



Submission to the Ministry of Community Safety and Correctional Services Review of Segregation in Ontario Adult Correctional Facilities

INTRODUCTION

The Canadian Civil Liberties Association (CCLA) appreciates the opportunity to make submissions to the Ministry of Community Safety and Correctional Services' (MCSCS) review of segregation in Ontario's adult correctional facilities. CCLA is deeply concerned about the pervasive use of segregation in Canadian prisons and jails,¹ and the effect of segregation on inmates' fundamental rights and freedoms.

Segregation, or solitary confinement, is generally understood to be the physical and social isolation of an inmate for 22-24 hours each day.² Within Canadian corrections, there are different units or statuses where inmates may experience such isolation, including administrative segregation, disciplinary segregation, isolation, and close confinement. CCLA does not distinguish between different types of segregation, and views them all as seriously concerning, given the impact they may have on inmates' health and well-being.

Concerns about the use of segregation in Canadian prisons and jails are not new. In 1996, Justice Louise Arbour chaired a commission of inquiry that examined a series of human rights abuses at the Prison for Women in Kingston.³ Justice Arbour made several key recommendations aimed at preventing unlawful and inhumane uses of segregation. In the years since Justice Arbour's report, a series of reports have echoed her call for far-reaching reform. More recently, Howard Sapers, the Correctional Investigator of Canada, criticized federal penitentiaries for their overuse of segregation, especially with respect to female inmates, inmates with mental illness, and Aboriginal and other racialized inmates.⁴ Yet despite

¹ Office of the Correctional Investigator, *Administrative Segregation in Federal Corrections: Ten-Year Trends* (28 May 2015) ["OCI, *Administrative Segregation in Federal Corrections*"]; Amy Dempsey, "Data reveal 'shocking' numbers of Ontario inmates in solitary" (1 March 2016), online: The Toronto Star <<http://www.thestar.com/news/canada/2016/03/01/data-reveal-shocking-numbers-of-ontario-inmates-in-solitary.html>>.

² *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UN GAOR 66th Sess, UN Doc A/66/628 (2011) at para 25 ["UN Special Rapporteur on torture, *Interim Report*"].

³ The Hon. Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (1996) ["Arbour Report"].

⁴ Office of the Correctional Investigator, *Annual Report 2014-2015*, online: Office of the Correctional Investigator <<http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx>> ["OCI, *Annual Report 2014-2015*"].

the profusion of reports, taskforces, studies and coroners' inquests, the practice of segregation remains common in Canadian prisons and jails.

Justice Arbour's finding that "[t]he Rule of Law is absent, although rules are everywhere" remains an unfortunate reality in many of Canada's prisons and jails. As a result, CCLA's recommendations are grounded in the recognition that a decisive change in direction – rather than incremental reform – is needed to adequately address the deep-seated concerns that exist regarding segregation in Canadian prisons and jails. Legislative and policy protections are vital, but in order to ensure that rules on paper are translated into practice, they must be accompanied by a profound culture shift and backed up by rigorous, effective oversight and accountability mechanisms.

CCLA notes that the vast majority of statistics, studies and recommendations regarding segregation in Canada have emerged from the federal correctional system. In part, this can be attributed to a lack of transparency and gaps in data regarding provincial and territorial jails. The Ontario Ombudsman, reporters and academics have all noted the difficulties they have faced in obtaining information about segregation.⁵ The limited data available about the practice of segregation in Ontario's correctional facilities has made it difficult for CCLA to evaluate existing policies and practices, and CCLA urges the MCSCS to address this gap through the review.

As outlined in greater detail below, CCLA recommends that segregation in all of its forms only be ordered in exceptional circumstances, with strict procedural protections and enhanced oversight, review and accountability mechanisms. CCLA further recommends an absolute prohibition on segregation for at-risk individuals, including inmates with mental illnesses, inmates in need of protection, and inmates under the age of 21. A summary of our recommendations is appended to these submissions.

Finally, CCLA notes that the overuse of segregation is symptomatic of other systemic issues within the correctional system, including overcrowding and challenges in managing inmates with mental health issues. In addition to the recommendations outlined below, CCLA encourages MCSCS to address these systemic issues, in order to attenuate the adverse effects of segregation on inmates and their civil liberties.

⁵ See Ontario Ombudsman, *Annual Report 2014-2015* (28 July 2015), online: Ombudsman Ontario <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/AR%202014-2015/AR14-15-EN_1.pdf>; Patrick White, "Solitary confinement reform hindered by gaps in prison statistics" (28 March 2016), online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/solitary-confinement-reform-hindered-by-gaps-in-prison-statistics/article29413413>>.

BACKGROUND

1. About CCLA

CCLA is a national, non-profit, non-partisan, non-governmental organization dedicated to protecting and promoting the fundamental human rights and civil liberties of all persons in Canada. CCLA has substantial expertise in relation to prisoners' rights and, in particular, advocating against the overuse of segregation in Canadian corrections. In recent years, the organization has taken the following actions:

- In March 2010, CCLA joined six other Canadian NGOs in writing an open letter to the federal Minister of Public Safety, calling on the government to drastically reevaluate its use of solitary confinement – especially in relation to inmates with mental illness.
- In 2012, CCLA addressed the issue of segregation in Canada in its report to the UN Committee Against Torture. In its concluding observations, the Committee made several recommendations regarding segregation and Canada's compliance with the UN Convention Against Torture, which will be discussed in the course of these submissions.
- CCLA acted as a public interest party in the inquest into the death of Ashley Smith. CCLA questioned witnesses, made oral submissions, and made joint and independent recommendations to the inquest jury – including recommendations that specifically addressed the use of segregation in federal corrections.
- In January 2015, CCLA initiated a constitutional challenge against the use of segregation in Canadian prisons. CCLA is seeking a declaration that the laws authorizing segregation in federal correctional facilities violate the rights of inmates under the *Canadian Charter of Rights and Freedoms* and are therefore of no force and effect.
- In July 2015, CCLA provided submissions to the United Nations Human Rights Committee, including concerns about the overuse of administrative segregation in prisons and, in particular, the use of segregation for persons with mental health issues.
- In February 2016, CCLA provided submissions to the United Nations Committee on Economic, Social and Cultural Rights, outlining our continued concerns about the overuse of segregation in Canadian prisons, and in particular the placing of persons with mental health issues into segregation.

2. Harms of Segregation

The detrimental physical and psychological effects of segregation are well documented. Segregation can result in, among other things, anxiety, headaches, nightmares, lethargy, insomnia, hallucinations, emotional breakdowns, chronic depression, self-harm, and suicidal thoughts and behaviour.⁶ Studies of

⁶ Craig Haney, "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement," (2003) 49:1 Crime and Delinquency 124 at 132-133.

involuntary segregation have consistently shown that segregation in excess of 10 days results in negative health effects,⁷ which worsen the longer an inmate remains in segregation.⁸ Segregation may also hinder inmates' abilities to re-enter general population or reintegrate with the outside community, undermining the broader goals of reintegration and rehabilitation of prisoners. Studies have shown that prisoners who leave segregation feel traumatized and socially disabled,⁹ and that segregation can lead to cognitive behavioural problems including difficulties solving interpersonal problems, inability to generate choices, lack of awareness of consequences, unrealistic goal setting, showing disregard for others, and impulsiveness.¹⁰

Importantly, several studies have documented that segregation can lead to an increase in the very behaviours that the correctional system is attempting to limit, control or address.¹¹ Individuals may be caught in a vicious cycle whereby the correctional system's primary tool for "helping" an individual stay safe becomes a major contributor to that person's mental and physical deterioration, thereby justifying further segregation.

