

ADOPTED

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
2 tribal legislatures to enact legislation, and correctional and detention facilities to enact
3 policies, to provide all women prisoners in all forms of detention, both adult and juvenile,
4 with unrestricted access, on housing units, to free toilet paper and a range of free feminine
5 hygiene products, including both tampons and sanitary pads, in sufficient quantities to
6 address their needs.

REPORT

This resolution urges federal, state, local, territorial, and tribal governments to enact legislation, and correctional and detention facilities to enact policies, to provide all women prisoners in all forms of detention with unrestricted access to free toilet paper and a range of free feminine hygiene products, including both tampons and sanitary pads, in sufficient quantities to address their needs.

The growing number of incarcerated women and young women

Over 200,000 women are confined in state and federal prisons, local jails, territorial facilities, and Indian Country jails. Women prisoners comprise the fastest growing segment of the incarcerated population.¹ In addition, young women constitute 15 percent of the total confined juvenile population and are most prevalent in detention (19 percent) and residential treatment programs (29 percent).² Between 1980 and 2015, the rate of women's imprisonment has outpaced that of men by over 50%.³ Despite this alarming growth rate, women comprise only 10% of our nation's prisoners.⁴ Women therefore enter correctional systems designed for, and based on the needs of men. Policies written for men rarely meet women's unique needs, which are consequently overlooked or ignored. Nowhere is this more apparent than in how facilities distribute and provide access to feminine hygiene products related to menstruation – specifically, sanitary pads and tampons.

Too often, women prisoners do not have access to sufficient feminine hygiene supplies. Facilities may provide women with some sanitary pads, but often in insufficient quantities. Access to even these limited supplies is often severely restricted, and supplies are often not available when women need them. Women who have the financial means to do so must purchase tampons and additional sanitary pads through a commissary, but unfortunately, not all women have this option.

Several departments of corrections have developed policies to provide free sanitary pads and tampons to women prisoners. However, access to basic hygiene products should extend to all women prisoners, both adult and juvenile, regardless of the facility in which they are confined. All women prisoners deserve access to sufficient

¹ Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, Prison Policy Initiative (January 9, 2018). Between 2000 and 2015, the women's jail population grew 40%, while the overall jail population grew 17%; and the women's prison population increased 22% compared to a 7% increase in the total prison population. See also *Overlooked: Women and Jails in an Era of Reform*, the Vera Institute (August 2016).

² Andrea J. Sedlak and Karla S. McPherson, *Conditions of Confinement: Findings from the Survey of Youth in Residential Placement*, OJJDP Juvenile Justice Bulletin (May 2010), based on 2003 statistics.

³ United States Department of Justice Bureau of Justice Statistics, *Prisoners in 2014; The Sentencing Project: Incarcerated Women and Girls* (November 2015).

⁴ Walmsley, Roy, *World Female Imprisonment List*. 4th ed. (2017).

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feminine hygiene supplies to meet their menstrual needs, and both legislative bodies and correctional and detention facilities should ensure that they have that access.

Women prisoners typically do not have access to sufficient basic feminine hygiene supplies.⁵

Feminine hygiene products, including tampons, sanitary pads, and toilet paper are fundamental, basic necessities for women prisoners who need them. Women should have free access to these supplies — yet they rarely do. Facilities will generally provide prisoners with some basic sanitary supplies, including toilet paper and feminine hygiene products. However, the quantity and variety of these supplies are often severely limited, and access needlessly restricted.

Many facilities limit the quantity of sanitary napkins they provide to women prisoners. Until recently, the New York state issued women 24 sanitary pads each month, which the vast majority of prisoners reported was inadequate.⁶ The state-issued sanitary pads were so thin that women reported needing to wear up to four pads at a time to adequately control their menstrual flow.⁷ Women had the option of requesting additional pads through the medical unit, but often faced degrading and unrealistic requirements when they did. One facility required women to be screened for anemia before being authorized to receive additional pads.⁸ Far worse, however, was the requirement for women at New York’s Bayview Correctional Facility. There, the Medical Director demanded concrete evidence that a woman needed additional supplies: “We need her to bring in a bag of used sanitary napkins to show that she actually has used them and needs more.”⁹

Prisoners in other states face similar problems with inadequate hygiene supplies.¹⁰ Prisoners in California jails describe being forced to reuse pads and to beg for hygiene supplies.¹¹ Prisoners in Connecticut describe receiving five pads per week to split

⁵ ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (3d ed. 2011), Standard 23-3.5(c).

