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Via email: GEN-NHQ-POL-CONSULTATION@CSCSCC.GC.CA

Carla Di Censo
A Director, Strategic Policy Division
Correctional Service Canada
340 Laurier Avenue West
Ottawa, ON K2P 0P9

Dear Acting Director Di Censo:

Re: Consultation on Commissioner's Directive 100 – Management of Offenders with Gender Identity or Expression Considerations

We are writing on behalf of the Sexual Orientation and Gender Identity Community Section (SOGIC) and the Criminal Justice Section of the Canadian Bar Association (CBA Sections) in response to draft Commissioners' Directive 100 (CD 100), issued by Correctional Service Canada (CSC) on October 5, 2020.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. SOGIC addresses the concerns of LGBTQI2S members in the CBA and provides a forum for the exchange of information, ideas and action on legal issues relating to sexual orientation and gender identity. Criminal Justice Section members include prosecutors, defense counsel and legal academics specializing in criminal law.

The CBA Sections are concerned that CD 100 will not protect the human rights of transgender prisoners. The CBA has urged all governments in Canada to address the human rights of transgender people in correctional and detention facilities. A 2016 [Resolution](#) highlighted concerns about institutional placement and identified elements of a non discriminatory framework. Society's understanding of gender identity and expression has evolved since CSC's trans policy was changed three years ago, yet CD 100 steps back from that earlier policy rather than moving forward to ensure the human rights of trans people are respected while serving federal sentences.

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 LGBTQI2S 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.

COMMENTS BY SECTION

Add preamble

The CBA Sections suggest that a preamble be added to CD 100, stating that human rights law and s. 4(g) of the *Corrections and Conditional Release Act* (CCRA) requires CSC to respect the dignity of people based on gender identity and expression, and its policies and programs must be responsive to the needs of trans prisoners. Explaining the serious harm caused by human rights violations such as misgendering, deadnaming or outing people, in addition to the violence that trans people experience in prison, would also be helpful.

Responsibilities (paragraphs 1 to 10)

1(b). The Assistant Commissioner, Policy is to assist in the development of correctional programs and assessment tools for prisoners with gender considerations. In doing so, CSC should engage with professionals who have expertise in gender identity and expression when developing programs and assessment tools for transgender people.

3(a). The Assistant Commissioner, Health Services conducts an annual review of provincial and territorial health plans and their associated eligibility criteria related to gender identity and expression. However, CD 100 does not state that CSC will pay for health services related to gender identity and expression if these jurisdictions in Canada cover a service. Federal prisoners are not covered by provincial health services while they are in custody. CSC is required to offer health services at the community standard pursuant to s. 86 of the CCRA. That standard is determined by reviewing what is available to people in the community.

4. We support mandatory and current training on gender identity and expression for all staff. We suggest stating in CD 100 that training is ongoing for all staff.

6(a) The CBA Sections endorse promoting awareness among incarcerated people on the human rights and needs of prisoners with gender considerations. We suggest that training be developed and delivered by an agency with expertise in transgender rights and awareness.

6(b) and 7(a)(i). We are encouraged that staff monitor and ensure compliance with the use of individualized protocols. Prisoners Legal Services report¹ from a number of trans women that their individualized protocols are routinely not complied with at more than one institution. CD 100 states that the Regional Deputy Commissioner and Institutional Heads ensure compliance with policy on individualized protocols. We suggest that another staff person, who is a Safe Space Champion and receives additional training on trans awareness, take on these roles both at the institutional and regional levels.

9. Making the requirement to develop individualized protocols subject to “overriding health or safety concerns” is overly broad. [Interim Policy Bulletin 548, Bill C-16](#) (Gender Identity or Expression) includes accommodations that would be included in an individual protocol of a transgender prisoner, that are not qualified by health or safety considerations:

- The Double-Bunking Cell Placement Assessment User Guide vulnerability risk assessment criteria now include the requirement to consider the needs of inmates with gender identity or expression considerations.

January 31, 2018 [Joint News Release](#) – Changes to the way transgender offenders are accommodated in Canada’s federal prison system, by CSC, PLS and the Canadian Human Rights Commission likewise includes rights that are not to be qualified by health or safety considerations:

- CSC staff must use offender’s preferred name and pronoun in all oral interaction and written documentation, even where inconsistent with the name and gender on their identification documents.

