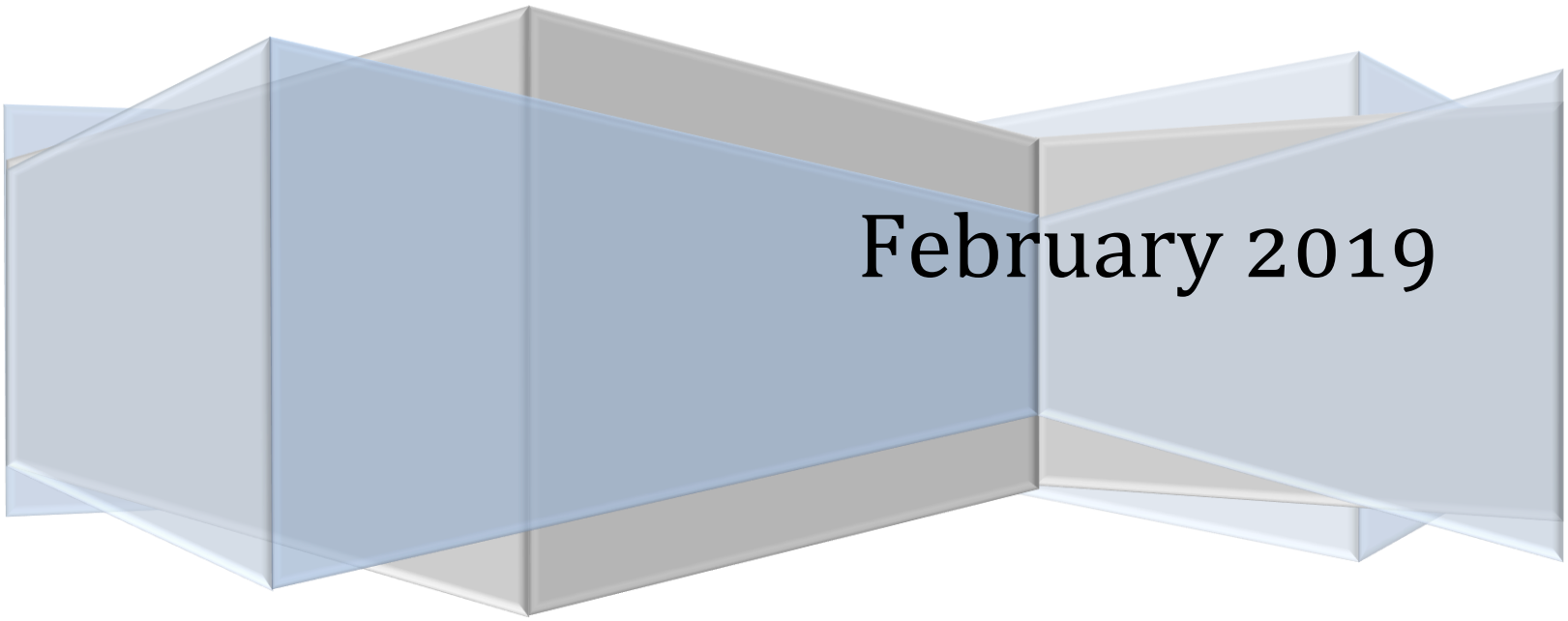
Interim Report of the Independent Reviewer of the Ontario Ministry of Correctional Services' Compliance with the 2013 Jahn Settlement Agreement and the Terms of the Consent Order of January 16, 2018 Issued by the Human Rights Tribunal of Ontario



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INTRODUCTION

"I've worked in hospital emergency departments. I've worked in mental hospitals. But this correctional population contains the most multi-problem people I've ever seen in my entire nursing career."

-Senior Mental Health Nurse, Quinte Detention Centre, Napanee

1. Background to this Report:

By Order in Council O.C. 371/2018 I am appointed by Cabinet to provide "independent progress reports with respect to compliance with the 2013 *Jahn* settlement of the terms of the order entered as a consent order with the Human Rights Tribunal of Ontario dated January 16, 2018". Each of these terms requires some further explanation.

Ms Christina Jahn was incarcerated at the Ottawa Carleton Detention Centre (OCDC), an adult correctional facility operated by the Ontario Ministry of Community Safety and Correctional Services (MCSCS), on two separate occasions:

(a) May 25-August 15, 2011. She was initially remanded into custody on charges of assault, obstruct police, assault with a weapon, causing a disturbance and mischief. After some time spent on custodial remand[1], she entered pleas of guilty to charges of assault, obstruct police, causing a disturbance and mischief, whereupon she was sentenced to a total of 100 days in custody.

(b) October 3, 2011-February 5, 2012. She was initially remanded into custody on charges of theft under $5000, assault peace officer and utter threat of death or serious bodily harm. After some time spent on custodial remand, she entered pleas of guilty to charges of theft under $5000 and assault peace officer, whereupon she was sentenced to a total of 167 days in custody.[2]

Ms Jahn alleged in a complaint to the Human Rights Tribunal of Ontario (HRTO) that she "was immediately placed in segregation and remained there for the duration of both incarcerations, spending 210 days in total isolation…in a 10 by 12 foot cell, with blocked out windows". Though MCSCS disputed Ms Jahn's assertions as to why she was placed in

[1] This narrative is derived from the pleadings before the Human Rights Tribunal of Ontario (HRTO) initiated by Ms Jahn and responded to by MCSCS within the context of her claim that she had been discriminated against by the MCSCS on the basis of her (mental) disability and her sex. It is important to note that because the matter was eventually settled between the parties, no formal findings of fact were made. Thus, the documents filed omit some facts that would no doubt have been disclosed had the matter proceeded through a hearing – such as the exact number of days spent in custodial remand prior to her guilty pleas. Nor do the pleadings reflect what consideration, if any, was given by the sentencing judge(s) to either the number of days spent on remand or to her conditions of confinement during that period of time.

[2] Once again the kinds of details referred to in the previous footnote are similarly absent from the pleadings filed.

segregation, the Ministry conceded that she "spent some time in segregation during these two periods of incarceration".[3]

After a period of negotiation between Ms Jahn's counsel, MCSCS and the Ontario Human Rights Commission[4], on September 24, 2013 Minutes of Settlement were entered into by the parties.[5] Schedule "A" of those Minutes of Settlement, entitled "Public Interest Remedies", required the Ministry to take steps to address:

- a variety of issues regarding its physical facilities, including agreement by the Ministry to build a new custodial institution in Brampton for adult women; special attention would be paid to the development of a variety of mental health assessment, placement and housing components;
- development of mental health screening tools and follow up assessment by a physician (if necessary);
- improvements in access to mental health services for incarcerated inmates;
- reforms to policies and practices regarding the placement and management of inmates in "administrative" and "disciplinary" segregation;
- reforms to "treatment plans" and "individualized mental health services" for inmates "with mental health issues" placed in either form of segregation, as well as the participation of physicians/psychiatrists as part of "5-day segregation reviews";
- improved mental health training for Ministry front line staff and managers;
- revisions to its Inmate Handbook "to reflect the rights and responsibilities of inmates";[6]
- statistical reports to be provided to the OHRC "concerning the number of female inmates at the Ottawa Carleton Detention Centre placed in segregation…" annually for a period of 3 years.

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[3] Ms Jahn's specification of the exact number of days she spent in segregation is likely correct. On the two sentences totaling 267 days, she could have (and likely did) earn remission of 1/3 of the days to be served, which reduced her total sentences to be served to 178 days (267-89). If she spent all of that time in segregation post-sentence, that would leave some 32 days (210-178) that she would have spent in segregation while on custodial remand. Assuming she entered her various guilty pleas early in the court process, that total figure would appear to be reasonable. In any event, the Ministry did not dispute Ms Jahn's calculation of the total amount of time spent in segregation.

[4] The OHRC had intervened in the litigation under s. 37(2) of the *Ontario Human Rights Code* with Ms Jahn's consent.

[5] Ms Jahn received some financial compensation from the Ministry "as compensation for injury to dignity, feelings and self-respect". The amount of that compensation is confidential as between the parties, and will not be referred to further in this Interim Report.

[6] For purposes of completeness I should indicate that MCSCS and the OHRC negotiated over revisions to the content of the Inmate Handbook for many months, but ultimately had little success in agreeing on the revisions. In mid-June 2015 Ms Jahn and the OHRC jointly initiated a "Settlement Contravention Application" before the HRTO on this issue. Once again a settlement was entered into between the parties, this time restricted to the content of a "Segregation Handout" for inmates placed in either administrative or disciplinary segregation.

Given the size of the Ministry and the need for substantial revisions to its policies and procedures, various time frames by which the Ministry was expected to comply with each of these "Public Interest Remedies" were agreed to by the parties.

In April 2017 the Ombudsman of Ontario released a Report on segregation in Ontario corrections which concluded that MCSCS was not complying with those portions of the "Jahn Public Interest Remedies" relating to segregation.[7] This was followed up a few weeks later by an Interim Report on segregation issued by Ontario's Independent Advisor on Corrections, which came to the same conclusions.[8] MCSCS immediately indicated (publicly) that it accepted the Independent Advisor's findings.

After some negotiation back and forth with the Ministry about its responses to these two reports, in September 2017 the OHRC initiated another Contravention Application with the HRTO, alleging *inter alia* that:

> "Four years ago, the Government of Ontario made a legally binding commitment to a vulnerable group of people – prisoners with mental health disabilities. Ontario explicitly recognized that segregation was harmful for this group and agreed, as part of a binding settlement agreement, to prohibit segregation for individuals with mental illness unless it would cause undue hardship. Four years later, two independent reviews have revealed that Ontario has not lived up to that commitment."

MCSCS responded by claiming that it had in fact "substantially complied" with the "Jahn Public Interest Remedies", and that these are "complex issues that are not amenable to a quick resolution".

Following more negotiations a further settlement was reached in January 2018.[9] Addressing the complexities referred to by the Ministry, the parties agreed that:

> "Ontario is engaging in a multi-year process to implement new overarching principles relating to living conditions in correctional institutions which will include creating alternative placements, supporting infrastructure, new staff and staff training."[10]

Against this backdrop the Ministry agreed to "comply operationally with the 2013 *Jahn v. MCSCS* settlement Public Interest Remedies", as well as to conduct a much broader system-wide comprehensive review of policies and their implementation, details of which may be found [COMM PLEASE MAKE LINK HERE]

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[7] The Ombudsman launched its review in light of the severity of issues raised in an increasing number of inmate complaints related to segregation. Ombudsman of Ontario, *Out of Oversight: Out of Mind: Investigation into how the Ministry of Community Safety and Correctional Services tracks the admission and placement of segregation inmates, and the adequacy and effectiveness of the review process for such placements* (Toronto: Office of the Ombudsman of Ontario, 2017).

[8] Howard Sapers, a former federal Correctional Investigator, had been appointed as an Independent Advisor on Corrections Reform in November 2016, with a mandate to review MCSCS' use of segregation. Independent Advisor on Corrections, *Segregation in Ontario: Independent Review of Ontario Corrections* (Toronto: Queen's Printer, 2017).

[9] Ms Jahn elected not to participate in this process.

[10] *Ontario Human Rights Commission v. Her Majesty the Queen in Right of Ontario as represented by the Minister of Community Safety and Correctional Services* January 16, 2018 Schedule "A" Preamble, clause 5.

The first element of this new settlement relevant to this background description was the creation of the position of an Independent Expert on human rights and corrections "to assist in implementing the terms of this consent order".[11] Prof. Kelly Hannah-Moffat "was mutually agreed upon by the Minister and the OHRC"[12] to act as the Independent Expert. Her duties can be broadly described as providing advice on the government's plan to track inmates placed in restrictive confinement and segregation, and on the way it releases public data.[13]

The second aspect of this new settlement was that MCSCS was required to "establish internal compliance mechanisms to monitor the implementation of and ongoing compliance with the terms of the *Jahn* consent order and the terms of [the January 2018] consent order".[14] Against this backdrop I am appointed as Independent Reviewer with an overall mandate "to report on compliance with the 2013 *Jahn* settlement agreement and the terms of this order as soon as reasonably possible".[15] According to the timeframes specified in the settlement, I am to produce an interim "progress report setting out the progress Ontario has made with respect to the commitments in this consent order which are to be completed prior to the date of the progress report".[16] I am then required, by September 30, 2019 to issue a final report containing my opinion regarding:

- The *Jahn* settlement remedies and terms of [the January 2018] consent order that have been complied with;
- The *Jahn* settlement remedies and terms of [the January 2018] consent order that remain outstanding;
- Any non-compliance with the *Jahn* settlement remedies and terms of [the January 2018] consent order, and if so, recommended steps with associated timelines for promoting compliance;
- The effectiveness of the accountability and oversight mechanisms put in place by Ontario, including the mechanisms for assessing undue hardship before placing individuals with mental health disabilities (including those at risk of suicide or self-harm) in segregation;
- Whether further changes are necessary to address the use of segregation for individuals with mental health disabilities (including those at risk of suicide or self-harm), and whether the ongoing use of segregation for this population is still necessary;
- Whether any changes are necessary to address the use of alternative housing or restrictive confinement for individuals with mental health disabilities (including those at risk of suicide or self-harm)

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[11] Ibid, clause 10.
[12] *Terms of Reference for the Independent Expert* "Method of Appointment"
[13] Ministry Press Release. More details are provided under the heading "Duties of the Expert" in her Terms of Reference.
[14] Schedule "A" clause 11.
[15] Ibid, clause 12
[16] Ibid, clause 14. The original date scheduled for production of this Progress Report was "in the Fall of 2018". Because of a series of difficulties principally regarding start up and production of data sets which could be properly analyzed by the Independent Expert, with the consent of both MCSCS and the OHRC, this date was delayed until February 28, 2019.

- Measurable changes to the treatment and experiences of individuals with mental health disabilities (including those at risk of suicide or self-harm) supported by human rights-based data and statistics.[17]

(The Consent Order specifies that "[t]he content of the final report is not limited to the above, and additional content can be included based on the discretion of the Independent Reviewer"[18]).

The original date scheduled in the consent order for production of this progress report was "in the Fall of 2018". Because of considerable hurdles encountered at various stages of this project, principally stemming from (1) delays in the appointment of the Independent Expert (2) delays in the production of data sets which could be properly analyzed by Prof. Hannah-Moffat and her team (discussed at length in her Report), and (3) MCSCS policy changes that continue to the present, the date for production of this Report was delayed until February 28, 2019 on the consent of both MCSCS and the OHRC.

2. Basic Facts and Figures About Ontario Corrections[19]:

Table 1: Adult Institutions: 2017/18 - Average Counts / Days Stay[20]

ALL INSTITUTIONS	Average Daily Count			Days Stay		
	Males	Females	Total	Males	Females	Total
Capacity/Days x Capacity**	8,184	678	**8,862**	2,876,302	262,639	**3,138,941**
Remand	4,698	384	**5,082**	1,714,855	140,045	**1,854,900**
Provincial Sentence	1,789	160	**1,949**	653,019	58,401	**711,420**
Intermittent Sentence*	396	20	**415**	62,122	3,089	**65,211**
Federal Sentence	124	8	**132**	45,327	2,815	**48,142**
Immigration	104	9	**114**	38,000	3,466	**41,466**
Other	19	0	**19**	6,766	107	**6,873**
INSTITUTIONAL TOTAL	**6,904**	**570**	**7,474**	**2,520,089**	**207,923**	**2,728,012**

* Intermittent sentence average count is the average weekend count, based on 157 "weekend" days rather than 365 days.

[17] Ibid, clause 15.
[18] ibid
[19] Tables 1 through 6 include data provided by the Statistical Analysis Unit, Research and Innovation Branch, MCSCS. Additional data is available on the Ministry website under the heading Jahn Settlement – Data on Inmates in Ontario.
[20] Ministry Statistical personnel advise that, for technical reasons, "days stay" should not necessarily be equated with "length of stay".

Table 2: Adult Community Caseload: 2017/18 - Average Month-End Balance by Supervision Status

Supervision Status	Total Province		
	Male	Female	Total
Probation	33,903	6,772	**40,675**
Community Service Orders*	4,239	1,204	**5,443**
Conditional Sentence	1,650	443	**2,093**
Parole	217	25	**242**
Total Community Caseload	**35,769**	**7,241**	**43,010**

* Community service orders are conditions of probation - these cases are included in the probation caseload figures

Totals may differ from the sum of the components due to rounding.

From these two tables it may be seen that approximately 7,300 inmates (over whom the provincial Ministry has jurisdiction) were incarcerated in a provincial adult institution on an average day in fiscal 2017/18. This amounts to about 15% of all persons being supervised by the Ministry.

Table 3: Admissions to Adult Institutions: 2017/18[21] - Adults

Location - All Admissions	Total Admissions			Sentenced Admissions[1]			Remand Admissions		
	Males	Females	Total	Males	Females	Total	Males	Females	Total
Algoma Treatment and Remand Centre	590	93	683	274	28	302	456	85	541
Brantford Jail	560	0	560	145	0	145	478	0	478
Brockville Jail	553	0	553	232	0	232	404	0	404
Central East Correctional Centre	4,260	616	4,876	1,853	182	2,035	3,197	535	3,732
Central North Correctional Centre	2,406	405	2,811	1,271	168	1,439	1,914	353	2,267
Elgin-Middlesex Detention Centre	2,685	448	3,133	988	111	1,099	2,317	406	2,723
Fort Frances Jail	219	69	288	40	7	47	198	63	261
Hamilton-Wentworth Detention Centre	2,635	666	3,301	1,402	184	1,586	2,230	625	2,855
Kenora Jail	1,419	381	1,800	392	107	499	1,340	352	1,692
Maplehurst Complex	8,594	2	8,596	3,103	0	3,103	6,735	2	6,737
Monteith Complex	675	154	829	303	59	362	572	137	709
Niagara Detention Centre	1,778	0	1,778	561	0	561	1,505	0	1,505
North Bay Jail	655	101	756	264	32	296	533	84	617
Ottawa-Carleton Detention Centre	3,483	585	4,068	1,706	224	1,930	2,532	475	3,007
Quinte Detention Centre	1,702	390	2,092	880	141	1,021	1,376	335	1,711
Sarnia Jail	545	96	641	158	24	182	479	93	572
South West Detention Centre	2,091	271	2,362	1,072	125	1,197	1,854	243	2,097
Stratford Jail	242	0	242	131	0	131	175	0	175
Sudbury Jail	796	133	929	407	53	460	631	107	738
Thunder Bay Correctional Centre - Females	6	306	312	3	84	87	2	284	286
Thunder Bay Jail	1,221	0	1,221	401	0	401	1,117	0	1,117
Toronto East Detention Centre	2,295	0	2,295	811	0	811	1,860	0	1,860
Toronto South Detention Centre	7,197	17	7,214	2,216	8	2,224	6,225	13	6,238
Vanier Centre for Women - Milton	3	2,853	2,856	0	638	638	4	2,507	2,511

1. Sentenced admissions are actually sentences to incarceration imposed during the year. The offender may have been in custody on remand at the time of sentencing, so it is not a physical admission. Because there is overlap between remand admissions and sentences imposed (sentenced admissions), they total more than the total institutional admissions. Sentenced admissions also includes federally sentenced offenders.
* Note: where female admission exists in an all male institution, it is the result of a transgender alert.

[21] Tables referring to 2017/18 refer to Fiscal 2017/18

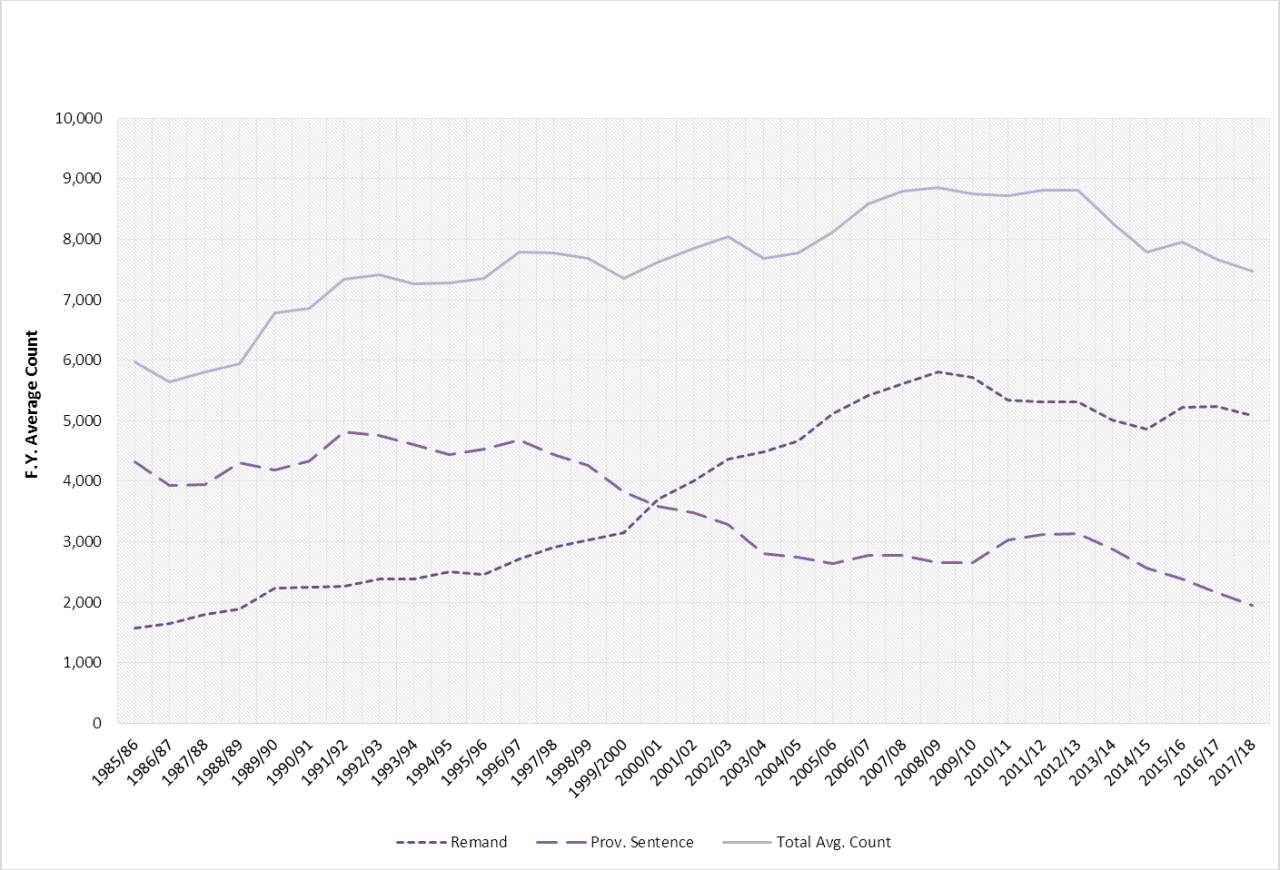
Table 4: Adult Institutions: 2017/18 - Time Served: Remands Ending in 2017/18

Length Category	Males	Females	Total	% of Total
1 to 3 Days	8,769	1,939	10,708	24.3
4 to 7 Days	7,143	1,449	8,592	19.5
8 to 14 Days	5,145	994	6,139	14.0
15 to 21 Days	2,844	522	3,366	7.7
22 to 31 Days	2,509	416	2,925	6.7
>1 to 3 Months	6,539	861	7,400	16.8
>3 to 6 Months	2,579	194	2,773	6.3
>6 to 12 Months	1,262	68	1,330	3.0
>1 Year	714	30	744	1.7
TOTAL	**37,504**	**6,473**	**43,977**	**100.0**
Average Length of Remand	45.3	23.1	42.0	…
Median Length of Remand	11.0	7.0	10.0	…

Table 5: Adult Institutions: 2017/18 - Time Served: Provincial Sentences Ending In 2017/18

Length Category	Males	Females	Total	% of Total
1 to 7 Days	3,748	627	4,375	27.9
8 to 14 Days	1,742	290	2,032	12.9
15 to 29 Days	2,255	329	2,584	16.5
1 Month	350	44	394	2.5
>1 to <3 Months	2,947	334	3,281	20.9
3 Months	76	6	82	0.5
>3 to <6 Months	1,391	112	1,503	9.6
6 Months	100	5	105	0.7
>6 to <12 Months	888	52	940	6.0
12 Months	32	1	33	0.2
>12 to <18 Months	346	10	356	2.3
18 Months	0	0	0	0.0
>18 to <24 Months	6	1	7	0.0
>2 Years	0	0	0	0.0
TOTAL	**13,881**	**1,811**	**15,692**	**100**
Average Provincial Sentence	60.6	36.0	57.8	…
Median Provincial Sentence	20.0	14.0	20.0	…

Table 6: Institutional Average Counts: 1985/86 - 2017/18



Tables 4-6 reflect over time the changing nature of custodial populations. Though the figure varies slightly over the last few years, the remand population consistently amounts to about 65% of admissions, while the sentenced population amounts to about 35%. A 2017 study conducted for the Ministry of the Attorney General analyzes lengths of time spent in remand.[22] On January 24, 2019 *Juristat* released its annual national review of adult criminal court processing statistics; it pointed out that in fiscal 2016/2017 there was "a slight increase" in the "median charge processing time" from 108-120 days.[23] Obviously, this has an impact on the lengths of time some inmates spend in remand custody.

[22] "Looking Behind (Prison) Walls: Understanding Ontario's Remand Population". Report to Ministry of the Attorney General, Ontario 5 January 2017 (on file).
[23] "Adult Criminal and Youth Court Statistics in Canada 2016/2017" (release 24.1.2019).

Table A-1[24]: Daily segregation and custodial counts in Ontario correctional facilities, yearly average 2006 – 2016

Average daily population counts, Ontario correctional facilities			
Year	**Total custodial population**	**Segregated population**	**Percentage of custodial**
2006	8,533	415	5%
2007	8,730	465	5%
2008	8,905	457	5%
2009	8,723	441	5%
2010	8,761	460	5%
2011	8,710	475	5%
2012	8,886	472	5%
2013	8,436	468	6%
2014	7,847	495	6%
2015	7,894	525	7%
2016	7,766	575	7%

Source: Ministry of Community Safety and Correctional Services

Table A-2: Yearly averages of daily male custodial and segregation population counts in Ontario correctional facilities, 2006-2016

Average daily population counts, Ontario correctional facilities			
Year	**Total male custodial population**	**Male segregated population**	**Percent of men in custody in segregation**
2006	7957	387	5%
2007	8112	440	5%
2008	8283	435	5%
2009	8128	417	5%
2010	8174	435	5%
2011	8106	447	6%
2012	8238	443	5%
2013	7799	440	6%
2014	7262	466	6%
2015	7277	491	7%
2016	7155	541	8%

Source: Ministry of Community Safety and Correctional Services

[24] Tables A-1 to A-5 and figures 2 to 5 are taken from Independent Reviewer of Corrections *Segregation in Ontario* March 2017.