⁶ Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 66, Women in Prison Project of the Correctional Association of New York (2015).

⁷ Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 66, Women in Prison Project of the Correctional Association of New York (2015).

⁸ Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 67, Women in Prison Project of the Correctional Association of New York (2015).

⁹ Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 67, Women in Prison Project of the Correctional Association of New York (2015).

¹⁰ ACLU of California, *Reproductive Health Behind Bars in California* at 20-21 (2016).

¹¹ ACLU of California, *Reproductive Health Behind Bars in California* at 20 (2016)

between two women in a cell.¹² The low-quality pads often fell out of women's pantlegs when the adhesive failed to adequately keep the pads in place.¹³ Women who could afford to buy additional supplies in a commissary could avoid that fate by using up to six pads at once. Women in Texas receive 30 sanitary pads and 6 tampons per month, and women routinely exhaust this supply.¹⁴

In Michigan, women in the Muskegon County Jail filed a lawsuit based in part on inadequate access to feminine hygiene products and toilet paper.¹⁵ Women described delays of up to two days in receiving sanitary napkins, causing them to bleed through their clothes despite their repeated requests. Women were forced to wear bloody clothes until the next available laundry day, which occurred once per week.

Women prisoners who need additional supplies may purchase them through a commissary, but often lack the means to do so. The vast majority of women prisoners are indigent and cannot purchase additional supplies.¹⁶ Even prisoners who work will be forced to spend much or all of their earnings on sanitary supplies – average wages for regular (non-industry) prison jobs range from an average of \$0.14 per hour to an \$0.63 per hour, and some states do not pay prisoners for their work.¹⁷ Tampons and pads are often sold in prison commissaries at significantly inflated prices. In New York, single tampons are offered for 12 cents, 17 cents, or 24 cents; and single pads cost 21 cents or 22 cents, depending on the facility.¹⁸ In Arizona, a woman would need to work for 21 hours to purchase a box of 16 pads, and 27 hours for a box of 20 tampons.¹⁹

The same problems that arise with insufficient quantities of menstrual supplies also arise with insufficient quantities of toilet paper. The Correctional Association of New York found that New York provided women prisoners with the same quantities of toilet paper

¹² Bozelko, Chandra, *Prisons that Withhold Menstrual Pads Humiliate Women and Violate Basic Human Rights*, The Guardian (June 15, 2015).

¹³ *Id.*

¹⁴ *The Treatment of Women in Texas' Criminal Justice System* at 10, Texas Criminal Justice Coalition (April 2018).

¹⁵ *Semelbauer v. Muskegon County*, 1:14-cv-01245 (W.D. Mich.)

¹⁶ Experts estimate that 80% of prisoners are indigent. Eisen, Lauren-Brooke, *Charging Inmates Perpetuates Mass Incarceration*. Brennan Center for Justice (2015). This figure is not broken down by gender and includes both men and women.

¹⁷ *How Much Do Incarcerated People Earn in Each State?* Prison Policy Initiative, (April 10, 2017) www.prisonpolicy.org/blog/2017/04/10/wages. Seven states do not pay prisoners for their work. Wages for jobs in "Correctional Industries" are higher – averaging between \$0.33 and \$1.41 per hour – but women's prisons frequently do not offer industry jobs, or have limited spaces available.

¹⁸ Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 67, Women in Prison Project of the Correctional Association of New York (2015).

¹⁹ Lydia O'Connor, *Federal Prisons Made Menstrual Products Free. Now Some States May Follow Suit*. Huffington Post (February 7, 2018).

