



Native Women's
Association of Canada

L'Association des
femmes autochtones
du Canada

Indigenous Women in Solitary Confinement: Policy Background

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ABOUT NWAC

The Native Women's Association of Canada (NWAC) is a national non-profit Indigenous organization representing the political voice of Indigenous women throughout Canada. It was incorporated in 1974 as a result of the activities of local and regional grassroots Native women's associations over many years. NWAC was formed to promote the wellbeing of Indigenous women within Indigenous and Canadian societies, and we focus our efforts on helping women overcome sex-based discrimination.

Today, NWAC engages in national advocacy measures aimed at legislative and policy reforms that promote equality for Indigenous women and girls. Through advocacy, policy, and legislative analysis, we work to preserve Indigenous culture, advance the wellbeing of Indigenous women and girls, as well as their families and communities.

NWAC is actively committed to raising the national and international profile on many issues specific to Indigenous women, including violence against women, the overrepresentation of women in prison, poverty, and ongoing sexual exploitation and trafficking of women and girls, along with the many other violations to Indigenous women's basic human rights. As a leader both domestically and on the international stage, NWAC works to improve the human rights of Indigenous women and remains dedicated to promoting gender equality through research, policy, programs, and practice.

Glossary of Acronyms

AG - Auditor General

CAEFS - Canadian Association of Elizabeth Fry Societies

CSC - Correctional Services Canada

CCRA - Corrections and Conditional Release Act

CHRC - Canadian Human Rights Commission

FSW - Federally-sentenced women

LEAF - Women's Legal Education and Action Fund

NWAC - Native Women's Association of Canada

OCI - Office of the Correctional Investigator

OHRC - Ontario Human Rights Commission

INDIGENOUS WOMEN IN CANADIAN FEDERAL PRISONS

This work encompasses NWAC's research and perspective on the over-incarceration of Indigenous women and the overuse of administrative segregation¹ and/or solitary confinement² upon them. In Canada, Indigenous women are more likely to be involuntarily segregated and endure longer segregations than non-Indigenous women.³ Indigenous women prisoners are younger than their non-Indigenous counterparts, with a median age of 29 (at admission), compared to a median age of 32 for non-Indigenous women.⁴

Segregation and solitary confinement are practices with proven detrimental psychological effects (discussed in greater detail below) which run contrary to the Correctional Service of Canada's (CSC) mandate of rehabilitation and reintegration,⁵ as well as failing to reduce rates of recidivism.⁶ Moreover, the practices have been condemned by the United Nations as constituting torture⁷ While prisoners in Canada who are placed in administrative segregation have the right to speak to their legal counsel and to be made aware of how long they will be segregated, research published by Office of the Correctional Investigator (OCI), the Canadian Human Rights Commission (CHRC) and the Canadian Association of Elizabeth Fry Societies (CAEFS) suggest that these rights are often not respected or enforced. Solitary confinement is a particularly harmful practice for individuals with

past histories of trauma, abuse, and/or self-harm, often exacerbating the psychological and emotional wounds and issues that go with these histories. As such, Indigenous women's specific lived experiences of colonial patriarchy and state violence (including but not limited to the Residential School System, Sixties Scoop, intergenerational trauma, and over-vulnerability to violence, murder, and abduction) make segregation/solitary even more torturous and dangerous. It is these same historical and sociological realities that result in the criminalization of Indigenous women, pushing them into poverty and increasing their likelihood of engaging in precarious and/or illegal work.⁸

As a population who are under-protected, over-criminalized, and more often classified as maximum security prisoners, Indigenous women are particularly vulnerable to abuse within prisons. Further, their high security classifications too often prohibit these women from completing their sentences in Healing Lodges, per Sections 81 and 84 of the Corrections and Conditional Release Act (CCRA).⁹

Indigenous Women in Federal Prisons

~5% of the female population in Canada, but 39% of the female prison population

Indigenous women make up 50% of federal segregation placements

¹ Corrections Canada defines administrative segregation as "the separation of an inmate to prevent association with other inmates, when specific legal requirements are met, other than pursuant to a disciplinary decision" (see Correctional Services Canada – "Administrative Segregation" – online at <http://www.csc-ccc.gc.ca/politiques-et-lois/709-cd-eng.shtml#dl>)