¹ *Prisoners’ Legal Services draft comments on Commissioner’s Directive 100, “Management of Offenders with Gender Identity or Expression Considerations”, November 17, 2020*

- CSC must take steps to maximize the privacy and confidentiality of information related to an offender's gender identity.
- CSC must offer individualized protocols for offenders who seek to be accommodated on the basis of gender identity or expression to ensure, among other things:
 - The safety, privacy and dignity of an offender when they access shower and/or toilet facilities; and
 - The choice of male or female staff to conduct frisk and strip searches, urinalysis testing, and camera surveillance.

The right to wear clothing that reflects a person's gender expression in custody and for court appearances, releases or absences should also not be subject to any health or safety concerns.

Paragraph 9 should emphasize the role the person with gender identity or expression considerations would necessarily play to develop their individualized protocol. The present wording is disempowering: "The Correctional Manager will develop individualized protocols for offenders with gender considerations... after discussion with the offender." We suggest that the institutional staff person referred to at paragraphs **6(b)** and **7(a)(i)** develop the individualized protocols with trans prisoners, rather than the correctional manager. The policy should state that individualized protocols must be followed and require documentation confirming that fact, including identifying staff who conduct security operational procedures and the time each day that private showers were provided. This would assist in ensuring compliance with individualized protocols.

10. Paragraph 10 requires all staff members and contractors to report to the Correctional Manager if an incarcerated person discloses gender-related needs, who then activates the Gender Considerations Needs form. It should also state that this information is to be disclosed only with the individual's consent, to protect their privacy.

Preliminary Assessment (paragraphs 11 to 13)

11. The CBA Sections do not find it appropriate to record an individual's sex in the Offender Management System (OMS), or to expect prisoners to disclose their sex or gender. This is private information. An incarcerated person may have good reasons for keeping their gender identity private. Paragraphs 10 and 11 are contrary to the 2018 joint news release, which states that CSC must take "steps to maximize the privacy and confidentiality of any information related to an offender's gender identity. Information about an offender's gender identity will only be shared with those directly involved with the offender's care and only when relevant".

12 and 13. The right to be held in an institution that reflects a person's gender is stated as the exception to the rule of placement by sex which is not in accordance with the Joint News Release or Interim Policy Bulletin 584. I. Paragraphs **12(b)** and **13(b)** require a "thought assessment" to be conducted before placement in an institution that reflects a person's gender identity. This does not accord with the Joint News Release or Interim Policy Bulletin 584. If there are no obvious health or safety concerns at intake, the person should be placed in their choice of a men's or women's institution immediately. To require an assessment delays placement by gender identity which is extremely dangerous for transgender inmates.
Admission, Placement, Transfer and Return to Custody (paragraph 14)

14. Completion of the Immediate Needs Indicators – Gender Considerations screen is only on admission if someone has an "Active Gender Considerations Need". We suggest that all persons coming into custody should be asked about their preferred pronouns and names and those should be recorded and used from intake on. They should also be asked if they want an individualized protocol and, if so, it should be completed immediately to ensure no human rights violations in the interim. All prison custody institutions, including reception centres, should have men's and women's clothing and personal effects to offer immediately on indication of preference. Referrals to gender identity specialists should not be delayed until penitentiary placement.

Offender Request during Intake Assessment for Penitentiary Placement or Offender Request for a Transfer (paragraphs 15 to 21)

15. Paragraph 15 does not comply with Interim Policy Bulletin 584 or the Joint News Release, which state that placement by gender identity is the rule, not the exception. There should be no transfer delay to an institution that reflects gender identity unless it is necessary to determine if health or safety concerns are “overriding” and “cannot be resolved.” A decision assessment should not be necessary in most cases. In any event, paragraph 15 should be prefaced with “Unless 12(a) or (b) or 13(a) or (b) apply...” It should also include an assessment timeframe for a decision to be made and for the individual to be transferred.

15(a). The word “overriding” should be included before “health or safety concerns that cannot be resolved” to comply with the Joint News Release and Interim Policy Bulletin 584. Including an exception to gender identity placement is discriminatory. We recommend that CSC implement a policy of gender identity placement if that is the preference, without exception. In practice, the application of this exception has led to some trans women being denied placement at women’s prisons based on risk speculation. The discrimination and safety risk of these women in men’s prisons, on the other hand, is not speculative, but is based on clear evidence. (See PLS’s report)

If CSC is unwilling to eliminate the exception to placement by gender identity, we recommend that at minimum the “health” exception be removed. We are not aware of any basis on which “health concerns” could be a *bona fide* requirement under human rights law to override the duty to accommodate based on gender identity and expression.

