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External Oversight and Women in Places of Detention

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EXTERNAL PRISON OVERSIGHT AND HUMAN RIGHTS

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International Corrections & Prisons Association

The Expert Network on External Prison Oversight and Human Rights is committed to bringing together various agencies responsible for external prison oversight to share information and exchange best practices and lessons learned.

For more information about the network and its activities, please visit: *https://icpa.org/icpa-expert-groups/external-prison-oversight-and-human-rights/*

Cover Photo c/o Ben Buckland, *Senior Adviser,* Association for the Prevention of Torture. To see more of his photography, visit www.benbuckland.photo

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Welcome Message from the Chair

Dear Members,

In 2022, the World Bank published its annual report titled, *Women, Business and the Law*. This annual report evaluates laws and regulations that affect economic opportunities for women in 190 economies. Legal gender equality is measured against eight indicators: mobility, workplace, pay, marriage, parenthood, entrepreneurship, assets, and pension. As per these indicators, women "are on an equal legal standing with men" in *only* 12 economies: Belgium, Canada, Denmark, France, Greece, Iceland, Ireland, Latvia, Luxembourg, Portugal, Spain, and Sweden.

It has been four decades since the United Nations General Assembly adopted the *Convention on the Elimination of All Forms of Discrimination against Women*, and yet women and girls continue to face gross inequalities around the world, including unequal access to justice.

According to Penal Reform International, more than 740,000 women and girls are incarcerated globally. Despite making up a small minority of prisoners overall, most incarcerated women "are charged or convicted for non-violent offences, and their imprisonment is often also related to poverty and the inability to pay fines or to afford bail."

The rights of women and girls require our urgent attention, so I am proud to share with you our ninth network newsletter on ***external oversight and women in places of detention***.

I would like to thank the following authors for their excellent contributions to this issue:

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It is my hope that this newsletter will inspire you in your efforts to promote the rights and interests of women around the world. I encourage you to share this issue with your colleagues and networks.

With Gratitude,

Ivan Zinger (J.D., Ph.D.), Correctional Investigator of Canada.

Pandemic Gender Gap Behind Bars and Lessons for the Future

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COVID laid bare the poor conditions that exist in so many correctional facilities and the resulting impact on the health and well-being of people in custody. Yet during the pandemic, there was little attention paid in the U.S. to the disproportionate harm that accrued to women, who are especially vulnerable, and the limited means that women have to protect themselves from harm while they are incarcerated. This meant that women continued to languish in facilities that were never designed for them and that cause them harm.

In April of 2021, while COVID was still ravaging prisons and jails across the U.S., we released a report titled, "The Pandemic Gender Gap Behind Bars," that asks how COVID—and, even more importantly, COVID precautions imposed in prisons and jails—had a differential impact on women in custody. The report details our recommendations for measures corrections agencies and legislators need to implement, both in the short-term and the long-term, to better address the needs of women and to reduce the harm that they experience while incarcerated. These recommendations are just as critical in the post-COVID era as they were during the worst of the pandemic.

This article summarizes some of our key findings in that report and our recommendations for the future.

Who are women in custody?

Women in custody in the U.S. have distinct characteristics and needs that are either different from—or more prevalent than—men. Most are lower-income, and 47% are women of color, predominantly Black and brown women. They have vastly higher rates of trauma experiences across their lifetime, are disproportionately lower income, have higher rates of unaddressed health challenges, and are overwhelmingly mothers and primary caregivers to their young children.

Women in custody also have different pathways to the criminal justice system than men. They are mostly arrested for low-level, relatively minor crimes, such as property offenses, drug offenses, and public order offenses. Their crimes are often driven by poverty and/or substance use. Women are much less likely than men to have been charged with a violent offense or to have extensive criminal histories. The most frequently reported convictions of violent offenses for women are linked to intimate partner violence. For these reasons, women are much less likely than men to present a serious risk to public safety or to safety within the institution.

How do women experience prison and jail differently than men?

Even before the COVID pandemic, women experienced incarceration differently than men, and it is important to understand this before discussing the ways COVID restrictions affected them. Prisons and jails lack programs and services that respond to women's distinct needs. Women are over-classified and assigned unnecessarily high security levels. Incarcerated women face higher risks of sexual victimization than men by their peers and staff. They are disciplined more frequently and given more severe sanctions. Limited health care resources take a toll on the physical and mental health of women in custody. Many prisons and jails lack sufficient quantities and decent quality of gender-specific clothing and hygiene supplies. And incarceration strains relationships between women and their families, including their children.

How did the pandemic response affect women in custody?

Despite correctional healthcare experts' warnings and guidance, in the U.S., very few states or localities deliberately reduced their incarcerated population during COVID to let out people at low risk to public safety or at high risk of dying. Not only did this keep

women at a very high risk of contracting the disease or succumbing to it, but keeping women's facilities at the same pre-pandemic density levels also made it harder for corrections officials to implement COVID mitigation measures recommended by the Centers for Disease Control and other healthcare experts.

It is important to acknowledge that corrections officials were between a rock and a hard place in dealing with the virus. Without the authority to release most people who are incarcerated, they took drastic steps to lock down their facilities and restrict movement and activities inside in order to address the rapid spread and the high risks of COVID. Those precautions, while harsh, almost certainly did save lives, but they had a particularly insidious impact on women in custody:

- In-person visitation was suspended and alternatives, such as video visitation, were either non-existent, limited, or too expensive, which strained already fragile and stressful relationships between incarcerated mothers and their children.
- The lack of transparency about what is happening behind the walls is always a problem, and during COVID, it was especially difficult for loved ones to find out whether their incarcerated family member was safe.
- In many facilities across the US, there was minimal adherence to COVID safety precautions, such as access to masks or cleaning supplies.
- Food quality and quantity was vastly diminished at a time when high nutrient food in adequate portions was more important than ever for strengthening immune systems, and nutrient deficiencies can exacerbate stress and behavioral issues.
- Women received even fewer hygiene supplies than usual. Soap, toilet paper, and feminine hygiene products were especially hard to come by.
- The delivery of both chronic health care and preventive care was vastly reduced during the pandemic as medical systems—which were already understaffed—switched to focusing on the response to COVID. Pregnant women's basic prenatal needs were also being overlooked during the intense focus on COVID care.
- Increased use of cell restriction and the isolation of women who may have been exposed were especially challenging for women. Social and psychological research shows that women depend on their connections with others to develop their sense of self and self-worth, and breaking social bonds can be traumatizing.

- Women had particularly limited access to phone calls, showers, fresh air, and exercise, any of which could have mitigated the harm they were experiencing.
- Most prisons and jails suspended all programming, leaving women without opportunities to address their underlying needs and thereby reducing their chances for successful reentry. And without access to required programming, many women couldn't qualify for parole release, so they remained incarcerated longer than necessary.
- Community-based services were suspended during the height of COVID, which meant women who were released or in transition towards re-entry faced the real possibility of being forced to return to unhealthy or unsafe living conditions with abusive partners or traffickers.

All of this should cause us to ask what we can learn from the COVID pandemic about how we can or should treat women in custody differently than we did before. What would a gender-responsive approach to corrections look like if we seek to better address women's needs and make sure they are less harmed by the experience of incarceration? How can we keep them safe and help build their resilience?

What does a "gender-responsive" approach to corrections look like in practice?

Barbara Bloom, Barbara Owen, and Stephanie Covington—giants in this field—define "gender-responsive" as the design of a program, practice, or policy that addresses the specific circumstances of women's lives and their particular risks and need factors, and that incorporates what we know works based on research conducted with women.

A gender-responsive approach is more than providing women access to programming that is tailored to addressing their distinct needs. It is a fundamental shift away from a traditional approach to correctional supervision, which harms women. Agencies that implement a gender-responsive approach to corrections identify and respond to women's distinct needs, mitigate the harm women experience during incarceration, and ensure women are prepared for release.

Our report details several recommendations that corrections agencies and policy makers could take to better protect the health and safety of women in custody, both during the pandemic and beyond. Our recommendations fall into two broad categories: 1) the need to reduce the numbers of women who are in custody and, in doing so, get the most

vulnerable women out of harm's way; and 2) the need to take steps to reduce harm for women who remain incarcerated. Specific gender-responsive measures are detailed below.

(1) Ways to release more women from prisons and jails.

We can bring down the size of the incarcerated population by releasing more women from prisons and jails. Since women present relatively low risks to the community, they are an ideal population to target for release.

At the front-end of the criminal justice system, we can accelerate the release of women held pre-trial in local jails by releasing more women on personal recognizance bonds; speeding up court hearings that were dramatically slowed down during the pandemic; and reminding women of their court dates to ensure they appear at their hearings through the use of reminder text messages.

And we should reduce the number of women entering correctional facilities in the first place. We can do so by expanding diversion options, such as by allowing law enforcement agencies to issue citations in lieu of making arrests for low-level and nonviolent offenses; reducing the number of probation and parole revocations issued to women serving a community supervision sentence by establishing alternative responses that do not include incarceration; setting realistic terms of community supervision that adequately account for the complexity of women's lives and barriers in the community such as a lack of affordable childcare and transportation; and investing in more community-based services to ensure adequate health care and social supports that keep women and their families healthy and safe.