Further, research has shown that the adverse effects of segregation may be compounded for women. Female inmates tend to experience segregation as rejection, abandonment, invisibility and a denial of their existence, which jeopardizes their safety and mental health through exacerbating feelings of distress.¹² Further, female inmates who have experienced prior physical or sexual assault may be re-traumatized by their experiences in segregation, including violent cell extraction by male guards, strip searches witnessed by male guards, and lack of privacy in washroom facilities.¹³ These concerns are further compounded for vulnerable subpopulations, including women with mental illness, Aboriginal women and other racialized women.

⁷ *Ibid.*

⁸ Sharon Shalev, *Sourcebook of Solitary Confinement*, London: Mannheim Centre for Criminology, London School of Economics (2008) at 21.

⁹ Matthew Lowen and Caroline Isaacs, *Lifetime Lockdown: How Isolation Conditions Impact Prisoner Reentry* (August 2012), online: American Friends Service Committee <https://afsc.org/sites/afsc.civicaactions.net/files/documents/AFSC-Lifetime-Lockdown-Report_0.pdf>.

¹⁰ Laurence L. Motiuk and Kelley Blanchette, *Case Characteristics of Segregation Offenders in Federal Corrections* (March 1997), online: Correctional Service Canada <http://www.csc-scc.gc.ca/research/092/r57_e.pdf>.

¹¹ Daniel P. Mears and Jamie Watson, "Towards a Fair and Balanced Assessment of Supermax Prisons" (2006) 23:2 Justice Quarterly 232; Holly A. Miller and Glenn R. Young, "Prison Segregation: Administrative detention or mental health problem?" (1997) 7:1 Criminal Behaviour and Mental Health 85; Terry Kupers, "How to create madness in prison," in David Jones, ed., *Humane Prisons* (Oxford: Radcliffe Publishing, 2006).

¹² Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (December 2003), online: Canadian Human Rights Commission <<http://www.chrc-ccdp.ca/sites/default/files/fswn.pdf>> ["CHRC, *Protecting Their Rights*"].

¹³ Cassandra Shaylor, *It's Like Living in a Black Hole: Women of Color and Solitary Confinement in the Prison Industrial Complex*, (1998) *New England Journal on Criminal and Civil Confinement* 24(2) 385-416.

CCLA is also concerned by reports that segregation is disproportionately used on inmates with mental health issues, Aboriginal inmates and other racialized inmates.¹⁴

The impact of segregation on at-risk individuals, such those with mental illnesses, will be further discussed below.

3. The Applicable Legal Framework

Canadian Legislation

The use of segregation engages multiple *Charter* rights, namely those protected under sections 7, 12 and 11(h).

Because of its profound effect on inmates' liberty and health, segregation implicates sections 7 and 12 of the *Charter*. Indeed, in at least two cases, Canadian courts have recognized that time spent in segregation in provincial and territorial jails constituted "cruel and unusual treatment," in violation of section 12.¹⁵ Moreover, given the evidence that segregation disproportionately impacts women,¹⁶ Indigenous and racialized inmates,¹⁷ as well as inmates with mental illness,¹⁸ the use of segregation may engage section 15 of the *Charter* and the fundamental protections outlined in the Ontario *Human Rights Code*.

Further, because an order of segregation increases the severity of the judicially measured sentence to which a prisoner is subjected, the use of segregation may violate an individual's right to not to be punished twice under section 11(h) of the *Charter*. The Supreme Court of Canada has held that the key considerations in determining whether a change in the severity of the conditions of an inmate's sentence amounts to a section 11(h) violation are (i) the extent to which the offender's expectation of liberty has been thwarted, and (ii) the presence or absence of procedural safeguards.¹⁹ Both of these factors are engaged in the current scheme in Ontario under which segregation is employed.

In Ontario, segregation is currently governed by both regulation and policy. Under the applicable regulation, the superintendent of a correctional institution (or a delegate) may place an inmate in

¹⁴ OCI, *Administrative Segregation in Federal Corrections*, *supra*.

¹⁵ *R v Brooklyn Palmantier*, 2014 NWTTC 10; *Bacon v Surrey Pretrial Services Centre (Warden)*, 2010 BCSC 805. In the latter case, at para 292, the Court held: "The petitioner is kept in physical circumstances that have been condemned internationally. He is locked down 23 hours per day and kept in the conditions Professor Haney described as 'horrendous.' These conditions would be deplorable in any civilized society, and are certainly unworthy of ours."

¹⁶ CHRC, *Protecting Their Rights*, *supra* at 45.

¹⁷ In federal corrections, over the past ten years, the segregation rate for black prisoners has grown faster than the black prison population. Over the same period, Indigenous prisoners have consistently had the longest average stays in segregation. See OCI, *Administrative Segregation in Federal Corrections*, *supra* at 2.

¹⁸ OCI, *Annual Report 2014-2015.*, *supra*.

¹⁹ *Whaling v. Canada*, 2014 SCC 20 at para 63.

segregation where, in the opinion of the superintendent, the inmate is in need of protection,²⁰ or the inmate must be segregated to protect the security of the institution or the safety of other inmates.²¹ The regulation also permits the superintendent to place an inmate in segregation if the inmate is alleged to have committed serious misconduct,²² or the inmate requests to be placed in segregation (“voluntary segregation”).²³

The MCSCS *Inmate Information Guide for Adult Institutions* also contains several references to the practice of segregation.²⁴ Notably, the policy provides that segregation is not to be used to discipline and/or manage inmates with mental illness, unless MCSCS has first considered and then rejected alternatives to segregation to the point of undue hardship.²⁵

Unfortunately, the current legislative and policy framework in Ontario does not provide for independent review of segregation placements. Rather, it grants discretion to correctional officials, without adequate checks and balances to prevent abuses. CCLA’s recommendations, addressed in greater detail below, include addressing this lacuna through enhanced oversight and review.

International Obligations and Jurisprudence

Canada’s binding legal obligations pursuant to international human rights law are also crucial in evaluating Ontario correctional facilities’ policies and practices regarding segregation. A benchmark international legal standard for the treatment of prisoners is set out in Article 10 of the *International Covenant on Civil and Political Rights* – ratified by Canada and legally binding – which requires that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”²⁶ Additional guidance is provided in the United Nations’ *Basic Principles for the Treatment of Prisoners*, which urge that “[e]fforts addressed to the abolition of solitary confinement as punishment, or to the restriction of its use, should be undertaken and encouraged.”²⁷

²⁰ RRO 1990, Regulation 778, under the *Ministry of Correctional Services Act*, RSO 1990, c M.22 at s 34(1)(a) [“Regulation 778”].

