

Guidelines re: Gender Identity and Gender Expression

The basics

- In Newfoundland and Labrador, discrimination or harassment based on gender identity is prohibited by the Newfoundland and Labrador *Human Rights Act* 2010.
- Complaints in NL are accepted under the enumerated ground of sex.
- The terms ‘gender expression’ and/or ‘gender identity’ are gradually being added to the texts of other provincial and federal Human Rights’ legislation across Canada.
- **Gender identity** is an individual’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex that the individual was assigned at birth.
- **Gender expression** are the external attributes, behaviour, appearance, dress, etc. by which people express themselves and through which others perceive that person’s gender.
- Employers and service providers have a duty to accommodate individuals up to the point of undue hardship. For more information on what is undue hardship, see the detailed guideline.
- Examples of accommodation are provided below.
- Although this document can act as a guideline for employers, employees, service providers and the public, it is not a substitute for legal advice.

Understanding Gender Identity: A Glossary¹

Trans: An umbrella term used to describe individuals who, to varying degrees, do not conform to what society usually defines as a man or a woman.

Transgender: People whose life experience includes existing in more than one gender. This may include people who identify as transsexual, and people who describe themselves as being on a “gender spectrum” or as living outside the categories of “man” or “woman”.

Transsexual: People who were identified at birth as one sex, but who identify themselves differently. They may or may not seek or undergo one or more medical treatments to align their bodies with their internally felt identity, such as hormone therapy, sex-reassignment surgery or other procedures.

Intersex: People who are not easily classified as “male” or “female,” based on their physical characteristics at birth or after puberty. This word replaces the inappropriate term “hermaphrodite.”

Crossdresser: A person who, for emotional and psychological well-being, dresses in clothing usually associated with the “opposite” sex.

Transition(ing): is the process of changing sex, including but not limited to hormone replacement therapy, name and gender pronoun change, cross-dressing, and/or surgeries. The transition process is not limited to or conditional on any of these things. There is no checklist or average time for completion and some people may live their whole lives in a state of transition.²

Sex-reassignment surgery (SRS): Refers to a group of surgeries to alter an individual’s gender. Hormone treatment is almost always given prior to or as follow up to SRS.³

M-to-F/ MTF: A term for transfemale/transwoman; a person who lives as a woman but was not female according to her assigned birth sex.⁴

F-to-M/ FTM: A term for transmale/transman; a person who lives as a man, but was not male according to his assigned birth sex.⁵

¹ This glossary (with some additions) comes from the “Gender Identity and Gender Expression (brochure),” Ontario Human Rights Commission, online: <www.ohrc.on.ca/>.

² This definition is taken from Mount Sinai Hospital’s Gender Identity Policy

³ University of California, *Transgender Health Care at the University of California*, online: <<http://www.uclgbtia.org/TransPamphlet.pdf>>.

⁴ Ibid.

⁵ Ibid.

Introduction

The *Human Rights Act, 2010* (“the Act”) states that it is public policy in Newfoundland and Labrador to recognize the inherent dignity and worth of all people and to provide for equal rights and opportunities without discrimination. The Act aims to create a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute fully to the development and well-being of the community.⁶

When public consultations were held in 2010, prior to the implementation of the new Act, it was the position of the Newfoundland and Labrador Human Rights Commission (the Commission) that ‘gender identity’ and/or ‘gender expression’ or another appropriate term should be included as a prohibited ground under section 9 of the Act. Such an amendment would help deliver the message of inclusion for individuals identifying as trans (see Glossary), and would contribute to public education and dialogue. When the new Act came into force, there was no express provision for the rights of trans individuals. The Commission wishes to clarify that in Newfoundland and Labrador, as in other provinces across Canada, claims dealing with discrimination or harassment on these grounds can be – and have been – accepted under the enumerated ground of sex.⁷

The issues that arise with respect to gender identity can be confusing for employers and service providers who are not familiar with different expressions of gender and who are unaware of obligations which may arise. This lack of awareness may lead to workplace policies that are either intentionally or unintentionally discriminatory. As regards the expression of an individual’s gender identity, both the employer and the employee have certain responsibilities. These guidelines explain what kind of behaviours are, and are not, appropriate from a human rights perspective, and explains the roles and obligations of both parties. It also serves to promote awareness of issues surrounding gender identity and to dispel stereotypes and myths that foster discrimination and harassment against individuals because of their gender identity.

⁶ *Human Rights Act*, SNL 2010, c H-13.1, preamble (CanLII).

⁷ See *Vancouver Rape Relief Society v British Columbia (Human Rights Commission)*, 2000 BCSC 889 (QL).

Discrimination, gender identity and human rights

The Act protects individuals from being discriminated against on the basis of what are called “prohibited grounds.”⁸ Discrimination can refer to distinct or differential treatment that puts an individual at a disadvantage. Under the Act, discrimination is prohibited in:

- employment;
- the provision of goods, services, accommodations and facilities;
- the right to occupy commercial or dwelling units;
- contracts and
- advertising.⁹

A finding of discrimination does not require intent.¹⁰ That means that a party can be found to have discriminated against someone without doing so “on purpose” or with the intention to cause harm to that individual.