At the back-end of the system, we need ways for women to have shorter lengths of stay. We can and should release as many pregnant women as possible from both prison and jail by making them eligible for "compassionate release," a release mechanism that allows people with serious medical conditions to be released before they have completed their sentences.

For women who are serving longer term prison sentences, we could call on governors to expand the frequency with which executive clemency is granted to women. Legislatures could also eliminate offense categories as the primary factor that determines a woman's eligibility for release from prison and jail, since for many women, their crimes do not define the level of risk they present to the community.

To improve re-entry and the likelihood that women will not return to prison, correctional agencies should ensure women have access to coordinated, supportive reentry planning and services. Parole staff should also work with local officials to ensure they have safe housing options upon release, and if quarantine options are necessary again, they should get creative about finding safe quarantine options for women in the community, such as unused hotel rooms or civic centers.

(2) Ways to reduce harm and better meet the needs of women who remain in custody.

For women who still remain in custody after all efforts to reduce the population through the measures described above have been implemented, it is important to ensure that officials seek to mitigate the harm women experience as a result of incarceration. While the need for these measures was vital during the worst of the pandemic, they are just as important to consider now that COVID restrictions have mostly eased. These recommendations should not be considered a menu of options, but rather a set of measures to be implemented comprehensively. To be truly gender-responsive, agencies need to carefully tailor all aspects of in-custody supervision to address women's needs and reduce harm.

Corrections agencies should develop innovative strategies to help women stay in contact with their children and families by:

- Issuing free computer tablets to women with no-cost plans so that they can maintain contact with their children and families without needing to use shared public phones;
- Revising mail policies to support parent-child communication;
- Providing a video visitation option that families can use if a facility is in lockdown or if they are unable to travel to a facility for an in-person visit, while ensuring that video visits serve as a supplement to, and not a replacement for, in-person visits;
- Allowing women, their children, and their families to participate in virtual activities together; and
- Creating a family-friendly visitation program that takes into account the needs of visitors and provides on-site support to women, their children, and caregivers.

Agencies should develop innovative ways to use tablets to deliver programs and reentry services to women in custody by:

- Providing women with free tablets that have applications they can use to attend virtual programs and access to services, at no cost, and by training staff on new procedures related to distributing and collecting tablets and ensuring internet connectivity;
- Allowing the use of tablets to play games, read e-books, listen to music, and participate in any other virtual activity that would help prevent idleness and stress;
- Expanding and enhancing the programs and services available to women in custody through additional community partnerships;
- Offering wellness programs as well as other preventive measures that promote women's health;
- Providing women with healthy food options and food preparation skills they can use after release;
- Offering arts programs that provide education and a creative outlet for women in custody, and use virtual streaming options to showcase their work;
- Creating a diverse team of case managers and a structure for overseeing a woman's progress toward achieving her goals and for preparing her to return to a community transformed by the pandemic;
- Ensuring all programs and services use a trauma-informed approach to interventions that recognize the prevalence of trauma among justice-involved women.

Agencies should also provide women in custody access to gender-specific health services that support positive physical, behavioral, and reproductive health outcomes by:

- Expanding women's access to health services by offering telehealth and tele-mental health services;
- Expanding access to prenatal counseling to support women through the challenges of pregnancy and to help them plan for their babies' arrival;
- Partnering with community-based health services to develop a continuum of care for women that begins while they are still in custody and supports their reintegration to the community.

Correctional administrators should reconfigure housing arrangements and create small cohorts, or "mini-communities," in correctional facilities to reduce the feeling of isolation by:

- Organizing women into "cohorts" that allow for social interactions, much like people in the outside community established "pods" during the height of the pandemic;
- Allowing cohorts to participate in programs and other community activities together;
- Allowing cohorts to participate in recreation at least daily
- Conducting regularly scheduled information sessions with each cohort in order to provide any pertinent information about, for example, any forthcoming changes to operational protocols, and allowing women to provide feedback;
- Creating community living pods for all women in custody;
- Developing a resident council for each community living pod.

Corrections officials should reduce reliance on solitary confinement, establish a trauma-informed approach to discipline, and ensure clear distinctions between punitive isolation and medical quarantine, by:

- Implementing a therapeutic approach to discipline that relies on de-escalation and trauma-informed approaches rather than punitive practices like solitary confinement;
- Separating women from the general population only when it is absolutely necessary for the safety of people who live and work in the facility, and ensuring conditions of separation are not psychologically punitive and re-traumatizing;
- Ensuring physical spaces used for medical isolation and quarantine are separate and distinct from areas used for punitive solitary confinement, and training staff on the differences between these practices;
- Providing women who are placed in medical isolation or quarantine with meaningful opportunities to communicate with others and engage in programs and services;

How staff members engage with women in custody has an enormous impact on the experiences of both the women and the staff, as well as on the culture of the facility. Agencies should ensure staff interactions with women in custody are respectful, helpful, and trauma-informed by:

- Requiring staff engage in supportive conversations with women throughout the day and always using respectful language when talking with women;
- Ensuring staff who supervise women have more of a social work mindset than a control attitude;
- Employing therapeutic discipline practices in responding to women's misbehavior during their incarceration.

COVID exposed the harm incarcerated women experience every day. We now have an opportunity to reflect on ways we can move away from imprisonment and adopt a healthier approach that will simultaneously strengthen public health and improve safety for women in custody as well as for their children, families, and communities. As both a public health measure and as a humanitarian mandate, we must find ways to better protect incarcerated women and to build their resilience for now and for the future. The recommendations highlighted here begin the process of enhancing the safety and well-being of justice-impacted women and ensuring a correctional environment that better meets the needs of those who remain incarcerated, both during public health crises and at any time.

Where are Rights for Women Prisoners in Canada? Organizational Risks and Reputational Management in Federal Corrections as Unintended Consequences of 'External' Oversight

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Post-colonial legacies, rights violations, abuses of power, and in-custody deaths are endemic to incarceration. Indigenous women account for nearly 50% of all federally incarcerated women despite representing less than 5% of the total population of women in Canada. They are disproportionately represented in segregation-like conditions of confinement, maximum security, and use of force incidents (61%) than their non-Indigenous counterparts.[1] Indigenous women also experience more frequent and longer durations of segregation than non-Indigenous women.[2] They are especially vulnerable to the harm of segregation because of the intergenerational trauma of colonialism. Compared

[1] Office of the Correctional Investigator. (2021, December 17). *Proportion of indigenous women in federal custody nears 50%: Correctional Investigator issues statement*.
[2] Wesley, M. (2012). *Marginalized: The aboriginal women's experience in Federal Corrections*.

to men, women have unique pathways into segregation and are more likely to experience isolation as a form of rejection or abandonment, and a denial of their existence.[3,4]

Over several decades, broad assemblages of laws, rules, policies, and protocols were established within the correctional context amid intensified external scrutiny of penal practices and conditions of confinement. Yet, the context of women's punishment and conditions remain strikingly comparable to the conditions in prisons for women in the mid-1980s. Prison oversight is complex and multifaceted. It relies on a combination of external bodies, legislative and regulatory frameworks. Nevertheless, reform is stagnant and limited because prisons are not designed to manage complex social problems faced by many women prisoners. Penal institutions also tend to misinterpret and fail to operationalize well-intentioned oversight attempts, especially when critiques against penal practices are piecemeal or procedure focused. The *raison d'être* of a prison system is infringement of people's rights and liberty.

Prisons anticipate human rights violations[5] and focus on documenting compliance to manage institutional legitimacy, not substantive changes.

In what follows, we show how the concerns of women prisoners are actively reframed and repositioned within a human rights narrative, and how ad hoc external oversight creates the conditions for 'legal compliance' alongside the continued perpetuation of harms. Within this context, we cannot simply consider the incidents under discussion as evidence of failed reform, institutional apathy, a by-product of imprisonment, increased punitive attitudes, or a typical disjunction between procedural and substantive justice. These processes play a part, but the picture is far more complicated[6] (see Hannah-Moffat *working paper*).

Reputational Management

In the early 1990s, women's prisons in Canada underwent significant restructuring in response to a renowned report by the *Task Force on Federally Sentenced Women:*

[3] Canadian Human Rights Commission. (2003, December). *Protecting their rights. A systemic review of human rights in correctional services for federally sentenced women.* Canadian Human Rights Commission.
[4] Vera Institute of Justice. (2018). *Women in segregation - Fact sheet.*
[5] Parkes, D., & Pate, K. (2006). Time for accountability: Effective oversight of women's prisons. *Canadian Journal of Criminology and Criminal Justice, 48*(2), 251–285.
[6] Kwon, J. (2023). *Misconduct management: Independent oversight, accountability, and the rule of law.* [Doctoral dissertation, University of Toronto]. ProQuest Dissertations & Theses Global.