Table A-3: Yearly averages of daily female custodial and segregation population counts in Ontario correctional facilities, 2006-2016

Average daily population counts, Ontario correctional facilities			
Year	**Total female custodial population**	**Female segregated population**	**Percent of women in custody confined to segregation**
2006	576	28	5%
2007	618	25	4%
2008	623	22	4%
2009	595	24	4%
2010	587	25	4%
2011	604	28	5%
2012	648	29	5%
2013	637	28	4%
2014	584	28	5%
2015	617	35	6%
2016	611	34	6%

Source: Ministry of Community Safety and Correctional Services

Figure 2 - Yearly averages of daily counts of adults in custody and segregation in Ontario correctional institutions, 2007-2016.

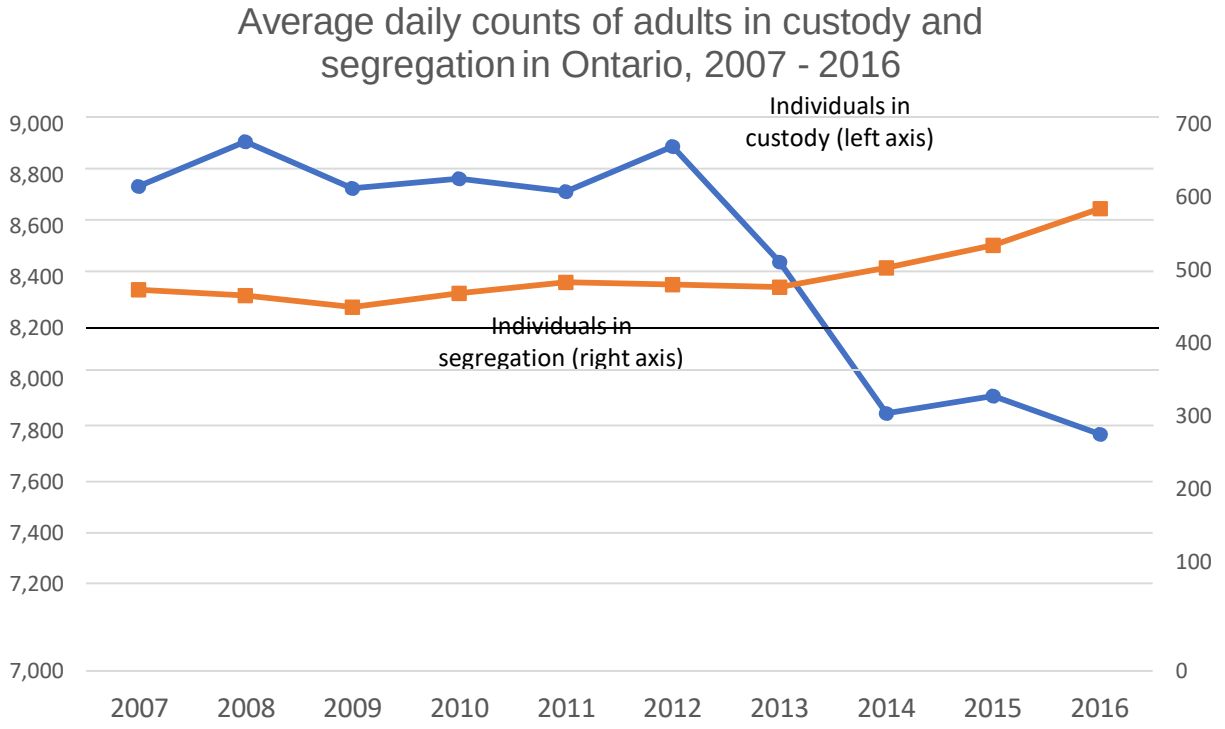
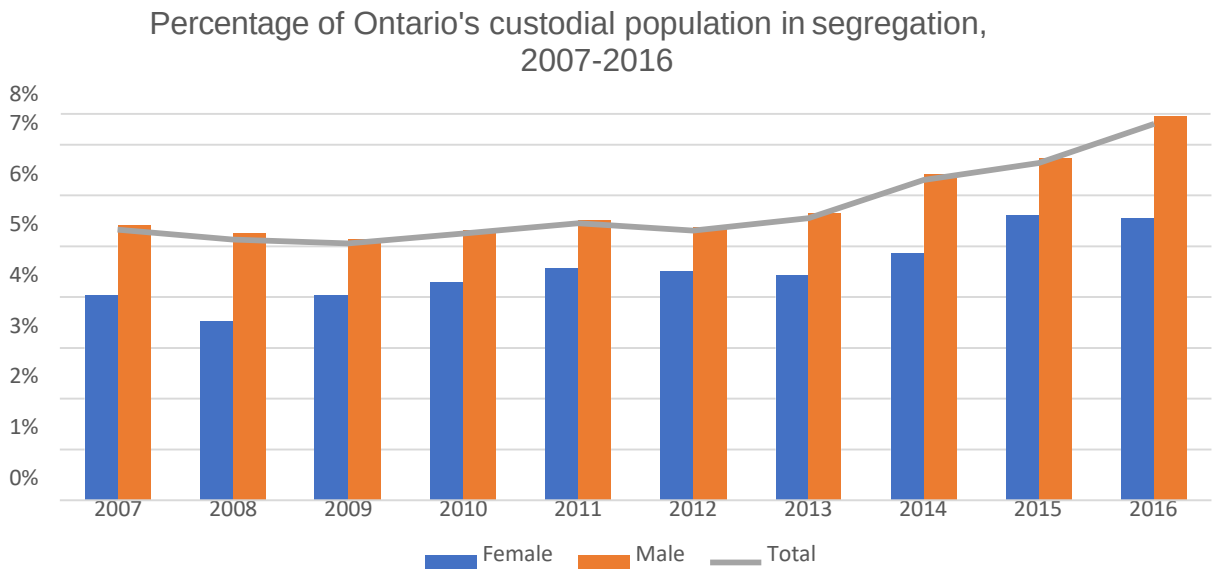


Figure 3 - Percentage of Ontario's male, female and total custodial populations in segregation, 2007- 2016. Calculations based on yearly averages of daily counts of adults in custody and segregation.



Figures very recently provided by British Columbia provincial corrections indicate that "for fiscal year 2017/18, the average daily count of individuals housed in a segregation unit was 125, which represents approximately 4.8% of the total inmate population".[25]

[25] January 23, 2019 email from Director, Policy and Programs, Strategic Operations Division, BC Corrections. This discrepancy will obviously need to be studied further to ascertain if the criteria used by the two provinces to place and maintain inmates in segregation are different.

Figure 4 - Admissions to segregation in Ontario correctional facilities in 2016, broken down by reason for admission to segregation. “Multiple reasons provided” refers to inmates who were admitted and/or continuously held in segregation for multiple reasons.

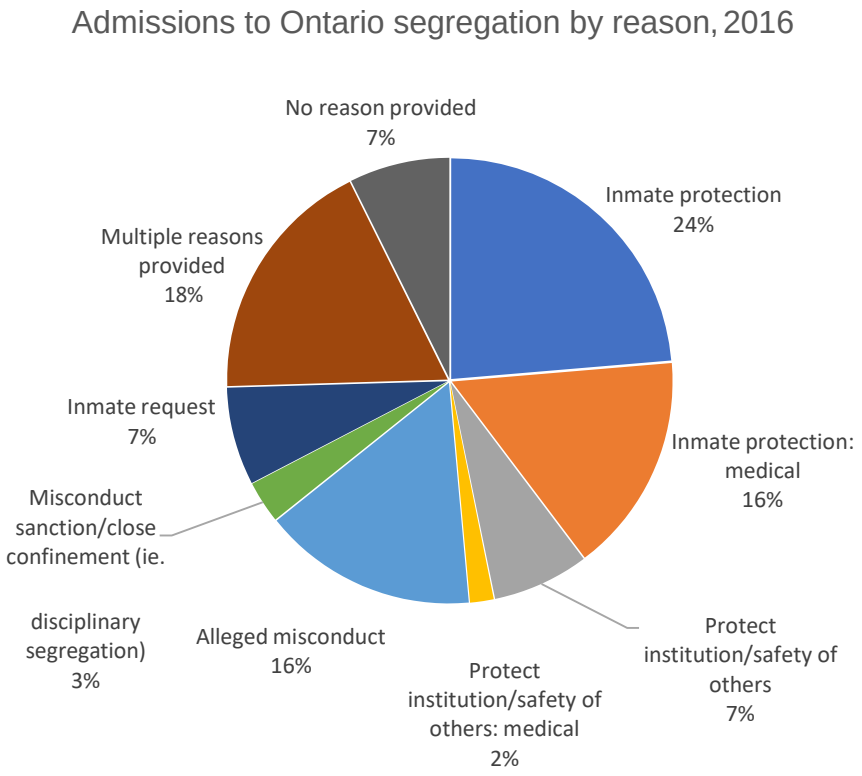


Figure 5 - Legal status of individuals in segregation on six random daily snapshots between July and December 2016. Note that not all institutions reported on the relevant dates. Category "Other" includes immigration holds, extradition holds, federal sentences, national parole violations, remand & immigration holds, and remand & national parole violations

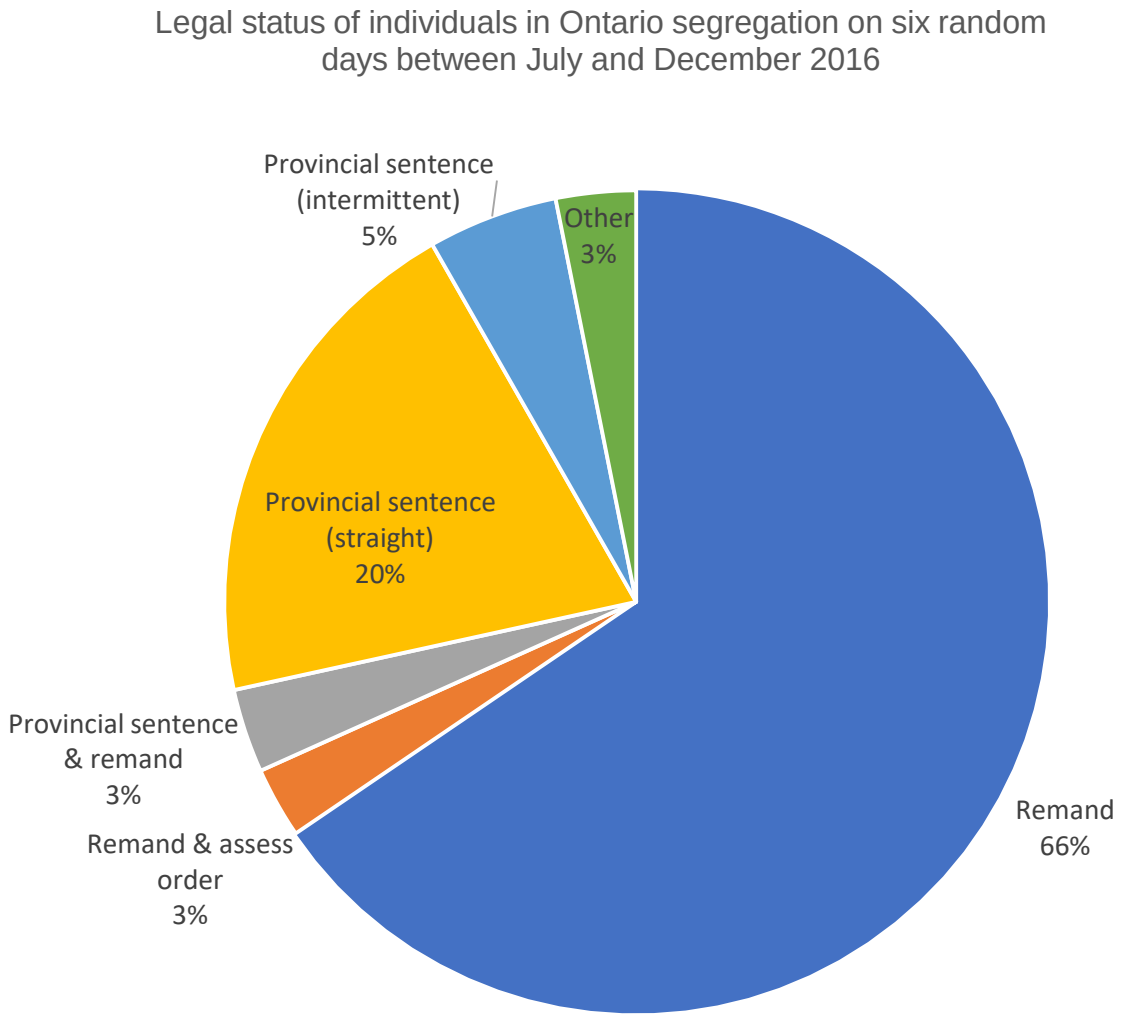


Table A-4: Percentage of custodial population in segregation by individual institution, yearly averages 2013-2016

Region	Institution	2013	2014	2015	2016
Central Region	Maplehurst Correctional Complex	2%	2%	3%	4%
	Ontario Correctional Institute	1%	1%	1%	1%
	Toronto East Detention Centre	11%	15%	16%	16%
	Toronto South Detention Centre	N/A	9%	6%	3%
	Toronto South Detention Centre - Intermittent Centre	4%	5%	4%	5%
	Toronto Jail (Closed Nov 27, 2013)	6%	N/A	N/A	N/A
	Toronto West Detention Centre (Closed Nov 14, 2014)	4%	6%	N/A	N/A
	Milton-Vanier Centre Detention Centre	3%	4%	4%	5%
	Milton-Vanier Centre Correctional Centre	0%	0%	0%	0%
Eastern Region	Brockville Jail	9%	9%	9%	11%
	Central East Correctional Centre	8%	8%	7%	9%
	Ottawa-Carleton Detention Centre	5%	5%	5%	13%
	Quinte Detention Centre	8%	7%	10%	10%
	St. Lawrence Valley Corr. & Treat. Centre	0%	0%	0%	0%
Northern Region	Algoma Treatment & Remand Complex	7%	8%	9%	9%
	Central North Correctional Centre	9%	9%	10%	10%
	Fort Frances Jail	2%	2%	7%	5%
	Kenora Jail	2%	2%	3%	4%
	Monteith Correctional Centre	3%	3%	2%	N/A
	Monteith Jail	7%	9%	9%	8%
	North Bay Jail	7%	7%	9%	10%
	Sudbury Jail	9%	13%	20%	17%
	Thunder Bay Correctional Centre	3%	3%	3%	3%
	Thunder Bay Jail	10%	11%	7%	10%
Western Region	Brantford Jail	3%	3%	2%	0%
	Chatham Jail (Closed May 16, 2014)	1%	2%	N/A	N/A
	Elgin-Middlesex Detention Centre	6%	5%	6%	6%
	Elgin-Middlesex DC - Inter. (opened Sept 2016)	N/A	N/A	N/A	0%
	Hamilton-Wentworth Detention Centre	3%	3%	3%	5%
	Niagara Detention Centre	8%	10%	12%	13%
	Sarnia Jail	2%	2%	2%	3%
	South West Detention Centre (opened July/Aug 2014)	N/A	9%	9%	8%
	Stratford Jail	4%	4%	3%	4%
	Windsor Jail (closed Aug 2014)	3%	3%	N/A	N/A

Source: Ministry of Community Safety and Correctional Services

Table A-5: Ontario institutions, construction date* and current operational capacity

Institution	Year Constructed	Age in 2017	Current Operational Capacity**
Brockville Jail	1842	175	48
Brantford Jail[26]	1850	167	87
Stratford Jail	1901	116	50
Fort Frances Jail	1908	109	22
Thunder Bay Jail	1928	89	120
Sudbury Jail	1928	89	168
Kenora Jail	1929	88	154
North Bay Jail	1929	88	108
Monteith Correctional Complex	1960	57	170
Sarnia Jail	1961	56	38
Thunder Bay Correctional Centre	1965	52	124
Quinte Detention Centre	1970	47	229
Ottawa-Carleton Detention Centre	1972	45	496
Ontario Correctional Institute	1973	44	186
Niagara Detention Centre	1973	44	236
Maplehurst Correctional Complex	1976	41	1,048
Toronto East Detention Centre	1977	40	368
Elgin-Middlesex Detention Centre	1977	40	338
Hamilton-Wentworth Detention	1978	39	466
Algoma Treatment & Remand	1990	27	141
Central North Correctional Centre	2001	16	1,103
Vanier Centre for Women (Milton)	2001	16	292
Central East Correctional Centre	2001	16	1,039
St. Lawrence Valley Correctional & Treatment Centre	2003	14	100
Toronto Intermittent Centre	2011	6	290
Toronto South Detention Centre	2012	5	880
South West Detention Centre	2013	4	282

*Note that this table only reflects original construction dates, and does not capture major projects that were undertaken to retrofit or add capacity to an existing institution.
**Based on operating capacity on January 24, 2017

[26] Brantford Jail closed in December 2017

3. The Plan of this Report:
   This progress report is divided into the following sections:

   (1) My report with respect to the compliance to date by Ontario according to the 2013 and 2018 *Jahn* settlements.
   (2) An Executive Summary from the Independent Expert and her team as to their views on what parts of the consent order have been complied with, and those which remain outstanding. This is accompanied by a series of recommendations from the Independent Expert.
   (3) A commentary from myself about legal aspects of major policy initiatives very recently announced by MCSCS in its amendments to its *Placement of Special Management Inmates* (PSMI) and *Discipline and Misconduct* (D&M) policies. As will be seen, in my view there are a number of unaddressed (or inadequately addressed) issues that continue to be troubling in relation to the placement and maintenance of mentally ill prisoners in what are now termed "conditions that resemble segregation". Several recommendations are made to address these issues.
   (4) An analysis by myself of what can be done to improve MCSCS' linkages with other components of Ontario's criminal justice system, particularly with local "court management committees" comprised of the judiciary, legal professionals and civilian stakeholders. Several recommendations are made to address what I consider to be a series of ongoing problems in this area insofar as they affect accused persons and offenders considered to be mentally ill.
   (5) A brief description of elements of the consent order that will need to be continually monitored and examined by both the Independent Expert and the Independent Reviewer before a final report can be produced.

SUMMARY EVALUATION OF MCSCS' COMPLIANCE WITH *JAHN* SETTLEMENTS

Pursuant to the 2013 and 2018 *Jahn* settlements, MCSCS is responsible for implementing 31 time-specific deliverables by September 2019. These focus on five key themes:

- Data Collection[27]
- Redefining Segregation[28]
- Segregation Reporting and Tracking[29]
- Enhanced Mental Health Screening[30]
- Compliance and Implementation[31]

The Ministry reports that to date 26 deliverables have been completed and reported to the Ontario Human Rights Commission, the Independent Expert and the Independent Reviewer. The remaining deliverables are due to be initially completed between April 19 and October 31, 2019[32]; some deliverables are to be completed on a continuing annual basis.

I am entirely satisfied that Ontario has to date complied with meeting the deadlines for various schedule items specified in the consent orders in a timely manner. I am also satisfied that the Ministry is in the process of making substantial improvements in tracking segregation and restrictive confinement, as well as undertaking a variety of reforms to some of its policies and procedures. Finally, I am satisfied that the remaining deliverables are well on track to be completed in 2019. For these efforts, which have involved significant commitments of institutional and corporate staff time and energy, as well as some considerable reorganization of Ministry corporate structures, the Ministry should be commended.

Having said this, I join with the Independent Expert when she writes (in the next section of this Report): "it is my opinion that the data reviews herein addressed were in many cases premature as Ontario is undertaking a variety of reforms to policies and procedures. Ontario's largely paper-based records systems [have] also impeded data collection and integrity audits. Institutions vary in their efforts to reduce segregation. There remain significant confusion and inconsistencies among Ministry divisions regarding adherence to the intent, principles, and substance of the Order, impediments which to

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[27] Schedule A-2/A-4 (completed February 20 and March 20, 2018); Schedule A-3/A-5 (completed April 16, 2018); Schedule A-6 (completed June 16, 2018); Schedule A-7 (completed July 31, 2018); Schedule B-15 (completed October 31, 2018).
[28] Schedule B-1 to B-6 (completed July 6, 2018); Schedule B-7 (completed December 17, 2018).
[29] Schedule A-9 (completed February 12, 2018); Schedule B-11 (completed July 31, 2018); Schedule B-12 (completed September 27, 2018); Schedule B-10 (completed December 17, 2018).
[30] Schedule B-14 (completed February 14, 2018); Schedule B-5 (completed July 31, 2018).
[31] Schedule A-10/12 (completed February 28, 2018).
[32] Schedule B-13, B-10(b), B-16, B-8 and B-17.

date have hindered the full implementation of the terms of the Order". I thus share the Independent Expert's concerns and conclusions that she is not yet prepared to conclude that Ontario is in compliance with the *Jahn* settlement items she mentions in her Executive Summary. More work will need to be done before she and I would be prepared to complete our assessments of Ontario's levels of compliance with the various terms of the consent orders.

I also join with the Independent Expert where she points out that one of the main reasons Ontario's progress to date has been somewhat scattered arises from the fact that the Ministry often seems unwilling or unable to commit itself to adequate working definitions on terms central to our work such as "mental illness", "major mental illness", "care/treatment plans", "undue hardship", "oversight mechanisms", "diversion of mentally ill inmates from (administrative or disciplinary) segregation". Both of us have shared legal and criminological literature and numerous evaluations from other jurisdictions (both Canadian and international) which are currently wrestling with similar issues among their mentally ill penal populations. When we point out the difficulties caused by non-existent or inadequate definitions when we try to conduct the analyses necessary to evaluate the Ministry's compliance, we are often greeted with vague promises that "these matters are under consideration, and that we will be advised in due course". If the Ministry expects us to be able to complete our allotted tasks within the current timeframes the types of definitions mentioned in the Independent Expert's Executive Summary and in the next sections of this Report need to be decided upon by the Ministry forthwith.

Since my appointment I have certainly noted a considerable "sea change" in attitudes towards the tasks the Independent Expert and I have undertaken. Where once there was ample evidence of resentment about and resistance towards the inquiries, requests and demands that our Terms of Reference require us to investigate, it is clear that many MCSCS officials – both corporate and line staff - now accept that "*Jahn* should not be seen as an obligation, but rather as an opportunity to improve treatment of mentally ill inmates and probationers". Such attitudes should be acknowledged and applauded as we *all* attempt to create policies, procedures and structures that will hopefully reduce the chances of other *Jahn*- type cases in the short and long term future.

INDEPENDENT EXPERT EXECUTIVE SUMMARY

The full-length version of my Submission evaluates Ontario's progress and compliance to the Jahn Consent Order (hereafter the Order) up to December 31, 2018. Compliance to the Order is evaluated both in terms of the spirit and principles of the Order, as well as specific schedule items. The 36 recommendations are based on my understanding of the processes and outcomes thorough consultations with various staff members at the corporate and institutional levels, and the Corrections Ministry Employer-Employee Relations Committee (MERC), site visits, and table discussions with civilian stakeholders. Overall, Ontario has demonstrated a commitment to meeting the deadlines specified in the Order for various schedule items and to improving its tracking of segregation and restrictive confinement. However, it is my opinion that the data reviews herein addressed were in many cases premature as Ontario is undertaking a variety of reforms to policies and procedures. Ontario's largely paper-based records systems also impeded data collection and integrity audits. Institutions vary in their efforts to reduce segregation. There remain significant confusion and inconsistencies among Ministry divisions regarding adherence to the intent, principles, and substance of the Order, impediments which to date have hindered the full implementation of the terms of the Order.

Principles of the Consent Order

As stipulated in the Order, Ontario and the Ontario Human Rights Commission (OHRC) agreed that segregation should be used only as a measure of last resort. The available data suggest, however, that **segregation remains a routine approach to population management, including for those with identified mental health concerns.** Women comprised 12.4% of those subjected to segregation, whereas men comprised 87.6% of those placed in segregation (Ontario). The 30-day report for September 2018 shows that for those who had segregation placements lasting 30 or more days, a higher proportion of female inmates (80%) were reported as having identified mental health concerns, than were men (60%).[33] These rates of individuals with identified mental health concerns in conditions of prolonged segregation are troubling.

The United Nations has defined prolonged segregation as that exceeding 15 days; it should be noted that persons can experience psychological damage immediately upon placement to segregation and that this damage can be irreversible well-before the 15-day threshold. How individuals will react to segregation is not predictable, and can be related to histories of abuse, trauma, violence, gender, and pre-existing mental health conditions. For these reasons, it is not possible to accurately predict who will be

[33] Ontario uses an OTIS-based (Offender Tracking Information System) mental health alert system to alert staff of required precautions, behaviour requiring monitoring, and/or services to be provided. This may refer to various signs and symptoms of mental health conditions and behavioural tendencies and is not limited to a clinical diagnosis. Any staff member who is involved with the inmate, including a community and institutional staff, may record or request that a mental health alert be recorded in OTIS. Mental health alerts that have not been confirmed by a healthcare professional remain as unverified alerts in the OTIS alert screen.

detrimentally affected by isolation, nor at what time point. Further, the use of segregation presents a public safety concern as remanded prisoners held in segregation can be released without discharge planning or having transitioned through less restrictive conditions of confinement. Various jurisdictions have not only eliminated the use of administrative solitary confinement, but for public safety reasons, now prohibit the direct release of someone in solitary confinement directly to the community. I have shared materials related to best practices with Ontario, yet I am not confident that these materials are being meaningfully considered or used to inform evidenced-based reforms to segregation practices to limit its use.

Disciplinary Segregation

I remain concerned about the use of disciplinary segregation for those with identified mental health concerns. Given that those awaiting the adjudication of an institutional misconduct will be held in administrative segregation, it is not clear how the Order's requirement to not segregate those with identified mental health needs will be met in this circumstance. For example, 26.3% of those segregated for an alleged misconduct, and 28.6% of those in close confinement during the month of September 2018, were identified as having mental health needs. Although the revised Discipline and Misconduct (DM) policy was implemented on July 6, 2018, Ontario has not turned its attention to how inmates with mental illness who are accused and/or found guilty of institutional misconducts will be diverted from segregation.

Alternative Housing & Restrictive Confinement

As stipulated in schedule item B-7, Ontario was to introduce a policy standardizing alternative housing by July 6, 2018 (revised), with these alternative housing placements applied across institutions by December 31, 2018. To my knowledge, the revised Placement of Special Management Inmates (PSMI) policy represents the culmination of Ontario's response to B-7. It contains four alternative placement categories for inmates (behavioural care, managed clinical care, stabilization, and supportive care) who cannot be housed in general population.

Overall, the PSMI requires revision to ensure clearer parameters and standards to facilitate Ontario's operational compliance with the requirements of the Order. **Similar to the Independent Reviewer, I am troubled by the absence of review and oversight mechanisms for its four newly introduced placement types.** Behavioural Care placements, for example, could become de-facto segregation as difficult to manage prisoners with mental health alerts might be diverted from administrative segregation as per the PSMI. Such placements remain permissible and lack robust admittance, release, and oversight provisions. The slippage between segregation and specialized care remains possible because Ontario has not set hard time-out-of-cell parameters for specialized care that exceed the two-hour threshold marking segregation. This increases the likelihood that inmates will experience these placements as the same as segregation; from an operational standpoint these placements will also be difficult to track.

