

GENDER IDENTITY: DEVELOPMENTS IN THE LAW AND HUMAN RIGHTS PROTECTIONS

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Introduction

To begin, ask yourself: How many times have you been asked to indicate your sex on an application form? Is it a difficult question to answer? Do you wonder why the information is necessary? How many of your identification documents indicate your sex?

Throughout history, men and women have held different rights; and, to enforce those rights, identifying a person as a man or woman was considered relevant. Today, while there are still imbalances between men and women, there should not be any discrepancies in benefits or opportunities available to a man or a woman; the purpose for gender identification is consequently diminished.¹

Comparatively, if you had to list your race, religion, and sexual orientation on every form on which you indicate your sex, you would be more likely to object. Many of us do not hesitate to answer a question about our sex because it is not a difficult question to answer, but for people who identify as trans or for people who do not identify using binary terms, this question may bring about anxiety, fear, frustration and discrimination.

This article is designed to be a general education and interest article. It is intended to be a valuable education piece for law students, lawyers, judges, and the general public on the topic of gender identity in the law. In particular, this article will explore issues faced by people in the trans community relating to identification documents and access to health services and will explore case law and changes in legislation which have attempted to address discrimination related to these issues. This article is informed by my perspective and experience as the Executive Director of the Prince Edward Island (“PEI”) Human Rights Commission and will draw on the PEI

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¹ There is still significant gender inequality and gender markers are still relevant for statistical and research purposes to monitor factors in an effort to eliminate these inequalities.

experience to illustrate these issues, while at the same time exploring them within the broader Canadian context.

Sex and gender are terms that are often used interchangeably in common parlance, but our understanding of gender has changed significantly over time. We now understand that gender is not binary. It is on a spectrum. Over the past five years I have had the privilege of learning and beginning to understand some of the challenges faced by people who do not identify with the sex they were assigned at birth. Some identify as trans male or trans female, while others do not identify with the binary concepts of male or female at all. I certainly do not profess to have a complete understanding of all of the legal or social challenges faced by people whose gender identity does not conform to what the majority of people understand to be the “norm”. I have had the opportunity to review decisions of human rights tribunals and courts; I have had discussions with my colleagues at other human rights commissions; and, I have had the privilege of meeting individuals who are living with these challenges and others who support and advocate for and with them. This paper draws on all of those sources.

What is clear across these sources is that trans people experience discrimination in many areas of their lives, including services, employment, and housing. As a result, there is a need for the general public, employers, employees, service providers, landlords, lawyers, judges, doctors, other professionals and government personnel to have a better understanding of the experiences and rights of trans people in their communities.

Discrimination often occurs because people do not understand or accept other people whose life experiences or personal characteristics are different from their own. Sometimes it happens out of a lack of understanding of people’s rights and responsibilities. Whether or not it is deliberate and intentional, the impact of the discriminatory behaviour is detrimental.

This paper is intended to bring awareness to some of the challenges, rights and responsibilities impacting people who identify as trans, two spirited, queer, non-binary, gender non-conforming, gender fluid or something else entirely. This article is intended to challenge its audience to think about why society operates the way that it does and what we could do differently in our legal, professional or social communities. Some changes would have little to no apparent impact on many people, but would make a significant impact and improvement to the lives of others.

For ease of reading, I will use the terms trans person or trans people unless the context requires more detail. In no way do I intend any offence to people who use another identity. People with non-binary or gender non-conforming identities experience many of the same issues and may also have additional challenges.

In discussions about gender identity, people refer to the acronym LGBTQ2 (lesbian, gay, bisexual, trans, queer/questioning, two spirited). I have intentionally chosen not to do so. Some of the letters of this acronym represent a person’s sexual orientation while others represent their gender identity. A trans person may identify

as gay, lesbian, straight, bisexual or queer just like cis people and people who do not identify as trans. Sexual orientation and gender identity are distinct concepts which are protected separately in human rights legislation. We must challenge stereotypes and ensure that every trans person is respected for who they are as an individual.

I hope the audience for this article finds it insightful and thought provoking and that it helps encourage the popular dialogue about gender identity and gender expression in an informed way. I challenge my audience to consider the ongoing struggles faced daily by trans people in our community, and to treat everyone with dignity and respect.

Understanding gender identity and gender expression

In order to understand this paper it is important to ensure a common understanding of the terms used. I borrow the following definitions from the Ontario Human Rights Commission.²

Sex: the classification of people as male, female or intersex. Sex is usually assigned at birth and is based on an assessment of a person's reproductive systems, hormones, chromosomes and other physical characteristics.

Gender identity: each person's internal and individual experience of gender. It is a person's 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.

For most people, their sex and gender identity align. For some, it does not. A person may be born male but identify as a woman, or born female but identify as a man. Other people may identify outside the categories of woman/man, or may see their gender identity as fluid and moving between different genders at different times in their life.

Gender expression: how a person publicly presents or expresses 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 people express their gender. Others perceive a person's gender through these attributes.

All people, regardless of their gender identity, have a gender expression and they may express it in any number of ways. For trans people, their chosen name, preferred pronoun and apparel are common ways they express their gender. People who are trans may also take medically supportive steps to align their body with their gender identity.

Trans or transgender: an umbrella term that describes people with diverse gender identities and gender expressions that do not conform to

² Ontario Human Rights Commission, "Policy on preventing discrimination because of Gender Identity and Gender Expression", (Toronto: OHRC, January 2014) at 54–57, online: <www.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20because%20of%20gender%20identity%20and%20gender%20expression.pdf>.

stereotypical ideas about what it means to be a girl/woman or boy/man in society. “Trans” can mean transcending beyond, existing between, or crossing over the gender spectrum. It includes but is not limited to people who identify as transgender, transsexual, cross dressers or gender non-conforming (gender variant or gender queer).

Trans includes people whose gender identity is different from the gender associated with their birth-assigned sex. Trans people may or may not undergo medically supportive treatments, such as hormone therapy and a range of surgical procedures, to align their bodies with their internally felt gender identity.

People who have transitioned from one gender to another may simply identify as female or male. Others may also identify as trans, as a trans woman or a trans man. Some people may identify as trans and not use the labels “female” or “male.” Others may identify as existing between male and female or in different ways beyond the binary of male/female.

Trans people may identify their gender in many ways. There is no single or universal experience of what it means to be trans. As a result, different trans people face distinct forms of discrimination in society, and this may relate to whether they identify as male, female, a person with a trans history, a person in the process of transitioning, a trans man, trans woman, transsexual, or gender non-conforming.

Gender non-conforming/gender variant/gender queer: individuals who do not follow gender stereotypes based on the sex they were assigned at birth. They may identify and express themselves as “feminine men” or “masculine women” or as androgynous, outside of the categories “boy/man” and “girl/woman.” People who are gender non-conforming may or may not identify as trans.

Lived gender identity: the gender a person internally feels (“gender identity” along the gender spectrum) and publicly expresses (“gender expression”) in their daily life including at work, while shopping or accessing other services, in their housing environment or in the broader community.

Cisgender and cisnormativity: most people are “cisgender” (not trans); that is, their gender identity is in line with or “matches” the sex they were assigned at birth. Cisnormativity (“cis” meaning “the same as”) refers to the commonplace assumption that all people are cisgender and that everyone accepts this as “the norm.” The term is used to describe prejudice against trans people that is less overt or direct and more widespread or systemic in society, organizations and institutions. This form of systemic prejudice may even be unintentional and unrecognized by the people or organizations responsible.

A study of trans people in Ontario³ provided significant insight into many of their realities. The information about the age at which many trans people were aware that

³ Greta R Bauer and Ayden I Scheim, *Transgender People in Ontario, Canada: Statistics from the Trans PULSE Project to Inform Human Rights Policy* (London: University of Western Ontario for the Trans

their gender identity did not match their body informs us that we must give significant attention to youth in our communities who are speaking out or struggling silently about their identity. There is no reason to think that the Ontario experience would be different in other jurisdictions. The study found that:

- Trans people come from a variety of ages, occupations and geographical areas;
- Trans people come from all ethno-racial groups including Aboriginal;
- 44% are in committed relationships and 24% are parents;
- 59% knew that their gender identity did not match their body before the age of 10, and 80% had this knowledge by the age of 14, even though they may not have had the language to describe it;
- Not all trans people indicate the need to transition medically and those that do may use a varying combination of hormones and/or surgery to do so;
- There are about equal numbers of trans people on male-to-female and female-to-male sides of the gender spectrum;
- About 1 in 5 trans people do not identify as male or female, or even as primarily masculine or feminine. These more gender-fluid people can identify as both male and female, neither male nor female, or as something else entirely (e.g. as another traditional gender recognized by Aboriginal or other cultural groups).

