicial supervision of segregation or review of segregation decisions by an independent adjudicator.¹²⁰ These were echoed by the Correctional Service's own Task Force on Administrative Segregation¹²¹ and, more recently, by the Office of the Correctional Investigator.¹²² Unfortunately, the Correctional Service has not adopted these recommendations, nor does it appear that reasonable efforts have been made to develop approaches to segregation or alternatives to it that reflect the needs and characteristics of women offenders.

¹¹⁶ Correctional Service of Canada. *Task Force Report on Administrative Segregation — Commitment to Legal Compliance, Fair Decisions and Effective Results*, Ottawa, Correctional Service of Canada, March 1997, under section K. Women Offender, at 1. Available: http://www.csc.scc.gc.ca/text/pblct/taskforce/toc_e.shtml

¹¹⁷ Kelly Hannah-Moffat and Margaret Shaw, eds. *An Ideal Prison? Critical Essays on Women's Imprisonment in Canada*, Halifax, Canada. Fernwood Publishing, 2000, at 130.

¹¹⁸ Data obtained from Correctional Service of Canada.

¹¹⁹ Correctional Service of Canada. *Task Force Report on Administrative Segregation — Commitment to Legal Compliance, Fair Decisions and Effective Results*, *supra* note 116, Section E at 1.

¹²⁰ Louise Arbour. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, *supra* note 5, Recommendation 9, at 255-256.

¹²¹ Correctional Service of Canada. *Task Force Report on Administrative Segregation — Commitment to Legal Compliance, Fair Decisions and Effective Results*, *supra* note 116, Recommendation 3.

¹²² Canada. Office of the Correctional Investigator. *Annual Report of the Correctional Investigator 2002-2003*, *supra* note 74, at 53.

Recommendation No. 6

It is recommended that:

- a. the Correctional Service of Canada implement independent adjudication for decisions related to involuntary segregation at all of its regional facilities for women. The impact of independent adjudication on the fairness and effectiveness of decision making should be assessed by an independent external evaluator after two years;
- b. a Segregation Advisory Committee for Women's Institutions should be created with membership from both within and outside the Correctional Service, including representatives of Aboriginal communities; and
- c. the Correctional Service should examine alternatives to long-term segregation for women offenders, in consultation with external stakeholders.

5.3 Facilities

Although the new facilities for women offer many improvements, there is increasing concern about the negative impact of incarcerating women in multi-level facilities in which women at all three security levels are housed. Relatively few men are incarcerated in such facilities; there are only two for men, and 40 of the remaining 43 facilities house only one security level. Two of the three exceptions to this arrangement house minimum and medium security men inmates, and the third facility houses medium and maximum security level men inmates. In contrast, all federally sentenced women, with the exception of those incarcerated at the Healing Lodge, are located in facilities where women with all three security levels share the facility.

During the interviews, some minimum and medium security women expressed fear about sharing facilities with maximum security women, and some Correctional Service officials told the Commission that overall security was likely to be heightened because of the presence of maximum security women in separate locked units. Other minimum and medium security women were more concerned about the probable restriction on their movements, for example, some institutions may institute a pass system to control movement within the facility. Other concerns expressed by inmates included reduced access to the gym, the visiting area, the sweat lodge and health services because of the need to share these services with maximum security inmates. These concerns will tend to exacerbate an already stressful environment and this result may be difficult to rectify because of the lack of room to expand at many of the newly constructed regional facilities for women.

5.3.1 Minimum Security Facilities for Women

As noted in Chapter 2, there is only one minimum security facility for federally sentenced women, the Isabel McNeill House. But inmates are reluctant to transfer there because of the threat of its closure, and when the Commission visited the facility in August 2002, it was not filled to capacity. Because there is no programming available at the Isabel McNeill House, most women transfer there because of the employment opportunities. Unfortunately, it appeared that most of the jobs available were low-skill positions such as cleaners and cashiers.

¹²³ Correctional Service of Canada. "Classification of Institutions", *Commissioner's Directive*, number 006, Section 10, Available: http://www.csc.scc.gc.ca/text/plcy/doc/006_cd.pdf

The lack of minimum security facilities for federally sentenced women prevents them from being incarcerated in the least restrictive conditions possible as required by the *Corrections and Conditional Release Act*. It also means that the Correctional Service of Canada's policy of not fencing the perimeter of a minimum security institution and of regulating the movement and association of inmates with little or no staff supervision is observed in facilities for men but not in those for women.¹²³ Thus, minimum security women live with physical barriers such as fences, locked gates, razor wire and cameras while their male counterparts tend to be housed in facilities that do not even have chain-link fences.

This situation is unfortunate, particularly given the relatively recent construction of the regional facilities. Consideration should be given to placing the minimum security houses outside of the perimeter fence. This is definitely possible for facilities such as the Fraser River Valley Institute, a former prison for men that is being retrofitted as a multi-level security institution for federally sentenced women.

Recommendation No. 7

It is recommended that the Correctional Service of Canada consider the needs and low risk of minimum and medium security women inmates in the construction of additional facilities for women.

5.3.2 Women in Maximum Security

Maximum security women are regularly moved out of their units to avail themselves of facilities that are shared among the different inmate populations. How they are moved from the secure unit is determined by a risk assessment conducted by staff using a four-level "movement framework."¹²⁴ A woman designated level 1 can leave the secure unit in handcuffs, a body belt and/or leg irons with 2 staff escorts. Level 4 does not require the use of restraint equipment and requires only one escort.

In contrast, maximum security men inmates tend to enjoy much more freedom of movement because they are typically housed in single-level facilities. Such inmates do not wear restraints when moving through the institution and are not escorted by staff except in unusual circumstances.

By contrast with men inmates, women who are classified as maximum security tend to earn this designation because of problems with institutional adjustment, rather than because they pose a risk to public safety.¹²⁵ Many maximum security women have been reclassified rather than classified as maximum during the initial offender intake assessment process. Institutional adjustment problems stem from a blend of risk and need, which manifests as increased self-harm, fights with inmates and staff, and damage to property. Research and operational experience at the Correctional Service of Canada indicate that these behaviours can be a response to frustration, boredom, refusal to follow rules, problems with other inmates or a means of gaining control.

Despite the fact that the majority of maximum security women are labelled as having problems with institutional adjustment, the *Secure Unit Operational Plan*, which governs most aspects of the custody, care and supervision of maximum security women inmates, focuses mostly on how to control security risks, rather than meet needs related to institutional adjustment.¹²⁶ Indeed, the

¹²⁴ Correctional Service of Canada. *Secure Unit Operational Plan*, *supra* note 33, at 37-38.

¹²⁵ Correctional Service of Canada. *Secure Unit Operational Plan*, *supra* note 33, at 9-10.

¹²⁶ Correctional Service of Canada. *Secure Unit Operational Plan*, *supra* note 33.

means chosen to control risk (physical segregation, controlled movement, etc.) probably increase women's problems with institutional adjustment and thus reduce their chances of obtaining a lower security classification. Finding different ways to supervise and manage federally sentenced women might enhance institutional safety, as well as benefiting the women incarcerated in those institutions.

Human Rights and the Duty to Assist Federally Sentenced Women with Rehabilitation and Reintegration

Programming is an integral part of the rehabilitation and reintegration process, and one of the main correctional services provided by the Correctional Service of Canada.¹²⁷ The *Corrections and Conditional Release Act* imposes a duty on the Correctional Service to provide programming that is responsive to the needs of women and Aboriginal offenders, as well as to the needs of other offenders with special requirements.¹²⁸ Program strategies and program implementation must be consistent with these objectives and respect the special needs of offenders who are vulnerable to discrimination on one or more grounds of discrimination.