Similarly, Ontario has recently defined "restrictive confinement" as conditions of confinement that are less restrictive than segregation, yet more restrictive than those in general population. This definition, which is consistent with that set out in the Order, is

contained the PSMI policy dated December 17, 2018. However, provisions for its tracking, monitoring, and reviewing are yet to be not elaborated despite the Order's clear intent to prevent the systemic slippage between restrictive confinement and segregation of vulnerable individuals.

The PSMI maintains the centrality of administrative segregation to prison management, and the segregation of those with identified mental health concerns remains permissible to the point of undue hardship. Despite this caveat, operationally Ontario does not have a process for consistently conducting and documenting the undue hardship analyses. Therefore, I remain concerned that this provision will have a negligible effect on the Province's use of segregation.

Mental Illness

Given the centrality of mental illness and disability to the Order, the identification and appropriate management of those with mental health concerns are crucial to Ontario's human rights-based requirements. The Order also requires a clear and consistent working definition of 'major mental illness.' At the time of my report, Ontario did not have a clear, consistent, or operationalizable definition of mental illness. To date, I remain unclear as to whether Ontario has provided a definition and/or guidance to the field regarding what constitutes major mental illness or how to accommodate and manage those with this condition. Both the recently revised PSMI policy (December 17, 2018) and the Mental Health Services policy ([MHS], July 31, 2018) do not define major mental illness.

Overall, these gaps have caused confusion and can have the effect of preventing meaningful communication for nurses and clinical staff in institutions; for correctional staff who do not receive sufficient information to appropriately manage inmates with mental health concerns; for those at regional, corporate, and ministerial levels who need a clear picture of the needs of populations in various institutions; and for data integrity purposes because it is impossible to understand with clarity how and why segregation is used for those with identified mental health concerns.

I have advised Ontario to adopt a clearer working definition of mental illness and to define the parameters surrounding major mental illness. This is necessary to ensure consistent and appropriate management and treatment of those experiencing mental health concerns, and to ensure proper data collection and monitoring of compliance. Mental health is a fluid and dynamic issue. Therefore, the absence of documented processes for the ongoing monitoring and intervention of mental health is concerning.

Based on my involvement in the data review processes, it became also evident that mental health alerts are not accurate indicators (even when verified) of current mental health needs. Policies and procedures surrounding the activation and expiration of alerts continue to be applied inconsistently, and there is little communication between community services and corrections. This impedes continuity of care. Inmates often have multiple active alerts, some of which are entered by community services and have not been verified by correctional mental health staff. Consequently, the Ministry's reliance on the presence of mental health alerts and treatment plans as indicators of the need to

accommodate Code-related factors has remained inadequate. The Ministry is reforming its alert system and implementing processes for verifying all alerts, as required by the Order.

Based on my consultations with various Ministry representatives, further consultation is needed on mental health screening tools. I remain concerned about the use of the Brief Jail Mental Health Screen. There has been considerable attention to the use of assessment tools for Indigenous persons, Black persons, and women. Some academic literature has shown that tools can have a discriminatory *impact* upon women and non-white persons. Given the high rates of mental illness amongst criminalized persons, mental health screening, assessment, and treatment are paramount to the spirit of the Order, effective corrections, and public safety. Ontario should undertake a culturally-informed and gender-based evaluation of how its current mental health screening tools are being used in its institutions, and familiarize itself with the considerable literature on gender-responsive classification, screening/assessment, as well as best practices.

Gender-Responsive Corrections

An overarching concern remains about the marginalization of gender-responsivity in Ontario's response to the Order. A considerable body of literature produced over the last three decades about women's corrections exists. Research in this field consistently shows that because women differ from men in their reasons for offending, their experiences of trauma and/or abuse, and institutional adjustment in prison settings; it is discriminatory, let alone ineffective, to manage women in criminal justice systems designed for men. From a human rights perspective, gender-responsivity is an issue of substantive equality.

Gender responsiveness (GR) requires an understanding of, and responsiveness to, social and cultural positions, histories and experiences of women in assessment, programming, and service delivery. Additionally, GR necessitates an intersectional understanding of how gender inequalities are compounded for certain groups of women (because of their age, ethnicity, race, mental health/disability, etc.). GR requires jurisdictions and service providers to identify and meaningfully address any intersectional barriers that arise form women who are also members of other equity groups (i.e., Indigenous women, black women, women with mental health concerns, and those with precarious immigration statuses). In the context of incarceration, gender responsivity requires more than an acknowledgement of gender. GR requires that correctional systems provide evidence-based programmes and services that are informed by a contextualized understanding of women's experiences.

Thus far, the Ministry has not demonstrated an awareness of the gender-responsivity literature or best practice, nor have they meaningfully engaged my advice on this issue. Policies and practices list gender as an axis of identity, but do not contain gender-responsive approaches as per my advice. This is a significant oversight that requires remedy in order for Ontario to meet its human rights obligations.

Care Plans

Following the 2013 Jahn Settlement, Ontario implemented care plans as required by Public Interest Remedy (PIR) 4. As per this PIR, Ontario is required to develop an appropriate management plan for inmates who screen positive for mental health issues via a gender-responsive and evidence-based mental health screening tool. Although the initial settlement refers "treatment plan," I have been advised that Ontario has responded to its obligation by developing a care plan template consistent with its requirements under PIR 4. Care plans include fields for an individual's management plan, intervention strategies, referral information, and discharge planning. Despite the clear requirement stipulated in the Order, Care plans are seldom used, and when extant, are insufficiently developed.

PIR 4 and the current care plan form indicate that the details collected are meant to facilitate the proper care and the accommodation of Code-protected factors for inmates who suffer from mental illnesses. Information contained in the care plans is meant to guide the work of front-line staff who are most frequently in contact with inmates including the security staff. The Ministry's interpretations of privacy law, however, seemingly impede its operational compliance to the requirements of PIR 4. Notably, there exists significant reluctance to share pertinent information and management strategies—even when confidentiality around diagnosis and medication are maintained—amongst inter-professional team based on privacy concerns. This gap can have the effect of preventing human rights-based accommodations.

I have shared materials from other jurisdictions on best practices for managing those with mental illness in a manner that upholds human rights and provides appropriate accommodation; these materials have also included policy, templates and operational instructions related to behaviour management plans from other jurisdictions. Ontario's interpretation of privacy requirements combined with the operational realities of its prisons results in a situation where front-line staff have little meaningful access to information about the needs of inmates. As detailed in my recommendations, the Ministry must provide clear direction to the field about privacy regulations and develop sustainable systems to share information required to accommodate Code-related factors.

Segregation Tracking & Reviews

Consistent with the requirements of the Order, Ontario has developed segregation tracking mechanisms. In particular, the Ministry has implemented a manual segregation tracking form and did pilot a smart-phone based tracking system. The PSMI also includes a section requiring institutions to record and track all placements manually, which are then recorded as a "Care in Placement" (CIP) entry in OTIS. In various institutions, data entry positions have been created to input segregation tracking data on a daily basis. In this regard, Ontario should be commended for its commitment to instituting a manual segregation tracking system that is resource- and time-intensive.

Because segregation is now a condition of confinement rather than a physical unit, tracking those in conditions of restrictive confinement and on the threshold of segregation requires attention. To this end, I recommend that the Ministry's proposed three-tiered procedure for tracking time-out-of-cell be formalized in policy. Since restrictive confinement is now defined in the PSMI, Ontario should turn its attention to developing and instituting tracking, accountability, and oversight mechanisms for those held in conditions of restrictive confinement, as required by the Order. As well, the segregation reports submitted to senior ministry officials and to the Minister's office require revision in format and content to ensure that the information contained therein is sufficiently detailed in terms of mental health concerns, alternatives and strategies to segregation, and all efforts to accommodate Code-related needs. The Ministry should implement review mechanisms for restrictive confinement that are similar to those used to monitor segregation.

Undue Hardship

Alternatives to segregation are meant to be exhausted to the point of undue hardship. The Ministry has devised a thorough document meant to guide how institutional staff undertake an undue hardship analysis. However, because undue hardship is a stringent legal test, institutional staff should not be expected to perform such an analysis. I had previously recommended that the field be directed to approach human rights principles as a "duty to accommodate." In this way, those in the field would have a positive onus to meaningfully consider and appropriately respond to Code-related factors. Ontario has revised the PSMI to inform staff of their "duty to accommodate short of undue hardship" (see s.4.5, 4.5.2, and 5.2.2, for example), but further revisions are needed. Staff require training and clear policy guidance to implement a proactive approach for the accommodation of Code-related factors. Changes such as these can help shift operational practice. Namely, the Ministry can move beyond documenting the presence of various Code-related factors, to Code-related factors shaping the conditions of confinement and management of an individual in its institutions.

Data Collection and Review

Ontario has made progress in its data collection and presentation procedures throughout the series of data reviews that were mandated by the order. However, concerns regarding data integrity, validation, and presentation remain and are significant. Institutions were largely responsible for submitting information meant to measure their own compliance. These are also partly attributable to the absence of standardized data recording and collection practices, as well as the absence of electronic systems. For future compliance reviews, the Ministry should endeavour to institute sound research methodology in the aim of achieving data integrity, including robust procedures for inter-rater reliability, as well as independent data verification and validation.

In addition to the above, Ontario must clarify how it identifies those with mental health conditions and/or those at risk of suicide. Longstanding issues with its mental health alert system that have been aforementioned make it largely unknowable as to who is experiencing mental health conditions. The Order also requires Ontario an ongoing

release of human rights-based data on segregation, restrictive confinement, and deaths in custody on a yearly basis. Ontario should commit to releasing proportionate prison-wide data relevant to ***every*** data sample it releases so that meaningful interpretation and analysis can occur.

Institutional Staff Training & Investments

With a recognition that inmate living conditions are staff working conditions, and in an effort to meet its requirements under the Order, Ontario should commit to providing additional substantial training for its staff specific to mental health first-aid, de-escalation techniques, gender-responsivity, and the accommodation of human rights. While a revised training curriculum was introduced in 2015 and included training on the identification of mental health, de-escalation, and self-care, high quality and ongoing training is urgently needed. As training and employment expectations should be clearly aligned, leadership at all levels should also frame employment expectations for front-line staff in a manner consistent with the Order. These measures are crucial to building rapport with inmates and encouraging time out-of-cell for those in conditions of segregation.

As suggested by various segregation sergeants, small investments can also have a *significant* impact on the implementation of the Order. For instance, we were told that hard copies of all policies, standing orders, and some documents such as care plans are only provided online as thus, difficult to access by some frontline staff. Institutions must ensure that all policies are easily accessible to all staff members. It was also reported that front line staffing is not sufficient and that equipment (e.g., computers or other electronic devices) is needed, to allow officers the time to review documents, verify policy, and consult corporate supports about the management of inmates, as needed. Likewise, it was suggested that lights be installed in recreation yards in order to extend the hours in which the yard can be used, and thereby increase time out-of-cell. Minor improvements such as these would significantly impact Ontario's ability to meet its requirements under Jahn. While data clerk positions have been added at some institutions, additional staff continue to be required to meet Ontario's reporting requirements under Jahn, especially those related to the tracking of segregation and restrictive confinement. Though relatively minor and straightforward, addressing these gaps can help the Ministry mitigate complex compliance issues and concerns raised during consultation processes. As well, I urge the Ministry to extend its lines of communication with frontline staff who continue to provide valuable insight informed by operational realities.

RECOMMENDATIONS

1. **To uphold its human rights obligations and to decrease its reliance on segregation for all inmates, Ontario should turn its attention to gender-responsive frameworks that are relevant to the needs of its women and trans-identified populations. Ontario should formally and operationally recognize the differing carceral experiences of women in general and women with mental illness, and the subsequent need for gender-responsive accommodation. I recommend that Ontario review its use of segregation relative to gender/sex, with particular attention to systemic discrimination.**

2. **As with other jurisdictions, Ontario should eliminate the use of administrative segregation and prohibit the direct release of someone in solitary confinement directly to the community for public safety reasons. Ontario is encouraged to systematically review the materials I have shared on best practices and evidenced-based reforms to segregation.**

   I recommend Ontario engage (beyond Superintendents) with institutions and staff to examine the feasibility of various requirements as it undertakes revisions to policies and procedures. The Province should also provide necessary support and resources that would allow institutions to be operationally compliant with the Consent Order.

COMPLIANCE & HUMAN RIGHTS DATA REVIEWS

3. **I recommend that Ontario develop processes that would allow for independent verification and validation of the data inputted for all future compliance reviews. This is necessary measure to ensure data quality, consistency, and integrity, and is required to properly examine compliance. Verification measures should also evaluate consistency within and across institutions related to the documentation of demographic information, determination of mental illness, delivery of service pertaining to the requirements of the Consent Order, and the accommodation of Code-related needs.**

4. **As the current paper-based system has been identified as impeding proper and timely compliance reviews, I recommend that Ontario explore alternative electronic documentation systems that would be conducive to sustainable data collection, monitoring, and analysis as required for ongoing compliance reviews. The implementation of such systems must account for and provide line staff sufficient time and resources to record information about inmates and decisions.**

5. **I recommend that by March 30, 2019, Ontario amend its relevant policies, including, but not limited to the DM, PSMI, and MHS, to address all concerns identified in this Submission.**

6. **I recommend that an additional compliance review be conducted in July 2019, with the requirement that the data and an inventory of measures taken to**

improve compliance be submitted to the OHRC, the Independent Reviewer, and myself by July 31, 2019. This Review should be inclusive and cover all grounds.

7. **Given that policy was also in flux at the time of the reviews, which caused operational inconsistencies in how data was recorded and collected, these human-rights based data reviews should occur once the new version of the PSMI is implemented. Given the difficulties with and patterns demonstrated in the data reviews to date, I recommend that Ontario be required to conduct additional reviews and publicly post the findings. These reviews ought to be defined and conducted by trained, arm's length staff to ensure data integrity and accuracy. This review needs to be attentive to the methodological issues detailed in this Submission in order to produce meaningful and cogent information as to Ontario's correctional practices in relation to the Jahn settlement.**

8. **For previous and future B-15 data releases (including the pilot review on restrictive confinement), I recommend that Ontario publicly release demographic and mental health data for the entire prison population from each of the review periods. Doing so would allow for the meaningful analysis of Ontario's use of segregation and restrictive confinement, and instances of death, relative to Code-protected grounds as stipulated in the Consent Order.**

9. **For the purpose of B-15, I recommend that Ontario clarify under the Code what constitutes human rights data to ensure accuracy, transparency, as well as unencumbered data collection and dissemination, as per the Consent Order. This will necessarily include data on sex/gender, race, disability, and other Code-related factors.**

10. **For future B-15 reviews on deaths in custody, I recommend that Ontario collect, analyze, and release information pertaining to the following:**

    - **Length of custody,**
    - **Whether mental health screening and medical professionals indicated that an individual had a mental health concern or was experiencing suicidality,**
    - **Services provided by healthcare,**
    - **Whether there was an appropriate care plan in place, and**
    - **Whether the individual had experienced segregation, as well as the reasons for placement.**

MENTAL ILLNESS: DEFINITION, SCREENING, ALERTS, AND DELEGATION OF DUTIES

11. **Ontario is advised to immediately adopt a clearer working definition of mental illness and to define the parameters surrounding major mental illness.**

12. **Given that mental health is a fluid and dynamic issue, and that inmates can decompensate at any point while in custody, especially in extenuating circumstances (e.g., segregation, significant life events, issues regarding institutional adjustment); Ontario must develop ongoing monitoring and intervention of mental health with proper documentation for its population. This**

should not be limited to those who have been placed in segregation, nor ought it be limited to the 6-month reassessment procedure that is already in place.

13. **To satisfy its obligations as per PIR 2, I recommend that Ontario forthwith undertake a culturally-informed and gender-based evaluation of how its current mental health screening tools are being used in its institutions and familiarize itself with the considerable literature on gender-responsive classification and screening/assessment as well as best practices.**

14. **By April 31, 2019, Ontario should revise its policies to give direction on how mental health professionals should address community mental health alerts (i.e., alerts placed on file by those working in a community safety capacity such as probation officers).**

15. **I recommend that Ontario cease its current practice of delegating duties meant to be performed by physicians and psychiatrists to other health care staff, contrary to the requirements of the Consent Order. This relates to various assessment and referral processes, as well as to the development and amendment of care plans.**

CARE PLANS

16. **In all future compliance reviews, Ontario is encouraged to review outcomes of the BJMHS and JSAT to properly examine whether the Consent Order's referral and care/treatment requirements have been met.**

17. **To meet the PIR 4 requirements, I recommend Ontario to establish clear policy standards regarding: the timeframe for establishment, review, and revisions of a care plan; who requires care plans as related to mental illness and major mental illness; and, which staff shall develop, communicate, and execute the plans. The policy should also include directions on how and where the care plans shall be made available to help address its functional availability/utility that significantly vary across institutions. Ontario is encouraged to consult international best practices *and* their frontline staff as part of their revision process.**

18. **To fully comply with PIR 4, I recommend Ontario: provide clear direction to its employees as to the interpretation of privacy law and confidentiality concerns; significantly improve its mental health training for correctional officers; and, develop standards and expectations to guide communication between health and security staff.**

19. **I recommend that Ontario provide clear direction in policy and training to meet the requirement set out in PIR 4 that "program personnel [be] engaged in discharge planning…[and] be advised at the earliest opportunity to begin planning for the inmate's return to the community." More specifically, this ought to be a necessary component of the care plan.**

20. **In order to address the significant confusion and variations across institutions regarding discharge planning, I recommend that Ontario conducts a province-wide review of practices, resources, and availability of staff dedicated for proper discharge planning. Results of this review should be submitted to the Independent Reviewer.**

SEGREGATION REVIEWS: ALTERNATIVES, UNDUE HARDSHIP, & DUTY TO ACCOMMODATE

21. **I recommend that policies be revised to contain clear direction about the reasons for segregation to help address the systemic issues driving the Province's use of segregation.**

22. **Ontario should undertake a province-wide study of drivers to segregation in consultation with the Independent Expert. These findings should be analyzed relative to Code-related factors and should be made publicly available.**

23. **Ontario should formally recognize the detrimental effects of physical and social isolation and commit to substantially reducing its reliance on segregation. I further advise that those "requesting" segregation be accommodated under specialized care placements, as per the PSMI policy.**

24. **For proper demonstration of compliance, I recommend that Ontario develop a robust, documented mechanism that will ensure diversion of inmates with mental illness who are accused and/or found guilty of institutional misconducts from being held in condition that constitutes segregation.**

25. **I recommend that Ontario revise its policies and forms to more robustly document decisions about alternatives and undue hardship analysis undertaken for the initial segregation decision and as part of all subsequent segregation reviews, including the 30-day consecutive and 60-day aggregate segregation reports. It should detail *how* decisions must be made, including what kind of information must be considered to meaningfully report on decision-making processes related to prolonged segregation.**

26. **Ontario should revise its policies, operational documents, and staff training to include a comprehensive list of alternatives, strategies, incentives, and staff expectations around time out-of-cell for those in conditions that constitute segregation. Institutions and staff members should NOT be left to develop their own alternatives in crises or emergency situations, and thus Ontario is encouraged to allocate resources for the development and implementation of alternatives to segregation.**

27. **I also recommend that details about how the 30-day and 60-day reports are considered, evaluated, and addressed by the Ministry be provided to the Independent Reviewer for further examination.**

28. **Following my consultations with the Ministry's corporate staff, including its legal and human rights representatives, as well as the OHRC, I recommend that Ontario's legal staff and senior staff at the corporate level be engaged to**

properly assess undue hardship should exceptional cases arise where alternatives to segregation are seemingly impossible. This will require additional revisions to the PSMI and other related policies and forms.

29. **At the institutional-level, Ontario is advised to further amend its PSMI and other related policies to direct the field to approach human rights principles as a "duty to accommodate." The revised policies will detail *how* staff are expected to accomplish this requirement.**

30. **These policy changes should come in tandem with *significantly* improved training (in terms of its quality, content, duration, and delivery) for its correctional and health care staff specific to: dentification of mental health, mental health first-aid, de-escalation techniques, gender-responsivity, the accommodation of human rights, secondary trauma and self-care. While the Ministry should communicate terms of the Order to its front-line staff as employment expectations, it should also recognize that those expectations can only be met when there exist sufficient support and guidance.**

TRACKING & PREVENTION OF SEG-LITE: SEGREGATION, RESTRICTIVE CONFINEMENT, & ALTERNATIVE PLACEMENTS

31. **I recommend that, for all of its components related to recommendations set out in this Submission and the Consent Order, the PSMI communicate clear, measurable, and observable expectations to allow for consistency and compliance across provincial institutions.**

32. **I recommend Ontario revise the PSMI to detail review, tracking, and monitoring mechanisms for all inmates held in conditions of restrictive confinement and those housed in the four newly introduced placement types. This oversight process ought to keep in mind that the specialized care units and restrictive confinements are likely to have the unintended effect of essentially reproducing conditions that constitute segregation (i.e., seg-lite).**

33. **The PSMI also needs to include clear processes for the accommodation of inmates with identified mental health concerns, who are under specialized placement but are not in conditions that constitute segregation, and those in condition of restrictive confinement**

34. **The PSMI policy ought to include a minimum "unlock" time of four-hours per day for all those in specialized care in order to clearly differentiate these placements from conditions that constitute segregation, to demonstrate substantive commitment to the principles of the Consent Order, and to remain consistent with established international best practices.**

35. **I recommend that Ontario formalize its three-tiered procedures regarding the time-out-of-cell tracker in its policy.**

36. **I recommend that Ontario provide samples, information roll-ups, and data related to each institution in order to monitor compliance with its requirement**

to track time out-of-cell tracking requirements, to the Independent Reviewer and myself. Such information should also include extensive feedback from the field regarding the implementation of the system, as well as a schedule for next steps and improvement.

REFORMS TO ADMINISTRATIVE AND DISCIPLINARY SEGREGATION

"*In the [court] record there is ample evidence from [the offender] that the long term confining of him in segregation had serious psychological consequences….Over a year in segregation, with almost no yard or other recreational time and simply sitting alone in a small cell for up to 23 hours a day, will turn a person into himself and create anxiety in dealing with others*."[34]

Justice E. M. Morgan, Ontario Superior Court (2018)

1. Introduction

One of the major aspects of my mandate is to examine whether some very recently implemented Ministry changes to institutional policies and procedures – particularly placement in "conditions that constitute segregation" - may assist in reducing the numbers of inmates suffering from mental illness[35] being kept in such conditions. Unfortunately, however, the recently implemented (December 17, 2018) Placement of Special Management Inmates (PSMI) policy is so new that neither the Independent Expert nor I have had any opportunity to track and evaluate how this (and related policies) will be applied in practice. Further, as a result of suggestions made by the Independent Expert and her team as to the need for more revisions to this new version of the PSMI policy, the Ministry has now accepted that the policy will need to be further revised, but I am told that such revisions will not be available before the deadline set for the issuance of my Interim Report on February 28, 2019. Thus, what follows is a partial analysis of how the current wording of the policy equates with other correctional statutory and policy documents being used by the Ministry.

Under both the previous and newly implemented PSMI policies, a Superintendent[36] may direct that an inmate (remand or sentenced) be kept in "administrative segregation" for one (or more) of four reasons:

- if the inmate is in need of protection;
- if the inmate must be segregated to protect the security of the institution or the safety of other inmates;
- if the inmate is alleged to have committed a misconduct of a serious nature;

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[34] *R. v. Roberts* 2018 ONSC 4566 at para. 34.

[35] To be clear, I am using this term in the same sense as in s.4.11 of the December, 2018 revision to PSMI policy, which defines "mental illness" as "describ[ing] an individual who is experiencing and displaying symptoms of alteration in mood, thought or behavior resulting in distress and/or some degree of impaired functioning that is not attributed to another condition". This definition was originally arrived at in 2015 in collaboration with the OHRC, the Ministry's Legal Services Branch and other Ministry Divisions, as well as with Optimus, a consultant group retained by the Ministry. The Ministry is in the process of developing a new definition of "mental health/disability", a draft of which was shared with myself and the Independent Expert in late January 2019. Because it is not yet finalized, I shall continue to rely on the existing definition.

[36] Rather than repeating the words "or designate" each time, I shall simply refer to the disciplinary decision-maker as "the Superintendent".

- if the inmate requests to be held in conditions that constitute segregation.[37]

In order to better understand this issue in within the institutional discipline context (bullet 3), I asked Ministry staff to provide me with data on various aspects of how "administrative segregation" has been applied in Ontario corrections up to the end of 2018. The various Tables of "snapshot data" they produced for the period March 1 and August 31, 2018[38] are appended to this Chapter. Tables 4 and 5 reflect that 248 inmates (232 male, 16 female) were already in some form of segregation at the time they were alleged to have committed new institutional offences, and a further 947 (825 male, 122 female) were placed in segregation as a result of the allegation(s) having been laid.[39] Not only are these numbers quite substantial in and of themselves, but it seems to me – and to the Independent Expert and her team - to be an entirely reasonable inference that many of the inmates referred to in these two Tables could likely have been classified as suffering from mental illness (and perhaps also developmental delay).

Once there has been a finding that "serious" institutional misconduct has been committed (further described *infra*), the Superintendent has available a number of penalties, the most severe of which is "close confinement", the official term for placement in segregation as a penalty. Table 8 reflects the extent to which "close confinement" was imposed during the "snapshot" period: 1214 inmates (1080 males, 134 females) were placed in close confinement for a definite period, while 2223 inmates (1971 males, 252 females) were placed in close confinement for an indefinite period during the period March 1 and August 31, 2018.[40] Combining these two dispositions, during this time frame 45.24% of all post-misconduct dispositions resulted in placement in disciplinary segregation for some period.[41] These placement decisions exceed all other misconduct dispositions available to a Superintendent by a very wide margin. In fact, a good argument can be made that such frequent resort to close confinement dispositions strongly suggests that disciplinary decision-makers do not have much faith in lesser penalties,

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[37] *Ministry of Community Safety and Correctional Services Institutional Services Policy and Procedures Manual* – Inmate Management – Placement of Special Inmates (PSMI), released December 17, 2018, ss. 4.1-4.4. The type of administrative segregation described in bullet 3 is formally defined as "conditions that constitute segregation for non-disciplinary reasons", because no determination has been made at this stage in the discipline process that any misconduct has been committed.

[38] I have no reason to doubt that this "snapshot" of misconducts over a recent six month period in 2018 would be any different were the Ministry to be asked to provide more historical data. I anticipate that, after receiving input from the Independent Expert, I may ask the Ministry to repeat this "snapshot" for the same months of 2019.

[39] Ministry statistical officials advise that some inmates may have been charged on more than one occasion during these timeframes, which may slightly inflate the overall numbers.

[40] Regulation 778 limits a single penalty of close confinement to no more than 15 days; under the policies existing up until the end of 2018, how much is actually served in close confinement depends on local practices, one of the major determinants of which was the availability of space in the segregation area. See Table 9.

