Update to Gender Identity and Gender Expression

Introduction

The Human Rights Act, 2010 ("the Act") states that it is public policy in the province of Newfoundland and Labrador to recognize the inherent dignity and worth of all people and to provide 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.7

On December 10, 2013, an amendment was made to the Act to include gender identity and gender expression as protected grounds of discrimination8. Previous to this amendment the Newfoundland and Labrador Human Rights Commission (the Commission), as with other provinces across Canada, accepted claims dealing with discrimination or harassment on the basis of gender identity and gender expression under the enumerated ground of sex9. However, the amendment to include gender identity and gender expression as protected grounds under the Act extends formal protections, delivers a message of inclusion for individuals who identify as trans or transgender (see Glossary), and contributes to public education and dialogue about issues surrounding gender identity and expression.

Gender identity and gender expression can be new, and sometimes confusing, for employers and service providers who are not familiar with different expressions of gender, resulting in unawareness of issues and obligations which may arise. This lack of awareness may lead to policies that are either intentionally or unintentionally discriminatory. These guidelines outline some basic ideas of gender identity and gender expression, explain the roles and obligations of both parties in instances of accommodation, and explain what kind of behaviours are, and are not, appropriate from a human rights perspective.

What are "Gender Identity" and "Gender Expression"?
While the terms "gender identity" and "gender expression" were left undefined by the legislature, and remain mostly undefined by case law, some cases before the Ontario Tribunal have relied on the Ontario Human Right's Commission's Policy on Discrimination and Harassment Because of Gender Identity's (LINK) working definitions, which state:

"Gender identity" refers to each person's internal and individual experience of gender. It is their sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex. Gender identity is fundamentally different from a person's sexual orientation.

"Gender expression" refers to how a person publicly presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender.

These definitions are intentionally broad in nature to ensure full inclusion of the many ways in which gender can be felt, identified with, experienced and expressed. The inclusion of gender identity and gender expression as protected grounds under the Act means that if an individual is affected in areas covered by the Act because of the way their gender is identified, experienced and/or expressed, they have a right to request accommodation of their specific needs.

Gender Identity, Gender Expression and Human Rights in Canada
On December 10th, 2013, Newfoundland and Labrador became the sixth jurisdiction in Canada to amend provincial human rights legislation to include gender identity and, in some cases, gender expression. North West Territories, Manitoba, Ontario and Nova Scotia had previously made the inclusive amendments, with Prince Edward Island adding gender identity and gender expression as protected grounds on December 6th, 2013.

Important Information regarding use of facilities
According to Canadian case law, trans individuals should have safe access to facilities consistent with their gender expression. This means, trans women must have safe access to women's facilities, and trans men must have safe access to men's facilities. Transgender persons should not be required to use different washrooms or change rooms because of discomfort or transphobic attitudes. The use of education and awareness is stressed to avoid harassment in these situations.

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

Accommodation and
the Duty to Accommodate

For grounds of discrimination protected under the Act, there exists a duty to accommodate to the point of undue hardship. Duty to accommodate means that employers and service providers are required to work with the specific needs of individuals based on grounds protected under the Act, and might mean changing or eliminating policies, rules, practices and behaviours that have a discriminatory effect. In the case of gender identity and gender expression, accommodation may mean, for example, implementing a gender neutral dress code which is applied equally and consistently for all employees, or, allowing an employee to choose the gender-specific dress code guidelines that best aligns with their gender expression.

This duty to accommodate exists up to the point of undue hardship - a legal term, with a threshold varying relative to specific situations and contexts. Accommodation to the point of undue hardship means that the accommodating party will be expected to absorb some hardship, and will generally not be able to justify refusal to accommodate on the basis of there being some cost involved in doing so. Undue hardship arises at the point where the financial burden or safety risk of accommodation is so high that the accommodating party could not reasonably bear it.

Accommodation also places responsibilities upon the individual requesting accommodation - a person requesting accommodation has a duty to provide relevant information about their specific needs and, where an option for accommodation is presented, the person requiring accommodation does not have a right to refuse an option that reasonably meets their needs.