6.1 Meeting the Rehabilitation Needs of Federally Sentenced Women

In 1994, the *Correctional Program Strategy for Women Offenders*¹²⁹ was developed to provide consistency in programming across the regional facilities. The strategy promised to deliver a broad range of programs to federally sentenced women in four core areas: abuse/trauma issues, education and employment skills, substance abuse, and parenting. These programs were considered essential to reintegration.

The strategy is currently being revised. Consideration is being given to changing the core program areas to categories of reintegration programming: correctional programs, mental health programs, education programs, employability programs and social programs. The program categorization would be the same for all offenders, and Correctional Service officials have explained that it is based on the premise that the criminogenic factors or the reasons why the women and men offender populations commit crimes, are the same.

6.1.1 A Systemic Flaw in Identifying Program Needs

Program referral and case management are guided by the inmate's correctional plan, which is based on the results of the dynamic risk assessment. As discussed in Chapter 4, the dynamic risk assessment uses the same instrument for federally sentenced women and men to identify their needs for reintegration programming. Both the gender-neutral nature of Correctional Service's proposed program categories and its use of the same instrument to identify programming needs reflects the premise that the criminogenic factors of men and women are the same. However, as noted earlier, there is considerable research suggesting that they are not.¹³⁰

A correctional system predicated on male norms, needs and behaviours, and a gender-neutral view of criminogenic factors cannot adequately serve federally sentenced women. Specifically, program categories that fail to address the unique reasons why women commit crimes will penalize women inmates by impairing both their chances of being released at the earliest possible date and their

¹²⁷ CCRA, *supra* note 37, s. 76.

¹²⁸ CCRA, *supra* note 37, ss. 4(a), 77 and 80

¹²⁹ Correctional Service of Canada. *Correctional Program Strategy for Federally Sentenced Women FSWN-18*, Ottawa, Correctional Service of Canada, July 1994, at 3. Available: http://www.csc_scc.gc.ca/text/prgrm/fsw/fsw18/toce_e.shtml.

¹³⁰ See references cited in Chapter 4, at *supra* 53.

chances of successful reintegration.¹³¹ If its programming is to be truly gender-responsive, the Correctional Service must ensure that the basis of programming — the identification of dynamic risks or criminogenic factors — is valid for women offenders. And it must develop truly gender-responsive programming based on program categories that actually address women's rehabilitation needs.

Recommendation No. 8

The Commission recommends that the Correctional Service of Canada:

- a. ensure that the revised program strategy for women acknowledges that some of women's criminogenic factors are unique;
- b. develop and implement gender-responsive programming that addresses the full range of women's criminogenic factors.

6.1.2 Poor Access to Programming

Federally sentenced women repeatedly told us that many programs are not offered at all institutions and that there are long waiting lists for some programs. Women have had to waive their right to a National Parole Board conditional release hearing because a lack of access to programming means they were unable to fulfill the requirements of their correctional plan. In her report earlier this year, the Auditor General noted that the Correctional Service had difficulty delivering programs prescribed for individual offenders, particularly those serving sentences of less than three years.¹³² In its submission to the Commission, the Office of the Correctional Investigator said it had received 18 complaints from women on this issue over the past two years, and that the issue has been raised by 8 out of 10 prison inmate committees.¹³³

Access to programming for federally sentenced women needs to be improved. A recent move to individualized programming with ongoing registration should help. It will permit individual women to access programming without waiting for a new session of programming to begin. But the Correctional Service must continue to look for creative ways to offer needed programming to the small population of federally sentenced women, in particular by making use of community resources.

6.1.3 The Promise of an Aboriginal Program Strategy for Federally Sentenced Women

Both of the concerns canvassed above — systemic flaws in how programming needs are identified and poor access to programming — have unique implications for Aboriginal federally sentenced women.

¹³¹ It should also be noted that researchers for the U.S. Department of Justice suggest that women's risk of re-offending is tied to a lack of transitional programs and support systems in their communities, not criminogenic factors. See *Gender Responsive Strategies*, *supra* note 3, at 20.

¹³² Auditor General of Canada. Report. "Correctional Services Canada — Reintegration of Women Offenders", Chapter 4, *supra* note 22, at para. 4.59–4.64.

¹³³ Office of the Correctional Investigator. *Response to the Canadian Human Rights Commission's Consultation Paper for the Special Report on the Situation of Federally Sentenced Women*, *supra* note 65, at 3.

In the 1994 *Correctional Program Strategy*, the Correctional Service promised to create a separate, but parallel program strategy for Aboriginal women. This promise has not yet been met. The Correctional Service has created programs with content specifically for Aboriginal women offenders in some of the same core areas identified for all inmates. Women inmates who have been able to access these programs (e.g., Spirit of a Warrior) spoke very highly of them.

"Aboriginal people in prison have unique perspectives and needs."

Supreme Court of Canada in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, at para. 60.

Interviews indicated that Aboriginal women inmates who were not located at the Healing Lodge had very limited access to Aboriginal programming. Correctional Service officials said that if access to Aboriginal programming was a problem for an inmate in one of the regional facilities, she might have to consider transferring to the Healing Lodge. But more than a decade ago, *Creating Choices* argued that women should not have to choose between programming and living close to their children and families.¹³⁴ Being forced to choose between access to programming and the need to maintain family ties is not equality for federally sentenced Aboriginal women.

More fundamental, however, is the question of whether the programming needs of Aboriginal offenders, including Aboriginal women, are being met. Representatives of some stakeholder groups assert that "rehabilitation" is not an Aboriginal concept.¹³⁵ They point out that the goal of Aboriginal correctional philosophy is the healing of the individual and community. While this may be true for some Aboriginal offenders, there are also others who wish to have access to reintegration programming that addresses their criminogenic factors. It is important that the criminogenic factors of Aboriginal offenders are addressed in both the structure of programming and its content.

6.1.4 Progress in Substance Abuse Programming

Relapse into substance abuse by federally sentenced women is one of the key factors in the suspension of conditional releases.¹³⁶ For women who are substance dependent, inadequate treatment and a lack of ongoing support in the community are barriers to their effective rehabilitation and reintegration. The fact that a higher proportion of substance abusers than non-abusers are classified as maximum security, and a significant number of maximum security women are released directly into the community, suggests that there is a need to target intervention to these women in order to assist their reintegration.¹³⁷

The Correctional Service has recently developed and is now piloting the Woman Offender Substance Abuse Program in all the regional facilities. The program is a new approach to treating women's addictions and may serve as a model for other gender-responsive programming in the future. The program has been very favourably reviewed in the recent report of the Auditor General.

¹³⁴ Correctional Service of Canada. *Creating Choices: The Report of the Task Force on Federally Sentenced Women*, *supra* note 4, at 76.

¹³⁵ Patricia Monture-Angus. *The Lived Experience of Discrimination: Aboriginal Women Who Are Federally Sentenced*, *supra* note 43, at 1.

¹³⁶ Auditor General of Canada. Report. "Correctional Services Canada — Reintegration of Women Offenders", Chapter 4, *supra* note 22, at para. 4.66. See also: Kelley Blanchette and Craig Dowden, *An Investigation into the Characteristics of Substance-Abusing Women Offenders – Risk, Need and Post-Release Outcome*, Ottawa: Research Branch, Correctional Service of Canada, April 1999, at iv. Available: http://www.csc_scc.gc.ca/text/rsrch/reports/r81/er81.pdf

¹³⁷ Kelley Blanchette and Craig Dowden. *An Investigation into the Characteristics of Substance-Abusing Women Offenders – Risk, Need and Post-Release Outcome*, *supra* note 136, at 14–15.

