

Federally Sentenced Women with Mental Disabilities: A Dark Corner in Canadian Human Rights

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INTRODUCTION

On March 8, 2001 (International Women's Day) the Canadian Association of Elizabeth Fry Societies (CAEFS) wrote to the Canadian Human Rights Commission (CHRC) requesting that it exercise its power under s. 61(2) of the *Canadian Human Rights Act (CHRA)* to prepare a special report on the government's treatment of women serving federal terms of imprisonment.¹ In its letter, CAEFS alleges that the federal prison system discriminates against women prisoners on the grounds of sex, race and cognitive and mental disabilities.² CAEFS specifically requested that the Commission undertake a broad-based, systemic review of the prison system as it pertains to women on these three grounds.

In conjunction with the CHRC investigation, CAEFS is conducting its own investigation and analysis of the prison system and its impact on the sex, race and disability interests of women prisoners.

CAEFS has asked DisAbled Women's Network Canada ("DAWN Canada") to provide a human rights analysis of the laws and policies that govern how Correctional Service Canada (CSC) deals with federally sentenced women ("FSW") living with a mental disability. DAWN Canada was founded in 1985. We are a national feminist organization controlled by women with disabilities working to achieve control over our own lives and end the stereotype that labels us dependent burdens on society.

Our paper is divided into five parts. We begin in Part I with a brief description of the historical roots of disability-based discrimination and the growing trend to criminalize persons living with a mental disability. In Part II, we attempt to describe whom we are talking about when we use the term "federally sentenced women with mental disabilities". Part III provides a brief description of the human rights laws that apply to the discrimination faced by FSW with mental disabilities. In Part IV, we examine some of the specific laws and policies implemented by the federal government and CSC that may constitute disability-based discrimination within the federal prison system. Finally in Part V, we propose some recommendations that may serve as a starting point for redressing the discrimination encountered by FSW living with mental disabilities. In particular, our recommendations explore the appropriateness and right of FSW to have access to services situated within the community that are specifically designed to assist women living with mental disabilities. The information and analysis contained in this paper is limited to FSW incarcerated in federal prisons.

PART I: OVERVIEW OF DISABILITY DISCRIMINATION

A. The Shift from Paternalism to a Human Rights Framework

In the past, persons with disabilities were often treated as objects to be protected or pitied.³ Historically, it was believed that it was the person's particular impairment that created problems for the person living with a disability. Persons with disabilities were regarded as objects in need of medical intervention.⁴ The medical model of disability situated the problem of disability with the individual and not the society or environment in which she lived.

In Canada, prior to 1960, social policy pertaining to disability was based on an ethic of care and protection.⁵ Many people with disabilities were classed as patients and forced to reside in institutions. It was assumed that they were permanently incapacitated and therefore incompetent.⁶ Institutionalization isolated persons with disabilities from the community; segregation emphasized disability as different; and lack of public awareness regarding the needs and interests of persons with disabilities engendered myths and stereotypes about life with a disability.⁷

Over time, social policy evolved and persons with disabilities were moved from medical institutions into community facilities. Even so, persons with disabilities continued to experience isolation and exclusion from mainstream society. Because persons with disabilities were relegated to the margins of society, societal norms only reflected characteristics ascribed to 'able-bodiedness'. For example, the built environment was only constructed for able-bodied persons who could walk, and not for persons who used assistive devices such as wheelchairs.

During the last couple of decades throughout the world, there has been a dramatic shift from paternalistic approaches to disability to the recognition of rights.⁸ As discussed later in this paper, Canadians with disabilities now enjoy both *Constitutional* and statutory protection of their human rights. Under a human rights framework, the focus has shifted from trying to 'fix' the individual, to evaluating how various social and economic processes can be reconfigured to accommodate the difference of disability.

B. The Criminalization of Persons Living with a Mental Disability: Institutionalization Revisited

1. Lack of Community Support

The institutional warehousing of persons with intellectual and mental disabilities is no longer an acceptable practice. The recognition that people can and do benefit from community services has rendered the likelihood of institutionalization more remote. In addition, institutions have been replaced by antipsychotic drugs, which are supposed to offer a more humane alternative to long-term hospitalization.⁹ As a result, the provision of community-based services is now recognized as the preferred approach.

Although community integration is promoted as a highly valued principle, relentless cuts to social and health programs over the last two decades have eviscerated any real hope for progress offered by this principle. Currently, the shortage of adequate community resources causes many persons with mental disabilities to fall through the cracks of the system. In many cases, society responds to the attempts of such persons to survive with inadequate resources by characterizing their behaviour as criminal, labelling them as criminal 'offenders', and institutionalizing them in the criminal justice system.¹⁰ Social and economic challenges such as homelessness, unemployment, social isolation, malnutrition and substance abuse further compound the plight of persons with mental disabilities to survive in the community.¹¹

As a result, American trends reveal that jails are increasingly becoming the default placement for persons with mental disabilities.¹² Similar trends also appear to be evident in Canada.¹³

Historically, women have been over-represented in psychiatric facilities and under-represented in the prison system. However, with the closure of psychiatric institutions and increasingly overtaxed and under-resourced community based services, Canada is now witnessing a marked increase in the number of women with cognitive and mental disabilities who are being criminalized.¹⁴ Studies on or about women in prison indicate that according to their research, women prisoners have a significantly higher incidence of mental disability including schizophrenia, major depression, substance use disorders, psychosexual dysfunction, and antisocial personality disorder.¹⁵ In addition, incarcerated women have a much higher incidence of a history of childhood sexual abuse and severe physical abuse than women in the general population.¹⁶ Among incarcerated Aboriginal women, who are disproportionately represented in the federal prison system, 90% reported physical abuse and 61% reported sexual abuse.¹⁷

Although other women in prison are often far more accommodating than their male counterparts when it comes to differences of all sorts, including abilities, prisoners with mental disabilities may still be shunned by their peers. They may also serve longer sentences and may be labelled as having more disciplinary problems.¹⁸

Many FSW labelled with a mental disability are more likely to be classified as a maximum-security prisoners.¹⁹ The practical reality is that mental health needs are equated with risk.²⁰ Women in maximum security who experience behaviour difficulties are more likely to be placed in administrative segregation. As a result, women who are suicidal or have mental or cognitive disabilities are often isolated, deprived of clothing and placed in stripped/barren cells.²¹

Generally the prison system is ill equipped to provide the services and supports required by women with mental disabilities. Although the *Corrections and Conditional Release Act (CCRA)* recognizes the right of prisoners to have access to mental health services²², and although CSC has taken steps to design a "Mental Health Strategy"²³, the capacity to create a therapeutic prison environment, conducive to healing, is antithetical to the purposes of the corrections system. According to the *CCRA*, the "protection of society" is the paramount consideration.²⁴ It is not surprising then that the training of prison staff prioritizes security and risk management over all other institutional and/or individual needs. As a result, prison staff may not have the training required to respond appropriately to prisoners with mental disabilities.²⁵

Some inmates with mental disabilities may have difficulty following prison rules; e.g., some inmates may not be capable of standing in an orderly line for meals. It is not uncommon for prison staff to respond to such a situation with some form of punishment or by placing the inmate in physical restraints or administrative segregation.²⁶ Such responses may exacerbate rather than alleviate the inmate's symptoms.²⁷

The trend to incarcerate persons with mental disabilities in prisons has caused advocates for the mentally disabled to say that the "clock is being turned back to the 19th century".²⁸ Indeed, the spectre of institutionalization common in previous days may very well be reinventing itself in today's prisons.

