Commission of Inquiry into Certain Events at the Prison for Women in Kingston

Submission of Women's Legal Education and Action Fund on the Classification of Federally Sentenced Women; The Need for Alternatives to Incarceration for Federally Sentenced Women and the Need for a Separate Correctional Service for Federally Sentenced Women

Counsel for LEAF
Harriet Sachs
Wendy Whitecloud
Jill Copeland
Carissima Mathen
c\o Dickson, Sachs, Appell & Beaman
10 Alcorn Avenue, Suite 306
TORONTO, Ontario
M4V 3A9

(416) 927-0891

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I INTRODUCTION

In this brief LEAF will be making three submissions:

(1) That the classification system in place for federally sentenced women violates their rights to equality and liberty as guaranteed under sections 15 and 7 of the *Charter*;

(2) That community alternatives to incarceration should be developed for federally sentenced women; and

(3) That federally sentenced women will continue to be treated unequally unless a separate correctional service for women is established.

II FEDERALLY SENTENCED WOMEN - HOW MUCH OF A RISK ARE THEY?

Some Basic Statistics

1. As of October 1995 there were 322 women serving federal sentences, 61 (20%) of whom were Aboriginal. Sentence length distributions of the total group were as follows:

(a) Under 6 years - 57.37%

(b) Between 6 to 10 years - 18.59%

(c) Over 10 years (but not life) - 5.45%

(d) Life - 18.59%

Between 29% and 34% of those incarcerated were serving sentences for homicide.

Correctional Service of Canada (1995) Profile of Federally Sentenced Women Ottawa: Correctional Service of Canada

2. The last comprehensive survey done of federally sentenced women found that two-thirds of those who were incarcerated were mothers. Over 70% of those had been single parents for all or part of the time that they had had responsibility for their children.

Shaw, M. et al (1991) Survey of Federally Sentenced Women, Ottawa: Correctional Service of Canada

Women and Violence vs Men and Violence - Is There A Difference?

3. In the words of Margaret Shaw:

> "Sex differences in rates of violence by men and women are consistent, with men outnumbering women by a very large margin. This is so across countries, over time, at all ages, and in relation to different types of violence. This relates to all types of violent aggressive behaviour, including bullying in schools, in sports, on the street, in the home, among hospital patients or prison populations. The only exceptions are the recent recognition of greater parity (but not equality) between rates of domestic homicide among black men and women in the U.S.A., and in child abuse in the home." (emphasis added)

Shaw, M., and Dubois, S. (1995) Understanding Violence: A Review of the Literature, Ottawa: Correctional Service of Canada, p.7

4. Research would suggest that part of the explanation for this difference is that women use aggression in a very different way than men. In particular, Anne Campbell, a psychologist who has studied women's use of aggression for the past 20 years, argues that for men aggression is most often instrumental -- it is a means of exerting control over people whom men feel the need to claim power. For women, on the other hand,

aggression more frequently takes the form of a loss of control -- a loss of control which is usually caused by overwhelming pressure and which rather than resulting in a feeling of power (a positive feeling), produces a feeling of guilt (a negative feeling). Campbell's findings are consistent with those of June Crawford et al. Shaw, in her review of the literature, concludes that boys and girls appear to be socialized in a different way regarding aggression. While no observable differences can be noted in infants, from childhood on "boys are taught when and how to use aggression, while girls are taught to suppress it."

Shaw and Dubois, supra, pp. 16 and 17
Crump, J. (1995) Literature Review on Women's Anger and Other Emotions, Ottawa: Correctional Service of Canada, p.14

5. In Canada, in 1991, 88% of those charged with violent crime were men, 12% were women. This is consistent with similar statistics in the United States where in 1991, 89% of those arrested for violent offences were men, 11% women, and in England and Wales where in 1989, 89% of all violent offences were committed by men, 11% by women.

Shaw and Dubois, supra, p. 8

6. According to Statistics Canada, in 1994, 58% of the charges laid for violent crime were classified as minor assaults, 13% as more serious assaults, 11% as sexual assault, 11% as robbery, and 7% as other (including .24% murder or manslaughter). Over all, women are more likely to be charged with minor assault than are men. Very few are charged with robbery, fewer still with sexual assault. In 1991, 486 murder and

manslaughter charges were laid against men, 48 against women. However, "among women charged with homicide in 1993, 71% of the victims were related to the offender domestically, compared with 24% of the men".

Shaw and Dubois, supra, p.8

7. In the 1970's, there was considerable speculation that as women's roles in society began to change as a result of their increased entry into the workforce and their increasing access to positions of power, so too would their use of violence. Thus, the speculation ran, we could expect to see an increase in the incidence of violent crime committed by women. In 1970, 8.1% of all charges laid against women were for violent offences. By 1991 this number had risen to 12%. However, the fact remains that the numbers of women convicted of violent offences still remains well below that of men and the majority of those convicted are convicted for minor assaults.

Shaw and Dubois, supra, pp.9-10

8. While the number of women who receive federal sentences is very small, on average, at least one-half of the incarcerated population is serving a sentence for offences classified as violent. In 1995, 30% were serving a sentence for homicide. In 1989, that percentage was as high as 42%.

9. Aboriginal women are incarcerated for more violent crimes than non-Aboriginal women. Carol La Prairie offers the following explanation for this phenomenon:

> "A broad range of economic, socio-cultural, and legal factors associated with being Aboriginal and female in a male-dominated, non-

> Aboriginal society, contribute to Aboriginal women coming into conflict with the law. The violent behaviour often demonstrated by Aboriginal women offenders is a product of historical socio-economic forces and background factors. The undermining of traditional Aboriginal values, the acceptance of violence in society, discriminatory provisions of the *Indian Act*, and tensions in male-female relationships have conspired to reduce many Aboriginal women to a marginalized status."
>
> Shaw and Dubois, supra, p.10

10. However, both the review conducted by Shaw and many other reviews establish that women convicted of violent offences "differ considerably from their male counterparts in terms of the types of violence involved, the reasons for their offence, their relationships to their victim, their offence histories, their level of risk to the public, their likelihood of committing further violence and their own experience of violence in childhood and as adults".

> Shaw and Dubois, supra, p.9

11. When women commit murder it usually involves a close partner or relative. In self-reports about reasons for spousal homicide, the most frequently cited reason by women is self-defence -- with the homicide occurring in anticipation of an abusive attack by a partner. Among men the most common justification given is jealousy and\or the spouse threatening to terminate the relationship.

> Shaw and Dubois, supra, pp. 30 and 31
> Crump, J. (1995),supra, p.24

12. Women convicted of a violent crime are much less likely than men to recommit violent offences once released.

> Kendall, K., (1993) Literature Review of Therapeutic Services for Women in Prison, Ottawa: Correctional Service of Canada at p.7 where a number of studies are cited to support this proposition
> Shaw, M., (1991), The Federal Female Offender, Report on a Preliminary Study, Ottawa: Correctional Service of Canada, p.78

13. Women have lower reconviction rates than men. When women violate their supervision conditions upon release, either for new offences or for technical reasons, they are far less serious violations. The evidence supports this in Canada, the United States and in England and Wales.

