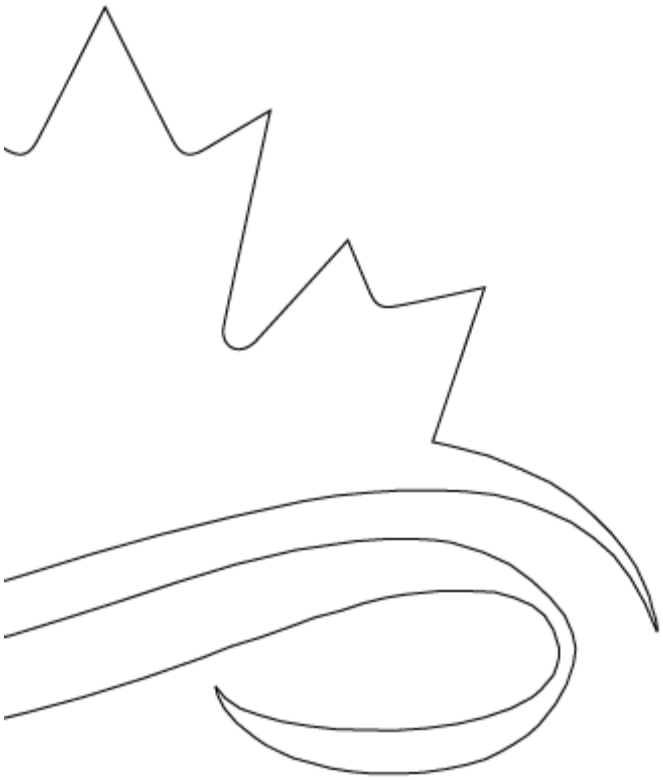

Submission to the Committee against Torture

By
The Canadian Human Rights Commission

April 2012

Table of Contents

1 LIST OF ABBREVIATIONS

CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CHRC - Canadian Human Rights Commission

CHRA - *Canadian Human Rights Act*

CCRA - *Corrections and Conditional Release Act*

CSC - Correctional Service of Canada

CERD - Committee on the Elimination of Racial Discrimination

CRC - Committee on the Rights of the Child

GOC - Government of Canada

ICC - International Coordinating Committee of National Human Rights Institutions

OCI - Office of the Correctional Investigator

OPCAT - Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

SCC - Supreme Court of Canada

UPR - Universal Periodic Review

2 INTRODUCTION

The Canadian Human Rights Commission (CHRC) is Canada's national human rights institution. It has been accredited "A-status" by the International Coordinating Committee of National Human Rights Institutions (ICC), first in 1999 and again in 2006 and 2011.

The CHRC was established by Parliament through the *Canadian Human Rights Act* (CHRA) in 1977. It has a broad mandate to promote and protect human rights. The purpose of the CHRA is to extend the laws of Canada to give effect to the principle that all individuals should have an opportunity equal with others to make for themselves the lives that they are able and wish to have, without being hindered or prevented from doing so by discriminatory practices which are based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for which a pardon has been granted.[1]

The CHRC promotes the core principle of equal opportunity and works to prevent discrimination by:

- promoting the development of human rights cultures;
- furthering the understanding of human rights through research and policy development;
- protecting human rights through effective case and complaint management; and
- representing the public interest to advance human rights for all Canadians.

As part of the CHRC's work, it has taken action to protect the human rights of vulnerable groups by investigating complaints, issuing public statements, tabling special reports in Parliament, and representing the public interest in the mediation and litigation of complaints. The CHRC also submits shadow reports to UN treaty bodies, including recently to the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Rights of the Child (CRC).

The Constitution of Canada divides jurisdiction for human rights matters between the federal and provincial or territorial governments. The CHRC has jurisdiction pursuant to the CHRA over federally regulated service providers and employers. Provincial and territorial governments have their own human rights codes and are responsible for provincially/territorially regulated sectors.

The Correctional Service of Canada (CSC) is federally regulated and is the agency responsible for administering prison sentences of two years or more and assisting in the rehabilitation of prisoners and their reintegration into the community. Such prisoners are known as "federally sentenced". CSC's legislative framework is provided by the *Corrections and Conditional Release Act (CCRA).*

The Office of the Correctional Investigator (OCI) is mandated by the *Corrections and Conditional Release Act* as Ombudsman for federally sentenced prisoners to investigate and bring resolution to individual complaints. The OCI also submits an annual report of its activities to the Minister of Public Safety, who then tables the report in Parliament.

[1] *Canadian Human Rights Act*, RSC 1985, c. H-6, s. 2.

The CHRC fully supports the rights and obligations enshrined in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). The CHRC is committed to working with the Government of Canada (GOC) to ensure continued progress in the protection of human rights. It is in the spirit of constructive engagement that the CHRC submits this report to the Committee against Torture (the Committee).

The CHRC is issuing this report in keeping with its obligations as Canada's National Human Rights Institution (NHRI).[2] Part I outlines the CHRC's concerns regarding conditions of confinement in prison; CSC's internal grievance system; prisoners with mental disabilities and the use of solitary confinement for this group; and the situation of vulnerable groups in prison, including women, sexual minorities, Aboriginal peoples and African Canadians. Part II raises issues relating to ratification of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).