Creating Choices.[7] The reform was intended to redress a long history of sexism and neglect in women's corrections, which particularly affected Indigenous prisoners, by developing an alternative correctional model that focused on the unique needs and experiences of women. This reform resulted in the closure of the notorious and degraded Prison for Women (P4W) in Kingston, Ontario. Notwithstanding this closure 5 additional prisons were built with expanded capacity and designed in accordance with the women-centred and culturally sensitive principles set out in *Creating Choices*. CSC also formally accepted the Task Force's recommendations, which placed it in the international spotlight as a leader in women's corrections. Many characterized the development of new prisons for women as a human rights milestone, and a necessary step to promote a gender-responsive correctional system.

Shortly after CSC committed to its landmark women-centred reform initiative, an incident occurred at the P4W, allegedly following racist remarks made by an officer towards an Indigenous woman prisoner. A popular television show broadcasted unarmed, partially clothed women prisoners being removed from segregation cells by male guards in full riot gear, subjected to cell extraction and body cavity searches on dirty cell floors as well as denied necessities and legal rights. These events led to a Commission of Inquiry headed by Justice Louise Arbour. Arbour's report[8] highlighted the absence of the rule of law at all levels of prison administration, despite the pervasive use of 'rules' in all aspects of prisoner management.

In response to the external scrutiny, CSC repositioned prisoners' rights as organizational 'risks' to be managed, especially for situations where compliance to law cannot be demonstrated. A year after the release of the Arbour report, CSC [9, 10] commissioned an audit-like report, that recommended various corporate strategies to "[evaluate] compliance" with the rule of law and "to effectively communicate such compliance." For example, it stated that CSC should be more upfront about the limitations of institutional programming to achieve safe reintegration. It also advised that CSC promote a better public understanding of how to achieve the best possible mix of control

[7] Correctional Service Canada. (1990, April). *Creating choices: The report of the task force on federally sentenced women*.
[8] Arbour, L. (1996). *Commission of inquiry into certain events at the Prison for Women in Kingston / the Honourable Louise Arbour Commissioner.*
[9] Correctional Service Canada (1997). *Task force report on administrative segregation — Commitment to legal compliance, fair decisions and effective results.*
[10] Correctional Service Canada. (1997, December). *Human rights and corrections: A strategic model.*

and assistance by creating its own media opportunities, publicizing more of both individual and statistical successes, and promptly countering adverse press with well-argued and factually convincing responses.

Over the next few decades, CSC made sustained efforts to remedy the issues identified by Justice Arbour. Yet numerous high-profile incidents continued to draw public attention soon after CSC's pledges to reform, which are proceeded by yet another set of external reports, inquests, and lawsuits. Patterns in CSC's responses to the external recommendations show the type of corporate strategy it adopted to withstand external criticisms and to present itself as lawful and socially purposeful correctional system. Typically, it issues audit-like reports, documenting its response to external authorities' recommendations. When accepting a recommendation, CSC documents how it accordingly modified its policies, trained staff in prisoners' rights, and so forth. When rejecting a recommendation, it goes as far as to record how it agrees "in principle", and then proceeds to demonstrate how it is legally justified in rejecting the recommendation.

CSC formally "accepted" the recommendations but problematic penal practices and the violation of institutional policies frequently resurfaced. For example, CSC introduced the Management Protocol in 2003,[11] adding new and strict procedural layers to dictate their segregation practices for women prisoners. The Protocol used the language of the *Corrections and Conditional Release Act* (*CCRA*)[12], claiming that its establishment was pursuant to "existing authorities provided in the law." Yet it imposed various behavioural standards, which acted as procedural grounds to punish and violate segregated women's basic liberties – an approach contrary to the *CCRA*, which clearly stipulates that segregation must be used as a last resort.[13] In 2011, a lawsuit was filed against the Management Protocol, challenging its constitutionality.

CSC cancelled the program, discharged women prisoners from the Protocol status (without removing them from segregation conditions), and settled the lawsuit, escaping judicial oversight.[14]

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[11] Correctional Service of Canada. (2003, September). *Secure unit operational plan: Part 8, "Management protocol".* Office of the Deputy Minister for Woman.
[12] Corrections and Conditional Release Act, SC 1992, c. 20
[13] Kerr, L. (2015). The origins of unlawful prison policies. *Canadian Journal of Human Rights, 4(*1), 91–119.
[14] Troian, M. (2013, June). *Warehousing indigenous women.* CBC Manitoba.

Similarly, CSC issued the Commissioner's Directives 709[15] "[t]o ensure...specific legal requirements are met and that restrictions are limited only to what is necessary and proportionate to meet the objectives of the [*CCRA*]." For example, it required 60-day regional segregation reviews for those in prolonged segregation. However, these reviews did not occur for Ashley Smith, an Indigenous teenager, during her nearly year-long segregation placement. Framed as 'alternatives to segregation,' CSC restarted the segregation clock throughout Ashley's 17 institutional transfers across Canada, which contributed to further deterioration of her mental health and eventually her death while under suicide watch in 2007. Segregation review requirements are seen as both necessary for institutional legitimacy and a bureaucratic process that can be overlooked.

More recently, CSC's systemic use of segregation came under microscope with two sets of constitutional challenges: *British Columbia Civil Liberties Association (BCCLA) v Canada (Attorney General)* and *Corporation of the Canadian Civil Liberties Association (CCLA) v Canada*. Examples of key issues covered in these lawsuits include the constitutionality of prolonged isolation, the lack of meaningful human contact, and the lack of independent review system for administrative segregations. The courts' and advocates' definition of acceptable degree of independence may differ for segregation reviews (see Kerr 2019 for comparisons[16]).

Yet, at the core of their disagreement lie the shared, taken-for-granted notion of 'external oversight' as necessarily fair, balanced, and impartial.

In response to the *BCCLA* and *CCLA* rulings, the federal government amended the *CCRA* in 2019, forcing CSC to 'abolish' segregation and establish the Structured Intervention Unit (SIU) regime to manage 'difficult' prisoners. This definitional change allowed CSC (n.d.) to state on its website that administrative segregation "is no longer used in federal correctional facilities." Notwithstanding the claim that it would be 'different' from segregation, the conditions of confinement and administration and governance mechanisms of SIUs closely resemble those of segregation, making it segregation by just another name. Notably, contrary to the legislative requirement, SIU Implementation Advisory Panel found that 78.4% of those placed in an SIU for a prolonged period (16 days

[15] Correctional Service Canada. (2014, March). *Commissioner's directive 709: Administrative segregation*.
[16] Kerr, L. (2019). The end stage of solitary confinement. *Criminal Reports*, *55*(7), 1-24.

or more) missed getting four hours outside their cells on at least half of their days in SIU[17]. It also found that Indigenous Peoples made up 48.9% of the SIU population (especially those with mental health issues).

The *CCRA* also instituted the Independent External Decision-Makers (IEDMs) to oversee SIU. Their mandate includes evaluating individual SIU placements on an ongoing basis, and providing recommendations and binding decisions regarding conditions and the duration of confinement. A recently released study found IEDM oversight to be inadequate, to lack transparency, and unnecessarily complex[18]. Even *with* their 'external oversight,' about 28% of stays in SIUs constituted solitary confinement and 10% constituted torture or other cruel, inhumane, or degrading treatment. Only 8.7% of IEDM 'independent' decisions recommended the removal of prisoners from SIUs. Yet again, these non-reformist reforms permitted CSC to claim legal compliance, because their SIUs are "closely monitored by independent bodies that were set up as transparency and accountability measures".[19]

External oversights usually require or encourage correctional institutions to collect and disclose data for compliance, but they seldom impose action to bring substantive changes in problematic practices. Resultantly, prison data provided in response to or as a requirement imposed by external oversight efforts often demonstrate non-compliance. Yet, such evidence seldom leads to pre-emptive review, proactive response, or reinforcement of internal accountability mechanisms by the correctional authorities. This approach also leads them to rely on external panels and reviewers while de-responsibilizing themselves from internal oversight.

Limits of 'External' Oversight and the Rule of Law

Canada being a constitutional democracy, external oversight authorities (as seen in the above-noted legislative attempts and court challenges) often refer to the rule of law to guide how correctional services and their oversight are provided. It is important to note

[17] Sprott, J. B., & Doob, A. N. (2021, February 23). *Solitary confinement, torture, and Canada's structured intervention units.*
[18] Sprott, J., Doob, A., Iftene, A. (2021). Do Independent External Decision Makers Ensure that "An Inmate's Confinement in a Structured Intervention Unit Is to End as Soon as Possible"?
[19] Correctional Services Canada. (2020, October 28). *Correctional Service of Canada on structured intervention units*. Government of Canada.

that both the rule of law and oversight measures have limited effectiveness regardless of the institutional positions of the reviewers or the robustness of the forms used.[20]

Prisoners' constitutional and human rights should not be balanced, eliminated, or reduced under any pretence that doing so will somehow promote safety and security of staff and the institution[21] (see the *CCRA* s.35). CSC expects routine rights violations in its prison administration and thus prescribes various rules it will follow and conditions it will consider in doing so as a way to appeal to the logic and the principle of the rule of law. For example, it often makes addendums to and amendments of various rules, procedures, and corporate strategies following successful court challenges and critical inquiries in anticipation of future external scrutiny. The rule of law has its values. It can reduce the likelihood of arbitrary judgment by enforcing existing rules and expectations. However, it is important to note that the rule of law can also work to sustain or justify systemic curtailment of prisoners' rights.