[41] This percentage may actually be higher, as the Table does not reflect that more than one disposition may be imposed on an inmate for a single breach. For example, it is quite possible that a forfeiture of earned remission is added to a penalty involving close confinement following a finding that a "serious" breach has occurred.

especially in cases involving inmates on remand (which, as Table 3 discloses, comprise just over 70% of all inmates upon whom misconducts were imposed).

Given the frequency with which both "administrative" and "disciplinary" segregation have been and continue to be used in Ontario corrections, it is important to contemplate whether the policy changes being instituted starting January 2019, which aim to change the nature and use of "conditions that constitute segregation", will actually make much difference (most particularly as they affect those with mental illness and/or developmental delays), or whether these new policies will, over time, simply "default back" to extensive use of segregation as a place rather than as a status, as described *infra*. Both the Independent Expert and I are extremely concerned that this may happen unless the processes are carefully analyzed and continually monitored.

Read together with the Ministry's Discipline and Misconduct (D&M) policy, the Ministry's new Placement of Special Management Inmates (PSMI) is intended to reflect fundamental changes to the management of those who cannot be housed in general population (GP), as well as to the concept and use of segregation to be followed in Ontario adult correctional facilities, beginning in January 2019.[42] As implementation of these new policies unfold, it becomes important to formally locate them within the context of both existing and legislation yet to be proclaimed. In sum, regardless of whether the new legislation is proclaimed, I am firmly of the view that the statutory provisions should be amended to provide more robust instruction to frame these policies.

In the documentation made available to me (and in consultations with Ministry staff), thus far, no evidence has been presented that these various policy changes have been accompanied by any impetus to modify any of the statutory (or regulatory) structures which formally legislate the processes whereby institutional "misconducts" are currently adjudged and penalized. If this continues, it would be open to MCSCS to potentially revoke or substantially modify the new PSMI (and the related new D&M policy) at any time, and to revert to the various procedures regarding segregation that currently exist under the governing regulation[43] and the *Ministry of Correctional Services Act* (MCSA)[44]. This of course is the same inadequate legislative and regulatory framework that led to some of the very problems faced by Ms Jahn and others,[45] which in turn resulted in the

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[42] *Ministry of Community Safety and Correctional Services Institutional Services Policy and Procedures Manual* – Inmate Management – Placement of Special Inmates (PSMI), released December 17, 2018. This document is to be read with the Ministry's Discipline and Misconduct Policy (D&M), released July 6, 2018. While, as noted *supra*, the Ministry agrees that the PSMI policy will have to be further revised, I have not been made aware of any current plans to revise the D&M policy – though of course updates and revisions to Ministry policies are prioritized either based on need from an operational perspective, or upon receiving proposals for changes from other stakeholders.

[43] s. 29(1) of Regulation 778 under the *Ministry of Correctional Services Act* (MCSA)

[44] Particularly s. 34(1) (c).

[45] I should specify that from the Ministry documentation filed in response to Ms Jahn's human rights complaint, it appears that she was never formally alleged to have committed any misconduct; rather, she was "administratively segregated" for lengthy periods of time, both because of her noncompliant behaviors towards institutional staff, and her efforts to harm herself (presumably under [now] s.4.1.2 of the D&M policy).

OHRC taking the Ministry before the Ontario Human Rights Tribunal (on two occasions) on the issue of mentally ill prisoners being unnecessarily exposed to lengthy periods of administrative segregation (publicly known as solitary confinement) in Ontario correctional facilities.

Recognizing these ongoing deficiencies, these two new policies represent a major part of the Ministry's response to the "Jahn" litigation and settlement. The most important conceptual change is that segregation will no longer be defined as a physical location, but rather as a status. In other words, an inmate alleged to have committed misconduct (while on remand or sentenced) will no longer be physically placed in a *designated* segregation cell (or unit) for any substantial period of time, either as "administratively segregated" (pending determination of the misconduct(s) alleged), or under "close confinement" (following a finding that misconduct has been committed).[46] By reconceptualizing "conditions that constitute segregation" as a status rather than as a physically separated location within an institution, the Ministry is to be commended for recognizing the need for fundamental change in its operational practice and approach to population management. By moving away from a purposefully designated location and thus expected use of segregation, it accepts that in a lawful and compassionate society, officially tolerated deprivations of basic human rights can longer be permitted.

My first recommendation on this point is that if the MCSA is to remain in force, both the sections of the *Act* and accompanying regulation that relate to what are now termed "conditions that constitute segregation" need to be revised to confirm the animating principles behind these new policies at a higher statutory level. In other words, in order to be consistent with the long-term remedial intent of the "Jahn Settlement", the present legislative framework needs to be amended to clarify that these policy changes comprise part of the governing statute and regulations. Otherwise, concerns remain that if these policies are revoked or substantially repealed, the Ministry will not be directly accountable to the legislature in a timely manner.

Alternatively, it should be noted that the 2018 *Correctional Services Reintegration Act* (CSRA) was enacted in anticipation that it would replace the existing MCSA. **If and when that legislation is proclaimed in force, the various revisions to policies and procedures for placing and maintaining inmates in "conditions that constitute segregation" contained in new versions of the PSMI and D&M policies will no doubt need to be carefully scrutinized to determine whether they are consistent with the new requirements of the CSRA; indeed, the legislative provisions of the CSRA may themselves need to be modified to confirm the animating principles behind the two new policies in statute.** Further, though various sections of this new legislation reflect that regulations are to be enacted to develop and unfold the blueprint of the legislative

[46] Depending on the physical plant of an institution and the Ministry's willingness to spend money on retrofitting some older institutions, it may well be that some of the currently designated segregation cells will continue to be used; however, as discussed in other sections of this Interim Report, "time out of cell" then becomes vital, in the sense that some of the new policies contemplate that an inmate may be segregated in their cell for as long as 22 hours per day.

provisions, to date I have not yet been made aware of any draft regulations that will likely impact these new policies, which may in turn call for further revisions.

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I now turn to briefly describe the main features of the new PSMI and D&M policies, accompanied by recommendations as to what needs to be further modified to better protect those mentally ill in Ontario institutions who are alleged to have committed (or are found to have committed) institutional offences. (I would have preferred to include these two policies in this Interim Report, but, given that the PSMI policy is in the process of being further revised, there seems little point).

The December 17, 2018 version of the PSMI[47] creates two broad categories of Housing Placements (regardless of whether an inmate is remanded or sentenced). "General Purpose (Operational)" placements are subdivided into two sub-categories: "general population" (GP) and "protective custody" (PC - which is deliberately defined as a sub-set of general population). The second category of housing placements - "Special Purpose" - are considered to be the "overarching category for all alternative placements other than general population (GP) or protective custody (PC) used to assess, stabilize, treat and house special management inmates".[48]

More pertinent to a discussion of newly fashioned discipline processes is its relationship to the further sub-division of "Special Purpose" placements contained in the PSMI which contains two broad categories: "Medical"[49] and "Specialized Care Placements (alternative housing)", which are further sub-divided into four types: "Behavioural Care", "Managed Clinical Care", "Stabilization" and "Supportive Care". The accompanying Memorandum to Superintendents summarizes each of these four types as follows:

"Behavioural Care: This placement is for inmates who:

- need to be separated from the GP or PC based on serious behavioural concerns (i.e. aggression, violence, highly disruptive behaviour, intimidation, etc.)
- are considered to be an immediate risk to staff, other inmates, the institution and/or themselves
- are not necessarily isolated from other compatible inmates and social interaction

[47] Section 6.0.
[48] Memorandum to all Superintendents announcing the Revised PSMI policy, December 17, 2018.
[49] Since this category seems to be reserved for those inmates who require "to be placed in isolation for medical or treatment purposes to protect the health and safety of the inmate or to prevent the spread of disease" (PSMI Medical Placement Policy s.6.3.2.a), misconduct issues seem unlikely to occur with this group. While such inmates can and often do create considerable management issues and concerns for staff e.g. the tubercular inmate who denies their illness, the Policy seems to be restricted to those who present with physical rather than mental health difficulties; consequently, this category will not be considered further.

- may have a mental health diagnosis but safety concerns override or have been assessed as not responsive to mental health treatment

Managed Clinical Care: This placement is for inmates who:

- present with symptoms of a chronic mental illness (i.e. addictions, concurrent disorder, dual diagnosis, etc.)
- have been identified as requiring additional clinical support on an ongoing basis to improve or maintain their wellbeing
- are not necessarily isolated from other compatible inmates and social interaction

Stabilization: This short-term placement is for inmates who:

- are experiencing a crisis or traumatic event
- are considered to be an immediate risk to themselves (including suicide) staff, other inmates and/or the institution
- may have a mental illness
- require intensive mental health services with a goal to stabilize and reintegrate the inmate into an alternate specialized care unit

Supportive Care: This placement is for inmates who:

- require special service provisions or programming that cannot be accommodated in the GP or PC
- may have a developmental, cognitive or physical disability (i.e. restricted mobility, deaf, blind, etc.)
- have other identified Human Rights Code related needs or unique circumstances which may cause them to be vulnerable in the GP or PC, identified by the inter-professional team."

These revised policies provide very detailed directions to staff as to how decisions are (and are not) to be made in deciding where to house "special management inmates", emphasizing:

> (a) that any such decisions are to be made on an "individualized assessment of an inmate's needs and circumstances based on reliable information and verified criteria, not assumptions or impressionistic views about the level of risk that their being housed in GP or PC may pose";
>
> (b) that decisions to place an inmate "in conditions that constitute segregation" are to be made "only as a last resort", and that "[a]ll alternative options are to be exhausted prior to an inmate being held in conditions that constitute segregation";
>
> (c) that even when an inmate is being held "in conditions that constitute segregation, [they] must be held under the least restrictive conditions available while protecting the safety of persons and/or the security of the correctional institution".[50]

Particular attention is paid throughout the new policies both to limit and guide when those with mental illness and/or developmental delays may (and sometimes may not) be

[50] PSMI Policy, ss.3.1.1-3.1.3

placed “in conditions that constitute segregation”.[51] Of particular interest to my mandate are various detailed provisions that direct early and ongoing consultation with and input from a “mental health provider” (preferably a physician or psychiatrist where available). No doubt in response to the issues raised by Ms Jahn’s case and others, there are extensive *mandatory* procedures enunciated throughout these policies that are meant to guide when decisions to place an inmate “in conditions that constitute segregation” must be reviewed, who must participate in those decision-making processes, what documentation is to be prepared, and who must further review any decisions to maintain an inmate in such conditions, “under *truly* exceptional circumstances and in a manner consistent with Code-related factors”. Once again, where an inmate held in such conditions is considered to be mentally ill and/or developmentally delayed, the policies further specify that particular attention must be paid to ongoing consultation with mental health professionals and the generation of supporting documentation as to why alternatives are not feasible.

If properly observed and scrupulously followed, it is my view that these various policy changes have the capacity to substantially transform the use of “conditions that constitute segregation” throughout Ontario corrections. However, given that these changes are only being instituted beginning in 2019, I reiterate that neither the Independent Expert nor myself have had any opportunity to observe and monitor whether these policy developments will “alter the penal landscape” in any substantial way by the time this Interim Report is to be delivered on February 28, 2019. Though it is hoped that these policy changes will bring about significant changes to the segregation regime, unfortunately it is entirely possible that inmates (mentally ill or not) who were previously housed for lengthy periods of time in either “administrative” or “disciplinary” segregation, may now be routinely housed in “behavioural care”, where they may cycle in and out of these two statuses, merely with time frames superficially adjusted, accompanied by reams of paperwork to justify maintenance of much of the status quo.[52]

The second – and somewhat related - problem with commenting at this time on whether these new policies have the possibility of transforming “conditions that constitute segregation” in any substantial way is that both the Independent Expert and I have been told that a new definition of what comprises “mental health/disability” is “in the process of being finalized”. We have very recently seen a draft version, and have offered some preliminary comments, particularly emphasizing that institutional staff training will have to be very substantially revised if the definition is to have any hope of promoting the changes envisaged in these new policies.

Thus, the recommendations that I would propose on point, which have been jointly agreed with the Independent Expert, are as follows:

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[51] Ibid ss. 3.1.4-3.1.6; 3.2.1-3.2.6

[52] As one difficult remand prisoner awaiting trial in an institution where some of these changes have already been instituted recently said in my court: “all this is b.s.; it’s just ‘seg. lite’”.

It is recommended that the Ministry regularly collect and monitor data about how Specialized Care Placements (which are a form of restrictive confinement) are used in Ontario institutions. This data should include details on (a) reason(s) for placement, duration, type and conditions of confinement, (b) processes of review, assessment and access to mental health care, as well as (c) each inmates' demographic information such as their gender, sex, mental illness, and other Code-related needs.

It is further recommended that individual level data must be available and routinely reviewed by the Superintendent where an inmate is being held in restrictive confinement (e.g. Specialized Care, segregation or other forms of restrictive confinement) until such time as the inmate returns to conditions akin to general population.

It is further recommended that a representative sample of the individual-level, province-wide data (as per *supra*) be periodically audited for accuracy and integrity. For transparency, the Ministry should release data and audit reports annually along with the human rights-based data on segregation and restrictive confinement as part of B-15. The public release of data and reports should include the Ministry's findings, together with its plans with timeframes to address identified issues, human rights concerns (e.g. gender/sex, mental illness and other Code-related needs), and compliance to the Consent Order.

I now turn to a series of commentaries and ensuing recommendations that I consider also need to be addressed as these new policies are implemented as applied to "administrative" and "disciplinary" segregation. (From what I am able to discern, though I have already shared some of these commentaries and recommendations with Ministry staff, these apparently will not have been included when the Ministry unrolls its pending amendments/revisions to the PSMI policy).

2. <u>The Timing of the Superintendent's Decision as to how to Treat an Allegation of Misconduct</u>

As a matter of law, the only discipline-related rationale for ordering that an inmate be placed in "Administrative Segregation" is where "*the Superintendent believes on reasonable grounds that the inmate…is alleged to have committed a misconduct of a serious nature*".[53] Such wording obviously assumes that only allegations of serious misconduct can result in an inmate being placed in administrative segregation. However, it is clear from both the structure of current Ministry policy[54] - as well as in the proposals contained in the CSRA - that a Superintendent is not formally required to make a determination as to whether the allegation of misconduct is to be treated as a serious offence until the time of the actual disciplinary hearing. I can well appreciate that it makes

[53] PSMI policy s.4.1.3.; D&M policy s.4.1.3.

[54] Ministry of Community Safety and Correctional Services – Institutional Services Policy and Procedures Manual – Inmate Management – General Inmate Management – Discipline and Misconduct (effective July 6, 2018).

a good measure of sense – not to mention equitable considerations – for a Superintendent to have as much information as possible at hand before deciding upon the categorization of the charge (which decision in turn opens up different ranges of penalties). For example, s.3.1.2 of the current D&M policy provides:

> "A disposition would be determined only after the interview stage has been completed with the inmate…taking into account any relevant documentation and the inmate's Human Rights Code related needs and circumstances (this is not an exhaustive list of factors) including whether accommodation is necessary and the adequacy of accommodations already in place…".

However, it is my opinion that other considerations should take precedence here, particularly if these portions of the current policy are to remain in effect:

1. Even though Crown counsel conducting a criminal prosecution will not likely have the benefit of a complete understanding of all of the complexities of a case, except in highly unusual circumstances, Crown counsel virtually always makes an election to proceed "summarily" or "by indictment"[55] as early as practicable in the proceedings. The Preamble to Ontario's current Crown Policy Manual[56] makes clear that this is normally to be done as a constituent element of basic fairness to an accused.
2. As will be discussed in more detail in the next section of these recommendations, elementary fairness requires that the inmate needs to know what is referred to in other aspects of criminal justice as "the extent of their jeopardy", in order that they may make informed decisions about a number of important matters, such as whether or not to plead guilty to the institutional charge, to see if witnesses who might support their version of events are available (and to make arrangements for them to attend), and to arrange for counsel (and/or interpreter and/or other support person) to assist at the hearing. Fairness requires that any inmate – and most particularly one who suffers from some level of mental illness – needs to be able to consider and take steps to arrange these matters as early as possible in the process.[57]
3. Should the inmate wish to dispute the allegation, as the various processes described in the previous paragraph all take time to arrange, I do not believe it is sufficient for a Superintendent to hear this for the first time at a discipline hearing,

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[55] These terms roughly correspond with allegations of "minor" and "serious" misconduct. Ontario legislation does not presently use the "serious-minor" distinction, but since it is quite clumsy to use the term "not serious" or "non-serious" each time, I shall use the word "minor" as a substitute for these terms.

[56] Citing the Supreme Court of Canada decision in *R. v. Beare* [1988] 2 S.C.R. 387, at paras. 51-53.

[57] the new PSMI policy clearly intends that if the extent of the inmate's mental illness (or developmental delay) is such that they cannot meaningfully participate in the discipline process, the superintendent, as advised by the attending physician (or other mental health professional) would decide not to proceed with disciplinary measures. Alternatively, the superintendent might consider resorting to "informal responses", as anticipated in ss.3.1.1, 3.1.5., and 3.2.3(a)-(c) of the D&M policy.

only then to rule on whether an adjournment should be granted,[58] a matter which becomes particularly difficult if the prisoner is being kept in "conditions constituting segregation" pending the discipline hearing.[59] Tables 10 and 11 provide useful data on the mean and median lengths of time between the date the misconduct is alleged until it is disposed of, both for those in segregation and those in general population.

I would thus recommend that this issue of whether decisions to treat a disciplinary charge as a serious matter could be made much earlier in the discipline process should be further discussed among Superintendents and other Ministry personnel; indeed I can readily envisage that there may be a need to develop proposed timelines that can accommodate differences among Ontario's 25 adult correctional institutions.[60] As part of this review (as particularly noted in section 9 *infra*) **I would also recommend that officials of Legal Aid Ontario (and such members of the private bar who may be interested) be additionally consulted with a view to establishing timeframes for the attendance of properly briefed counsel[61] to assist at disciplinary hearings where such is permitted.** I would hope that a Report could be prepared for my consideration for possible inclusion in my Final Report.

3. <u>The Desirability of Creating Pre-Determined Categories of Institutional Offences and Derivative Issues</u>

There are some further issues to be considered here. I understand MCSCS is considering whether the new D&M policy should be revised to include pre-defined lists of what behaviors constitute serious or minor misconducts. While such lists could no doubt be created, I take no position one way or the other on this issue. Having said this, as discussed in section 6 *infra*, I am firmly of the view that very extensive and timely consultations with physicians and/or psychiatrists, and that substantial limitations need to be placed on the availability of segregation as a penalty for a mentally ill or developmentally delayed inmate where a "minor" misconduct is found to have been committed.

In the federal penitentiary system CSC's Commissioner's Directive 580 differentiates between "negative or non-productive inmate behavior that is contrary to institutional rules" (minor offences) and "commits, attempts, or incites acts that are serious breaches of

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[58] D&M policy s. 6.6.2(h). Section 71(8) of the CSRA provides that "[i]f, *during the interview*, the superintendent determines that the alleged misconduct is serious misconduct…the superintendent shall cancel the interview and refer the matter to the Independent Regional Chair to have a hearing before a Disciplinary Hearings Officer" (emphasis added).

[59] Hopefully, no Superintendent would intentionally resort to such behaviours, but I have in mind here the notion discussed in the "Mandela Rules" that solitary confinement should never be used coercively, for example, to force a confession or to induce an admission of guilt. See also *Report of the Royal Commission on the Toronto Jail and Correctional Services* (1978), where it was found that jail custodial staff colluded with police in a number of ways to "soften up" inmates.

[60] See Tables 10 and 11.

[61] I note that the newly proposed federal Bill C-83 envisages the creation of "patient advocate" positions for federal prisoners. This might provide an alternate or supplementary model.

security, violent, harmful to others, or repetitive violations of rules" (serious offences). I am of the view – and my informal contacts with federal officials somewhat confirm – that, though superficially attractive, in practice this is not a particularly useful distinction because it is not very helpful in addressing those frequently encountered cases where a "minor" breach of an institutional rule has particularly serious implications. An example of this that I have some familiarity with is a non-violent behavior that I consider to be particularly (and sometimes dangerously) offensive to prison routine - willful interference with the process of conducting an institutional count[62]. That offence can – and sometimes does – create significant impediments to institutional management. It can significantly interfere with other prisoners' ability to conform to institutional routine, which in turn contributes to institutional tensions, thereby making "the society of captives" considerably more difficult to manage for both inmates and staff. That to me is an example of an offence that should have at least the possibility of the imposition of a penalty more severe than those contained in federal Commissioner's Directives, particularly if the behavior is repeated.

The question then arises as to who is the most appropriate decision-maker. In my view, arguing in part from the analogy to "Crown elections" in criminal prosecutions, this is a decision best left up to the Superintendent. As the Ontario Divisional Court said many years ago in one of the only judicial decisions in this province considering discipline in provincial institutions – a case involving an allegation that a remand prisoner had pulled a radio out of a cell wall:

> "It was also submitted that the segregation imposed on the applicant was unjustified because the act which the applicant was alleged to have committed was not a "misconduct of a serious nature". Although it was submitted in the course of argument that the cause of the disturbance to the normal location of the radio may have been accidental *I have no doubt that what was alleged was clearly misconduct. That is was serious misconduct is arguable. However, it may appear to one who is afforded the opportunity of a more leisurely deliberation carried out retrospectively, it seems to me not unreasonable for an officer in charge of a correctional institution, concerned with preventing willful defiance of authority by inmates where behavior might encourage similar behavior by other inmates, to conclude that the misconduct was, indeed, of a serious nature."*[63]

This is a clear example of how a Court will usually be prepared to defer to decisions made by a Superintendent, particularly those which arise in a context of having to make a decision rapidly. A reviewing court is only likely to interfere if it either finds that the superintendent acted in bad faith, or that the superintendent deliberately refused to consider factors important to the disciplinary decision (as it ultimately did in the *Desroches* case). Absent either of those considerations, following normal principles of administrative

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[62] Such behavior could be formally charged under sections 70(1) (a), (g), (i) or (l) of the CSRA.

[63] *Re Desroches and The Queen* (1983) 6 C.C.C. (3d) 406 per Krever J. at 412; (emphasis added). Disclosure: I was one of the prisoner's counsel in that case.

law, a court will normally accept that a superintendent is better placed to make an initial determination as to how to proceed, even if (as seems clear here) the court might not have made the same decision.

In sum, I take no position at this time as to whether pre-determined categorization of institutional charges need to be created as part of a revised D&M policy.

4. The Need for Criteria to Guide a Superintendent's Discretion

If the Ministry ultimately concludes that there should not be pre-determined lists classifying "serious" and "minor" misconducts, the question then becomes whether some criteria should be developed to guide and structure a Superintendent's discretion in relation as to how allegations of institutional misconduct should be classified. (If, as has just been suggested, the Ministry adopts the proposal that Superintendents should normally be required to indicate their election to treat a particular incident as "serious" or "minor" much earlier in the process, this becomes more salient). Currently there is no explicit guidance provided to Superintendents as to how they should exercise their discretion to treat an allegation of misconduct as "minor" or "serious". There are, however, existing policies regarding what a Superintendent must consider before imposing a penalty (or combination of penalties) arising from a single incident:

a. any Code related needs or characteristics (e.g., mental illness and/or developmental disability) which may cause the inmate to be adversely impacted by a particular disciplinary measure and which require accommodation (i.e., implementation of alternatives). Where mental illness is present, this will include consultation with mental health providers and/or clinical staff;
b. the adequacy of accommodations currently in place;
c. the nature and seriousness of the misconduct;
d. any explanation or statement of mitigating factors provided by the inmate;
e. the impact the misconduct may have had on staff, other inmates or the security, safety and good order of the institution;
f. the performance of the inmate during the present incarceration;
g. previous Misconducts and Misconduct Report(s) (or other reports regarding inmate's behavior) during the present incarceration;
h. the inmate's conduct and demeanour during the interview (taking into consideration any mental illness that may impact the inmate's response during the interview or pending discipline); and
i. whether the inmate has taken corrective action, apologized or attempted to make amends for the misconduct.[64]

Many of these criteria could be readily transposed into a framework to guide Superintendents in their decisions as to whether to treat an allegation of misconduct as "serious" or "minor", and it is recommended that the Ministry undertake such an exercise. While there are a number of models in both Canadian and

[64] Institutional Services Policy and Procedures Manual – Inmate Management – Discipline and Misconduct s.6.8.1 (July 6, 2018).

United States jurisdictions, the current Nova Scotia provincial discipline processes include some additional criteria that might well be included in such a framework. These provide:

> "In deciding to impose a penalty on an offender for breach of a rule, the superintendent must consider all of the following:
> (b) the degree of premeditation;
> (c) the degree of awareness that the offender has of having breached a rule;
> (e) the circumstances surrounding the breach, including, in particular, the degree of provocation;
> (h) the temporary measures taken…following the breach[65]".

5. The Special Case of "Making a Gross Insult"

Some 25 years ago I acted as Co-Chair of the Commission on Systemic Racism in the Ontario Criminal Justice System. One of our mandates was to examine the possibility of unconscious racial bias affecting prison discipline decisions in Ontario provincial institutions (both adult and youth). In our Final Report we reported the findings of a study of disciplinary practices at five southern Ontario institutions that at the time held – and likely still do hold - significant numbers of black prisoners. Though we acknowledged that the considerable quantity of missing data resulting from inadequate record-keeping meant that our findings should be interpreted with caution,[66] we nevertheless felt comfortable in reporting that:

> *"Policing Discretion*
>
> - *Taken as a whole, black prisoners were most over-represented and white prisoners most under-represented in misconduct reports for willfully disobeying an order. By contrast, black prisoner were most under-represented and white prisoners most over-represented in misconduct reports for possession of banned substances – the misconduct known as "contraband".*
> - *Black women were most over-represented and white women most under-represented in misconduct reports for issuing a "gross insult". By contrast, black women were most under-represented and white women most over-represented in misconduct reports for contraband.*
> - *Black adult males were most over-represented and white adult males most under-represented is misconduct reports for committing or threatening assault. By contrast, black adult males were most under-represented and white adult males most over-represented in misconduct reports for contraband.*
>
> *These trends indicate that black prisoners are more likely to be charged with misconduct involving interpretation of behavior, in which correctional officers exercise a greater degree of subjective judgment. However, black prisoners are less likely to be charged with misconduct when the discretionary powers of*

[65] Nova Scotia *Correctional Services Regulations* N.S. Reg. 99/2006 (June 28, 2006) s. 95(2).
[66] Our formal conclusion was that: "it is simply not possible to determine the extent to which racial differentials exist [in the enforcement of misconducts]" (p. 311).

correctional officers are limited by the need to show factual proof, such as possession of forbidden substances. The reverse is true for white prisoners.