Although not all trans people have the same experiences, many report barriers to employment, discrimination in medical care, and violence. These experiences lead to avoidance of public spaces, isolation, avoidance of health care, economic marginalization, mental health issues, and suicide.⁴

Identification documents

Significant challenges can arise when a person's gender identity is different from what their identifying documents indicate. Imagine identifying and living as a woman and having to show your banker or a new employer or the security guard at the airport your driver's licence that says you are male. Every time a trans person has to show an identity document that is inconsistent with their gender identity they are effectively "outed".

Most identification documents, including birth certificates, use the sex marker which the doctor assigned when the person was born. For many people those identities are congruent but for others they are not. For some children who were born intersex⁵ it was not apparent what gender they would be. Doctors assigned a sex and

PULSE Project Team, June 2015) at 2, online: <transpulseproject.ca/wp-content/uploads/2015/06/Trans-PULSE-Statistics-Relevant-for-Human-Rights-Policy-June-2015.pdf>.

⁴ *Ibid* at 5–6.

⁵ Ontario Human Rights Commission, *supra* note 2 at 56: "Intersex: a term used to describe a person born with reproductive systems, chromosomes and/or hormones that are not easily characterized as male or

parents raised their children accordingly. Some find their assigned sex congruent with their gender identity, but others do not.

For people whose gender identity and sex assignment at birth are not congruent, having to show identity documents which do not indicate the gender with which they identify creates barriers, complications and discrimination. Previously, many provinces allowed people who had undergone an anatomical sex change to have the sex designation on their birth certificate changed.⁶ Many trans people, however, may not want to undergo the significant invasive medical procedures to proceed with a hormonal or surgical change. On the other hand, for those that do wish to do so, there is limited availability for many procedures and, in some jurisdictions, a lack of public financial support for the procedures. I will address this issue later.

Recognition of the disadvantages, prejudices and stereotyping experienced by trans people was a key finding in the 2012 Human Rights Tribunal decision in *XY v Ontario (Government and Consumer Services)*.⁷

XY was of seminal importance in understanding the root of discrimination and harassment with respect to gender identity and gender expression. The Tribunal found discrimination in the fact that while a cis person could have identifying documentation that matched their gender identity, a trans person could not unless they underwent the “extraordinary step of surgically altering their bodies and then certifying to the government that they have done so.”⁸

The Tribunal found:

[G]iving [transgender] persons an official government document with a sex designation which is dissonant with their gender identity conveys the message that their gender identity in and of itself is not valid. This message, in turn, is the very same message that lies at the root of the stigma and prejudice against [transgender] persons...

[T]he legislative requirement for “transsexual surgery” in s.36 of the VSA promotes the view that [transgender] persons who, for whatever reason, do not have surgery are less deserving of respect, in sense that they are less deserving of having their gender identity respected; and thus reinforces the notion at the very core of the prejudice against [transgender] persons in our society...

female. This might include a woman with XY chromosomes or a man with ovaries instead of testes. Intersex characteristics occur in one out of every 1,500 births. Typically intersex people are assigned one sex, male or female, at birth. Some intersex people identify with their assigned sex, while others do not. Some choose to identify as intersex. Intersex people do not typically identify as transgender or transsexual.”

⁶ See e.g.: *Vital Statistics Act*, RSO 1990, c V.4, s 36(1); *Vital Statistics Act*, SNB 1979, c V-3, s 34(3); *Vital Statistics Act*, SA 2007, c V-4.1, s 30(1).

⁷ *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726, [2012] OHRTD No 715 [*XY* cited to neutral citation].

⁸ *Ibid* at para 170.

[T]he VSA exacerbates the already disadvantaged position of [transgender] persons in a practical way when they are required to present or have occasion to present a birth certificate that does not accord with their lived gender identity. It seems to me that this will inevitably affect how the person's gender is perceived by the person with whom they are interacting and may open the door for others to question the validity of the [transgender] person's expressed gender identity. In the worst case scenarios, being "outed" by the birth certificate as "[transgender]" could expose the person to some of the more blatant forms of harassment, discrimination, and abuse which is all-too-commonly experienced by [transgender] persons in our society...

[T]he VSA exacerbates the situation of this historically disadvantaged group because it requires them to undergo inherently painful, invasive, and risky procedures that they may not otherwise wish to undertake in order to avoid the negative consequences that flow from having a birth certificate which says that, officially, they are not the gender they feel themselves to be and present to the world.⁹

The applicant in the XY case was threatened, assaulted, rejected by her family, ridiculed, and harassed because she was transgender.¹⁰ The evidence at the Tribunal established that transgender persons "have been and continue to be the subject of stigma and prejudice in our society."¹¹

The legislative provision requiring a person to undergo genital surgery to change the sex designation on their birth certificate has also been found to be a violation of the *Canadian Charter of Rights and Freedoms*.¹²

In the case of *CF v Alberta (Vital Statistics)*, Justice Burrows spoke about the uncontroverted evidence that trans people are historically disadvantaged and face extreme social stigma, prejudice, and discrimination.¹³ He accepted that they face high rates of verbal harassment, physical assault, unemployment, suicide attempts, and substance related disorders; he accepted the evidence that the social stigma attached to being trans is "pretty severe".¹⁴

Justice Burrows concluded that the system of birth registration requiring a person to undergo surgery to change their sex designation created a distinction based on sex which led to the differential treatment of transgender people compared to cis people and compared to trans people who were willing to undergo genital surgery. People in the latter two categories could obtain "a birth certificate which [stated] their

⁹ *Ibid* at paras 171–172, 174, 176.

¹⁰ *Ibid* at para 168.

¹¹ *Ibid* at para 169.

¹² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [the *Charter*].

¹³ *CF v Alberta (Vital Statistics)*, 2014 ABQB 237 at para 46, 100 Alta LR (5th) 75.

¹⁴ *Ibid*.

sex to be the sex they live”,¹⁵ while many trans people could not do so. He found that the “distinction...between a person with male genitalia who lives as a male and one who lives as a female is...a distinction made on the basis of sex”¹⁶ (or at least on a ground analogous to sex) and is thus based on a ground protected by the *Charter*.¹⁷

Changing sex designation on birth certificates

As was the case in other jurisdictions, prior to 2016, PEI’s *Vital Statistics Act* required a person to prove that their anatomical sex structure had changed before they could obtain a change of sex designation on their birth certificate. It also required that two medical practitioners swear affidavits stating that the anatomical sex of the person had changed.

In 2015, the PEI Human Rights Commission recommended in a letter to the Minister of Justice and Public Safety that the *Vital Statistics Act* be amended to remove this discriminatory provision.¹⁸ In the same letter, the Commission also raised concerns regarding the barriers which arose for many people due to the type of documentation required, namely having two doctors swear affidavits. The *Vital Statistics Act* was consequently amended in 2016 to remove the need for a person to establish that their anatomical sex structure had changed.¹⁹ It also made the process less onerous. The current provisions require the applicant to provide a written declaration stating that the person has “assumed, identifies with, and intends to maintain, the gender identity that corresponds with the requested amendment” and a written statement (rather than affidavit) from one medical practitioner (rather than two) confirming that the sex recorded on the person’s registration of birth does not correspond with the person’s gender identity.²⁰

All jurisdictions in Canada now allow a change of sex designation on a birth certificate without the need for surgical intervention.²¹ In Ontario the *Vital Statistics*

¹⁵ *Ibid* at para 38.

¹⁶ *Ibid* at para 39.

¹⁷ *Ibid*.