² The United Nations defines solitary confinement as "the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day" (see United Nations – *Istanbul Statement* online at http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf)

³ Jennie Thompson and Sara Rubenfeld for Correctional Service of Canada "A profile of women in segregation" (Ottawa: Correctional Services Canada, 2013) at iii. (Research Report R-320)

⁴ Public Safety Canada, "Corrections and Conditional Release: Statistical Overview" (Ottawa: Public Safety Canada, 2015) at 45. Retrieved online at <https://www.publicsafety.gc.ca/cnt/rsrccs/pblctns/ccrso-2015/ccrso-2015-en.pdf>

⁵ Minister of Justice, *Corrections and Conditional Release Act* (S.C. 1992, c. 20)

⁶ See Public Safety Canada, "Marginalized: The Aboriginal Women's experience in Federal Corrections" (2012) online <https://www.publicsafety.gc.ca/cnt/rsrccs/pblctns/mrgnlzd/index-en.aspx> at 18 and 21; Corrections Canada, "Rates of Recidivism for Women Offenders" (2008) online <http://www.csc-ccc.gc.ca/research/r192-eng.shtml>

⁷ This is discussed further in the "United Nations and Solitary Confinement" section, page 8.

⁸ See FAFIA, "Canada: Women's Civil and Political Rights - Report to the Human Rights Committee" (2015) online www.leaf.ca at 92-94; Howard Sapers, *Annual Report of the Office of the Correctional Investigator 2015-2016* (Ottawa: Office of the Correctional Investigator, 2016);

⁹ More information on the Healing Lodges can be found at <http://www.csc-ccc.gc.ca/aboriginal/002003-2000-eng.shtml>

OVERVIEW - WHAT IS SOLITARY CONFINEMENT?

Solitary confinement refers to the practice of confining a prisoner alone in their cell for prolonged periods of time, where prolonged constitutes 15 days or more. Solitary confinement can be imposed on prisoners for a number of reasons, including as “short-term punishment for prison offences, or indefinitely for the prisoner’s own protection, either at his request or at the discretion of the prison authorities”. Prisoners can additionally be “isolated from others for months and even years on administrative grounds, as a long-term strategy for managing challenging prisoners or where prisoners are deemed to be a threat to national security.”¹⁰ The United Nations Human Rights Council defines “prolonged” solitary confinement as any period of solitary confinement in excess of 15 days.¹¹ The UN Special Rapporteur on Torture has further noted that, considering the extreme mental and physical distress such confinement can cause, the practice can amount to torture or cruel, inhuman or degrading treatment or punishment.¹²

While in solitary confinement, prisoners experience little to no meaningful social contact, and all forms of stimuli are reduced to a minimum. This has been recognized as having a detrimental effect on prisoners’ mental and physical health, and has strong corollary links to prisoners’ likelihood to self-harm and/or attempt suicide.¹³

Indigenous peoples are disproportionately impacted by the use of segregation in Canada, in part due to their staggering overrepresentation in the correctional system. Although Indigenous women account for less than 5% of the total female population in Canada, they make up over one third (39%) of female admissions to federal custody.¹⁴ Further, they make up 42% of the maximum security women’s population in Canada, and 50% of segregation placements.¹⁵ The Government of Canada and its sub-agencies have acknowledged the particular harmfulness of solitary confinement on the psychological wellbeing of women in general and Indigenous women in particular.¹⁶



¹⁰ Dr. Sharon Shalev, *A Sourcebook on Solitary Confinement* (London: London School of Economics and Political Science, 2008), retrieved from <http://solitaryconfinement.org>

¹¹ See Juan Méndez, *Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General* (United Nations General Assembly, sixty-sixth session, 2011) Retrieved from <http://undocs.org/A/66/268> at 2.

¹² *Ibid.* at 2.