3 ISSUES RELATING TO PRISONERS

3.1 The Conditions of Confinement in Prison (Article 11, 16)

In its 2009-2010 report, the OCI observed that the overall conditions of confinement are becoming "*more and more restricted in terms of inmate association, movement and assembly*" for both men and women.[3]

Physical Infrastructure

According to the OCI, a considerable number of prisons are in need of repair or replacement. The average age of a prison is 46 years. Five prisons were built between 1835 and 1900 and these are increasingly costly to operate, repair and maintain.[4]

According to CSC policy and internationally recognized standards[5], "*single occupancy accommodation is the most desirable and correctionally appropriate method of housing offenders.*"[6] The OCI has reported that the practice of accommodating two prisoners in a cell

[2]The Committee against Torture expressed its appreciation for the information it receives from NHRIs. In its report of the Forty-fifth session 2011 and forty-sixth session, 2012, it stated that "…*it looks forward to continuing to benefit from the information it derives from these bodies, which has enhanced its understanding of the issues before the Committee*." The report is available at: http://www2.ohchr.org/english/bodies/cat/docs/A.66.44.pdf

[3] OCI, *Annual Report 2009-10.*

[4] OCI, *Annual Reports 2009-10 and 2010-11.*

[5]Canada is a signatory to the *United Nations Standard Minimum Rules for the Treatment of Prisoners*. Section 9(1) states that "*Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room*".

[6] Commissioner's Directive No. 550 on Inmate Accommodation, http://www.csc-scc.gc.ca/text/plcy/cdshtm/550-cd-eng.shtml

meant for single occupancy, or "double-bunking", has increased by 50% in the past five years.[7] In its 2010-2011 Annual Report, the OCI stated that

> "*… currently approximately 13% of the total inmate population is 'double-bunked' (i.e., more than one inmate accommodated in a cell designed for one person). CSC estimates that the number of double-bunked offenders will increase to 30% of the overall inmate population in the next three years before new construction can provide any substantive relief. The situation is particularly acute in the regional assessment/reception units, with double-bunking rates already exceeding 60% in some facilities...*"[8]

Violence and Use of Force

The OCI has reported that the overall level of violence in prison remains "*unacceptably high"* and "*the Correctional Service continues with alarming frequency to manage its penitentiaries with an overreliance on use of force and segregation to resolve disputes and tension."*[9] The OCI has noted concern over the 25% increase in the number of use of force incidents from 2006-2007 to 2008-09. [10]

Finally, the OCI has highlighted the following in regards to deaths in prison:[11] It found that CSC:

- *"[…] has failed consistently to incorporate lessons learned and implement corrective action over time and across regions…."*
- *"resists or fails to reasonably act on a large proportion of coroners' findings and recommendations, compared to the findings and recommendations of its own boards of investigation*" and
- *"[…] continues to lack reliable and valid data on inmate injuries" in the broad sense."*

The CHRC is concerned that Canada's existing prisons, built for a different generation and profile of prisoners, have inadequate infrastructure to deal with the rising and complex needs of prisoners, in particular those with mental illness. The CHRC agrees that the practice of double bunking is not an appropriate or sustainable solution to overcrowding, in particular for older prisoners and those who have mental illness or physical disabilities. The CHRC is also

---

[7] *Supra* note 3.
[8] OCI, *Annual Report 2010-11*.
[9] OCI, *Annual Report 2005-06* as well as the *Annual Report:* 2006-07.
[10] OCI, *Annual Reports* 2006-07 to 2008-08. See also Canada, Office of the Correctional Investigator, *Unauthorized Force: An Investigation into the Dangerous Use of Firearms at Kent Institution between January 8 and January 10, 2010* (March 2011) which looked into an exceptional search of this maximum security facility which generated 379 separate use of force incidents in a 10-day period.
[11] See Canada, Office of the Correctional Investigator, *Annual Report: 2006-07* as well as Office of the Correctional Investigator, *Deaths in Custody* (February 2007) <www.oci-bec.gc.ca/rpt/oth-aut/oth-aut20070228-eng.aspx>. [11] See also OCI, *Annual Report 2005-06*. In the *Annual Report 2007-08*, the OCI noted that while CSC "indicated a willingness to address many of the *Deaths in Custody* study's findings" and was making progress with some good initiatives, "*they fall short of what is required and expected in the circumstances to address concerns raised in the Deaths in Custody study*."

concerned that projected increases in the prisoner population and longer sentences associated with the introduction of new legislation (Bill C-10) may exacerbate an already difficult situation.

3.2 Safe Streets and Communities Act (Bill C-10)

Bill C-10 is an omnibus crime bill which was recently adopted by Parliament.[12] The Bill contains a number of technical amendments to the CCRA that have raised human rights concerns, notably by the Canadian Bar Association and the Canadian Psychiatric Association.

For example, one of the amendments introduced important changes to the principle that correctional authorities use the least restrictive measures in relation to prisoners. The wording has been changed from

> "*use the least restrictive measures consistent with the protection of the public, staff members and offenders*" to one allowing for more discretion: "*the Service uses measures that are consistent with the protection of society, staff members and offenders and that are limited to only what is necessary and proportionate to attain the purposes of this Act;*"[13]

CSC administers the most severe punishment in our society, which is the deprivation of liberty. As noted in the submission of the Canadian Bar Association on Bill C-10 and in the *Arbour* report, we know from past experience that the exercise of power and control over all aspects of a prisoners' life can lead to human rights abuses.[14] Thus, CSC must be subjected to the highest standard of accountability – one that imposes a clear limit on the discretion of authorities, rather than allowing a higher degree of individual discretion.