¹⁸ Prince Edward Island Human Rights Commission, “Letting Our Youth Educate Us: Annual Report 2015-2016”, (Charlottetown: PEI HRC, 2017) at 4, online: <www.gov.pe.ca/photos/sites/humanrights/file/web-2015-2016%20Human%20Rights.pdf>.

¹⁹ See Bill No 19, *An Act to Amend the Vital Statistics Act*, 2nd Sess, 65th Gen Assembly, Prince Edward Island, 2016 (assented to 13 May 2016).

²⁰ *Vital Statistics Act*, RSPEI 1988, c V-4.1, s 12.

²¹ *Vital Statistics Act*, RSBC 1996, c 479, s 27; *Vital Statistics Information Regulation*, Alta Reg 3/2012, s 16.1; *The Vital Statistics Act, 2009*, SS 2009, c V-7.21, s 31; *The Vital Statistics Act*, RSM 1987, c V60, s 25; Bill 103, *An Act to strengthen the fight against transphobia and improve the situation of transgender minors in particular*, 1st Sess, 41st Leg, Quebec, 2016, s 9 (assented to on 10 June 2016) SQ 2016, c 19; *Vital Statistics Act*, SNB 1979, c V-3, s 34; *Vital Statistics Act*, RSNS 1989, c 494, s 25; *Vital Statistics Act, 2009*, SNL 2009, c V-6.01, ss 26–26.1; *Vital Statistics Act*, RSY 2002, c 225, s 12; *Vital Statistics Act*,

Act has not been amended, but the change of sex provisions are effectively provided by policy.²²

Jurisdictions are not consistent in relation to children or youth being able to request a change in their sex designation. For example, PEI and Alberta legislation is silent in relation to an application by a minor; British Columbia allows changes on records of minors with the consent of their parents; Manitoba requires a health care professional to provide an opinion that the minor has the capacity to make health care decisions; Quebec allows a minor over the age of 14 years to apply on their own behalf or to consent to a parental application; and, New Brunswick allows a change in sex designation for persons 16 years or older, and between 12 and 16 with certain conditions.²³ Although the legislation is silent, PEI will allow a minor to change their sex designation if they have a statement from the minor along with appropriate statements from their parents, parental consent, and a supporting statement from a medical practitioner.²⁴

In PEI, other provincial identifying documents such as a person's driver's licence or voluntary identification can also be amended to reflect the person's gender identity. The applicant must provide a written declaration stating that the person has assumed, identifies with, and intends to maintain the gender identity that corresponds with the requested amendment and a written statement from a medical practitioner confirming that the sex recorded on the person's driver's licence does not correspond with the person's gender identity.²⁵

It is not necessary in PEI to have a person's birth certificate amended before obtaining a driver's licence with the preferred sex designation.

In Ontario, a person can obtain a driver's licence indicating their gender identity by providing a doctor's letter stating that "in the doctor's opinion, the sex designation change ... is appropriate."²⁶

SNWT 2011, c 34, ss 41–42; see also *Vital Statistics Regulations*, NWT Reg 086-2012, ss 3.1–3.2; *Vital Statistics Act*, RSNWT (Nu) 1988, c V-3, s 11.1.

²² *Vital Statistics Act*, RSO 1990, c V.4, s 36(1); but, see also: "Changing your sex designation on your birth registration and birth certificate" (7 November 2012), online: Service Ontario <<https://www.ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate>>.

²³ See the *Vital Statistics Act* or *Regulations* from each province, *supra* notes 20–22.

²⁴ According to written correspondence from Adam Peters, Manager of Vital Statistics PEI (1 May 2018) to the PEI Human Rights Commission.

²⁵ Interview with Brenda Picard and Graham Miner, Director of PEI Highway Safety Division, (16 November 2015 and 5 January 2018).

²⁶ XY, *supra* note 7 at para 177.

Do we need gender markers on identification documents?

The ability to change a sex designation on a birth certificate or driver's licence is significant for people who identify as trans male or trans female, but it fails to address the concerns of those who identify as non-binary or gender non-conforming. One of the recommendations made to the Minister of Justice and Public Safety in the 2015 letter from the PEI Human Rights Commission was that the province not include gender markers on its identifying documents. As our understanding of gender identity grows, and the need to distinguish between genders lessens, the need for using gender as an identifier decreases. For cis people it may not matter either way if the sex marker is on the document, but for a trans or gender non-conforming person it may make a significant difference. The PEI Commission is not alone in our recommendations. In discussions with other human rights commissions, we speculate that this may well be the direction of the future.

The Gender Free ID Coalition²⁷ challenges governments and other institutions to stop requiring gender information. The Gender Free ID Coalition, and many others, argue that collecting information about a person's gender is not reliable or necessary. The many forms that require a gender indicator would never ask for a person's sexual orientation and, although historically they did, no longer ask for a person's race. Further, a person's gender can be misidentified by a doctor when a child is born, and can change with time, so it is not a useful identifier. Likewise, gender is not always apparent; whether a person is cis or trans, when their appearance and documentation do not "match" in someone else's opinion (such as a bank teller, employer, or security guard), it can subject the person to unnecessary scrutiny and potential discrimination.

Driver's licences and voluntary identification cards in PEI have been redesigned such that, at some point in the future, they will not need to include a gender marker. One of the barriers to implementing this change is that people often use their licence as identification for interprovincial travel. Currently, federal regulations require that provincially-issued identification cards used for interprovincial travel indicate gender.²⁸ For the people who use their driver's licence for this purpose, the gender marker is still indicated. If this requirement changes, PEI is technologically ready and willing, along with its Atlantic counterparts, to remove the gender marker from the driver's licence and voluntary identification.²⁹

Rather than removing the gender marker all together, some jurisdictions are establishing a third option for a sex designation. Ontario and the federal government

²⁷ A growing coalition of activists, lawyers, advocates, grassroots and non-profit organizations and regular people across Canada who are advocating for the removal of a gender/sex designation on all state-mandated documents. This includes birth certificates, passports, driver's licenses, SIN numbers, etc. Online at: Gender Free ID Coalition, online: <gender-freeidcoalition.ca/index.html>.

²⁸ *Secure Air Travel Regulations*, SOR/2015-181, s 3(1)(a).

²⁹ Interview with Brenda Picard and Miner, Graham, Director of PEI Highway Safety Division, January 5, 2018

have started the process of reviewing and amending their documents to allow a person to use M, F or X.³⁰ In Ontario, X is intended to include Trans, Non-Binary, Two-Spirit, and Binary people as well as people who don't want to disclose their gender identity. If information about a person's "sex" is required to deliver, monitor or improve services, Ontario government departments must explain why they are collecting the information and how it will be used.³¹ Yukon and the Northwest Territories also allow for a gender-neutral marker.³²

Although seen by many as a step forward, this option continues to be problematic. How a person identifies their gender is personal and private. By marking an X on their documents, the risk continues that they "out" themselves every time they need to use the documentation. Again, this creates ongoing opportunities for harassment, discrimination and violence. It was anticipated that the X option would be available on Canadian passports by September 2017. A recent look at the passport form, however, indicates that only an M or an F are listed in the category line for "Sex".³³ The federal government website states: "You will soon be able to have your sex marked as X (unspecified) on your passport or travel document".³⁴

According to the same federal government website, the reason that removing the gender marker is not available is to comply with the International Civil Aviation Organization. The website cautions that a passport with an X may not be accepted in other countries. In order to avoid "outing" trans people, the Gender Free ID Coalition suggests that if the passports have to have a gender marker to meet international standards, all Canadian Passports should just be marked with the letter X no matter how the person identifies. With the use of X or "other" as an option for some jurisdictions, one must again query the value of the gender marker.

Removing the need for people to be identified by their gender, when that characteristic is not relevant to the situation, seems an important step in reducing gender-based discrimination. Limiting the collection and use of gender information to when it is truly necessary or for research or statistical purposes and then allowing people to self-identify using a variety of options would be an important step forward.

Another barrier that some trans people face when changing their name or sex designation on their documentation is that of cost. For trans people who are struggling

³⁰ See: "Gender and sex information on government IDs and forms" (8 August 2016), online: Service Ontario <<https://www.ontario.ca/page/consultation-gender-and-sex-information-government-ids-and-forms>>.