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as they provided men prisoners, even though women routinely need more toilet paper than men.²⁰ Not surprisingly, women routinely reported running out of toilet paper and resorting to using "magazines, newspaper, lined paper and washcloths" instead.²¹

The type of feminine hygiene products offered is crucial. Tampons are rarely provided free of charge to women prisoners. Some women will prefer tampons to pads, especially to the low-quality state-issued pads they often receive. In prison, any desired item – whether it is a necessity, a luxury, or even something illegal – becomes a part of the prison economy.²² Feminine hygiene products are no exception. Without access to the amount or type of sanitary supplies that they need, women are often forced to resort to the underground economy to obtain these basic necessities.²³

In some facilities, however, lack of access to tampons can have far worse consequences. Many women prisoners must use group showers, where menstruating prisoners without access to tampons face the impossible choice of either not bathing for the five to seven days of menstruation, or of visibly bleeding while showering in full view of other prisoners, or even correctional staff. Unfortunately, unscrupulous correctional staff can take advantage of these women's desperation, even demanding sexual acts in return for tampons.²⁴

Women prisoners can safely be provided with unrestricted access to free tampons, sanitary pads, and toilet paper.

External organizations that evaluate women's prisons routinely conclude that women prisoners should have access to sufficient quantities of tampons, pads, and toilet paper.²⁵ Notably, several states and the Federal Bureau of Prisons have instituted

²⁰ Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 68, Women in Prison Project of the Correctional Association of New York (2015).

²¹ Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 67, Women in Prison Project of the Correctional Association of New York (2015).

²² B. Owens, J. Wells, J. Pollock: *In Search of Safety: Confronting Inequality in Women's Imprisonment* at 75 (2017).

²³ B. Owens, J. Wells, J. Pollock: *In Search of Safety: Confronting Inequality in Women's Imprisonment* at 75 (2017).

²⁴ Letter from Acting Assistant Attorney General Jocelyn Samuels to Governor Robert Bentley, January 17, 2014. A consent decree resolving this case requires Alabama's Tutwiler Prison for Women to provide free, unlimited tampons and pads to their women prisoners – and they have been doing so since March 2016. See State of Alabama Department of Corrections Standard Operating Procedure 8-27 (March 8, 2016). Currently, all housing unit bathrooms have open cabinets containing toilet paper, maxi pads, and tampons. The same supplies are available on the segregation unit and medical unit, although outside of the cells.

²⁵ *Women and Imprisonment: The Handbook for Prison Managers and Policy-Makers*, United Nations (2015); Task Force on Correctional Health Care Standards, *Standards for Health Services in Correctional Institutions*, American Public Health Association at 150 (3rd ed. 2003)("Toilet paper must be provided to all prisoners and all female prisoners must be issued sanitary napkins and/or tampons when they are needed."); Rachel Ramirez, *Reentry*

policies to provide women prisoners with sufficient sanitary supplies. For example, the Federal Bureau of Prisons issued an Operations Memorandum on August 1, 2017 to provide women prisoners, at no cost, with tampons (regular and super size); maxi pads with wings (regular and super size), and panty liners.²⁶ Julia Tutwiler Prison for Women in Alabama has provided free toilet paper, sanitary napkins, and tampons (regular and super size) to women since March 2016.²⁷ The Nebraska Department of Corrections took the initiative in January 2018 to provide free tampons and pads to women prisoners after legislation that would have mandated free tampons and pads for women prisoners failed.²⁸

When agencies do develop policies to provide appropriate, free menstrual supplies to women prisoners, it is critical to specifically provide for meaningful access to the products, and policies must explicitly address distribution methods. The U.S. Department of Justice's Office of Inspector General evaluated federal women prisoners' access to menstrual supplies in its September 2018 Review of the Federal Bureau of Prisons' Management of its Female Inmate Population.²⁹ The Bureau of Prisons' policy had simply required that "products for female hygiene needs shall be available," but did not address any method of distributing the supplies."³⁰ Although each of the 29 federal institutions that house women were following the identical policy, distribution methods varied across facilities, even of the same security level, and negatively impacted the availability of sanitary supplies.³¹ The OIG recommended that the BOP modify its current policy to "[c]larify guidance on the distribution of feminine hygiene products to ensure sufficient access to the amount of products inmates need free of charge."³² The BOP agreed to do so.³³

Considerations for Justice Involved Women, National Resource Center on Justice Involved Women; *Gender Responsive Policy and Practice Assessment*, National Institute of Corrections.