PART II: PROFILE OF FEDERALLY SENTENCED WOMEN WITH MENTAL DISABILITIES

A. A Brief Description of FSW Labelled with a Mental Disability

Mental disability is a broad term used to describe a variety of disabilities. Human rights legislation in Canada has defined "mental disability" to include intellectual disabilities, mental health disabilities and learning disabilities.²⁹

Unfortunately, there is a general lack of data substantiating the numbers of federally incarcerated persons with mental disabilities. According to some unreported sources the number of those with mental disabilities in the prison system varies, some people estimating that between 30 to 50% have a learning disability, while others suggest that it is more like 15 to 20%.³⁰ A report issued by the United States Department of Justice in 1999 estimates that at that time, 16% of all inmates in state and federal jails and prisons had schizophrenia, manic depressive illness (bipolar disorder), major depression, or another severe mental illness.³¹

The dearth of reliable statistical information makes it difficult to say with any certainty what percentage of FSW is considered to have a mental disability. According to findings of the Participation and Activity Limitation Survey, 2001 (Statistics Canada) approximately 6.7% of women in the general population are considered to have a mental disability.³² As this paper notes elsewhere, CSC estimates the rate of mental disability among FSW to be significantly higher than women in the general population. This paper accepts this assertion, however, we are also cautious about CSC's assessment of the prevalence of mental disability.³³ The CSC tends to cast a wide net when identifying women with mental disabilities by equating social disadvantage with having a mental disability.³⁴ While social disadvantage combined with inappropriate incarceration may create mental health problems, CSC seems to use the label of mental disability as a means of removing women from the general population into a more controlled environment.

This paper uses the term "mental disability" to refer to intellectual disabilities, mental health disabilities and learning disabilities. Due to the difficulty in providing an accurate statistical profile of FSW with mental disabilities in the prison system, this paper offers a narrative description of some of the factors that are known about FSW with mental disabilities.

Hannah-Moffat and Shaw observe that "[w]omen in the federal population come from a wide range of backgrounds and experiences in terms of their age, social and economic position, culture and ethnicity, and sexual preferences. They include women who have spent much of their life on the street or in institutions, older first-time offenders, those with families and children, single women, and those with special physical and health needs. As a whole, the population is very diverse - more so than the much larger male population."³⁵ They further observe that many incarcerated women are identified as having high levels of need for programs and services, including mental health needs.³⁶ The types of mental health problems are different for women than men. Many problems experienced by FSW can be linked directly to past experiences of early and/or continued sexual abuse, physical abuse and assault.³⁷ Overall, women outnumber men in all major psychiatric diagnoses with the exception of Anti-Social Personality Disorder.³⁸

Mental disability can also affect women and men differently. CSC³⁹ describes these differences as:

- (1) In general men turn their anger outward while women turn theirs inward;
- (2) FSW are three times as likely to experience moderate to severe depression compared to incarcerated men.
- (3) Men tend to be more physically and sexually threatening and assaultive while women are more self-abusive and suicidal. Self-destructive behaviours, such as slashing, are not uncommon for women with mental disabilities.

PART III: THE LEGAL FRAMEWORK

Domestically, there are two human rights instruments that govern the laws, policies and practices implemented by the federal government and its agents (the CSC in this case). They are the *Canadian Human Rights Act (CHRA)*⁴⁰ and the *Canadian Charter of Rights and Freedoms (the Charter)*⁴¹. When considering matters within the federal jurisdiction, it is not unusual for the court to consider both instruments.⁴² While some of the problems encountered by FSW with mental disabilities may be individualistic in nature, issues associated with current risk assessment tools and security classifications are broad-based and systemic in nature. This paper addresses the systemic discrimination arising from the *CCRA* and the policies and practices that are carried out under its authority. Both the *CHRA* and the *Charter* have the capacity to address systemic discrimination and thus a brief analysis of the various legal mechanisms employed by each instrument is set out below.

A. The Canadian Human Rights Act

Section 3 of the *CHRA* prohibits discrimination on a number of grounds including "disability". Disability is given a broad and open-ended definition in s. 25; "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug. Under the *CHRA*, services and programs offered by the federal prison system are construed as services customarily available to the public. Section 5 of the *CHRA* states that it is an offence to deny or to differentiate on the basis of disability in the

provision of public services.

A service provider can argue pursuant to s. 15(1)(g) that a denial or differentiation is based on a bona fide justification (BFJ). To invoke successfully the BFJ defence, s. 15(2) stipulates that a service provider must demonstrate that she/he has attempted to accommodate the persons affected and that the required accommodation would impose an undue hardship.

The Supreme Court of Canada has set out a stringent three-step test which respondent/service providers must meet to establish a BFJ.⁴³ Once a plaintiff establishes discrimination, the onus shifts to the respondent/service provider to prove on a balance of probabilities that the denial or differentiation is based on a BFJ. When Applied to CSC's approach to FSW with mental disabilities, the CSC would have to prove the following:

- (1) That the current approach to FSW with mental disabilities is based on a purpose or goal rationally connected to the function of the corrections system;
- (2) That the current approach was adopted in good faith and in the belief that it is necessary for the fulfilment of the purpose and goal of the corrections system; and
- (3) That the current approach is reasonably necessary to accomplish its purpose or goal because other approaches would impose undue hardship on the corrections system. Undue hardship may encompass factors such as impossibility, serious risk or excessive cost.

In summary, the *CHRA* prohibits service providers from discriminating against persons with mental disabilities unless they can prove that their actions are based on a BFJ. To substantiate a BFJ, a service provider must illustrate that her/his decision has a rational basis, is carried out in good faith, and is reasonably necessary in that accommodating the affected persons would constitute an undue hardship. Later this paper argues that various aspects of the CSC approach to FSW with mental disabilities violates s. 5 of the *CHRA*, which cannot be saved by the BFJ defence.

B. The Equality Guarantee of the *Canadian Charter of Rights and Freedoms*

The *Canadian Charter of Rights and Freedoms* forms part of Canada's *Constitution* and thus, as a *Constitutional* document, is regarded as the supreme law of Canada. The *Charter* applies to government action (whether federal or provincial/territorial) which includes laws, programs, policies and practices.⁴⁴ Where a law, policy or program conflicts with the provisions of the *Charter*, it will be declared by the Court to be of no force or effect unless it can be established that the impugned law, policy or program is reasonably necessary in a free and democratic society.⁴⁵

Section 15 of the *Charter* guarantees equality to all Canadians:

- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The *Constitutional* guarantee of equality has played an instrumental role in reshaping our understanding of equality in Canada. The Supreme Court of Canada (SCC) has stated that

equality does not necessarily mean treating everyone the same.⁴⁶ Indeed, the Court has recognized that identical treatment can sometimes create inequalities.

Consequently, the Court characterizes equality as a dynamic concept whereby the "accommodation of differences...is the essence of true equality."⁴⁷ The purpose of s. 15 is therefore twofold; to prevent discrimination, and to ameliorate disadvantages experienced by groups and individuals who have historically been excluded from mainstream society, as has been the case for persons with mental disabilities.

In assessing an equality claim under s. 15 of the *Charter* the Court looks beyond the actual law being challenged, and considers the social, political and legal position of the claimant in society.⁴⁸ Clearly, legislatures must have the authority to draw distinctions among people. However, according to the Court's interpretation of the equality guarantee in the *Charter*, such distinctions must not exacerbate or re-enforce the disadvantage of certain groups and individuals in society.⁴⁹ To be more specific, the Court has stated that the overall purpose of s. 15 is to "...remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society."⁵⁰ Consequently, social context is the key to any equality rights analysis.

In a 1999 ruling, the SCC confirmed the need for a purposive and contextual approach to s. 15 claims.⁵¹ The Court stated that the following three inquiries should be made when evaluating the merits of a claim of discrimination under the *Charter*:

- (1) Does the impugned law impose differential treatment, in purpose or effect, on the claimant compared to others?
- (2) Is the claimant subject to differential treatment based on one or more of the enumerated and analogous grounds?
- (3) Does the law in question have a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds?⁵²

In the *Swain* case, the SCC recognized persons with mental disabilities as a group in our society which has been negatively stereotyped and historically disadvantaged.⁵³ Practices within the prison system that exacerbate or do not take into account the already disadvantaged position of persons with mental disabilities could be construed as fulfilling the first inquiry of the s. 15 test for discrimination.