3.3 CSC Internal Grievance System

Under the CCRA, prisoners have access to an internal grievance procedure for resolving their complaints and grievances. When a prisoner is dissatisfied with an action or a decision by correctional staff, the prisoner may submit a written complaint. The complaint and grievance

---

[12] In September 2011, the Minister of Justice introduced Bill C-10, *Safe Streets and Communities Act*, which is an omnibus crime bill. It has been heavily criticized for a number of reasons by many groups including the Canadian Bar Association, the Quebec Bar, the Canadian Psychiatric Association, the John Howard and Elizabeth Fry Societies. Criticisms surround issues such as the imposition of mandatory minimum sentences for numerous offences, overreliance on incarceration, curtailing judicial independence, and impacting those with mental illnesses and other vulnerable groups disproportionately. The Bill received Royal Assent on March 13, 2012. The text of the Bill is available at <www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5120829>.

[13] 4(d) of the *CCRA.*

[14] Louise Arbour, Commission of Inquiry into Certain Events at the Prison for Women in Kingston (Ottawa: Public Works and Government Services Canada, 1996) at xi [*Arbour Report*]. See also, the Canadian Bar Association's submission on Bill C-110, http://www.cba.org/cba/submissions/PDF/11-45-eng.pdf .

procedure includes four levels: written complaints, then first-level, second-level, and third-level grievances.[15]

There has been criticism of CSC's internal grievance system.[16] In particular, it has been criticized for its lack of: 1) independence; 2) legislated remedies; and 3) enforcement mechanisms once a decision is made.

CSC's internal grievance system provides for the review of decisions made by "*prison authorities by other prison authorities*".[17] Thus, as noted by the Supreme Court of Canada, "*it cannot be reasonably expected that the decision-maker…. could fairly and impartially decide the issue*". The court also noted that there are no remedies set out in the CCRA, and its regulations and decisions with respect to grievances are not legally enforceable.

Outside of CSC's grievance system, the CHRC receives complaints from prisoners who feel they have faced discrimination based on one or more of the 11 grounds listed in the CHRA. Considering the deficiencies it has noted in CSC's internal grievance process, the CHRC has sometimes accepted complaints without requiring the prisoner to first exhaust CSC's internal grievance process; in particular when there have been issues of health or safety. It is noteworthy to add that although the CHRA offers an important human rights enforcement mechanism, it rarely leads to sweeping changes in the systems, practices and policies of an organization. Nor does it necessarily prevent discrimination from happening again in future. Furthermore, while the OCI also has a legislative mandate to conduct investigations related to decisions, recommendations, acts or omissions of CSC, the Office's recommendations are not binding. [18]

In 2003, the CHRC conducted a study on federally sentenced women and concluded that these women lack an effective means to grieve inadequate correctional services or treatment. At that time, the CHRC made a recommendation that CSC establish an independent external redress body. This recommendation was never acted upon and the CHRC therefore reiterates its recommendation.[19]

Recommendation No.1: The Canadian Human Rights Commission recommends that the Correctional Service of Canada establish an independent external redress body for federally sentenced offenders.

[15] See s. 90 and 91 of the *CCRA.* See also *CCRR* s.74-82 and Commissioner's Directive 081 on Offender Complaints and Grievances.
[16] For example, see: Canada, Commission of Inquiry into Certain Events at the Prison for Women (April 1996) <www.justicebehindthewalls.net/resources/arbour_report/arbour_rpt.htm> (*Arbour Report*); OCI, *Annual Report 2002-03* and *Annual Report 2004-05*; *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (December 2003) <www.chrc-ccdp.ca/pdf/reports/fswen.pdf >.
[17] *May v. Ferndale*, 2005 SCC 82 at para 63.
[18] See s.179(3) of the *CCRA.*
[19] CHRC, *Protecting Their Rights.*

3.4 Accommodation of Mental Illness in Prison (Article 2, 11, 16)

Roots of the Problem

In Canada, the deinstitutionalization of psychiatric services took place over the past 40 years, when many psychiatric hospitals were closed and patients were discharged into the community.[20] It has been noted that the release of patients with mental illness out of hospitals and into the community should have been accompanied by a growth of community mental health services. Unfortunately, insufficient assistance in housing and community support has caused people to fall through the cracks.[21]

As noted by the Executive Director of the John Howard Society in testimony to the Standing Committee on Public Safety and National Security,

> *"Prisons are dumping grounds for Canada's mentally ill. It was not supposed to be this way when, in the 1970s and 1980s, the provinces closed their mental hospitals and transferred care to the communities. As is now understood, the resources for community-based care never appeared, and as increasing numbers of people went off their meds or fell through the cracks created by cutbacks to provincial social services, a larger number of them have been criminalized and ended up in federal custody. The federal prison system is the only component of the state apparatus that cannot say "Sorry, we're full", so today we face a crisis of mental illness and substance abuse in our federal prisons."*[22]