In the further alternative, we suggest the policy include guidance to determine if there are overriding safety concerns that cannot be addressed. The guidance must state that people should be placed according to gender identity if that is their wish, unless to do so would meet the threshold of undue hardship. The policy should require a safety risk assessment in the current and proposed environments, including the safety of all prisoners. The assessment of safety risk must be based on evidence and not speculation or stereotypes. Refusal of placement by gender identity should be in rare and extreme circumstances.

15(b) and (c). These articles relating to the appropriateness of the environment to assess risk and needs should be deleted. These considerations are not limited to “overriding health or safety concerns that cannot be resolved” which is the only caveat to the right to be placed according to gender identity if that is the individual’s wish. Additional requirements are not part of Interim Policy Bulletin.

17. Paragraph 17 refers to the Gender Considerations Case Review Board’s guidance. We support the Board giving guidance and endorse its mission and values. We are concerned that board membership is exclusively CSC staff and no members are required to possess gender identity and expression expertise. The board should include a member of a transgender advocacy agency and include trans people. We also suggest that the comments, guidance and recommendations made by the Gender Considerations Case Review Board be shared with the person subject to the review.

21. Paragraph 21 deals with security classification. CD 100 should include guidance ensuring that gender identity or expression is not used to increase security level, as that would constitute discrimination. Guidance should ensure that decision makers acknowledge that difficulties with “institutional adjustment” would likely resolve if the person were to be moved to lower security or to a gender appropriate environment. The policy should recognize the higher risk of violence and discrimination of trans people in custody and should encourage community release at the earliest opportunity.

Security Operational Procedures (paragraphs 22 to 24)

22. Paragraphs 22 and 23 are contradictory and may confuse staff. The policy should state clearly that prisoners with gender identity or expression considerations have the right to choose the sex (or preferably, gender) of the staff who conduct searches and urinalysis testing, and individualized protocols must include their choice.

This is stated as a requirement in Interim Policy Bulletin 584: “Offenders may also choose whether strip and frisk searches and urinalysis testing are conducted by a male or a female staff member”, and the Joint News Release: “to ensure...the choice of male or female staff to conduct frisk and strip searches, urinalysis testing, and camera surveillance”.

23. Paragraph 23 should also explain the right to choose a split search.

24. If individualized protocols are not supported, the matter should be referred to the Gender Considerations Case Review Board for direction.

Other Gender-Informed Measures (paragraphs 25 to 27)

25. The language of paragraph 25 – “To the extent possible, offenders will be provided access to private showers and toilets, in consideration of their gender identity or expressions.” – does not accord with the Interim Policy Bulletin 584 or the Joint News Release. The Joint News Release says CSC must “ensure...the safety, privacy and dignity of an offender when they access shower and and/or toilet facilities.”

26. Paragraph 26 should explicitly state that prisoners with gender considerations will be permitted to wear institutional clothing and underclothing of their choosing.

Collection, Display and Sharing of Gender and Sex Information (paragraphs 28 to 32)

32. Paragraph 32 states that legal names will be used either exclusively or along with the chosen name when there is an “identified security risk that cannot be resolved” and gives the example of OMS header information. OMS header information is on every official document produced by CSC about an individual, and cannot be characterized as an “identified security risk that cannot be resolved”.

Paragraph **32(b)** again states that a legal name can be used either exclusively or along with the chosen name for “legal requirements” and for “operational assessments”. These exceptions are not consistent with the Joint News Release or Interim Policy Bulletin 584. CD 100 does not identify staff who are responsible for assisting individuals in completing legal name changes.

Annex B, paragraph 3 states: “Offenders’ needs related to gender considerations must be met without delay, barring overriding health or safety concerns that cannot be resolved.” Again, the caveat of overriding health or safety concerns that cannot be resolved should not be an excuse to withhold basic rights.

The CBA Sections appreciate the opportunity to comment on the draft policy. We trust our comments are helpful and would be pleased to offer further clarification.

Yours truly,

(original letter signed by Julie Terrien for Jody H. Berkes and Frances Mahon)

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