³¹ *Ibid.*

³² *An Act to Amend the Human Rights Act and the Vital Statistics Act (2017)*, 2nd Sess, 34th Leg, Yukon, 2017, s 4 (assented to 13 June 2017), SY 2017, c 4; *Vital Statistics Act*, SNWT 2011, c 34, s 42(2).

³³ "Adult General Passport Application" at 1, online: <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/passport/forms/pdf/pptc153.pdf>>.

³⁴ "Change the sex on your passport or travel document" (31 August 2017), online: Government of Canada <<https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html>>.

financially, the cost of changing multiple identification documents can make the process impossible.

The publication requirements associated with name changes also arise as barriers to legally changing documentation for some individuals. Publication concerns were raised at least ten years ago when the Ontario government amended its *Change of Name Act*³⁵ to allow trans people to forgo having their names published in the Ontario Gazette out of concern for the personal safety of trans people.³⁶

Adding gender identity and gender expression as grounds under human rights legislation

Trans people have historically been protected by human rights legislation under the ground of sex or disability or both. Those rights have been recognised in cases spanning close to two decades.

One of the earliest cases establishing that discrimination against a trans person could be covered under the grounds of sex and/or disability was *Sheridan v Sanctuary Investments*, a 1999 decision of the British Columbia Human Rights Tribunal.³⁷ *Sheridan* involved a trans woman who was told she had to use the men's washroom at the Respondent's night club on the basis of their policy that customers use the washroom which corresponds with their anatomical sex. The washroom policy was found to be discriminatory. The Tribunal held that the discrimination fell under the ground of sex "because of the lack of congruence between the criteria which determine sex."³⁸ After hearing evidence related to gender identity disorder, its impact, its inclusion in the DSM (Diagnostic and Statistical Manual of Mental Disorders), and its impact on this complainant, the Tribunal also found that discrimination against trans people could be founded under the ground of disability.³⁹

Other examples of cases dealing with trans issues under the ground of sex or disability are discussed later in this paper in relation to access to health care.

Even with these protections, many advocacy and human rights organizations have lobbied for the inclusion of gender identity, and in some jurisdictions, gender expression, as enumerated grounds in the legislation.

Having gender identity protected under the ground of sex or disability left the protections subject to interpretation and lacking clarity. Enumerating gender identity

³⁵ *Change of Name Act*, RSO 1990, c C.7.

³⁶ *XY*, *supra* note 7 at para 167.

³⁷ *Sheridan v Sanctuary Investments*, 1999 BCHRT 4 at paras 90–94 (CanLII) [*Sheridan* cited to neutral citation].

³⁸ *Ibid* at para 90.

³⁹ *Ibid* at para 94.

and gender expression highlights and confirms, unambiguously, that discrimination on those grounds is prohibited. It clarifies that those protected have the right to make a complaint and it makes it clear to employers, landlords, service providers and to any others that they have a responsibility not to discriminate based on a person's gender identity or gender expression.

Since 2009, AIDS PEI (now known as the PEERS Alliance), the Native Council of PEI and the Abegweit Rainbow Collective have been lobbying the PEI government to improve protection and services for trans people. In 2013, the PEI Human Rights Commission recommended changes to the *Human Rights Act* requesting that it specify gender identity and gender expression as protected grounds.

In December of 2013, the PEI legislature unanimously approved those amendments.⁴⁰ PEI was the fourth jurisdiction in the country to do so. With 2017 amendments to the New Brunswick,⁴¹ Yukon,⁴² and Canadian Human Rights Acts,⁴³ all jurisdictions with the exception of Nunavut specify gender identity as a protected ground.⁴⁴ Each of these jurisdictions, with the exception of Manitoba, Saskatchewan and the Northwest Territories, also include gender expression as a ground. Since the manner in which people express their identity, whether it be their gender, age, race, religion or other protected characteristic, is part of the protection offered by protecting the characteristic itself, there is not likely to be any significant difference in the application of the human rights protections in those provinces which do or do not specify gender expression.

With these changes, complaints by trans people under the ground of sex have lessened in favour of the ground of gender identity.⁴⁵ Additionally, a trans person can file under these grounds without having to file under the ground of disability, a ground which is problematic for complainants who do not experience their gender identity as disabling.⁴⁶

⁴⁰ Bill No 11, *An Act to Amend the Human Rights Act*, 4th Sess, 64th Gen Assembly, Prince Edward Island, 2013 (assented to 6 December 2013).

⁴¹ Bill 51, *An Act to Amend the Human Rights Act*, 3rd Sess, 58th Leg, New Brunswick, 2017, s 1 (assented to 5 May 2017).

⁴² *Act to amend the Human Rights Act and the Vital Statistics Act (2017)*, *supra* note 32, s 2.

⁴³ Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code*, 1st Sess, 42nd Parl, Canada, 2017, s 2 (assented to 19 June 2017) SC 2017, c 13.

⁴⁴ *Human Rights Act*, SNWT 2002, c 18, s 5; *The Human Rights Code*, SM 1987-88, c 45, s 9; *Human Rights Code*, RSO 1990, c H.19, s 1; *Human Rights Act*, RSNS 1989, c 214, s 5; *Human Rights Act*, SN 2010, c H-13.1, s 9; *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 2; *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 3; Bill 103, *supra* note 21, s 11; *Human Rights Code*, RSBC 1996, c 210, s 7.

⁴⁵ See for example *McMahon v Wilkinson*, 2015 HRTO 1019 at para 1, 81 CHRR D/265 where the complainants filed under six grounds, including gender identity and gender expression, but not sex.

⁴⁶ See *XY*, *supra* note 7 at para 5.

Protecting gender identity and gender expression: what does it mean?

Enumerating gender identity and gender expression in human rights legislation should clarify that a person has the right to experience their life in accordance with their gender identity. As indicated in the *Sheridan* case, trans persons who are “living as members of the desired sex should be considered to be members of that sex for the purposes of human rights legislation. Taking this view, the Complainant, ... was a woman and, therefore, her choice of the women’s washroom was appropriate.”⁴⁷

Trans people, and others who identify in the many ways noted previously (non-binary, gender non-conforming, two spirited), have the right to be treated with dignity and respect, and have access to services and employment. They have the right to be called by their pronoun and chosen name. They have the right to use washrooms, change rooms, and other sex-segregated services and facilities based on their gender identity. They have the right to play sports with the team which reflects their gender identity.

Trans people should not be harassed or treated negatively at work, when looking for a place to live, eat or exercise, when joining groups, or when using health care facilities, including hospitals and nursing homes.

Employers and service providers are responsible for taking steps to prevent discrimination and provide a safe, welcoming environment for trans people. Harassment by co-workers, supervisors, or customers is unacceptable and an employer may be liable for any discrimination or harassment which occurs at a work site, even if such discrimination is not perpetrated by their own employees.⁴⁸

Dress code policies should be inclusive and flexible, and must not prevent people from dressing according to their gender identity.

Establishing and enforcing non-discriminatory practices should address the majority of the needs of a trans person and be more inclusive for everyone. These practices will assist in creating an atmosphere which does not support discrimination. There may, however, be times when a trans person requires specific accommodation such as approving additional time off work for medical attention or surgical procedures. An employer or service provider is responsible for accommodating a trans person’s needs, up to the point of undue hardship.

Much attention has been given to the issue of bathrooms. Some employers, businesses or service providers set up a “special” bathroom or will suggest that a trans

⁴⁷ *Sheridan*, *supra* note 37 at para 104.

⁴⁸ See *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62, [2017] 2 SCR 795. Although not related to gender identity this case speaks to the broad considerations of employer liability in human rights complaints. Protection by employers against the actions of customers was addressed in *Garland and Tackaberry, Re*, [2013] MHRBAD No 105, 2013 CLLC 230-023 (Man HRC). Although the *Manitoba Human Rights Code* contains a specific provision regarding failing to take action in relation to harassment (see section 19(1)) the principles may still be applicable in other jurisdictions.

person use a staff or otherwise segregated bathroom. Some trans people may appreciate the privacy that this might allow, but others will not appreciate that they are being treated differently, which is, of course, an indicator of discrimination. If a trans woman wants to use the women's washroom or change room, then she is entitled to do so. If this requires a renovation to allow for more privacy within those facilities, then that may be something the business has to consider. If another employee argues that they are uncomfortable with a trans woman in the washroom, then perhaps it is she who needs to use the "special" washroom.

