



**LEAF
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WOMEN'S LEGAL
EDUCATION & ACTION FUND
FONDS D'ACTION ET D'ÉDUCATION
JURIDIQUE POUR LES FEMMES



**Morgane Oger
FOUNDATION**

Narrow the gap

December 11, 2020

Via email:

Commissioner Anne Kelly,

Carla Di Censo, A/Director, Strategic Policy & Cabinet Affairs,

Correctional Service of Canada / Service correctionnel du Canada

CC: The Honourable Bill Blair, Minister of Public Safety and Emergency Preparedness

The Honourable Bardish Chagger, Minister of Diversity and Inclusion and Youth

The Honourable Maryam Monsef, Minister for Women and Gender Equality and Rural Economic Development

We are writing on behalf of the Morgane Oger Foundation and the Women's Legal Education and Action Fund (LEAF) to provide submissions on Commissioner's Directive 100, "Management of Offenders with Gender Identity or Expression Considerations" ("the Directive"). It is our submission that the Directive should not be implemented in its current form. We urge Correctional Service Canada (CSC) to draft a new directive on managing Persons¹ with gender identity or expression considerations in meaningful consultation with Transgender, Two-Spirit, and gender-diverse² individuals, as well as with gender-equity seeking organizations.

About the Morgane Oger Foundation and Women's Legal Education and Action Fund

The **Morgane Oger Foundation** works to narrow the gap between Canada's human rights legislation and the experiences lived on the ground by those our laws were enacted to protect from discrimination and hatred.

¹ In this document, we use the term "Persons" to indicate any individual under the responsibility or under the jurisdiction of Correctional Service Canada - whether they are housed in CSC facilities or in facilities maintained by other organizations.

² In this document, we use the term "Transgender, Two-Spirit, or gender-diverse individuals" to refer to anyone who is not cisgender. We recognize that there are many ways of describing non-cisgender identities or experiences. A cisgender person is someone whose gender identity or expression is congruent with the sex designation they were assigned at birth.

Since 2018 we have supported Persons under the jurisdiction of CSC who are involved in human rights complaints. We accompany them and advocate for their rights to be recognized and respected as they make their case. As part of that work we have direct knowledge of the experiences of several Transgender and gender-diverse individuals currently incarcerated under the mandate of CSC and several who are on parole at this time. Our work has covered situations at CSC and Provincial facilities contracted by CSC, as well as remand centres and transitional housing while on parole.

This work has included meetings with wardens, deputy commissioners and senior staff, as well as with a number of Transgender, Two-Spirit, and gender-diverse Persons within the mediation process of the Canadian Human Rights Commission and through a help line.

The **Women's Legal Education and Action Fund (LEAF)** works to advance the substantive equality rights of women and girls through litigation, law reform, and public education. Since 1985, we have intervened in landmark cases that have advanced equality in Canada—helping to prevent violence, eliminate discrimination in the workplace, provide better maternity benefits, ensure a right to pay equity, and allow access to reproductive freedoms.

It is our submission that the Directive should not be implemented.

The Directive, which largely codifies current operational practices, is rooted in transphobic views of sex and gender that have caused significant harm to Transgender, Two-Spirit and gender-diverse individuals in penal contexts and in Canadian society more broadly. In particular, the Directive's foundational assumption is that Persons are to be categorized and placed according to "sex", rather than according to their gender identity. This is based on an outmoded assumption, no longer accepted in human rights law, that one's sex characteristics and histories constitute one's "real" sex.

In its December 4, 2020 submission³ to your office on this matter, the Canadian Bar Association (CBA) wrote:

In our view, CD 100 is based on the incorrect assumption that people are fundamentally men or women (or intersex) based on biology at birth. We recommend that the policy be based on the assumption that people have the right to be placed in institutions that reflect their gender identity if that is their choice. A policy of placement by gender identity is consistent with human rights law and s. 15 of the *Canadian Charter of Rights and Freedoms*. It also accords with the CBA's 2018 [Resolution](#) which denounces human rights violations against LGBTI2S people wherever they occur. This approach eliminates the policy's problematic requirement for placement by sex, by default, followed by a special process to respect human rights. It is imperative that the policy be attentive to the realities and needs of trans women and trans men.

³ Canadian Bar Association, "Re: Consultation on Commissioner's Directive 100 –Management of Offenders with Gender Identity or Expression Considerations" (Dec 4 2020), online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=0ec5b438-2199-4dfc-8c76-49b6300961af>

We share the concerns of the CBA. In our view, the Directive will cause harm to Transgender, Two-Spirit and gender-diverse Persons by codifying transphobic views of sex and gender that are inconsistent with Canadian human rights law. Further, the Directive confers significant discretion to staff in relation and, given the incorrect assumptions on which the Directive is based, we have concerns about how it will be implemented in practice.

This is not a clause by clause review of the Directive. We have chosen to highlight just some of what we see as its foundational problems.

Privileging “biological attributes” in the initial classification of Persons is inconsistent with human rights obligations.

In 2017, Parliament enacted Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code*⁴. Bill C-16 added “gender identity or expression” to the enumerated list of explicitly-prohibited grounds of discrimination in federally-regulated contexts. CSC is now required to uphold this protection for everyone in Canada. Yet this protection appears to be absent from the Directive. Instead, the Directive is rooted in the mistaken view that one’s biology or anatomy at birth is determinative of whether that person is a man or a woman.