More specifically, institutions have multiple layers of process, rules, and an overarching legal framework. The hierarchy of laws and the *ultra vires* doctrine prioritize constitutional principles above all other subordinate laws, such as legislation and agency-specific procedural rules. Yet constitutional challenges are few and far between, require a considerable amount of evidence to establish rights violations, and take several years to reach a conclusion. Meanwhile, the rule of law (especially its 'thin' conception) itself does not always impose substantive requirements beyond that public institutions must follow the existing rules.[22] Prison officials can thus use the rhetorically powerful claim of 'the rule of law' without instituting constitutional values by adopting languages of the existing legislation and court rulings.

As well, the rule of law has the underlying values of rationality and predictability in social relations. It means that most legal cases (exc. constitutional challenges) and external segregation reviews seldom use their enforcement authority to overturn specific administrative decisions based on the broader principles enshrined in the constitution unless there exist precisely written positive prohibitions on certain aspects of their decision-making.[23] Meanwhile, prisons influence the regulatory outcome by voluntarily

[20] Sunstein, Cass R (1995). Problems with Rules. *California Law Review*. 83(4): 953-1026.
[21] Parkes, D., & Pate, K. (2006).
[22] Kwon, J. (2023).
[23] *Ibid.*

producing and disseminating filtered information to demonstrate compliance to existing rules and laws[24].

Ideologically independent oversight is rare because most are sympathetic to concerns about institutional security and the CSC's primary mandate to penalize the subject populations.[25] The exceptions, such as C*reating Choices,* the Arbour Report, and OCI systemic reports, are limited to making recommendations only.

Moving Forward

To interrupt this repetitive history, oversight efforts must critically question whether rules, procedures, and documented procedural 'compliance' indeed protect the substantive and normative rights of *individual* women prisoners. Furthermore, we must recognize that an oversight authority's structural independence or institutionalized procedural requisites alone cannot address many prison injustices. Finally, we must recognize the double-edged rhetoric of 'the rule of law,' which can impede the function of external oversight.

[24] Agrell, P. J., & Gautier, A. (2012). Rethinking regulatory capture. In J. J. Harrington & Y. Katsoulacos (Eds.), *Recent advances in the analysis of competition policy and regulation* (pp. 286–302). Edward Elgar Publishing.
[25] Parkes, D., & Pate, K. (2006).

External Oversight of Women in Places of Detention: The New Zealand Experience

Dr. Sharon Shalev (LLM; PhD).

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Sharon runs the website solitaryconfinement.org and tweets from @solitary_org.

When the Covid-19 pandemic broke out in early 2020 and countries worldwide began closing their borders, I was in New Zealand, monitoring places of detention. I had accepted an invitation from the New Zealand Human Rights Commission, the country's Central National Preventive Mechanism to follow up my 2017 review of the use of solitary confinement and restraint across New Zealand's mental health and criminal justice institutions. As covid lockdown restrictions were in place, and detention facilities were mostly closed to all outsiders, much of my initial review consisted of examining official documentation and data. This was followed by site visits when lockdown restrictions were lifted.

My findings were not encouraging. In prisons, despite promises of positive changes and a substantial injection of money into mental health provision, a refit of some segregation units and a name change of others to indicate a more therapeutic approach, not much had improved on the ground since 2017. Too many people continued to be held in solitary confinement, for too long, without meaningful human contact and often without a convincing reason. The central message of the ensuing report, Time for a Paradigm Shift, was that a significant change in the very way that detaining agencies think about the extreme tool of solitary confinement was needed for a meaningful change to be achieved.

But the persistence of two issues alarmed me in particular: a reported increase in incidents classified as 'assaults' in women's prisons, and the apparent intersection of race,

gender, and punishment in segregation units in the country's three women's prisons, in particular in the largest of the three, Auckland Women's Correctional Facility.

My analysis revealed that, although women in prison were a particularly vulnerable population with high levels of deprivation, trauma, and multiple and diverse needs, they were routinely placed in solitary confinement (segregation) at even higher rates than men. The situation was particularly grim for Māori women. Not only were they grossly overrepresented in prisons (63% of all women in prison, compared to roughly 16.5% of New Zealand's female population) they were also disproportionally isolated, accounting for a staggering 78% of all segregations in a Management Unit. This is the most restricted environment where women were held alone in a cell for up to 23 hours a day, at times for weeks and months on end.

Māori women were also segregated for longer, accounting for 68% of all segregations of longer than 15 days, the limit set by the United Nations' Nelson Mandela Rules. Seventy-five segregation stays (some involving the same women) in 2019 lasted longer than 15 days. Eleven lasted longer than three months.

Interestingly, similar findings that long segregations of women disproportionately involve First Nations women and women of colour have been made in Canada, the United States and Australia.

My analysis of incident reports from the three women's prisons in New Zealand revealed that despite it being the harshest form of imprisonment, the reasons for segregating women included minor incidents which were inaccurately classified as assaults and treated as such. This resulted in long stays in extreme conditions.

As well as being locked up in their cell for upwards of 22 hours a day, women were subjected to an array of damaging and degrading practices. These included cell extractions—when two, three or four officers enter the cell unannounced, remove the prisoner from it, often placing them in restraints, and conduct a thorough cell-search; lack of mental health care; invasion of privacy; and degrading rituals, including frequent strip searches. Women were routinely strip-searched on arrival at the segregation unit and periodically thereafter. Women admitted to the Interventions and Support Unit—a segregation unit for women deemed to be at risk of self-harm and therefore requiring special protection—were also required to wear an 'anti-rip' gown, and their cells were subject to CCTV surveillance 24/7.

My analysis of unit records indicated that the wearing of the gowns and the strip searches were, unsurprisingly, often a source of conflict and grievance. An illustrative case was that of one woman who, on reception to the prison, was assessed to be at risk of self-harm. She was escorted from the receiving office directly to the Interventions and Support Unit where she was placed in a strip cell and instructed to remove her clothes. One of the four officers involved described what happened next.

"Upon arrival at the ISU she became non-compliant and refused to take her clothes off and change into a gown. She finally removed her top and bra and put on the gown but refused to remove her pants. Staff instructed xx to move from the strip room to her allocated cell.

Once in the cell, I instructed xx to remove her pants and underwear. She did so after much abuse towards staff. Her behaviour became worse as she announced she had her period.

When officer xx instructed her to remove her hair tie, she stood in front of her and then spat in her face. Spontaneous use of force was used, and the hair tie was removed. I took her right arm, officer xx had her left arm, officer xx took the head and officer xx had her legs as the prisoner was resisting. Staff exited the cell with no further issues."

This incident involved four prison officers, struggling with one woman in a strip-gown without underwear for the purpose of removing her hair-tie, aggravating what was clearly an already tense situation.

Other practices included frequent use of pepper spray against women inside their cell, sometimes with the aid of the so-called 'cell buster,' a device which helps to disperse the pepper gas inside the cell. Women were pepper-gassed for minor reasons, for example, covering the observation panel in their cell door. Looking in detail at reported incidents, I discovered that many involved minor and trivial incidents, including – and I quote – "Threw a hat at staff and attempted to grab at their hair"; "Refused her medication and threw the container which contained her medication back at the nurse. It missed the nurse"; "She proceeded to peel her orange and throw it at staff"; "Threw jacket at nurse"; "threw a spoon at staff which landed at officer's stab-proof vest"; "threw carton of rotten milk at staff which landed on the front of one of their trousers [sic]. The prisoner claimed that the milk slipped."

I would note that in men's prisons incidents such as these would most likely not even be reported, let alone punished so harshly. Worse still, the use of pepper spray in Auckland Women's prison was second only to its use in Mount Eden, the largest remand facility for men.

My report, from which these examples are taken, was titled 'First Do No Harm', after one of the most fundamental principles in medical ethics. It takes aim at the inadequacy of making statements about new ways of working allied to cultural and gender specific sensitivities whilst at the same time subjecting women to punishment and humiliation.

I wasn't alone in closely scrutinising the use of force, segregation, and other practices in women's prisons. The courts were examining them too, and expressing their concern. In a case brought by two women who endured long stretches of segregation at Auckland Women's prison as well as the use of pepper spray, Manukau District Court Judge McNaughton stated in his judgement that:

"It is difficult to see all of these examples of the ill treatment of prisoners as anything other than a concerted effort to break their spirit, and defeat their resistance."