The UN Committee on Human Rights also noted its concern with the fact that in some provinces and territories, persons with mental illness remain in detention due to lack of community-based supportive housing.[23]

In its 2009-2010 Annual Report, the OCI stated that

> *"As a society, we are criminalizing, incarcerating and warehousing the mentally disordered in large and alarming numbers. The needs of mentally ill people are unfortunately not always being met in the community health and social welfare systems. As a result, the mentally ill are increasingly becoming deeply entangled in the criminal justice system."*[24]

---

[20] The Canadian Journal of Psychiatry, Canadian Psychiatric Association, *Forty Years of Deinstitutionalization of Psychiatric Services in Canada: An Empirical Assessment*, Patricia Sealy, PhD, Paul C Whitehead, PhD, April 2004. http://ww1.cpa-apc.org:8080/Publications/Archives/CJP/2004/april/sealy.asp

[21] See Canada. Senate, Standing Senate Committee on Social Affairs, Science and Technology, *Out of the Shadows at Last: Transforming Mental Health, Mental Illness and Addiction Services in Canada* (May 2006)

[22] Canada, House of Commons Standing Committee on Public Safety and National Security, Evidence of Craig Jones, Executive Director of the John Howard Society of Canada (27 October 2009) at 1120 <www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4174003&Language=E&Mode=1&Parl=40&Ses=2>.

[23] Human Rights Committee, *Concluding Observations on Canada* (20 April 2006), CCPR/C/CAN/CO/5.

[24] OCI, Annual *Report 2009-10.*

A 2004 study reported that prisoners' physical and mental health is generally poorer than the general public, including socio-economic measures (e.g. employment, education), health behaviours (e.g. smoking, substance abuse), chronic conditions, and mental health disorders.[25] People are arriving at the doors of prisons with a more complex array of problems.

Mental Health Needs have Doubled

The OCI reported in its 2005-2006 Annual Report that

> "*the number of offenders in federal penitentiaries with significant, identified mental health needs has nearly doubled over the past decade. In 1997, 7% of incarcerated men and 13% of incarcerated women self-identified as having current mental health diagnoses. In 2007, 12% of incarcerated men and 21% of incarcerated women self-identified as having such diagnoses.* The OCI also noted "*about 22% of adult offenders would likely be diagnosed with FASD [Fetal Alcohol Spectrum Disorder].*"[26] In the opinion of the OCI, "*The mental health services offered by the Correctional Service have not kept up with this dramatic increase and, in some instances, the services have deteriorated.*"[27]

CSC's Responsibility to Provide Mental Health Services

CSC is required by the CCRA to provide services to prisoners, including mental health services in keeping with generally accepted community practices.[28] The CCRA defines "mental health care" and requires the provision of essential health care and "*reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community*." [29]

Inadequacy of Intermediate Mental Health Care

CSC developed a mental health strategy to enhance its capacity to address and respond to the mental health needs of prisoners.[30] Initially, this strategy included intermediate care units to be established within prisons as an important component. The units would have provided an intermediate level of mental health care for prisoners whose problems are not so serious as to require in-patient care in a psychiatric facility, but who nevertheless need "structured support".[31]

According to the OCI, CSC committed to seek funding to support the implementation of the intermediate care units. However, in its 2009-2010 report, the OCI noted that "*it is currently*

---

[25] Francoise Bouchard "A Federal Health Care Needs Assessment of Federal Inmates in Canada" (2004) Canadian Journal of Public Health.
[26] See OCI statement to the Standing Senate Committee on Social Affairs, Science and Technology. Report available online at: http://www.parl.gc.ca/Content/SEN/Committee/391/soci/rep/rep02may06part5-e.htm
[27] OCI, *Annual Report 2005-06*.
[28] *Corrections and Conditional Release Act*, SC 1992, c. 20.
[29] Ibid.
[30] CSC Mental Health Strategy, http://www.csc-scc.gc.ca/text/pblct/qf/11-eng.pdf
[31] CSC Mental Health Strategy, http://www.csc-scc.gc.ca/text/pblct/qf/11-eng.pdf

unfunded". CSC's website also notes "*Development of intermediate care units for male offenders with mental health issues in institutions (currently unfunded)".*

Inadequacy of Acute and Chronic Mental Health Care

CSC has five Regional Treatment Centres which offer "acute and chronic mental health care to inmates suffering from the most serious mental health conditions and require[ing] in-patient treatment. Treatment centres are "hybrid" facilities, in that they are considered to be a "penitentiary" subject to the provisions of the federal *CCRA*, and a "hospital" subject to the provisions of the relevant provincial legislation."[32]

In its 2009-2010 Annual Report the OCI reported that:

> ***"****Prevailing physical conditions of confinement in some of the regional psychiatric facilities is far from ideal or therapeutic from a mental health standpoint — the living units are often noisy, crowded and devoid of natural light. Several medium and maximum security facilities have resorted to accommodating offenders in so-called "special needs" units because of the challenge in accessing beds at the Regional Treatment Centres, as an alternative to segregation or as a substitute for appropriate mental health care. By CSC's own estimates, bed capacity in the five treatment centres only meets 50% of identified need.*"