Incorporating universal design principles⁴⁹ into planned construction and renovation projects should alleviate many bathroom/locker room concerns. Many locations have been able to simply change signs on single stall washrooms to indicate that they are gender inclusive. This is helpful, but if there are also single-sex washrooms, having a gender inclusive washroom should not prevent a trans person from using the washroom which best reflects their gender identity and is most convenient for them.

During education sessions, business owners often raise a question about how to address the discomfort or fear of other employees or customers. Responses could include questions for the business owner to consider: What is the underlying stereotype that is creating the fear? How can this be addressed? If the employee came to you and said "I am uncomfortable using the washroom with a fellow employee from a different country or who has a different skin color or religion", how would you handle that? When considered in this way most employers recognize the fear directed at trans people is inappropriate. Just as discrimination on the basis of color or religion is prohibited, so is discrimination on the basis of gender identity. There is no hierarchy of protected grounds and all people need to be treated with dignity and respect. Consequently, if an employer or service provider legitimately needs and collects personal information that identifies, directly or indirectly, a person's biological sex as being different from their gender identity, that employer or service provider must ensure that the individual's privacy is protected. It is always up to the individual to decide whether, and to whom, they disclose their birth-assigned sex or gender identity.

Access to health care for trans people

Access to health care continues to be an ongoing struggle for many trans people. From a PEI perspective, anecdotal reports indicate that access to care from doctors and health care professionals who are aware and sensitive to the issues of a trans person is challenging. That is, however, not to say it is totally unavailable; there are reports of wonderful health care professionals supporting their patients, but that care is not always available. There continue to be reports of doctors, psychiatrists and others working in health care who do not respect or support an individual's right to experience life or health care in accordance with their gender identity. There are other

⁴⁹ See: Canadian Human Rights Commission, *International Best Practices in Universal Design: A Global Review* (March 2006), online: <<https://www.chrc-ccdp.gc.ca/eng/content/international-best-practices-universal-design-global-review>>.

doctors who have the necessary respect but have limited training or experience, which creates a potential barrier for service delivery. For trans people who have a family doctor who is not sensitive to or trained in the medical needs of a trans patient, changing family doctors is often very difficult. At the same time, it does not take any special training to be able to respect a person's chosen name, pronoun and gender identity.

Ontario residents who participated in the Trans PULSE survey reported having been told by their doctor that the doctor would not treat or support the patient's medical needs because the patient was trans.⁵⁰ PEI residents have reported the same experience, as well as the refusal of their medical professionals to use the pronoun and name which match their gender identity.

A multi-disciplined team approach, involving properly trained professionals, would provide a positive experience to meet the health care needs of trans people. Provinces, health authorities, colleges of physicians and surgeons, medical schools and others responsible for medical education need to examine what they are doing to ensure health care is prepared to meet the needs of trans people. According to the Canadian Psychiatric Association, citing from a 2003 research paper: "LGBTQ participants in a national study found the level of knowledge of health care professionals 'to be inadequate, the amount of homophobic reactions to their lives to be unethical and the willingness of the health care system to adapt to their needs to be minimal.'"⁵¹

The size of PEI's population offers both challenges and opportunities for trans health care. The limited access to specialized procedures and professionals is a challenge. At the same time, the smaller number of professionals working in health care should allow for more education, information sharing, and understanding. Conversely, one of the challenges identified by local advocates is navigating the system: not knowing who to contact or where to get information or services; surmounting these difficulties should be a manageable in such a small community.

Hospitals and clinics which refuse to use the pronoun and preferred name for a patient create a difficult situation for the patient and are vulnerable to a complaint of discrimination. If a cis person is able to indicate their pronoun, their preferred name, and how they wish to be addressed but a trans person who has not had their identity documents changed cannot, an argument could be made that this is differential treatment. A hospital may argue, in response, that there is a legitimate need to ensure they know who they are treating, but they may also have to establish that they have considered alternative ways of accomplishing that while also ensuring the dignity, safety, and privacy of the patient and that the hospital would experience undue hardship to accommodate those needs.

⁵⁰ Bauer and Scheim, *supra* note 3 at 4.

⁵¹ Albina Veltman and Gary Chaimowitz, "Mental Health Care for People who Identify as Lesbian, Gay, Bisexual, Transgender, and (or) Queer" (2014) 59:11 *The Canadian Journal of Psychiatry* 1 at 2.

Whether legal names and sex designations have been changed or not, linking health care identification with gender can be problematic. Take, for example, a trans man who has had all of his identity documents changed to reflect his gender identity. He arrives for medical treatment for ovarian cancer and is denied treatment because the “system” rejects the concept that a man may have ovaries. Similarly, a trans woman needing treatment for prostate cancer would experience the same problems. No doubt it is important for the medical community to understand the needs of the patient before them, but applying a label of male or female in these situations creates differential treatment in the way patients are able to access service. A cis male requiring prostate cancer treatment can access it without difficulty whereas, in the situation previously described, a trans woman cannot. The medical need for both patients is the same – access to treatment for prostate cancer.

Pros and cons of diagnosis

During the late 20th century trans and gender non-conforming people were considered to be suffering from a mental health disorder termed gender identity disorder. Further, “gender identity was considered malleable and subject to external influences. Today, however, this attitude is no longer considered valid.”⁵²

While the DSM-IV identified gender identity disorder in its compilation of mental disorders, the DSM-5 removed gender identity disorder and added gender dysphoria. While some argue that including gender dysphoria “pathologizes transgender identities”⁵³ and may lead to efforts at conversion therapy and thus should be removed from the DSM, others argue it should remain as a way of ensuring access to appropriate medical treatment.⁵⁴

WPATH (World Professional Association for Transgender Health) has been advocating that trans people not be considered mentally ill since 2010 when they released this statement:

The WPATH Board of Directors strongly urges the de-psychopathologisation of gender variance worldwide. The expression of gender characteristics, including identities, that are not stereotypically associated with one’s assigned sex at birth is a common and culturally-diverse human phenomenon which should not be judged as inherently pathological or negative. The psychopathologisation of gender characteristics and identities reinforces or can prompt stigma, making prejudice and discrimination more likely, rendering transgender and

⁵² “Transgender Health: Position Statement” (September 2017) at 1, online: Endocrine Society <<https://www.endocrine.org/advocacy/priorities-and-positions/transgender-health>>.

⁵³ Veltman and Chaimowitz, *supra* note 51 at 1.

⁵⁴ *Ibid.*

transsexual people more vulnerable to social and legal marginalisation and exclusion, and increasing risks to mental and physical well-being.⁵⁵

Depathologization continues to be the goal in the World Health Organization's International Classification of Diseases.⁵⁶

With the inclusion of gender identity under human rights legislation it may no longer be necessary for a complainant to file a complaint under the ground of disability, but there may still be circumstances where a person with gender dysphoria may be considered disabled and a diagnosis may be required to access certain health care treatments.

In the case of *1401-00532 (Re)*, the Ontario Social Benefits Tribunal found that a 25 year old who lived with depression and gender identity disorder was a person with a disability as set out under the *Ontario Disability Support Program Act*.⁵⁷ The assessment depends on the particular circumstances of the applicant. In another case involving a trans person, the applicant was not found to be disabled.⁵⁸

As will be seen later in this paper, the legal analysis applied in cases where a trans person is seeking access to health services is one which requires an analysis of the purpose of the provincial health plan. If the purpose of the plan is to provide for medically necessary services, there is an argument to be made that trans-related health services can only be provided if the patient has a medical diagnosis which makes the treatment "medically necessary". As a result there continues to be support for maintaining the diagnosis of gender dysphoria in the DSM-5. If depathologizing of gender dysphoria occurs, it must be done in a context which ensures that access to appropriate health care options remains available to trans people. A broad and purposeful approach to the interpretation of the purpose of a provincial health plan may need to look at whether a DSM-5 diagnosis is always required to establish a procedure is "medically necessary".

