

**Submission prepared by the Canadian Association of Elizabeth Fry Societies
(February 2018)**

Introduction –

CAEFS is a federation of 24 autonomous Elizabeth Fry Societies which are local community-based volunteer agencies. It is governed by an 18-member Board of Directors comprised of a president and a past president, an Indigenous representative and three Board members elected by the membership in each of the five regions in Canada.

Some local Elizabeth Fry Societies provide direct services to federally sentenced women under contract with the Correctional Service of Canada. CAEFS Regional Advocates are mandated to visit every federal penitentiary where women are imprisoned at least once every month, meeting with those women, their organized groups and the warden or warden's designate.

CAEFS has extensive experience advancing the equality rights of women whose behaviour is, or is sought to be, criminalized, and a depth of knowledge concerning the interactions of such women with the legal system. CAEFS has a substantial interest in ensuring the criminal justice system operates fairly with respect to women, and that the perspective and experience of women, in particular Indigenous women, are represented in its design and operation.

Background –

Non-violent, property, and drug offences represent the majority of crimes for which women are convicted. Relative to men, women have lower rates of recidivism and pose far less risk to community safety.¹ 27 Only 2% of federally sentenced women are returned to prison for the commission of a new offence, less than 0.5% for a violence offence.²

¹ Canadian Centre for Justice Statistics, Female Offenders in Canada (Ottawa, ON: Statistics Canada, 2008), online: Statistics Canada < <http://www.statcan.gc.ca/pub/85-002-x/2008001/article/10509-eng.htm>>.

² Shoshana Pollack, Locked In, Locked Out: Imprisoning Women in the Shrinking and Punitive Welfare State (Waterloo: Wilfrid Laurier University, 2008) at 7, online: Wilfred Laurier University <<http://www.efryottawa.com/documents/LockedInLockedOut-SPollockresearchreport.pdf>>.

85% of federally sentenced women have a history of physical abuse, while 68% have a history of sexual abuse. This rate increases to 91% for Indigenous women.

Two-thirds of federally sentenced women are mothers and have primary childcare responsibilities. Separation from their children and the inability to deal with problems surrounding this separation are major anxieties for women in prison.

Classification and the need to desegregate women –

The Custody Rating Scale used to determine the security classification of federally sentenced women was designed for White men 25 years ago.³ It results in skewed, discriminatory assessments and overly high security classifications of federally sentenced women. In 2003, the CHRC confirmed in its report, “Protecting Their Rights”, that the classification scheme discriminated against women on the basis of sex, race and disability and that most Indigenous women were over classified and therefore unable to access programming, recreational and other services and conditional release.

In response to the 2003 report, CSC hired Dr. Moira Law to investigate its classification protocols for federally sentenced women. After consulting with women prisoners, CSC staff and other stakeholders, Dr. Law recommended that all federally sentenced women be allocated a minimum security classification.⁴

The fundamental way in which security classification impacts correctional treatment plans, and how resulting conditions of confinement impede access to programs and services and conditional release have been reiterated in the case of *Ewert v Canada*, numerous reports by

³ 2017 Fall Reports of the Auditor General of Canada to the Parliament of Canada, Report 5—Preparing Women Offenders for Release—Correctional Service Canada, available online: < http://www.oag-bvg.gc.ca/internet/English/parl_oag_201711_05_e_42670.html#>.

⁴ Moira A. Law, “Beyond a Risk-Needs Paradigm: Initial Security Classification Protocols with FSW” (February 2007). (Attached at Appendix “A”)

the OCI and the Auditor General of Canada's 2016 report, *"Preparing Indigenous Offenders for Release"*.

Maximum security women represent 11% of the overall federally sentenced women population. Indigenous women represent 37% of all women behind bars, but they make up 50% of the maximum security population and present with unique culturally-based needs. Women with mental health issues are also more likely to be placed in maximum security. Further, women not deemed a risk to the prison or to public safety can be placed in a maximum security and kept there for a minimum of 2 years because of CSC policy.⁵

Maximum security units in the Federal prisons for women are a form of segregation. Women in maximum security are subject to restrictive, punitive conditions, and are isolated from the general population. The maximum security units are comprised of "pods". Each pod has approximately 5 cells, almost identical to a segregation cell, with the exception that some have bunk beds to enable double bunking. Outside the cells is a small area with a couch, television, a sink and a fridge, and a table and bench bolted to the floor. There are usually a few windows, which open a couple of inches at the bottom and do not allow for much air flow. Women are generally imprisoned in these pods for 23 hours a day. Women are meant to have access to a yard one hour a day. The yard is generally concrete ground surrounded by concrete walls topped with barbed wire; some have a small grassy area with a garden.