Penalty Discretion

- *Taken as a whole, black prisoners were most over-represented and white prisoners most under-presented in the "closed confinement" or segregation category of punishment.*
- *Black women prisoners were most over-represented and white women prisoners were most under-represented in the segregation category. By contrast, black women were most under-represented and white women most over-represented among prisoners punished with a reprimand.*
- *Among 16-and 17-year-old youths, black males were most over-represented and white males most under-represented in the segregation category. By contrast, black males were most under-represented and white males most over-represented in punishments involving "changes in program or living accommodation."*
- *Black men were over-represented and white men under-represented in segregation penalties, but this was not the penalty with the greatest over-representation of black and under-representation of white prisoners. The category with the greatest disparity favoring white men was changes in program or living accommodation. Black men were most under-represented and white men most over-represented in punishments involving loss of remission.*
  Given these findings, it was clearly important to explore the relationship between the type of misconduct and penalty to see if the over-representation of Black prisoners in the segregation category of penalty simply reflected the nature of the offence charged or the combined effect of policing and punishment choices. This analysis shows a striking absence of a correlation between offence type and penalty, indicating complete randomness in the assignment of penalties to offences.

  This finding strongly confirms the views of prisoners, OPSEU and individual correctional officers about disparities in the exercise of penalty discretion, at least if the nature of offence is supposed to be the most important factor. As noted above, however, decision-makers are to take account of several factors when selecting penalties. Since they generally do not record the reasons for the penalty, or even the factors they took into account, the study was unable to identify any explanations for penalty choices.

Conclusion

While these trends do no conclusively document systemic racism, they go much further than indicating greater representation of black prisoners amongst those subjected to formal discipline. The over-representation of black prisoners in the more subjective misconduct charges, and their under-representation when discretion is restricted, strongly support the conclusion of differential treatment because of race.

…

> *The definition of misconducts should be restricted to behavior rather than subjective assessments of attitude or lack of respect for authority. Restraint should be shown in resorting to formal discipline, and informal alternatives should be preferred. Superintendents should also exercise restraint and seek greater consistency in the penalties they impose. The purposes of the disciplinary system and its underlying principles should be clearly articulated. In short, the disciplinary system should comply with the rule of law."*[67]

The above section from this Ontario Report is unfortunately consistent with recent studies from several American jurisdictions[68] which reveal that institutional offences classified as "respect-related" frequently end up being inappropriately influenced by irrelevant considerations of race and gender, which can all too easily result in women and racial minorities being overly represented in segregation placements.[69]

It is to be hoped that much has changed since the periods in 1993-1994 when we collected the data that formed the basis for the *Systemic Racism* study. As previously indicated I requested that Ministry officials responsible for data collection in the field of correctional discipline provide lists of the types of offences for which prisoners had been disciplined over a six-month period in 2018. Table 1 reflects that, apart from threats and/or assaultive behaviors towards other inmates or staff, disobeying a correctional officer's order and possession of contraband, "making a gross insult" is among the most frequent institutional misconducts for which an inmate can be punished (5.3%).

The offence of "Makes a Gross Insult at a Person" is defined in policy as follows:

> "This misconduct is defined as making a gross insult, by gesture, use of abusive language, or other act, directed at any person. Behaviours labelled as such are typically making derogatory, racist and sexual comments or gestures towards staff or fellow offenders."

Based on data recently provided by the Ministry, between March 1, 2018 and August 31, 2018, there were 364 misconducts on file for "makes a gross insult at person." Of

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[67] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Queen's Printer: 1995), Chapter 9, pp. 312-314.

[68] Vera Institute of Justice, "Women in Segregation - Fact Sheet," 2018, https://storage.googleapis.com/vera-web-assets/downloads/Publications/women-in-segregation/legacy_downloads/women-in-segregation-fact-sheet.pdf. New York Civil Liberties Union, "Boxed In: The True Cost of Extreme Isolation in New York's Prisons" (New York: New York Civil Liberties Union, 2012). Vedan Anthony-North, Stephen Roberts, and Sara Sullivan, "The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the New York City Department of Correction," June 2017; Jessa Wilcox, "The Safe Alternatives to Segregation Initiative: Findings and Recommendations on the Use of Segregation in the Middlesex County Adult Correction Center," April 2017; Jessa Wilcox, Léon Digard, and Elena Vanko, "The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the North Carolina Department of Public Safety," December 2016; David Cloud, Jacob Kang-Brown, and Elena Vanko, "The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Nebraska Department of Correctional Services," November 2016; Allison Hastings, Elena Vanko, and Jessi LaChance, "The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Oregon Department of Corrections," October 2016.

[69] See Tables 4 and 5.

these 364, 79% (n=289) were men, and 21% were women (n=75). For men with these misconducts on file, 50% identified as white (n=145), 21 % as Black (n=62), 14% as Indigenous (n=39), 5% (n=14) as East/Southeast Asian, 9% (n=27) were categorized as "other race category," and less than 1% (n=2) were categorized as "unknown." Of the women with the misconduct of "makes a gross insult at person" on file, 61% (n=46) identified as white, 19% (n=14) as Indigenous, 5% (n=4) as Black, 3% (n=2) as East/Southeast Asian, and 12% (n=9) were categorized as "other race."

Over half (53%, n=193) of the total sample had a mental health alert on file; 77% (n=148) were men, and 23% (n=45) were women. During the sample period, "gross insult" was adjudicated as a serious misconduct in 43% of the cases (n=157/364), with 24% of cases (n=86/364) adjudicated as serious and involving an individual with a mental health alert. For men whose "gross insult" was adjudicated as a serious misconduct but *did not* have a mental health alert, 44% (n=24) identified as white, 26% (n=14) identified as Black, 13% (n=7) identified as Indigenous, 11% (n=6) were categorized as "other race category," and 6% (n=3) identified as East/Southeast Asian. There were 17 women (23%) whose misconduct for "gross insult" was considered serious and did not have a mental health alert on file. Of these, approximately 53% (n=9) identified as white, 18% (n=3) identified as Black, 18% (n=3) identified as Indigenous, and 12% (n=2) were categorized as "other race category."[70]

While there were 289 charges of misconduct for men, in 63 of these cases (22%), the individuals had a mental health alert on file and the charges were of a serious nature. Of the men who had a mental health alert on file and whose misconducts were treated as serious misconducts, 73% (n=46) identified as white, 5% (n=3) identified as Black, 14% (n=9) identified as Indigenous, 2% (n=1) identified as East/Southeast Asian, 5% (n=3) were categorized as "other race category," and 2% were categorized as "unknown."[71] There were 40 serious misconducts on file for women; 23 of these women (58%) had a mental health alert on file. Of these, approximately 65% (n=15) identified as white, 13% (n=3) identified as Indigenous, and 22% (n=5) were categorized as "other race category."[72]

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[70] When compared to the overall misconduct sample, of those whose charges were adjudicated as serious, white men were under-represented (44% versus 50% of those charged overall), and black men were over-represented (26% versus 21% of those charged overall). For women whose charges were adjudicated as serious, white women were underrepresented (53% versus 61% overall) and Black women were overrepresented when compared to women in the overall misconduct sample (18% versus 5%).[70] Indigenous men and women without mental health alerts had serious misconducts on file at similar rates as the overall misconduct sample.

[71] When compared to the overall misconduct sample, white men with a mental health alert were more likely to have a "gross insult" adjudicated as serious (77% versus 50% of overall misconduct sample), and East/Southeast Asian men with a mental health alert were under-represented (1% versus 5% of overall misconduct sample). Indigenous and Black men with a mental health alert had serious misconducts on file at rates similar to the overall misconduct sample.

[72] In comparison to the overall misconduct sample, white women with a mental health alert were somewhat more likely to have and a serious misconduct for "gross insult" (65% versus 61% of overall misconduct sample), Indigenous women were underrepresented (13% versus 19% of overall misconduct sample). This

Without comparable population data for all persons in Ontario prisons during the same review period, I cannot determine whether various racialized groups are over-represented in misconducts for "gross insult." Based on the small sample size and five-month sample period, it is also not possible to assess overrepresentation across the variables of gender, mental health alert, and serious misconducts. I reiterate that I expect to be requesting that the Ministry duplicate the "snapshot" data in 2019. (I suggest that the Ministry might wish to consult with the Independent Expert on the data to be used in such a study).

While I can readily appreciate the need for some "gross insults" to be the subject of punishment, the considerable number of incidents where formal discipline was invoked (5.3%) for this category to me raise concerns regarding inadvertent racial discrimination, particularly having regard to the dangers of conflating "insult" with "defiance", as disclosed in some of the American literature on point. **I would urge that the Ministry carefully examine the use of such charges further, particularly where incidents of this kind are categorized as "minor" rather than "serious"; perhaps some consideration might be given to developing some criteria that re-classify all but the most serious incidents as "minor".**

6. <u>The Penalties Available for "Minor" Misconducts Committed by Mentally Ill and/or Developmentally Delayed Inmates</u>

Both historically and in the current (July 2018) version of the Discipline and Misconduct policy it is sensibly anticipated that not all allegations of misconduct should automatically result in the invocation of formal disciplinary processes. The policy emphasizes the desirability of promoting "[a] fair and consistently applied system of inmate discipline *which includes both formal and informal responses and procedures*".[73] To this end staff are encouraged to try to engage in counselling inmates not to commit (or continue to commit) minor institutional offences. This should be encouraged, especially if the inmate's mental health/developmental delay issues are obvious. Such initiatives would be bolstered by adequate and ongoing consultation with a physician and/or psychiatrist, as anticipated in the new policy.

The current D&M policy additionally specifies three linked policies designed to substantially reduce the potential exposure of mentally ill and developmentally delayed inmates to being "held in conditions that constitute segregation. The first is the notion of "progressive discipline"[74] being used in disciplinary decisions, which, when combined with the notion of encouraging staff to first attempt to use informal responses to breaches of discipline, seems to be most appropriate manner of promoting the concept of restraint wherever possible. Second, staff are directed not to place an inmate in "conditions that constitute segregation" unless (a) progressive discipline has been applied, and (b) that

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sample does not contain entries for Black women with mental health alerts whose "gross insult" was adjudicated as serious. Again, without population data and because of an analysis at the intersections of gender, mental health, and serious misconduct yield such smaller numbers, these findings cannot be used to infer patterns or systemic trends.

[73] D&M policy s. 3.1.1 (emphasis added)

[74] D&M policy s.3.1.5.

alternative measures (such as brief restriction of privileges) "have been considered".[75] Most important from the perspective of my mandate the D&M policy is clear that if properly put into practice:

> "Segregation will not be used to discipline and/or manage inmates with mental illness and/or developmental disability, unless the Ministry can demonstrate and document that all other alternatives to being held in conditions that constitute segregation have been considered and rejected because they would cause an undue hardship."[76]

Both the D&M and PSMI policies make clear that:

> "[The legal test for] undue hardship is a high standard and must be supported by real, direct and objective evidence [that costs and health and safety risks limit the organization's duty to accommodate]. The authority to decide that an accommodation cannot be provided rests with the regional director or designate. The superintendent…will contact the regional director…who will consult with appropriate corporate supports…as needed, if they believe that accommodating an inmate's Human Rights Code related need could result in undue hardship".[77]

Given the fact that these policy initiatives are so new (and obviously untested), it remains to be seen whether they will serve to substantially reduce the placement of mentally ill (and developmentally delayed) inmates in conditions that constitute segregation at any stage of the disciplinary process. The restrictions outlined above, particularly the twin concepts of restraint and making every reasonable effort to seek out alternatives, could potentially have this effect. However, this needs to be carefully monitored by the Ministry as these policies are implemented. **I would recommend that the Independent Expert be closely consulted as to appropriate monitoring mechanisms.**

No doubt arising from the very recently expressed views of numerous Canadian and other judges, policy makers and academics as to the inherently destructive effects of anything more than very brief segregation, I find it noteworthy that**, if and when proclaimed in force, the disciplinary regime envisaged under the CSRA would preclude the imposition of a penalty of "holding an inmate in conditions that constitute segregation"[78] upon a finding that an inmate has committed a minor institutional offence. I would support this legislative intent and would recommend its proclamation.** However, unless and until that new legislation is proclaimed, I shall act on the assumption that the existing statutory and policy regime will continue in force.

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[75] D&M policy s.3.1.6.
[76] D&M policy s.3.1.7.
[77] D&M policy ss.4.5.2-4.5.3; PSMI policy ss.4.5.2-4.5.3. It should be noted that the policy specifies that the Ministry's Legal Services Branch should normally be consulted, particularly if questions of defining and applying "undue hardship" arise.
[78] CSRA s.74(2)(1)

During a recent institutional visit, a Superintendent provided me with a Guide[79] listing suggested criteria for disciplinary officials to apply in deciding what penalties to impose following a finding of misconduct. Though I understand that this Guide has not been formally adopted as Ministry policy, it is clear that the document considers that segregation is presently available as a punishment for a "minor" institutional offence. Because this was contrary to what was suggested in a Ministry "Discussion Note: Serious Misconduct", I made several inquiries of Ministry officials as to which interpretation of current policy is correct. It was eventually conceded that the position taken in the Guide is correct as a matter of current law and policy i.e. that "close confinement" does exist as a potential penalty upon a finding that an inmate has committed a minor misconduct (see Tables 6 and 8) . In my view, this must be restricted as much as possible, particularly as it might be applied to prisoners considered to be mentally ill. To this end, **I would recommend that the Ministry adopt a standard in which no mentally ill (or developmentally delayed) inmate be disciplined for a minor institutional offence by way of placement in close confinement, unless there have been findings of guilt for at least two previous similar offences during the same period of confinement.**

It seems to me that there are two additional issues to be considered here in relation to allegations that a mentally ill inmate has committed a minor offence. First, as previously recommended (see section 2 *supra*), Superintendents should be required to indicate their election to treat an allegation of misconduct much earlier in the process. If a Superintendent elects to treat the allegation as minor in nature, then according to existing policy an inmate cannot be placed in administrative segregation pending determination of the allegation of misconduct; as previously indicated, s.4.1.3 of the D&M policy restricts placement in administrative segregation to cases where it is alleged that the inmate has committed a serious misconduct.

However, it is obvious as a matter of common sense that the Superintendent will require some time to consider how to proceed, and it is therefore possible that a misbehaving inmate may be (hopefully very briefly) removed from the general population pending that initial "election". **Until the new legislation is proclaimed, I would recommend that a Superintendent who ultimately determines that an inmate has committed a minor disciplinary offence, and it is appropriately determined that a penalty of close confinement should be imposed, the Superintendent should be *required* to deduct any time spent in administrative segregation from the period of close confinement.**

Where the Superintendent decides to treat an allegation of misconduct as serious, and it is determined that a mentally ill (or developmentally delayed) inmate has committed a serious offence, I would propose that the D&M policy be amended to clarify that a Superintendent *may exercise their discretion* to deduct any time spent in administrative segregation from any penalty of close confinement

[79] Monteith Correctional Complex "Manager's Guide to Misconducts" (September 2015; unpublished). The Superintendent advised that it is his information that this Guide has been shared with, and is used by disciplinary officials in some provincial institutions.

imposed for that offence. Consistent with the notion of restraint discussed *supra*, this might serve to reduce the use of disciplinary segregation consistent for those with major mental illness and/or significant impairment.

7. The Sufficiency of the Misconduct Notice

The new PSMI policy properly specifies that when an inmate is placed in "conditions that constitute segregation" (for any of the four reasons previously indicated), the inmate "must be given specific…written…details about any alleged incidents that formed the basis for the decision to place the inmate in conditions that constitute segregation", that "[t]he inmate must have sufficient information to understand the reasons, the expected duration and the expectations of the institution in order to be released...", that an inmate "must have a meaningful opportunity to tell their side of the story and to provide submissions…to explain why they should be released…or be placed in a different setting", and that "[f]air and meaningful reviews of…segregation must be conducted, including a transparent assessment of the basis for initial and continuing placement in conditions that constitute segregation".[80] Further, "reviews must take into account and [Human Rights] Code related factors e.g. mental illness". If followed, all of these processes seem entirely fair, both for initial placement decisions and (presumably) as indicative of what should be contained in the contents of a Misconduct Notice.

Having said this, first point I would make here is that in my opinion the Misconduct Notice currently being used by the Ministry does not specify as clearly as it could that the inmate may dispute the allegation of misconduct. It seems to me that words like "address the allegation", "present arguments and explanations regarding the allegation", "question the person(s) making the allegation" and "you have a right to call witnesses"[81] are insufficient to bring home to an inmate that they may dispute the allegation – particularly one who is suffering from some level of mental illness or developmental delay. This lack of clarity is continued in the Inmate Information Guide[82] which is supposed to be distributed to each inmate upon admission.[83] The first time this issue is mentioned the Guide states that: "If you are accused of committing a misconduct, you will have the opportunity to explain your actions and your version of events at a misconduct

[80] PSMI s.4.12.1-4.12.5.

[81] Misconduct Notice CSD 075-003B (10/04). The French text is clearer, in that it specifies that the inmate may "conteste…l'allegation".

[82] *Inmate Information Guide for Adult Institutions*. The unpublished document bears a publication date of September 2015. While this was no doubt accurate when the Guide was originally produced, it now makes reference to policies regarding human rights (and mental illness) that were not brought in until 2018, so the date on the document needs to be amended.

[83] Both staff and inmates have told me that this is by no means a consistent practice. Further, though a copy of this Guide is supposed to be "prominently posted" in areas of institutions such that it may be "easily accessible" to inmates, my own observations in several institutions in different parts of the province strongly suggests to me that this too is not consistent. I would go further: in my opinion – based on innumerable visits to provincial corrections over the past 45 years – the idea that "deemed notice" is effective is completely unrealistic.

interview".[84] It is not until the next page that the Guide specifies: "A manager will investigate and meet with you before the misconduct interview to learn your version of what happened. You will also be told that you have the right to…deny the misconduct".[85]

Ministry staff advise that the vast majority of allegations of misconduct are usually admitted (in whole or in part)[86], and that what is usually at issue is the determination of the appropriate penalty. That may well be true, but I consider that there is a lack of clarity here, particularly when it is recalled that many inmates are functionally illiterate or are not native English (or French) speakers. **The Notice form should be amended, applying the principles laid down in section 4.12 of the new PSMI policy.[87]**

The next issue to be discussed is the extent to which an inmate is made aware of the range of penalties they may be facing, given the specifics of the allegation(s) alleged. Here, it is useful to remind the reader that my remit is to examine the situation of prisoners who are (or may be) mentally ill. I make this point at this stage because, although the various "deemed notice" provisions posted in the institution are supposed to provide an inmate with general notice that penalties may be imposed for breaches of institutional rules, I am especially concerned that inmates suffering from some sort of mental illness or developmental delay[88] may not appreciate how these general penalties may be applied to their specific situation. Consequently, and most particularly if they do not have counsel (or other person) to assist them during the misconduct hearing, they may not be able to make tailored submissions as to the appropriate penalty to be imposed.[89]

It seems to me that this ties into the issue raised in a previous section of this Chapter, namely that the Superintendent should normally be in a position to "elect" to proceed with a misconduct allegation as "serious" or "minor" well before the scheduled hearing date. In this regard, I note that s.6.8.2 of the current policy specifies five punishments that may be imposed following a finding of guilt[90]; it would surely not be too onerous to include these either on the Notice itself, or as a separate sheet appended to it.

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[84] Page 28. The document continues: "You should make it clear in your defence if your misconduct allegation is related to Human Rights Code needs".

[85] Page 29.

[86] While the Independent Advisor on Ontario Corrections' December 2018 Report on Institutional Violence was apparently unable to discern what percentage of inmates plead guilty to allegations of misconduct, the Ministry data provided in response to my inquiries disclosed that 4922 of 7031 misconduct charges resulted in either an "admission" of guilt or an "admission with explanation" (approximately 70%. See Table 7).

[87] On this, see *Desroches, supra*, at 416-418.

[88] Or indeed have low levels of reading comprehension.

[89] By analogy sections 726 and 726.1 of the *Criminal Code* confer a right on an offender to speak to sentence.

[90] In the event those portions of the *CSRA* dealing with discipline are proclaimed in force, s. 72(12) of that legislation specifies that, in "minor" discipline cases determined by the Superintendent, there are at least six specified penalties. I am aware that a 7th potential penalty is described as "[a]ny other prescribed disciplinary measure", which presumably awaits the enactment of Regulations on point. I would prefer to reserve comment on this until I am made aware of what these may entail.

The same applies in cases involving an allegation of serious misconduct. In the event the CSRA is proclaimed in force, s. 74(1) and (2) provide for a range of penalties that may be imposed. Subject to my previously expressed reservation as to what "other prescribed disciplinary measures" may mean, that list of penalties could be incorporated into the misconduct notice or appended to it. **In the event those portions of the CSRA are not proclaimed in force, and s.6.8.3 of the current policy remains in force, I again suggest that some specification of the range of available penalties could be easily created and be attached to the written Notice of Misconduct served on the inmate.**

It is also important to address the issue of the sufficiency of the content of allegations of misconduct, as there has in recent years been a fair amount of judicial commentary on this point (beyond the Ontario decision in *Desroches, supra*). In his March 2017 Report,[91] the Independent Advisor on Ontario Corrections cited two cases where courts in other provinces had expressly found that continued detention in segregation was unlawful because, *inter alia*, the prisoner had not been provided with adequate reasons. In *Charlie v. BC (AG)* [92], the British Columbia Supreme Court ordered the release of a prisoner from "Enhanced Supervision Placement", in part "because she was not provided with basic procedural fairness rights, including an adequate explanation of the reasons for her isolation". The court held that, in order for placement in segregation (or in this case segregation-like conditions) "correctional authorities must provide the inmate with written reasons for the placement decision *that include particular details about any alleged incidents that formed the basis for the decision*". In *Hamm v. AG (Can.)*[93] an Alberta court found that a high level of procedural fairness is required in segregation decisions, given the consequences they carry. On the particular facts of the case the court held that the institution had "provid[ed] the inmates with insufficient details regarding the placement decision, [and that] the institution also carried out perfunctory, inadequate segregation reviews".

To these decisions should be added the very recent Alberta decision in *R. v. Prystay*,[94] where, within the context of a sentencing hearing, the judge found that various behaviours of institutional officials in deciding to keep a remand prisoner in segregation for 13.5 months were so egregious that they amounted to a significant breach of the prisoner's *Charter* rights. The judge decided that the only fair remedy was to grant a very considerable reduction (3.75 days credit for each day spent in pre-sentence custody) in what would otherwise have been a perfectly appropriate "joint submission" as to the sentence that should be imposed.

While I have not received any specific complaints about the substantive adequacy of contents of misconduct notices in Ontario corrections. I am aware of two 2018 decisions

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[91] *Segregation in Ontario* p. 20.
[92] 2016 BCSC 2292. The Independent Reviewer's Report also cites other cases going back over 40 years where the adequacy of reasons supporting detention in segregation has been challenged, and often found wanting.
[93] 2016 ABQB 440.
[94] 2019 ABQB 8.

by E.M. Morgan J. of the Ontario Superior Court that touch on this issue[95]. In *R. v. Charley*[96] Morgan J. writes: "the idea of due process [has] not really taken hold in the [TSDC]'s disciplinary processes…corrections jargon and the use of grade school euphemisms do not do much to hide the punishing nature of [the offender's] stay at the TSDC". In his subsequent sentencing decision in *R. v. Roberts*[97], a case involving the question of whether a prisoner who "voluntarily" segregated himself could then claim "enhanced credit" by way of a reduction in sentence due to poor custodial conditions, Morgan J. continued this theme: "Defence counsel has put into the record a large number of [segregation] review forms completed by staff at the TSDC. *They all appear to be cut and paste jobs with no meaningful content*" (para. 36; emphasis added).

In the only recent Ontario case directly addressing the issue of the sufficiency of reasons for segregation, both the judge hearing the case at first instance[98] and the Ontario Court of Appeal[99] both found that, while there might have been some minor procedural errors by OCDC officials, none of those amounted to any error that would entitle the prisoner to some relief. Both levels of court were clearly impressed by the quality and extent of the written rationales for continued segregation provided to this difficult inmate. However, given courts' increasing willingness to scrutinize such decisions, **I recommended that those sections of the new D&M policy that deal with procedural fairness (s.4.13) be specifically made applicable to those sections of the policy that deal with notifying the inmate of "the nature and circumstances of the misconduct" (s.6.5.3c.ii). Additionally, Superintendents should receive training from MCSCS Legal Services Branch as to the substantive content of allegations within misconduct notices.**

Though it may not precisely be part of my mandate, I consider it necessary to briefly raise one other issue of sufficient importance that it should at least be "flagged" in order to assist the overall process of reform of disciplinary processes. The question of forfeiture of remission (or loss of ability to earn remission) as a punishment for a sentenced inmate following a disciplinary hearing was an issue which significantly affected the Ontario Court of Appeal in its consideration of a series of cases brought by a prisoner during the late 1960s (called the "*McCaud* trilogy"). Because the possibility of forfeiture of remission could affect the length of the prisoner's term of imprisonment (and thereby "his civil rights in that they affect his status as a person as distinct from his status as an inmate") the Court of Appeal held that a disciplinary decision-maker must behave "judicially" as distinct from "administratively"[100]. While that distinction is long gone (even pre-*Charter*), **I suggest that the discipline penalty section (s.6.8.3.c & d) should be re-written to**

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[95] I use the term "touch" deliberately, as the two cases I refer to here were both sentencing cases where, unlike in *R. v. Prystay*, no application for *Charter* relief on the basis of inadequate reasons for segregation detention was under consideration. Strictly speaking the portions of Morgan J.'s decisions are *obiter.*

[96] 2018 ONSC 3551 paras. 44-45.

[97] 2018 ONSC 4566 paras. 26-41.

[98] *R. v. Boone* 2014 ONSC 370.

[99] *Boone v. MCSCS* 2014 ONCA 515.

[100] *R. v. Institutional Head of Beaver Creek Correctional Camp, Ex parte McCaud* [1969] 1 O.R. 373 (C.A.).

make it clear that if the Superintendent envisages forfeiture of remission (or loss of ability to earn remission) as a penalty the sentenced inmate must be (a) positively advised in advance of the hearing that this possibility exists, and (b) be expressly told (both in advance of and at the hearing) that they may separately address that issue. (Table 8 discloses that 318 misconduct penalties included either forfeiture of remission or loss of ability to earn remission.).

8. External Scrutiny of Decisions to Place or Maintain an Inmate in Administrative Segregation:

Currently before the courts are two challenges brought by the Canadian Civil Liberties Association against the practice of placing federally–sentenced inmates in administrative segregation. Those cases are currently under reserve judgment in both the British Columbia and Ontario Courts of Appeal[101], so I do not have the benefit of the reasoning of these appellate courts. Similarly, I am aware that legislation is pending in the federal Parliament,[102] but the final text of that legislation has not yet been voted on in Parliament; I understand that final legislation is expected in the next few months.

With these various factors in mind, I have elected to defer consideration of this issue until my Final Report.