To answer the second inquiry of the s. 15 test, the claimant must show that a distinction is being drawn between her and others. Typically, this involves comparing the claimant's experiences with that of others.

Determining the appropriate comparator group for FSW with mental disabilities is complex and difficult. There are a number of groups that could be identified as the appropriate comparator group including non-disabled women in the general population, women with mental disabilities in the general population, non-disabled incarcerated FSW, and incarcerated federally sentenced men with mental disabilities. Each group raises its own set of problems which, in the end, results in an artificial and unproductive analysis.

The most plausible connection might arise between FSW with mental disabilities and women with mental disabilities in the general population and/or federally incarcerated men with mental disabilities. Such comparisons however, would surely make a mockery of the purpose of s. 15. Neither women with mental disabilities in the general population nor federally incarcerated men with mental disabilities enjoy any kind of real advantage which could serve as a benchmark for measuring the degree to which FSW with mental disabilities are burdened or denied benefits.

Rather than straining the integrity of the law, it may be more useful to answer the second inquiry by applying the analysis articulated by the SCC in the *Eldridge* case.⁵⁴ In this case, the Court endorsed the view that discrimination can arise where government fails to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public.

The *CCRA* specifies that one of the purposes of the corrections system is to assist with the rehabilitation of offenders and their reintegration into the community.⁵⁵ The second inquiry of the s. 15 test can thus be met where a federally sentenced woman can establish that the rehabilitation policies and practices of the prison system do not take her mental disability into account, or where such policies and practices cause her mental disability to worsen. In such a case, a distinction arises because FSW with mental disabilities are denied the opportunity to benefit equally from the corrections system. In other words, the CSC fails to recognize the particular needs required by FSW with mental disabilities to ensure successful rehabilitation and reintegration.

The lack of appropriate programming and services within the federal prison system exacts a high price from FSW with mental disabilities. Without appropriate supports FSW with mental disabilities may have difficulty fulfilling rehabilitation goals, which in turn, may impede their progress in returning to the community. These circumstances fulfil the third inquiry of the s. 15 test; they demonstrate that FSW with mental disabilities are prevented from enjoying an equal opportunity to benefit from the services offered by the prison system. Moreover, the fact that their mental disability may delay their return to the general population imposes an onerous burden on their lives.

In summary, under s. 15 of the *Charter*, government action which does not take into account the already disadvantaged position of a particular group, and which perpetuates the disadvantage by denying opportunities or imposing burdens may be found to violate the guarantee of equality in the *Charter*. Such discrimination can only be upheld where the government meets the rigorous test of establishing that it is demonstrably justified in a free and democratic society.

PART IV: FACTORS CONTRIBUTING TO THE DISCRIMINATION AGAINST FEDERALLY SENTENCED WOMEN WITH MENTAL DISABILITIES

Jane is a FSW with a mental disability. Because of certain behaviours that may be caused by her mental disability, the CSC therapeutic team decided that the most appropriate solution for Jane was to place her in segregation and isolate her from the rest of the prison population.

While in segregation, an incident occurred and Jane was charged with assault. She was

then referred to a hospital in the community for a psychiatric assessment in relation to her ability to stand trial on the charge.

Upon her arrival at the hospital, she was found to be in a deteriorated mental state and unfit to stand trial. However, within days, her thinking, concentration and speech improved significantly leading her psychiatrist to report to the Court that Jane's experience of being segregated had caused deterioration in her mental state over time. It was the view of the hospital Forensic Science team that the change in environment was probably the key element in the improvement in Jane's mental state. While in the hospital, Jane had the opportunity to interact with her family and other people including the patients who shared her room.

As Jane prepared to return to prison, her hospital psychiatrist issued strong warnings regarding the inevitable deleterious effects of a treatment plan based on segregation. Moreover, The Forensic Science team described prison as an anti-therapeutic environment for Jane. Despite these warnings, the prison psychiatric staff continued with their decision to return Jane to segregation causing her to regress and effectively delayed her therapeutic and correctional progress.

A. Equating "Mental Disability" with Risk

Section 30 of the *CCRA* requires CSC to assign each inmate to a classification of maximum, medium, or minimum security, in accordance with the *Regulations* made under the *Act*. In determining the appropriate security classification to be assigned to a prisoner, s. 17 of the *Regulations* requires CSC to take a number of factors into account. A review of these factors discloses blatant discrimination towards persons with mental disabilities. Mental disability is a factor which must be considered by CSC when determining an appropriate security classification.

17. The Services shall take the following factors into consideration in determining the security classification to be assigned to an inmate pursuant to section 30 of the Act;

...

(e) any physical or mental illness or disorder suffered by the inmate.

By equating "mental disability" with a security risk, corrections legislation perpetuates negative stereotypes and assumptions which characterize mental disability as dangerous. Section 17(e) of the *Regulations* is by all accounts discriminatory, and a Court challenge would very likely find it to be in violation of the equality guarantee contained in the *Charter*. For all prisoners, including those with disabilities, it is their conduct which should be taken into account in determining the level of institutional supervision and control which should be provided and that criteria is already included in s. 17(c) of the *Regulations*: (c) the inmate's performance and behaviour while under sentence."⁵⁶

In addition to the legislative requirements, CSC also uses a variety of risk and needs assessment scales to determine the appropriate security classification for a prisoner. Several factors are taken into account including the prisoner's desire to obtain employment, accept marital/family support, associate with non-criminal associates, live without relying on alcohol or drugs, possess necessary knowledge and skills for daily living, exercise control over one's life and live in law abiding ways.⁵⁷ Many of these factors are problematic for FSW with mental disabilities as

unemployment, estrangement from family, homelessness and substance abuse may all represent symptoms congruent with having a mental disability.

Consequently, the security classification system employed by CSC subjects FSW with mental disabilities to multiple forms of discrimination. First, the legislation overtly discriminates against FSW with mental disabilities by citing a physical or mental illness or disorder as a risk factor. Second, the risk/needs assessment tools create an adverse impact on FSW with mental disabilities in that they translate an individual's needs resulting from a disability into a potential management problem.

B. The Impact of Maximum Security on Federally Sentenced Women with Mental Disabilities

In 1996, following some escapes from a couple of the new federal regional prisons, CSC announced that all women classified as maximum security would be moved to separate units located in men's penitentiaries.⁵⁸ At the same time, Dr. Margo Rivera was asked by CSC to review the mental health needs of 26 women who were deemed to be incapable of functioning adequately in the new regional prisons. Dr. Rivera identified only 8 women of the entire population of FSW who required extra supervision and treatment, which was then not available in the general population of the regional prisons.⁵⁹ Rather than transferring such women to maximum security prisons, Dr. Rivera recommended that a house in each of the regional prisons be dedicated and resourced to meet the needs of women who need a long term intensive healing program.⁶⁰

CSC did not follow her recommendation. Instead, it interpreted her recommendation to mean that women identified as having mental health needs must be dealt with in highly structured and controlled environments which could not be provided in the new regional prisons.⁶¹ CAEFS argued: "Using the need for mental health treatment as a reason to classify women as maximum security imposes harsher treatment on such women. Since this is based on their disability, it is clearly discriminatory and contrary to s. 15(1) of the *Charter*."⁶²

Factors such as the small number of prisoners and the difficulties of being co-located in men's prisons can significantly affect the availability and quality of programs and services accessible to women in maximum-security facilities. Examples of conditions endured by women prisoners housed in segregated maximum security in men's prisons include:

- In the Springhill Institution, movement is severely restricted within the facility resulting in limited access to facilities such as the gym and the main prison yard. Programs are provided on the range where there is little opportunity for confidential meetings. There is no meaningful employment.
- In the Saskatchewan Penitentiary, programs are extremely limited and only offered on a sporadic basis. There are no vocational programs and only limited maintenance-style work opportunities.
- In the Burnaby Correctional Centre for Women, most federally sentenced women are housed in extremely restricted forms of confinement. Movement and access to prison areas is subject to much greater restriction than that available to men, especially including maximum security men.