> Shaw, M., The Federal Female Offender, supra, p.72

Once Incarcerated, Do Women Pose a Risk of Escape?

14. The incidence of escape among women offenders is so low that in the Literature Review conducted for the Federally Sentenced Women Program the statement is made that "escape may not be a factor that is necessarily essential to measure when assessing female inmates".

> Federally Sentenced Women Program (nd), Literature Review, Ottawa: Correctional Service of Canada (unpublished), pp.7 and 12
> Burke, P. and Adams, L., (1991), Classification of Women Offenders In State Correctional Facilities: A Handbook for Practitioners, Washington: National Institute of Corrections, p.17

Women Offenders and Institutional Violence

15. Some women may find it more difficult to adjust to prison than men. However, research in both Canada and other countries establishes:

(a) that women tend to be disciplined for much less serious behaviour than men, and that

(b) when disruptive behaviour occurs, much of it relates to the characteristics of the institution.

Shaw, The Federal Female Offender, supra, pp. ix and 80

16. In New York State the risk instrument for women prisoners has been in use since 1988 and was developed from research on their population of women inmates.

> "This research cited that the incidence of escape and institutional violence among women inmates was so limited that the most effective policy was to predict that all female inmates would adjust well."

Burke and Adams, supra, p.63

17. When violence does occur in women's institutions, it is more likely to be self-inflicted (suicide attempts or slashing) than directed toward other people. The incidence of self-inflicted violence is disproportionately high among Aboriginal women.

Shaw and Dubois, supra, pp. 38-39

Summary

18. LEAF submits that from the above the following conclusions can be drawn:

(1) Women commit proportionately far less violent crime than men.

(2) The context of and explanations for women's violence as opposed to men's violence is different. For example, women's homicide usually involves a spouse or close relative and may well have occurred in the context of an abusive relationship.

(3) Women are much less likely to recommit violent crimes upon release than men.

(4) Women present a very low risk of escape.

(5) Women present less risk for violence in institutions than men.

(6) Aboriginal women and other racial minority groups are over represented among federally sentenced women.

(7) A high proportion of federally sentenced women are single mothers and those with child care responsibilities.

Shaw, The Federal Female Offender, supra, p.vii

III CLASSIFICATION OF FEDERALLY SENTENCED WOMEN

A. Outline of the Argument

19. How federally sentenced women are classified is the fundamental determinant of the way they are treated within the correctional system. Their classifications can affect their housing, their access to programmes, their access to the community and their

families, and their ability to be released on parole. It directly impacts on the degree of deprivation of liberty to which they are subject.

20. In this portion of its brief LEAF will be making the following submissions:

(a) That the classification system in place for women is fundamentally the same as that in place for men;

(b) That this scheme is a scheme based on assessing risk -- risk to the public, risk of escape; and risk to the institution;

(c) That CSC is not in a position to reliably assess risk for federally sentenced women. This is because:

(i) the instruments in place have been developed for men and do not work when attempts are made to validate them for women;

(ii) the primary predictor of risk used, i.e. the seriousness of the offence for which a women has been convicted is not a reliable indicator of risk of violence, escape or institutional adjustment; and

(iii) that in predicting violence within institutions, institutional characteristics and practices may be more important than the individual offender's profile;

(d) That applying a risk based classification system developed for men to federally sentenced women results in women being sorted into

disproportionately higher levels of security or custody than is required. This, in turn, negatively impacts on their level of freedom, their access to programming, their contact with the community, their contact with their families and children and their ability to be paroled;

(e) That the emphasis on security inherent in a risk based system of classification with its resultant disproportionately negative effects on federally sentenced women cannot be justified. In fact, if anything, the results are counter-productive to reducing violence and promoting rehabilitation;

(f) That there is no need for a risk-based classification system for federally sentenced women; and

(g) That the continued application of such a system to federally sentenced women violates their constitutional rights to equality and to liberty as guaranteed by sections 15 and 7 of the *Canadian Charter of Rights and Freedoms*.

B. **Statutory and Regulatory Framework**

21. Section 30 of the *Corrections and Conditional Release Act* provides that the Correctional Service of Canada shall assign a security classification to each inmate in accordance with the regulations made under paragraph 96(z.6).

Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 30

22. Sections 17 and 18 of the *Corrections and Conditional Release Regulations* deal with the issue of classification. Those sections provide:

> 17. The Service 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:
> (a) the seriousness of the offence committed by the inmate;
> (b) any outstanding charges against the inmate;
> (c) the inmate's performance and behaviour while under sentence;
> (d) the inmate's social, criminal and, where available, young-offender history;
> (e) any physical or mental illness or disorder suffered by the inmate;
> (f) the inmate's potential for violent behaviour; and
> (g) the inmate's continued involvement in criminal activities.
>
> 18. For the purposes of section 30 of the Act, an inmate shall be classified as
> (a) maximum security where the inmate is assessed by the service as
> (i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or
> (ii) requiring a high degree of supervision and control within the penitentiary;
> (b) medium security where the inmate is assessed by the Service as
> (i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or
> (ii) requiring a moderate degree of supervision and control within the penitentiary; and
> (c) minimum security where the inmate is assessed by the Service as
> (i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and
> (ii) requiring a low degree of supervision and control within the penitentiary.

Corrections and Conditional Release Regulations, SOR/92-620, October 29, 1992 (Canada Gazette Part II, 18/11/92), ss. 17, 18

23. Commissioner's Directive 006 requires that federal correctional institutions shall be classified as minimum security, medium security, maximum security, special handling units, or multi-level security.

Commissioner's Directive 006, s. 2

24. The security measures in place at an institution are determined by the classification of the institution. Commissioner's Directive 006 establishes the following security requirements:

> "Minimum Security (s. 10)
> The perimeter of the minimum security institution will be defined but not directly controlled. Inmate movement and association will be regulated but with little or not staff supervision. Arms will not be retained in the institution.
>
> Medium Security
> The perimeter of a medium security institution will be well-defined, secure and controlled. Inmate movement and association will be regulated and generally supervised. Although arms will be retained in the institution, they will not normally be deployed within the perimeter.
>
> Maximum Security
> The perimeter of a maximum security institution will be well defined, highly secure and controlled. Inmate movement and association will be strictly regulated and directly supervised. Arms will be retained in the institution and may be deployed within the perimeter.
>
> Special Handling Unit
> The perimeter of a special handling unit will be well-defined, highly secure and strictly controlled. Inmate movement and association will be strictly regulated and rigidly controlled. Arms may be deployed within the perimeter."