Developed and tested with women inmates in the general population, its applicability and effectiveness with subpopulations such as women with cognitive limitations or mental health concerns are unclear and untested. A second pilot project involving a special-needs test group will be necessary to ensure that the program accommodates the needs of these women, for whom the program may work best if it is delivered one on one or in a small group setting. This would likely require the allocation of further resources. In general, the new program is far more resource intensive than its predecessor, and it will require ongoing and permanent funding to achieve success.

There is (also) a need for programming for women offenders who import drugs, but don't necessarily use them.
Correctional Service of Canada official

There is also uncertainty about whether the program can be modified for Aboriginal female offenders, or if a separate substance abuse program should be developed for this group. Given the Correctional Service's four-year-old research findings that an extremely high proportion of Aboriginal women are substance abusers, and its seeming awareness of the need for substance abuse programming tailored for Aboriginal women, it is puzzling that the programming needs of this inmate population have not been a higher priority.¹³⁸ Given the disproportionate number of Aboriginal women inmates who are substance abusers, tailoring a program to meet their needs makes sense.

"... the time, dollars and energy devoted to drug seeking dogs, prisoner frisks and drug surveillance tests is unproductive to a prison population with such a high addictions rate."
Staff at an Elizabeth Fry Society

Harm reduction and the absence of punishments are central features of the new substance abuse program. Women who continue to use drugs or alcohol and those who suffer relapse will be able to participate in the program. If Aboriginal inmates are to benefit from this change in therapeutic approach, it will be necessary for the Correctional Service to relax its zero-tolerance policy. Some of the women interviewed at the Healing Lodge told the Commission they feared being "shipped out" for slippages, even though they were likely to need enhanced rather than diminished emotional support during relapses.

The non-punitive nature of the new substance abuse program and its recognition and acceptance of relapses as part of the recovery process are at odds with the Correctional Service policy on random urinalysis testing.¹³⁹ That policy currently provides that an inmate with a positive random test shall be subject to the disciplinary

(They) go overboard if someone gets a dirty urinalysis by putting them in seg or taking away programs. It only pisses people off and leads to greater drug use.
A minimum security woman inmate

¹³⁸ "Aboriginal women were overrepresented amongst substance abusers (N=251 federal women offenders). An extremely high proportion (93%) of Aboriginal women was classified as substance abusers, compared to 49% of non-Aboriginal women. This difference was statistically significant, and highlights the need for substance abuse programming tailored for Aboriginal women..." (emphasis added). Kelley Blanchette and Craig Dowden. *An Investigation into the Characteristics of Substance-Abusing Women Offenders – Risk, Need and Post-Release Outcome*, supra note 136, at ii-iii.

¹³⁹ This policy has a statutory basis: CCRRA, supra note 37, s. 54(b).

process.¹⁴⁰ There is a mixed message here about how the Correctional Service deals with substance abuse and it is unclear what impact this may have on inmates struggling with conquering drug dependence.

6.1.5 The Need for Improved Employment and Employability Programming

It's very difficult for women to get into CORCAN. I would like the opportunity to work and make some money.

Minimum security woman inmate

Meaningful employment opportunities are of pressing concern for federally sentenced women, many of whom demonstrate low rates of education and employability on incarceration, yet are the sole supporters of one or more children. In terms of vocational programming, some opportunities are available through CORCAN, a special operating agency responsible for prison industries, but most of its offerings go to men. In part, this is because the building plans for the regional facilities for women neglected to allocate space for prison industries.

The Correctional Service has recognized that it must improve employment and employability programming for all inmates and its efforts in this regard have intensified in 2003. It has made provision for inmates to take three-month training programs leading to certification in certain high-demand areas such as forklift operation and food safety inspection. This type of programming should prove to be of benefit to federally sentenced women, many of whom are serving shorter sentences than men. But these opportunities must be made available to women. So far, very few women inmates are aware of the program's existence, and fewer have begun taking advantage of certification opportunities.

It is also possible for inmates to get on-the-job experience through community-based work releases. Federally sentenced women who have participated in this program spoke highly of their experiences. Such opportunities are rare and much sought-after by women. Given the generally lower risk profile of women inmates, it makes sense for the Correctional Service to bring a focus to developing jobs for women in the community. However, the Service's policy on the availability of work releases must be consistent with this focus.¹⁴¹ In particular, it is important

(We) are starved for vocational training.... told that the best that they can do is to give you a mop, broom and a spatula.

Lifers Group

that work releases be of a duration long enough to enable women to meaningfully pursue employment and to make it reasonable for employers to want to obtain their services. The current policy of 60 days should not be shortened.

Men come out with job skills whereas women don't... (they) have poor job reintegration compared to men.

Worker at community release facility

On a final note, while the Correctional Service is attempting to shift the focus of its employment and employability programming from the operational needs of CORCAN to the employment needs of offenders, there is no clear indication that the needs of women or other offenders are being adequately considered. A requirement for inmates' correctional plans to include employability programming or

¹⁴⁰ Correctional Service of Canada. "Urinalysis Testing in Institutions", *Commissioner's Directive 566-10*, Ottawa, Correctional Service of Canada, April 2003, at para. 36. Available: http://www.csc.scc.gc.ca/text/plcy/doc/566_10_cd.pdf

¹⁴¹ Correctional Service of Canada. "Work Releases", *Commissioners Directive 740*, Ottawa, Correctional Service of Canada, December 2001. Available: http://www.csc.scc.gc.ca/text/plcy/doc/740_cd.pdf

employment will only assist offenders in achieving the earliest possible release date if meaningful and appropriate employment opportunities are available. The different employment histories of federally sentenced women and men, along with the special employment needs of inmates with disabilities and others, suggest that this is another area of correctional services in which one size will not fit all.

Recommendation No. 9

The Commission recommends that the Correctional Service of Canada bring a gender focus to its employment and employability programming for federally sentenced women, including the development of job opportunities in the community.

6.1.6 Meeting the Need for Violent Offender Programming for Federally Sentenced Women

Violent offender programming is a major necessity.
Inmate Committee

Progress has been made on this front with the recent introduction of women-specific programming for sex-offenders. However, women inmates with a history of violent offending told us that there was a lack of programming in this area, and that their only option was to take anger management programming repeatedly.

Relative to men, women face unequal access to violent offender programming. Men with a history of violent offending take an intensive reintegration program that consists of more than 120 two-hour sessions, including at least three individual sessions and two testing sessions.

Further resources need to be devoted to developing women-specific programming for aspects of violent offending other than sex-offending. Rehabilitating behaviour that is linked to violent offending is part of rehabilitation, and women have a right to receive the full benefit of these correctional services.

6.2 Ensuring the Reintegration of Federally Sentenced Women

In 1990, the Task Force on Federally Sentenced Women recommended that the Correctional Service develop a community strategy for women. It took more than 12 years for the Correctional Service to implement that recommendation, finalizing its *Community Strategy for Women on Conditional Release* in October 2002. The strategy is still not fully implemented. Yet it is well-known that federally sentenced offenders on conditional release face challenges that can be more pronounced for women than men. Women parolees must cope with child care, find decent affordable housing that will accommodate their children, make a living, find appropriate health care and deal with their addictions. Women with physical disabilities currently have almost no options for accessible housing.

All women, but particularly Aboriginal women, racialized women and women with special needs, will benefit from pre-release planning that addresses the systemic barriers they face to community reintegration. Research carried out in the United States indicates that discharge planning is

important in preventing re-offending, and women have a particular need for ongoing relationships in the community that are established before they leave prison.¹⁴² Discharge planning that includes assigning a parole officer before a woman leaves the institution, specialized training for parole officers working with women, referrals to community resources for counselling to deal with trauma and abuse issues, and assistance with child care are all important discharge issues for women.

6.2.1 Appropriate and Adequate Community Housing

It's really hard to find a place for a "mentally ill" woman.