FSW with mental disabilities in maximum security units may face further segregation because of their disability. They may be confined in cells for 23 hours a day, with no personal property of any kind and released only for showers and exercise for one hour daily, in shackles.⁶³

In a recent report, the Correctional Investigator criticised the practice of preventing women in maximum security from associating with the general population of the institution in which they are housed, as well as the practice of segregating them from the broader general population of the women's regional facilities.⁶⁴ The Investigator took the position that placing women classified as maximum security and women with serious mental health problems in male penitentiaries was inappropriate. The Report described such placements as discriminatory, and "in reality", a form of segregation.⁶⁵ The Report also argued that this form of segregation - based on security classification and mental health status, placed these women in terms of their conditions of confinement, at a considerable disadvantage to that of the male offender population.⁶⁶

Conditions of isolation and lack of appropriate service underscores the harsh and discriminatory results of placing women with severe mental disabilities in maximum security. It further raises serious questions about its therapeutic/rehabilitation value for such women. To ensure a successful return to the general prison population and ultimately the community, CSC must accommodate the needs of such women by providing them with appropriate mental health care and opportunities to develop effective interpersonal and work skills.

C. Impact of Minimum and Medium Security on Federally Sentenced Women with Mental Disabilities

Not all women with mental disabilities are classed as maximum security prisoners. Some are considered to be minimum or medium security. Rather than accommodating women with mental health needs within the general population of the Women's Regional Facilities, CSC confines such women to separate structured living environments. Structured living environments are located in the regional facilities; however, they are operated in accordance with a separate program known as the Intensive Healing Program.

Unlike mental health programs in the community, the Intensive Healing Program does not acknowledge the rights and choices of the participants. A program which may be acceptable in a psychiatric hospital is not necessarily transferable to a prison, without posing serious inequalities and disadvantage for prisoners who are identified with mental health disorders."⁶⁷ Patients who participate in programs in a psychiatric hospital are there either voluntarily, which means they have a choice about participating, or involuntary which means they must be released when they no longer meet the statutory criteria for committal.⁶⁸

Section 86 of the *CCRA* entitles inmates to receive essential health care including mental health care. The *Act* does not give CSC the authority to impose health care on a prisoner. Nevertheless, FSW with mental disabilities are compelled to participate in programs such as the Intensive Healing Program, which by its very name implies a form of mental health treatment. A woman who objects to participating in such a program is at risk of being transferred to the Regional Psychiatric Centre in Saskatoon or to a maximum security facility. Clearly, such coercion increases the disadvantaged and vulnerability of FSW with mental disabilities.

D. Role of the Regional Psychiatric Centre ("RPC") in Saskatoon

The Regional Psychiatric Centre operates as both a penitentiary under the *CCRA* and a psychiatric hospital under the *Saskatchewan Mental Health Act*. There are inconsistencies in the two legislative regimes, which operate to the detriment of inmates.⁶⁹ For example, on one hand, prisoner/patients may be denied procedural protections under the *CCRA* on the basis that they are being treated for their illness, while on the other hand, they may be subjected to security decisions that compromise their medical treatment.

CAEF's overall paper provides a comprehensive discussion of the various problems that occur when a prisoner is assigned the dual status of "prisoner/patient" at the Regional Psychiatric Centre. For ease of reference, the portions of that paper, which are relevant to this discussion, are reproduced below.

1. The "Level System"

The *CCRA* provides that all prisoners are entitled to be in the general population of the prison in which they are incarcerated (s. 73). This means that they are entitled to the same degree of liberty within the prison as other prisoners within that prison. The degree of liberty of the general population of a prison varies, depending on the security level of the prison. The exception to this is administrative or punitive segregation. Punitive segregation may be imposed only after a conviction in institutional court for a disciplinary infraction, and a sentence to serve time in segregation may not exceed 30 days (s. 44, *CCRA*). The use of segregation as a disciplinary tool indicates that it is an especially severe form of imprisonment. The purpose of administrative segregation is to keep prisoners from associating with the general prison population (s. 31, *CCRA*). Administrative segregation may only be imposed on specific statutory criteria set out in s. 31 of the *CCRA*, and in accordance with the procedural requirements in s. 19 - 23 of the *Regulations*. There is nothing in the legislation that permits a prisoner to be given less freedom within the institution than the rest of the general population except in accordance with the strict requirements of the legislation.

At the RPC, the "level system," which operates in psychiatric hospitals, is used to control the degree of liberty permitted to women prisoners in the unit. For example, on Level 1, a woman will be placed in one of three cells in the isolation unit, where she may be deprived of her personal possessions and restricted to the cell except for showers or exercise in the prison yard for an hour a day. She may be handcuffed whenever she is out of her cell. Levels 2 to 4 are progressively less restrictive and provide more "privileges", that is access to legal entitlements of a prisoner in general population.

The decision to assign a level is made by the treatment team, which includes correctional officers, who are not mental health professionals. The authorization for the imposition of the level system is the *Saskatchewan Mental Health Act*, which implies that decision-making should be based on therapeutic considerations and rest with qualified mental health professionals.⁷⁰

2. Use of Seclusion (segregation cells)

All medium and maximum security prisons have segregation cells, which are the counterpart to seclusion cells at the RPC. These cells amount to solitary confinement and may be used lawfully only under specific statutory criteria set out in the *CCRA*. Under the *CCRA*, a prisoner may be segregated only for her own protection or for the protection of others, or during the active investigation of an offence. When a prisoner is placed in segregation involuntarily, she must be advised of her right to counsel because segregation is recognized in law as a separate form of confinement, or a “prison within a prison.” In addition, pursuant to the *Regulations*, the prisoner must be provided with written reasons for the segregation and an opportunity to respond; a segregation review board hearing must be held within 5 working days and every 30 days thereafter. Alternatively a prisoner may be sentenced to segregation after a hearing of a disciplinary charge by an independent chairperson. The punitive sentence may not exceed 30 days. The *CCRA* recognizes segregation as an extremely onerous form of confinement.

At the RPC, prisoners who act out may be placed in seclusion cells in the isolation unit. The segregation provisions of the *CCRA* and the *Regulations* are not invoked at the RPC because seclusion is used for “treatment” rather than “security” reasons. The prisoner stays there, at the discretion of the treatment team, with no formal process for review. A prisoner may stay in seclusion for an indefinite period of time. Clearly, patients are disadvantaged when their statutory entitlements are withdrawn by reason of their mental disability.⁷¹

E. Quality of Mental Health Services for Federally Sentenced Women

In February 2000, a woman prisoner housed in one of the segregated maximum security units in a men’s prison committed suicide after 51 consecutive days of segregation. This unfortunate event prompted the Correctional Investigator to review the quality of mental health services available to FSW. Although numerous prison staff members saw the woman, the Investigator concluded that the Correctional Service of Canada failed this individual; their efforts were described as, at best, “uncoordinated” with no particular person in place to take charge of the case.⁷² The Investigator made the following findings:⁷³

- The woman was transferred from the provincial system to the federal system. Despite a provincial psychiatric diagnosis, which raised significant mental health concerns, the diagnosis was not documented on any file when she was transferred to the federal institution. In fact the Intake Assessment Report states “no mental health concerns or previous suicide history”.
- The psychological assessments and reports required by the Service's Intake and Segregation policies were inadequate. The psychologist responsible for such policies was new, had received no training and was unaware of her responsibilities.
- The mental health nurse was also new and untrained. Moreover her title related more to her work location than her training and professional qualifications.