The inability to appropriately house and effectively deal with a prisoner's mental health needs can have serious repercussions. In one example, Mr. Tekano, a prisoner with serious mental disorders, alleged that CSC failed to accommodate his mental disabilities by repeatedly placing him in a segregation unit, locked in his cell for 23 hours a day, most of the time with nothing but a mattress.[33] Among the findings of a federal court, the court noted that in this instance, segregation was:

> *[…] "akin to mental torture" for someone with ADHD[Attention Deficit Hyperactivity Disorder]…In that sense, although this measure commonly used by CSC to protect an inmate from the inmate population or from injuring himself (such as suicide watch) is not generally intended to be a punitive measure, it may well have become so for Mr. Tekano given his mental disabilities and the fact that he continued, despite his efforts, to bang his head on the walls to the point of causing himself serious injuries.*[34]

The court found there was evidence that alternatives to housing Mr. Tekano in segregation were available to CSC. In particular, it stated that "the Mental Health Act contains provisions that were to be used for cases just like this one. [35]

---

[32] See CSC website http://www.csc-scc.gc.ca/text/pa/adt-rtc-rpc-378-1-252/adt-rtc-rpc-378-1-252-eng.shtml
[33] *Tekano v. Canada* (Attorney General) 2010 FC 818 at 4.
[34] *Tekano* 46. The judge emphasized at 56 that "While there is no doubt that the applicant has been found guilty of very serious crimes and that the CSC has many constraints given the duty imposed on it, one must also consider that a disabled inmate in a maximum security correctional facility is in a uniquely vulnerable situation."
[35] Ibid at 48.

The Special Rapporteur on Torture has raised concerns with "*the use of seclusion i.e. the solitary confinement of patients as a form of control or medical treatment.*"[36] In this regard, the European Committee on the Prevention of Torture has recommended that States not hold mentally disabled prisoners in solitary confinement-like units but rather house them in secured hospital facilities.[37]

The CHRC believes that the treatment of people with mental illness in Canada's prisons is a pressing human rights issue that requires immediate attention. This issue must also be addressed at its roots, within the community. The investment required is in housing and supportive services and cuts across federal and provincial/territorial jurisdictions. In its report entitled *Out of the Shadows*, the Standing Senate Committee on Social Affairs, Science and Technology made a number of recommendations for the Government of Canada to work with the provinces and territories as well as the Mental Health Commission of Canada to deal with these issues.

Recommendation No. 2: The Canadian Human Rights Commission recommends that the issue of community-based supportive housing for persons with mental health disabilities be addressed.

Recommendation No. 3: The Canadian Human Rights Commission recommends an increase in the capacity of intermediate and acute mental health treatment centres for prisoners.

3.5 The Use of Solitary Confinement (Articles 2, 11, 16)

Although there is no universally agreed upon definition of solitary confinement, the Special Rapporteur has defined solitary confinement, also sometimes referred to as "segregation", "isolation", "separation", "cellular", "lockdown", "Supermax", "the hole" or "Secure Housing" as the "*physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day.*"[38] Meaningful contact and quantitative/qualitative stimuli is reduced to a minimum.

[36] Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with Assembly resolution 57/200 of 18 December 2002, (A/58/120 at 49).
[37] European Committee on the Prevention of Torture, *Report to the Portuguese Government on the Visit to Portugal from 19 to 27 January 1992* (22 July 1994) CPT/Inf (96) 9 [Part 1] at ¶ 68. For example, at Styal Prison in the United Kingdom, "When someone self-harms or goes into some sort of behaviour indicating acute mental illness, the person is sent to [a special] unit and one specific staff member is assigned to that person. Essentially, that person is put within a health care setting within the institution": see House of Commons Standing Committee, Statement by Don Davies (5 December 2009) at 1300.
[38] United Nations General Assembly, Sixty-sixth session, Interim report of the Special Rapporteur of the human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, p.2, available at:http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement

Prolonged solitary confinement is defined as "*any period of solitary confinement in excess of 15 days*."[39] The Special Rapporteur has concluded that 15 days is the limit between solitary confinement and prolonged solitary confinement because the literature now shows that, beyond this limit, some of the harmful effects of isolation can be irreversible.[40]

Harmful Effects of Prolonged Solitary Confinement

The negative effects of prolonged solitary confinement on mental health are now well documented in literature. 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.[41]

Canadian courts have also recognized the effects of segregation, in particular it has recently been noted that *"segregation does not help inmates' mental condition"*.[42]

In its report entitled Out of the Shadows, the Standing Senate Committee on Social Affairs, Science and Technology noted the adverse impact of prison, in particular segregation, on prisoners with mental illness.

> *[They] are unable to complete regular programs, are preyed upon by other offenders, end up in segregation, they have limited coping skills and they are usually classified as maximum security. They do not have the ability or skills required to focus and concentrate in order to complete regular programming. They are very vulnerable and their segregation is usually for a much longer period of time than others in segregation. They are usually referred to see the psychiatrist, who typically finds no evidence of a psychiatric disorder, per se, and identifies these individuals as exhibiting a behavioural problem. These offenders therefore do not meet the criteria that would allow them to benefit from services provided in treatment centres, so they stay in the general institutions. They have limited coping skills, which may cause them to withdraw, self-injure, set fires, attempt or commit suicide, and in some extreme situations assault others or guards.*[43]

---

[39] Ibid.