Gender identity across Canada

In Newfoundland and Labrador, as in other provinces across the country, the courts have held that complaints of discrimination based on gender identity may be accepted under the enumerated ground of sex.¹¹ Some jurisdictions, such as Ontario, Nova Scotia, Manitoba and the Northwest Territories have gone further and amended provincial legislation to include the term gender identity and, in some cases, gender expression.

As of June 2012, sections 1-7 of the *Ontario Human Rights Code* now include gender identity and gender expression as separate enumerated grounds.¹² These terms were left undefined by the legislature and remain mostly undefined by case law. However, some cases before the Ontario Tribunal have relied on the Ontario Human Rights Commission’s “[Policy on Discrimination and Harassment Because of Gender Identity](#)” for discussion and interpretation.¹³ The OHRC is currently engaged in consultations with community partners and other human rights groups to update this document and develop new definitions.

⁸ *Human Rights Act*, SNL 2010, c H-13.1, s 9 (CanLII).

⁹ *Human Rights Act*, SNL 2010, c H-13.1, ss 11, 12, 13, 14, 21 (CanLII).

¹⁰ *Human Rights Act*, SNL 2010, c H-13.1, s 10 (CanLII).

¹¹ See Vancouver Rape Relief Society, *supra*. Case appealed as far as the BC Court of Appeal on different grounds. Also, see *M.L. and Commission des droits de la personne et des droits de la jeunesse du Quebec v Maison des jeunes* [1998] JTD PQ no. 31 JEL/1998-0489, No 500-53-000078-970 (trib. Que.)

¹² *Human Rights Code*, RSO 1990, c H.19, ss 1-7 (CanLII).

¹³ See *Vanderputten v Seydaco Packaging Corp.*, 2012 HRTO 1977, CHRR Doc. 12-2477 (Ont. Human Rights Trib.)

Edmonds, Ryan, “Ontario’s *Human Rights Code* Amendments: Deconstructing ‘Gender Identity’ and ‘Gender Expression’”, Ontario Bar Association, Vol. 2, No. 2, December 2012, online:

<www.oba.org/en/pdf/sec_news_sog_dec12_gen_edm.pdf>.

Recently, Nova Scotia amended its *Human Rights Act* by passing the *Transgendered Persons Protection Act* in December 2012.¹⁴ This amends the Act to explicitly include gender identity and gender expression as separate enumerated grounds. In the *Human Rights Act* of the Northwest Territories, the preamble and s. 5(1) list gender identity as a separate prohibited ground.¹⁵ Also, section 9(2) of the *Manitoba Human Rights Code* lists gender identity as a prohibited ground.¹⁶ Although these amendments do not include definitions for either 'gender identity' or 'gender expression', the Human Rights Commission of Manitoba has also published a [guideline](#) with definitions.

In March 2013, the House of Commons approved a similar amendment to the Canadian Human Rights Act.¹⁷ Gender identity, in that document is defined as: "...the individual's deeply felt internal and individual experience of gender, which may or may not correspond with the sex that the individual was assigned at birth."¹⁸ As of the time of writing, the Bill has not gone further than second reading at the Senate.

The draft working definitions developed by the OHRC offer a thorough explanation of the new grounds. They state:

"Gender identity" refers to each person's deeply felt internal and individual experience of gender. A person's gender identity may or may not correspond with their birth sex, and with social norms of "male" and "female". It includes an individual's personal sense of their body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, such as dress, speech and mannerisms.

"Gender expression" refers to the external attributes, behaviour, appearance, dress, etc., by which a person expresses themselves and through which others perceive that person's gender.¹⁹

If the Government of Newfoundland and Labrador decides to amend the prohibited grounds listed in section 9 of the Act, the Commission can provide advice on proper definitions and terminology that can be adopted.

¹⁴ *Transgendered Persons Protection Act*, SNS 2012, c 51, s 2, online:

<http://nslegislature.ca/index.php/proceedings/bills/transgendered_persons_protection_act_-_bill_140/>.

¹⁵ *Human Rights Act*, SNWT 2002, c 18, s 5 and preamble (CanLII).

¹⁶ *The Human Rights Code*, CCSM c H175, s 9 (CanLII).

¹⁷ Bill C-279, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)*, 1st Sess, 41st Parl, 2013, online:

<www.parl.gc.ca/legisinfo/BillDetails.aspx?billId=5122660&Mode=1&View=3&Language=E>.

¹⁸ *Ibid.*

¹⁹ "Human Rights and Gender Identity and Gender Expression Fact Sheet," OHRC, online:

<www.ohrc.on.ca/en/human-rights-and-gender-identity-and-gender-expression-fact-sheet>.

Discrimination and Gender Identity

The following are some examples of discrimination or harassment on the basis of gender identity.

Example 1: Despite clearly identifying yourself as Naomi – corresponding to your chosen gender identification – the manager at your office continues to address your communications and cheques to your former male name. You may have a human rights claim.²⁰

Example 2: In an interview for a new job, you do not disclose that your outward gender expression is different from your gender as identified at birth. You get the job and the manager discovers this information while setting up your human resources file. You are let go two weeks later despite good attendance and good productivity. You may have a human rights claim.