9. External Scrutiny of Disciplinary Decisions:

Section 29 of the MCSA continues to govern disciplinary decision-making processes in Ontario. According to that statutory provision, the Superintendent is the decision-maker (subject of course to court challenges, such as occurred in *Desroches, supra*). The MCSA leaves a residual power in the Minister to "review" a Superintendent's decision at an inmate's request. The Minister's decision is considered to be "final".[103] Other than a 1990 Supreme Court of Canada decision[104] holding that "provincial" disciplinary proceedings are neither criminal proceedings by their nature nor are they proceedings involving the imposition of "true penal consequences", there appears to have been no case which deals directly with the issue of whether various provisions of the *Charter of Rights and Freedoms* mandate the creation of an independent decision-maker to adjudicate upon allegations of "serious" misconduct in Ontario institutions. Should the MCSA remain in force, I would suggest that, given recent case law, the absence of a truly independent decision-maker may now be constitutionally fatal to the continuing legality of s. 29, at least in the adjudication of "serious" misconduct".

The simplest way for Ontario to deal with this would be to proclaim in force those portions of the CSRA relating to serious misconducts; these provide for the

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[101] *Canadian Civil Liberties Association v. Canada (Attorney General)* [2017] O.J. No. 6592; 2017 ONSC 7491. The Government of Canada's appeal of this decision was heard on November 21, 2018, and the Ontario Court of Appeal decision is currently under reserve 2018 ONCA 1038. The decision of the British Columbia Court of Appeal is currently on reserve. And see the court's interim decision reported at 2019 BCCA 5.

[102] Bill C-86.

[103] MCSA s. 33

[104] *R. v. Shubley* [1990] S.C.J. No. 1.

creation of external Disciplinary Hearings Officers[105] to adjudicate allegations of "serious" institutional misconduct. If, however, the MCSA remains the guiding statute, two recent decisions in court challenges brought against the current administrative segregation regime in federal penitentiaries will need to be considered. In *British Columbia Civil Liberties Association v. Canada (Attorney General)*[106] the trial judge held, *inter alia*, that it amounted to a breach of s.7 of the *Charter* for "[a British Columbia penitentiary] institutional head to be the judge and prosecutor of his own cause". In the companion Ontario case, though his reasoning is slightly different from that in the British Columbia case, the trial judge similarly held that:

> [Because] the procedure chosen [by Parliament] provides that the Institutional Head is the final decision maker for admission, maintenance and release from administrative segregation and is the final institutional decision-maker of required reviews and hearings which occur immediately after an inmate is segregated….I am satisfied that the lack of an independent review of the decision to segregate more than minimally impairs the inmate's liberty and security of the person interests and that as a result the infringement caused by this aspect of the sections 31-37 of the *Corrections and Conditional Release Act* is not saved by section 1 of the *Charter*[107].

Of course, it can be argued that these decisions only affect the federal penitentiary system, that they only affect the regime of administrative segregation not directly related to discipline, and that they may be reversed on appeal. However, it seems to me that the constitutional logic animating these two cases would certainly apply to provincial correctional disciplinary adjudication. In this regard, I see the decision in *Currie et al. v.*

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[105] Though tempting as a way of providing for external scrutiny of disciplinary processes, I have concerns about the practicalities of having external Disciplinary Hearings Officers readily available throughout the province. I am aware from discussions with federal authorities that there have been and continue to be ongoing problems with engaging and retaining Independent Chairpersons to conduct disciplinary hearings in "serious" matters, with the unfortunate result that disciplinary hearings can sometimes be severely delayed. While it would likely be only tangentially related to my mandate to comment on this further, I believe that other models may be more appropriate and should be considered, particularly given the relatively brief lengths of time most sentenced inmates serve in Ontario corrections. I anticipate that I may examine this more extensively in my Final Report.

[106] [2018] B.C.J. No. 53; 2018 BCSC 62. The Government of Canada's appeal of this decision was heard on November 13-14, 2018. The Ontario Attorney General sought intervenor status in the appeal, seeking to "provide valuable context for [the] court's deliberations in this appeal [by] highlight[ing] how administrative segregation in the provincial and territorial correctional setting differs from the federal setting". This application was dismissed on the basis that the appellate judge hearing the application was "unable to discern any unique or helpful perspective that Ontario could bring to this appeal within the confines of the issues under appeal". See [2018] B.C.J. No. 2833; 2018 BCCA 282.

[107] It should be pointed out that in the Ontario case Marrocco J. was not prepared to go as far as in the British Columbia case, in that he considered it might be sufficient for CSC to build in another layer of scrutiny *internally* within the correctional system. No doubt these differing views will be considered when the appeals are determined.

Alberta Remand Centre[108] as most helpful on this issue. In that case, the Alberta Court of Queen's Bench held that the disciplinary tribunals established in Alberta provincial corrections were insufficiently independent of an Institutional Director, and thus breached s.7 of the *Charter*. Even though, as a strict matter of law that decision is not "binding" on Ontario corrections, I strongly suggest that an Ontario court would rule the same way, especially given that the CSRA deliberately anticipates an independent decision-maker for serious disciplinary matters.

I anticipate that I may return to this issue in my Final Report.

10. Is access to counsel at disciplinary hearings now constitutionally mandated?

There have been several cases that have examined this issue in the provincial disciplinary context (see cases cited in the previous section). As far as I am able to tell, they have all concluded that a right to counsel – or at least to an independent advisor – is now constitutionally mandated.

Once again**, I turn to the provisions of the CSRA, which, if proclaimed, confirms a right to counsel in s. 73(5) for those "serious" misconduct allegations referred to the Independent Hearing Officer. I agree with this legislative initiative and recommend that it be proclaimed in force**.

The right to counsel in "minor" disciplinary hearings under the MCSA is not as clear. Sections 6.6.2.f and g of the current D&M policy anticipate that the Superintendent has a discretion to permit counsel to attend, depending on "the complexity of the issues", "the inmate's ability to represent themselves adequately and to understand the allegation" and "the seriousness of the alleged misconduct and potential consequences". While I see nothing constitutionally objectionable to the existence of discretion regarding counsel being sparingly used in routine "minor" cases, having regard to my mandate to examine the situation of the mentally ill, I would hope that Superintendents would be liberal in their application of their discretion where mentally ill prisoners are involved. In Messrs. Hogg and Whitehead's 2006 text on Ontario corrections, the authors examine the structure of both federal and provincial codes of disciplinary offences and conclude:

> "If one compares the codes of inmate disciplinary offences and possible sanctions in both the federal and provincial Acts, they are arguably similar and therefore the provisions of the MCSA may attract an inmate's right to counsel in appropriate cases."[109]

I agree with these authors that "appropriate" cases may now include a right for a mentally ill inmate to have counsel to assist even in "minor cases". (In point of fact, from my conversations with several Superintendents[110] on this issue, I feel reasonably certain

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[108] [2006] A.J. No. 1522; 2006 ABQB 858

[109] K.W. Hogg & B.G. Whitehead *Guide to Ontario's Ministry of Correctional Services Act* (2006 Edition) p. 286.

[110] I may add that I have had informal discussions on this issue with Superintendents in Nova Scotia and British Columbia, who agree that legal representation of the mentally ill (and developmentally delayed) would be of considerable assistance to act as an independent check on their discretion.

that they would not only permit counsel to attend, but would be grateful to have counsel present to ensure that whatever can be said on a mentally ill inmate's behalf is done).

Currently, Legal Aid Ontario (LAO) has "onsite" duty counsel physically located in 7 provincial institutions; however, the services these duty counsel presently render in these institutions do not consist of direct service in disciplinary proceedings.[111] Anticipating that there will be a considerably enlarged role for counsel in both "serious" and "minor" disciplinary hearings, and recognizing the reality that private counsel will not likely be readily available to represent clients at such hearings[112], **I recommend that consideration be given to expanding "onsite duty counsel" to other Ontario institutions**. Given the geographical dispersion of Ontario's 25 adult correctional facilities, not to mention the relative sizes of different institutions, this is an issue that will require considerable consultation and policy development between Legal Aid Ontario (LAO) and the Ministry.

In addition to developing security and other protocols (including timely access to materials to be relied upon at various types of institutional hearings), duty counsel will need to be properly trained in this area.

If this concept of substantially enlarging the onsite duty counsel program to all 25 adult provincial institutions is not immediately feasible for economic reasons, I would alternatively recommend that policy discussions take place over the next few months between officials of LAO and MCSCS[113] regarding a possible expansion of services provided by onsite duty counsel in the 7 institutions where services are currently available, with a view to having duty counsel much more involved in the direct provision of various legal services to mentally ill inmates. I would reiterate that Superintendents and other institutional personnel who regularly deal with mentally ill prisoners have almost universally told me that they would actively welcome onsite duty counsel additionally appearing (a) as advisors to mentally ill prisoners upon request (b) as a prisoner's representative at segregation review hearings.[114]

In one of its submissions to the Ministry as part of MCSCS' 2016 stakeholder consultations regarding possible policy changes, the OHRC urged that:

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[111] There would be nothing to prevent a privately retained counsel from applying to appear as counsel at a disciplinary hearing under current rules. I am told that this "almost never" happens in provincial institutions, although counsel frequently appear at disciplinary hearings in Ontario penitentiaries.

[112] Particularly given the apparent rapidity with which such disciplinary charges come on for hearing, as revealed in Tables 10 & 11.

[113] As part of this consultation process, I suggest that the Ministry of the Attorney General, the Queen's University Correctional Law Project and the Canadian Prison Law Association be consulted, as they have expertise to contribute in these areas.

[114] I note that the newly introduced federal Bill C-83 will, if enacted, place CSC under an "obligation to provide inmates with access to patient advocacy services". Perhaps this might provide an alternative (or supplementary) service to provincial inmates.

> “MCSCS ensure that all prisoners and their legal representatives are provided with relevant information about and a genuine opportunity to challenge both the nature of and justification for segregation placements.”

I entirely agree with this recommendation, and see this initiative to expand the role of onsite duty counsel as entirely consistent with this proposal. I would hope to receive a report from LAO as to the progress being made in this area, for possible commentary in my Final Report.

Recommendations Regarding Institutional Disciplinary Processes in Dealing with Mentally Ill and Developmentally Delayed Inmates

1. It is recommended that *if* the *Ministry of Correctional Services Act* is to remain in force, both the *Act* and accompanying regulations be revised to confirm in statute the animating principles relating to what are now termed "conditions that constitute confinement" in the Ministry's "Placement of Special Management Inmates" and "Discipline and Misconduct" policies.

2. In the alternative, it is recommended that if the 2018 *Correctional Services Reintegration Act* (or portions thereof) is proclaimed in force, both the legislation and any accompanying regulations be revised to confirm in statute the animating principles behind the "conditions that constitute confinement" in the Ministry's "Placement of Special Management Inmates" and "Discipline and Misconduct" policies.

3. It is recommended that the Ministry regularly collect and monitor data about how Specialized Care Placements (which are a form of restrictive confinement) are used in Ontario institutions. This data should include details on (a) reason(s) for placement, duration, type and conditions of confinement, (b) processes of review, assessment and access to mental health care, as well as (c) each inmates' demographic information such as their gender, sex, mental illness, and other Code-related needs.

It is further recommended that individual level data must be available and routinely reviewed by the Superintendent where an inmate is being held in restrictive confinement (e.g. Specialized Care, segregation or other forms of restrictive confinement) until such time as the inmate returns to conditions akin to general population.

It is further recommended that a representative sample of the individual-level, province-wide data (as per *supra*) be periodically audited for accuracy and integrity. For transparency, the Ministry should release data and audit reports annually along with the human rights-based data on segregation and restrictive confinement as part of B-15. The public release of data and reports should include the Ministry's findings, together with its plans with timeframes to address identified issues, human rights concerns (e.g. gender/sex, mental illness and other Code-related needs), and compliance to the Consent Order.

4. It is recommended that Ministry personnel and officials of Legal Aid Ontario review processes regarding the timing of a Superintendent's decision to treat an allegation of misconduct as "serious" or "minor", with a view to substantially advancing the timing of that decision-making process. It is further recommended that a report of deliberations be submitted to the Independent Reviewer by September 1, 2019 for possible consideration in the Final Report.

5. It is recommended that Ministry personnel develop criteria to guide Superintendents in their decision to treat an allegation of misconduct as "serious" or "minor".

6. It is recommended that the Ministry conduct a detailed study of charging and disposition practices in relation to the institutional offence of "making a gross insult", with a view to examining whether inadvertent racial discrimination may affect decision-making processes. It is recommended that the Independent Expert be consulted as part of any such study.

7. It is recommended that section 74(2)(1) of the 2018 *Correctional Services Reintegration Act* be proclaimed in force in order to prohibit the availability of a penalty of close confinement for a minor disciplinary offence.

8. In the alternative, it is recommended that if the *Ministry of Correctional Services Act* is to remain in force, both the *Act* and accompanying regulations should be revised to require a Superintendent to deduct any time spent in administrative segregation from any penalty of close confinement that may be imposed for a minor disciplinary offence. In cases involving serious disciplinary offences, a Superintendent should be expressly authorized to exercise their discretion to deduct any time spent in administrative segregation from any penalty of close confinement that may be imposed for a serious disciplinary offence.

9. It is recommended that the form of Misconduct Notice currently being used be substantially revised. The usage of high order language detracts from the ability of all readers to process its meaning the way it is intended; problems of illiteracy in Canada's official languages need to be better addressed; the list of potential penalties should be included on the printed Notice Form; inmates should be specifically advised that they may make submissions as to penalty.

10. It is recommended that those sections of the new D&M policy that deal with procedural fairness (s.4.13) be applied to those sections of the policy that deal with notifying the inmate of "the nature and circumstances of the misconduct" (s.6.5.3c.ii). In addition Superintendents should receive training from MCSCS Legal Services Branch as to the substantive content of allegations within misconduct notices.

11. It is recommended that sections 65-67 of the 2018 *Correctional Services Reintegration Act* dealing with the appointment of Disciplinary Hearings Officers to adjudicate allegations of serious misconduct be proclaimed in force.

12. In the alternative, it is recommended that if the *Ministry of Correctional Services Act* is to remain in force, a process for the appointment of independent adjudicators for serious misconducts be immediately developed.

13. It is recommended that s. 73(5) of the 2018 *Correctional Services Reintegration Act* dealing with the right to counsel in cases involving allegations of serious misconduct be proclaimed in force.

14. In the alternative, it is recommended that if the *Ministry of Correctional Services Act* is to remain in force, a process for the ensuring access to counsel in cases of allegations of serious misconduct be created.

15. It is recommended that MCSCS and Legal Aid Ontario develop policies for expanding the role of "onsite duty counsel" as advisors to mentally ill and developmentally delayed inmates, as well as representing such inmates at segregation review hearings and in disciplinary proceedings. It is further recommended that the current "onsite duty counsel" program (or equivalent) be expanded to other institutions.

Discipline Tables

Table 1: Misconducts by Charge - Guilty Findings - March 1 to Aug 31, 2018

Misconduct Charge	Count	Percent
Commits/Threatens Assault (On Other)	2,982	42.3%
Commits/Threatens Assault (Staff)	495	7.0%
Contraband - Alcohol	130	1.8%
Contraband - Drugs / Illicit	154	2.2%
Contraband - Drugs / Prescription	124	1.8%
Contraband - Electronic Device	3	0.0%
Contraband - Tobacco	20	0.3%
Contraband - Weapon / Inmate Crafted	25	0.4%
Contraband - Weapon / Manufactured	5	0.1%
Counsels/Aids/Abets Another Inmate	7	0.1%
Creates / Incites A Disturbance	250	3.5%
Escapes, Attempts To Escape, UAL	52	0.7%
Gives/Offers A Bribe/Reward To Employee	3	0.0%
Has Contraband Or Attempts To Bring Into	1,094	15.5%
Leaves An Appointed Place W/O Authority	34	0.5%
Makes A Gross Insult At Person	373	5.3%
Obstructs An Authorized Investigation	4	0.1%
Takes Or Uses Another's Property	33	0.5%
Wilful Breach/Attempt Reg/Rule	150	2.1%
Wilful Breach/Attempt Breach of Temporary Absence	7	0.1%
Wilfully Disobeys Order Of Officer	881	12.5%
Willfully Damages Property Not Inmate's	217	3.1%
Total	**7,043**	**100.0%**

*Includes all misconduct charges with findings of guilt between March 1 and August 31, 2018

Table 2: Gender of offenders for all misconducts with guilty finding between March 1 and August 31, 2018

	Male	Female	Total
Count	6,283	748	7,031

Table 3: Hold status of offenders at time of incident for all misconducts with guilty finding between March 1 and August 31, 2018

Hold Status	Male	Female	Total
Remand	4,103	441	4,544
Sentenced	1,610	177	1,787
Other	570	130	700
Total	**6,283**	**748**	**7,031**

* Other includes those placed on immigration holds and in police lock up.

Table 4: Was the offender in segregation (administrative or disciplinary) at the time of being charged with institutional offence?

Segregation Reason at time of Misconduct	Male	Female	Total
Alleged Commit Misconduct Of Serious Nature	129	13	142
Inmate Needs Protection	135	14	149
Inmate Requests Protection	145	2	147
Inmate Request Safety/Security/Inst/Oth	33	2	35
Protect Security Inst/Safety Of Others	107	18	125
Close Confinement	103	3	106
Not in Segregation	5,631	696	6,327
Total	**6,283**	**748**	**7,031**

Table 5: Was the offender placed in segregation pending disposition as a consequence of the charge(s) being laid?

Misconduct leading to placement	Male	Female	Total
No	5,458	626	6,084
Yes	825	122	947
Total	**6,283**	**748**	**7,031**

*Data are based on misconduct incident dates occurring less than 10 days (including the day of) from a segregation placement for an alleged misconduct of a serious nature.

Table 6: Was the offence characterized as "serious" or "minor" by the Superintendent?

Misconduct Charge	Male			Female			Total		
	Serious Misconduct			Serious Misconduct			**Serious Misconduct**		
	No	Yes	Total	No	Yes	Total	No	Yes	Total
Commits/Threatens Assault (On Other)	1,193	1,575	2,767	103	151	254	1,295	1,726	3,021
Commits/Threatens Assault (Staff)	164	279	443	12	32	44	176	311	487
Contraband - Alcohol	53	61	114	8	8	16	61	69	130
Contraband - Drugs / Illicit	51	70	121	8	24	32	59	94	153
Contraband - Drugs / Prescription	61	47	108	6	9	15	67	56	123
Contraband - Electronic Device	0	2	2				0	2	2
Contraband - Tobacco	7	6	13	5	1	6	12	7	19
Contraband - Weapon / Inmate Crafted	4	16	20	0	2	2	4	18	22
Contraband - Weapon / Manufactured	3	1	4				3	1	4
Counsels/Aids/Abets Another Inmate	4	5	9				4	5	9
Creates / Incites A Disturbance	73	150	223	8	11	19	81	161	242
Escapes, Attempts To Escape, UAL	23	19	42	2	4	6	25	23	48
Gives/Offers A Bribe/Reward To Employee	2	1	3				2	1	3
Has Contraband Or Attempts To Bring Into	507	462	969	74	60	134	581	522	1,103
Leaves An Appointed Place W/O Authority	15	9	24	5	4	9	20	13	33
Makes A Gross Insult At Person	172	117	289	35	40	75	207	157	364
Obstructs An Authorized Investigation	0	4	4				0	4	4
Takes Or Uses Another's Property	15	12	27	2	1	3	17	13	30
Wilful Breach/Attempt Reg/Rule	67	54	121	11	13	24	78	67	145
Wilful Breach/Attempt Ta	2	5	7				2	5	7
Wilfully Disobeys Order Of Officer	410	356	766	55	46	101	465	402	867
Willfully Damages Property Not Inmate's	113	93	206	6	2	8	119	95	214
Total	**2,939**	**3,344**	**6,282**	**340**	**408**	**748**	**3,278**	**3,752**	**7,031**

For the purposes of this table, a misconduct is categorized as serious based on the sanctions given. Where the sanction for a misconduct results in close confinement, suspension of the eligibility to earn remission, or forfeiture of earned remission, the misconduct is considered serious. This definition is derived from Institutional Services Policy.

Table 7: Plea of offenders for all misconducts with guilty finding between March 1 and August 31, 2018

Plea	Male	Female	Total
Admits	3,630	421	4,051
Admits With Explanation	766	105	871
Denies	1,389	146	1,535
Refuses To Admit Or Deny	483	76	559
Unable To Adjudicate	12		12
Withdrawn	3		3
Total	**6,283**	**748**	**7,031**

Table 8: Sanctions imposed for all misconducts with guilty finding between March 1 and August 31, 2018

Sanctions	Male	Female	Total
Loss of privileges	1,627	146	1,773
Change of program	121	6	127
Change of classification	49	12	61
Change of security status	29	4	33
Reprimand	1,582	189	1,771
Close confinement for a definite period	1,080	134	1,214
Close confinement for an indefinite period	1,971	252	2,223
Forfeiture of earned remission	294	22	316
Suspension of eligibility to earn remission	2	0	2
No action taken max	72	4	76

Table 9: If the inmate is ordered segregated for a set period of days as one element of a punishment imposed, is there any data on whether the inmate actually serves the full number of days in segregation?

Time Served in Close Confinement	Male	Female	Total
Less than Days Ordered	272	26	298
Same as Days Ordered	72	9	81
Greater than Days Ordered	92	4	96
Total	**436**	**39**	**475**

Data are based on all incidents with a sanction of close confinement with an incident date between March 1 and August 31 2018. Cases were included if the incident occurred less than 10 days prior to the close confinement placement date.

Day calculations for time in custody are based on days and not hours, so they may be slightly inflated.
Note that this is an estimate only as the sanction days in OTIS are subject to data entry errors. For example, in many cases there are no sanction days entered in the proper box, but the comments indicate the inmate is to serve time in close confinement. This issue is under review.
475 cases were included:

- Of those, 298 (62.7%) spent less time in close confinement than was ordered as a result of the
  misconduct sanction
- Of those 81 (17.1%) spent the ordered amount of time in close confinement

The remaining 96 (20.2%) spent more time in close confinement than was ordered on the sanction

- Note that in some cases this may be due to multiple misconducts
- Of the 96, 74 (77.1%) spent 5 or less additional days in close confinement;
- Of the 96, 18 spent (18.8%) spent 6-10 additional days; and
- 4 (4.2%) spent more than 10 additional days in close confinement. One each at 11, 12, 13 and 34 days.

Of the 298 placements that were less than the ordered time in close confinement, the average proportion of time spent in close confinement is 56% of the misconduct days ordered. Time spent in close confinement ranges from 6.7% of the time to 93.3% of the time with 62.8% of cases spending at least 60% of days ordered in close confinement.

Tables 10 & 11: Is there any data available on how long it takes to process misconduct allegations from the date the allegation is made until the date the Superintendent (or designate) decides whether the allegation is made out? If such data exists, could it be broken down into (a) cases involving inmates who are in segregation at the time the allegation is made (b) cases of inmates who are placed in segregation as a result of the allegation being made (c) inmates who are in general population at the time the allegation is laid?

Table 10 - Misconducts Occurring Between March 1 and August 31, 2018

Gender	Segregation Status	Days from Misconduct To Hearing			Percent
		Mean	Median	Number	
Male	Not in Seg - Misc. did not lead to seg.	1.65	2	4,820	76.70%
	Misc. leading to seg.	3.44	3	638	10.20%
	Misc. while in seg.	2.75	2	825	13.10%
	Total	1.98	2	6,283	100.00%
Female	Not in Seg - Misc. did not lead to seg.	0.76	2	579	77.40%
	Misc. leading to seg.	2.26	1	47	6.30%
	Misc. while in seg.	2.25	2	122	16.30%
	Total	1.1	2	748	100.00%
Total	Not in Seg - Misc. did not lead to seg.	1.56	2	5,399	76.80%
	Misc. leading to seg.	3.36	3	685	9.70%
	Misc. while in seg.	2.68	2	947	13.50%
	Total	1.88	2	7,031	100.00%

Table 11 - Misconducts Occurring Between March 1 and August 31, 2018: by Serious Misconduct*

Gender	Segregation Status	Not Serious Misconduct				Serious Misconduct			
		Days from Misconduct To Hearing				Days from Misconduct To Hearing			
		Mean	Median	Number	Percent	Mean	Median	Number	Percent
Male	Not in Seg - Misc. did not lead to seg.	2.64	2	2,341	79.70%	0.71	2	2,479	74.10%
	Misc. leading to seg.	3.69	3	331	11.30%	3.17	3	307	9.20%
	Misc. while in seg.	3.61	3	267	9.10%	2.34	2	558	16.70%
	Total	2.85	2	2,939	100.00%	1.21	2	3,344	100.00%
Female	Not in Seg - Misc. did not lead to seg.	1.98	1	275	80.90%	-0.34	2	304	74.50%
	Misc. leading to seg.	1.79	1	24	7.10%	2.74	2	23	5.60%
	Misc. while in seg.	2.68	2	41	12.10%	2.03	1	81	19.90%
	Total	2.05	2	340	100.00%	0.3	2	408	100.00%
Total	Not in Seg - Misc. did not lead to seg.	2.57	2	2,616	79.80%	0.6	2	2,783	74.20%
	Misc. leading to seg.	3.56	3	355	10.80%	3.14	2	330	8.80%
	Misc. while in seg.	3.49	2.5	308	9.40%	2.3	2	639	17.00%
	Total	2.77	2	3,279	100.00%	1.11	2	3,752	100.00%

Data Notes

- Please note that this is a count of all offenders with a misconduct on file during this time period. As such, the same offender may be counted several times for different incidents and several offenders may be counted for the same incident.
- Nine cases were removed due to data inconsistencies that put into question their inclusion.
- Misc. leading to seg are based on misconduct incident dates occurring less than 10 days (including the day of) from a segregation placement for an alleged misconduct of a serious nature.
- Not in Seg - Misc. did not lead to seg. does not necessarily indicate housing in general population. Rather it refers to those who were not in segregation at the time of the incident.
- Misc. while in seg. refers to all segregation placements regardless of reason.

*Serious misconduct is categorized as serious based on the sanction given. Where the sanction for a misconduct results in close confinement, suspension of the eligibility to earn remission, or forfeiture of earned remission, the misconduct is considered serious. This definition is derived from Institutional Services Policy.

IMPROVING LINKAGES BETWEEN ADULT CORRECTIONS AND COURTS

"*Lawyers, judges, wardens and even scholars often treat the criminal courts and the penal administrative realm as two separate worlds*".[115]

Prof. Lisa Kerr, Queens University Faculty of Law

As there are written reports regularly presented to judges presiding in criminal courts that may be of assistance to MCSCS officials in their assessment and placement of mentally ill inmates and probationers, I considered it necessary to study the efficacy of transfer of such information between Ontario courts and corrections, particularly examining whether and to what extent MCSCS accesses such materials in a routine and timely manner.