[40] For more information on the effects of isolation see: Craig Haney, "Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, Crime and Deliquency", vol 49. No.1 pp. 124-156.

[41] Sharon Shalev, *A Sourcebook on Solitary Confinement*, Mannheim Centre for Criminology, London, 2008.

[42] *Supra* note at 35.

[43] *Out of the Shadows at Last* at p. 308. As the matter was put, "there is a need to ensure that those with learning disabilities are properly assessed on reception as they have difficulty following orders from the officers and thus end up being charged, in segregation, and receiving disciplinary sanctions." It thus creates a vicious circle that is near impossible to break under the current set of circumstances.

International Standards & Practices

The use of solitary confinement is now widely condemned at the international level.[44] In his 2011 report, the Special Rapporteur emphasized that:

- States should *"abolish the use of solitary confinement for juveniles and persons with mental disabilities"*[45]
- *"In regard to the use of solitary confinement for persons with mental disabilities, the Special Rapporteur emphasizes that physical segregation of such persons may be necessary in some cases for their own safety, but solitary confinement should be strictly prohibited."*[46]
- *"where the physical conditions and the prison regime of solitary confinement cause severe mental and physical pain or suffering…. when used prolonged, on juveniles or persons with mental disabilities, it can amount to cruel, inhuman or degrading treatment or punishment and even torture"*

The CHRC notes that Canada supported the *Basic Principles for the Treatment of Prisoners*.[47] Principle 7 provides that *"Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged*."

Forms and Use of Solitary Confinement in Canada

The CCRA provides for two forms of solitary confinement – known as "segregation". Disciplinary segregation can be imposed as a sanction if a prisoner has been found guilty of a serious offence in a hearing before an independent chairperson. It is the most severe form of punishment that can be administered as a disciplinary sanction. However, it is limited to a maximum of 30 days.[48]

The second form is administrative segregation. It can be used whenever there are reasonable grounds to believe that the presence of the prisoner in the general population jeopardizes the security of the penitentiary or the safety of any person or would interfere with a serious investigation. In these cases, the institutional head must be satisfied that there is no alternative

[44]The Special Rapporteur has also noted that the use of solitary confinement on persons with mental disabilities "[…] *is cruel, inhuman or degrading treatment and violates article 7 of [the International Covenant on Civil and Political Rights] and article 16 of CAT"* and as such has recommended abolishing its use on prisoners with mental illnesses. Also, the Human Rights Committee has observed that, generally speaking, "*prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7*" of the *International Covenant on Civil and Political Rights* (*ICCPR*) (prohibition on torture and ill-treatment).
[45]See: General Assembly report of the Special Rapporteur on Torture, 2011, para 86, available online at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement
[46] Ibid.
[47]Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990, available at http://www2.ohchr.org/english/law/basicprinciples.htm
[48] See s.44 of the *CCRA.*

but to segregate the prisoner and must ensure that the prisoner is returned to the general population as soon as possible.[49]

In its 2010-2011 Annual Report, the OCI stated that "*In any given year, there are approximately 7,500 individual segregation placements in federal prisons. In 2009-10, 16% of these placements involved durations exceeding 120 days*."[50] It is also reported that on any given day, there were, on average, approximately 800 offenders in segregation *[O]ver 40% of segregated offenders spent over 60 days in administrative segregation*."[51]

The CCRA provides that a prisoner's state of health and health care needs shall be considered in all decisions affecting the prisoner, including the placement in or transfer to segregation.[52] However, the CHRC notes that, as illustrated in the *Tekano* decision, this is not always the case. As mentioned in the *Tekano* decision, there are alternatives available to CSC, including counseling, psychiatric treatment or even certification under the *Mental Health Act*, when appropriate. [53]

The CHRC has received a number of complaints from prisoners with mental disabilities who were dealt with through placement in segregation. The CHRC notes that despite clear international guidance and standards, the use of segregation has not been abolished for persons with mental illness. Furthermore, the practice is allowed for prolonged periods, which research shows may result in permanent psychological damage.

Given the above, the CHRC supports the Special Rapporteur's recommendation that solitary confinement should be "strictly prohibited" in the case of prisoners with mental disabilities.

Recommendation No. 4: The Canadian Human Rights Commission recommends that the use of disciplinary and administrative segregation be abolished for persons with serious or acute mental illness.

---

[49] A detailed examination of the law and practice of administrative segregation can be found in Michael Jackson, *Justice behind the Walls: Human Rights in Canadian Prisons*, section 4 online at http://justicebehindthewalls.net/book.asp?cid=112

[50] *Corrections and Conditional Release Statistical Overview: Annual Report 2010*. Public Safety Canada, 2010.

[51] OCI, *Annual Report 2004-05*. During the fiscal year 2008-09, 7619 inmates were placed in segregation (7198 men, of which 5752 were involuntary, and 421 women, of which 388 were involuntary): see Statistical Overview Report: Administrative Segregation (September 16, 2009). For a definition of administrative segregation see: Commissioners Directive 709 " *Voluntary administrative segregation is when the inmate requests placement in administrative segregation and the Institutional Head believes on reasonable grounds that the continued presence of the inmate in the general population would jeopardize the inmate's own safety and there is no reasonable alternative to placement in administrative segregation*." Involuntary segregation "*is when the placement meets the requirements of subsection 31(3) of the CCRA and the placement in administrative segregation is not voluntary*."