¹³ See International Psychological Trauma Symposium (9 December 2007), *The Istanbul statement on the use and effects of solitary confinement*, retrieved online at <http://solitaryconfinement.org/>; Louise Arbour, Commission of Inquiry into Certain Events at the Prison for Women in Kingston (Ottawa: Public Works and Government Services Canada, 1996) (Cat. No. JS42-73/1996E); Kim Pate, *Increasing over-representation of Indigenous women in Canadian Prisons* [Speech], (Debate of the Senate, 1st Session, 42nd Parliament, December 2016); Sharon Shalev, *A Sourcebook on Solitary Confinement* (London: London School of Economics and Political Science, 2008)

¹⁴ Statistics Canada, “Study: Women in Canada: Women in the Criminal Justice System” (Ottawa: Statistics Canada, 2017) at p. 2. Retrieved online at <http://www.statcan.gc.ca/daily-quotidien/170606/dq170606a-eng.pdf>.

¹⁵ Howard Sapers, *Annual Report of the Office of the Correctional Investigator 2015-2016* (Ottawa: Office of the Correctional Investigator, 2016) at 62

¹⁶ See Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) (Cat. No. JS42-73/1996E); 2015 and 2016 Annual Reports of the Office of the Correctional Investigator; Office of the Prime Minister, “Minister of Justice and Attorney General Mandate Letter” (2015) online at <http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>



This can be attributed to their overrepresentation as victims of sexual, physical, emotional, and psychological abuse, as well as the violent legacy of the Indian Residential School System, colonizing child welfare practices, and lack of access to training, education, and employment.¹⁷ Criminologist Lisa Monchalin (Algonquin, Métis) further argues that Canada’s criminal justice system is “rooted in Euro-Canadian colonialism [and] fuels injustice that is directed specifically against Indigenous peoples.”¹⁸ Monchalin also points to the structure of the system—including the over-policing of Indigenous communities, the inefficacy of Gladue reports¹⁹, and the overall erasure of colonial history and systemic racism within Government reports and recommendations—as responsible for Canada’s criminal justice system’s failure to deliver justice to Indigenous peoples.²⁰

“Studies show that between one-third and as many as 90% of prisoners experience some adverse psychological symptoms while in solitary confinement. These may include insomnia, confusion, feelings of hopelessness and despair, hallucinations, distorted perceptions and psychosis.”

- *Canadian Human Rights Commission (2012)*

¹⁷ Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) (Cat. No. JS42-73/1996E).

¹⁸ Lisa Monchalin, *The Colonial Perspective: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016) at xxxv.

¹⁹ See pages 11-12 for more information on Gladue reports.

²⁰ *Supra* note 18, at pp. 258-286.



NWAC'S PAST ADVOCACY FOR INDIGENOUS WOMEN IN PRISON

NWAC has previously stated—and maintains—that this overrepresentation exemplifies Canada's racist legacy of colonization.²¹ Speaking to the divide between settler and Indigenous ways of knowing, late Mohawk scholar Patricia Monture-Angus argued that differences in Indigenous and non-Indigenous notions of justice can lead to a misunderstanding of the actions and reactions of Aboriginal Peoples in the legal system, leading police, lawyers, judges and juries to misunderstand their words, demeanor, and body language.²²

Like advocacy organizations such as the Canadian Association of Elizabeth Fry Societies (CAEFS), the Women's Legal Education and Action Fund (LEAF), and independent human rights bodies such as the Canadian Human Rights Commission (CHRC), NWAC has long advocated the abolishment of the practice of solitary confinement for women.

In 2003, NWAC and 25 other national and international organizations joined CAEFS' complaint to CHRC regarding Canada's treatment of federally-imprisoned women. At this time, NWAC's submission emphasized the importance of change in the following five areas:

1. Decarceration of Aboriginal women in the federal prison system;
2. Capacity-building in Aboriginal communities to facilitate reintegration of Aboriginal women prisoners back into Aboriginal society;
3. Facilitation and implementation of ss. 81 and 84 of the Corrections and Conditional Release Act for the benefit of criminalized Aboriginal women prisoners;
4. Compensation for Aboriginal women prisoners based on the Correctional Service of Canada's [the 'CSC'] breach of its fiduciary duty to Aboriginal prisoners; and
5. Standardization of the treatment of federal Aboriginal women prisoners in British Columbia²³