²¹ *Ibid* at s 34(1)(b).

²² *Ibid* at s 34(1)(c).

²³ *Ibid* at s 34(1)(d).

²⁴ Ministry of Community Safety and Correctional Services, *Inmate Information Guide for Adult Institutions* (September 2015), online: Ministry of Community Safety and Correctional Services <<http://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/ec167925.pdf>> [“MCSCS, *Inmate Guide*”].

²⁵ *Ibid* at 41.

²⁶ *International Covenant on Civil and Political Rights*, GA Res 2200(A) XXI, 21 UNGAOR Supp (No 16) at 52, UN Doc A/6316 (entered into force 23 March 1976).

²⁷ *Basic Principles for the Treatment of Prisoners*, GA Res 45/111, UN Doc A/RES/45/111 (14 December 1990).

Most recently, in December 2015, the United Nations General Assembly approved revisions to the *UN Standard Minimum Rules for the Treatment of Prisoners*.²⁸ The revised Rules, also known as the Nelson Mandela Rules, place specific limits on the use of segregation. In particular, Rule 43 requires prohibitions on indefinite solitary confinement and prolonged solitary confinement; prolonged solitary confinement is defined as segregation in excess of 15 consecutive days. Rule 45 further states that “[s]olitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review.” It also requires that states prohibit the use of solitary confinement for women, children, and prisoners with mental or physical disabilities that would be exacerbated by the use of segregation. Finally, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also expressed concern regarding the use of solitary confinement. In his opinion, prolonged segregation may amount to cruel, inhuman or degrading treatment or punishment and, under certain conditions, may amount to torture.²⁹

The European Court of Human Rights has also found, in several cases, that the use of solitary confinement violates the European Convention for the Protection of Human Rights and Fundamental Freedoms. For example, in a 2009 case against France, the Court ruled: “Solitary confinement was not a disciplinary measure and mere reference to organised crime or some unsubstantiated risk of escape was insufficient. Likewise, the classification of a detainee as a dangerous prisoner, or his committing even a serious disciplinary offence did not justify placing him in solitary confinement.”³⁰

Canada’s use of segregation has been criticized by international experts. In June 2012, the UN Committee Against Torture concluded its sixth periodic review of Canada and expressed concern about “the use of solitary confinement, in the forms of disciplinary and administrative segregation, often extensively prolonged, even for persons with mental illness.” The Committee urged Canada to “[l]imit the use of solitary confinement as a measure of last resort for as short a time as possible under strict supervision and with a possibility of judicial review” and to “[a]bolish the use of solitary confinement for persons with serious or acute mental illness.”³¹ These recommendations were recently echoed by the United Nations Committee for Human Rights, which in July 2015 urged that Canada minimize the use of administrative segregation in prisons, use disciplinary segregation only as a measure of last resort, and avoid segregation for individuals with mental health issues,³² and in the constructive dialogue between members of the UN Committee on Economic Social and Cultural rights, and the Canadian delegation during consideration of Canada’s sixth periodic report on the ICESCR in February 2016.

²⁸ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)*, GA Res 70/175, UN Doc A/RES/70/175 (27 December 2015) at rule 44 [“*Standard Minimum Rules*”].

²⁹ *Interim report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UNGA 63rd Sess, UN Doc A/63/175 (28 July 2008).

³⁰ *Khider v France* (Information Note on the Court’s case-law No. 121), No. 39364/05, ECHR.

³¹ UN Committee Against Torture, *Concluding observations of the Committee Against Torture: Canada*, UN DOC CAT/C/CAN/CO/6 (25 June 2012) at 6 [“UNCAT Observations”].

³² UN Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, UN DOC CCPR/C/CAN/CO/6 (13 August 2015) [“UN Human Rights Committee, Concluding Observations on Canada”].

RECOMMENDATIONS

1. MCSCS Review Must Address All Forms of Segregation

Segregation, or solitary confinement, is generally understood to be the physical and social isolation of inmates confined to their cells for 22 to 24 hours a day.³³ Inmates in segregation are typically only allowed to leave their cells for one hour of solitary exercise each day; their social and physical contact with others is minimal.³⁴ For instance, in the federal correctional context, inmates' interactions with correctional and medical staff are usually conducted through the food slot in the segregation cell door.³⁵

Solitary confinement may go by different names (for example, segregation, administrative segregation, voluntary segregation, isolation, separation or secure housing to name a few).³⁶ Yet regardless of the terminology used, where inmates are subjected to conditions that mirror the primary features of solitary confinement, the same policy and legal framework should apply. In Canada, federal officials have maintained that "the term solitary confinement is not accurate or applicable within the Canadian federal correctional system."³⁷ Such an approach denies the reality of solitary confinement in Canada, and avoids the need to move beyond semantics and work towards solutions.

In Ontario, Regulation 778 does not define the term "segregation." However, the regulation does provide that inmates may be placed in segregation in five different situations: where an inmate refuses to be searched,³⁸ where an inmate is in need of protection; where necessary to protect the security of the institution or the safety of other inmates; where an inmate is alleged to have committed serious misconduct; and where the inmate requests to be placed in segregation.³⁹ Moreover, inmates may be placed in "close confinement" where they commit "a misconduct of a serious nature."⁴⁰ Regardless of why placement in segregation is ordered or how it is classified, given the impacts that segregation can have on inmates' health, the same safeguards and prohibitions must apply. As such, Ontario should employ a definition of "segregation" that encompasses all statuses or situations where an inmate is isolated with only one to two hours outside his or her cell each day.

³³ UN Special Rapporteur on torture, *Interim Report*, *supra* at para 25; *Standard Minimum Rules*, *supra* at rule 44.

³⁴ UN Special Rapporteur on torture, *Interim Report*, *ibid*.

³⁵ OCI, *Annual Report 2014-2015*, *supra* at 26.

³⁶ UN Special Rapporteur on torture, *Interim Report*, *supra* at para 26.

³⁷ Correctional Service Canada, *Response to the Coroner's Inquest Touching the Death of Ashley Smith* (December 2014), online: Correctional Service Canada <<http://www.csc-scc.gc.ca/publications/005007-9011-eng.shtml>>.

³⁸ Regulation 778, *supra* at s 26.

³⁹ *Ibid*, s 34(1).

⁴⁰ *Ibid*, s 32(2).

Indeed, experience in other Canadian jurisdictions has shown that there are forms of confinement that, while not officially classified as segregation, reproduce similar conditions for inmates.⁴¹ For instance, many federal correctional institutions have separate units where prisoners are subject to movement and association restrictions. These units may be called secure living environments, gang ranges, special needs units, or intensive support units. Observers have called this phenomenon “segregation lite.”⁴² Prisoners placed in such units may not be entitled to the procedural protections afforded to prisoners “officially” placed in segregation, slim as those protections may be, yet they are subjected to many of the same deprivations.

Accordingly, CCLA submits that MCSCS’ review must address all contexts where Ontario inmates are subject to segregation-like conditions.