In summary, the Report concluded that the unqualified use of the titles "Psychologist" and "mental health nurse" conveyed a level of mental health services beyond that which was actually available. As the Report states: "The bottom line was that a young woman died, in part, because the interventions, resourcing, staff training, programs and policies designed to address her needs remain on the bureaucratic drawing board."⁷⁴

In some jurisdictions isolation itself has been declared inhumane treatment.⁷⁵ Furthermore, it has been determined that when the person being held in isolation has a mental disability, the onus is even greater on the institution to protect the physical, mental and moral integrity of such persons held under its custody.⁷⁶ The failure by CSC to provide appropriate professional services to FSW with mental disabilities who are housed in maximum security facilities or who are detained in segregation is not only morally irresponsible, it is also a violation of human rights law (failure to accommodate on the ground of disability) and the equality guarantee of the *Charter* (failure to take into account of disadvantage caused by disability).

PART V: RECOMMENDATIONS

This paper has touched on just a few of the issues confronting FSW with mental disabilities in federal prisons. The experience of SIS (Strength in Sisterhood) and CAEFS reveals that there are many other issues requiring redress. However, as this paper argues, the mental health services provided by CSC to FSW are inadequate and frequently inappropriate.

No matter how well intended, under the current corrections system the ability of CSC to provide effective mental health services will always be influenced/tainted by the overriding requirement of security and public safety. Consequently, this paper recommends a fundamental shift in the model of service delivery for FSW from the prison system to the community. In addition, this paper recommends that at a minimum, provisions that equate mental disability with risk be deleted from the *CCRA* legislation.

These recommendations do not provide wholesale remedies. Rather, they highlight those matters that may be in contravention of human rights law and the equality rights of the *Charter*. Ultimately, it is hoped that they will spark further discussion and eventual action that will improve the lives of FSW with mental disabilities.

A. Role of the Community in Supporting and Assisting Federally Sentenced Women with Mental Disabilities

Recommendation #1

It is recommended that FSW with mental disabilities be permitted to serve their sentence in the community and to receive support and assistance from mental health services based in the general community.

Recommendation #2

As Recommendation #1 may be a long-term strategy, it is further recommended that in the meantime, incarcerated FSW with mental disabilities be permitted to access mental health services based in the general community.

Discussion

Prisons are an inappropriate place for persons with mental disabilities because of the primacy of security as the objective of the prison authorities; the stress caused by such an environment and the lack of effective mental health services.⁷⁷ With respect to women in particular, SIS, CAEFS and many others who work with women in prisons within Canada and internationally, believe that the prison environment as a whole, particularly the purposes and priorities of CSC, staff interactions and prisoner isolation creates and exacerbates women's mental health concerns.⁷⁸ CAEFS takes the position that women with mental health problems do not belong in prisons and that the treatment, support and assistance they need should be provided to them in the community, rather than in prison.⁷⁹

CAEFS is not the only voice questioning the wisdom of imprisoning persons with mental disabilities. In the U.S. where the criminalization of mental illness is rapidly escalating, some members of the judiciary have taken an important step by introducing a therapeutic approach to criminal offenders with mental health disabilities.⁸⁰ They have devised a "mental health court" as a specialized division of the criminal court. The purpose of such courts is to address more effectively the unique and complex needs of mentally disabled offenders and to refer such offenders to treatment facilities whenever possible without compromising public safety.

Very few women are incarcerated for committing violent crimes.⁸¹ Moreover, as this paper asserts and as research confirms, most women offenders have severe mental health needs that require intensive support.⁸² Nevertheless, the public need for the appearance of retribution may deter government from considering alternatives to sentencing persons with mental disabilities to imprisonment.

CAEFS recognizes that the proposition of keeping FSW with mental disabilities in the community and out of prison is most likely a long-term strategy. Consequently, as an alternative, it proposes that women prisoners be permitted to access mental health treatment, support and assistance from community-based health service providers, whose primary focus is health and not security.⁸³ In support of this position CAEFS argues: "Despite the best intentions of CSC staff, their primary focus is security, not health. The focus of the CSC's work with women is the imprisonment and community supervision of women sentenced to terms of imprisonment of two years or more. It has been our observation that the CSC is not well situated to assume the core business of delivering mental health services."⁸⁴

Set out below are a number of arguments which are based on human rights principles and which support the proposal to utilize the community to provide mental health services.

1. The Right to Community Services

As this paper observes, FSW with mental disabilities may be sentenced to prison because of behaviour caused by their disability. They may also be classed as high security and isolated from the rest of the prison population because of their disability. In some ways then, prisons have become the modern day version of non-voluntary mental institutions and asylums.

Unlike earlier days though, current law protects the rights of persons with mental disabilities. Thus the de facto institutionalization of women with mental disabilities must be carried out in accordance with human rights principles. Both the *CHRA* and the *Charter* protect the right of persons with disabilities to benefit equally from public services. Moreover, there is an emerging body of support at both the international and state level that reinforces the right of persons with disabilities to receive service in their community.⁸⁵ Set out below is a brief description of some of the international and state developments that offer legal reinforcement for the principle of community integration.

a. International Developments

Since the International Year of Disabled Persons in 1981, the United Nations has taken a number of significant steps to demonstrate its commitment to the promotion and recognition of the human rights of people with disabilities. This paper will not examine all United Nations activities. Rather, it will highlight a few examples that may be particularly relevant to the predicament of FSW with disabilities.

Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care

In 1991, the United Nations passed a non-binding resolution adopting the principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (“the *MI Principles*”).⁸⁶ Despite their non-binding status, these principles offer poignant guidance regarding the treatment of FSW with mental disabilities. Principle 20 specifies that the *MI Principles* apply to persons serving sentences of imprisonment for criminal offences. The *MI Principles* further stipulate that, as far as possible, every person with a mental disability should have the right to be treated and cared for in the community in which he or she lives.⁸⁷ This support for community living is reinforced by the duty to treat persons with mental illness in the least restrictive setting in their own community and to preserve and enhance their autonomy.⁸⁸ The *MI Principles* prohibit discrimination on the grounds of mental illness and define discrimination as “any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights.”⁸⁹

The *MI Principles* may therefore serve as a useful framework for enforcing a claim of discrimination by FSW with mental disabilities. Essentially, they could argue that they are being discriminated against by governments that rely primarily on the institutional prison system to provide services rather than respecting their right to benefit from suitable community services.

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities

In 1993 the United Nations General Assembly adopted *The Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (the Standard Rules).⁹⁰ The overall purpose of the *Standard Rules* is:

"to ensure that girls, boys, women and men with disabilities, as members of their societies, may exercise the same rights and obligations as others. In all societies of the world there are still obstacles preventing persons with disabilities from exercising their rights and freedoms and making it difficult for them to participate fully in the activities of their societies. It is the responsibility of States to take appropriate action to remove such obstacles."

The *Rules* enunciate a set of standards aimed at encouraging states to implement measures that respect the equal opportunities of persons with disabilities. Rule 3 describes the essential elements that should be incorporated into rehabilitation plans for persons with disabilities. Some of the elements include:

"States should ensure the provision of rehabilitation services to persons with disabilities in order for them to reach and sustain their optimum level of independence and functioning.

States should develop national rehabilitation programmes for all groups of persons with disabilities.

Such programmes should be based on the actual individual needs of persons with disabilities and on the principles of full participation and equality.

Such programmes should include a wide range of activities, such as basic skills training to improve or compensate for an affected function, counselling of persons with disabilities and their families, developing self-reliance, and occasional services such as assessment and guidance.

All persons with disabilities, including persons with severe and/or multiple disabilities, who require rehabilitation should have access to it.

Persons with disabilities and their families should be able to participate in the design and organization of rehabilitation services concerning themselves.

All rehabilitation services should be available in the local community where the person with disabilities lives."

The *Rules* are not binding. Rather they constitute a form of international customary law. Despite their non-binding status, they are widely recognized around the world.

In the case of rehabilitation initiatives, the rules stand for the principle that such activities must be designed to advance the equal opportunity and participation of persons with disabilities. They further stipulate that, where possible such activities should take place in a person's local community.