Women in maximum security are not eligible to participate in work release programs or community release programs. Even within the prison, the "levels system" limits maximum security women's access to family visits, programming, education and services in the rest of the prison.⁶ The level system is a gender-based discriminatory restriction unique to the women's sites: male prisoners are not subject to the same movement restrictions in order to access services and programs in the prison. The OCI notes that the practice is tantamount to the

⁵ Commissioner's Directive 710-6, available online: <<http://www.csc-scc.gc.ca/politiques-et-lois/710-6-cd-eng.shtml>>.

⁶ Office of the Correctional Investigator, *Annual Report 2016/17*, available online: <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20162017-eng.pdf>>.

rescinded and illegal former Management Protocol. Similar to the former Management Protocol, women commonly report the ease with which they “lose levels” and accompanying “privileges” and the great difficulty they experience in trying to “earn” their return to less restrictive prison conditions.

As an example, women who score as a “1” or “2” on the levels system may be shackled, including with leg irons and handcuffs, to visit with their families and children. Due to these policy requirements, at the Grand Valley Prison for Women, only two maximum security women can be accommodated for family visits at a time. In addition, a number of women have reported cancelling visits because they did not want their children to see them shackled in this way.

Not only are maximum security women disadvantaged in their opportunities to progress through their correctional plans, but they also suffer similar harms to those recognized amongst segregated prisoners. The Superior Court of British Columbia recently accepted that the “permanent harm” of segregation, “prevents the [prisoner] from successfully readjusting to the broader social environment of general population in prison and...often severely impairs the [prisoner’s] capacity to reintegrate into the broader community.”⁷ Women in maximum security similarly struggle in adjusting to the general population and the broader community after being kept in the isolated conditions of maximum security for months or years. It is not uncommon for a woman to be released to the general population only to be returned to maximum security, sometimes first through segregation, due to difficulties in adjusting.

The impacts of over-classification on Indigenous women’s reintegration are pronounced. Indigenous women are released later in their sentence, and more likely to be returned to prison due to suspension or revocation of parole for technical reasons:

1. In 2015-16, most Indigenous prisoners were released from custody at their statutory release date, having served two thirds of their sentence.

⁷ *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62.

2. Of those released on statute, 79% were released into the community directly from a maximum or medium security institution, without benefit of a graduated and structured return to the community.
3. Parole grant rates were much lower for Indigenous than non-Indigenous offenders:
 - Only 12% of Indigenous prisoners had their cases prepared for a parole hearing once they were eligible.
 - An overwhelming 83% of Indigenous prisoners postponed their parole hearings.⁸

Desegregation is a critical piece to addressing the fundamental ways that maximum security and segregation placements interfere with women's successful reintegration.

Community Options –

There is an urgent need for more community release options for Indigenous women. The lack of available options is not as much due to the legislation as it is to policy decisions which have compromised the effect of the legislation. The CCRA is set up to facilitate community release. Sections 81 and 84 of the CCRA enable the transfer of resources to Indigenous communities, on and off reserve in rural or urban settings, to host community members who would otherwise be in Federal prison and to support their reintegration in ways that benefit the individual and the community more broadly. The intent of sections 81 and 84 was to afford Indigenous communities greater control over matters affecting them.⁹ These provisions are broad, allowing for creative, flexible and individualized community-based solutions. Unfortunately, since their inception 25 years ago, they have been severely under-utilized, especially in the case of Indigenous women.

⁸ 2016 Fall Reports of the Auditor General of Canada: Report 3 – Preparing Indigenous Offenders for Release – Correctional Service Canada.

http://www.oagbvg.gc.ca/internet/English/parl_oag_201611_e_41802.html

⁹ Submission Prepared By: Atif Akhtar (May 2017) Dissecting the Legislative Intent of Sections 81 and 84. The Senate Standing Committee on Human Rights.

The under-utilization of s. 81 specifically is the policy developed and driven by CSC. For instance, it is well known that Indigenous women are significantly overrepresented in maximum security placements due to discriminatory classification tools relied upon by CSC.¹⁰ At the same time that Indigenous women are being over-classified, CSC policy also restricts s. 81 agreements to those classified as minimum security. As a result, when the first CSC healing lodge was built for Indigenous women, 90% of them did not qualify for it.¹¹ In fact, s. 81 does not require a healing lodge or other institution be built at all and this restricted reading of the provision can create major barriers for Indigenous communities interested in undertaking a s. 81 agreement.