2. Moving Towards the Elimination of Segregation

Twenty years ago, Justice Arbour wrote that “[w]e must break the mindset which assumes the inevitability of segregation.”⁴³ Given the widespread use of segregation in jails across this province, it is evident that this mindset continues to prevail. A significant cultural shift is necessary.

The need for such a shift is demonstrated by the fact that MCSCS has not implemented the terms of the *Jahn* settlement reached in 2013. Documents have revealed that inmates with mental illness are still being placed in segregation in high numbers: 40% of Ontario inmates held in segregation for more than 30 consecutive days in the last five months of 2014 suffered from mental health issues or other special needs.⁴⁴ This practice runs counter to the *Jahn* settlement and the resulting MCSCS policy that provides the segregation of inmates with mental illness should not be used unless all other alternatives have been considered and rejected.⁴⁵ CCLA is also deeply concerned by the fact that inmates with mental illnesses are not receiving adequate care. Documents have been reported to show that one inmate characterized as “unresponsive” and “catatonic” by corrections officers still had no plan of care on day 422 of his segregation. Another inmate characterized as “special needs” spent 556 days in segregation.⁴⁶

⁴¹ See e.g. *Bacon v Surrey Pretrial Services Centre*, *supra* at para 293: “While Echo 2 is not a segregation unit (apparently in the sense that it is not located in a segregation area), the restrictions imposed on the petitioner in this unit (no contact with anyone in the prison population and continued restrictions on visits and telephone communication), perpetuate the isolation of segregation. The petitioner’s description of conditions on Echo 2, as scarcely better, and in some ways worse, than segregation, is not contradicted” (emphasis added).

⁴² Ivan Zinger, “Segregation in Canadian federal corrections: A prison ombudsman’s perspective,” presented at Ending the Isolation: An International Conference on Human Rights and Solitary Confinement (University of Manitoba, 22-23 March 2013).

⁴³ Arbour Report, *supra* at 103.

⁴⁴ Patrick White, “Documents reveal troubling details about long-term solitary confinement” (24 April 2016), online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/documents-reveal-troubling-details-about-long-term-solitary-confinement/article29746902>>.

⁴⁵ See MCSCS, *Inmate Guide*, *supra* at 2.

⁴⁶ White, “Documents reveal troubling details about long-term solitary confinement,” *supra*.

Further, documents have been reported to reveal that inmates are being placed in segregation without any valid legal basis. Inmates have been placed in segregation due to overcrowding and under-staffing, and because the prison had no available mental health, medical or protective custody units. One inmate was even placed in segregation because he tested positive for tuberculosis, while another was placed in segregation for 103 days because he required a walker for medical reasons, a device characterized as contraband in general population.⁴⁷ Such practices relating to the use of segregation are unacceptable and unjustifiable.

CCLA argues that, in order to secure effective, on-the-ground reform in this area, the Ministry must take a strong and unequivocal stand: Ontario should be the first jurisdiction to take concrete, measurable steps to move towards the elimination of segregation. It is only with this goal clearly in mind that segregation may become to be seen as a truly exceptional measure that is used only as an absolute last resort.

Although this would represent a significant policy shift for the Ministry, it is not unattainable. Numerous other jurisdictions, including the United States, Australia and the United Kingdom, have taken steps to dramatically curtail their segregated populations, including complete prohibitions on the use of segregation for certain populations. For example, the VERA Institute, an independent, nonpartisan, non-profit organization focused on justice policy, is currently working with five US states to reduce reliance on segregation. In cooperation with government authorities, the Institute works “to address site-specific needs to:

- Review criteria to determine who should be held in segregation and who could be moved safely to the general prison population;
- Assess disciplinary sentences and lengths of stay in segregation;
- Enhance programs to transition prisoners out of segregation;
- Improve programming and conditions of confinement for those who remain;
- Track the effects of moving prisoners from segregation back to the general prison;
- Assess segregation policies and practices;
- Analyze the effects of the use of segregation; and
- Implement recommendations for enhancing responses to protective custody, disciplinary, and intensive management populations.”⁴⁸

These and other reform initiatives have focused on data-driven expert study of how a correctional system is actually operating, targeted policy and practice reform, and operationalizing and normalizing a

⁴⁷ *Ibid.*

⁴⁸ VERA Institute of Justice, “Segregation Reduction Project,” online: VERA Institute of Justice <<http://www.vera.org/project/segregation-reduction-project>>.

range of alternatives to segregation. It has been reported that these strategies have led to a reduction in segregation, as well as decreases in use of force and prisoner complaints.⁴⁹

There are numerous examples⁵⁰ of reform initiatives that have resulted in concrete decreases in the use of segregation in the United States. The US Department of Justice has summarized the types of recent state-level initiatives as falling into several categories:

- Prevention. These reforms are designed to prevent the type of disruptive behavior that often results in segregation. The policies make it easier for correctional staff to identify inmates who are prone to violence, victimization, and/or mental health issues, facilitating early intervention. Among other things, these policies include behavioral and contingency management tools, as well as risk assessment programs.
- Specialized, or “mission-specific,” housing units. These reforms involve the creation of specialized housing units for categories of inmates that require removal from the general population, but typically do not require the type of restrictions typically found in a “traditional” segregation unit. These mission-specific programs include units for inmates with serious mental illness and those requiring protective custody.
- Stricter rules for placement and length of stay. These reforms limit when, why, and for how long an inmate can be placed in restrictive housing, especially in cases involving disciplinary or preventative segregation. Some jurisdictions have narrowed the list of offenses that are punishable by restrictive housing. Some have also imposed limits on the amount of time inmates can be held in restrictive housing, which can apply to specific categories of inmates (e.g., juveniles and inmates with serious mental illness), or to certain types of segregation (such as maximum penalties for disciplinary violations). Some jurisdictions have effectively eliminated restrictive housing for certain populations, such as juveniles.
- Regular status reviews. Several states have instituted regular reviews of inmates in restrictive housing, to help ensure that those who do not belong in segregation will be promptly moved to a more appropriate setting. Oftentimes, these reviews are conducted by multi-disciplinary committees of prison officials, which include mental health staff.
- Re-entry programming. These reforms focus on rehabilitation while in restrictive housing, thus increasing the likelihood that the prisoner can safely return to the general inmate population and, eventually, society at large.⁵¹

⁴⁹ Angela Browne et al., “Prisons within Prisons: The Use of Segregation in the United States,” online: VERA Institute of Justice <<http://www.vera.org/sites/default/files/resources/downloads/prisons-within-prisons-segregation.pdf>>.

⁵⁰ US Department of Justice, Report and Recommendations Concerning the Use of Restrictive Housing (January 2016), online: US Department of Justice <<https://www.justice.gov/dag/file/815551/download>> [“US Department of Justice, Restrictive Housing Report”] at 72-78.

⁵¹ *Ibid.*

CCLA believes that the Ontario government can target changes in each of the above areas; the reform processes undertaken by correctional departments across the United States can provide a road-map for the ambitious level of reform that CCLA urges the Ontario government to undertake.