It is unclear from Commissioner's Directive 006, what level of security measures will prevail at a multi-level facility. However, it is submitted that s. 7 of the Commissioner's

directive presents a real danger that it can become the level of the highest security inmates present. Section 7 provides:

> "Security measures in place at any institution shall reflect the degree of control required to maintain the good order of the institution and to protect staff, inmates and the public."
>
> Commissioner's Directive 006, ss. 7, 10, 13, 16, 19

25. Security classification of an institution also determines the type of programs available in the institution. Programs delivered at lower security institutions focus on facilitating reintegration into the community. Programs at higher levels of security focus on enabling the inmate to move to a lower level.

> Commissioner's Directive 006, ss. 8(b), 9(b), 11(b), 12(b), 14(b), 15(b), 17(b), 18(b)

How This Framework is Applied

26. Irving Kulik, Deputy Commissioner for the Ontario Region, explained that there are three components to the classification of offenders by Corrections Canada.

(a) Institutional Adjustment - "Will the individual behave in an appropriate fashion?" (includes risk to himself or herself as well).

(b) Escape Factor - "Can we expect this individual to escape while he (she) is being incarcerated?"

(c) Public Safety Issue - "Should this individual be released or should this individual escape, will he\she pose a low, moderate or high risk to the safety of the public?" (she added).

According to Mr. Kulik, if the offender fell into the maximum category under any of the above factors, he\she was classified as maximum.

Evidence of Irving Kulik, Vol. 2, pp. 142-143

27. The above classification scheme is clearly a risk-based classification scheme. Offenders are classified as maximum, medium or minimum on the basis of an assessment of the risks they present -- risk to the institution; risk of escape or risk to the public. The more risk - the higher the security and control that the offender is subjected to.

28. Irving Kulik also made it clear that the basic approach to classification is the same for women as for men.

Evidence of Irving Kulik, Vol. 2, p.146

Classification System Proposed for Federally Sentenced Women

29. The classification system proposed for the federally sentenced women's facilities has as its purpose the management of security. It is called a Security Management System. Each federally sentenced woman will be assigned a security classification based upon the risk criteria outlined above -- risk of escape, risk to the public and risk to the institution.

Federally Sentenced Women Program (nd), Security Management System, Ottawa: Correctional Service of Canada (unpublished), p. 3 ("FSW Security Management System")

30. Each federally sentenced woman will be assigned a management level to correspond with her Security Classification. There will be 5 management levels -- 2 maximum, one medium and 2 minimum. Pending classification, new admissions will be assigned to admission status level. "Increase of security classification level is directly related to the increase of the risks of the FSW."

FSW Security Management System, pp. 7 and 8

31. One of the factors isolated as "having the potential to increase the FSW escape risk" is if she is involved in a custody battle or she is concerned about a placement for her children.

FSW Security Management System, p.13

32. Security levels assigned determine the degree of control the offender is subjected to within the institution; her contact with her children; her contact with her family; her ability to have visits; her contact with the community and her access to programming. The higher the security level the more control, the less contact with the children, family and visitors, the less contact with the community and the less access to programming.

FSW Security Management System, pp.20-27

C. Can We Reliably Assess Risk for Federally Sentenced Women?

No Valid Instrument Exists

33. There is no objective, empirically based risk assessment instrument in use for Canadian federally sentenced women.

> Bonta et al (in press), "Predictors of Recidivism Among Incarcerated Female Offenders", Prison Journal, p. 11

34. The instrument developed for risk prediction, assessment of risk, institutional violence and assaults are based on men or relate to the male population.

> Shaw and Dubois, supra, p.40

35. A study to validate a risk scale developed on a male offender population for women found "poor generalization". Even an attempt to include more factors appropriate for female offenders failed to produce positive results.

> Bonta et al, supra

Cannot Predict Risk on Basis of Severity of Offence

36. One of the prime factors used to determine an offender's classification is the severity of the offence for which she has been convicted. However:

> "Much research on risk prediction indicates that severity of offence is not highly correlated with risk of violence, escape or rule breaking. In fact, escape is such a relatively rare event that even the jurisdictions in our study which had researched the topic of escape risk were unable to develop an empirical tool that was helpful in predicting escape."

Burke and Adams, supra, p.43

37. One cannot predict whether or not a woman will be reconvicted on release based on the type of offence for which she is admitted except to say that those convicted of crimes against the person (generally considered most serious and violent) are less likely to be reconvicted.

Shaw, Federal Female Offender, supra, p.78
Bonta et al, supra, p.18

38. One can also not predict institutional adjustment on the basis of the type of offence for which a woman is admitted. For example, offenders convicted of murder are less likely to be charged with discipline in prison than others. Women serving shorter sentences tend to be charged more than women serving longer sentences.

Shaw and Dubois, supra, p.36

In Predicting Violence Within Institutions, Institutional Characteristics and Practices Cannot be Isolated from Offender Profile

39. Violence within institutions is an interactive phenomenon. It is often associated with situational factors such as over crowding, provocation by staff or other inmates, refusal of requests for action by inmates and arbitrary imposition of sanctions.

Shaw and Dubois, supra, p.36-37 referring to research by Rice and Davies

40. Higher rates of discipline charges are found in institutions with higher security.

Shaw and Dubois, supra, p.37

41. Marnie Rice states that:

> "The literature provides considerable support for the idea that significant reduction in institutional violence could be achieved by a staff training program aimed at teaching non-restrictive, non-authoritarian, and non-provocative ways of interacting with residents; behavioural cues and situational characteristics associated with assertiveness; and effective verbal strategies for use with highly upset individuals."
>
> Rice, M., Harris, G., Varney, G., and Quinsey, V., (1989), Violence in Institutions: Understanding Prevention and Control, Toronto: Hogrefe and Huber Publishers, p.32

42. In 1986 Mandaraka-Sheppard examined this issue in relation to women. As described by Margaret Shaw

> "She collected data from three open and three closed women's prisons and found clear evidence that it was the organization of the prison which was the main factor in explaining behaviour. Thus methods of punishment, or perceived lack of autonomy, lack of incentives to good behaviour, the quality of inmate\staff relations, and staff age and experience were the main factors explaining disruptive behaviour not the age or offending histories of the inmates. Nor did history of violence distinguish the disruptive from the rest.
>
> Mandaraka-Sheppard was also able to show that much of the behaviour was trivial, the rules vague, and discretion on the part of the prison officers very great. It also differed from that of men in being individual rather than group behaviour."
>
> Shaw, The Federal Female Offender, supra, p.55

43. Thus, there would appear to be no direct relationship between offending background and risk of institutional disruption or violence. In fact, such disruption or violence may tell us more about the characteristics of the institution concerned than about the risk posed by the individuals involved in the disruption.

Shaw, ibid, p.81

44. Irving Kulik appears to partially recognize this reality when he states:

> "I believe that one should not necessarily jump from the context and the classification of women at Prison for Women into the context and classification model that will be used in the new facilities. I believe that behaviour is often a function of one's environment, and as the environment changes, so does one's behaviour. That has been at least my experience."