Gender dysphoria is defined in the DSM-5 as follows:

In adolescents and adults gender dysphoria diagnosis involves a difference between one's experienced/expressed gender and assigned gender, and significant distress or problems functioning. It lasts at least six months and is shown by at least two of the following:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics

⁵⁵ The World Professional Association for Transgender Health, Inc, Press Release, (26 May 2010), online: <https://amo_hub_content.s3.amazonaws.com/Association140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf>.

⁵⁶ GATE, Press Release, "Depathologization" (5 April 2017), online: <<https://transactivists.org/depathologization/>>.

⁵⁷ *1401-00532 (Re)*, 2014 ONSBT 4071 (CanLII) at paras 2, 5.

⁵⁸ *1306-06132 (Re)*, 2014 ONSBT 2858 (CanLII) at paras 2, 6.

2. A strong desire to be rid of one's primary and/or secondary sex characteristics
3. A strong desire for the primary and/or secondary sex characteristics of the other gender
4. A strong desire to be of the other gender
5. A strong desire to be treated as the other gender
6. A strong conviction that one has the typical feelings and reactions of the other gender.⁵⁹

As indicated previously, not all trans people want to undergo surgery to express their gender identity. This may be even more so for those who do not use a binary identity. For those that do require medical intervention there are options available. These may include hormone therapy, top surgery, bottom surgery or a combination thereof. As with any patient there are numerous factors which are considered when determining the most appropriate medical strategy. The same strategy will not be appropriate for everyone and no one should be forced to undergo any medical treatment or procedure to be able to express their gender identity.

Hormone replacement therapy

Hormone therapy will induce physical changes that are more congruent with a patient's gender identity. These usually develop over the course of two years. In female to male patients these may include a "deepened voice, clitoral enlargement...growth in facial and body hair, cessation of menses, atrophy of breast tissue, increased libido, and decreased percentage of body fat compared to muscle mass."⁶⁰ In male to female patients, the changes may include "breast growth...decreased libido and erections, decreased testicular size, and increased percentage of body fact compared to muscle mass."⁶¹

Gender affirming surgery

Gender affirming surgery (also known as gender confirming surgery and sex reassignment surgery or SRS) is a term used to refer to a variety of surgical procedures which may be sought by some trans people to ensure that their physical body aligns with their gender identity.

When speaking about gender affirming surgery people usually refer to top surgery or bottom surgery. For a trans man, top surgery might include a double

⁵⁹ Ranna Parekh, "What is gender dysphoria?" *American Psychiatric Association* (February 2016) at "Diagnosis", online: <<https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>>.

⁶⁰ *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th version, at 36, online: The World Professional Association for Transgender Health <<https://www.wpath.org/media/cms/Documents/Web%20Transfer/SOC/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf>>.

⁶¹ *Ibid.*

mastectomy and chest masculinization – sometimes referred to as chest contouring. For a trans woman, top surgery might include breast reconstruction or augmentation.

Bottom surgery includes surgery to remove the uterus, ovaries, penis or testicles as well as reconstructive surgical procedures which construct a penis, scrotum or vagina. As learned by conversation with trans people who have contacted the Commission, having the removal surgery without reconstruction may make reconstruction impossible or, at the least, more difficult as the existing tissue is used in the reconstruction procedure. Bottom surgery includes:

Female to Male – Oophorectomy, (removal of the ovaries)

Hysterectomy, (removal of the uterus)

Phalloplasty (construction of a penis using skin from other body parts),

Metoidioplasty (creating a penis and scrotum from the clitoris)

Male to Female – Penectomy (removal of the penis)

Orchidectomy (removal of the testicle)

Vaginoplasty (construction or reconstruction of the vagina).

Genital reconstruction surgery is very specialized. Currently there is one private clinic in Canada, Montreal's Centre Métropolitain de Chirurgie, which is performing bottom reconstruction surgeries. The Women's College Hospital in Toronto is in the process of expanding a clinic to enable them to offer additional services.

In Canada, provincial health plans generally cover the cost of surgeries which are determined to be medically necessary. The process for determining if a procedure is medically necessary may vary from province to province and from one procedure to another. Not all surgeries are covered under provincial plans. For example, in PEI reversal of sterilization procedures and cosmetic surgery deemed not medically necessary are excluded from coverage.

WPATH (World Professional Association for Transgender Health) has established SOC (Standards of Care) for determining best practices for medical treatment.⁶² WPATH's criteria are internationally accepted and CPATH (Canadian Professional Association for Transgender Health) supports doctors to use WPATH guidelines. WPATH promotes respect, evidence-based clinical treatment, research, education, and advocacy for trans people.

What do provinces and territories provide in relation to trans health care?

In 2015 CPATH and the United Food and Commercial Workers Canada collaborated to conduct a systematic review of publicly funded transition related health care coverage in Canada. In its executive summary the report confirmed gender transition

⁶² *Ibid.*

health care is medically necessary, provided a partial list of papers, statements and resources supporting the need for access to health care and provided an overview of coverage that existed at that time.⁶³ As seen on the geographical map generated to reflect the information from this review, ten jurisdictions were reported to be providing hormone replacement therapy; PEI, Northwest Territories and Nunavut being the three that did not.⁶⁴

In a 2016 article, the phrase “health-care lottery” was used to express the concern that where you live in Canada determines what gender affirming surgeries are publicly funded.⁶⁵

It appears there has been some progress made since that article, although there is still inconsistency in services available among provinces and territories. It is challenging to determine exactly what procedures are covered in all jurisdictions as some policies and agreements are not easily accessible or use different terminology.

Following discussions with members of the trans community in 2015, PEI changed its policies to provide public health coverage for certain hormone replacement therapies and certain surgical procedures. PEI did not provide coverage for chest masculinization or genital reconstructive surgeries (phalloplasty, metoidioplasty, or vaginoplasty) until May 9th, 2018 when the Minister of Health announced in the legislature that PEI would increase its coverage for gender affirming surgery.⁶⁶ Although details on process are still being developed, PEI will now cover clitoral release, erectile/testicular implant, hysterectomy, mastectomy with chest masculinization, metoidioplasty, oophorectomy, phalloplasty, scrotoplasty, vaginectomy, clitoroplasty, labiaplasty, orchiectomy (or also referred to as orchidectomy), penectomy, and vaginoplasty.⁶⁷

The Northwest Territories and Nunavut do not cover any transgender medical treatments.

⁶³ *Public Funding of Transgender Health Care in Canada*, (1 October 2015), online: <www.cpath.ca/wp-content/uploads/2016/02/Publicly-Funded-Transition-Related-Medical-Care-in-Canada-Executive-Summary.pdf>.

⁶⁴ *Ibid*, online: <http://www.cpath.ca/wp-content/uploads/2016/02/Publicly-Funded-Transition-Related-Medical-Care-in-Canada_poster8x11_EN.pdf>.

⁶⁵ Laura Brightwell, “Trans health care in Canada: a provincial lottery” *Rabble* (29 June 2016), online: <rabble.ca/news/2016/06/trans-health-care-canada-provincial-lottery>.

⁶⁶ Prince Edward Island, Legislative Assembly, *Hansard*, 56th Gen Assembly, 3rd Sess, (9 May 2018) at 2478 (Hon Robert Mitchell).

⁶⁷ “Transgender Health Services” (30 January 2018), at “What procedures are covered?”, online: Health PEI <<https://www.princeedwardisland.ca/en/information/health-pei/transgender-health-services>>.

All provinces and the Yukon cover the cost of mastectomies. Chest contouring or chest masculinization is funded in all provinces except Newfoundland and Labrador.⁶⁸

British Columbia,⁶⁹ Alberta,⁷⁰ Saskatchewan,⁷¹ Ontario,⁷² Quebec,⁷³ New Brunswick,⁷⁴ Nova Scotia,⁷⁵ and Yukon⁷⁶ provide coverage for all bottom surgeries. Manitoba⁷⁷ does not cover phalloplasty or metoidioplasty but does cover vaginoplasty. Newfoundland and Labrador does cover vaginoplasty and scrotoplasty but not phalloplasty or metoidioplasty.⁷⁸

⁶⁸ See *Public Funding of Transgender Health Care in Canada*, *supra* note 63 for coverage in other jurisdictions.