Ultimately, in order to make a serious reversal in the overuse of segregation a reality, the government and the correctional system must view “alternatives” to segregation (including “voluntary” segregation) as the primary response to a range of behavioural and management issues within Ontario jails. Again, lessons can be learned from other jurisdictions. One alternative to individual segregation is to implement housing for problematic inmates in smaller units with other prisoners, rather than in individual segregation, and provide them with access to the same facilities and benefits as other prisoners. In the United Kingdom, for example, inmates who are identified as too dangerous or disruptive for general population are referred to what are known as Close Supervision Centres. However, these centres do not operate as solitary confinement units. While prisoners are held in single cells, small groups of prisoners are able to move around in their living units and associate with each other, unless an individual assessment determines an inmate poses to an acute level of severe or fatal risk of harm to other prisoners. Further, all inmates are given daily access to showers, telephones, the library, outside exercise, the gym and educational materials, and have daily and direct contact with prison and health staff and are entitled to visits.⁵² There are currently five Close Supervision Centres in the UK with space for a total of 56 prisoners. They are only for males 21 years or older and are not used for prisoners requiring separation for their own protection.

Similar alternatives to segregation are available to address the needs of inmates with mental illnesses, inmates in need of protection and youth. As outlined in the section 3 below, CCLA maintains that the government should immediately implement an absolute prohibition on the segregation of these at-risk populations. Alternatives to segregation for those populations are also addressed below.

3. Prohibiting the Use of Segregation for At-Risk Individuals

CCLA is particularly concerned about the impact of time in segregation on vulnerable inmates, including inmates with mental illness, inmates in need of protection, and inmates under the age of 21.

Inmates with Mental Illness

As discussed above, CCLA is deeply troubled by the fact that high numbers of Ontario inmates with mental illness are being placed in segregation despite the evidence of harmful effects, and despite the terms of the *Jahn* settlement and MCSCS policy. Documents have shown that in the final five months of 2014, in 40 per cent of Ontario segregation cases, mental health or special needs were cited as

⁵² National Offender Management Service, *Close Supervision Centre Referral Manual* (January 2013), online: UK Department of Justice <<https://www.justice.gov.uk/downloads/offenders/psipso/psi-2012/psi-42-2012-csc-referral-manual.doc>>.

justifications for prolonged segregation, despite comments from regional prison managers noting that mental health should not be used as a rationale for segregation. Those same documents have shown that inmates with suspected mental illnesses and special needs have, in some cases, remained in segregation for up to 556 days.⁵³

The UN Committee Against Torture and the UN Special Rapporteur on torture have both called for a prohibition on segregation of inmates with mental illnesses.⁵⁴ Research has shown that segregation exacerbates inmates' pre-existing mental illnesses and that those inmates are particularly vulnerable to behavioural deterioration as a result of segregation.⁵⁵ As reviewed above, the UN's Standard Minimum Rules also prohibit segregation of inmates with mental health issues where their conditions would be worsened by such measures.⁵⁶

These recommendations are being operationalized at multiple facilities in other jurisdictions. For instance, last year, the New York City Department of Correction and Department of Health and Mental Hygiene announced a plan to eliminate the practice of solitary confinement for prisoners with serious mental health issues. Inmates with serious mental health issues who violate institutional rules will be dealt with in a clinical setting, allowing for a treatment-based response to problematic behaviour. Inmates with behaviour issues stemming from less serious mental illness are also approached in a less punitive manner.⁵⁷

There is also range of measures that other jurisdictions, including the United Kingdom, Australia and the United States, have implemented to help manage inmates with self-harming behaviour. In general, these approaches involve using "multi-disciplinary therapeutic team approaches that recognizes self-harm as a coping mechanism and contextualize the behaviour."⁵⁸ In New South Wales, for example, inmates at risk of self-harm or suicide are to be managed using the principle of "least restrictive care." Assessment cells are viewed as intensive care and short-term options of last resort. Instead, inmates are whenever possible placed in shared accommodation and provided with appropriate interaction with a specific staff member.⁵⁹ Peer support programs, such as the one in place at the Prison for Women in

⁵³ White, "Documents reveal troubling details about long-term solitary confinement," *supra*.

⁵⁴ UNCAT Observations, *supra* at para 19; UN Special Rapporteur on torture, *Interim Report, supra* at para 86. In addition the UN Human Rights Committee made these comments specifically to Canada; see UN Human Rights Committee, Concluding Observations on Canada, *supra*.

⁵⁵ Stuart Grassian, "Psychiatric Effects of Solitary Confinement," (2006) 22 Washington University Journal of Law and Policy 325 at 378; Shalev, *supra* at 10; Haney, *supra* at 142.

⁵⁶ Standard Minimum Rules, *supra* at rule 45(2).

⁵⁷ Fatos Kaba et al., "Solitary Confinement and Risk of Self-Harm Among Jail Inmates" (2014) 104:3 American Journal of Public Health 442 at 447.

⁵⁸ Kelly Hannah-Moffat, *Report to Coroner Investigating the Death of Ashley Smith at Grand Valley Institution for Women (GVI)* (11 October 2013) at 5.

⁵⁹ *Ibid* at 9.

Kingston in the early 1990s,⁶⁰ have also been identified as beneficial for both inmates in need of assistance and those trained as support workers.

In the United States, the Federal Bureau of Prisons has implemented two types of secure mental health units to divert inmates with mental illness who may be disruptive or violent away from traditional segregation: the Secure Mental Health Step-Down Program and the Secure STAGES Program. Both of these programs involve providing inmates with in and out-of-cell programming based on their individual treatment plans, usually over the course of a year. On top of these specialized secure mental health units, the Bureau also operates additional secure and non-secure psychology treatment programs, provides enhanced mental health services for inmates in segregation through screening and intensive psychological programming, and offers mental health care to all federal inmates in an effort to reduce the type of behaviour that results in segregation.⁶¹

Accordingly, CCLA recommends that MCSCS continue to proactively and carefully enforce a prohibition on segregation of inmates with serious mental illnesses. This should include meaningful mental illness screening for all inmates upon their admission to a correctional facility, admission to segregation, or during their segregation review.⁶² The state of compliance with these requirements should be subject to periodic audits conducted by medical professionals external to the correctional system.

Inmates in Need of Protection

Under section 34 of the Regulation, the superintendent of a correctional facility can order segregation of an inmate if, in the superintendent's opinion, the inmate is in need of protection.⁶³ Accordingly, superintendents may order segregation under this section to prevent inmates from engaging in self-harm, or to prevent inmates by being harmed by other members of the general population.

In CCLA's view, subjecting an inmate to involuntary segregation in order to secure that individual's safety is an unjustifiable deprivation of liberty under section 7 of the *Charter*. Yet, protective custody was the cited justification for 37 per cent of Ontario prisons' segregation records for the final five months of 2014.⁶⁴

First, detention to prevent an inmate from engaging in self-harm is grossly disproportionate to the physical and mental harm inmates endure when subject to segregation. Second, the deprivation of an

⁶⁰ Kathleen Kendall, Program Evaluation of Therapeutic Services at the Prison for Women (August 1993), online: Correctional Service Canada <http://www.csc-scc.gc.ca/publications/fsw/fsw14/program-eval_fsw14-eng.shtml>.