Evidence of Irving Kulik, Vol. 3, p.295

45. Finally, it must be noted that for women, there is no concrete evidence that a record of disciplinary problems is related to success on release.

Shaw, The Federal Female Offender, p.81, citing a study by Canfield done in 1989 of federal women on parole

D. Impact of Risk Based Classification Systems on Federally Sentenced Women

Over Classification

46. Classifications systems based on risk consistently over classify women -- sorting them disproportionately into higher levels of security or custody than is required.

Burke and Adams, supra, p.13
Shaw and Dubois, supra, p.40
Literature Review, FSW Program, supra, p.2

47. Native women in particular, tend to have higher security ratings and lower parole release rates than non-Natives.

Shaw, The Federal Female Offender, p.ix

48. Women in general are likely to rate more poorly than men on a scale which measures work patterns, drug and alcohol abuse, and unstable family background. The ratings for Aboriginal women, because of their marginalized status, are even worse.

Shaw, ibid, p.77

49. Aboriginal women also do poorly in a scale which rates programming participation. This is not surprising since, when surveyed, most found the programming offered culturally irrelevant or insensitive to their needs and attitudes.

Shaw, ibid, p.77

Labelling

50. The process of risk assessment classification necessarily involves labelling a woman either negatively or positively. Mandaraka-Sheppard has stressed the adverse consequences that labelling a woman as violent or dangerous can have. Through such labelling expectations are set up about their likely behaviour, hostile interpretations of their actions are encouraged and resistance is induced from the women.

Shaw, supra, p.38

Programming and Contact with the Community

51. An initially higher classification affects access to programming. It also affects the women's ability to have contact with the community inside the institution or through temporary absences, escorted or unescorted. Since so much of the programme delivery

contemplated in the new facilities will involve the use of community resources, the ability to access the community and to access programming are inextricably linked.

Shaw, The Federal Female Offender, supra, p.77
Burke and Adams, supra, pp.7-8
Axon, Lee (1989), Model and Exemplary Programs for Female Inmates - An Institutional Review, Ottawa: Correctional Service of Canada, p.13
FSW, Security Management System, pp.20-27

Less Contact with Family and Children

52. Women classified at higher classification levels have limited rights to have contact with their families and children. At the highest level all visits must be supervised and by appointment. At the next highest level there is no ability to participate in the mother-child program.

FSW Security Management System, pp.20-27

Less Likelihood of Parole

53. Higher security classifications affect decisions about suitability for temporary absences or day parole and about full parole.

Shaw, The Federal Female Offender, supra, p.77

E. Can This Impact Be Justified?

54. Receiving a higher classification can result in being housed in a situation with higher static or physical security. In the case of federally sentenced women this could result in being housed in the Enhanced Units or at Burnaby.

Evidence of Irving Kulik, Vol. 2, p.167

55. However, more physical control does not necessarily reduce the risk of escape, the risk to the public or the risk to the institution. Static security measures create a fortress mentality which operates to increase the fear and anxiety of those within the institution which in turn increases the potential for institutional violence.

Rice et al, supra, pp.98-100

56. As Marnie Rice has noted:

> "In the Canadian penitentiary system, despite the introduction of "super-maximum" security units called "Special Handling Units" with a very heavy investment in physical security, violence has continued to escalate."

Rice et al, ibid, p.100

57. Receiving a higher security rating results in more control over an offender's movement within the institution, reduced access to activities and restricted access to certain areas of the institution. This is not necessarily an effective method of reducing violence.

> "In an attempt to reduce prison violence in California, authorities increased institutional control by reclassifying and reducing inmate assignments, cancelling evening activities, revising lock up times, and eliminating traffic in certain areas. Research showed that these stricter policies failed to reduce the rates of fatal stabbing and assaults on the staff."

Rice, ibid, p.104

58. Receiving a higher security rating results in a woman being entitled to have less control and responsibility over her actions and decisions. This would appear to be counter-productive if what one is hoping to achieve is the ability to exercise more responsibility and control. From the woman's point of view, higher security reinforces her irresponsibility by denying her the opportunity to exercise self-control and self-determination.

Axon, supra, pp.12-13

59. There is a self-fulfilling prophecy at work when inmates are labelled and treated as high security. Immediately the message has been given that what is expected is the worst rather than the best from her behaviour. Responsibility for dealing with this behaviour is vested in the institution rather than the inmate, since "responsibility is ordinarily understood to correspond with power." In addition, more control produces more resistance.

Axon, supra, p.11
Shaw and Dubois, supra, p.38

60. Receiving a higher security classification reduces a woman's access to programming and activities. This is counter-productive since one of the factors which serves to increase the incidence of institutional violence is monotony and inactivity.

Cooke, D.J., (1991), "Violence in Prisons: The Influence of Regime Factors", The Howard Journal of Criminal Justice, Vol. 30, No. 2, p.103

61. Receiving a higher security rating impacts on a woman's access to visits and to her contact with the community. This is also counter-productive. Recidivism may be reduced by maximizing the contact between inmates and the community. Access to personal visitors can act as a significant control over violent behaviour and a stimulus for change. One factor which increases the likelihood of institutional disruption is the inability to adequately maintain family ties.

Cooke, ibid, P.102

F. Is There a Need for a Risk Based Classification System for Women?

62. Classification of inmates is usually done initially to sort prisoners into maximum, medium and minimum security institutions. Since women tend to be housed in one institution the initial objective of classification has disappeared.

Literature Review, FSW Program, supra, p.3
Burke and Adams, supra, p.12

63. Peggy Burke and Linda Adams conducted research on classification involving input from 48 state correctional agencies at both the administrative and institutional level. The project was conducted for the National Institute of Corrections in Washington and had as its advisory panel three senior correctional administrators, including Jacqueline Fleming, who was at that time the Superintendent of Shakopee.

> "Perhaps the central conclusion emerging from this study is that in the past we have been asking the wrong question about women's classification. We have been focusing primarily on how to do better risk classification. Do we need separate tools, do we need more precise tools,

> can you import a classification tool from another jurisdiction, how do you get around the problem of having too few women in your group to do adequate statistical analysis?
>
> These are all pertinent questions if the major issue is how to do better risk classification of women offenders. And if you are, in fact, going to do risk classification for women, they must be answered. However, the central issue is whether current 'mainstream' classification systems provide adequate tools for the management of women offenders. The answer to that question is no, but not because we need risk assessment tools for women. It is because we need different approaches to classification for women generally, or for any groups of offenders whose profile allows correctional institutions to focus the bulk of their resources and energy on issues such as habilitation programming and preparation for release." (emphasis added)
>
> Burke and Adams, supra, pp.13-14

Note: The use of the work "habilitation" as opposed to "rehabilitation" is deliberate. It is meant to signify that the skills lacking in female offenders were never present as opposed to needing to be relearned.