These issues were also known to New Zealand's monitoring bodies. The country has a well-established independent National Preventive Mechanism, located within the Office of the Ombudsman, whose reports have highlighted the treatment of women in prison and the over-reliance on segregation. New Zealand's Department of Corrections also has an active internal inspectorate body which regularly visits places of detention and has published a report on the conditions of three specific women.

Nonetheless, it took the judicial intervention mentioned above, a wide-ranging media expose, and an external review containing graphic descriptions of practices within women's prisons to effectively bring the issue to the fore and prompt the Department of Corrections to announce a series of policies ('A New Strategy for Women') on the treatment of women in prison.

At the time of writing though, it is not clear if much has changed in practice in attitudes and day to day practices. That, in my view, will require further internal, external and independent oversight to actively look beyond alarming headlines and policy statements, ensure effective implementation, and properly scrutinise prison conditions for women.

Shining a Light on Women in New Zealand Prisons

Janis Adair
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New Zealand

Janis worked as a nurse in the Army Medical Services and then became a Police detective in the United Kingdom, moving to New Zealand in 2004. She has worked for the Commerce Commission, the Independent Police Conduct Authority and the Office of the Ombudsman. Janis returned to the United Kingdom in 2014, where she worked at the Independent Inquiry into Child Sexual Abuse. In July 2017, Janis was appointed as Chief Inspector and led the enhancement of the Office of the Inspectorate.

Over the last few years, the Office of the Inspectorate has shone a light on the imprisonment of women in New Zealand.

Women in New Zealand prisons share common experiences with imprisoned women around the world. Many women are likely to be caring for children, have low levels of literacy, have experienced trauma and abuse, and have mental health and substance use disorders. In response to these experiences, experts have called for gender-responsive and trauma-informed practices in prisons.

In New Zealand, women make up 6.1% of the prison population (as of 31 October 2022). Currently, 486 women are housed in New Zealand's three women's prisons, down from a high of 766 in 2018. Women tend to be in prison for less serious offences than men, such as offences against public order (which include drug and traffic offences), and are more likely to be sentenced for property crimes, including burglary and dishonesty. Women are also much less likely to offend against a person than men, and are less likely to be reconvicted of a crime in the two years after being released from prison.

Indigenous Māori women are over-represented in New Zealand prisons, a long-standing trend. Māori women aged 20-60 years comprise 15% of the general population, but are 63% of women in prison. In comparison, Māori men comprise 52% of the prison population. The majority of women in prison (69%) are aged between 20 and 40 years, and a small number are under 20 or over 60. Around a sixth of women in prison have gang links, compared with 37% of male prisoners.

The Office of the Inspectorate's focus on imprisoned women began with a complaint, received in February 2020, from a lawyer representing three maximum security women at Auckland Region Women's Corrections Facility (ARWCF). This led to a special investigation into the management of these women. A report was released in March 2021, which included adverse findings around the use of segregation and force.

Following this, Minister of Corrections, Kelvin Davis, issued a letter of expectations to the Chief Executive of the New Zealand Department of Corrections | *Ara Poutama Aotearoa,* in which he said the Department should accept the recommendations outlined in the report. There should be, he said, an "*urgent review and overhaul of maximum security classification for Women, the development of management plans for Women and a review of all Women's prisons.*"

He went on to state: "*The corrections system and network was built to suit the needs of male prisoners. I believe we need to review the system and network to ensure we operate our women's prisons based on the needs of female prisoners.*"

Following the Minister's letter, the Inspectorate broadened its scrutiny and carried out inspections at New Zealand's three women's prisons (ARWCF, Arohata Prison and Christchurch Women's Prison), and then undertook a thematic inspection of the lived experience of women in prisons. Together, the reports examine the challenges faced by women in prison and offer an opportunity for the Department to refresh its policies, practices and procedures. The reports aim to focus and strengthen the Department's efforts to make significant and lasting changes to the women's prison network.

The inspection reports are part of the programme carried out by the Inspectorate across New Zealand's network of 18 prisons. The inspection process provides an ongoing invaluable insight into prisons, assurance that shortcomings are identified and addressed in a timely way, and examples of good practice to be shared across the prison network.

My decision to undertake the thematic inspection arose from the recognition of a real and present opportunity for the Department to reimagine and redesign the way in which women are managed in prison and prepared for their transition back to the community.

The thematic report, *The Lived Experience of Women in Prison*, provides insights into the vulnerabilities and specific needs of women which, while recognised in the Department's *Women's Strategy (2017-2021) | Wāhine E Rere Ana Ki Te Pae Hou*, were

never fully realised. Importantly, it also shares the voices and lived experiences of women in prison and of staff, providing the most powerful and compelling messages of all.

The thematic report has one overarching recommendation, which has been accepted by the Department: "*The Department must review the strategic and operational leadership, resourcing, operating model and service delivery across the women's prison network (including health services) to enable, and deliver, better outcomes for women, which are critically gender specific, culturally responsive and trauma informed*."

While I recognise there is much work to be done, I felt it necessary to make only one over-arching recommendation and provide further areas for consideration. The Department should focus on prioritising actions for better outcomes and closely monitor and report on progress to ensure visibility. There must be a positive and open culture which promotes and encourages continuous improvement.

I expect the Department to work collaboratively with key partners and stakeholders and, equally important, engage directly with women in prison and on release to best understand how improvements can be co-designed to reflect the specific needs and vulnerabilities of women.

The significant over-representation of Māori women in New Zealand prisons – who also make up the majority of the remand population – demands attention and must be more robustly addressed with an authentic Māori response across the three women's sites, alongside the Department's Hōkai Rangi strategy, which aims to "*humanise and heal*" and reduce the proportion of Māori in prison.

Considered together, these reports provide a compelling case for changes to the management of women in prisons. I also appointed dedicated staff from my Office to work across the women's prison network to provide assurance over the findings and recommendations of the reports.

In response to the Inspectorate reports, in October 2021, the Department released its updated women's strategy for 2021-2025 called, *Wāhine - E rere ana ki te pae hou | Women rising above a new horizon*. The strategy was developed in consultation with a range of predominantly Māori women, including those with lived experience of the justice system, whānau (extended family), service providers, staff and a range of agencies and iwi (tribe-based) organisations.

The Corrections National Commissioner said at the time: "*The release of three reports by the independent Corrections Inspectorate, all relating to the management of women in prison in our recent history, demonstrates the absolute need for a refreshed strategy to guide our work*".

The next step for the Inspectorate is a review of mothers with babies units in the women's prisons. Currently, women in prison who have a child aged under two can apply to keep their child with them in prison in a special unit. The review aims to assess the adequacy and effectiveness of the Department's practices and processes when working with women in prison who have a child or children aged two years or under, are pregnant, or are housed in a mothers-with-babies unit. A report will be released in 2023.

The Minister's letter also led to a review of the entire Corrections' complaints system, overseen by my Office, which resulted in the report titled, *Redesigning the Ara Poutama Complaints System: Working towards a manaakitanga approach. This wide-ranging report* proposed a redesign of the complaints resolution system to move Corrections towards a model that places the complainant at the centre of the issue. Work is now ongoing towards that aim.

The Office of the Inspectorate works to ensure that all prisoners are treated in a way that is fair, safe, secure and humane. The Inspectorate is part of the Department of Corrections, but functions independently to ensure objectivity and integrity.

All five reports have been publicly released:

Auckland Region Women's Corrections Facility inspection report

Arohata Prison inspection report

Christchurch Women's Prison inspection report

Thematic Report: The lived experience of women in prison

Special Investigation into the management of three wāhine at ARWCF

Body Searches: A Higher Risk for Women in Prison

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Association for the Prevention of Torture (APT)

The APT is an international non-governmental organisation with 45 years of experience in preventing torture and ill-treatment worldwide. As part of its work to promote transparency in all places of deprivation of liberty, the APT collaborates with and supports oversight bodies in their efforts to influence and change detention policies and practices. One of APT's main strategies is to address the situations of heightened risks faced by women, LGBTI+ people and other persons deprived of liberty in situations of heightened vulnerability.

"It is very humiliating," Adila, a woman detainee, told me a few days ago when complaining about the strip search she had to undergo every time she was visited by her family and every time she was escorted by prison guards to the hospital outside the prison.

The humiliation experienced by Adila is not an isolated case. Every day, women across different countries and regions experience body searches while in prison. This practice can be humiliating to the extent that women may prefer not to receive visits to avoid being strip searched. Body searches can also affect women visiting their loved ones in prison.

A matter of dignity or security?

Questioning detention practices is at the core of monitoring the treatment and conditions of persons deprived of liberty. A simple question such as "why does it happen?" can be a powerful tool to prevent human rights violations from occurring.

Questioning the way body searches are conducted in practice is a clear example of that. When asking prison management and staff why body searches are conducted at certain times and in a certain way, oversight bodies will always hear that it is a matter of

security. However, can security concerns always justify the implementation of body searches? The short answer is no. Ensuring security in prison cannot be a justification for conducting practices that violate human dignity and other fundamental rights.