⁶¹ US Department of Justice, *Restrictive Housing Report*, *supra* at 111-112.

⁶² *Christine Nadine Jahn v Minister of Community Safety and Correctional Services*, Settlement Agreement – Public Interest Remedies (24 September 2013), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/sites/default/files/Jahn%20Schedule%20A_accessible.pdf>.

⁶³ Regulation 778, *supra* at s 34(1)(a).

⁶⁴ White, "Documents reveal troubling details about long-term solitary confinement," *supra*.

inmate's liberty does not accord with the principles of fundamental justice when it is based on the potential wrongful acts of others.

The United States Department of Justice has recommended that inmates who require protective custody not be placed in segregation, but instead be transferred to general population at another institution or a special-purpose housing unit with other inmates requiring protection, with comparable conditions as general population.⁶⁵ Some federal prisons maintain reintegration housing units (RHUs) for protective custody inmates. RHUs are distinct from segregation units: participants live, work and program in residential units with approximately 16 hours out-of-cell per day. The end goal of these units is to help protective custody inmates eventually reintegrate with the general population.⁶⁶

Inmate at risk of sexual abuse – including women, youth inmates in adult prisons and LGBTQ inmates – are another sub-group of inmates requiring protection that should be diverted away from traditional segregation. The VERA Institute has identified a number of methods used in state prisons for preventing the isolation of such inmates. A number of state prisons have adopted gender and age-specific risk screening and individual case management for those inmates identified as vulnerable to sexual abuse. Further, rather than placing victimized inmates in segregation, some state prisons have begun mixing compatible vulnerable populations in separate units with conditions similar to general population. In other state prisons, inmates with higher levels of identified risk are given more frequent health and medical check-ins, and increased monitoring. The VERA Institute has found that the use of such alternatives for inmates at high risk of sexual abuse can protect their safety without the adverse effects and isolation common to segregation units.⁶⁷

For these reasons, CCLA recommends that MCSCS prohibit involuntary segregation on the grounds of the protection of the safety of the inmate. CCLA further recommends that MCSCS mandate that if an inmate has a verified need for protective custody, they be either transferred to another facility or be placed in a special purpose housing unit with similar conditions to those available to inmates in general population.

Youth

CCLA is concerned about young people who are still adolescents (under 21 years old) being subjected to segregation in adult correctional facilities.

⁶⁵ US Department of Justice, *Restrictive Housing Report* at 98.

⁶⁶ *Ibid* at 110-111.

⁶⁷ Allison Hastings et al, "Keeping Vulnerable Populations Safe under PREA: Alternative Strategies to the Use of Segregation in Prisons and Jails" (August 2015), online: VERA Institute of Justice <<http://www.vera.org/sites/default/files/resources/downloads/housing-vulnerable-populations-prea-guide-april-final.pdf>>.

The UN Special Rapporteur on torture has taken the position that the imposition of segregation of any duration on juvenile inmates constitutes cruel, inhuman or degrading treatment.⁶⁸ CCLA agrees, and takes the position that placing a juvenile inmate in segregation for any period of time amounts to cruel, inhuman and degrading treatment, in violation of sections 7 and 12 of the *Charter*.

Moreover, within Canada, the Office of the Correctional Investigator has recommended an absolute prohibition on segregation for inmates under age 21.⁶⁹ Indeed, the Provincial Advocate for Children and Youth has raised concerns about the impact of isolation on adolescent development and mental health, noting that an individual's brain is not fully developed until the mid-twenties.⁷⁰ As such, CCLA recommends that MCSCS prohibit segregation of inmates under the age of 21 in adult correctional facilities.

4. Absolute Prohibition of Long-Term or Indefinite Segregation

Currently, in Ontario, neither the Act nor the Regulation imposes any limits on the amount of time inmates may be held in segregation. Documents have revealed that the average stay in segregation among 360 Ontario inmates in 2014 was 103 days.⁷¹ Yet, international authorities are clear that long-term and/or indefinite segregation can have serious, detrimental health impacts for inmates.

Long-term (or prolonged) segregation should be defined as lasting 15 consecutive days or longer. The UN has adopted this definition of prolonged segregation in the Standard Minimum Rules, and has identified prolonged and indefinite segregation as prohibited practices.⁷² Similarly, in his Interim Report, the UN special rapporteur on torture has characterized segregation lasting longer than 15 days as torture or cruel, inhuman or degrading treatment or punishment, as it is at this point that the literature suggests that some of the adverse effects of segregation become irreversible.⁷³

Furthermore, studies have shown that indefinite segregation promotes increased feelings of helplessness and panic. When an individual is uncertain about how long they will be detained in segregation, its adverse health effects may be compounded.⁷⁴ A firm limit on the maximum amount of time an inmate may lawfully spend in segregation would help alleviate these concerns.

⁶⁸ UN Special Rapporteur on torture, *Interim Report*, *supra* at para 77.

⁶⁹ OCI, *Annual Report 2014-2015*, *supra* at 31.

⁷⁰ Provincial Advocate for Children and Youth, *It's a Matter of Time: Systemic Review of Secure Isolation in Ontario Youth Justice Facilities* (2015) at 16, online: Provincial Advocate for Children and Youth <http://provincialadvocate.on.ca/documents/en/SIU_Report_2015_En.pdf>.

⁷¹ White, "Documents reveal troubling details about long-term solitary confinement," *supra*.

⁷² Standard Minimum Rules, *supra* at rules 43, 44.

⁷³ UN Special Rapporteur on torture, *Interim Report*, *supra* at para 26; Haney, *supra*.

⁷⁴ Shalev, *supra* at 21, 23.

Both prolonged and indefinite segregation expose inmates to serious physical and mental suffering, in violation of their right to security of the person under section 7 of the *Charter*. The conditions of segregation that restrict inmates' ability to have meaningful social contact and enhance the severity of an inmates' otherwise judicially measured prison sentences violates their right to liberty protected under section 7 of the *Charter*. Further, prolonged and indefinite segregation, known to cause serious physical and psychological harm, violates inmates' right to be free from cruel and unusual punishment protected under section 12 of the *Charter*.

As a result, CCLA recommends that MCSCS place firm caps on the amount of time an inmate may lawfully spend in segregation. Specifically, MCSCS should:

- Implement an absolute prohibition on long-term placements in segregation. Long-term should be defined as any period greater than 15 consecutive days.
- Implement a clear direction that segregation should only be used in exceptional circumstances, as a last resort, and for the shortest time necessary to serve a particular purpose.
- Institute a strong, global limit on the total number of days an inmate may spend in segregation in a calendar year, and require a minimum period of time in between placements in segregation. Each new application to place an individual in segregation, and each segregation review, must start from the presumption that the individual is to be placed in (or returned to) the general population. In any event, under no circumstances should an inmate be confined to segregation for more than 60 non-consecutive days per year, the annual cap recommended by Justice Arbour and the Ashley Smith inquest jury.⁷⁵
- Direct that, where an inmate is transferred between institutions or briefly taken away from the institution (e.g. for a medical appointment or court appearance), the calculation of consecutive days must continue.