64. It is clear that the major focus of the new regional facilities is and should be on "habilitation" and programming concerns. The size of the federally sentenced women population generally, the size of each institution and the low risk federally sentenced women present make it unnecessary and counter-productive to classify women on the basis of risk. Women do not need to be "sorted". There are no separate institutions for each security classification. The size of each institution provides a perfect opportunity to deal with any management concerns on an individualized and "as needed" basis.

65. There are other types of assessment systems which may have more applicability to federally sentenced women. One is a "needs" based system. The purpose of this system is to identify the programme needs of the inmate so that they can be adequately

met. The other is a "performance" based system. This approach relies upon the offender earning or losing privileges based upon her actual performance within the institution. There is no prediction of future performance. Central to such a system is that all new admissions to the facility are placed at the same level (usually the mid level). No new admission is penalized at the beginning of her incarceration by being assessed at the lowest level. Whether they move up or down is up to them and how they perform. The "levels" system in place at Shakopee is an example of a performance-based system. The ideal assessment system for women should incorporate aspects of both, but should at the same time ensure that such fundamental necessities as access to programming, the community and families do not become "privileges" to be earned or lost.

Axon, supra, pp.6-7
Burke and Adams, supra, p.12

G. Section 30 of the *Corrections and Conditional Release Act* and the Regulations and Commissioner's Directives Made Thereunder Violate Sections 15 and 70F of the *Canadian Charter of Rights and Freedoms*

(1). Section 15 of the *Charter*

General Principles of Interpretation

66. Section 15(1) of the *Charter* provides:

> "(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."

Canadian Charter of Rights and Freedoms, s. 15

67. The Supreme Court of Canada has outlined a number of steps in determining whether a law breaches s. 15 of the *Charter*.

68. The first step is to determine whether a law creates an inequality, either because on its face distinctions are made on the basis of personal characteristics or, alternatively, by a provision which, though neutral on its face, has a differential impact or effect on a group identified by certain personal characteristics. If such inequality is found, the second step is to determine whether the inequality is discriminatory, i.e. does it have the effect of imposing "burdens, obligations or disadvantages on such individuals or groups not imposed upon others, or withholds or limits access to opportunities, benefits, and advantages available to other members of society". Finally, it must be determined whether the affected group is protected by Section 15(1) of the *Charter*, either by enumerated or analogous grounds.

> Andrews v. Law Society of British Columbia, [1989], 1 S.C.R. 143 at pp.164-176 per McIntyre J.; at pp.152-154 per Wilson J.
> Re Turpin [1989] 1 S.C.R. 1296 at pp.1331-32
> Egan and Nesbitt v. The Queen [1995] 2 S.C.R. 513 at p.584, per Cory and Iacobucci JJ. (dissenting in the result, but not on this issue)
> Miron vs. Trudel (1995), 124, D.L.R. (4th) 693 (S.C.C.) AT P.739 per McLachlin J.

69. With respect to the first aspect of the s. 15 analysis LEAF submits that in this case there is no discrimination arising on the face of the legislation, regulations and directives being challenged. Although there are differences in the classification system proposed

for women at the new regional facilities, the underlying principles of this new system are the same, i.e risk based and security focused.

See paragraphs 26 to 30 above

70. However, section 15 also protects against adverse effect discrimination. Cory and Iacobucci, JJ. described adverse effect discrimination in Egan v. Canada at pp.586-87:

> "Adverse effect discrimination occurs when a law, rule or practice is facially neutral but has a disproportionate impact on a group because of a particular characteristic of that group"

Thus, even where a law is not discriminatory on its face, section 15 requires that a subfacial analysis be done on a challenged law, to examine its consequences or impact upon a particular person or group of people. Whether or not such discriminatory impact is intentional is irrelevant.

> Andrews v. Law Society of British Columbia, supra, at pp.173-174, per McIntyre J.
> Egan v. Canada, supra, at pp.586-87 per Cory and Iacobucci JJ, at pp.548-49 per L'Heureux-Dubé J.
> Symes v. Canada, [1993] 4 S.C.R. 695 at pp.755-56 per Iacobucci J.

71. An adverse effect experienced by some, but not all members of a group, can constitute discrimination within the meaning of s. 15. So long as unequal treatment is based on membership in a disadvantaged group(s), section 15 of the *Charter* is violated even when not all members of an identifiable group are affected. Dickson C.J.C., writing for the Court in Janzen v. Platy, held at p. 1288:

> "While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the

> individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of the individual."
>
> Brooks v. Canada Safeway Limited, [1989] 1 S.C.R. 1219 at pp.1241-50 per Dickson CJC
> Symes v. Canada, supra, at pp.769-70
> Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1252 at pp.1288-89

72. Whether a legislative scheme (or other state action) has a discriminatory effect is to be determined by reference not only to the legislation itself, but by reference to the broader, social, political and legal context.

> Andrews v. Law Society of British Columbia, supra, at p.152 per Wilson J.
> R. v. Turpin, supra, at pp.1331-32 per Wilson J.
> Egan v. Canada, supra at pp.586, 600 per Cory and Iacobucci JJ.; at pp.544-45 per L'Heureux-Dubé J.

73. In Brooks v. Canada, the Supreme Court employed a contextual approach in finding that an employer's accident and sickness insurance plan which excluded pregnant women discriminated on the basis of sex. Dickson C.J.C., writing for the Court, stated:

> "The disfavoured treatment accorded Mrs. Brooks, Mrs. Allen and Mrs. Dixon flowed entirely from their state of pregnancy, a condition unique to women. They were pregnant because of their sex. Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.
>
> . . .
>
> Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one half of the population."

Brooks v. Canada Safeway Ltd., supra at pp. 1241-50

74. Similarly, in Janzen v. Platy, in finding that sexual harassment constitutes discrimination on the basis of sex, the Supreme Court took into account the fact that "those with the power to harass will be predominantly male and those facing the greatest risk of harassment will tend to be female."

Janzen v. Platy Enterprises, supra at pp. 1284-91

75. Norberg v. Wynrib involved a doctor who had supplied drugs to a patient who was addicted to them in return for sexual favours. The Court found that consent could be vitiated by factors other than those that had been recognized in the past (violence, fraud, or incapacity). In coming to that conclusion, the Court recognized the reality that the doctor-patient relationship is frequently characterized by imbalances of knowledge and power, and that in some cases this imbalance could undermine the presumption of individual autonomy that underlies the concept of consent.

Norberg v. Wynrib, [1992] 2 S.C.R. 226

76. In K.M. v. H.M., the Court considered the social context in which incest occurs and concluded that the limitation period in cases arising out of incest should be suspended until the victim can reasonably discover the connection between the incest and the psychological injuries he or she may have suffered.

K.M. v. H.M., [1992] 3 S.C.R. 6

77. The Supreme Court of Canada has recognized the validity of approaching the elaboration of legal doctrine in a manner that recognizes the realities of women's lives in R. v. Lavallee. That decision was based upon a recognition that it is predominantly women who experience spousal abuse and that, in the interests of equality, legal doctrine had to be made to respond to women's experience of threats to life or health within the context of an abusive relationship. Wilson J. stated at p. 874:

> If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".