²¹ Native Women's Association of Canada, *Gender Matters: Summary dialogue report of the cross country Arrest the Legacy: from Residential Schools to Prisons dialogues* retrieved from <https://www.nwac.ca/wp-content/uploads/2015/05/Gender-Matters-Introduction.pdf>

²² Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 2002) at 195

²³ Sharon McIvor and Ellisa C. Johnson for NWAC (5 May 2003) "Detailed Position of the Native Women's Association of Canada on the Complaint Regarding the Discriminatory Treatment of Federally Sentenced Women by the Government of Canada filed by the Canadian Association of Elizabeth Fry Societies) Retrieved from <https://www.nwac.ca/>



“The state has effectively trained many Aboriginal women to believe they are on their own in circumstances where they face violence [...] When women are forced to meet violence with violence, the travesty is they are then susceptible to facing criminal charges.”

- CAEFS and NWAC (2008)

In 2007, NWAC recommended enhancing Corrections Services Canada’s (CSC) accountability through sections 77 and 80 of the Corrections and Criminal Releases Act (CCRA). At this time, NWAC also noted that Indigenous women are much more likely to be placed on CSC’s “management protocol” classification system, which has since been discontinued.²⁴ NWAC also emphasized that not only do federally-sentenced Indigenous women not have access to adequate programs and services while imprisoned, but the programs that do exist are neither culturally-appropriate, nor geared towards reintegration.²⁵ In a separate issue paper, NWAC recommended that alternative practices “such as restorative justice [...] be brought into the justice system and used on a regular basis.”²⁶

In 2008, CAEFS and NWAC also partnered to publish a discussion paper outlining the patterns of systemic discrimination within the Canadian legal system. In particular, this discussion centers around the notion of “hyper-responsibility”, a term that refers to the trend within the legal system of women being expected to take more individual responsibility for their actions. This is particularly true for non-white women, women with physical and/or mental disabilities, women who live in poverty, and women who do not identify as cis-gendered or heterosexual.²⁷ In this work, NWAC and CAEFS also emphasized that the women at the intersections of these social oppressions are more vulnerable to violence (at the hands of both the individual and the state), which often results in their criminalization and institutionalization.

²⁴ NWAC, *Federally Sentenced Aboriginal Women Offenders: An Issue Paper* (2007) retrieved from www.nwac.ca

²⁵ *Ibid.* at p. 1.

²⁶ NWAC, *Aboriginal Women and the Legal Justice System in Canada: An Issue Paper* (2007), retrieved from www.nwac.ca

²⁷ CAEFS and NWAC, “Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility”, *Canadian Woman Studies* (2008) 26.3-4 at 94.

²⁸ NWAC and Justice For Girls, *Gender Matters: Building Strength in Reconciliation*, (2012), retrieved online at <https://www.nwac.ca/policy-areas/human-rights-in-canada/justice/>

In 2012, NWAC partnered with Justice For Girls to publish *Gender Matters: Building Strength in Reconciliation*, a summary report of dialogue stemming from the “Arrest the Legacy: from Residential Schools to Prisons” roundtables.²⁸ In this series of talks/workshops, women came together to discuss improving conditions and opportunities for Indigenous women and girls impacted by residential schools who are criminalized or in conflict with the law. Women who participated in the circles clearly articulated how their lived experiences with early violence and inter-generational trauma caused or connected to future experiences with substance abuse, homelessness, gang violence, and/or domestic abuse. Participants also discussed how imprisoning women “continues the cycle of child removals, and increases the chances that the next generation of children will end up in custody”.²⁹ The resulting recommendations focus on strength-based, gender-sensitive ways to move forward, such as increasing resources for Healing Lodges and Indigenous-specific substance abuse recovery programs, housing projects, and diversion programs aimed at helping Indigenous women and girls “address the trauma beneath their addictions and criminalization.”³⁰ Follow-up work by international human rights bodies³¹ as well as the CHRC,³² and the OCI’s own annual reports indicate that many of these recommendations remain unaddressed or under-addressed.