[52] See s. 87 of the *CCRA.*

[53] Supra note 35. In the *Tekano* decision, the judge explained that certification under the *Mental Health Act* is obtained through a Declaration that the individual is incompetent to make decisions in respect of his/her proper treatment.

4 OTHER VULNERABLE GROUPS (Articles 2, 11, 16)

This section will briefly discuss the adverse effect that the prison system can have on the following vulnerable groups: women prisoners, prisoners that are members of sexual minorities and Aboriginal and African Canadian prisoners.

4.1 Women Prisoners

Both the 1996 Arbour report[54] and the CHRC's 2003 Protecting Their Rights report, provided recommendations to CSC in order to address issues specific to women offenders. While CSC has made progress on many recommendations, there are two outstanding issues of major significance.[55]

1. In its 2003 report, the CHRC recommended that CSC implement independent adjudication for decisions related to segregation at all of its regional facilities for women to ensure fair decision-making. Although CSC originally accepted this recommendation in principle, it has failed to ensure the creation of an independent adjudication mechanism formed with members from outside the Correctional Service.[56]

2. The CHRC also recommended in 2003 that CSC create, within one year, a security classification tool explicitly for federally sentenced women; one that takes into consideration the low risk posed to public safety by most women. To date, this recommendation has not been implemented.[57]

Recommendation No. 5: The Canadian Human Rights Commission recommends that the Correctional Service of Canada implement two outstanding recommendations from the 2003 *Protecting Their Rights* report, with respect to independent adjudication (6b), and the security classification tool (2a) for women prisoners.

4.2 Prisoners that are Members of Sexual Minorities

Prisoners who are members of sexual minority groups, including lesbian, gay, bisexual or transgendered or transsexual (LGBT) may face unique risks and forms of discrimination.[58] They

[54] *Supra* note 14.
[55] *Supra* note 19.
[56] *Protecting Their Rights*, recommendation 6b)
[57] *Protecting Their Rights*, recommendation 2a).
[58] In Canada, the acronym LGBTTIQQ2S is sometimes used. It refers to lesbian, gay, bisexual, transgender, transsexual, intersex, queer (this term is used as a self-identifier by the gay community–typically by those of a younger demographic), questioning (someone who is unsure of their gender, sexual orientation or sexual identity) and two-spirited (an umbrella term used by some Aboriginal cultures for any person who displays characteristics of any of the above).

are at risk of sexual violence and may face challenges in obtaining appropriate health care services, including mental health services. In addition, LGBT prisoners may face safety risks if they are inappropriately housed. Living under a constant threat to physical safety creates a humanitarian situation for these prisoners.

On the issue of sexual minorities, the Special Rapporteur on Torture has stated that "*When detained, members of sexual minorities are often considered as a sub-category of prisoners and detained in worse conditions of detention than the larger prison population ... members of sexual minorities in detention have been subjected to considerable violence, especially sexual assault and rape, by fellow inmates….*[59]

Over the years, the CHRC has received complaints from transgendered prisoners on a number of issues including decisions relating to sex reassignment surgery. The CHRC notes that the Harry Benjamin International Association is the organization that publishes the internationally accepted Standards of Care (including criteria for sex reassignment surgery) for the Health of Transsexual, Transgender, and Gender Nonconforming People (SOC). The seventh version, published in September of 2011, brought important changes concerning the applicability of the standards in a prison setting.

The SOC states that "*People should not be discriminated against in their access to appropriate health care based on where they live, including institutional environments such as prisons or long-/intermediate-term health care facilities*." The SOC now provide that "*all elements of assessment and treatment as described in the SOC [standards of care] can be provided to people living in institutions. Access to these medically necessary treatments should not be denied on the basis of institutionalization or housing arrangements"*. [60]

Recommendation No. 6: The Canadian Human Rights Commission recommends that the Correctional Service of Canada policies and practices be amended to ensure they reflect current international standards, including *The Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th version Standards of Care (SOC) – also known as the Harry Benjamin SOC).

[59] See General Assembly report: Question of Torture and other cruel, inhuman and degrading treatment, A/56/156 at para 23. See also the 2011 Special Rapporteur Annual Report to the General Assembly, A/HRC/19/41 at para 34-34.
[60] The original SOC were published in 1979. Previous revisions were in 1980, 1981, 1990, 1998, and 2001. The most recent version, 7th version was published in 2011 by the World Professional Association of Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, http://www.wpath.org/documents/Standards%20of%20Care_FullBook_1g-1.pdf

4.3 Aboriginal Prisoners

Canada's OCI noted that, in 2009-2010, 20% of the total federal offender population was Aboriginal yet only 4% of the Canadian population identifies as Aboriginal.[61] For Aboriginal women, this over-representation is even more striking at 33.1% of federally sentenced women.[62] The Supreme Court of Canada has 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."[63] The Court also found 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.

The OCI has also 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.[64]

4.4 African Canadian Prisoners

The African Canadian Prisoner Advocacy Coalition (ACPAC) has raised concerns with the CHRC and the OCI about the situation of African Canadian prisoners. The OCI has noted an increase in the proportion of federally-sentenced prisoners who self-identify as African Canadian. This proportion has increased from 6% in 2000-2001 to 9% in 2010-2011.[65] The most recent census data available suggests that Canadians of African descent represent only 2.5% of the general population.