Security is a real and legitimate concern, and states have an unavoidable duty to guarantee good order and internal security in places of deprivation of liberty. In this regard, body searches may be necessary and legitimate means to prevent detainees from having access to dangerous or prohibited items or substances, which may threaten the safety of staff, other persons deprived of liberty, and visitors.

At the same time, when depriving a person of their liberty, states have the duty to guarantee the enjoyment of all those fundamental rights that are not restricted by the deprivation of liberty. The right to dignity is inherent to all human beings, and it is one of the fundamental rights that states must ensure at all times, including in the context of deprivation of liberty. As reaffirmed by the Nelson Mandela Rules, "all prisoners shall be treated with the respect due to their inherent dignity and value as human beings" (Rule 1).

While sometimes necessary for security reasons, certain detention practices entail a high risk of discrimination, abuse and ill-treatment by their nature but also for the manner in which they are implemented.

Body searches are among those risky practices. They can take different forms, including pat-down, i.e., when the person being searched remains dressed; strip searches involving nudity but without physical contact; and invasive or body cavity searches involving a physical examination of body orifices.

Body searches are situations when abuse is possible, as they can involve nudity and physical contact, circumstances that increase the risk of humiliation and abuse. Due to their intrusive nature and the infringement of a person's privacy, body searches can be particularly traumatic for women detainees, but also for women visitors.

This is exacerbated in the case of women who have experienced sexual violence or other kinds of trauma. Moreover, the intersection between gender and other factors, such as sexual orientation, gender identity and expression, religion, ethnicity and race, can expose certain women detainees to a greater risk of discrimination, abuse and violence during body searches.

Humiliating searches, particularly strip and cavity searches, may even amount to torture or ill-treatment when conducted on discriminatory grounds and when leading to severe physical or mental pain or suffering.

A specific set of international standards

The use of body searches must respect the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment under international law, which is not only enshrined in many treaties but also recognized as a norm of customary law.

Taking into account the inherent risk posed by the use of body searches, a number of international and regional human rights standards have included specific provisions relating to body searches of persons deprived of liberty. The 2010 Bangkok Rules provide for the specific protection of women deprived of liberty, including in relation to body searches, complementing the provisions set out in the 2015 Nelson Mandela Rules.

Both the Nelson Mandela Rules (Rule 50) and the Bangkok Rules (Rule 19) specify that respect for the dignity of the person being searched is the foremost priority when conducting body searches in places of detention. International (Nelson Mandela Rule 50) and regional standards such as the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and the European Prison Rules also establish that body searches can be legitimate only if they follow the principles of legality, necessity, and proportionality. This means that body searches should not be applied systematically as a blanket measure to all detainees, but should respond to specific identified risks. In addition, most progressive standards have also included the prohibition of cavity searches for their invasive nature.

Furthermore, international and regional standards have also defined the modalities in which body searches should be carried out to mitigate the inherent risks they entail. In this regard, Bangkok Rules 19-21 establish that body searches of women shall be conducted only by adequately trained women staff. It is also very important that body searches are conducted under appropriate sanitary conditions and that they are properly recorded, including the reasons for the searches and the identities of the person searched and the persons conducting the search (Nelson Mandela Rule 51).

Recognising the harmful psychological and physical impact of body searches, other alternative methods of inspection, such as scans, should be privileged to replace strip and invasive searches of women (Bangkok Rule 20). Where body searches are unavoidable,

these should be carried out in two steps (first from the waist up and then from the waist down) to avoid the person being completely naked.

How to monitor body searches in practice?

Oversight bodies play a crucial role in monitoring body searches of women in prison. To support their work, the APT has developed several tools, including the recently published analysis piece "Women in detention: Body searches. Improving protection in situations of vulnerability" and the Detention Focus Database.

To effectively monitor body searches, oversight bodies need to check if body searches are clearly regulated in national laws, policies, regulations and procedures, and if they comply with the most progressive international standards. When needed, oversight bodies should propose changes and amendments to existing laws and policies to ensure they are in conformity with international standards.

Even more importantly, oversight bodies are uniquely placed to monitor how body searches are conducted in practice. Even if laws and policies on body searches comply with international standards, their implementation may be problematic. It is, therefore, crucial that the information collected by oversight bodies is verified through different sources, a process known as "triangulation."

For instance, prison regulations may clearly define the reasons for and modalities of body searches of women in prison in compliance with international and regional standards. However, prison staff may not be aware of such regulations and/or not follow them carefully. Strip searches may be used systematically for all women detainees as a blanket policy, without an individual assessment, or used disproportionally with certain women on discriminatory grounds.

The only way to gain accurate information is to check existing laws and policies, check detention registers, check training curricula, interview women deprived of liberty and visitors in private, interview staff, directly observe the place where body searches are conducted, and check first-hand the availability and functioning of alternative methods for body searches, e.g., scans and X-rays.

By doing so, oversight bodies can check whether strip and invasive searches are used as a last resort and when strictly necessary. Relying on different sources, especially interviews with women deprived of liberty and women visitors, is key to understand the modalities of body searches and their impact on women detainees and visitors.

Again, it is about asking the "why," questioning the reasons why body searches are used. It is also about the "how," questioning the modalities in which body searches are conducted in practice. Based on their accurate findings, oversight bodies can make recommendations and contribute to changing laws, policies, and practices.

Preventing the Torture and Ill-Treatment of Incarcerated Women: A Spotlight on Reproductive Healthcare

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Content Warning – This article discusses sexual assault and pregnancy loss.

Equivalency of Healthcare

Incarcerated women should be afforded at least the same standard of health care that is available in the community. The United Nations Standard Minimum Rules for the Treatment of Prisoners ("the Mandela Rules") make clear that imprisoned people "should enjoy the same standards of health care that are available in the community, and should have access to necessary healthcare services free of charge, without discrimination on the grounds of their legal status." Similarly, the International Covenant on Economic, Social and Cultural Rights includes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Of course, as highlighted by the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (**OSCE ODIHR**), equivalency of healthcare should extend to reproductive rights, and there should be healthcare staff in prisons that are "specialized in healthcare issues specific to women and girls, including reproductive healthcare." Particularly relevant to those monitoring conditions of detention, the United Nations

Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**) has raised concerns regarding situations where women deprived of their liberty have a "lack of adequate attention to their right to health care, including sexual and reproductive health rights".

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ("the Bangkok Rules") state that "[g]ender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners," and that medical screening on entry to prisons should include the "reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any related reproductive health issues" although women retain "the right not to share information and not to undergo screening in relation to their reproductive health history." The Bangkok Rules also require "[p]reventive health-care measures of particular relevance to women, such as Papanicolaou tests and screening for breast and gynaecological cancer."

The World Health Organisation defines reproductive health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so." This article does not cover all aspects of reproductive health, highlighting instead a number of discrete issues for those bodies monitoring conditions of and treatment in detention, with the view to ascertaining whether there is access to culturally appropriate reproductive healthcare equivalent to that provided in the community, and preventing torture and cruel, inhuman or degrading treatment or punishment. Issues focused on are menstruation and menopause, access to abortions, pregnancy and birth, and decisions regarding whether children remain with or are separated from their mothers. This article is not intended to be a comprehensive analysis of reproductive healthcare considerations for incarcerated women, with critical issues, like "access to condoms and dental dams to women prisoners, to prevent the spread of sexually transmitted diseases," not being addressed (United Nations Office on Drugs and Crime).

With ethnic minorities and Indigenous peoples being overrepresented in prison systems across the world, it is essential that the reproductive healthcare provided to incarcerated women and girls is culturally safe. In Australia, for example, there must be a particular focus for monitoring bodies on culturally appropriate healthcare for Aboriginal

and Torres Strait Islander women, who are imprisoned at a much higher rate than the rest of the population (see the Australian Bureau of Statistics, Corrective Services September Quarter 2022 statistics).

The Australian Health Practitioner Regulation Authority has defined cultural safety as follows:

> *Cultural safety is determined by Aboriginal and Torres Strait Islander individuals, families and communities. Culturally safe practise is the ongoing critical reflection of health practitioner knowledge, skills, attitudes, practising behaviours and power differentials in delivering safe, accessible and responsive healthcare free of racism.*

It is also essential to ensure that reproductive healthcare rights are inclusive of non-binary and transgender people, ensuring that everyone's medical and healthcare needs are adequately met, as highlighted in Principle 9 of the Yogyakarta Principles:

> *States shall [p]rovide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health.*

Menstruation

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (**CPT**) noted the following in its 10th General Report:

> *The specific hygiene needs of women should be addressed in an adequate manner. Ready access to sanitary and washing facilities, safe disposal arrangements for blood-stained articles, as well as provision of hygiene items, such as sanitary towels and tampons, are of particular importance. The failure to provide such basic necessities can amount, in itself, to degrading treatment.*

The importance of being able to access the above "without embarrassment" has been echoed by others. As clearly stated by the Anti-Torture Initiative at the Washington College of Law, this is not an issue of convenience but rather "a requirement for… dignity and health", with the denial of access to sanitary items and being able to wash during menstruation resulting in humiliation while also leaving women vulnerable to coercion and exploitation. Pain management is also not something to be disregarded, inclusive of

access to the contraceptive pill used by many women not only to prevent conception but to "alleviate painful menstruation".