Correctional Service of Canada official

Community release facilities, or as they are more commonly known, halfway houses, can provide specialized support and programming for their residents, and also permit a more comfortable, gradual transition from the institution to community programs or work. Although the Correctional Service maintains that there are sufficient spaces for women in

halfway houses¹⁴³, much of this accommodation is not appropriate; currently many female offenders are released to shelters for the homeless, co-ed facilities and halfway houses located in neighbourhoods where they were formerly drug users or sex trade workers.

These types of accommodation do not respond to the needs of federally sentenced women, and the situation is particularly bleak for women with higher needs, who require a more structured living environment or accessible facilities. Very few halfway houses permit children, and there appears to be a shortage of women-only halfway houses, an option that many federally sentenced women told us they would prefer. The presence of men can be a distraction at this critical juncture in a woman's release plan and inappropriate relationships tend to develop. Given the negative experiences of many female offenders with men, the Commission has serious reservations about the placement of small numbers of women in halfway houses that are occupied predominantly by men.

Drug use is rampant in halfway houses... for women who really want to stay clean, it is very difficult.

Staff at an Elizabeth Fry Society

This issue of appropriate and adequate housing for federally sentenced women in the community has been a longstanding concern.¹⁴⁴ The range of women's needs could likely be better met through contracted accommodations, preferably those that allow them to live in an independent or semi-independent manner, with their young children if need be. Supervised satellite apartments should be made available for women who are at low risk for re-offending but need some initial support while they establish themselves.

There should be an Aboriginal halfway house — similar to the Healing Lodge — because there are barriers to practising Aboriginal spirituality at some halfway houses.

An Aboriginal woman inmate

Many prisoners' advocacy groups suggest that private home placements have the greatest potential to help women reintegrate into society, and should be more widely used. Correctional Service has recognized the need to work on providing access to alternative types of accommodation, and has been allocated funding for three years (2001–2004) to develop accommodation

¹⁴² K.C. Vigilante. "Reduction in Recidivism of Incarcerated Women through Primary Care, Peer Counselling, and Discharge Planning", *Journal of Women's Health*, Volume 8, Number 3, 1999, at 414.

¹⁴³ Auditor General of Canada. Report. "Correctional Services Canada — Reintegration of Women Offenders", Chapter 4, *supra* note 22, at para. 4.91.

¹⁴⁴ Royal Commission on the Status of Women. *Report of the Royal Commission on The Status of Women in Canada*, Ottawa, Information Canada, September, 1970, at 385; Correctional Service of Canada. *Creating Choices: The Report of the Task Force on Federally Sentenced Women*, *supra* note 4, at 116-119.

in the community for offender groups with distinct needs. There are four target groups: women, Aboriginal people, elderly persons and persons with physical disabilities.

The situation of Aboriginal women on community release must also be met. Some women told us they had been prevented from smudging at one halfway house, even out-of-doors. However there are currently some promising initiatives being pursued for post-release housing for Aboriginal women. One such initiative — MorningStar — will offer a private home placement for up to three Aboriginal women, with the option to spend some time on a nearby reserve.

Currently, funding for community housing for women is precarious and short term. During our visits to some community release facilities, we were told that satellite apartments in Kingston had been closed and that funding for Dismas House in Truro was so uncertain that they could not make any long-term staffing commitments. Permanent funding for residential community housing is needed.

For women who are at greater risk and need, the more secure setting of a community release facility run by the Correctional Service of Canada could offer 24-hour supervision. But women currently have less access to these facilities than men do. A community release facility can help women who have served long sentences make the transition to a more independent life. Currently some women remain incarcerated until their statutory release date instead of being released earlier on parole because there is no community release facility available and they are not considered appropriate candidates for other housing options.

Insofar as it encourages and facilitates the safe reintegration of offenders, effective community corrections help protect society. It therefore make sense for the Correctional Service of Canada to be at least as active in soliciting community support and assistance as it is in supervising parolee behaviour. Community support, understanding and acceptance is needed to safely reintegrate women into their communities.

Recommendation No. 10

It is recommended that, based on common guidelines, an action plan for each region should be developed to ensure that the Correctional Service of Canada meets the need for accommodation for federally sentenced women on community release. The plan should include home placement agreements, satellite apartments and other options that would permit women on conditional release to be housed with their children.

6.2.2 Community Programs and Services

We agree with the Auditor General that there is a need for more community programming for women, particularly in the most critical part of the transition period — the first three to six months after release. Another critical issue for women is lack of money. Some women told us that the lack of funds or employment while living in a halfway house leads them back to working on the street. For many women, the proper assistance and support during this period may be their best chance to gain some control over their lives and avoid returning to the conditions that led to their incarceration.

One of the strengths of the new substance abuse program for women offenders is that it will provide maintenance programming in the community, and this linkage is critical given that many women return to prison because of technical violations to the terms of their parole — usually involving drug or alcohol use — rather than because they commit offences. The Commission hopes that the Correctional Service of Canada will provide permanent funding to the maintenance phase of the program and that this phase will serve as a model for other types of community-based programming.

Recommendation No. 11

It is recommended that the Correctional Service of Canada:

- a. continue to take steps to ensure greater continuity between programs offered in the institution and those offered in the community. The community programming phase of the Woman Offender Substance Abuse Program may provide a good model for doing so and should be monitored;
- b. offer more assistance to women on conditional release, particularly through employment, counselling and child care.

6.2.3 Community Release Options for Federally Sentenced Women

When it comes to sections 81 and 84, no one knows how to utilize the CCRA.

An Elder

Despite the over-representation of Aboriginal women offenders in the federal correctional system, little use is made of section 84 of the *Corrections and Conditional Release Act*. Section 84 provides for the release and reintegration of an offender into an Aboriginal community. From April 2001 to September 7, 2003, there were 13 agreements entered into under section 84 for the release of women to Aboriginal communities.¹⁴⁵ In her report earlier this year, the Auditor General also noted that this option is not discussed at any length with Aboriginal women during the intake process, and is given insufficient consideration in developing correctional plans.¹⁴⁶

Strength in Sisterhood indicated its support for the return of Aboriginal women to their communities in the most supportive and least restrictive manner possible. Aboriginal women who have the support of their families or communities should have the opportunity to be paroled to their family home or the private home of a community sponsor, rather than a halfway house. There is a need to provide education and information about this option both to women and Aboriginal communities. It is also important that efforts to build

I found out about section 84 through a fluke.

Aboriginal woman inmate

¹⁴⁵ Of these thirteen women, five are still being supervised in the community, four are incarcerated (two women had parole denied; the two others had their parole revoked), two successfully completed their sentences, one is temporarily detained on pending charges and one is absent without leave. (Data provided by the Correctional Service of Canada)

¹⁴⁶ Auditor General of Canada. Report. "Correctional Services Canada — Reintegration of Women Offenders", Chapter 4, *supra* note 22, at paras. 4.76–4.81.

awareness and capacity to use section 84 recognize that more federally sentenced Aboriginal women than men may have lost their ties to reserve communities and wish to be reintegrated into urban Aboriginal communities.

Recommendation No. 12

It is recommended that:

- a. federally sentenced women be provided with an opportunity to consult with an Elder before finalizing their correctional plans. With the agreement of individual women, Elders should play a key role throughout case management and release planning;
- b. in partnership with Aboriginal communities and organizations, the Correctional Service of Canada should review the use of section 84 of the *Corrections and Conditional Release Act*, identify barriers to its use, and create and implement an action plan to encourage its use for federally sentenced women. Progress should be reviewed and reported within one year.