5. Legal Rights and Conditions of Inmates Entering and Within Segregation

CCLA recognizes that there may remain a very few, highly exceptional cases where specific individuals are segregated from the general population and cannot be housed in smaller interim units. These individuals must be afforded specific legal rights to ensure that they are placed in segregation for no longer than absolutely necessary and that the conditions of confinement are as open as possible. Particular procedures and legal rights are detailed below.

First, all decisions regarding the whether a particular individual will be placed within segregation must be based upon highly individualized risk assessments. The criteria for placement in segregated

⁷⁵ Arbour Report, *supra* at 105; Coroner's Inquest Touching the Death of Ashley – Verdict of Coroner's Jury (19 December 2013), online: Correctional Service Canada <<http://www.csc-scc.gc.ca/publications/005007-9009-eng.shtml>>.

conditions must be clearly set out in advance and must be applied on an individual basis. The current regulatory standard for who is eligible for segregation is too broad. It should be amended as follows:

- Add a general clause specifying that segregation is only to be used as an exceptional measure of last resort after all other alternatives have been exhausted;
- Eliminate s 34(1)(a), which allows for inmates in need of protection to be placed in segregation;
- Amend s 34(1)(c) to require that inmates be placed in segregation only for proven misconduct, rather than simply allegations; and
- Add a limiting definition of what constitutes a “serious” offence.

As outlined in other sections of our submissions, a robust, independent review system must be put in place and firm limits on the number of consecutive days, as well as the cumulative number of days, that can be spent in segregation must be adhered to.

Institutions should have clear plans to provide all standard rights to inmates within segregated units, including family visits, telephone calls, access to programming, access to educational or entertainment materials, yard time, and work opportunities. Any failure to provide these rights in specific cases must be fully documented and made available at the independent review.

The United Nations’ Standard Minimum Rules outline the role of health-care personnel in the segregation process to address the adverse effects of segregation. The Rules provide that health-care personnel shall:

- (i) visit inmates in segregation on a daily basis and provide them with prompt medical assistance at their request;
- (ii) report to the director of the correctional facility any adverse effects of any restrictive measures and advise the director whether those measures should be altered or terminated for physical or mental health reasons; and
- (iii) have the authority to recommend changes to the involuntary segregation of a prisoner to ensure that the separation does not exacerbate an inmate’s existing medical, mental or physical conditions.⁷⁶

CCLA supports the enhanced participation of health-care professionals in the segregation process to attenuate the adverse effects of segregation on inmates’ mental and physical health. In accordance with the Standard Minimum Rules, CCLA recommends that MCSCS mandate that health care personnel visit each inmate in segregation on a daily basis, report the condition of each inmate to the superintendent of the correctional facility, and be given the authority to recommend changes to an inmate’s status in segregation.

⁷⁶ Standard Minimum Rules, *supra* at rule 46.

6. Review and Oversight

External, Independent Review of Segregation Decisions

CCLA submits that meaningful, independent adjudication of an inmate's status in segregation is indispensable to ensure that segregation, when used, is truly a measure of last resort. The need for such independent review is emphasized by documents that reveal that Ontario inmates are being placed and kept in segregation without adequate legal justification. In one case, the justification provided on day 50 of an inmate's segregation was simply: "incompatible."⁷⁷ CCLA is concerned that rather than provide legitimate reasons for initial segregation and continued segregation orders, correctional staff are operating on the presumption that segregation is the default method of detention.

The need for independent review has been a common thread running through numerous internal and external reports examining the use of segregation in federal corrections. Justice Arbour recommended placing segregation decisions under the control and supervision of the courts, seeing no other solution to the overuse of prolonged segregation.⁷⁸ Failing that, Justice Arbour recommended that segregation decisions at the institutional level be subject to confirmation within five days by an independent adjudicator – a lawyer who would be required to provide reasons for the decision to maintain segregation. She further recommended that segregation reviews be conducted every 30 days, before a different adjudicator (also a lawyer).

Following the Arbour Report, a series of reports have concluded that independent adjudication is critical to combatting the overuse of segregation and to ensuring inmates' fundamental rights are respected.⁷⁹ For instance, in 2010, a Parliamentary committee concluded: "We believe that an independent mechanism is necessary not only to ensure the transparency of CSC decisions, but also to identify any violation of these offenders' human rights. The Committee fears that there may be abuse without such a mechanism."⁸⁰

Contrary to these recommendations, the current regime in Ontario provides only for internal reviews conducted by correctional authorities or by the Minister. Where inmates are placed in segregation because they are alleged to have committed serious misconduct, the superintendent must conduct a

⁷⁷ White, "Documents reveal troubling details about long term solitary confinement," *supra*.

⁷⁸ Arbour Report, *supra* at 105.

⁷⁹ See e.g. House of Commons Standing Committee on Justice and Human Rights, *A Work in Progress: The Corrections and Conditional Release Act* (May 2000); CHRC, *Protecting Their Rights*, *supra*; House of Commons Standing Committee on Public Safety and National Security, *Mental Health and Drug and Alcohol Addiction in the Federal Correctional System* (December 2010) ["House of Commons Standing Committee"]. See also Michael Jackson, "The litmus test of legitimacy: Independent adjudication and administrative segregation," 48 *Canadian J Criminology & Crim Just* 157 (2006).

⁸⁰ House of Commons Standing Committee, *ibid* at 57.

preliminary review within 24 hours to determine whether continued segregation is warranted.⁸¹ Otherwise, the superintendent must only review the circumstances of each inmate in segregation once every five days.⁸² Where an inmate is placed in segregation for 30 continuous days, the superintendent must report the reasons for that inmate's continued segregation to the Minister.⁸³

CCLA is concerned that inmates do not have a clearly defined avenue for challenging their initial segregation placement. Moreover, the periodic review of an inmate's status in segregation is not sufficiently independent to be meaningful.⁸⁴ The five-day reviews of the inmate's circumstances are performed by the superintendent of the correctional facility – the very individual who made the initial decision to place that inmate in segregation. Moreover, the review framework presupposes that prolonged use of segregation (beyond 30 continuous days) may be warranted. In the federal system, such reviews have been sharply criticized for being mere *pro forma* exercises, instead of meaningful safeguards.⁸⁵

The absence of independent, meaningful review of segregation decisions violates the principles of fundamental justice requiring procedural fairness under section 7 of the *Charter*. Exposing inmates to the severe physical and psychological consequences of segregation cannot be justified on the basis of discretionary, subjective and intermittent procedures.

As such, CCLA recommends that MCSCS introduce independent adjudication of segregation placements. This oversight mechanism should not presume continued segregation or merely monitor compliance with policy. Rather, the onus must lie on correctional authorities to fully justify any ongoing use of segregation and to demonstrate that alternative options have been exhausted. Specifically, MCSCS should:

- Create an independent review board staffed by impartial, legally trained adjudicators for the purpose of reviewing segregation placements.
- Require an initial hearing of all segregation orders within 24 hours. The burden at the hearing should lie on the superintendent (or a delegate) to justify any ongoing use of segregation.
- Require the superintendent (or a delegate) to justify an inmate's segregation to the independent review board as long as the inmate remains in segregation, at five-day intervals.