The CHRC shares the OCI's concern that these statistics may point to a variety of social issues existing outside the prison walls, including but not limited to racism, barriers to educational attainment, and possibly a systemic human rights issue in the administration of justice in Canada. Many observers have argued that proposed federal sentencing reforms, such as mandatory minimum sentences, will exacerbate an already troubling human rights situation rather than alleviating it. The CHRC shares these concerns. As stated in our shadow report to the Committee on the Elimination of Racial Discrimination, we will monitor changes to the human rights environment as these reforms are implemented.

---

[61] OCI, *Annual Report 2009-10*

[62] Canada, Office of the Correctional Investigator, *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections* (February 2010) at 6 <www.oci-bec.gc.ca/rpt/pdf/oth-aut/oth-aut20091113-eng.pdf>.

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

[64] The Commission expressed similar concerns in its shadow report to the CERD.

[65] Information provided by the Correctional Investigator of Canada based on CSC Corporate Reporting System, as of October 2, 2011.

5 OTHER ISSUES OF CONCERN

5.1 Ratification of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

The OPCAT was adopted by the General Assembly in December 2002. It establishes "*a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment*."[66] Although Canada was a part of the working group that developed the OPCAT, it has not yet ratified the Protocol.

Canada has in place, through the OCI, a mechanism that meets some of the requirements of the OPCAT. However, many of the essential elements of OPCAT are not met. For example, OPCAT calls for the establishment of a system of regular visits by an independent international body in order to complement the role and duties of the OCI.[67]

As we have illustrated in this report, Canada is not sheltered from cases of ill-treatment with regards to prisoners and must remain vigilant in this regard. It is not sufficient for the prison system to have its own internal grievance process. A system of regular visits by an international body would provide a more effective mechanism for preventing ill-treatment. It would also strengthen Canada's role in promoting and protecting human rights.

National and International Pressures

The OCI has "[…] *encouraged the Canadian Government to yet again demonstrate its leadership by signing and ratifying* […]" the protocol.[68]

The 2009 United Nations Universal Periodic Review (UN UPR) of Canada recommended that Canada accede to OPCAT and create the requisite [national preventive mechanism] NPM.[69] Canada's response was "*it is conducting the required analysis of its domestic legislation and policies in considering the possible signature/ratification of the CRPD[Convention on the Rights of Persons with Disabilities] and the OPCAT*."[70]

However, in its sixth report to the Committee, Canada again noted that it "[...] *is presently considering whether to become a party to* [...]" OPCAT.

---

[66] OPCAT, http://www2.ohchr.org/english/law/cat-one.htm

[67] For Canada to be compliant with OPCAT at the federal level, it would have to develop domestic inspection mechanisms for a variety of facilities, such as the Canada Border Service Agency.

[68] OCI, *Annual Report 2005-06*.

[69] Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review: Canada*, (5 February 2009) A/HRC/WG.6/4/L.3 at para 86(2).

[70] Canada, Heritage Canada, *Universal Periodic Review Response of Canada to the Recommendations* (5 June 2009), online: <http://www.pch.gc.ca/pgm/pdp-hrp/inter/101-eng.cfm>.

The CHRC believes that a comprehensive monitoring mechanism to prevent ill-treatment must include a system of regular visits by independent international and national organizations to places where people are deprived of freedom.

Recommendation No. 7 The Canadian Human Rights Commission recommends that Canada sign and ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

6 CONCLUSION

The Commission has focused this report on the conditions of confinement in prisons; CSC's internal grievance system; prisoners with mental disabilities including the use of solitary confinement for this group; the situation of vulnerable groups, including women and sexual minorities, Aboriginal peoples, African Canadians; and the ratification of the OPCAT. Report after report has documented these same concerns. Despite the numerous calls for action from both within Canada and abroad, the situation for many vulnerable groups remains unsatisfactory.

ANNEX 1: Canadian Human Rights Commission Recommendations

Recommendation No.1

The Canadian Human Rights Commission recommends that the Correctional Service of Canada establish an independent external redress body for federally sentenced offenders.

Recommendation No. 2

The Canadian Human Rights Commission recommends that the issue of community-based supportive housing for persons with mental health disabilities be addressed by all levels of government.

Recommendation No. 3

The Canadian Human Rights Commission recommends an increase in the capacity of intermediate and acute mental health treatment centres for prisoners.

Recommendation No. 4

The Canadian Human Rights Commission recommends that the use of disciplinary and administrative segregation be abolished for persons with serious or acute mental illness.

Recommendation No. 5

The Canadian Human Rights Commission recommends that the Correctional Service of Canada implement two outstanding recommendations from the 2003 *Protecting Their Rights* report, with respect to independent adjudication (6b), and the security classification tool (2a) for women prisoners.

Recommendation No. 6

The Canadian Human Rights Commission recommends that the Correctional Service of Canada policies and practices be amended to ensure they reflect current international standards, including *The Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th version Standards of Care (SOC) – also known as the Harry Benjamin SOC).

Recommendation No. 7

The Canadian Human Rights Commission recommends that Canada sign and ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Other (OPCAT).

ANNEX 2: Relevant Articles from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.