²⁶ Federal Bureau of Prisons Operations Memorandum 001-2017, *Provision of Feminine Hygiene Products* (August 1, 2017)(re-issued August 1, 2018).

²⁷ State of Alabama Department of Corrections, Standard Operating Procedure 8-27, *Hygiene Item Issuance*, (March 8, 2016).

²⁸ *New Tampon Policy Provides Them Free to Nebraska Prisoners*, Oklahoma World-Herald (January 19, 2018). Like most other states, Nebraska had previously provided free pads, with tampons available at the commissary for inflated prices.

²⁹ Office of the Inspector General, U.S. Department of Justice, *Review of the Federal Bureau of Prisons' Management of its Female Inmate Population*, Evaluations and Inspections Report 18-05 (September 2018).

³⁰ Office of the Inspector General, U.S. Department of Justice, *Review of the Federal Bureau of Prisons' Management of its Female Inmate Population* at p. 29. The investigation occurred prior to the revised Operations Memorandum for the Provision of Feminine Hygiene Products, and therefore evaluated the earlier policy. Neither the earlier policy nor the current policy addresses distribution.

³¹ *Id.* at 29.

³² *Id.* at 44.

³³ *Id.* at 50.

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The Alabama Department of Corrections, in contrast, provides clear guidance on access to the free tampons, pads, and toilet paper that it provides to women prisoners at Julia Tutwiler Prison for Women.³⁴ The policy requires hygiene items to be readily available in bathroom areas, assigns specific inventory and distribution responsibilities to the Housekeeping Officer, and designates an Administrative Lieutenant to ensure that the hygiene items are provided as required. An Independent Monitor has evaluated women prisoners' access to these supplies under a 2015 Consent Decree.³⁵ All six compliance reports that the Monitor has filed with the court reflects that Tutwiler is following their policy, and that women prisoners have unrestricted access to free tampons, pads, and toilet paper.

Potential problems with unrestricted access to hygiene supplies can be addressed without restricting access to all women.

Perceived and actual problems with providing unrestricted access to free pads and tampons can be adequately addressed without depriving women of basic sanitary supplies. Facilities often worry that women will use feminine hygiene products for reasons other than they are intended, such as for cleaning supplies or to address other basic housekeeping issues in the prison. And that does happen. Women have reportedly used pads to clean housing units, "to quiet squeaky doors, steady uneven tables and chairs,"³⁶ as toilet covers for stainless steel toilets, or to pad blisters on their feet.³⁷ However, as the Correctional Association of New York recommended, the problem of women using sanitary supplies for housekeeping can be easily alleviated by providing women with appropriate cleaning supplies.³⁸ Other problems reflect basic supervision issues, which can be resolved without restricting all prisoners' access to pads and tampons.³⁹

The most commonly reported problem with unrestricted access to feminine hygiene supplies is that women tend to hoard the supplies, at least initially. However,

³⁴ State of Alabama Department of Corrections, Standard Operating Procedure 8-27, *Hygiene Item Issuance*, (March 8, 2016).

³⁵ *United States v. Alabama*, 2:15-cv-00368 (May 28, 2015).

³⁶ Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 67, Women in Prison Project of the Correctional Association of New York (2015).

³⁷ Chandra Bozelko, *Prisons that Withhold Menstrual Pads Humiliate Women and Violate Basic Human Rights*, The Guardian (June 15, 2015).

³⁸ Kraft-Stolar, Tamar. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* at 66, Women in Prison Project of the Correctional Association of New York (2015).