Good practice among National Preventive Mechanisms (**NPM**s – established in accordance with obligations under the United Nations *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**)) can be found in His Majesty's Inspectorate of Prisons for England and Wales *Expectations Criteria for assessing the treatment of and conditions for women in prison* ("HMIP Expectations"), which require that:

> "[w]omen are provided with enough sanitary and menstrual items without having to ask for them, [w]omen have access to sanitary and washing facilities and the means of disposing of sanitary and menstrual items discretely, [c]lean bedding is provided for each woman on arrival and can be replaced or laundered weekly or whenever needed."

Case Study – Use of Force to Conduct a Strip Search

In January 2021, an Aboriginal woman remanded in custody at the Alexander Maconochie Centre (**AMC**) – Canberra's only adult prison – was subjected to a planned use of force for the purpose of carrying out a strip search in the prison's Crisis Support Unit (**CSU**). This incident became the subject of a Critical Incident Review by the ACT Office of the Inspector of Correctional Services (**OICS**) after she made a complaint about her treatment, and the Minister for Corrections referred the matter to OICS.

The woman became distressed after receiving news that she would not be able to attend her grandmother's funeral and participate in Sorry Business with her family and community (due to logistical issues associated with short notice of funeral arrangements). She was subsequently placed at-risk and transferred to the CSU. A Corrections Officer saw her touching her crotch area and was concerned she may have been concealing a sharp object that she might use to hurt herself. Due to the woman refusing to comply with a strip search upon admission to the CSU, a decision was made to carry out a planned use of force with the intent of strip searching her.

The use of force involved four custodial staff in full Tactical Personal Protective Equipment (**TPPE**) and a number of other staff members, including males, in the vicinity. After a prolonged struggle, the woman agreed to comply with the strip search, which was carried

out in a bathroom with two female officers. The CSU at the AMC accommodated both men and women and, at the time of the incident, there were men in the unit who could hear what was taking place and were shouting out comments to the woman involved.

The woman's complaint about this incident described how this was a highly traumatic experience for her. She had several additional vulnerabilities, which put her at increased risk in a use-of-force situation, and was also the recent victim of a sexual assault and was menstruating at the time of the incident.

An excerpt from Letter from Detainee A outlining the allegations:

At this time, I was menstruating heavily due to all the blood thinning medication I take on a daily basis. Here I ask you to remember that I am a rape victim. So you can only imagine the horror, the screams, the degrading feeling, the absolute fear and shame [I] was experiencing.

The review by OICS made nine recommendations to the ACT Government to improve policy, procedures and practices around uses of force and strip searching, in particular, ending the practice of mandatory strip searching upon entry to the CSU. OICS also recommended that "procurement of body scanner technology to provide options for less restrictive ways than strip searching to search detainees on entry to the Crisis Support Unit" be expedited. It also raised concerns about ACT Corrective Services' compliance with human rights considerations under the *Human Rights Act 2004* (ACT), which requires human rights to be considered in all decision-making by a public authority.

The ACT Government agreed to all nine recommendations.

HMIP Expectations also address the importance of women "experiencing… menopause hav[ing] the same level of care and support as women in the community" and having staff with relevant training to support women who may "experience psychological and physical difficulties related to menopause and require specific medical services."

Access to Abortions

Gender-Based Violence is "[v]iolence that results in, or is likely to result in, physical, sexual or psychological harm or suffering, against someone based on gender discrimination, gender role expectations and/or gender stereotypes, or based on the differential power status linked to gender." The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment ("Special Rapporteur") report stated that:

> *International and regional human rights bodies have begun to recognize that abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender. Examples of such violations include… denial of legally available health services such as abortion and post-abortion care…*

In that same Report, the Special Rapporteur cited *R.R. v. Poland*, noting that "[a]ccess to information about reproductive health is imperative to a woman's ability to exercise reproductive autonomy, and the rights to health and to physical integrity." In that case, the European Court of Human Rights determined that there had been a breach of Article 3 of the *European Convention on Human Rights* ("[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment"), with the applicant having "obtained the results of the [genetic] tests when it was already too late for her to make an informed decision on whether to continue the pregnancy or to have recourse to legal abortion." The Report also references the matter of *K.N.L.H. v. Peru*, in which the Human Rights Committee formed the view that there was a violation of Article 7 of the *International Covenant on Civil and Political Rights* (**ICCPR**), as a result of the "omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced." In their Report, the Special Rapporteur cited the Committee against Torture's concerns regarding bans and restrictions on access to abortion, other UN bodies' concerns "about the denial of or conditional access to post-abortion care," and the Human Rights Committee's findings of breaches of Article 7 ICCPR arising from denial of access to abortion for pregnancies resulting from rape.

Similarly, the *Istanbul Protocol - Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol") references the Committee on the Elimination of

Discrimination against Women's findings that "forced continuation of pregnancy" can amount to a breach of rights. The OSCE ODIHR – in considering situations where people are deprived of their liberty – found that sexual and gender-based violence (**SGBV**) may consist of forced pregnancy, particularly instances of "[f]orcing women to continue pregnancies where existing legal provisions permit interruptions of pregnancy or to have abortions while in custody." This caveat of ensuring access to abortion in places of detention where there is access in the community has been repeated by the CPT:

> *Equivalence of care also requires that a woman's right to bodily integrity should be respected in places of detention as in the outside community. Thus, where the so-called "morning after" pill and/or other forms of abortion at later stages of a pregnancy are available to women who are free, they should be available under the same conditions to women deprived of their liberty.*

While the reasoning for this is understandable, practically this will mean that incarcerated women will have different rights in different countries and sometimes even across states or territories within the same country, such as Australia. It may mean that where women are not able to realise reproductive rights in the community, this practice is imported into places of detention, and the consequential harms are may also be amplified in that specific situation of deprivation of liberty. The added distress and trauma of having an unwanted pregnancy while incarcerated arises from a number of factors, including the fact that access to healthcare while pregnant, during birth, and after birth is almost invariably *not* equivalent to the care available in the community. Incarcerated women do not have the same level of access to support from their partner, families and communities, and there is the very real risk that their children will be removed from them after the birth, and potentially funnelled into the child protection system.

Standards or expectations of monitoring bodies should specifically address access to abortion and information, such as Western Australia's Office of the Inspector of Custodial Services (**WA OICS**) *Code of Inspection Standards for Adult Custodial Services*, whose measures against the standard that "[p]regnant prisoners' health care needs are met by services and support equal to that in the community" include that "[i]nformation and counselling about pregnancy and termination options is delivered by qualified staff." Similarly, the NSW Inspector of Custodial Services (**NSW ICS**) *Inspection Standards for Adult Custodial Services in New South Wales* requires that "[p]regnant inmates should be offered information and counselling by qualified counsellors regarding pregnancy and

termination options." HMIP Expectations include an indicator that "women considering termination can access appropriate services and follow-up care."

Pregnancy and Childbirth

There has been recognition internationally that there are certain practices (restrictive/invasive/use of force) in places of detention that are particularly harmful to pregnant women, with the OSCE ODIHR's considerations including whether there is a "total prohibition of the use of vaginal searches for pregnant women" and whether "pregnant women, women with infants and breastfeeding mothers… [are] ever subjected to solitary confinement." Critically, the Bangkok Rules stipulate, "[i]nstruments of restraint shall never be used on women during labour, during birth and immediately after birth."

However, there is also more specific guidance to be found in terms of the healthcare needs of incarcerated pregnant women. The Bangkok Rules discuss the need for specific medical care for pregnant girls, and the development of and monitoring of a health and diet program for pregnant or breastfeeding women by a qualified health practitioner. These Rules have been supplemented domestically. For example, HMIP Expectations state:

> "[w]omen can access pregnancy testing and emergency contraception within 24 hours of arrival, if required; [p]regnant women in prison have access to community-equivalent antenatal care in line with national standards, including access to midwifery advice by phone whenever they need it; [p]regnant women in prison are able to prepare for childbirth and parenting in line with national standards; [a]ll staff are able to recognise the signs of the onset of labour and premature labour and know what steps to take."

Similarly, NSW ICS' *Inspection Standards for Adult Custodial Services in New South Wales* state:

> "[p]regnant inmates should have individual care plans developed as soon as a pregnancy is confirmed and the appropriate screening completed as soon as possible."

HMIP Expectations envisage "[p]atient-centred birth plans… in place in advance… include[ing] identifying a birthing partner, risks, midwifery input and hospital care and monitoring arrangements."