It was not necessary to assume that all women shared these experiences to conclude that the adaptation of a legal doctrine was appropriate.

R. v. Lavallee, [1990] 1 S.C.R. 852 at pp. 872-75 per Wilson J.
Brooks v. Canada Safeway Ltd., supra at pp. 1241-50 per Dickson C.J.C.

Section 15 Violation

78. It is submitted that the risk based classification scheme mandated for all federally sentenced offenders by s. 30 of the *Corrections and Conditional Release Act* and the regulations and directives made thereunder has a disproportionately adverse effect upon federally sentenced women. The system has been developed for males and has not been validated for females. As a result, women end up over classified. This situation is exacerbated for Aboriginal women.

79. As a result of being over classified federally sentenced women are subject to burdens and deprived of advantages. They are subject to higher levels of security and control. They have less access to programming, less right to contact with the community, less ability to interact with their children and families and less access to temporary absences, day parole or full parole than the risks they represent would warrant.

80. The fact that not all women end up being over classified by the legislative scheme in question is irrelevant. The fact is that a risk based classification has a disproportionate impact on many federally sentenced women solely because male developed criteria are being applied despite the reality that as women both the extent and the nature of the risks they present are different than those presented by men.

81. In applying a risk based classification scheme to women the Government is failing to take into account the reality that the vast majority of women do not present a risk either to the public or to the institution they are housed in. It also fails to take into account the fact that female offenders present a very minor risk of escape.

82. Female offenders are far more likely than male offenders to be the main support and care givers for their children at the time of incarceration. Limiting their ability to continue to parent their children through limiting visitation, participation in the mother-child programs and limiting access to the community has a disproportionate impact on women. It is also damaging to their children.

83. Involvement in a custody battle or concern about the placement of her children is, under the classification scheme proposed, to be considered an "unusual circumstance having the potential to increase the FSW escape risk". There is no evidence that either of these factors increases the risk of a woman escaping. In fact, the only evidence there is is that escape by female offenders is so rare that it is impossible to meaningfully identify any factors which increase or decrease the risk of it occurring. By identifying concerns about her children as an escape risk the Government is discriminating against female offenders because of their sex. Women are the ones who bear children and women are usually the primary care givers and nurturers of children.

(2) Section 7 of the *Charter*: Liberty

84. Section 7 of the *Charter* provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
>
> *Canadian Charter of Rights and Freedoms*, s. 7

85. The Supreme Court of Canada has stated that the analysis of s. 7 of the *Charter* involves two steps. "To trigger its operation there must be a finding that there has been a deprivation of the right to life, liberty and security of the person and, secondly, that the deprivation is contrary to the principles of fundamental justice."

R. v. Beare (1988), 55 D.L.R. (4th) 481 (S.C.C.) at 492

86. Life, liberty and security of the person are independent interests, which must be given independent significance by the Court. The interest affected in this case is liberty.

> R. v. Morgentaler (1988), 44 D.L.R. (4th) 385 (S.C.C) at p.398
> Re Singh and Minister of Employment and Immigration (1985), 17 D.L.R. (4th) 422 (S.C.C.) at p.458

87. The Supreme Court of Canada has held that the manner in which a person is made to serve a sentence invokes the liberty interest in section 7 of the *Charter*. McLachlin J., writing for the Court in Cunningham v. Canada, stated:

> However, the *manner* in which he may serve a part of that sentence, the second liberty interest identified by Lamer J. in *Dumas*, supra, has been affected. One has "more" liberty, or a better quality of liberty, when one is serving time on mandatory supervision than when one is serving time in prison.
>
> Cunningham v. Canada (1993), 80 C.C.C. (3d) 492 (S.C.C.) at pp. 497-98

88. In R. v. Gamble, supra, Wilson J., writing for the majority, stated:

> I believe that the effects of a deprivation of liberty or a continuation of a particular form of deprivation of liberty should be reviewed from a qualitative perspective.
>
> R. v. Gamble (1988), 45 C.C.C. (3d) 204 (S.C.C.) at p. 240

89. Similarly, even before the *Charter*, Dickson J. (as he then was) recognized the concept of "a prison within a prison", where harsher conditions of confinement are imposed on an inmate.

> Martineau v. Matsqui Institution Disciplinary Board (No. 2) (1979), 50 C.C.C. (2d) 353 (S.C.C.) at p. 373
> Miller v. The Queen (1985), 23 C.C.C. (3d) 97 (S.C.C.) at pp. 114-15

90. Where an infringement of life, liberty or security of the person goes beyond what is needed to accomplish the governmental objective, it will be overbroad and not in accordance with the principles of fundamental justice. Cory J., writing for the majority in R. v. Heywood, held:

> If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason.

Overbreadth analysis is an aspect of balancing the societal interest against the individual interest. Where the societal interest can be achieved with a lesser infringement of liberty, the more intrusive infringement will not be in accordance with the principles of fundamental justice.

> R. v. Heywood (1994), 24 C.R.R. (2d) 189 (S.C.C.) at pp. 206-09
> Cunningham v. Canada, supra at pp. 499-501

91. It is submitted that over-classification of women inmates, and the results that flow from it (increased security and control, limits on access to programs, family, and the community), are not in accordance with the principles of fundamental justice because they limit inmates' liberty unnecessarily. The state's objectives of protecting the public, inmates and institutional staff, as well as rehabilitation, can be accomplished without such severe limits on inmates' liberty. Indeed, the evidence supports the proposition that in most cases rehabilitation is better achieved through less restrictive forms of incarceration.

(3) Section 1 of the *Charter*

92. Section 1 of the *Charter* provides:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
>
> *Canadian Charter of Rights and Freedoms*, s. 1

93. For a limit of a *Charter* right to be reasonable and demonstrably justified in a free and democratic society the Government must show that the legislation or state action in question addresses a pressing and substantial objective, that there is a rational connection between the legislative objective and the measure at issue, that the legislation impairs the *Charter* rights as little as possible and that there is proportionality between the importance of the objective and the injurious effects of the legislation.

> R. v. Oakes, [1986] 1 S.C.R. 103 at 138-40 per Dickson C.J.C.
> Hunter v. Southam Inc. (1984), 11 D.L.R. (4th) 641 (S.C.C.) at 659-60, per Dickson C.J.C.

94. There must be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. No matter how important the goal may seem, if the state has not demonstrated that the means by which it seeks to achieve it are reasonable and proportionate to the infringement of rights, then the law must fail.

> R.J.R. MacDonald, (1995) 127 D.L.R. (4th) 1 (S.C.C) at p. 89 per McLachlin J.

95. The section 1 analysis must take into account the context in which the particular law is situate. The section 1 inquiry is a fact-specific inquiry.