By way of introduction, the following are some regularly encountered examples of such mental health assessment reports:

- At any stage of criminal proceedings a judge may order that an assessment of an accused's "fitness to stand trial"[116] be conducted by a "medical practitioner"[117]. A report is prepared and presented to the presiding judge. Such reports can sometimes be of assistance to MCSCS in deciding how to deal with the custodial placement of and services offered to a remanded inmate.
- An accused who was at an earlier stage in the proceedings declared unfit to stand trial may now be sufficiently stabilized such that in the opinion of their attending physician/psychiatrist the accused may now be fit to stand trial. In such cases a report is prepared[118] and presented to the presiding judge. If the judge adopts the proposal of the accused's medical advisors, and orders that the accused stand trial, the inmate will be transferred from a mental hospital to MCSCS custody. Even if the accused is granted bail, the inmate will spend some time in MCSCS custody pending that determination. It is likely that the physician's report would be of assistance to MCSCS in deciding how to deal with the remanded inmate, regardless of how long they remain in MCSCS custody.
- As part of submissions to sentence defence counsel arranges for and presents a mental health assessment/psychiatric report to the presiding judge, with the aim of

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[115] "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment", *Canadian Journal of Law and Society, 2017* Volume 32, no. 2 pp. 187-207 at p. 191.

[116] *Criminal Code* s. 672.11(a). Subsections (b)-(e) delineate other circumstances where a court may make such an order, but since these are less frequently resorted to, I shall simply refer to "fitness assessments" throughout.

[117] Depending on regional resources, such assessments are usually conducted by a psychiatrist, sometimes in concert with a mental health team.

[118] Sometimes this will be in the form of a report/note from a psychiatrist which explains that in the doctor's view the Treatment Order (*Criminal Code* s.672.58) has been successful. This may be supplemented by Reasons for Disposition from an initial hearing conducted by the Ontario Review Board (ORB).

providing evidence in mitigation of the offence and/or demonstrating that the offender's risk to reoffend is low.[119] Such a report can be of assistance to MCSCS in deciding how to deal with an offender sentenced to custody and/or probation/conditional sentence.

- A court may order a mental health assessment of its own motion in certain circumstances, either under the *Criminal Code* or under the provisions of the *Ontario Mental Health Act*.[120] Such a report can be of assistance to MCSCS in deciding how to deal with a remanded inmate, or an offender sentenced to custody and/or probation/conditional sentence.

I now turn to examine some of the substantive problems that tend to limit MCSCS' routine access to such mental health assessments.

1. MCSCS' Approaches to Ontario's Privacy Legislation:

Recent amendments to the Ministry's *Placement of Special Management Inmates* (PSMI) policy reference that "court records" are to be considered as source of "important information regarding special management inmates".[121] Against this backdrop, and having regard to my particular mandate to examine and report on mentally ill inmates (and probationers), it was most disappointing to learn the view of several senior MCSCS managers very experienced in custodial administration who considered they were absolutely precluded from accessing any mental health reports presented to adult courts "because of [Ontario's] privacy legislation". From discussions with them – and they should be complimented for their candour – it became clear that they have no appreciation that mental health reports in adult courts are public documents to which any member of the public (including the press) may virtually always have access as of right.[122]

What was even more troubling was the fact that this misapprehension as to the limitations created by "the privacy legislation" had been passed on to senior officials within MCSCS, including two Assistant Deputy Ministers (ADMs). It was unfortunately

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[119] *Criminal Code* s. 718(d). In *R. v. Ayorech* 2012 ABCA 82, [2012] A.J. No. 236 at paras. 10 & 13, the court usefully observed: "[M]ental disorders, particularly schizophrenia, can significantly mitigate a sentence, even if the evidence does not disclose that the mental illness was the direct cause of the offence…It is sufficient that the mental illness contributed to the commission of the offence…[Also] the effect of the imprisonment should be taken into account when it would be disproportionately severe because of the offender's mental illness". In the Ontario context, see the important case of *R. v. Batisse* [2009] O.J. No. 452 (Ont. C.A.).

[120] R.S.O. 1990, c. M-7 ss. 21-22. Although decisions in a number of other Canadian jurisdictions have held that *Criminal Code* sections 721(4) and 723(3) may provide a statutory basis for judges to order psychiatric reports for the purposes of sentencing, there is no comparable Ontario authority. Although the Ontario Court of Appeal decision in *R. v. Lenart* (1998) 123 C.C.C. (3d) 353 (Ontario Court of Appeal) is by now somewhat dated, it still governs. It permits the use of the *Mental Health Act* provisions to order assessments for sentencing purposes but rules out the use of the *Criminal Code*. See paragraphs [19], [51] and [52].

[121] *Ministry of Correctional Services Institutional Services Policy and Procedures Manual* – Inmate Management – PSMI s. 6.0., effective December 17, 2018.

[122] It was also suggested to me by more than one senior MCSCS official that "we don't need such [reports], as we do our own assessments". This unfortunately leads to a reasonable inference that some senior Ministry personnel may continue to hold the view that MCSCS is somehow separate from other parts of the criminal justice system, which it is not.

necessary for me to take these ADMs and some of their senior staff to a Toronto courthouse so that they might be able to see and learn firsthand how such documents can be readily obtained.

With this in mind, a meeting of MCSCS and MAG counsel with expertise in privacy issues was convened at my request. These experts helpfully explained that Ontario's privacy legislation does not normally affect the question of access to court filings in adult cases[123], and that MCSCS officials were simply incorrect in their assumptions that there were privacy issues to be considered at this level.[124]

Several lessons should be learned from MCSCS' current misperceptions of their inability to access publicly available mental health assessments that might assist in the classification and placement of adult inmates in custody (either on remand or post-sentence), or subject to probation/conditional sentence conditions:

1. **At a corporate level, MCSCS senior officials need to have ongoing access to experienced criminal practitioners and experts in Ontario's privacy legislation, who should be readily available to provide advice in the development, application and evaluation of policies. MCSCS officials should "embed" such consultations into their decision-making forthwith; it is simply unacceptable that MCSCS senior management should be so ill-informed about basic rules and procedures governing the operation of Ontario's adult criminal justice system.**
2. **Local courts – including the judiciary, Crown Attorneys, defence and duty counsel, and court personnel - need to be sensitized to the need to develop systems to facilitate MCSCS' access to mental health assessments filed in court proceedings. (See Section 4 *infra*.)**
3. **MCSCS Regional Managers and institutional Superintendents, as well as MCSCS "community" personnel, need to develop and/or expand liaison systems with courthouses from which they normally receive prisoners/probationers, in order to better operationalize access to such documents. A potential mechanism for facilitating this is discussed in Section 4 *infra*.**

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[123] Perhaps this misunderstanding arises from MCSCS officials' experience in youth courts, where the *Youth Criminal Justice Act* creates a quite complicated regime for restricting and allowing access to these types of mental health assessments. While a presiding judge has the power to direct that an Exhibit be sealed in an adult case, this would be an extremely rare occurrence – an example being where a "Gladue Report" discloses wrongdoing by a named person other than the indigenous offender.

[124] As a result of a "test case" initiated by the *Toronto Star* (2018 ONSC 2586) I am told that the Ontario government is studying ways to facilitate access to court Exhibits in adult criminal cases for the media and interested members of the public. (It goes without saying that, in order to protect privacy interests, there are different rules in family court and adoption proceedings).

2. Consistency in Marking Documents as Exhibits:

Reference was made in the previous section to mental health assessments being "presented to" or "used" by the courts. This requires some brief explanation because, regrettably, experience demonstrates that the way such reports come before the court is sometimes not adequately recorded in formal court proceedings, despite the directions contained in Procedures Manuals used in training clerks/registrars. Even if the presiding judge expressly directs that such reports are to be "marked as Exhibits", some clerks/registrars do not formally record their existence as such on the "Information" or "Indictment" (the charging documents available to the public). This can in turn make it difficult for MCSCS officials to access them readily, because, unless they are formally marked as Exhibits, penal and probation officials may not become aware of their existence.[125]

This is a recurrent problem that needs to be addressed. **I would recommend that each time a mental health assessment (or for that matter any other admissible document that may cast light on the mental health of the accused/offender) is presented to the presiding judge, the judge should expressly direct the clerk/registrar to record/"mark" such a document as an Exhibit on the Information (or Indictment) before the court, and the clerk/registrar should respond accordingly.[126] Perhaps this recurrent deficiency could be brought to the attention of judges presiding in criminal cases[127], as well as being occasionally monitored and continually re-emphasized in the training given to court clerks/registrars.**

3. Ongoing Problems with Access to Mental Health Assessments Filed as Exhibits in Courts

In response to Coroner's Jury recommendations in a series of inquests in the 1980s and 1990s examining several tragic cases where prisoners released from federal penitentiaries murdered halfway house staff or civilians, Parliament enacted s. 743.2 of the *Criminal Code*, which obligates "[a] court that sentences…a person to penitentiary…[to]…forward to the Correctional Service of Canada its reasons and recommendations relating to the sentence…any relevant reports that were submitted to the court, and any other information relevant to administering the sentence…".[128] This is

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[125] It is true that MCSCS officials could listen to a recording of the court proceedings and/or access a transcript of the court proceedings. The reality, however, is that in Ontario's busy adult criminal courts, this is unlikely to be feasible, let alone cost-effective, in all but the most exceptional circumstances.

[126] Even on those very rare occasions where a judge (or very occasionally the *Criminal Code*) directs that an Exhibit be sealed, the Information (or Indictment) should reflect the fact that the Report has been made an Exhibit in the proceedings, accompanied by an explanation that the presiding judge has directed that it be sealed. In such a case, should MCSCS officials consider it necessary, they could apply to the judge for a release of the Report, and the judge could decide to release it upon condition that the Report only be used for placement or sentence management purposes.

[127] Some Judges in busy courts are unfortunately not blameless in this regard.

[128] Sections 23 & 24 of the *Corrections and Conditional Release Act* create correlative obligations on the part of CSC officials to collect such court-based information. CSC has responded to this by creating

valuable legislation, but it must be understood that it relates only to that small percentage of prisoners sentenced to terms of imprisonment of two years or greater (currently about 3.2% of all offenders).

For several years, Ontario has had in place some complementary policies in this regard; however, *these policies only apply in cases involving true custodial sentences of six months to two years less one day*. In such cases, immediately after sentencing the judge[129] is asked to complete a "Memorandum of Court to Ontario Correctional (*sic*) Institution" listing what documents are to be forwarded to MCSCS (see Appendix "A"[130]). Such an initiative is a welcome idea, but in order for it to be considerably more effective – most particularly where there are mental health concerns[131] – several issues need to be thought out more carefully:

1. Timeliness is a significant issue. Some documents should be readily available on or near the day sentence is imposed, but others – especially transcripts – may not be available until weeks/months after the fact. Indeed, by the time some of the transcripts judges are asked to approve prior to public release are presented to the judge, the offender's custodial sentence is entirely likely to have been concluded. Because there are quite significant cost implications involved in the preparation and timely delivery of transcripts – even though Ontario court systems are rapidly moving to "digital transcription" of court proceedings - these issues need to be re-examined by MAG and MCSCS.

2. Document delivery is an ongoing problem (a) to the institution where the offender is immediately incarcerated when the sentence is imposed; (b) to the institution where the offender is serving sentence if they only become available later in the sentence, and (c) to the Ontario Board of Parole. It is tempting to say that the simplest way of dealing with the immediately receiving institution is to attach such documents as are readily available to the Warrant of Committal (WOC) – the formal court order directing that the offender be admitted to a correctional institution (see #7 *infra*). However, several judges (including myself) who have attempted to "follow the paper trail" have unfortunately discovered that sometimes the documents do not appear to get attached to the WOC, or for some reason are

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"Information Retrieval Units" (IRUs) across the country. My experience with the Ontario IRU is that it is generally quite efficient and effective.

[129] Some Ontario Superior Court judges have delegated this responsibility to court Registrars.

[130] This document erroneously refers to this being a procedure "In the Matter of the *Corrections and Conditional Release Act*", which of course applies only to sentences of two years or greater. Additionally, the reference to documentation being forwarded "in accordance with the *Federal/Provincial Agreement on Information Sharing*" is misleading.

[131] I am informed that the Ontario Review Board (ORB) has an agreement with the Ministry of the Attorney General (MAG) that the Crown Attorney involved in any case of Not Criminally Responsible (NCR) or "Unfit to Stand Trial" is to forward to the ORB a New Accused Information Sheet (NAIS) which identifies a new case; this "sheet" also contains a checklist of court documents to be forwarded to the ORB. Perhaps this might be examined as part of any review MCSCS undertakes.

detached from the WOC prior to arrival at the immediately receiving institution.[132] **If this method of transferring such documents to the immediately receiving institution is to be followed by MCSCS, its efficacy needs to be monitored. In the second and third scenarios, alternative methods for delivery need to be rationalized and made consistent. Perhaps some combination of digitalization and "cloud-based access" might be the best way to proceed.**

3. The issue of what the Memorandum refers to as "Transcript of reasons/recommendations related to sentencing" can be problematic. Read literally, they may omit the very materials most necessary for those who will either manage the custodial portion of a sentence or will supervise the offender subject to probation or a conditional sentence. Particularly if portions of the proceedings took place on different court days, "reasons and recommendations" will not necessarily include (a) the facts of the offence (either admitted or found); (b) the submissions of counsel (which usually include much about the offender's background and circumstances); (c) evidence called at trial or at the sentencing hearing. If, as is quite likely in a busy court, the sentencing judge only delivers summary reasons for sentence on the day when sentence is finally pronounced, a transcript of each previous day's proceeding will need to be ordered in order for all of the necessary information to be made available to MCSCS.

4. Though a written Victim Impact Statement (VIS) is properly listed as one of the documents that is to be sent on to MCSCS, if the victim elects to provide their VIS orally (which they have a virtually absolute right to do), a transcript will likely have to be ordered, which relates back to some of the "timeliness" problems outlined in the previous paragraphs. These in turn can be compounded if there are prohibitions on contact with a victim that MCSCS must enforce following the making of a court order (either during a period of custody on remand, or during service of a custodial sentence).[133]

5. It sometimes arises that the offender disputes some of the factual assertions contained in any of the documents filed[134], and there are recurrent problems

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[132] A comprehensive paper examining this issue across several Canadian jurisdictions was written by Justice A. Gans *Judicial Recommendations in the Sentencing Process: Myth or Reality* (2011 – manuscript on file).

[133] See *Criminal Code* ss. 516(2) & 743.21. Staff at the ORB advise that VIS are most useful before that Board when the victim knows the accused and may be able to identify a clinical or other issue relevant to mental health treatment.

[134] As a recent example see *R. v. Junkert* 2010 ONCA 549, where the Ontario Court of Appeal was very critical of the contents of a pre-sentence report containing negative comments about the offender's remorse, where the probation officer "relied almost entirely on the superficial observations of a single police officer whom the probation officer erroneously believed was the arresting officer." (para. 53) The Court went on to say that "[w]hen preparing pre-sentence reports, probation officers must be thorough and fair….Probation officers are professionals. They have an obligation to the court and the parties to canvass all of the relevant information and to provide a professional assessment that the court can rely upon." (paras. 59-60)

ensuring that any corrections necessitated by judicial finding are reflected in the documents ultimately sent on to MCSCS. Judges are usually reluctant to redact documents filed with the court, relying instead on their findings as reflected in the oral record of court proceedings. Once again, if a transcript is not ordered, or is not received in a timely manner, this can significantly affect both the offender's sense of fair treatment as well as society's safety and security interests. This is particularly true where, as frequently happens, MCSCS relies on the "Synopsis" contained in the Crown brief as if it accurately represents the facts of the offence(s). (A Synopsis is a document prepared by the police at the time of arrest for the assistance of Crown counsel who will attend the bail hearing. As such, it usually represents the Crown case at its highest, unmodified by any input by, or on behalf of the accused).

By the time the facts either emerge (as during a trial) or are agreed as part of a guilty plea, it is entirely likely that there will have been modifications to the original police position. Unfortunately, however, in their quite natural desire to have available some factual basis for understanding the offence, it usually happens that the MCSCS Court Liaison Officer (CLO) or local probation Area Manager (AM) simply asks the Crown for a copy of the Synopsis, that normally being the only document immediately available.[135] The potential dangers to the offender and to society are obvious.[136]

6. As noted *supra* by far the greatest problem in this area is that these Memoranda are currently only used in cases involving "provincial" custodial sentences of six months or more. According to Ministry data for fiscal year 2017-18, of admissions to custody to serve provincial length sentences only 12.2% are between six months and two years less one day; in other words 87.8% of provincial-length sentences imposed would not normally involve the preparation of a transcript of reasons for sentence.[137] While the economics of ordering transcripts no doubt had much to do with drawing the line at six months – and will no doubt have to be re-examined by MCSCS on a "going forward" basis - in the absence of judicial orders for delivery of documents *other than transcripts* expressed through these Memoranda, there are likely substantial numbers of cases in which mental health information available at the court is not passed on to either institutional or community–based MCSCS staff tasked with placing and supervising an offender**. This issue presents a substantial deficiency that needs to be addressed; both MCSCS**

[135] A practice seems to be arising, particularly in cases involving carefully negotiated guilty pleas, of Crown and defence counsel jointly preparing an Agreed Statement of Facts (ASF), which is then read into the record to support the guilty plea (and is often filed as an Exhibit). While this is obviously better than reliance on a Synopsis, to date such ASFs are currently used in a very small minority of cases.

[136] Even more egregious is the fact that Synopses very frequently include reference to charges in respect of which an accused is not arraigned, and which therefore do not form any part of the guilty plea.

[137] Ministry of Correctional Services, Adult Admissions to Institutions: 2017-18, Sentenced Admissions by Aggregate Sentences, Total Province.

and MAG need to examine whether there are ways in which at least Exhibits (and, where they exist, ASFs) can be expeditiously made available to MCSCS staff in cases either not involving a custodial sentence[138] or involving a custodial sentence of less than six months. Perhaps the existing "Memorandum" could be re-worked to lower the threshold at which judges would be required to make an order directing the forwarding of documents (other than transcripts) to MCSCS.[139]

7. The existing "Memorandum" contains several "tick boxes" indicating that the various "Reports on Sentencing" documents may be attached to the Information – the formal charging document – presumably so they may be formally marked as Exhibits (as discussed *supra*). The judge may also direct that copies be provided to the local "Supervisor of Court Operations". While procedures appear to differ across the province, what usually happens is that the Supervisor (or designate) either arranges for copies to be attached to the Warrant of Committal (WOC) or be faxed to the immediately receiving institution. As previously indicated, unfortunately experience demonstrates that copies attached to the WOC seem to go astray quite often; perhaps delivery by email direct to the receiving institution would be more appropriate.[140] Finally, the judge may indicate (alternatively or additionally) that the documents "be provided to Probation and Parole Office on behalf of MCSCS"[141]. This seems very sensible, and is hopefully followed in most courthouses, both for those documents that are available on the day sentence is pronounced and those that become available later. **However, as previously discussed, the "Memorandum" currently only applies to sentences of six months or more; thus, unless the threshold is lowered (see #6 *supra*) mental health information that may assist both institutional personnel and probation officers may not routinely come to the attention of MCSCS staff. This is a problem that needs to be addressed at the courthouse level between the local judiciary, court operations staff, local Crown Attorney and MCSCS staff.[142]**

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[138] Because the Memorandum refers to it being directed to "Ontario Correctional Institution", conditional sentences of imprisonment are excluded.

[139] Though MCSCS will need to reflect on the appropriate threshold, there would seem to be little practical point in judges ordering that a transcript be prepared in cases of custodial sentences of less than 90 days. (If a transcript of previous proceedings has been prepared for some other purpose, and is available on the sentencing date, of course it should be forwarded to MCSCS for its guidance in any case where such exists, but that is likely to be fairly rare).

[140] Email with scanned attachments would allow for both document tracing as well as encryption, and thus would seem to be preferable to faxing.

[141] This is similar to the procedures required under s. 34(2) of the *Youth Criminal Justice Act* before youth probation may access a mental health assessment prepared to assist the judge in sentencing.

[142] The Chair of the Ontario Review Board (ORB) advises that it has recently adopted a "cloud-based" approach to making court (and other relevant) documents available to parties, reporters and board members in advance of Review Board hearings. The materials are "filed" electronically by those tendering the various materials. Stakeholders are then able to access them by means of a "pass code". Objections to admissibility of documents is determined at the Board hearing. (Communication from Justice R.

4. Involvement of MCSCS with Court Management/Operations Committees:

MCSCS staff accept that there are no province-wide processes currently in place to enable routine collection of such documents by MCSCS[143]; instead, there are *ad hoc* arrangements whereby MCSCS institutional and probation staff are sometimes represented on what are usually referred to as "court management" or "court operations" committees. Regardless of the name chosen in a particular locale, what such committees have in common is that they provide a forum where recurrent issues and new problems are discussed and hopefully resolved. With the full assistance of MCSCS officials, inquiries were made as to the representation of both community services/probation and institutional staff on such committees. It will be useful to discuss the responses in some detail.

Community Services (Probation and Parole) Involvement:

The Independent Reviewer was initially provided with a list of 33 probation (area or individual) offices across each of the regions of the province that had responded to my inquiries, briefly describing their involvement in their local courthouse committee.[144] Where such positions exist, most reported that the court's Court Liaison Officer (CLO) attends meetings.[145] Not all offices expressly reported that mental health issues respecting probationers (and parolees) were discussed at these meetings; however, my own experience attending such meetings as a representative of the local judiciary, as well as through discussions with several CLOs suggests that they are generally made aware of issues regarding mentally ill prisoners; perhaps more important, they are afforded opportunities at such meetings to raise their own issues and concerns for consideration by other stakeholders.

Some weeks later MCSCS staff forwarded the results of a survey of CLOs (Court Liaison Officers) and ILOs (Institutional Liaison Officers) across the province (see Appendix "B").[146] While the attached survey results do not purport to be scientific, both the quantitative and qualitative responses (n=35 approx.) are most helpful in understanding some of the broader problems surrounding MCSCS' collection of data regarding court proceedings.

Schneider, Chair, on file). It appears that similar "cloud- based" procedures exist in some provinces to provide electronic disclosure to defence counsel in more complex criminal cases.

[143] In some parts of the province police/court officers who transport prisoners back to the local detention centre will sometimes convey such documents. This may work in a smaller jurisdiction, but the problem is that in a busy large courthouse, transporting officers are not as likely to know of the existence of such assessments, as they are not usually in the courtroom when the prisoner appears.

[144] Some reported involvement at more than one courthouse. There are 119 probation offices across the province.

[145] Where CLO positions do not exist, the Area Manager (AM) usually attends.

[146] I did not expect to receive such a document. I would be remiss if I omitted to complement the relevant ADMs and senior staff in promoting this survey. Having said that, it is obvious that this document does not reflect any official Ministry position or policy.

The responses most relevant to my mandate of examining the provision of services to mentally ill inmates and probationers may all be categorized as indicating a lack of consistency across the province:

- In some places there appear to be either no court management/operations committees or, more likely, that "probation" is not involved in them (either regularly or on occasion).
- In some courthouses probation officers (CLOs, ILOs or field probation officers (PPOs)) actually participate in these committees, but in others these functions are performed by probation Area Managers (AMs). CLOs, ILOs and PPOs reported in substantial numbers that they consider their presence at such meetings would be beneficial. [147]
- Access to Crown briefs (which, as previously discussed, is often the only source of information about the offence(s) readily available to MCSCS officials) seems to depend on the availability (and perhaps willingness) of Crown counsel seized with a case to share.
- Access to documents formally filed in courts (such as fitness assessments or psychological/psychiatric reports) similarly seems to depend on the way the courthouse is organized (and, presumably, the willingness of court personnel to make them available in a timely manner).
- Concerns about documents potentially considered to be subject to privacy considerations vary considerably from one jurisdiction to another.

It seems clear that all of these inter-related patterns of communication need to be carefully examined by MCSCS policy makers in discussion with the local judiciary, Crown Attorney's office and court administrators. While Ontario's geography likely requires that some flexibility be envisaged from one courthouse to another, efforts to standardize approaches to ensuring timely access by CLOs and ILOs to all types of mental health assessments (and other materials filed with the court) should be promoted. In addition, as will be repeated in the next sub-section, those courthouses that either do not yet have court management/operations committees should be encouraged to establish one, and in courthouses where "probation" representation is absent or inconsistent, efforts should be made to ensure that MCSCS "community services" representatives (however defined) are routinely "at the table".

Involvement of Institutional Officials:

Following a meeting with senior Institutional Services personnel, the Independent Reviewer was provided with brief descriptions of the involvement of Superintendents (or designates) in court management/operations committees in all four regions of the province (see Appendix "C"[148]). While only some of the institutional representatives

[147] Questions surrounding whether field probation officers or probation managers should participate at such meetings is beyond my remit. I mention it only because it was a striking element of the qualitative responses.
[148] This document does not represent any official Ministry position or policy.

expressly reported that issues involving mentally ill prisoners were discussed at these meetings, I feel confident in reporting from my own experience as an occasional judicial representative on several of these court operations committees that these issues figure either as regular agenda items at such meetings, or as necessary from time to time.

Having said this, from the documentation provided it appears that at least five of Ontario's adult institutions are not presently involved in such committees[149]. **It is recommended that (a) province-wide representation on Court Operations Committees (by both institutional and probation personnel) be adopted as a policy goal by MCSCS (perhaps as discussed with representatives from MAG); (b) those institutions that are not presently involved in existing committees make every effort to join, particularly regarding issues that relate to mentally ill offenders[150], and (c) that issues of MCSCS' access to court Exhibits be discussed with the judicial officers chairing such Committees, to the point that such access is routinized.**

As I consulted on these issues, a former Crown Attorney very experienced in appearing in "mental health court" sensibly suggested to me that a solution might be that each courthouse *and* each custodial institution should have a what she termed a "designated mental health point person" to facilitate transfers of mental health information. She wrote: "In the days of SCOPE [MAG's new computer system] a designated Crown should be able to access a [mental health] report and make it available. At the same time if a correctional officer identified someone who they thought was behaving in a way that suggested fitness was in issue then contacting the designated Crown would be the way to go". **If this this concept of having a formally designated mental health liaison in each institution is desirable, which I would endorse, perhaps part of that person's job description might be to liaise proactively with the local court system where a prosecution is scheduled to occur if the institution considers that a remand prisoner's mental health is deteriorating significantly. If the institution has a known "route" as to who should be contacted in the local court system – local administrative judge, mental health court Crown (or Crown seized with a particular prosecution)[151], defence or duty counsel – this is something that could be**

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[149] Some of the reporting is unfortunately incomplete. For example, it is reported that the Vanier Centre for Women (VCFW) "has not had an opportunity to attend any court based meetings…". This is incorrect; I have been present when Vanier social work staff have been and continue to be actively involved as regular participants in that court's Alternative Resolution Court (ARC) Committee, which is particularly involved in issues of mentally ill women appearing in that courthouse (Minutes on file). Vanier officials similarly participate on a "consortium" of stakeholders that meets from time to time to discuss issues related to the operation of the "mental health court" at the Old City Hall courthouse in Toronto.