“Those who participated in the Arrest the Legacy circles made it clear that large numbers of First Nations, Inuit and Métis women and girls are criminalized above all, because of traumas they have lived. To this day, we see extremely high levels of violence against Aboriginal women and girls, both direct and systemic.”

- NWAC and Justice for Girls, *Gender Matters: Building Strength in Reconciliation*

²⁹ *Ibid.* at 10

³⁰ *Ibid.* at 13

³¹ United Nations, International Covenant on Civil and Political Rights, “Concluding observations on the sixth periodic report of Canada” (2015) online http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FCAN%2FCO%2F6&Lang=en

³² CHRC, “Report on Equality Rights of Indigenous Peoples” (2013), online at <http://www.chrc-ccdp.gc.ca/eng/content/report-equality-rights-aboriginal-people>

SOLITARY CONFINEMENT AND THE UNITED NATIONS

In terms of studying and recognizing the harms of the practice of solitary confinement and providing justification for reducing or eliminating the practice, the work of the United Nations (UN) and its subsidiaries has been instrumental as a tool for human rights and justice activists at the national level.

The UN has largely decried the use of prolonged solitary confinement since 1992, asserting that it may constitute torture.³³ In 2011, former Special Rapporteur on Torture Juan Méndez called for extreme restrictions on the use of solitary confinement, particularly in cases involving juveniles and individuals with mental disabilities.³⁴ Méndez also recommended that indefinite or prolonged solitary confinement in excess of 15 days be banned altogether, as studies indicate that the chances for irrevocable mental damage drastically increase at this point.³⁵ In monitoring State compliance and making recommendations regarding their use of solitary confinement, the UN also relies on the Standard Minimum Rules for the Treatment of Prisoners (also known as “The Nelson Mandela Rules”)³⁶ and the Istanbul Statement on the Use and Effects of Solitary Confinement.³⁷ Both of these documents state that using solitary confinement

against individuals with mental health issues can never be justified. Youth and women are additionally protected by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty³⁸ and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (or the “Bangkok Rules”).³⁹



³³ United Nations Human Rights Committee, (10 March 1992) “CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)”, 44th Session of the Human Rights Committee, at p. 1. Retrieved online at <http://www.refworld.org/docid/453883fb0.html>

³⁴ Supra note 11

³⁵ Supra note 11

³⁶ United Nations, “The United Nations Standard Minimum Rules” for the Treatment of Prisoners (the Nelson Mandela Rules)” (2015), retrieved online at <https://www.unodc.org/>

³⁷ International Psychological Trauma Symposium (9 December 2007), *The Istanbul statement on the use and effects of solitary confinement*, retrieved online at <http://solitaryconfinement.org/>

³⁸ United Nations General Assembly, “United Nations Rules for the Protection of Juveniles Deprived of their Liberty” A/RES/45/113 (1990). Retrieved online at <http://www.un.org/documents/ga/res/45/a45r113.htm>

³⁹ United Nations General Assembly, “United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)” A/RES/65/229 (2011). Retrieved online at https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf

<p><i>Standard Minimum Rules for the Treatment of Prisoners</i> (the Nelson Mandela Rules) (2015)</p>	<p>“Rule 37 - Any form of involuntary separation from the general prison population shall always be subject to authorization by law or by the regulation of the competent administrative authority.</p> <p>Rule 43 (1) - In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment, including a) Indefinite solitary confinement; b) Prolonged solitary confinement; and c) Placement of a prisoner in a dark or constantly lit cell.</p> <p>Rule 44 - Solitary confinement: confinement of prisoners for 22 hours or more a day without meaningful human contact Prolonged solitary confinement: solitary confinement for a time period in excess of 15 consecutive days.</p> <p>Rule 45 (1) - Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner’s sentence.</p> <p>Rule 45 (2) - The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, continues to apply.”</p>
<p><i>United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders</i> (the Bangkok Rules) (2010)</p>	<p>“22. Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison.”</p>
<p><i>The Istanbul statement on the use and effects of solitary confinement</i> (2007)</p>	<p>“The use of solitary confinement should be absolutely prohibited in the following circumstances:</p> <ul style="list-style-type: none"> • For death row and life-sentenced prisoners by virtue of their sentence. • For mentally ill prisoners. • For children under the age of 18. <p>Furthermore, when isolation regimes are intentionally used to apply psychological pressure on prisoners, such practices become coercive and should be absolutely prohibited.</p> <p>As a general principle solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort.”</p>
<p><i>United Nations Rules for the Protection of Juveniles Deprived of their Liberty</i> (1990)</p>	<p>“67. All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose. Labour should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction. No juvenile should be sanctioned more than once for the same disciplinary infraction. Collective sanctions should be prohibited.”</p>