> "In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and proof offered of its justification, not on abstractions." (emphasis added)
>
> R.J.R. MacDonald, supra, at p. 90 per McLachlin J.

96. The Supreme Court of Canada has drawn a distinction between cases involving socio-economic issues and cases where government is best characterized as the singular antagonist of the individual whose right has been infringed. Where the state is the antagonist of the individual, a stricter scrutiny will be undertaken.

A.G. Quebec v. Irwin Toy Ltd. [1989] 1 S.C.R. 927 at 993-94

97. LEAF does not dispute that protecting the public and reducing disruption within institutions is a pressing and substantial objective. It is LEAF's position, on the basis of the facts outlined in this brief, and particularly paragraphs 33 to 45 thereof, that the Government cannot demonstrate an actual connection between their objectives and the classification scheme in question as it applies to federally sentenced women. Further the Government cannot demonstrate that the actual benefit which the law is designed to achieve outweighs the actual seriousness of the limitation of the right. In fact, there is substantial evidence that this classification scheme, when applied to federally sentenced women, may in fact be counter-productive to the objectives sought to be achieved.

See paragraphs 54 to 63 above.

IV NEED FOR ALTERNATIVES TO IMPRISONMENT

98. We have now built five new prisons for women. Already CSC is projecting that they will be filled to capacity and in some cases over-capacity. Now that women who receive a sentence of two years or more no longer have to go to the Prison for Women will Judges feel less restraint about sentencing women to more than two years? It is crucial to consider how we should respond to this situation. In LEAF's submission that that response should not be to build more prisons. Instead, the majority of women should be housed in the community, thereby recognizing the low risk they represent and enabling them to continue to assume responsibility for their children. It will also give Aboriginal women greater access to their own communities and culture.

99. The *Corrections and Conditional Release Act* defines a "penitentiary" as:

> (a) a facility of any description, including all lands connected therewith, that is operated, permanently or temporarily by the Service for care and custody of inmates, and
> (b) any place declared to be a penitentiary pursuant to section 7 (emphasis added)

(Section 7 of the Act permits the Commissioner of Corrections to declare any prison or hospital to be a penitentiary for any person or class of persons).

Corrections and Conditional Release Act, supra, ss. 2, 7

100. A person who is sentenced, committed or transferred to a penitentiary may be received in any penitentiary.

Corrections and Conditional release Act, supra s. 11

101. It is LEAF's submission that the above provisions are flexible enough to encompass the use of community placements for federally sentenced women.

102. Alternatives to imprisonment are required not only because they are better for those convicted of criminal offences, but because the cost of imprisonment is such that the government will not be able to continue to pay for incarceration of a large percentage of inmates who do not pose a risk to the public. Canada has a higher rate of incarceration than any other western democracy, except the United States. The federal inmate population in Canada has increased 8 percent since 1992/93 and 17 percent since 1989/90. If current trends continue, the federal inmate population will increase by nearly 50 percent in the next 10 years.

> Rethinking Corrections, drafts of paper by Corrections Review Group obtained under Access to Information Act, January 1995, March 1995, April 1995 drafts

103. The average annual cost of incarcerating an offender in a penitentiary (1994/95) is $52,953.00. The average annual cost of supervising an offender in the community is $10,951.00.

> Rethinking Corrections, supra, 5

104. The experience of the United States shows that more incarceration does not increase public protection or lower levels of crime.

> Rethinking Corrections, supra, pp.68-69

105. After studying the issues of the cost of incarceration and alternatives to it, the Corrections Review Group, a group established at the federal level by the Deputy Solicitor General, concluded that:

> "The current strategy of heavy and undifferentiated reliance on incarceration as the primary means of responding to crime is not the most effective response in many cases, and is financially unsustainable."

The Corrections Review Group further concluded in a meeting of June 14, 1995 that:

> "*there is an alternative* - a more integrated and cost-effective approach to crime prevention, policing, sentencing, corrections and parole; *a balanced approach* in which the criminal justice system deals forcefully with violent offenders, and uses other more moderate techniques to deal with low risk offenders -- either alternatives to incarceration or programming and assessment that will facilitate earlier, successful release back into the community."

The February 1995 federal budget stated that the Solicitor General would develop, in consultation with the Minister of Justice and the provinces, a strategy for containing the rate of growth of the inmate population and associated costs.

> Rethinking Corrections, supra, pp.5 and 67
> Minutes of the Sentencing and Corrections Review Group, June 14, 1995

106. Several European countries have successfully lowered their rates of incarceration without apparently sacrificing public safety. These include Italy, the Netherlands, West Germany, Austria and Finland. They have done so by such measures as:

> "introducing 'administrative sanctions' such as confiscation of drivers' licenses, gun permits or passports instead of jail sentences involving the personal use of drugs; viewing drug addiction not as criminal behaviour but as a health issue; changing behaviours of prosecutors and judges, so that fewer charged persons are remanded in custody, prosecutions decrease as prosecutors acquire broad discretion to dismiss cases and even to impose sanctions on their own; victim-offender mediation at the initial stages of the

> criminal justice process to prevent, where possible, the offender from proceeding further through the system for 'minor' crimes (punishable by no more than 3 years), reparation and restitution rather than incarceration; reductions in penalties for certain offences; lowering the minimum time served before eligibility for parole, and increases in the use of suspended sentences."
>
> Rethinking Corrections, supra, p.69

107. As already demonstrated, female offenders pose a much lower risk than male offenders. They are the ideal population for the non-incarcerative alternatives which are so urgently needed.

108. The Federal\Provincial\Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System recommended in 1993 that much greater emphasis had to be placed upon non-incarcerative solutions to sentencing such as diversion services and community alternatives.

> Kendall, supra, p.8

109. This has long been recognized by academics working in the field. Professor Marie-Andrée Bertrand, in a paper she presented on "Women in Detention", stated:

> "In our view, the legitimacy of imprisonment, especially in the case of women but not only, has not yet been demonstrated if legitimacy of detaining anyone is to be founded on his or her actual dangerousness to others. In our view, and in the opinion of many prison staff members that we interviewed, 70% to 80% of the women presently incarcerated in Canada and in the U.S.A...do not represent, by any criterion, a danger to society."
>
> Bertrand, Marie-Andrée (1992), Presentation on Women in Detention, pp.4-5

110. Margaret Shaw, in her paper on the Federal Female Offender stated:

> "Taken together, these factors suggest that in considering the future of the federal population, security of provision for women may be much less important -- and counter-productive -- even for long-term offenders, that the quality of inmate-staff relations and programming which responds to the needs which the women themselves perceive, and that community alternatives may well be a more viable (and less costly) option for a proportion of the population."
>
> Shaw, The Federal Female Offender, supra, p.ix

111. Meda Chesney-Lind and Jocelyn Pollock, two American academics, have also taken the same position arguing that:

> "Both the types of crime women commit and their unique relationship to their children offer, for example, unique and low-risk opportunities to release them to half-way houses."
>
> Chesney-Lind, M. and Pollock, J. (1995) "Women's Prisons: Equality with a Vengeance" in Women Law and Social Control, eds. Merlo, A. and Pollock, J., Allyn and Bacon, p.171

112. Pat Carlen, a Professor of Criminology in England, takes the position that non-prison alternatives should be used for all but the very few dangerous female offenders. Her proposal incorporates settings that emphasize the woman's role as mother and family member and encourage the woman to be self-sufficient economically and emotionally. The settings discussed include half-way houses that allow women to live with their children, shelters that allow women to come back in times of crisis and continuing groups in the community that serve as meeting places to share ideas and experiences.