[150] There are many subject matters routinely discussed at such meetings that are not likely of interest to institutional personnel. This should not be a reason for declining to participate, something I have noted from my own involvement in these committees. In fact, when I personally attended a January 2019 meeting of the ARC Committee (referenced in the previous footnote), I noted that while institutional staff from the Vanier Institution for Women were well represented, no representative of the Maplehurst Institution, which shares the same property as Vanier, was present.

[151] I should point out that there may be "*Jordan"* considerations here. If a prisoner is deteriorating to the extent that they may no longer be "fit" by the time of trial/preliminary inquiry, further delays are likely inevitable. If correctional authorities can bring their concerns to the attention of Crown counsel, perhaps

developed through regular participation by institutional personnel on court management committees.[152]

Particular Lessons to be Learned from Ottawa-Carleton Detention Centre (OCDC) Task Force:

As a result of ongoing concerns about overcrowding leading to health and safety issues for both staff and inmates at OCDC, in March 2016 the [then] Minister established a Task Force charged with developing an action plan to address these issues in the short and long term, as well as to create an accountability structure to track and report on the Ministry's response to recommendations made by the Task Force.

It is not my intention here to review the work of that multidisciplinary Task Force[153] in any detail; its Progress Reports may be found on the MCSCS website. Rather, the aim here is to identify certain elements of the Task Force's work that might be useful for court management/operations committees to focus on in order to better serve inmates and probationers suffering from mental illness.

1. The Task Force considered it necessary to solicit the views of inmates about a number of issues relevant to its work (some of which are not relevant to my mandate). Members of the OCDC Community Advisory Board facilitated the completion of 130 questionnaires (43 female inmates and 87 male inmates). Though obviously this was quite unprecedented for MCSCS, it proved to be quite beneficial in focusing the Task Force's attention, *inter alia*, on some of the ongoing mental (and physical) health issues faced by inmates at the facility. For example, 66% of inmate respondents "felt that they needed more health care services and improved quality of care…[including]…increased addiction supports…and increased mental health supports." The Task Force responded by recommending in its first Report that "MCSCS should establish Step-Down and Mental Health Units with dedicated trained staff for both men and women at the OCDC to better support inmates with mental health needs" (Recommendation 24).

Obviously, it would be highly unlikely that a court management\operations committee would wish to (or indeed have the resources to) conduct a survey of inmates in detention centres in a court's catchment area. Nevertheless, analogizing from the OCDC experience, if the Ministry (or designate[154]) were to conduct such a survey, it might

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earlier court appearances can be scheduled so that the accused's mental health status can be investigated in advance of the date(s) set for substantively dealing with the case.

[152] To this I would only add that similar arrangements will need to be made to facilitate MCSCS' access to court personnel where the accused/offender is already in the community.

[153] Without listing them all, the Task Force was comprised of several representatives from different levels of MCSCS, the Corrections Ministry Employer-Employee Relations Committee (MERC), the Crown Attorney for Ottawa, Ottawa-based defence counsel and various service providers. Numerous submissions – both public and private – were received from several stakeholders.

[154] Or perhaps a local Community Advisory Board might administer such a survey.

sensitize local court management committees to address such issues to the extent that they involve the interface between courts and corrections to issues faced by mentally ill inmates. For example, though it did not arise from the administration of a questionnaire to inmates, Brampton provincial court's Alternative Dispute Resolution Committee (ARC) has, as a result of input from many institution-based stakeholders who interact daily with mentally ill female inmates at the Vanier Centre for Women (as well as from Vanier inmates themselves[155]), developed considerable modifications to such issues as the time of day mentally ill offenders are brought to and returned from court, the priority with which they are treated at court, and addressing the sometimes very difficult issues surrounding releases from custody at court (further discussed *infra*). **In my view, this issue of soliciting inmates' views is one which is worth addressing.**[156]

2. The OCDC Task Force investigated a number of ways in which mentally ill (and other) prisoners could be safely released from pre- and post-trial custody:

   (a) The first of these was a series of measures designed to accelerate the processes surrounding consideration of applications for bail. As the Task Force noted: "Issues related to bail, remand (or pre-trial custody) are significant factors that contribute to overcapacity within OCDC".[157]

   Much has changed in the area of bail since that Task Force was struck – the Supreme Court of Canada has handed down its seminal decision reinvigorating the 1972 *Criminal Code* provisions respecting bail in *R. v. Antic*, [158] a powerful reminder to lower courts of an accused's right to speedy and reasonable bail; other courts have followed the Supreme Court's lead; MAG and the Chief Justice of the Ontario Court of Justice have established pilot projects in both Ottawa and Toronto, whereby Judges rather than Justices of the Peace preside in bail courts; Legal Aid Ontario (LAO) and various continuing education bodies (such as the Ontario Bar Association and the Law Society of Ontario) continue to hold educational sessions for counsel on bail issues. Though it is likely impossible to obtain meaningful data as to the impact these various initiatives have had since the relatively recent release of the *R. v. Antic* judgment in mid-2017, anecdotally it appears that across Ontario bail is being granted slightly more rapidly, and generally under less stringent conditions, than previously.[159]

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[155] Perhaps contrary to what might be assumed, mentally ill accused/offenders are often acutely aware of barriers to speedy resolution of their legal and practical issues.

[156] Such an initiative would also be entirely consistent with Ontario's recently expressed commitment to "Open Government".

[157] p. 13.

[158] *R. v. Antic* 2017 SCC 27; [2017] S.C.J. No. 27.

[159] Though not referring directly to *R. v. Antic,* a 2017 Report prepared for MAG concludes that bail processes across Ontario seem to be slightly more speedy in recent years, at least in cases involving what the authors refer to as "short stay remand prisoners". A. N. Doob, J.B. Sprott & C.M. Webster *Looking Behind (Prison) Doors: Understanding Ontario's Remand Population: A Report to the Ministry of the Attorney General of Ontario* 5 January 2017 (on file).

(b) A second recommendation of the OCDC Task Force was to propose that MCSCS and MAG should work with the Ministry of Health and community agencies to review the funding of "bail beds for offenders whom the court determines could be appropriately housed and supervised in the community" (Recommendation 11).

Resulting from the Task Force's recommendation on point, the John Howard Society of Ottawa has established a Supervised Bail Housing Program funded by MAG. The program is described as "a 12 bed facility…providing community-based residential supervision for higher needs individuals that would likely otherwise be held in custody pending resolution of their criminal charges". One of the listed eligibility criteria is that "the individual present[s] with mental health issues that can be effectively supported in a single-staffed environment". According to information received from the facility, since its inception in April 2017, 43 residents have either passed through, or are currently resident. Reflecting the need for such a program, the Program Coordinator reports that, as of December 2018, there is already a waiting list of approximately two months from the date the accused is approved for entry and the date they actually take up residence.[160]

Arising from the Task Force's recommendations, a somewhat similar "bail beds" program for adult women has been established by the Elizabeth Fry Society of Ottawa. The Program Manager provided the following description:

"Lotus House, is a 12 bed residence, providing safe, supportive and supervised housing for vulnerable, at-risk individuals who require enhanced supervision in the community. Since its inception in April 2017, 49 residents have either transited through or are currently residing at the Elizabeth Fry Bail Housing Program. Particular consideration is given to vulnerable populations such as Indigenous, racialized individuals and individuals living with mental health and addiction issues. In the summer of 2018, a partnership was created with the Canadian Mental Health Association to provide enhanced mental health supports within the residence. Additionally, the Elizabeth Fry Society of Ottawa's Addiction/Relapse Prevention Support Worker meets with our residents on a weekly basis as well as in-house indigenous support services are offered within the residence….The investment that has been made into the Bail Bed Programs has created a foundation for success in addressing the circumstances in which women are becoming involved in the criminal justice system, in Ontario."[161]

Though bail residences have existed from time to time in a number of provinces (including Ontario), experience unfortunately demonstrates that they tend to close down after some years, once the "pilot project" funding

[160] All information received from Craig Santos, Coordinator (email on file).

[161] All information received from Diane Serre, Manager, Residential Bail Program, Elizabeth Fry Society of Ottawa (email on file). Ms Serre further advised that, as of late January 2019, there is no waiting list, though there have in the past been delays between bail granting and entrance into the facility for as long as one month.

has expired. It is hoped that this will not happen to the Ottawa program, which seems to fill a much-needed "gap" in services for vulnerable accused who might otherwise not be granted bail. It is recommended that the literature on the ongoing success of English "bail hostels" be examined by MCSCS and MAG, with a view to possibly expanding the availability of such facilities to other Ontario judicial districts.

These two recommendations emphasize well the obvious point that each time a mentally ill inmate is released from custody (assuming a reasonable alternative can be found), that is one less "special management" inmate MCSCS needs to be concerned with. It is therefore very much in the Ministry's interest to work closely with local officials (including MAG) to try to reduce both the number of mentally ill accused who are detained in custody, as well as to reduce the amounts of time they spend there.

It must unfortunately be clearly noted that the very creation of the Task Force discloses all too clearly that MCSCS did not at the time see itself as a *core partner* in the administration of Ontario's criminal justice system "at the front end" – and may still not do so. I am firmly of the view that unless and until MCSCS institutional officials in all parts of the province become more actively involved in court management/operations committees, it unfortunately seems all too likely that mentally ill accused persons will be detained in custody longer than minimally necessary to determine whether their release may be safely determined.

Chronologically, the first point where issues surrounding the mental health of a prisoner can arise is where a freshly arrested accused is lodged in MCSCS custody pending initial court appearances. In such circumstances, it frequently occurs that the arresting police may first have taken the accused to hospital to see if they can/should be admitted there, particularly when the accused is perceived to be acting out as a result of some mental disturbance. Alternatively, MCSCS officials will on occasion take the prisoner to hospital if directed to do so by the Superintendent,[162] especially if they are concerned about the prisoner's "suicidality". Sometimes, the physician who sees the patient at the hospital[163] will prepare a brief report, which can (and should) be provided to MCSCS staff. There should be no reason why such a report cannot in turn be shared with a Judge who may be asked to remand the accused for a fitness assessment.[164]

Even if the accused is not taken to hospital by the police (or by MCSCS officials), MCSCS staff may become immediately concerned about an inmate's mental state.[165] Alternatively, their concerns may develop over time, perhaps to the point where they may

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[162] Formally, the Superintendent (or designate) may direct staff to take an inmate to hospital "for medical treatment that cannot be supplied at the correctional institution", MCSA s.24.

[163] The patient may be well known either to the attending physician or to the hospital.

[164] I have not neglected that there may be some privacy concerns here, but I do not believe they are insurmountable. I intend to investigate this further in anticipation of my Final Report.

[165] It unfortunately goes without saying that MCSCS staff may be well aware of a particular inmate from past admissions to custody.

consider that the prisoner may no longer be fit to stand trial by the time their trial/preliminary hearing date arrives (which may be many weeks or months in the future). The "traditional" view that has been explained by MCSCS staff at a number of institutions I have visited is that "MCSCS has no business contacting the courts in such circumstances; it is not our role to do so". For example, at my "base court" in Toronto (Metro West), the local Crown Attorney advises that in the approximately five years he has occupied that position, he has never been contacted by anyone in MCSCS to express concern about a prisoner's mental state, which is most disappointing, given that the TDSC, the largest adult institution in the province, is in that court's catchment area.

Consistent with what I have previously recommended regarding the creation of formally designated mental health liaison positions in each courthouse, custodial institution and adult probation service, I wish to make reference here to what was expressed to me by the Superintendent of Monteith Correctional Complex, who described that he has an ongoing working relationship with both the Regional Crown Attorney and local defence counsel, whereby he can simply call them if he has concerns about the mental health of a particular prisoner to see if steps can be taken to advance the case before the court (either for bail or trial). This seems to me to be a most sensible and humane arrangement, and I would hope that court management committees could encourage such contacts between courts and MCSCS as necessary. However, I reiterate that unless and until MCSCS officials come to see themselves as "core partners" within the broader criminal justice system – which, regrettably some senior officials do not - this is unlikely to happen in any systematic way. **I encourage MAG, MCSCS and defence and duty counsel to work more closely together on these questions of courts and corrections improving access to mental health information, currently all too often lodged in their respective "silos".[166]**

Two of the OCDC Task Force's "downstream" recommendations seem to complement its recommendations regarding speeding up potential bail releases:

[166] A recent survey article by Justice Richard Schneider (currently ORB Chair, in addition to being a judge who has presided for many years in Toronto's mental health courts) makes the point that mental health courts work best when principles of "therapeutic jurisprudence" are allowed to flourish. He writes: Therapeutic jurisprudence rejects the antiquated notion which holds that the law is the exclusive domain of the legal profession or of criminal justice workers. It crosses professional boundaries and creates a climate that supports interprofessional collaboration and creative problem-solving….[A]bove all, it recognizes that contact with the criminal justice system is impactful and that it is possible to influence that impact so that its effects are positive rather than negative". "Mental Health Courts: Where Might We Go From Here?" in *Handbook of Forensic Mental Health Services* (1st Edition), Edited by Ronald Roesch, Alana N. Cook, Routledge, 2017 at p.576.

(a) The Task Force recommended that: "MCSCS and MAG should increase the availability of pre- and post-charge diversion programs for individuals suffering from addictions and mental illness…"[167]

(b) The Task Force similarly recommended that: "MCSCS should…collaborate with partner agencies to explore alternative housing options such as mental health facilities…for those sentenced offenders with mental health needs."[168]

I entirely agree with these additional Recommendations. As the Task Force aptly noted: "In appropriate circumstances, offenders with mental health needs should not be in correctional institutions due to the complexities associated with mental health issues and the limited ability of correctional facilities to provide appropriate care. Therefore, the Task Force believes it is important in the long term to divert those with mental health issues from correctional facilities to more appropriate community based services".[169] To the extent that court management/operations committees are able to use their collective expertise and "brainstorming" to promote such alternatives at the local level, this should be encouraged.

In this regard, I consider it necessary to mention some recurrent problems for which there are not as yet province-wide solutions which might be considered by court management committees for modification at the local level as necessary.

The first issue that needs to be highlighted is a series of problems in the development and expansion of a pilot program called the Discharge from Distant Court Program (DDCP) - informally known as the "Red Bag Program". Ministry personnel provided the following helpful description of the way this program currently functions:

- "The Discharge from Distant Court Program (DDCP) is a pilot program designed to assist identified vulnerable remand inmates who have:
  - chronic or acute mental health concerns, concurrent disorder, addiction, developmental disability or dual diagnosis, and
  - been identified as likely to be released from court in a distant location from the correctional institutions.
- This program objective is to support the most vulnerable clients getting released at court in hopes of decreasing their re-contact with the justice system, through the transportation of the identified inmate's essential personal property. The Red Bag typically includes specifically the inmate's wallet, identification, keys, list of community resources/shelters, emergency contact information, prescription and/or critical medications (minimum of three day supply), etc., in a sealed red envelope.

[167] Recommendation 18. I of course acknowledge that, strictly speaking, issues of addiction are beyond my mandate. However, given that addictions and mental health are so frequently linked, I consider it right to quote this portion of the Task Force's Recommendation. I further note that the remainder of the Recommendation proposes "the development of pre-charge diversion options for administration of justice charges for those with mental illnesses". While this makes good sense, it also is beyond my mandate.
[168] Recommendation 25.
[169] p. 16.

- Transportation of the property is facilitated, in partnership with the transporting police service and a designated court worker/liaison agent.
- The content of the envelope is given to the inmate if they are released at court by the mental health court support worker.
- No narcotics or opioids are included in the medications in the Red Envelope. Methadone or suboxone will not be included as medication. If the inmate requires these medications, a "bridging" prescription will be provided by the institutional physician and will be included in the red envelope.
- All other property belonging to the inmate remains at the facility until they can pick up, post discharge. At the Vanier Centre for Women, if an inmate is released in the GTA area, the property is sent to TSDC to facilitate retrieval.
- Should the inmate not be released at court, the inmate's property will return to the institution with the inmate. The red envelope will remain sealed along with all completed documentation which will indicate the inmate was not released at court. The sealed red envelope will be returned to the facility via the police service.
- This program was initially established as a pilot at OCDC in the summer of 2010, and a formal protocol (Red bag program) was developed in 2015.
- Based on the success of OCDC's discharge from court protocol for inmates with mental health concerns, the program was expanded and is now operational at Vanier Centre for Women as well. North Bay Jail is currently in the process of implementing the program. The Central East Correctional Centre attempted to implement the DDCP program, but the OPP transport was not willing to participate. In order to be responsive to the needs of the inmates, the facility has arranged for inmates to provide a letter of consent, which allows their property to be shipped to an addressed provided by the inmate via Purolator. This alleviates the requirement for them to return to the institution to retrieve their property.
- An MOU approved by legal along with other documents including presentation to external stakeholders, institutional staff and Q&As are available to institutions which do not have any alternative arrangement in place and are interested in rolling the program out."[170]

Obviously this is a program that has considerable potential for providing "bridging" services to mentally ill prisoners. However, there remain some continuing problems which need to be addressed:

1. Not all courthouses have mental health court support workers. Even in courthouses which do have such workers, they are not likely to be MCSCS employees; as such, they may well be reluctant to undertake such a role, for fear of being accused of "misplacing" or "losing" an inmate's property - a concern that has been expressed to me by some court-based employees of the Canadian Mental Health Association. Perhaps at a local level duty counsel and/or bail program staff could be detailed to perform such a role.
2. **Not all police forces (or detachments within forces) across the province are "on board" with this issue, apparently for the same reasons of being**

[170] Email from Corporate Project Lead, Institutional Services Division, MCSCS October 30, 2018.

concerned about potential liability regarding loss or misplacing of property. One Superintendent explained to me that his particular remote institution deals with four different detachments of the Ontario Provincial Police; two are prepared to accept responsibility for prisoners' property, two detachments take the opposite view, and will not "sign on" to this program. The option of using a courier seems to be unnecessarily complicated – let alone contending with problems regarding delivery of an inmate's property where they are homeless. It seems to me that this needs to be taken up by the Policing side of MCSCS at a policy level, as well as being discussed by court management committees.

The second problem, one unfortunately well-known within MCSCS, is that of "unanticipated releases at court". Several of the larger provincial institutions have recently appointed Ministry personnel as "discharge planners" to work with sentenced inmates regarding contact with a variety of community agencies as part of planning for release. While this is obviously an initiative for which the Ministry is to be commended,[171] it is currently institution-based, and does not seem to be oriented to other release scenarios – such as where an inmate is granted a bail release at court (often to be intensively supervised by a bail program), or charges are withdrawn by the Crown on a trial date, or an inmate pleads guilty and is sentenced to "time served" in light of the amount of their time already spent in pre-trial custody. **In such cases, institutional discharge planners would not likely be involved. Senior Ministry personnel are well aware of these problems, and they are currently awaiting Ministerial approval of funding of a pilot project designed to address such "unexpected releases". I would urge that this pilot project be funded and its results shared with local court administration committees.**

[171] I note parenthetically that, if proclaimed in force, s. 34(3)(b)(iii) and (iv) of the proposed *Correctional Services Reintegration Act* will create a formal role for such forms of "case management".

Recommendations Designed to Improve Integration Between Courts and Corrections in Dealing with Mentally Ill Accused and Offenders:

1. It is recommended that MCSCS officials forthwith "embed" consultation with experienced criminal practitioners and experts in privacy legislation into decision-making policies.

It is unacceptable that MCSCS senior management be ill-informed about basic rules and procedures governing the operation of Ontario's criminal justice system.

2. It is recommended that MCSCS take steps to ensure that both institutional and community services personnel join and actively participate on local "court management" committees in areas of the province where MCSCS is not currently represented.

3. It is recommended that personnel in local courthouses – including the judiciary, Crown Attorneys, defence/duty counsel and court administrators – become sensitized to the need for, and to actively assist in developing/improving systems to facilitate MCSCS' access to mental health assessments filed in court proceedings.

4. It is recommended that all mental health assessments (or other documents that may cast light on the mental health of an accused/offender) be formally filed as numbered Exhibits in court proceedings, and that court personnel take steps to facilitate MCSCS access to such documents in a timely manner.

While my mandate only directly extends to MCSCS policies and procedures under the *Jahn* Consent Orders, it is obvious that improvements in access to mental health assessments filed in court proceedings must engage all relevant stakeholders.

5. It is recommended that MCSCS and MAG enter into discussions to determine whether it is (a) feasible and (b) economically justifiable to have transcripts of court proceedings regularly prepared in cases involving custodial sentences of less than six months. It is further recommended that MCSCS and MAG, after discussion with the judiciary, develop standardized policies defining what is normally to be included in instructions to court reporters to prepare "transcript(s) of reasons/recommendations related to sentencing".

It is further recommended that in every case where a victim elects to provide their Victim Impact Statement (VIS) orally, a local protocol be developed to ensure that a transcript of such evidence be expeditiously prepared and provided to MCSCS, regardless of type or length of sentence imposed.

6. It is recommended that MCSCS and MAG, after discussion with the judiciary, consider whether the current "six month" limitation contained in MAG Court Services Division's "Memorandum of Court to Ontario Correctional Institution" be

deleted, and that the sentencing judge should be requested to complete a listing of documents to be forwarded to MCSCS in every case.

7. It is recommended that MCSCS representatives on local "court management committees" review with local stakeholders what is the most effective and timely method of mental health document delivery either to the local custodial institution or to the local probation/parole office.

8. It is recommended that MCSCS and MAG develop protocols at the local level designed to reduce MCSCS' reliance on the Police Synopsis as the only immediately available document regarding the facts of the offence(s).

9. It is recommended that in each courthouse, each custodial institution and in each MCSCS community office, a position of designated "mental health liaison" be created, each with a mandate to proactively work together whenever an inmate's mental health is perceived to be actually or potentially at issue.

It is recommended that, wherever feasible, MCSCS work with local stakeholders to facilitate mentally ill accused persons' access to speedy judicial interim release, as well as to post-charge diversion programs.

10. It is recommended that MCSCS take steps to investigate barriers to the expansion of the "Discharge from Distant Court ("Red Bag") Program" across the province. It is recommended that MCSCS further investigate the related problem of lack of discharge planning in cases potentially involving "unanticipated releases at court". It is further recommended that MCSCS provide a Report to the Independent Reviewer by August 1, 2019, so that further recommendations may be included in my Final Report.

Appendix A: Memorandum of Court to Ontario Correctional Institution

JAIL (6 MONTHS - 2 YRS LESS ONE DAY).c

Appendix B: Jahn Consent Order Community Services Questions

Jahn CS Questions_Final.ppt

Appendix C: Court Operations Committees

Court Operations Committees 27 Sept

MOVING FORWARD

"*We need more tools in the toolbox to manage better*." – Vanier Institution for Women staff, addressing alternatives to segregation

"*What we need is a [radical] curriculum shift*." – Vanier Institution for Women staff discussing adequacy of staff training on mental health issues

"*I don't even know what [constitutes] Undue Hardship. There is no such thing, and we don't get to use the term because we are expected to turn every stone already…. We need to know what we are working with, and we don't want to be so fragmented, but no clear direction or guidance ever comes from the corporate. There is a huge communication breakdown*." – Toronto East Detention Centre staff

"*Different clinicians have different definitions of [what comprises] privacy [under Ontario legislation]. So the type and amount of information shared is largely inconsistent*." – Psychologist, Ontario Correctional Institute

As will have been seen from a perusal of the contents of this progress report, much remains to be done. Above all, the operationalization of MCSCS's brand-new (and as yet completely untested) PSMI and D&M policies will have to be carefully monitored over the next few months in order that a proper assessment of their ability to reduce the number of inmates placed and kept in "conditions that constitute confinement" can be conducted and accurately reported. In addition, as the Ministry unfolds new definitions of such critical terms as "mental illness", "major mental illness", "alternative housing", and as it modifies some other definitions in light of actual field experience (such as "restrictive confinement", "undue hardship", "least restrictive"), these too will need to be evaluated as part of the monitoring and assessment process.

It is obvious that the principal responsibility for these types of monitoring and assessment will naturally fall to the Independent Expert and her team. Prof. Hannah-Moffat advises that she intends to primarily focus on the following major areas over the next few months:

(1) Overseeing the Ministry's response to, and implementation of the 35 recommendations contained in the Independent Expert's Report regarding additional reviews, policy reform, tracking, oversight, changes to mental health policies and practices, and immediate attention to Gender.

(2) Ensuring that policy and operational units are on the same page regarding the relevance and importance of complying with the principles enunciate in the *Jahn* settlements. There remains a lot of inconsistency in the various teams' knowledge of how *Jahn* principles relate to their work, and the need to work with the Independent Expert. I continue to be concerned about the lack of demonstrated knowledge of the literature and best practices and how that informs policy development, as well as how to think about accommodating

operational realities while maintaining *Jahn* principles. In short, operational challenges can and must be problem-solved. All too often these seem to be used as an excuse to impede or prevent the crafting of clear policy directives and mechanisms for tracking compliance.

(3) As indicated both in my Executive Summary and the Report of the Independent Reviewer, of utmost importance will be the development of oversight and review processes for restrictive confinement, which may all too easily become the new "unmonitored segregation".

(4) Building effective compliance and oversight structures are important. These are referred to in the *Jahn* settlement, but there is presently no deadline for their completion.

(5) The Ministry needs to improve its capacity to collect and review best practices from the literature from other jurisdictions, even if this means contracting out reports. Much of the "in-house" jurisdictional review materials I and the Independent Reviewer have seen are either inadequate or barely passable.

For my part, I intend to focus on the following major areas for possible comment and elaboration in my final report:

(1) Examining and interpreting Ministry and stakeholder responses to the interim recommendations contained in this progress report, paying particular attention to those most closely involved in institutional service delivery to mentally ill inmates;

(2) Examining what more can be done to encourage and facilitate inmates (remand or sentenced) not to seek to "self-segregate" in conditions that constitute segregation;

(3) Examining barriers – real and perceived – to adequate sharing of information among those who deal with mentally ill inmates, most particularly institutional front-line staff, mental health professionals, and probation staff;

(4) Examining barriers to public availability of Ministry policies that continue to exist despite Ontario's commitment to "open government". This examination is particularly required given that many other Canadian and foreign correctional jurisdictions have for many years posted most of their policies on the internet;

(5) Examining barriers to the routine sharing of Ministry human-rights based data and statistical studies – particularly those which consider aspects of the incarceration of mentally ill inmates - with the public and interested researchers;

(6) Reviewing the evolution of pending appellate case law and proposed federal legislation intended to reduce the numbers of federally sentenced inmates placed and maintained in a range of segregation-like conditions;

(7) Developing measures designed to encourage MCSCS staff involvement (both corporate and "field") as "core members" of the Ontario criminal justice system, in order to strengthen timely and effective communication and improve decision-making;

(8) Examining barriers to the expansion of the “red bag” program and improvements in service delivery to mentally ill inmates who are “unexpectedly released” at court;

(9) Examining, and if necessary commenting on, proposed changes to the sustained training of Ministry staff who will deal with mentally ill inmates, both in institutions and under community supervision;

(10) Examining the effectiveness of accountability and oversight mechanisms put in place and operationalized by MCSCS, including the mechanisms for assessing undue hardship before placing inmates with mental health disabilities in conditions that constitute segregation.