INDIGENOUS WOMEN AND SOLITARY CONFINEMENT IN CANADA

DISCIPLINARY SEGREGATION:

- ◇ Used as a punishment for a “serious disciplinary offence”
- ◇ Must be imposed by a disciplinary court
- ◇ Cannot be longer than 30 days
- ◇ 3% of women in segregation are placed there for disciplinary reasons.

ADMINISTRATIVE SEGREGATION:

- ◇ Meant to be used for safety or security reasons when there are **no other alternatives**.
- ◇ Can be voluntary or involuntary
- ◇ No limit on length.
- ◇ Prisoners have the right to know
 1. why they are being placed in segregation, and
 2. how long they will spend in segregation.
- ◇ Prisoners also have the right to speak to their legal counsel.
- ◇ 97% of women in segregation are placed there for administrative reasons.

In Canada, the Office of the Correctional Investigator (OCI) has documented the overuse of administrative segregation for over 20 years.⁴⁰ This is particularly concerning as administrative segregation is not governed by the same procedural safeguards as disciplinary segregation, and is therefore less accountable.⁴¹ In conducting an investigation of incidents of abuse and violence at the Prison for Women in Kingston (ON) in 1996, the Honourable Louise Arbour found a gross misuse of administrative segregation, and recommended harder limits on its use.⁴² Years later, she would call for an end to the use of solitary confinement altogether.⁴³

In 1999, the Supreme Court of Canada noted that “[t]he drastic overrepresentation of Aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem”.⁴⁴ As a result, the Court ruled that all reasonable and available sanctions other than imprisonment must be considered for all offenders, with particular attention given to the circumstances of Aboriginal offenders.⁴⁵

This resulted in the creation of the Gladue principle, which mandates that sociological and historical factors stemming from colonialism and racism (such as the residential school system, experience with the child welfare or adoption system, lack of education, poverty, and unstable housing) must be considered “whenever the liberty interests of an Aboriginal person are at stake”.⁴⁶ CSC has extended this principle to correctional decision-making, including “security classification, penitentiary placement, institutional transfer and administrative segregation decisions”.⁴⁷ However, the OCI has reported that “there remains insufficient and uneven

⁴⁰ Office of the Correctional Investigator [Press Release], *Office of the Correctional Investigator Releases Administrative Segregation in Federal Corrections: 10 Year Trends Federal Corrections Overuses Segregation to Manage Inmates* (Ottawa: The Correctional Investigator Canada, 28 May 2015)

⁴¹ Ontario Human Rights Commission (2016). *Supplementary Submission of the Ontario Human Rights Commission to the Ministry of Community Safety and Correctional Services’ Provincial Segregation Review*. Retrieved from www.ohrc.on.ca

⁴² See Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) (Cat. No. JS42-73/1996E)

⁴³ Debra Parkes (6 June 2016), “Cruel and unusual punishment: It’s time to end solitary confinement” *The Globe and Mail*, retrieved online www.theglobeandmail.com

⁴⁴ R v. Gladue, [1999] 1 S.C.R. 688, at 64

⁴⁵ Ibid.

⁴⁶ Supra note 15 at 45.