Discrimination and Gender Identity

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

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.

Example 2: In an interview for a new job, you do not disclose that your outward gender expression is different from your sex 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 the gender your present as. 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 washroom. This may be grounds for a human rights complaint11.

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 complaint12.

Example 6: Although Paul identifies and presents as male, his boss demands he provide medical documentation of his transition before allowing him to use the men’s change room at work. This may be grounds for a human rights complaint13.

The Ontario Human Rights Commission has a checklist of best practices that can be found here. This checklist is helpful when a person or employer is unsure about how to best approach situations involving transgender individuals. 14

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 and gender expression 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.

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

Tel: 709-729-2709
Toll Free: 1-800-563-5808
Fax: 709-729-0790
humanrights@gov.nl.ca

Glossary15
Cisgender: A person whose gender identity aligns with conventional social expectations for the sex assigned to them at birth. For example, a cisgender man is someone who identifies as a man and who was assigned male sex at birth.

Cross-dresser: A person who, for various reasons, wears gender atypical clothing. They may or may not self-identify as a cross dresser. "Cross-dresser" is a word that tends to refer to men with sometimes strong preferences for clothing often worn by women.

Genderqueer: A term used by some individuals who identify as neither entirely male nor entirely female.

Gender Non-conforming: A term for individuals whose gender expression is different from societal expectations of gender.

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".

Queer: A term used to refer to lesbian, gay, bisexual and, often also transgender, people. Some use queer as an alternative to "gay" in an effort to be more inclusive, since the term does not convey a sense of gender.

Sex / Assigned Sex: Is the classification of a person as male, female or intersex based on biological attributes, such as external genitalia, reproductive organs, chromosomes and hormones. Generally, individuals are assigned a sex at birth by a medical professional, often on the basis of their external genitalia.

Sex / Gender Binary: Is the notion that there are only two possible sexes (male/female) and genders (man/woman), that they are opposite, distinct and uniform categories, and that they naturally align as male/man and female/woman (in other words, that gender is determined by sex).

Sexual Orientation: Describes an individual's enduring physical, romantic and/or emotional attraction to another person. Gender identity and sexual orientation are not the same. Transgender people may be of any sexual orientation.

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.

Transgender: An umbrella term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth, including but not limited to transsexuals, cross-dressers, androgynous people, genderqueer people, and gender non-conforming people.
Transsexual: Refers to a person who does not identify with the gender conventionally associated with the sex assigned to them at birth. Many transsexual people feel a strong need to access medical transition to physically alter their bodies (e.g., hormone therapies and/or gender affirming surgeries).

Two Spirit: An umbrella term that reflects the many words used in different Indigenous languages to affirm the interrelatedness of multiple aspects of identity, including gender, sexuality, community, culture and spirituality. Prior to the imposition of the sex/gender binary by European colonizers, many Indigenous cultures recognized Two Spirit people as respected members of their communities and accorded them special status as visionaries, healers and medicine people based upon their unique abilities to understand and move between masculine and feminine perspectives. Some Indigenous people identify as Two Spirit rather than, or in addition to, identifying as LGBTQ.

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

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

---

8 http://www.assembly.nl.ca/business/bills/bill1325.htm
9 See Vancouver Rape Relief Society v British Colombia (Human Rights Commission), 2000 BCSC 889 (QL).
10 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).
11 See Vanderputten v Seydaco Packaging Corp., supra.
12 See Forrester v Peel (Regional Municipality) Police Services Board, 2006 HRTO 13, No. HR-0583/584-04 (Ont. Human Rights Trib.)
13 Vanderputten v Seydaco Packaging Corp., supra. and XY v. Ontario (Government and Consumer Services), 2012 HRTO 726 (CanLII)
15 Adapted from:
   - "Gender Identity and Gender Expression (brochure)," Ontario Human Rights Commission
16 This definition is taken from Mount Sinai Hospital's Gender Identity Policy