⁸¹ Regulation 778, *supra* at s 34(2).

⁸² *Ibid* at s 34(3).

⁸³ *Ibid* at s 34(5).

⁸⁴ See Standard Minimum Rules, *supra* at rule 45.

⁸⁵ Justice Arbour concluded that the internal segregation review process in place at the Prison for Women was woefully inadequate. "If the segregation review process was designed to prevent endless, indeterminate segregation, by imposing a periodic burden on the prison authorities to justify further detention, it proved to be a total failure in this case": Arbour Report, *supra* at 81.

Enhanced External Oversight

In addition to regular segregation reviews, CCLA submits that enhanced external oversight of Ontario jails is essential to prevent and address rights violations, in the context of segregation and beyond. External scrutiny helps shine a light on what occurs in closed correctional institutions, providing a credible and objective assessment of conditions within an institution. Oversight can take different forms – periodic audits, investigations triggered by prisoner complaints, monitoring to prevent future abuses – which all serve different needs. The need for oversight is magnified in the case of vulnerable populations, such as inmates in segregation.⁸⁶

In order to enhance oversight of Canadian prisons, CCLA has urged the Canadian government to ratify the Optional Protocol to the Convention against Torture (OPCAT), adopted by the UN General Assembly in 2002. The Optional Protocol focuses on strengthening national and international oversight of prisons, on the principle that openness and transparency are key tools to prevent human rights abuses. It establishes a system of regular, unannounced prison visits conducted by independent bodies. Recently, the Canadian government publicly committed to joining the Optional Protocol.⁸⁷ Ontario should both support this process and, pending ratification at the national level, take a proactive, leadership role in strengthening its own oversight structures consistent with the OPCAT requirements. Specifically, this would mean empowering an independent body to serve as a “protective mechanism,” conducting regular visits to all places where individuals are deprived of liberty. Such visits would include the ability to interview inmates in private, and would ultimately generate reports and recommendations to improve the protection of inmates.⁸⁸

Finally, CCLA maintains that access to the courts is an essential safeguard for inmates placed in segregation. Currently, in Ontario, an inmate can request ministerial review of the superintendent’s decision to place him or her in segregation. However, the current regime provides an inmate with no recourse beyond the minister’s decision, which is final. The UN Special Rapporteur on torture and the UN Committee Against Torture require internal administrative decisions be subject to judicial review.⁸⁹ As such, CCLA recommends that MCSCS should ensure inmates are entitled to seek judicial review of ministerial decisions with respect to segregation orders.

⁸⁶ Michelle Deitch, “Special populations and the importance of prison oversight,” 291 Am J Crim L 37:3 (2010). Deitch identifies eight essential elements of effective prison oversight: independence; regular inspections; unfettered and confidential access; adequate resourcing; duty to report findings; a holistic approach; investigation and monitoring; and cooperation with the institution.

⁸⁷ Canadian Press, “Canada to join UN anti torture protocol after years of delay” (2 May 2016), online: Maclean’s <<http://www.macleans.ca/news/canada/canada-to-join-un-anti-torture-protocol-after-years-of-delay>>.

⁸⁸ See Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Guidelines on national preventive mechanisms,” UN DOC CAT/OP/12/5 (9 December 2010).

⁸⁹ See UN Special Rapporteur on torture, *Interim Report*, *supra* at paras 97-98; UNCAT Observations, *supra* at para 19.

Data and Transparency

CCLA understands that Ontario currently has limited statistical data regarding the use of segregation.⁹⁰ When compared to the federal correctional system, there is comparatively little transparency regarding the use of segregation in provincial and territorial jails. CCLA is deeply concerned that there are correctional facilities in Ontario that do not maintain records relating to segregation, as revealed by attempts to obtain documentation through freedom of information requests.⁹¹

Meaningful oversight cannot occur without greatly enhanced collection of and access to data regarding what is happening behind prison walls. Secrecy regarding the conditions of confinement and prevalence of segregation can only serve to increase the likelihood of rights violations – violations that may frequently go unreported, and unremedied, due to the vulnerable and transitory nature of inmates. It is crucial, therefore, that outside researchers, oversight bodies and the public be proactively informed of the use of segregation within Ontario’s jails. Accurate and comprehensive statistics must be compiled and publicly disclosed in order to fully understand the problem, track trends, and evaluate the success of reform initiatives.

CCLA urges MCSCS to collect comprehensive data about the use of segregation in Ontario jails, including disaggregated data related to sex, race, Indigeneity, and mental health concerns, and to make this data available to researchers, oversight bodies, policy experts and the public.

SUMMARY OF RECOMMENDATIONS

1. Recognize that the isolation of an individual prisoner for 22-23 hours per day constitutes segregation, whether it is referred to as solitary confinement, administrative detention, or voluntary segregation.
2. Review all contexts where Ontario inmates are subject to segregation or segregation-like conditions.
3. Commit to the goal of abolishing segregation, except in the most extenuating and temporary circumstances.
4. Explore and implement alternatives to segregation, as employed in other jurisdictions, to better respond to behavioural and management issues.
5. Continue to enforce a prohibition on segregation of inmates with serious mental illness. This should include meaningful mental illness screening for all inmates upon their admission to a correctional facility, admission to segregation, or during their segregation review.
6. Prohibit involuntary segregation on the grounds of the protection of the safety of the inmate. Mandate that if an inmate has a verified need for protective custody, they be either transferred

⁹⁰ White, “Solitary confinement reform hindered by gaps in prison statistics,” *supra*.

⁹¹ White, “Documents reveal troubling details about long-term solitary confinement,” *supra*.

to another facility or be placed in a special purpose housing unit with similar conditions to those available to inmates in general population.

7. Prohibit segregation of inmates under the age of 21.
8. Place firm caps on the amount of time an inmate may lawfully spend in segregation. Implement an absolute prohibition on long-term placements (over 15 consecutive days) in segregation, and introduce a global limit on the total number of days an inmate may spend in segregation in a calendar year.
9. Narrow the criteria for placement in segregated conditions, including amending the current regulatory standard for who is eligible for segregation.
10. Provide all standard rights to inmates within segregated units, including family visits, telephone calls, access to programming, access to educational or entertainment materials, yard time, and work opportunities.
11. Mandate that health care personnel visit each inmate in segregation on a daily basis, report the condition of each inmate to the superintendent of the correctional facility, and be given the authority to recommend changes to an inmate's status in segregation.
12. Create an independent review board staffed by impartial, legally trained adjudicators, in order to conduct external reviews of all segregation placements. Require the superintendent of a correctional institution (or a delegate) to fully justify an inmate's placement in segregation within 24 hours, and thereafter at five-day intervals.
13. Strengthen the oversight of Ontario jails, consistent with the requirements and spirit of the Optional Protocol to the Convention Against Torture.
14. Ensure inmates are entitled to seek judicial review of ministerial decisions with respect to segregation orders.
15. Collect comprehensive data about the use of segregation in Ontario jails, including disaggregated data related to sex, race, Indigeneity, and mental health concerns, and make this data available to researchers, oversight bodies, policy experts and the public.