⁶⁹ “Surgery Funding”, online: Trans Care BC: Provincial Health Services Authority <transhealth.phsa.ca/medical-options/surgeries/surgery-funding>.

⁷⁰ “Final Stage Gender Reassignment Surgery”, online: Alberta Health Services <<https://www.albertahealthservices.ca/info/Page15676.aspx>>.

⁷¹ “Gender Identity, Gender Diversity, and Transgender Support”, online: Government of Saskatchewan <<https://www.saskatchewan.ca/residents/health/accessing-health-care-services/gender-identity-gender-diversity-and-transgender-support>>; see also: Government of Saskatchewan, *Payment Schedule: For Insured Services Provided by a Physician*, (Regina: Government of Saskatchewan, 2017) at 222, online: <<https://www.ehealthsask.ca/services/resources/Resources/physician-payment-schedule-oct-17.pdf>>: “Sex reassignment surgery is insured only if performed on patients for whom surgery has been recommended by an authority recognized by Medical Services Branch.”

⁷² “Sex Reassignment Surgery”, online: Ontario Ministry of Health and Long Term Care <www.health.gov.on.ca/en/pro/programs/srs/>.

⁷³ “Trans-specific Surgeries”, online: Action Santé Travesti(e)s et Transsexuel(le)s du Québec <santetranshealth.org/jemengage/en/guide-contents/trans-specific-surgeries/>.

⁷⁴ “Gender-confirming surgery”, online: Health New Brunswick <www2.gnb.ca/content/gnb/en/departments/health/patientinformation/content/GenderConfirmingSurgery.html>.

⁷⁵ “Sex Reassignment Surgery”, online: Government of Nova Scotia <<https://novascotia.ca/dhw/sex-reassignment-surgery/>>.

⁷⁶ Yukon Health and Social Services, “Health Services – Insured Health and Hearing Services”, GAS Policy – IHHS DHSS approved by Marguerite Fenske (Whitehorse: Yukon Health and Social Services, 6 October 2017), online: <www.hss.gov.yk.ca/pdf/policy-pc-4.pdf>; and Yukon Health and Social Services, “Health Services – Insured Health and Hearing Services” Policy number CDDB 2017-01 approved by Marguerite Fenske (Whitehorse: Yukon Health and Social Services, 30 September 2017), online: <<http://www.hss.gov.yk.ca/pdf/policy-cddb-2017-01.pdf>>.

⁷⁷ “Gender transition made easier” (12 June 2015), online: Winnipeg Regional Health Authority <www.wrha.mb.ca/healthinfo/news/2015/150612-gender-transition-made-easier.php>.

⁷⁸ Newfoundland and Labrador covers gender affirming surgery if recommended by the Gender Identity Clinic – Centre for Addiction and Mental Health: Newfoundland and Labrador, Department of Health and Community Services, “Insured and Non-Insured Services” in *Medical Care Plan (MCP) – Physician Information Manual* (St John’s: Department of Health and Community Services, January 2007), s 3.3, online: <http://www.health.gov.nl.ca/health/mcp/providers/pim_nsured_and_non_insured_services.pdf>; but see: Martin Jones, “What is covered...is essentially disfiguring surgery”, *Kicker* (6 April 2017), online: <kicker.cna-nl.com/2017/04/06/what-is-covered-is-essentially-disfiguring-surgery/>; “What is covered ... is essentially disfiguring surgery,” said [Dr.] Sinnott. ‘They are covering removal of genitals and removal of the breasts but no reconstruction. It’s just the removal of identifying sex characteristics. There is nothing gender affirming or confirming in that.’” According to Mari-Lynne Sinnott of Clinic 215, Newfoundland

Surgeries such as laser hair removal, pectoral implants, breast implants, and voice-pitch surgeries are not usually publicly funded for anyone whether they are seeking it as gender affirming surgery or not, but some provinces may provide access to these procedures on a case by case basis.⁷⁹

Over the years, some people have argued that gender affirming surgeries are elective surgeries and thus should not be covered by public health funds. Although they may not be necessary for all trans people, there is agreement among many medical and professional bodies that these surgeries are not cosmetic or elective:

The medical procedures attendant to gender affirming/confirming surgeries are not “cosmetic” or “elective” or “for the mere convenience of the patient.” These reconstructive procedures are not optional in any meaningful sense, but are understood to be medically necessary for the treatment of the diagnosed condition. In some cases, such surgery is the **only** effective treatment for the condition, and for some people genital surgery is essential and life-saving.

These medical procedures and treatment protocols are not experimental: Decades of both clinical experience and medical research show they are essential to achieving well-being for the transsexual patient. For example, a recent study of female-to-male transsexuals found significantly improved quality of life following cross-gender hormonal therapy. Moreover, those who had also undergone chest reconstruction had significantly higher scores for general health, social functioning, as well as mental health.⁸⁰

The Canadian Psychiatric Association, WPATH, the Endocrine Society, and the American Psychiatric, Psychological, and Medical Associations all agree that appropriate medical treatment including access to hormones and surgical intervention for trans people is medically necessary and is not cosmetic.⁸¹

Gender dysphoria can lead to stigmatization, discrimination and victimization, which can lead to increased rates of mental health issues and increased risk for suicide; children, in particular, “are at higher risk of emotional and behaviour problems including anxiety and depression.”⁸² It is, therefore, important for all jurisdictions to provide trans people access to trans related medical services as well as

Labrador is currently reviewing its policies regarding what surgery is covered as well as the assessment process itself.

⁷⁹ See e.g.: Yukon Health and Social Services, GAS Policy – IHHS DHHS *supra* note 76, s 2.3.1(2.5).

⁸⁰ “Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the USA” (21 December 2016), at 3–4, online: World Professional Association for Transgender Health <<https://www.wpath.org/newsroom/medical-necessity-statement>> [emphasis in original].

⁸¹ Veltman and Chaimowitz, *supra* note 51 at 2–3; “Transgender Health: Position Statement”, *supra* note 52 at 1.

⁸² Ranna Parekh, *supra* note 59 at “Challenges/Complications”.

to provide support and mental health services to address related mental health issues, if any.

In PEI, the trans community continues to identify a significant lack of services and issues in trans health care including:

- Failing to offer chest masculinization when performing a mastectomy which leaves the patient “disfigured”;
- Failing to offer funding for reconstructive surgery. If a patient has the removal surgery offered in PEI there is limited opportunity for reconstruction later as the tissue being removed is often used in the reconstruction;
- Lack of doctors, medical health personnel and psychiatrists who are trained or experienced in trans patient care;
- Delay in services by requiring trans patients to get a psychiatric assessment prior to trans related health care, particularly with a shortage of psychiatrists. Other provinces train other professionals to do the assessments and/or authorize family physicians to make referrals and obtain informed consent;
- Lack of counselling and support; and
- Lack of information in the province’s online sites to direct patients to the proper support services.

Access to trans health care: cases before human rights tribunals

Many of the early cases dealing with trans rights before human rights tribunals deal with access to health care and, in particular, access to funding for gender affirming surgeries. A review of some of these cases is helpful to explore what tribunals have considered relevant and may help to inform jurisdictions who do not provide services as to what their obligations may be. As these cases occurred before the amendments to human rights legislation adding gender identity to the enumerated grounds, the complaints were heard under the grounds of sex, disability or both.

Waters, a trans man, alleged that the British Columbia Ministry of Health Services and the Medical Services Commission discriminated against him and denied him a service on the grounds of sex and sexual orientation.⁸³ Waters sought to have gender affirming surgery which was not available in British Columbia. He travelled out of province to have the first two stages of his surgery completed. There was a third surgery necessary. The province had provided coverage for the costs of his first two surgeries “at the rate that would have been paid if the surgery had been performed in [British Columbia],”⁸⁴ which left Waters owing money and unable to afford the third part of the surgery.

Waters argued that surgeries for trans women outside of the province were paid for in full, while surgeries for trans men were not and that this differential treatment was discriminatory. The Tribunal found that Waters established a *prima*

⁸³ *Waters v BC Medical Services Plan*, 2003 BCHRT 13 at para 2, 46 CHRR D/139.