> Carlen, Pat, Alternatives to Women's Imprisonment, Open University Press, 1990

113. Less restrictive forms of incarceration and community alternatives for women are consistent with the purposes and the principles of the *Corrections and Conditional Release Act*, as set out in ss. 3 and 4(d) and (h), which provide:

> "3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
> (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
> (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.
>
> 4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are
> (d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;
> (h) that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements.
>
> *Corrections and Conditional Release Act*, supra ss. 3, 4(d), (h)

114. It is also consistent with s. 28 of the *Corrections and Conditional Release Act*, which provides that where an inmate is to be confined in a penitentiary, CSC shall stake all reasonable steps to ensure that the penitentiary to which the person is confined is the least restrictive environment for that person. It also provides that in determining the least restrictive environment, CSC is to take into account the safety of the public and the inmate, accessibility to the inmate's home community, family, a compatible cultural environment, a compatible linguistic environment, the availability to programs and services, and the inmates willingness to participate in such programs.

> *Corrections and Conditional Release Act*, s. 28

V A SEPARATE CORRECTIONAL SERVICE FOR FEDERALLY SENTENCED WOMEN

115. The recommendation was made during Phase II that there should be a separate correctional service established for federally sentenced women. LEAF supports this recommendation.

116. This brief demonstrates how importing a correctional perspective developed for men results in inequality for women. Female offenders are a fundamentally different population than male offenders. In spite of this, even with the federally sentenced women's initiative, their treatment is dominated by a male perspective. One instance is the classification system. Another is the training program developed for correctional officers at the new facilities. First they will participate in the 11 week core training program (minus the weapons training) designed for dealing with men. After that there will be a 10-day "add-on" focused around the specific needs of women.

Evidence of Irving Kulik, Vol 3, p.305

117. LEAF submits that inherent in this approach is a belief that female offenders can be treated in the same way as male offenders, provided a few "adjustments" are made to account for their "special needs".

118. Developing a new initiative for 300 women in a correctional service whose attention is dominated by serving the needs of 14,000 men creates several problems, including:

(a) that if difficulties are encountered the commitment to try something different will wane and the well institutionalized techniques and perspectives of the male dominated Correctional Service will be reverted to; and

(b) that the implications of any such new initiatives will not be fully explored and advocated for.

For example, if a new non-risk based assessment system were to be developed for women in acknowledgment of their differences, this system would have to be explained so that it did not adversely affect a woman's parole opportunities. Currently, the Parole Board relies on the "cascading" built into the Correctional Service's risk based classification scheme to make its decisions. It would have to be made clear to the Parole Board that female offenders are not the same as male offenders and must be treated in acknowledgment of their differences. Will this advocacy be done by a Service whose perspective on corrections is so male dominated? History would suggest not.

119. Lee Axon, in her research, found that:

> "Authorities within female corrections repeatedly emphasize the importance of creating a position in Government Departments of Corrections responsible for female corrections and having equal voice with male corrections. It is only in this way, it is stated, that future inequalities may be avoided."
>
> Axon, L., supra, p.15

120. The Report of the Task Force on Federally Sentenced Women ("The Task Force") commented that the need articulated by Lee Axon was arguably implicitly recognized in Canada as early as the *Ouimet Report*. In 1969 *Ouimet* recommended that a woman be appointed "to a position of senior responsibility and leadership". The Task Force Report also noted that in 1981 the Canadian Association of Elizabeth Fry Societies put forward a recommendation that a Deputy Commissioner of Women be appointed and that women be considered a "Sixth Region" within the structure of Corrections Canada. This recommendation was reiterated in the 1988 Canadian Bar Association Report "Justice Behind Bars".

> Task Force on Federally Sentenced Women (1990), Creating Choices, Ottawa: Ministry of the Solicitor General of Canada, Corrections Branch, p.95

121. In the end, while certain members of The Task Force continued to believe that a new plan for federal women had to be managed by a woman Deputy Commissioner, the recommendation was not adopted as the concept was "difficult to envisage given the decentralized management style currently utilized by the Correctional Service of Canada".

> Creating Choices, ibid, pp.95-96

122. The history of female corrections in Canada is a well documented one of neglect and inequality. Echoing throughout the research is the phrase coined by Berzins and Dunn (Cooper) "Too Few Count".

123. In recognition of this inadequate treatment the Federal Government has embarked on some new initiatives for the treatment of federally sentenced women -- the most visible components of which are five new regional facilities.

124. The Task Force was cognizant of the need, given such a system, to put a structure in place that would be capable of ensuring that all "the decentralized components function within the national framework for federally sentenced women, with a minimum of regional variances in fundamental areas, and that each component support and learn from the others". The Task Force expressed the fear that without such a structure each decentralized facility would become isolated within its own region. What form the structure should take was left for further discussion.

Creating Choices, ibid, p.95

125. It is LEAF's position that the only structure that will ensure that the separate and distinct needs of federally sentenced women are met is one that is completely separated from the huge bureaucratic structure in place to service male offenders. Simply adding on a division to the current correctional structure, even one headed by a senior woman, will not work. As The Task Force has already indicated, the problem is more than just one of creating a separate area of responsibility - it is also one of managing this area within a bureaucracy which already has its own firmly entrenched management style.

126. It is submitted that creating such a separate correctional service for women is directly encompassed by the concept of equality inherent in section 15 of the *Charter*.

The Supreme Court of Canada has explicitly recognized that in many cases inequality will only be remedied by a recognition that a historically disadvantaged group may require different treatment in order to achieve equality of results.

> Andrews v. Law Society of British Columbia, supra, at pp.169, 171, per McIntyre J.
> Conway v. Canada, [1993] 2 S.C.R. 872 at 877, per LaFrost J.

127. As a result of the federally sentenced women's initiative a population which has long been ignored because of its size will be disbursed across the country into still smaller pockets. It is LEAF's fear that without a separate and centralized administrative structure specifically devoted to supervising and monitoring the needs of federally sentenced women history will repeat itself with a vengeance. Once the energy associated with opening the new facilities has dissipated and once the spotlight put on the treatment of federally sentenced women by this Commission has dimmed, the issues facing federally sentenced women will become subsumed by the huge demands placed on the system by its male population. As a result, their needs will once again go unnoticed, unfunded and unmet...until the next crisis.

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