**Submission by Ms. Marcia V. J. Kran OC, member of the UN Human Rights Committee, to the Committee on the Elimination of Discrimination Against Women on its draft of General Recommendation No. 39 on the Rights of Indigenous Women And Girls**

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**I. Introduction**

I appreciate the opportunity to provide input on the UN Committee on the Elimination of Discrimination Against Women’s (“CEDAW Committee”) draft of its General Recommendation No. 39 on the rights of indigenous women and girls (“the Draft”). Thanks are due to the International Justice and Human Rights Clinic at Peter A. Allard School of Law of the University of British Columbia that provides legal support for my UN Human Rights Committee mandate and carried out research that underpins my comments regarding the Draft.

**II. Suggestions**

**A. Suggestions about Definitions**

# Use of the term “ordinary”

We propose that the term “ordinary” used throughout the Draft to describe and distinguish non-indigenous laws and systems be replaced with the term “non-indigenous”. The term “ordinary” can be found at paragraph 23 in reference to inheritance laws; paragraphs 32-36, 38-39, 44, and 47 in reference to justice systems; and paragraph 61 in reference to health systems. Describing non-indigenous systems as “ordinary” is value-laden and suggests that such systems are the default or normal, thus perpetuating the marginalization and othering of indigenous people and their institutions. We suggest the term “non-indigenous” as a more neutral alternative that linguistically places non-indigenous and indigenous ways of organizing on equal footing and aligns with states’ obligations under Article 27 of the *United Nations Declaration on the Rights of Indigenous Peoples* (“*UNDRIP*”) to give due recognition to indigenous peoples’ laws, traditions, [and] customs”.[[1]](#footnote-2)

# Inclusion of Two-Spirit, Gay, and Queer-Gendered Identity Categories

We note that while the Committee refers to the inclusion of two-spirit individuals in reference to “LBTI” at paragraph 25, we encourage the CEDAW Committee to include “queer” and, importantly, “two-spirit” to the acronym of identities so as to read “LGBTIQ2S+”, notably at paragraph 60. The term “two-spirit” was coined and proposed by Elder Myra Laramee at the Third Annual Inter-tribal Native American, First Nations, Gay and Lesbian American Conference hosted in Winnipeg in 1990. “Two-spirit” is used by some indigenous people who identify as having both a masculine and feminine spirit, in addition to a description for sexual, gender, and/or spiritual identity.[[2]](#footnote-3) Additionally, the term “queer” encompasses a variety of sexual and gender identities beyond straight and cisgender.[[3]](#footnote-4) Expanding the acronym used by the Committee in the Draft to include these terms more accurately includes the diverse range of identities applicable to Indigenous women and girls—particularly in view of the fact that some Indigenous languages “do not have terms to describe sexual identities such as gay, lesbian, or bisexual”.[[4]](#footnote-5)

**B. Specific Suggestions**

While acknowledging the general nature of the Committee’s Draft Recommendations, we encourage the Committee to include more specific language in several of its recommendations to States to best assist governments in giving effect to their obligations and commitments under the Convention and other instruments of international law. We are concerned that certain recommendations in the Draft Recommendations set forth standards for State compliance may lead to the partial fulfilment or even diluting the rights set forth by CEDAW or other international law instruments. Our suggested amendments are in italics and underlined:

# Inclusion of more concrete or specific measures taken by state parties and more targeted standards to inform state compliance

Paragraph 28

1. At (a)

Develop comprehensive policies to eliminate discrimination against indigenous women and girls, *centered around* consultations with indigenous women and girls living in and outside of indigenous territories. This policy should include measures to address intersectional discrimination faced by indigenous women with disabilities; indigenous girls; older indigenous women; indigenous *LGBTIQ2S+* women; those in situations of poverty; rural indigenous women; and displaced, refugee and migrant indigenous women. State parties should collect disaggregated data on the forms of gender-based discrimination and violence faced by indigenous women and girls;

1. At (c)

Repeal and amend *all* *legislative and policy instruments, such as* laws, policies, regulations, programmes, administrative procedures, institutional structures, and budgetary allocations, which directly or indirectly discriminate against indigenous women and girls;

1. At (i)

Adopt *effective* measures to legally recognize and protect the lands, territories, and natural resources of indigenous peoples, including indigenous women; take steps to fully respect the right to free, prior, and informed consent, and the effective participation of indigenous women and girls in decision-making on matters affecting them;

1. At (j)

Adopt *effective* measures to eliminate and prevent all forced assimilation policies. This includes the prompt investigation of and accountability for past and present assimilation policies, the establishment of truth and reconciliation bodies, and ensuring access to justice and reparations for the victims involved.