General Comments, Recommendations and Resolutions

In 1994, the Committee on Economic, Social and Cultural Rights adopted *General Comment No. 5* on persons with disabilities.⁹¹ In *Comment No. 5*, the Committee interpreted the Covenant on Economic, Social and Cultural Rights to include disability rights. The *General Comment* states:

"The Covenant does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, in so far as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability. Moreover, the requirement contained in article 2 of the Covenant that the rights 'enunciated' will be exercised without discrimination of any kind - based on certain specified grounds 'or other status' clearly applies to discrimination on the grounds of disability."

Comment No. 5 recognizes both the *MI principles* and the *Standard Rules*. It recognizes the right to community integration including the right to receive medical and social services that enable full participation. *General Comment No. 5* interprets the right to health as part of the general requirement to promote individual independence and social integration.⁹²

The objectives of *General Comment No. 5* are complemented by *General Comment No. 14*. This *Comment* calls on states to develop a range of community services for persons with mental disabilities.⁹³

Subsequent resolutions passed by the United Nations Human Rights Commission in 1998 and 2000⁹⁴ continue to advance the human rights of persons with disabilities at the international level.

In addition, the Committee on the Elimination of All Forms of Discrimination Against Women issued a specific General Recommendation No. 18 encouraging state parties to report on the status of women with disabilities. It is assumed that such reports would include obstacles encountered by women with disabilities regarding their participation in the political, social, economic and cultural life of their country. Indeed, the discriminatory impact of CSC's security classification on FSW with mental disabilities was noted by the Canadian Feminist Alliance for International Action in its report to the Committee on the Elimination of Discrimination Against Women.⁹⁵

In summary, the MI Principles, and the Standard Rules together with the various Comments, Recommendations and Resolutions formulate an international starting point for establishing a right to community integration for persons with disabilities.⁹⁶ They also confirm that it is discriminatory to institutionalize persons with disabilities who are capable of living in the community.⁹⁷

b. State Developments

The subject of inappropriate institutionalization of persons with disabilities was recently dealt with by the United States Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, ("*Olmstead*").⁹⁸ In this case, the Court held that states may not detain persons with disabilities in institutions if such persons are capable of living in the community. The Court declared that improper institutionalization constituted discrimination under the anti-discrimination prohibition of Title II of the *Americans with Disabilities Act*.⁹⁹ U.S. jurisprudence under *Olmstead* may therefore provide an example of how the right to community integration can be understood and developed in international law.¹⁰⁰

c. Impact of These Developments on Canada

FSW with mental disabilities are detained in federal prisons because they have committed a criminal offence. Generally however, persons with disabilities like those involved in the *Olmstead* case are forced to remain in institutions because governments failed to provide the supports necessary for them to live in the community. At first blush the circumstances pertaining to each group appear quite different. However, similarities start to emerge - not only when the mental health needs of FSW are distinguished from their sentence requirements, but, also when one considers that it is the very evisceration of social and health programs that are increasingly resulting in the criminalization of those who are desperately attempting to survive such cuts. This is the case for women with mental and cognitive disabilities.

Using a mental disability lens, those FSW who are incarcerated primarily because of behaviour occasioned or influenced by their disability, may be able to challenge the legality of their institutionalization and assert their right to community integration as contemplated by international principles. Similarly, women whose sentence is bona fide, but who experience mental health problems may be able to cite the right to community integration to bolster their demand to receive mental health services outside the prison system. Such assertions may be buttressed by the SCC, which has begun to look to international human rights standards to guide its deliberations.¹⁰¹ Human rights legislation and/or the *Charter*, together with international standards and principles dealing with mental disability, may therefore form an innovative legal basis for advancing such arguments.

2. Right to Quality of Service

The lack of adequate community-based resources has made it difficult for persons in society with mental health concerns to receive appropriate services. This is particularly true for those persons experiencing multiple problems such as drug or alcohol dependence, abuse or personality disorders.¹⁰² Such persons are thus more likely to end up in the prison system.¹⁰³ Consequently, while this paper is focused on the federal prison system, it must be borne in mind that federal, provincial and local governments also have a responsibility to provide supports and services aimed at preventing such persons from becoming criminal offenders.

With respect to the availability of mental health services in federal prisons, the prohibition of disability-based discrimination by the *CHRA* and the *Charter* may be triggered in a couple of

ways. An obvious first step would be to compare the services provided by the prison system with those provided by the community.

Discrimination may be substantiated where the mental health services provided by the federal prison system are found to be inferior in quality and/or effectiveness than those available in the community. Although the comparison between prison services and community-based services represents a good starting point, the results may not offer a complete answer. Such a comparison may simply demonstrate that both the prison system and the community have failed to address the needs of persons with mental disabilities. In some regions, such as the Atlantic region, prison-based programs may even be seen to be better resourced, and therefore viewed as superior to those available to women in the community. It is argued however, that such findings would not absolve CSC from its responsibility to provide effective programming to FSW with mental disabilities. Indeed, the CSC has a statutory obligation to be responsive to the special needs of offenders.¹⁰⁴

Consequently, discrimination may be triggered where it can be established that the mental health of an inmate was made worse by being in prison. Although prisoners are entitled to receive mental health services¹⁰⁵ it is worth noting that the *CCRA* does not require the prison system in and of itself to provide such services. The CSC has made some attempts to provide mental health programming to women, but the real issue in question is the quality and effectiveness of such programming when it is offered in a penal environment, as opposed to a milieu where therapy and health, not merely security and control, are primary objectives.

Most advocates believe that offering services in the community is a more effective option and may minimize the chances that women will be criminalized. Regrettably, the devastatingly lack of resources for mental health services in the community is viewed by some as shoring up CSC's argument that it is serving the needs of women well by developing prison-based mental health programs. The logic is circular and is creating an increased number of women who are ostensibly being criminalized in order to allow them to access prison-based mental health services because community-based services are less likely to be available for women who are seen as challenging "patients" in the community.

There is evidence that CSC has encountered difficulties in supplying effective mental health programs for women. For example, as discussed elsewhere in this paper, the Correctional Investigator determined that in some instances, women inmates have been seriously harmed by both the lack of appropriate services and the substandard quality of existing services.¹⁰⁶ In addition, in its role of assisting women prisoners, CAEFS has had first hand experience in working with women whose mental condition worsened because of ineffective treatment plans imposed on them by CSC.¹⁰⁷

People are sent to prison to serve their sentence and to receive rehabilitation to enable them to reintegrate successfully back into the community.¹⁰⁸ Clearly, FSW who experience mental health problems require mental health services as part of their rehabilitation. However, given the paramount statutory requirement to first and foremost protect society¹⁰⁹, it can be assumed that providing resources and developing mental health services is not the main priority for CSC. Furthermore, given the punitive and non-therapeutic environment of a penal institution, the goal of providing good quality, in-house mental health care may be a contradictory undertaking.

It is submitted that services located in the community that are dedicated to women with mental

disabilities would have the capacity to offer a better quality of service, and would also fulfil the principle that CSC use the least restrictive measures when providing services to FSW with mental disabilities.¹¹⁰ The fact that some community-based services may be under-resourced and underdeveloped should not be used as an excuse to dismiss the idea of CSC investing in the development and accessing of community-based and health- controlled services outside the prison system.

It is the merit of the principle which must first be evaluated. Obviously, identifying resources would be the next step. Moreover, as previously described, there is a growing body of domestic and international human rights laws and principles that support the right of persons with disabilities to access community services.

B. Mental Disability and the Presumption of Risk

Recommendation #3

In accordance with human rights and equality rights principles, it is recommended that clause (e) be removed from s. 17 of the Corrections and Conditional Release Regulation.