⁴⁷ Ibid. at 45

application of Gladue social history considerations in correctional decision-making” and that investigators often find “little explanation of how Gladue factors were actually considered, incorporated or applied to [these] decision”.⁴⁸

Despite the Gladue principle, Indigenous people in general and Indigenous women in particular remain staggeringly overrepresented in Canadian federal prisons. In 2013, the Department of Justice commissioned a study of how and whether the practices of jurisdictions across the country reflected the principles set out in *R. v. Gladue*, and found that “less than half the jurisdictions reported that sentencing recommendations made by the Crown are systematically informed by the kinds of non-custodial measures available to Aboriginal offenders”.⁴⁹ The Canadian Bar Association (CBA) has attributed the continued increase, in part, to policy decisions such as mandatory minimum sentences and “restricted judicial discretion” to impose sentences that would allow people to serve their sentences in their communities.⁵⁰

In 2016, CSC reported that women in custody are approximately 15% more likely to be Indigenous than non-Indigenous, as well as being more likely than non-Indigenous women to be classified as medium and maximum security risks.⁵¹ Likewise, the OCI has documented “systemic barriers that continue to exist in prisons, including Aboriginal offenders being released later in their sentence, classified as higher risk, and being more likely to have their conditional release revoked than non-Aboriginal offenders”.⁵² The OCI has also asserted that the ongoing over-incarceration of Indigenous peoples, and in particular, Indigenous women, is a form of systemic discrimination within the Canadian criminal justice system.⁵³ In 2013, CSC commissioned

a study of 2,718 women who had been admitted to a Federal Penitentiary between April 2002 and March 2012, 844 of which had experienced solitary confinement.⁵⁴ Overall, Indigenous women were 10% more likely to have been segregated than non-Indigenous women (39% vs. 28%).⁵⁵ This study also indicated that Indigenous women spend longer stints in segregation,⁵⁶ are younger than their non-Indigenous counterparts, and are far more likely to be considered a high-level security risk.⁵⁷

Although Sections 81 and 84 of the CCRA allow Indigenous peoples to serve their sentences in non-institutional Healing Lodges, 90% of Indigenous prisoners are prevented from accessing these services due to their security classification.⁵⁸ The OCI has asserted that CSC’s policy of only admitting minimum security prisoners to Healing Lodges “was neither Parliament’s intent nor CSC’s original vision” and “is seen as a way for the Service to minimize risk and exposure”.⁵⁹

FEDERAL HEALING LODGES FOR INDIGENOUS WOMEN:

- ◆ Buffalo Sage Wellness House
Location: Edmonton, AB
Managed by: Native Counselling Services of Alberta (section 81)
- ◆ Okimaw Ohci
Location: Maple Creek, SK
Managed by: Corrections Canada

⁴⁸ Ibid. at 45

⁴⁹ Sebastien April and Mylene Magrinelli Orsi for Department of Justice Canada, “Gladue Practices in the Provinces and Territories” (Ottawa: Research and Statistics Division, Department of Justice Canada, 2013) (Cat. No. J2-378/2013E-PDF) at 23.

⁵⁰ Canadian Bar Association (15 April 2014), “Fifteen years after Gladue, What Progress?” at para. 19. Retrieved online at <http://www.nationalmagazine.ca>

⁵¹ CSC, *Corrections and Conditional Release 2015 Annual Report: Statistical Overview* (Ottawa: Public Safety Canada, 2016) at 54-55

⁵² CHRC, “Submission to the Committee Against Torture” (2012), at 19. Retrieved online at http://www.chrc-ccdp.gc.ca/sites/default/files/cat_cct-eng.pdf

⁵³ Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2005-2006* (Ottawa: Minister of Public Works and Government Services Canada, 2006), at 11

⁵⁴ Supra note 3

⁵⁵ Ibid. at 13

⁵⁶ Ibid. at 11

⁵⁷ Ibid. at 15

⁵⁸ Office of the Correctional Investigator, “Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act” (Ottawa: Minister of Public Works and Government Services Canada, 2012) (CAT. NO.: PS104-6/2013E-PDF) at page 3

⁵⁹ Ibid. at page 3 and 4



THE GOVERNMENT OF CANADA'S RESPONSE

The Government of Canada has repeatedly acknowledged, directly and indirectly, the harm caused by the practice of solitary confinement and the injustice of Indigenous peoples overrepresentation in the criminal justice system.⁶⁰ In 1996, the Royal Commission on Aboriginal Peoples (RCAP) documented the connections between inter-generational trauma, the residential school system, and the criminalization of Indigenous peoples. More recently, the 2015 findings of the Truth and Reconciliation commission—and its subsequent calls to action—echo these connections further. Of the TRC's 94 Calls to Action, five are centered around criminal justice:

1. Eliminate the overrepresentation of Aboriginal people and youth in custody over the next decade.
2. Implement community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.
3. Eliminate barriers to the creation of additional Aboriginal healing lodges within the federal correctional system.
4. Enact statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by Fetal Alcohol Spectrum Disorder (FASD).
5. Reduce the rate of criminal victimization of Aboriginal people.⁶¹

Justice Minister Jody Wilson Raybould's 2015 mandate letter included implementing the recommendations of the Ashley Smith Coroner's Inquest. Among these recommendations is the "absolute prohibition [of] the practice of placing female inmates in conditions of long-term segregation, clinical seclusion, isolation, or observation," where "long-term" is defined as any period in excess of 15 days.⁶² At a 2016 Senate Hearing with the Standing Committee on Aboriginal Peoples, Minister Wilson-Raybould reiterated this commitment to further work on this issue, noting that she was working with Minister of Health Jane Philpott and Minister of Public Safety Ralph Goodale on the file.⁶³ Several months later, Minister Goodale announced a 15-day cap on solitary confinement sentences, to be phased in by CSC over an 18-month period, during which time the maximum amount of consecutive days that can be spent in solitary will be 21 days.⁶⁴

⁶⁰ Royal Commission on Aboriginal peoples, *Report of the Royal Commission on Aboriginal Peoples - Volume 3: Gathering Strength* (Ottawa: The Commission, 1996). Retrieved online at <http://data2.archives.ca/e/e448/e011188230-03.pdf>

⁶¹ Canada, Truth and Reconciliation Commission of Canada, *The Truth and Reconciliation Commission of Canada: Calls to Action* (2015) online at http://nctr.ca/assets/reports/Calls_to_Action_English2.pdf

⁶² CSC, *Coroner's Inquest Touching the Death of Ashley Smith - Jury Recommendations*, retrieved online at <http://www.csc-scc.gc.ca/publications/005007-9009-eng.shtml>

⁶³ Senate of Canada, *Debates of the Senate - Standing Committee on Aboriginal Peoples* (Vol. 150:63) Retrieved online at http://publications.gc.ca/collections/collection_2016/sen/Y3-421-83-eng.pdf, at 1973 and 1972.

⁶⁴ Kathleen Harris, "Liberals set 15-day limit on solitary confinement of federal prisoners" *CBC News* (19 June 2017). Retrieved online at <http://www.cbc.ca/news/politics/corrections-solitary-confinement-segregation-1.4167555>



CONCLUSIONS AND RECOMMENDATIONS

The overrepresentation of Indigenous women in solitary confinement has wide-reaching implications. In addition to the side effects on psychological health, individuals in solitary confinement tend to be less able to reintegrate after release, are granted few to no opportunities to complete programming while incarcerated, and are less likely to be granted discretionary release.⁶⁵ Overall, this creates a culture of recidivism and revictimizes Indigenous women. This is particularly troubling as Indigenous women are disproportionately impacted by patriarchal and colonial legislation such as the *Indian Act*, and as a result are more likely to have to leave their communities, more impacted by poverty, and more likely to have to engage in precarious or criminal activities.

THE GOVERNMENT OF CANADA SHOULD:

1. Abolish the practice of solitary confinement and segregation for Indigenous women.
2. Revise CSC policies and practices regarding Sections 81 and 84 of the CCRA so that do not restrict the legislative provisions and fulfill their legislative intent⁶⁶ and therefore enable more women to access community-based and culturally appropriate options.
3. Train police officers, judges, and lawyers on the impacts of colonialism and systemic discrimination and how those systems lead to the over-criminalization and incarceration of Indigenous women.
4. Collaborate with Indigenous communities, Elders, National Indigenous Organizations, and social justice/human rights organizations to develop community-based, culturally appropriate programming that is responsive to the needs of Indigenous women.

⁶⁵ CSC (2013), iii.

⁶⁶ Supra note 58 at page 3.



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Native Women's
Association of Canada

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L'Association des  
femmes autochtones  
du Canada