Paragraph 32:

According to these principles, states must ensure that all justice systems, both *indigenous and non-indigenous*, act in a timely fashion to offer appropriate and effective remedies for indigenous women and girls who are victims of discrimination and violence. This entails having available interpreters, translators, anthropologists, psychologists, healthcare professionals, lawyers, and cultural mediators with experience and training on the realities, culture, and different worldview of indigenous women and girls. Justice systems should also have in place methods to collect evidence that are appropriate and compatible with the culture and worldview of indigenous women and girls. Justice officials should be consistently trained on the rights of indigenous women and girls, and the individual and collective dimensions of their identity*, with the goal of instilling a substantial degree of indigenous cultural competence*. In this process, it is key to respect the different conceptions of justice and processes that *non-indigenous* and indigenous systems have. Justice can be a process of balance and healing for indigenous peoples, with the goal of restoring harmony to their communities.

Paragraph 47:

1. At (a)

Adopt and *effectively implement* legislation prohibiting gender-based violence against indigenous women and girls incorporating a gender, indigenous women and girls, intersectional, intercultural, and multidisciplinary perspective, as defined in paragraph 4 of this General Recommendation;

1. At (c)

Ensure that indigenous women and girls have *timely and* effective access to both *non-indigenous* and indigenous justice systems, including protection orders *and the investigation of cases of missing and murdered indigenous women and girls*, free from discrimination and bias;

1. At (f)

Systematically collect data and undertake studies, in collaboration with indigenous communities and organizations, to assess the *magnitude, gravity* *and root causes* of gender-based violence against indigenous women and girls, to inform measures to prevent and respond to such violence.

Paragraph 52:

1. At (h)

Take proactive *and effective* steps to recognize, support, and protect the life, integrity, and work of indigenous women human rights defenders and ensure that they conduct their activities in conditions of safety and in an enabling and inclusive environment. States’ measures should include the creation of specialized government bodies to protect women human rights defenders, with the effective, real, and meaningful participation of women human rights defenders.

Paragraph 56

1. At (a)(iv)

Creating support systems for indigenous women and girls toreduce their unequal share of unpaid care work*,* combat child marriage, and to assist victims in reporting acts of gender-based violence and labour exploitation *by creating social support systems that are operationally effective, accessible, and culturally responsive.*

1. At (c)

Promote the adoption of curricula, that reflect indigenous education, languages, cultures, history, knowledge systems, and epistemologies *and, when possible, adopt curricula grounded in the cultures and languages of indigenous women and girls in accordance with Article 14 of UNDRIP*.[[5]](#footnote-6) These efforts should extend to all schools *and educators*, including those in the mainstream;

1. At (f)

Provide systemic and *culturally responsive* training to teachers and school administration personnel at all levels of educational system on the rights, *histories, and cultures* of indigenous women and girls;

Paragraph 62

1. At (d):

Ensure the *legal* recognition of and *respect for* indigenous health systems, knowledge, and practices and prevent and sanction the criminalization of this knowledge;

1. At (e):

Provide gender-responsive and culturally responsive capacity building to health professionals treating indigenous women and girls, including community health workers and traditional birth attendants, and encourage *and support* indigenous women to enter the medical profession *such as through scholarships and/or the use of admission quotas*;

**C. Suggestions to Reduce Ambiguity**

We put forward the comments below with the aim of refining the Draft Recommendations to avoid possible difficulties due to ambiguity.

# Refinement to mitigate possible harms stemming from ambiguity

Paragraph 4:

The definition of an intercultural perspective should be clarified to address meaningful cultural competence. Defining this perspective as mere consideration of cultural diversity of indigenous peoples, their worldview, culture, and languages may be interpreted to allow for State compliance in cases where such considerations are understood superficially and through the conceptual lens that permeates non-indigenous legal systems—as opposed to the conceptual lens through which Indigenous peoples view their legal systems. This may (particularly as it concerns the training of judges mentioned in paragraph 39(b)) hamper the ability for non-indigenous judges to effectively make sense of the backgrounds of Indigenous women and girls in non-indigenous justice systems, as well as establish a genuine respect for Indigenous justice systems.

Paragraph 32 and 39(d):

It is unclear whether the requirements of having available interpreters, translators, anthropologists, psychologists, healthcare professionals, lawyers, and cultural mediators would fall on Indigenous justice systems. If so, this may lead to two problematic outcomes. First, it may (without provisions requiring financial assistance on the part of states in certain circumstances) present an onerous financial burden on Indigenous nations that do not have substantial budgets—and may erode their right to self-determination and the means of financing autonomous functions under UNDRIP Article 4. This ambiguity may be resolved by setting forth with greater clarity what administrative and financial obligations would be required by “having available” such professionals. Second, it may (particularly in the case of mandating the presence of anthropologists) unduly influence the development of Indigenous peoples’ right to maintain and strengthen their distinct political and legal institutions under UNDRIP Article 5.

I offer these comments in a constructive spirit and trust they will be helpful to CEDAW colleagues.

1. <https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>. [↑](#footnote-ref-2)
2. <https://lgbtqhealth.ca/community/two-spirit.php>. [↑](#footnote-ref-3)
3. <https://www.plannedparenthood.org/learn/teens/sexual-orientation/what-does-queer-mean>. [↑](#footnote-ref-4)
4. <https://lgbtqhealth.ca/community/two-spirit.php>. [↑](#footnote-ref-5)
5. *Supra* at note 1. [↑](#footnote-ref-6)