The Directive stipulates that Persons will initially be classified according to “sex”⁵ and will be admitted to a men’s or women’s institution according to that “sex” unless and until (1) a thorough assessment can occur and (2) there are no overriding health or safety concerns. There is no mention in the Directive that a person’s declared gender will influence their initial classification. This runs counter to rights-respecting practice.

The right to live according to one’s gender identity is a fundamental human right that must be respected by CSC.⁶ As has been expressed by the Ontario Human Rights Commission, “[f]or legal and social purposes, a person whose gender identity is different from their birth-assigned sex should be treated according to their lived gender identity.”⁷ Any denial of this right must be justifiable pursuant to federal human rights law.

The starting point for any CSC protocols or policies developed for Persons with “gender considerations” should be that they have the right to be treated according to their declared gender identity.

⁴ SC 2017, c. 13

⁵ Which the Directive defines as “biological attributes used to classify humans as male, female or intersex, primarily associated with physical and physiological features, including chromosomes, hormone levels and function, and reproductive/sexual anatomy.”

⁶ *Canadian Human Rights Act*, RSC 1985, c H-6, s 3(1).

⁷ Ontario Human Rights Commission, “Policy on preventing discrimination because of gender identity and gender expression” at 14, online:

<http://www3.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20because%20of%20gender%20identity%20and%20gender%20expression.pdf> >.

Concerns related to requiring Transgender, Two-Spirit, and gender-diverse Persons to disclose their “sex”

The Directive also requires Persons to categorize themselves according to the Directive’s definition of “sex”, and to inform prison staff of this categorization. No one should be required to categorize themselves according to an external understanding of “sex”; Persons should be treated according to their declared gender identities. The requirement to disclose one’s “sex” will force Transgender, Two-Spirit, and gender-diverse Persons to out themselves when there are no reasonable health or safety considerations for doing so. Should a person wish to disclose their “biological attributes” to prison staff for any reason (e.g. health needs), it must be their decision to do so.

We are concerned that this requirement could be used to justify imposing internal disciplinary sanctions on Persons whose gender identities do not conform to CSC’s understanding of that individual’s “sex”. Persons perceived by CSC to be cisgender will not be expected to disclose their biological attributes to staff, and therefore will not be penalized for failing to do so; only those individuals whose gender presentation or identity documents appear to be different from the Directive’s definition of “sex” would appear to be vulnerable to sanction for failing to disclose.

No one should be subject to the fear of sanctions for choosing if, when, or to whom they disclose any attribute of their biology or anatomy. No Transgender, Two-Spirit, or gender-diverse individuals should be subject to additional disciplinary sanction simply for being Transgender, Two-Spirit, or gender-diverse.

The Directive confers broad discretion on staff in its operationalization, which raises significant concerns

The Directive confers significant discretion on staff in relation to the categorization, placement, and treatment of Transgender, Two-Spirit, and gender-diverse persons. Most notably, placement decisions are to consider “health or safety concerns”, but these are not adequately defined in the Directive. Such discretion is concerning given the incorrect assumptions on which the Directive is based.

The Directive codifies current operational practices that have caused significant and documented harm to federally-incarcerated Transgender, Two-Spirit, and gender-diverse Persons

The Morgane Oger Foundation has advocated alongside Persons who have faced concrete harms as a direct result of having been placed in facilities according to their perceived “biological attributes”. The harms that have previously resulted from someone’s sex or gender being determined by a third party because they are of diverse gender identity must not be codified into policy at any point of the intake or risk assessment process.

The Directive inappropriately imposes an additional and more onerous safety review for Transgender, Two-Spirit, and gender-diverse people

The Directive proposes a separate safety review for Persons who are Transgender, Two-Spirit, and gender-diverse that would not be required for all other Persons being placed into a housing facility or moved between facilities. This seems to suggest, without any justification, that these Persons may pose more of a risk than others. Policies developed for Transgender, Two-Spirit, and gender-diverse Persons must not result in more onerous safety reviews or assessment processes for such Persons.

We recommend that Correctional Service Canada draft a new directive on “managing Persons with gender identity or expression considerations” in meaningful consultation with Transgender, Two-Spirit, and gender-diverse Persons, as well as with organizations that represent such Persons.

The flaws in the Directive are not surprising given that it was developed without meaningful input from or consultations with Transgender, Two-Spirit, and gender-diverse advocates and community organizations which could have advised on rights-respecting and identity-respecting policy. A meaningful consultation engages directly-affected communities - including in this case, racialized and Indigenous Transgender and Two-spirit women in particular - early in policy development such that their perspectives are built into a policy's foundation. Consultees are then provided a draft policy for comment with adequate time to meaningfully review it.

This Directive is not the product of meaningful consultation and it is our position that it should not be implemented in its current form.

Thank you again for inviting the Morgane Oger Foundation and LEAF to comment on the Directive. If there are any clarifications needed, please do not hesitate to contact our offices.

With kindest regards,



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Our organizations concur with the analysis and recommendations in the above letter. We encourage CSC to adopt them.

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