Case Study – Birth at Bandyup Women's Prison

In March 2018, an Aboriginal woman gave birth at Bandyup Women's Prison in Western Australia. Upon reviewing this incident, Western Australia's Inspector of Custodial Services found that "[d]espite pleading for help multiple times for over an hour, a woman ('Amy') gave birth alone in a locked cell at 7.40pm. Staff observed events through a hatch in the cell door, but the door was not unlocked for several minutes after the birth… Amy did not have medical staff with her when giving birth, and… it was only after her child was born that staff called a 'Code Red' emergency… it took somewhere between seven and 12 minutes for the cell door to be opened after the Code Red was called."

The Inspector concluded, "human, procedural and systemic failings had combined to create serious and avoidable risks to both mother and child":

- "staff were slow to act even though they knew Amy was in the late stages of pregnancy";

- there "was clearly an emergency well before" the Code Red was called;

- the length of time it took to open the cell door once the Code Red was called was "inexcusable";

- "[c]ommunication between staff was poor, cell keys were not readily available, and staff shift changes seemed to take priority over caring for Amy"; and

- "the prison downplayed the seriousness of the events when reporting to head office."

Monitoring bodies should also assess whether there is adequate support for women who have miscarried – in terms of both their physical and mental health – and provide support to women whose children have been removed from them following the birth.

Children and their Mothers

The days immediately following the birth are critical. There should be an opportunity for women to remain in the hospital with their baby for a number of days, to breastfeed, to bond with their baby, and to have an experience that is as close as possible to the experience they would normally have following a birth (for example, the Victorian Aboriginal Legal Service, in its Submission to the Inquiry into Children of Imprisoned Parents, included a case study that spoke to the importance of being able to take photos of the mother and baby, to record the occasion).

The decision about whether to remove a child from their mother or to permit the child to reside at the prison with their mother is a critical one. The Bangkok Rules require that "[d]ecisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child," and that the "removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified." Decisions should not be based on whether there is capacity at the prison. As noted in the NSW ICS' *Inspection Standards for Adult Custodial Services in New South Wales*, there must be "sufficient appropriate accommodation and facilities for the in-correctional centre care of pregnant women, infants and children." The Bangkok Rules state, "[c]hildren living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services," and that women "shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so," and the "medical and nutritional needs of women prisoners who have recently given birth, but whose babies are not with them in prison, shall be included in treatment programmes." HMIP Expectations include that "[w]here a child is separated from its mother before the mother's discharge date, the mother is fully supported, both emotionally and practically, in making the arrangements for separation."

Case Study – Prevention of separation of an Aboriginal mother and baby

As a result of the Bandyup facilities in Western Australia being at capacity, the detaining authorities intended to remove a newborn baby from their Aboriginal mother, despite medical advice that it would not be in the best interests of the baby. The Aboriginal Legal Service of Western Australia, representing the mother, successfully secured an outcome whereby the baby could remain with its mother in prison, noting that the Western Australian Inspector of Custodial Services had already previously recommended that the facilities at Bandyup be expanded.

Of course, where children are to remain with their mothers, there must be suitable healthcare for both the mother and their child, including "[p]ostnatal care… equivalent to that available in the community" and "[m]aternal and child nutrition… managed under national guidelines."

Conclusion

"Women's issues" are so often invisibilised or minimised in the community, and there is a significant risk of these critical health issues being further sidelined while women are incarcerated. Monitoring for equivalency of reproductive healthcare in prisons is central to preventing the torture and ill-treatment of incarcerated women. Culturally appropriate healthcare is, therefore, particularly important given the sensitivities surrounding reproductive health.

Creating Choices in Canada

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A brief history of women's corrections in Canada

In 1989, the Commissioner of Corrections established a Task Force on Federally Sentenced Women to develop a plan and guidelines for future policies and interventions in women's corrections. The Task Force examined the lives, experiences, and insights of federally sentenced women, as well as the management practices for women in custody. In April 1990, *Creating Choices: The Report of the Task Force on Federally Sentenced Women* was released. It has served as a blueprint for women's federal corrections in Canada, and marked the beginning of a correctional system that is recognized as "woman-centered".

The Task Force made short and long-term recommendations that significantly changed women's corrections. It enshrined five principles integral to a woman-centered approach to correctional services**:**

1. Empowerment
2. Meaningful and responsible choices
3. Respect and dignity
4. Supportive environment
5. Shared responsibility

Nine major problems were also identified and summarized by the Task Force:

1. The Prison for Women is not adequate;

2. Prison for Women is over secure;
3. Programming is poor;
4. Women are isolated from their families;
5. The needs of Francophone women are not met;
6. The needs of Aboriginal women are not met;
7. Responsibility for federally sentenced women must be broadened;
8. Women need to be better integrated into the community; and,
9. Incarceration does not promote rehabilitation.

Perhaps most importantly, the Task Force was clear that the single federal prison for women located in Kingston, Ontario, was completely inadequate. Its design was based on a men's maximum-security facility, which meant that most women were held at a higher security level than required. The Task Force recommended that five regional women's sites be constructed with cottage-style units to incorporate independent living, non-intrusive security measures, natural light, fresh air, space, privacy, dedicated spiritual space, and access to land. Today, the Correctional Service of Canada runs five regional sites, as well as an Indigenous Healing lodge for women. All frontline staff working in these facilities are required to complete Women-Centered Training – a ten-day course that strengthens an understanding of women's issues, as well as improves the ability to work directly with women offenders. Courses are also available for interventions staff and management.

The Role of External Oversight

Although the evolution of women's corrections has seen a number of improvements and best practices, challenges to realize the full intention and potential of *Creating Choices* continue to exist. As an oversight body, the Office of the Correctional Investigator consistently examines decisions and practices of the Correctional Service to help ensure that the principles of *Creating Choices* are reflected in practice. Over the years, the Office has observed that decisions, programs, and initiatives that encompass the principles of *Creating Choices* are those that make the most positive difference in the lives of women. Progressive, fulfilling initiatives enable women to maintain connection, express creativity and demonstrate responsibility while improving self-esteem and emotional self-

worth. This leads to feelings of respect, support and dignity, and empowers women to move forward.

The 2020-21 *Annual Report of the Office of the Correctional Investigator* marked the 30-year anniversary of *Creating Choices* by examining what has changed since its introduction to women's corrections. Through interviews with women offenders, correctional staff and management, stakeholders, and a review of academia, it was unfortunately concluded that little has changed for most federally incarcerated women.

One of the most significant changes over the past thirty years has been the sheer increase in the number of federally sentenced women. Admissions to women's federal correctional facilities more than tripled, from 170 in 1990-91 to 562 in 2019-20. The composition of the population changed significantly as well. Most notably, the population of federally sentenced Indigenous women has increased by 73.8% over 30 years.

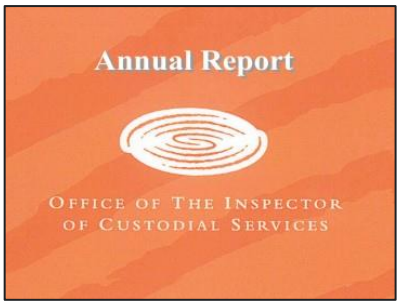
Many of the problems identified by the Task Force continue to exist today; namely, inadequate infrastructure, over-securitization, lack of appropriate programming and services, and poor community reintegration practices. Correctional practices that re-traumatize women – for example, random strip searches, temporary placements in higher security, isolation from family, arbitrary decision-making, and discrimination – in no way contribute to a healing environment. The Office emphasized that women need to feel safer, need space to heal, need to have a sense of purpose, and need prosocial models and support. It was also made clear that more-targeted change, including a shift of institutional resources to the community, is required if we are to have any hope of realizing the vision of the Task Force and *Creating Choices*.

Through regular institutional visits and communication with women offenders and correctional staff, the Office will continue to promote a correctional setting that best responds to the unique needs of women and reflects the importance of *Creating Choices.* Additionally, the Office is currently paying close attention to the complexities of gang affiliations and the experiences of gender-diverse offenders, emerging issues that were not considered by the original Task Force.

Resources

In November 2022, the HM Chief Inspector of Prisons for Scotland, Wendy Sinclair-Gieben, tabled her 2021-22 Annual Report. You can find the report by clicking on the link below.

HMIPS 2021-22 Annual Report



The Office of the Inspector of Custodial Services for Western Australia, Eamon Ryan, also published his 2021-2022 Annual Report in November. You can acess the full report by clicking on the link below.

OICS 2021-22 Annual Report

Penal Reform International published a report, titled, "Deaths in prison: Examining causes, responses, and prevention." From their website:

> *This briefing is a call to action for the international community and national actors to strengthen their approach to deaths in prisons, to take pro-active measures to prevent loss of life and, when deaths do occur, to respond appropriately and conduct robust investigations in line with international human rights standards to identify any systemic concerns and prevent future harm.*

The International Corrections and Prisons Association has announced that it will be holding its 3rd International Correctional Research Symposium from March 27-30, 2023. The symposium will be held at the Holiday Inn Porto Gaia Hotel in Porto, Portugal.

For more information and to register, CLICK HERE