Example 3: You work for a hair salon. The owner of the store discovers that you have not lived your entire life as a female. Two weeks later she dismisses you, and she tells you it is because you have not been showing up for work and are consistently late. If what your employer claims is true, you may not have a human rights claim as the cause of your dismissal was not your gender identity. The actual cause was your constant tardiness.

Example 4: An employer receives complaints from workers about a transitioning male-to-female transsexual co-worker who has begun to use the female washroom facilities. The employer insists that she continue to use the men's change room. This may be grounds for a human rights complaint.²¹

Example 5: Despite identifying as a woman, a police officer with reasonable grounds to conduct a strip search insists that a male officer conduct the search. This may be grounds for a human rights complaint.²²

Duty to Accommodate: One Rule Does Not Fit All

If the expression of an individual's gender identity affects him/her in areas protected under the Act, they have a right to request accommodation of their needs. It is the responsibility of the person/business who is the recipient of the request to make all reasonable efforts to accommodate the individual, whether the recipient is a landlord, employer, or service provider. That person must then

²⁰ Based on one of the indicia of sex discrimination in the case of *Sheridan v Sanctuary Investments (No. 3)* (1999), 33 CHRR D/467 (BC Tribunal).

²¹ See *Vanderputten v Seydaco Packaging Corp.*, supra.

²² See *Forrester v Peel (Regional Municipality) Police Services Board*, 2006 HRTO 13, No. HR-0583/584-04 (Ont. Human Rights Trib.)

explore and assess all options available to see if the individual can be accommodated without undue hardship.

What is Accommodation?

Accommodation means making changes/adaptations to meet an individual's needs. It may mean, for example, implementing a gender neutral dress code which is applied consistently for all employees.

The individual requesting accommodation also has responsibilities. A person requesting accommodation has a duty to provide relevant information about their specific needs. Where an option for accommodation is presented, the person requiring accommodation does not have a right to refuse an option that reasonably meets his/her needs.

Accommodation is best served where parties communicate their needs effectively and cooperatively. Compromise is necessary on both sides so that parties can achieve their objectives.

Potential Accommodations

Section 11(1) of the Act provides for equal treatment without discrimination with respect to services and facilities, but allows for restrictions of facilities by sex on the ground of public decency (section 11(3)(b)).²³

This section allows for separate washrooms, examination areas, change rooms and other services that are men-only or women-only. According to case law in Canada, trans individuals should be treated in a manner consistent with the gender that they present and should be provided access to the appropriate facilities.²⁴

Other attempts to accommodate persons with respect to their gender identity include:

- The use of partitions or individual stalls in male and female locker rooms.
- Allowing a trans individual to use private staff facilities instead of public washroom facilities.
- Ensuring the utmost privacy of individuals, if personal information from birth certificates or driver's licenses is required.

Undue Hardship: What is the Extent of the Duty to Accommodate?

The duty to accommodate persons on the ground of gender identity continues up to the point of *undue hardship*. Undue hardship is a legal term, the threshold of

²³ *Human Rights Act*, SNL 2010, c H-13, s 11 (CanLII).

²⁴ *Sheridan v Sanctuary Investments (No. 3)* (1999), *supra*.

which varies depending on the facts of the particular situation. Accommodation to the point of undue hardship means that the party making the accommodation will be expected to absorb *some* hardship. A party will generally not be able to justify refusal to accommodate a person simply because there will be some cost associated with doing so. Undue hardship arises at the point where the extra cost or safety risk is so high that the business cannot reasonably bear it.²⁵

What constitutes undue hardship is different in every situation. A court or board of inquiry will usually look at a number of factors, including how much the accommodation will cost, the size of the enterprise, what effect the accommodation will have on other employees or the collective agreement, whether restructuring is viable, and whether other alternatives are available.²⁶ When determining whether a request for accommodation is reasonable or will constitute undue hardship in a specific circumstance, it is advisable to seek legal advice.

For any further questions or concerns, please contact the Human Rights Commission at:

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Toll Free: 1-800-563-5808
Fax: 709-729-0790
humanrights@gov.nl.ca

Guidelines are not law: These guidelines reflect the Newfoundland and Labrador Human Rights Commission's interpretation of the provisions of the Newfoundland and Labrador *Human Rights Act, 2010* and various legal decisions from across Canada with respect to gender identity in the context of human rights. They are subject to decisions by Boards of Inquiry (called Tribunals in some provinces) and the Courts and should be read in conjunction with such decisions and with the specific language of the Act. Readers should be aware that as with all areas of law, legal obligations may evolve as new decisions emerge. If there is any conflict between these guidelines and the Act, the Act will prevail. Any questions regarding these guidelines should be directed to Commission staff. These guidelines should not be substituted for legal advice.

²⁵ In *Kavanagh v Canada (Attorney General)*, [2001] CHRD No. 21, it was found that Correctional Services Canada met its burden to accommodate having regard to the unique nature of the prison setting and the needs of the inmate population.

²⁶ See *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 SCR 489.