Funding parity for community-driven section 81's and 84's is also required. There continues to be substantial funding discrepancies, as well as differences in terms and conditions of work, between Section 81 Healing Lodges operated by Indigenous communities and those operated by CSC. In fact, in its report "Spirit Matters", the OCI indicates that CSC diverted s. 81 funding meant for Indigenous communities to prison-based programs like the pathways houses.¹²

Women with mental health needs can and should be transferred to community-based treatment facilities using section 29 of the CCRA. In 2013, recommendations to increase community treatment capacity for complex mental health cases were made in the Inquest Touching the Death of Ashley Smith. In 2016, Terry Baker, who had documented mental health issues, died in a segregation cell shortly after being taken off mental health monitoring. To this day, CSC has not implemented the 2013 recommendations. Instead, CSC claims that it is too costly to place and treat women with mental health issues in psychiatric facilities and further that these facilities are reluctant to accept complex needs cases. These claims are not entirely

¹⁰ Office of the Correctional Investigator, *Annual Report 2016/17*.

¹¹ The Correctional Investigator Canada, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (Ottawa: Minister of Public Works and Government Services Canada, 2012) at page 3, online: < <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022-eng.aspx>>.

¹² *Ibid.*

substantiated as CSC has received proposals from external psychiatric/forensics facilities that would expand treatment capacity in the community.¹³

A fundamental re-evaluation of the CSC policies, such as those restricting s. 81 agreements, by an independent body to ensure their compliance with the CCRA is needed. Given CSC's history of resistance to meaningfully implement recommendations from outside bodies, where CSC policies do not comply with the CCRA, there should be a mechanism through which to enforce compliance.

Judicial Oversight –

We urge the committee to consider the need for judicial oversight on all considerations relating to Indigenous women given the current rates of incarceration and over-classification.

Further, the committee should explore a remedial option, such as that recommended by the honourable Louise Arbour in her 1996 report, for prisoners whose conditions of confinement amount to correctional interference with their lawful sanction and therefore renders their sentence in need of remediation.

Mandatory Minimum Sentences –

Mandatory minimum sentences and parole ineligibility periods have a disproportionate impact on women, and in particular Indigenous women. Indigenous women are overrepresented among those sentenced to life. Mandatory minimum sentences deny judges the ability to consider lower levels of culpability, for example, in instances where an accused is party to a spouse's offence or where the accused was acting in relation to an offence against oneself or one's child. This is particularly relevant for women whose violent crimes are overwhelmingly defensive or otherwise reactive to violence directed at themselves, their children, or another third party.¹⁴ Moreover women, and in particular Indigenous women, plead guilty at higher

¹³ Office of the Correctional Investigator, *Annual Report 2016/17*.

¹⁴ Canadian Human Rights Commission, *Protecting Their Rights: A Systematic Review of Human Rights in Correctional Services for Federally Sentenced Women* (Ottawa: Minister of Public Works and

rates than men.¹⁵ In this way, mandatory minimum sentences, including for murder, undermine the purpose of section 718.2 (e) of the Criminal Code. These issues follow women into prison where CSC policy requires women convicted of a life sentence to serve their first two years in maximum security, regardless of whether they are assessed as a risk to the prison or to public safety.¹⁶

Exhibit: National Inquiry into Missing and Murdered Indigenous Women and Girls		
Location/Phase: <u>Parts 2/3 Quebec</u>		
Witness: <u>Panel 3</u>		
Submitted by: <u>Christa Big Canoe</u>		
Add'l info: <u>P02-03 P02 P0301</u>		
Date: <u>SEP 19 2018</u>		
Initials	I/D	Entered
<div>63</div>	<div></div>	<div>34</div>

Government Services Canada, 2003) at 32, online: CHRC < <https://www.chrc-ccdp.gc.ca/eng/content/protecting-their-rights-systemic-review-human-rights-correctional-services-federally>>.

¹⁵ Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility, available online at: <<https://cws.journals.yorku.ca/index.php/cws/article/viewFile/22118/20772>>. Report of the Aboriginal Justice Inquiry of Manitoba, available online: <<http://www.ajic.mb.ca/volume1/chapter4.html>>.

¹⁶ Commissioner's Directive 710-6, available online: <<http://www.csc-scc.gc.ca/politiques-et-lois/710-6-cd-eng.shtml>>.