³⁹ See also Office of the Inspector General, U.S. Department of Justice, *Review of the Federal Bureau of Prisons' Management of its Female Inmate Population*, Evaluation and Inspection Report 18-05 at 30-31. ("Other state officials told us that if inmates were misusing feminine hygiene products for other purposes, they would address the issue with the individual inmates rather than changing the distribution method for all inmates.").

once women come to trust that they will continue to have access to the supplies, they no longer hoard them because there is no reason to do so.⁴⁰

Significantly, no security issues related to unrestricted access to feminine hygiene have been identified. The Office of Inspector General's report on the federal facilities noted that "no BOP staff member told us that feminine hygiene products were misused in a manner that presented a security concern."⁴¹ The Administrator of the Women and Special Populations Branch concurred that making feminine hygiene products freely accessible could not be a security concern.⁴²

Women prisoners in both juvenile and adult systems deserve unrestricted access to necessary basic feminine hygiene supplies. Women should not be forced to forfeit their dignity, their health, or their safety to obtain tampons, sanitary pads, or toilet paper. All legislatures and correctional facilities should take action to ensure that women have the necessary supplies to meet their biological needs.

Respectfully submitted,

Lucien Dervan
Chair, Criminal Justice Section
January 2019

⁴⁰ See also Office of the Inspector General, U.S. Department of Justice, *Review of the Federal Bureau of Prisons' Management of its Female Inmate Population*, Evaluation and Inspection Report 18-05 at 30. (State official explained that an initial hoarding issue stopped when prisoners realized that they would continue to have access to hygiene products.).

⁴¹ *Id.* at p. 30 n. 65.

⁴² *Id.*

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GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Lucian Dervan, Chair

1. Summary of Resolution(s).

This resolution urges federal, state, local, tribal and territorial governments to enact legislation, and correctional and detention facilities to enact policies, to provide all women prisoners in all forms of detention, both adult and juvenile, with unrestricted access to a free toilet paper and a range of free feminine hygiene products, including both tampons and sanitary pads in sufficient quantities to address their needs.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the Fall Meeting in Washington, DC, on November 3, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The Criminal Justice Standards for the Treatment of Prisoners, Standards 23-3.5c and 23-6.1(iv), state generally that correctional authorities should ensure that special health care protocols are used for female prisoners. This resolution is very specific because institutions have failed to understand exactly what female prisoners, both adult and juvenile, need in order to adequately respond to their monthly menstrual cycles.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.

6. Status of Legislation. (If applicable)

Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This policy will be used as a basis of advocacy in federal, state, local, territorial and tribal correctional systems.

8. Cost to the Association. (Both direct and indirect costs)

No cost to the Association.

9. Disclosure of Interest. (If applicable)

Not applicable

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Commission on Veteran's Legal Services
Legal Aid & Indigent Defense
Commission on Disability Rights
Special Committee on Hispanic Legal Rights & Responsibilities
Commission on Homelessness and Poverty
Commission on Women
Center for Human Rights
Commission on Immigration
Racial & Ethnic Diversity
Racial & Ethnic Justice
Commission on Youth at Risk
Young Lawyer's Division
Civil Rights and Social Justice
Government and Public Sector Lawyers
International Law
Federal Trial Judges
State Trial Judges
Law Practice Division
Science & Technology
Health Law
Litigation

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY**1. Summary of the Resolution**

This resolution urges federal, state, local, tribal and territorial governments to enact legislation, and correctional and detention facilities to enact policies, to provide all women prisoners in all forms of detention with unrestricted access to a free toilet paper and a range of free feminine hygiene products, including both tampons and sanitary pads in sufficient quantities to address their needs.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the need for all correctional facilities to provide women prisoners with appropriate hygiene products.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The resolution urges all correctional facilities to provide feminine hygiene products in sufficient quantities and to make them available free of charge.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.

Some correctional facilities have expressed concerns about women hoarding supplies, or using sanitary napkins to clean cells or housing units, quiet squeaky doors, stabilize uneven chairs or tables, to protect blisters, or to pad cold metal toilet seats.