Strengthening Internal Responsibility for Human Rights

It is widely recognized that human rights are best served when organizations take responsibility for their policies and practices, rather than waiting for their clients or employees to complain to outside bodies.¹⁴⁷ External monitors such as the Office of the Correctional Investigator perform an invaluable function and role, but it can be difficult to impose from outside the kind of systemic change that may be needed. Moreover, an organization and the individuals associated with it benefit by taking responsibility for ensuring that it happens from within. This is particularly true in the correctional context, where ensuring human rights is so integrally linked with effective corrections.

7.1 Coordinating Efforts to Enhance Human Rights Protection

While there are positive and innovative initiatives under way throughout the Correctional Service of Canada that have the potential to enhance human rights protection, there appears to be a lack of communication and coordination. For example, an audit of the grievance system noted that one institution was handing out a "how to" brochure prepared by Inmate Affairs in 1992. The report helpfully suggests that, given the positive response to the brochure, the remaining copies be located and distributed among the institutions.¹⁴⁸ While there may be some practical merit to this suggestion, what it also highlights are the lack of systems and practices to ensure the availability of useful, up-to-date and consistent information about inmates' rights.

In its 1997 report, *Human Rights and Corrections: A Strategic Model*, the Working Group on Human Rights recommended that the task of monitoring the Correctional Service's internal human rights compliance "be assigned to a designated Human Rights Unit, headed by an individual with the appropriate seniority and having the necessary resources to carry out its mandate and report its findings directly to senior management."¹⁴⁹ Although this recommendation led to the creation of a Human Rights Unit within the Correctional Service, the unit has since shrunk to only one permanent and one temporary position. Much of the staff's time is taken up responding to human rights complaints filed with the Canadian Human Rights Commission, with understandably little opportunity to coordinate and support proactive initiatives to achieve equality and human rights relating to Correctional Service activities.

It is true that the scope of the Correctional Service of Canada's operations presents challenges for coordinating and implementing a proactive approach to human rights protection. Nevertheless, the integral link between effective corrections and human rights makes it vital to do so. There is need for a focus on protecting and promoting human rights across the organization, rather than reacting to individual human rights complaints and grievances. Rectifying systemic problems before complaints arise may reduce the number of complaints filed, enhancing compliance with the *Canadian Human Rights Act*.

¹⁴⁷ Canadian Human Rights Act Review Panel. *Promoting Equality: A New Vision*, Ottawa, Canadian Human Rights Act Review Panel under the authority of the Minister of Justice and the Attorney General of Canada, June 2000, at 27.

Available: http://canada.justice.gc.ca/chra/en/chraireview_report_2000.pdf

¹⁴⁸ Correctional Service of Canada. *Offender Complaint and Grievance System Audit Report*, Ottawa: Performance Assurance Sector, Correctional Service of Canada, June 2002, at 23.

Available: http://www.csc_scc.gc.ca/text/pblct/pa/complaint/complaint_e.pdf

¹⁴⁹ Correctional Service of Canada. *Human Rights and Corrections: A Strategic Model*, Report of the Working Group on Human Rights, Ottawa, Correctional Service of Canada, December 1997, at 76.

Available: http://www.csc_scc.gc.ca/text/pblct/rights/human/toce_e.shtml.

The structure of an organization can also increase accountability for human rights protection, as well as enhancing compliance. Many commentators have noted that the current position of the office of the Deputy Commissioner for Women in the overall organizational structure of the Correctional Service does not assist in bringing the needed focus and integration to women's corrections. We note as well our concerns about the challenges for consistent human rights compliance that may result from an organizational structure in which the office of the Deputy Commissioner for Women is not directly connected to the front-line operations of women's facilities.

Recommendation No. 13

It is recommended that the Correctional Service of Canada consider whether its current organizational structure optimizes its capacity to ensure consistent human rights compliance in women's facilities, and that it develop an enhanced functional capacity to ensure the consistent protection and promotion of human rights across its operations.

7.2 The Need for an Anti-harassment Policy for Inmates

Protection against harassment is vital for incarcerated women, many of whom have already been victimized and who are traditionally disempowered. Harassment not only violates an inmate's human rights, but it also has unique consequences in the prison environment because, unlike an employee who experiences harassment, an inmate cannot leave the place where the harassment is occurring. Harassment of inmates may lead to problems with internal security and discipline, and impede rehabilitation programming.

Numerous reports have pointed to the need for an anti-harassment policy that applies to inmates and is tailored to the needs of the correctional environment,¹⁵⁰ but such a policy has yet to be developed. Instead, inmates can file harassment complaints through the Offender Complaint and Grievance Process. Correctional Service of Canada officials have said that the "spirit" of the *Treasury Board Policy on the Prevention and Resolution of Harassment in the Workplace*,¹⁵¹ which applies to all Correctional Service employees, will be applied to harassment grievances from inmates. But it is unclear both what this means and whether it is being put into practice, especially since the Correctional Service's Guiding Principles on the Prevention and Resolution of Harassment in the Workplace expressly states that "... the TB policy does not apply to complaints from the public and inmates."¹⁵²

¹⁵⁰ See Louise Arbour. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* supra note 5, at 253; Thérèse Lajeunesse and Associates. *The Cross Gender-Monitoring Project Federally Sentenced Women's Facilities: Third and Final Report*, supra note 111, Recommendation 9, at 70; Canada. Office of the Correctional Investigator. *Annual Report of the Correctional Investigator, 2001-2002*, supra note 74, at 12-13; Report of the Working Group on Human Rights, supra note 149, at 74.

¹⁵¹ Treasury Board Secretariat of Canada. *Policy on the Prevention and Resolution of Harassment in the Workplace*, Ottawa, Treasury Board Secretariat of Canada. See also: Correctional Service Canada. *Policy Bulletin 146*, Ottawa, Correctional Service Canada, March 13, 2003.

Available: http://www.tbs_sct.gc.ca/pubs_pol/hrpubs/hw_hmt/hara_e.asp.

¹⁵² Correctional Service of Canada. Internal document, October 6, 2002, at 2.

Recommendation No. 14

It is recommended that, in consultation with its staff and inmates, the Correctional Service of Canada immediately develop and implement an anti-harassment policy and education program that applies to inmates. The policy should provide for independent anti-harassment counsellors for inmates. A short, plain-language version of the policy should also be developed and distributed.

7.3 The Need for a Comprehensive Accommodation Policy for Inmates

The importance of accommodating individual needs and differences has been emphasized throughout this report, and is essential to human rights compliance. However, the Correctional Service does not have an adequate policy framework concerning the accommodation of inmate needs and differences relating to prohibited grounds of discrimination. Correctional Service officials told the Commission that the "spirit" of the accommodation policy that is applicable to staff¹⁵³ would apply to inmates as well. But it is unclear whether this unwritten practice is being followed, and if so, how. More guidance to Correctional Service staff with responsibility for dealing with accommodation issues in the regional facilities is necessary, and inmates need clear, up-to-date and consistent information about what their rights to accommodation are.

Although a directive on Case Management (CD-700) addresses the issue of offenders with special needs, it is not comprehensive. The only accommodation issues addressed by CD-700 relate to the accommodation of physical, intellectual and learning disabilities. Other policies, such as those dealing with inmate ethnocultural programs and psychological services, raise the issue of special needs, but the issue of accommodation is not identified as a human rights matter, nor are consistent procedures for accommodation set out. As part of its knowledge management strategy, the Correctional Service is currently revising many of its policies to reduce duplication and provide clearer guidance. Developing a single accommodation policy is one example of how this approach would enhance efforts to comply with the *Canadian Human Rights Act*.

Recommendation No. 15

It is recommended that the Correctional Service of Canada immediately develop and implement a comprehensive accommodation policy that specifically addresses the accommodation of inmates on all prohibited grounds of discrimination. A short, plain-language version of the policy geared to offenders with cognitive limitations or low literacy levels should also be developed and distributed as part of an educational program.