Discussion

In determining the security classification to be assigned to a prisoner pursuant to s. 30 of the *CCRA*, s. 17 of the regulation specifically identifies mental illness or disorder as a factor to be considered. The *Regulation* places mental disability on the same list of risk factors such as the prisoner's potential for violent behaviour and the prisoner's continued involvement in criminal activities. By identifying "mental disability" as a risk factor, the regulation is guilty of perpetrating one of the most harmful and pernicious stereotypes; that is, mental disability is synonymous with dangerousness.

It is understood that in some circumstances, the presence of a mental disability may necessitate an assessment of appropriate programs and services for a prisoner. However, singling out mental disability as a risk factor is patently discriminatory. Clearly a law, which identifies race or sex as a risk factor would not be tolerated morally or legally. Consequently, discrimination on the basis of mental disability should be similarly rejected on the ground that both human rights legislation and Canada's *Constitution* prohibit it. Isolation and segregation of persons with disabilities were once common features of social policy. But in the past 30 years or so, the law has shifted significantly to recognize the right of persons with disabilities to be integrated into mainstream programs and services.

PART VI: CONCLUSION

Gradually, Canadians have come to realize that denying persons with disabilities access to goods, services and facilities is a violation of human rights laws. Although full recognition of disability rights remains a challenging goal, it is fair to say that progress has been made on many fronts. Unfortunately, FSW with mental disabilities have not enjoyed such progress.

Because of her mental disability, a woman prisoner can be classed as high-risk, denied opportunities and privileges, placed in isolation or segregation, and subjected to intensive management and control. Lack of appropriate, good quality mental health services may impede her rehabilitation goals, which may then delay her return to the general community.

The duty to accommodate has become the cornerstone of human rights legislation. As a service available to the public, the federal prison system is obligated to accommodate prisoners with mental disabilities. For the reasons cited above, this paper contends that with respect to FSW with mental disabilities who require ongoing mental health services, the most appropriate and effective form of accommodation is the development of community resources outside the prison system.

The CSC has the right to argue that such an accommodation would create an undue hardship. However, concrete, objective evidence and not just impression must uphold such a claim. Given the failure by the CSC to adequately accommodate FSW with mental disabilities to date, and given the limited number of women who may ultimately require such accommodation, the CSC will find it difficult to raise a successful defence of undue hardship.

Similarly, the equality guarantee of the *Charter* requires governments and their agents (such as the CSC) to avoid actions that perpetuate discrimination and promote instead, actions to ameliorate disadvantage experienced by particular groups such as persons with mental disabilities. Discrimination under the *Charter* is only permitted where the government can meet the onerous test of proving that such discrimination is demonstrably justified in a free and democratic society. Once again, fulfilling this test may be an insurmountable hurdle for the CSC.

In conclusion, FSW with mental disabilities are one of the most disadvantaged groups in our society. Such women are often sentenced to prison as a last resort. Prisons must therefore pay extra special attention to how they deal with the disadvantage of such women. We must not allow prisons to ignore human rights laws, and to be the one Canadian institution that systematically discriminates on the basis of mental disability. Ultimately, we must not allow the federal prison system to be the dark corner on Canada's landscape of human rights.

ENDNOTES

- ¹ Letter written by Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies to Michelle Falardeau-Ramsay, Chief Commissioner - Canadian Human Rights Commission, March 8, 2001.
- ² *Ibid.*
- ³ Quinn, G. & Degener, T., *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 2002, (United Nations: New York and Geneva) at p. 13.
- ⁴ *Ibid.*
- ⁵ Federal/Provincial/Territorial Review of Services Affecting Canadians With Disabilities. *Pathway to Integration: Final Report, Mainstream 1992*: Report to Ministers of Social Services, 1993 at p. 2.
- ⁶ *Ibid.*
- ⁷ *Ibid.*
- ⁸ *Ibid.* at p. 1.
- ⁹ Butterfield, F. "Prisons: The Nation's New Mental Institutions" in *CAPT Outreach Magazine*, February 2000 (a condensation of a New York Times article by Butterfield which highlights what is the most egregious fall-out of inadequate care for people with serious brain disorders such as schizophrenia: incarceration.)
- ¹⁰ *Ibid.*
- ¹¹ The Joint Committee on Mental Health Reform, *A Report of the Public Hearings of the Joint Committee on Mental Health Reform and Findings and Recommendations* as Adopted by the California Legislature Senate Select Committee on Developmental Disabilities and Mental Health, June 2000, [Online] Available: <http://www.sen.ca.gov/ftp/SEN/COMMITTEE/SELECT/DEVELOP/_home/Report.htm>.
- ¹² *Broward's Mental Health Court: An Innovative Approach to the Mentally Disabled in the Criminal Justice System?* Honourable Ginger Lerner-Wren, Presiding Judge, Broward Mental Health Court, Florida, [Online] Available: <<http://www.ncsc.dni.us/KMO/Projects/Trends/99-00/articles/MntlHlth.htm>>.
- ¹³ See for example CAEFS' Annual Report – 2000.
- ¹⁴ Canadian Association of Elizabeth Fry Societies, *Recent Issues Impacting Women's Imprisonment in Canada*, [Online] Available: <<http://www.elizabethfry.ca/lcopa.htm>>.
- ¹⁵ Laishes, J., *Mental Health Strategy for Women Offenders*, [1997], Correctional Service of Canada - Mental Health, Health Services at p. 2., [Online] Available: <http://www.csc-scc.gc.ca/text/prgrm/fsw/mhealth/mhealth_e.rtf>.
- ¹⁶ *Ibid.*
- ¹⁷ *Ibid.* at p. 3.
- ¹⁸ See "Mental Health Treatment in Jails and Prisons: Bazelon Center," *Criminalization Fact Sheet*, [Online] Available: <<http://www.bazelon.org>>.
- ¹⁹ Position of the Canadian Association of Elizabeth Fry Societies Regarding the Classification and Carceral Placement of Women Classified as Maximum Security Prisoners, March 1998, [Online] Available:

<<http://www.elizabethfry.ca/maxe.htm>>.

²⁰ *Ibid.*

²¹ Canadian Association of Elizabeth Fry Societies, Elizabeth Fry Week 2002 - Fact Sheets, *Human and Fiscal Costs of Prison*, April 2002, [Online] Available: <<http://www.elizabethfry.ca/eweek02/factsht.him#prison>>.

²² *Corrections and Conditional Release Act* (1992, c. 20) at s. 86, [Online]: Available: <<http://laws.justice.gc.ca/en/C-44.6/index.html>>.

²³ *Supra* note 15. See also letter from K. Pate to J. Laishes critiquing the Strategy, *loc. cit.* note 78.

²⁴ *Supra* note 22 at s. 4(a).

²⁵ *Where We Stand: The Criminalization of People with Mental Illness*, 2002 (Arlington, VA: National Alliance for the Mentally Ill), [Online] Available: <<http://www.nami.org/update/unitedcriminal.html>>.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Supra* note 9.

²⁹ See for example *Disability Policy and Guidelines* produced by the Ontario Human Rights Commission:

1.1 THE DEFINITION IN THE HUMAN RIGHTS CODE

Section 10 (1) of the Code defines "handicap" as follows:

"because of handicap" means for the reason that the person has or has had, or is believed to have or have had,

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness, and without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,

(b) a condition of mental retardation or impairment,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997.

"Disability" should be interpreted in broad terms. It includes both present and past conditions, as well as a subjective component, namely, one based on perception of disability. Although sections 10(a) to (e) set out various types of conditions, it is clear that they are merely illustrative and not exhaustive. Protection for persons with disabilities under this subsection explicitly includes mental illness,⁸ developmental disabilities and learning disabilities. Even minor illnesses or infirmities can be "disabilities", if a person can show that she was treated unfairly because of the perception of a disability.⁹ Conversely, a person with an ailment who cannot show she was treated unequally because of a perceived or actual disability will be unable to meet even the prima facie test for discrimination. It will always be critical to assess the context of the differential treatment in order to determine whether discrimination has taken place, and whether the ground of disability is engaged.