7.4 Human Rights Education and Training for Inmates and Staff

Our inquiry revealed that inmates were provided with confusing and at times inaccurate information about their rights, including their human rights. The primary source of information is

¹⁵³ See Correctional Service of Canada. *Policy Bulletin 96*, June 2000, which is clearly restricted to accommodation in employment, and does not address accommodation in the provision of services. It is unclear how inmates would even know of its existence.

the handbook given to women when they first arrive at an institution. The quality and accuracy of these handbooks varied dramatically. Only one institution had a handbook with easy-to-understand and accurate information about the rights of inmates under the *Canadian Human Rights Act*.

There is a need to let women know exactly what their rights are. It is empowering to know your rights.

A Correctional Service of Canada official

Inmates need clear and up-to-date information about their rights, as well as about how to obtain access to internal redress mechanisms, the Office of the Correctional Investigator, the Canadian Human Rights Commission, the Elizabeth Fry societies and other prisoner advocacy groups, visiting officials, the police and legal assistance. They also need to be better informed about court appearances, access to information, their privacy rights and their entitlement to protection under *the Canadian Charter of Rights and Freedoms*. This is not happening in a consistent or

timely fashion. The 2002 report of the Correctional Service of Canada Performance Assurance Sector noted a lack of procedures to ensure that offenders who are not proficient in English or French are informed of the internal grievance process.¹⁵⁴ Even when information is available in alternate formats to respond to the needs of inmates with visual limitations or low literacy levels, staff may not know about it. For example, although a video about rights and redress was sent to institutions in 1992, staff were unaware of its existence and it had not been updated in more than 10 years.¹⁵⁵

Recommendation No. 16

It is recommended that the Correctional Service of Canada:

- a. establish guidelines for institutional handbooks to ensure that complete, consistent and accurate information is provided to inmates in all facilities;
- b. annually monitor the human rights-related content of inmate handbooks, orientation sessions and ongoing human rights-related training;
- c. make available information suitable for women with limited cognitive abilities or low literacy levels, as well as information in alternate formats;
- d. ensure that the accountability accords for managers include contribution to human rights compliance; and
- e. integrate human rights training vertically throughout the organization through effective knowledge management.

7.5 Mechanisms for Informal Dispute Resolution

The Report of the Cross-Gender Monitor raised concerns about using informal conflict or complaint resolution systems to resolve complaints about staff because of the power imbalance between inmates and staff. It notes that many federally sentenced women feel coerced by

¹⁵⁴ Correctional Service of Canada. *Offender Complaint and Grievance System Audit Report*, supra note 148, at 11.

¹⁵⁵ *Ibid.* at 12.

mediation because there is no neutral third party, or the person acting as mediator is not trained in conflict resolution.¹⁵⁶

The same shortcomings may apply but with less force to the use of mediation to resolve inmate disputes, and, in fact, the Correctional Service has indicated an interest in using mediation to address conflicts and incompatibility issues between inmates. In the Commission's experience, alternative dispute resolution can be very successfully applied for human rights issues with appropriate measures to address power imbalances, such as a clearly impartial process, adequate human rights knowledge, and a voluntary process. As the Law Commission of Canada set out in its 2003 report, *Transforming Relationships through Participatory Justice*, "it would be unfair to deny litigants the benefit of a participatory process because their claim involves a human rights argument."¹⁵⁷ Issues of consistency and proper training also remain important.¹⁵⁸ We urge the Correctional Service to develop training and policies for staff involved in mediating inmate disputes to ensure a consistent and informed approach. Mediation can be a useful and appropriate tool to resolve disputes by allowing parties to participate in developing solutions to conflict, including those that engage human rights issues.

Recommendation No. 17

It is recommended that the Correctional Service of Canada implement a pilot mediation project at facilities for federally sentenced women, using trained, external mediators trained in human rights to attempt to resolve complaints, as well as providing conflict resolution training for inmates. The pilot project should begin by the end of 2004, and it should be evaluated within two years of implementation by an independent contractor.

7.6 Formal Dispute Resolution Mechanism

Federally sentenced women currently lack an effective means to grieve inadequate correctional services or treatment, thus increasing their sense of disempowerment and lack of control over their lives. Although section 90 of the *Corrections and Conditional Release Act* sets out the Correctional Service's duty to provide a grievance system that fairly and expeditiously resolves offenders' grievances, our review indicates that women inmates perceive the system as ineffective.

The majority of the women who were interviewed described the redress system in negative terms such as "slow and not very effective," "takes forever" and "useless." Some of the problems identified by the women included:

1. The absence of protection against retaliation.
2. Poor administration (lack of timeliness;¹⁵⁹ lack of communication about status of complaints; no clear results; grievances go missing or are not acknowledged).

¹⁵⁶ Thérèse Lajeunesse and Associates. *The Cross Gender Monitoring Project Federally Sentenced Women's Facilities: Third and Final Report*, *supra* note 111, at 37.

¹⁵⁷ Law Commission of Canada. *Transforming Relationships Through Participatory Justice*, Ottawa, Public Works and Government Services Canada, 2003, at 143-144.

Available: http://www.lcc.gc.ca/en/themes/sr/rj/participatory_justice/participatory_justice.pdf

¹⁵⁸ Correctional Service Canada. *Secure Unit Operational Plan*, *supra* note 33, at 27.

¹⁵⁹ The Office of the Correctional Investigator has repeatedly expressed concern about excessive delays in responding to grievances at the institutional and regional levels of the process.

3. Poor results¹⁶⁰ (staff pressure inmates to withdraw complaints; grievances are denied; warden does not support recommendations of successful grievances).

Correctional Service officials who were interviewed in the regions indicated that, based on their experience, the grievance system could be improved. Comments included: "the process stinks," "it is lengthy and tedious," "no fairness" and "procedures for inmates and staff suck." Data provided by the Correctional Service of Canada confirm that timeliness has been a problem. In 2001–2002, more than 4 of 10 priority complaints (i.e., those considered to have a significant impact on an offender's rights and freedoms) were not processed within established time frames. We note that the Correctional Service recently agreed to address this problem.¹⁶¹

Our review of grievance data also suggest that the coding process underlying the system is not gender-responsive. In 2002–2003, the subject matter of 6.3% of the complaints filed by women was coded as "other," whereas only 2.4% of the complaints filed by men were coded as "other." This suggests a need for a separate coding system for complaints from federally sentenced women to ensure that issues of concern to women can be systematically identified, monitored and addressed.

To the extent that federally sentenced women do use the grievance system, the statistics underline the importance of improving the system's operation. Based on data provided by the Correctional Service for 2002–2003, almost 10% of the complaints filed by women dealt with harassment or discrimination compared with 2.5% of the complaints filed by men. This example illustrates how tracking statistics from the internal grievance system can be useful in highlighting systemic issues of concern to women's corrections. We note that the Correctional Service has agreed with the recent recommendation of the Office of the Correctional Investigator that grievance data be analyzed, and we hope that this analysis will be made available to all stakeholders.¹⁶²

Given that the women are completely disempowered, it is difficult to expect them to use the grievance system to resolve conflicts.

Correctional Service of Canada officia

We recognize that there are unique challenges to using an internal grievance system in a prison environment that is necessarily characterized by a power imbalance between staff and inmates, an imbalance that is likely augmented by gender. Section 91 of the *Corrections and Conditional Release Act* states that "every offender shall have complete access to the offender grievance procedure without negative consequences;" however, it is unclear what real protection

against retaliation inmates have. The Cross-Gender Monitor also found that women feared retaliation for lodging a grievance and did not trust the system.¹⁶³ As the Women's Legal Education and Action Fund observed in its submission, one explanation may be that many federally sentenced women have long histories of abuse and have learned first hand of the need to remain silent.¹⁶⁴

¹⁶⁰ A survey conducted by the Cross Gender Monitor in 1999 found that 61 of 82 federally sentenced women thought the inmate grievance system was either not at all or not very effective. See Thérèse Lajeunesse and Associates. *The Cross Gender Monitoring Project Federally Sentenced Women's Facilities: Third and Final Report*, supra note 111, at 24.

¹⁶¹ Canada. Office of the Correctional Investigator. *Annual Report of the Correctional Investigator 2002-2003*, supra note 74, at 37.

¹⁶² Canada. Office of the Correctional Investigator. *Annual Report of the Correctional Investigator 2002-2003*, supra note 74, at 18 in the Response from the Correctional Service of Canada section.

¹⁶³ Thérèse Lajeunesse and Associates. *The Cross Gender Monitoring Project Federally Sentenced Women's Facilities: Third and Final Report*, supra note 111, at 37.

¹⁶⁴ Gillian Calder. *Rethinking the Treatment of Federally Sentenced Women in a Substantive Equality Context*, Women's Legal Education and Action Fund — National Legal Committee, submitted for the Special Report on the Situation of the Federally Sentenced Women, Toronto, April 2003, at 11.

A lack of trust may also account for the divergent views of the grievance process that were recorded in an audit of the offender grievance system by the Correctional Service's Performance Assurance Sector. The audit did not reveal a high level of dissatisfaction with the system.¹⁶⁵ These findings are at odds with the information collected by the Commission and the Cross-Gender Monitor.

7.7 Human Rights Audits

Reactive approaches to protecting human rights redress discrimination on an "after-the-fact" basis. The damage has already been done and the costs — both collateral and direct — have been incurred. These are consequences that a proactive approach would avoid.

In 1997, the Working Group on Human Rights examined the ability of the Correctional Service of Canada to monitor its compliance with Canada's domestic and international human rights obligations, and developed a strategic model for evaluating human rights performance.¹⁶⁶ The Working Group recommended that the Correctional Service undertake human rights audits to strengthen its corporate human rights capacity and culture; entrench human rights principles, norms and practices; and maintain a safe, humane, lawful and socially constructive correctional system. In response, the Correctional Service of Canada created the *National Long Range Internal Audit Plan on Human Rights*, which identifies 17 enumerated human rights¹⁶⁷ that are to be formally evaluated at least once every seven years.

So far, only one human rights audit has been completed — a review of offender access to religious and spiritual programs and services.¹⁶⁸ It is hard for the Commission to judge from just one example whether the legal and policy requirements of domestic and international human rights instruments are understood and adhered to. Although the applicable sections of the *Canadian Charter of Rights and Freedoms*, the *Corrections and Conditional Release Act*, the *Universal Declaration of Human Rights*, the *Canadian Human Rights Act* and the *United Nations Standard Minimum Rules for Treatment of Offenders* are listed in the audit, their application to the correctional context is not made clear. There is also a question of whether these human rights instruments, while providing the applicable foundational principles, can form the basis of a human rights accountability and evaluation framework that will produce clear and actionable recommendations, identify measurable results and establish time frames for implementation.

In the future, it may be helpful for the Correctional Service of Canada to clearly define expected results that reflect sound performance measurements of human rights outcomes prior to commencing an audit. By adopting reporting measures and standards that reflect desired human

¹⁶⁵ The report identified problems related to the lack of training for staff who process complaints and grievances. (Correctional Service of Canada. *Offender Complaint and Grievance System Audit Report*, *supra* note 148).

¹⁶⁶ Correctional Service Canada. *Human Rights and Corrections: A Strategic Model*, *supra* note 149, 12-20.

¹⁶⁷ The areas are: safe, secure and humane conditions of confinement; humane treatment; harassment and discrimination; freedom of religion and spirituality; freedom of expression; right to liberty; principles of fundamental justice; right to effective internal and external remedies; right to privacy; right to vote; right to information; right to maintain contact with outside; language rights; equality rights; freedom of association; and right to medical services. Another area, employee conditions of employment, has also been added.

¹⁶⁸ Correctional Service of Canada. *The Review of Offender Access to Religious and Spiritual Programs and Services*. Ottawa, Performance Assurance Sector, Correctional Service Canada, June 2002.

Available: http://www.csc_scc.gc.ca/text/pblct/pa/relig_spirit/relig_spirit_e.pdf

rights outcomes and reviewing the implementation of these measures and standards through the audit process, the Correctional Service will be in a better position to evaluate whether it is meeting its human rights obligations. Human rights audits could then be the basis for developing a corrective human rights action plan with time frames and procedures to ensure follow-up and implementation.

Recommendation No. 18

It is recommended that the Correctional Service of Canada work with the Canadian Human Rights Commission to develop, implement and assess a human rights audit model, including the identification and measurement of human rights performance indicators and public reporting.

Protecting Human Rights Requires Effective External Redress

Effective redress for inmates is a critical issue that has implications for human rights compliance. Human rights mean little if they are not respected. It is in the interests of everyone concerned — the Correctional Service, staff, inmates and society — if safeguarding human rights is strengthened by adding an independent oversight function. A specialized oversight function can provide an unbiased and informed view of human rights compliance within the correctional context.

The Commission is not alone in this view. The 2002–2003 Annual Report of the Office of the Correctional Investigator has put the question of effective external redress for inmates squarely on the table.¹⁶⁹ Most of the submissions received by the Commission backed the idea of an independent body with enforcement powers. Several previous reports have also endorsed the need for effective external monitoring, and have recommended various types of bodies and powers for this purpose.¹⁷⁰ Most recently, the Standing Committee on Public Accounts recommended that the Correctional Service establish an external body to monitor the grievance system in place for federally sentenced women.¹⁷¹

External monitoring bodies are common in other countries. The Chief Inspector of Prisons for England and Wales conducts approximately 20 full inspections each year and is concerned with issues of broad impact, rather than individual complaints. This stands in contrast to the primary function of the Office of the Correctional Investigator which is to investigate and resolve individual offender complaints. Although the Office of the Correctional Investigator also has responsibility for reviewing and making recommendations on the Correctional Service's policies and procedures relating to individual complaints, the systemic impact of this function is limited by the lack of enforcement powers. In England and Wales, there is also a Prison Ombudsman who is charged with receiving complaints on all matters relating to prison and probation, with the exception of parole decisions.

There is a wide range of options for an external monitoring and enforcement agency. One option is to establish an administrative tribunal with the power to compel the Correctional Service to comply with legislation and policy governing the administration of sentences, and to redress the negative effects of non-compliance. The remedial powers of such a tribunal would also include the

¹⁶⁹ Canada. Office of the Correctional Investigator. *Annual Report of the Correctional Investigator 2002-2003*, *supra* note 74, at 57-58.

¹⁷⁰ Thérèse Lajeunesse and Associates. *The Cross Gender-Monitoring Project Federally Sentenced Women's Facilities: Third and Final Report*, *supra* note 111, recs. 6, 7 and 8; Correctional Service of Canada. *Human Rights and Corrections: A Strategic Model*, *supra* note 148, at chap. 4, at 12; Correctional Service of Canada. *Task Force Report on Administrative Segregation — Commitment to Legal Compliance, Fair Decisions and Effective Results*. *supra* note 116, at section O, Rec. 3a. Canada. Parliament. House of Commons Canada. Sub-committee on *Corrections and Conditional Release Act* of the Standing Committee on Justice and Human Rights. *A Work in Progress: The Corrections and Conditional Release Act*. Ottawa: Public Works and Government Services Canada, May 2000, at Chapter 5 - 5.32. Available: http://www.parl.gc.ca/InfoComDoc/36/2/SCRA/Studies/Reports/just01/07_toc_e.html

¹⁷¹ Canada. Parliament. House of Commons. Standing Committee on Public Accounts. *Twenty-sixth Report of the Standing Committee on Public Accounts — Chapter 4 of the April 2003 Report of the Auditor General of Canada — Correctional Service of Canada — Reintegration of Women Offenders*, Ottawa, Public Works and Government Services, November 2003, Recommendation 12.