Reference note 8 further explains:

Mental illness has been described as "significant clinical patterns of behaviour or emotions associated with some level of distress, suffering (pain, death), or impairment in one or more areas of functioning (school, work, social and family interactions). At the root of this impairment are symptoms of biological, psychological or behavioural dysfunction, or a combination of these." See Canadian Psychiatric Association, *Mental Illness and Work* (brochure), online: Canadian Psychiatric Association homepage <http://cpa.medical.org/MIAW/MIAW.asp> at pg. 1

- ³⁰ Advocacy Resource Centre for the Handicapped, notes on inmates with disabilities, unpublished.
- ³¹ Bureau of Justice Statistics Special Report, *Mental Health Treatment of Inmates and Probationers* (July 1999, NCJ 174463), [Online], Available: <<http://www.ojp.usdoj.gov/bjs/abstract/mhtip.htm>>.
- ³² This figure represents reportings of disability in the areas of 'learning', 'memory', 'developmental', 'psychological' and 'unknown'. The PALS Survey 2001 is available online at: <<http://www.statcan.ca/english/freepub/89-579-XIE/89-579-XIE02001.pdf>>.
- ³³ See companion paper on general CAEFS' overview, unpublished.
- ³⁴ *Ibid.*
- ³⁵ Hannah-Moffat, K. & Shaw, M., *Taking Risks: Incorporating Gender and Culture into the Classification and Assessment of Federally Sentenced Women*, 2001, Government of Canada: Status of Women Canada, at p. 2. Abstract available online at <http://www.swc-cfc.gc.ca/pubs/0662654323/index_e.html>.
- ³⁶ *Ibid.*
- ³⁷ Laishes, J., *Mental Health Strategy For Women Offenders*, 1997, Correctional Service of Canada: Mental Health, Health Services, [Online] Available: <http://www.csc-scc.gc.ca/text/prgrm/fsw/mhealth/toc_e.shtml> at p. 1.
- ³⁸ *Ibid.* at p. 2.
- ³⁹ *Ibid.*
- ⁴⁰ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.
- ⁴¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11 [*Charter*].
- ⁴² See for example *Eaton v. Brant (County) Board of Education* (1995), 22 O.R. (3d) 1 (C.A.): D/261.
- ⁴³ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Human Rights Comm.)* [1999], 36 C.H.R.R. D/129 (S.C.C.) ("*Grismel*"), which applied the three-step test set out in "*Meiorin*", cited as *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3. S.C.R. 3.
- ⁴⁴ The *Charter*, s. 32.
- ⁴⁵ *Ibid.* at s. 1.
- ⁴⁶ *Andrews v. Law Society of British Columbia* *Ibid.*, [1989] 1.S.C.R. 143, 56 D.L.R. (4th) 1.
- ⁴⁷ *Ibid.*
- ⁴⁸ *R. v. Turpin*, [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8.
- ⁴⁹ *Ibid.*
- ⁵⁰ *R. v. Swain*, [1991] 1.S.C.R. 933, 63 C.C.C. (3d) 481.
- ⁵¹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at ¶ 88.

⁵² *Ibid.*, see also *Gosselin v. Quebec (Attorney General)*, [2002] S.C.C. 84 at ¶ 17.

⁵³ *Supra* note 50 at p. 948.

⁵⁴ *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577.

⁵⁵ CCRA, s. 3(b).

⁵⁶ *Corrections and Conditional Release Regulations* SOR/92-620, s. 17(c), [Online] Available: <
<http://laws.justice.gc.ca/en/C-44.6/SOR-92-620/76183.html>>.

⁵⁷ Offender Intake Assessment and Correctional Planning: Standard Operating Practices Issued Under the Authority of the Commissioner of the Correctional Service of Canada, 2002-06-03.

⁵⁸ Rivera, M., *Giving Us A Chance - Needs Assessment: Mental Health Resources for Federally Sentenced Women in the Regional Facilities*, [1996] as examined in the *Position of the Canadian Association of Elizabeth Fry Societies (CAEFS) Regarding the Classification and Carceral Placement of Women Classified as Maximum Security Prisoners*, [1998], Available online at <
<http://www.elizabethfry.ca/maxe.htm>>.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Annual Report of the Correctional Investigator 2000-2001*, (Public Works and Government Services Canada) at p. 38, [Online] Available: <
http://www.oci-bec.gc.ca/reports/ar200001_e.asp>.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Supra* note 33.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Supra* note 64 at p. 18.

⁷³ *Ibid.* at p. 31.

⁷⁴ *Ibid.* at p. 32.

⁷⁵ Report 63/99, Case 11.427, Ecuador, OEA/Ser.L/V/II.102 Doc. 6 rev. April 13, 1999 [hereinafter *The Case of Victor Rosario Congo*].

⁷⁶ *Ibid.*

⁷⁷ *Supra* note 18.

⁷⁸ Letter written by CAEFS (Kim Pate) to Jane Laishes, Senior Manager Mental Health, Health Services, Correctional Service Canada, August 5, 2002.

⁷⁹ *Ibid.*

⁸⁰ *Supra* note 12.

⁸¹ The Task Force on Federally Sentenced Women, *The Transformation of Federal Corrections for Women, Where Did We Come From? Prison for Women An Historical Context*

⁸² *Ibid.*

⁸³ *Supra*, note 78.

⁸⁴ *Ibid.*

⁸⁵ Rosenthal, E. & Kanter, A. *The Right to Community Integration for People with Disabilities Under United States and International Law*, 2000, [Online] Available: <http://www.dredf.org/symposium/kanter1.html#_ftn120>.

⁸⁶ See *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, G.A. Res. 119, U.N. G.A.O.R., 46th Sess., Supp. No. 49, Annex at 188, U.N. Doc. A/46/49 (1992).

⁸⁷ *Ibid.*, Principle 7.

⁸⁸ *Ibid.*, Principle 9.

⁸⁹ *Ibid.*, Principle 4.

⁹⁰ United Nations G.A. Res. 48/96 of 20 December 1993.

⁹¹ *General Comment No. 5 (1994) on Persons with Disabilities, Report on the Tenth and Eleventh Sessions*, U.N. ESCOR 1995, Supp. No. 2 [according to U.N. Doc. E/1995/22/Corr.1-E/C.12/1994/20/Corr.1], at 102, ¶ 15, U.N. Doc. E/1995/22-E/C.12/1994/20 (1995).

⁹² *Supra*, note 88.

⁹³ *General Comment 14 (2000) The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (2000).

⁹⁴ See *Resolution 1998/31* passed by the 54th session of the UN Commission on Human Rights, March/April 1998 and *Resolution 2000/51* passed by the 56th session of the UN Commission on Human Rights, April 2000.

⁹⁵ Submitted on the occasion of the Committee's Review of Canada's 5th Report, January 2003.

⁹⁶ *Supra* note 85.

⁹⁷ *Ibid.*

⁹⁸ *Olmstead* 527 U.S. 581 (1999).

⁹⁹ *Ibid.*

¹⁰⁰ *Supra*, note 85.

¹⁰¹ See for example *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 where the Court considered the *Convention on the Rights of the Child* in relation to a *Charter* claim.

¹⁰² Côté, G., Pinel, P. & Lesage, A., Complementary Diagnoses and Social Adaptation Among Schizophrenic and Depressive Inmates, Last updated: 2002-09-06, Correctional Service Canada. Summary available online at <http://www.csc-scc.gc.ca/text/rsrch/regional/summary5_e.shtml>.

¹⁰³ *Ibid.*

¹⁰⁴ *CCRA* s. 4(h).

¹⁰⁵ *CCRA* s. 85-86.

¹⁰⁶ *Supra* note 64.

¹⁰⁷ Submission to the National Parole Board, Detention Hearing for Tona Mills.

¹⁰⁸ *CCRA* s. 3.

¹⁰⁹ *CCRA* s. 4

¹¹⁰ *CCRA* section 4(d).