Available: <http://www.parl.gc.ca/InfoCom/PubDocument.asp?FileID=66140&Language=E>

jurisdiction to order the Correctional Service of Canada to pay compensation to any offender subjected to illegal or unfair treatment. With the jurisdiction to accept direct references from prisoners or their advocates in cases that raise issues of general importance to prisoners, the tribunal could effect more widespread and systemic change than currently exists. It could be part of an existing structure, such as the Canadian Human Rights Tribunal.

In 1996, Justice Arbour recommended the creation of sanctions for correctional interference with the integrity of a sentence. In her view, interference could include illegalities, gross mismanagement or unfairness in the administration of a sentence.¹⁷² In its submission, *Rethinking the Treatment of Federally Sentenced Women in a Substantive Equality Context*, the Women’s Legal Education and Action Fund argued that "it is imperative that a just and effective sanction be developed to offer an adequate redress for the infringement of prisoners’ rights, as well as to encourage compliance."¹⁷³ This is an avenue of redress that could be dealt with by an external enforcement body.

The Canadian Association of Elizabeth Fry Societies has argued for a source of funding for prisoners seeking to challenge unfair treatment. Currently many prisoners do not have access to legal representation. In his book, *Justice Behind The Walls: Human Rights in Canadian Prisons*, Michael Jackson laments how little legal aid is available to inmates.¹⁷⁴ It is clear that funding for prisoners to take steps to protect their rights is, in some circumstances, necessary in order for those rights to become a reality. The Court Challenges Program offers one model of funding that could be expanded or developed by the Government of Canada for prisoners.

Other options for external redress include strengthening the powers of the Office of the Correctional Investigator. Created in 1973, the Office has a mandate "to conduct investigations into problems of offenders related to decisions, recommendations, acts or omissions of the Correctional Service."¹⁷⁵ The effectiveness of the Office would be enhanced if it were given the power to enforce its recommendations. As only one example of many, the Office has repeatedly requested a public response from the Correctional Service to the recommendations of Justice Arbour’s report. Other groups, including the Canadian Association of Elizabeth Fry Societies, have made the same request.

It would be good if the Correctional Investigator had power because as it now stands it is just venting to talk to the Correctional Investigator.

A woman inmate

We look forward to reviewing the discussion paper to be produced by the Office of the Correctional Investigator concerning options for judicial interventions, external review and accountability.¹⁷⁶ Its proposal to partner with the Correctional Service to co-facilitate a conference in early 2004 to identify measures to address these issues is sound and constructive. This should provide the opportunity to move relatively quickly to identify and define the features of an effective external redress body.

¹⁷² Louise Arbour. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, supra note 5, at 255.
¹⁷³ Women’s Legal Education and Action Fund. *The Tip of the Discrimination Iceberg: Barriers to Disclosure of the Abuse and Mistreatment of Federally Sentenced Women*, A Submission by the Women’s Legal Education and Action Fund (LEAF), Toronto, LEAF, May 2003, at 12. Available: <http://www.elizabethfry.ca/submissn/leaf/1.htm>
¹⁷⁴ Michael Jackson. *Justice Behind The Walls: Human Rights in Canadian Prisons*, Toronto, Douglas and McIntyre, 2002, at 277. Available: <http://www.justicebehindthewalls.net>
¹⁷⁵ CCRA, supra note 37, s.167(1).
¹⁷⁶ Canada. Office of the Correctional Investigator. *Annual Report of the Correctional Investigator 2002-2003*, supra note 74, at 58.

Recommendation No. 19

It is recommended that the Solicitor General of Canada and the Correctional Service of Canada, in consultation with stakeholders, establish an independent external redress body for federally sentenced offenders.

Conclusions

Our review of the treatment of federally sentenced women in the provision of correctional services by the Correctional Service of Canada indicates that, while some progress has been made, systemic problems continue to affect the correctional system and the treatment of federally sentenced women. In the past ten years, some progress has been made towards achieving a system of correctional services that is responsive to the needs of all offenders, including women; however, further work needs to be done by the Government of Canada, including the Correctional Service.

Our analysis has been based on the human rights principle that recognizing differences between individual offenders and groups of offenders is not enough to protect human rights or achieve equality in the correctional system. Differences between individuals and groups that relate to prohibited grounds of discrimination must lead to changes in how systems are designed, how policies are developed, and how practices are implemented. More than "special measures" are required to transform ways of rehabilitating and reintegrating offenders so that all offenders have an equal opportunity to benefit from the rehabilitative purpose of the correctional system. The public interest in doing so relates not only to treating individual offenders fairly, but also to enhancing public safety through the safe and timely reintegration of offenders as law-abiding members of society.

The process of transformation must begin with security classification, which is the foundation of the correctional system. The generally lower risk profile of most federally sentenced women has been acknowledged for many years, but it has not yet been fully reflected in correctional services relating to their custody and supervision. As we have noted, processes and tools used to assess risk must be appropriate for the population they are intended to serve. Only responsive and properly validated risk assessment tools can guide decisions about where and how individual federally sentenced women are incarcerated, how they are supervised and what correctional services, including family visits and work releases, are available to them.

As well, the policy platform upon which correctional services are based must recognize that some of the criminogenic factors of federally sentenced women are different from those of men. Reintegration program strategies for women, the content of programming and the development of individual correctional or reintegration plans for women offenders must address their unique criminogenic factors. Although the Correctional Service acknowledges that federally sentenced women as a group demonstrate high reintegration potential, the correctional services it offers do not fully support realizing this potential. In order to achieve this important goal, correctional services for women must not only be different, they must be responsive to the underlying differences between women and men.

Women's most common pathways to crime involve survival efforts that result from abuse, poverty, and substance abuse. Research suggests that all of these factors are interconnected.

Gender Responsive Strategies, supra note 3, at 8.

Ensuring that correctional services are gender-responsive also requires recognizing that not all federally sentenced women are the same. Federally sentenced Aboriginal women and federally sentenced women with disabilities have unique characteristics that may have implications for how they are incarcerated and assisted with reintegration. The situation of federally sentenced Aboriginal

women, including the fact of their over-representation in our prisons and at maximum security levels, is a pressing issue requiring immediate action. Changes to the security classification system must ensure that Aboriginal women are treated fairly and incarcerated in the least restrictive environment possible and, where desired, in Aboriginal communities under section 81 of the *Corrections and Conditional Release Act*. Programming strategies and programs must also be developed to meet their reintegration needs.

The issue of the impact of the current security classification tool on federally sentenced women requires further investigation by the Correctional Service of Canada, particularly its impact on women with disabilities. Similarly, more research is required to identify unique criminogenic factors relating to disability, if any, and programming must be developed to address these needs. More attention must be given to the unique needs of federally sentenced women with disabilities on conditional release, including housing and employment that will enhance their reintegration potential.

The process of transforming the correctional system should not take place in a vacuum. The antecedents of discrimination, inequality and crime, and the interplay between them are multifaceted and interconnected. The scope and timing of this review did not permit a global examination of other factors possibly relevant to discrimination against federally sentenced women such as police charging practices and sentencing practices. Further study by the Correctional Service of Canada, the Solicitor General of Canada and others is needed to unravel the relationships between these factors and the disadvantage faced by federally sentenced offenders. We hope, however, that this report will offer a place to begin to change the correctional system from within in order to enhance its compliance with human rights.

ANNEX A - Bibliography, Legislation, Regulations, Commissioner's Directives, Policy Bulletins and Cases

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