⁸⁴ *Ibid.*

facie case of discrimination on the ground of sex based on the evidence that a trans woman was able to have a vaginoplasty paid for at the usual and customary out of province rates whereas the specific surgery Waters required as a trans man, phalloplasty, was paid at reduced British Columbia rates. The Respondent failed to show that there was a reasonable or *bona fide* justification for their policy or that it would experience undue hardship to accommodate Waters.⁸⁵

The Tribunal stated that surgery for gender dysphoria is a medically necessary treatment and is not cosmetic. The Tribunal found that because of the Ministry's treatment, it injured Waters' dignity and self-respect.

What MSP did was to leave Mr. Waters in the middle of a surgical process: not being totally a male in physical appearance and function, and being unable and unwilling to return to being a physical female. The dignity and self-respect of a person is most often dependent on how he sees himself and how he is seen through the eyes of society. In this case, Mr. Waters is not a complete and fully-functioning physical male. He is aware of this every day. When he moves in the community he is inhibited in what he can do, namely being naked and urinating as a man without difficulty.⁸⁶

As a result of the discrimination, the tribunal ordered the Ministry to cease the contravention, pay for the medical services already received and pay for upcoming surgery at the usual and customary rate and to pay legal fees and general damages.⁸⁷

In *Brodeur v Ontario*, the complainants were trans women who sought gender affirming surgery.⁸⁸ Both complainants were seeking funding for surgeries for their transitions and claimed that not funding their surgeries was discrimination on the ground of sex. The surgeries they required were breast augmentation, laser hair removal and voice therapy. The complainants alleged that further discrimination could occur if they did not get the required surgeries.

Their complaints were dismissed as the procedures were not found to be medically necessary and, thus, did not fall under the purpose of the Ontario Health Insurance Program ("OHIP").⁸⁹ The tribunal did give some direction as to what evidence a complainant might need to establish that OHIP policies are discriminatory, namely that their needs fall within the purpose of the program which they may be able to do by "showing that equivalent, although not necessarily identical, health care needs for others without their personal characteristics are covered while theirs are not."⁹⁰

⁸⁵ *Ibid* at paras 164, 185.

⁸⁶ *Ibid* at para 225.

⁸⁷ *Ibid* at paras 201, 210.

⁸⁸ *Brodeur v Ontario (Health and Long-Term Care)*, 2013 HRTO 1229 at para 1, [2013] OHRTD No 1235 (QL).

⁸⁹ *Ibid* at para 21.

⁹⁰ *Ibid* at para 23.

The tribunal went on to find that for breast augmentation, the same standard should apply to cis women and trans women such that if, after hormone treatments, a trans woman had breast aplasia (absence of breasts) then the reconstruction should be covered.⁹¹ Laser hair removal was found to be not medically necessary.⁹² Speech therapy was funded in the province if medically necessary, but voice therapy was not and there was no evidence before the Tribunal that speech therapy was necessary in *Brodeur*.⁹³

In the case of *M v BC*, the complainant alleged the process of getting approvals for gender affirming surgery was discriminatory on the ground of sex.⁹⁴

M applied for a bilateral mastectomy with chest contouring. His doctor sent a request for approval, as required, to the Ministry of Health, but there was a significant delay in the response. When M was approved, there was a time limit to the approval of two years (although it could be renewed). Cis men did not have to go through the same approval process and were not subject to the 24-month time limit. The focus of M's complaint was on the delay the process created, the stress that occurred as a result, and his uncertainty about what would occur once the two-year period expired. M alleged that his wait time was increased to see the surgeon because he needed Ministry approval whereas cis men did not. In addition, M stressed that the fact the Ministry wanted to oversee the whole process for transgender patients slowed down the process. M alleged negative impacts on his social and work life due to the process.

M's complaint was filed outside the time limit provided in the *Human Rights Code*, but, in British Columbia, there is a discretion to accept complaints outside the limitation period. In deciding to proceed with the complaint the Tribunal stated:

I find that there is a strong public interest in the Tribunal being given an opportunity to determine whether the Ministry's GRS policy discriminates against transgender persons who require medical services integral to their full participation in society. In my view, this complaint raises important issues respecting the application of the *Code* in these circumstances. In my view, the focus of M's complaint would provide relevant and different evidence from that of the Flagg complaint and indeed may compliment Flagg in providing a fuller examination of the Ministry's GRS policy.⁹⁵

The tribunal ordered the M case to be joined with the complaint of Flagg who alleged similar discrimination by the Ministry of Health.⁹⁶

⁹¹ *Ibid* at paras 14–15.

⁹² *Ibid* at para 37.

⁹³ *Ibid* at paras 17–18.

⁹⁴ *M v BC (Ministry of Health)*, 2014 BCHRT 242 at para 1, [2014] BCHRTD No 242 (QL).

⁹⁵ *Ibid* at para 59.

⁹⁶ *Flagg v BC (Ministry of Health)*, 2014 BCHRT 45, [2014] BCHRTD No 45 (QL).

Like *M*, *Flagg* was requesting a bilateral mastectomy with chest contouring and his complaint related to the approval process for surgery. *Flagg* argued that cis patients are not subject to the same lengthy requirements as trans patients. *Flagg* compared medically necessary chest treatment for cis people compared to trans men. For comparison, he referred to a cis man who had gynecomastia, a cis woman who required a breast reduction, and a cis woman who had a significant amount of asymmetry between her breasts. *Flagg* argued that cis people could have a direct referral from their family physician to a surgeon whereas *Flagg* had to ask his family physician to submit a referral request to the Ministry.⁹⁷

The timeliness of the complaint was addressed in this preliminary decision. The Tribunal found the allegations related to a continuing contravention of the *Code* and accepted the complaint.⁹⁸

The *M* and *Flagg* cases were preliminary decisions regarding whether the complaint should proceed to a hearing. There is no indication of a substantive decision regarding the alleged discrimination, but following these preliminary decisions, changes to the funding process in British Columbia were implemented. There is no longer a need for a special application for coverage nor approval by the Chief Assessor, and the 24-month time limit on MSP funding was removed.⁹⁹

These cases demonstrate that discrimination allegations may arise relating to both the actual service provided as well as the process involved in approving surgeries.

How might future tribunals deal with allegations of discrimination in health care funding?

In addition to the general application of human rights principles, tribunals may need to consider the following questions:

1. Do the needs of the transgender person seeking surgery fall within the purpose of the medical insurance program?
2. Are similar health care needs for people without the trans person's personal characteristics covered while the trans person's are not?
3. Is the approval process for coverage the same for cis and trans patients?
4. Are there policies in place which appear to treat everyone equally but which, in fact, have an adverse impact on trans people different from that of others?

⁹⁷ *Ibid* at para 9.

⁹⁸ *Ibid* at para 25.

⁹⁹ "Surgery Funding", *supra* note 69.

1. Do the needs of the transgender person seeking surgery fall within the purpose of the medical insurance program?

As noted above, according to WPATH, for patients living with gender dysphoria, gender affirming surgery is not elective, nor experimental; it is medically necessary.¹⁰⁰ Although not every trans person may want or need gender affirming surgery, for those that do, the surgery should be considered medically necessary. Which surgery and procedure is appropriate for a particular patient is an individualized decision and should be assessed by appropriate medical consultation.

2. Are similar health care needs for people without the trans person's personal characteristics covered while the trans person's are not?

There are a number of possible appropriate comparator groups when assessing equity in health care coverage. An assessment would have to be done to determine which procedures are covered, and in what circumstances, to determine if the coverage would also be appropriate in a trans person's situation. Some comparator groups might include the following possibilities. This is not meant to be a complete list of arguable issues or comparator groups and there may be additional arguments relating to the particular needs of trans patients.

A. Breast Reconstruction for Breast Cancer Patients vs. Breast Reconstruction or Chest Contouring for a trans person

If provincial medical plans provide coverage for breast reconstruction for a woman with breast cancer, that may be an appropriate comparator group for a trans person seeking top surgery with chest contouring.

In a Nova Scotia news article, Jesiah MacDonald, a trans man seeking top surgery with chest contouring spoke about the fact that a mastectomy was funded by the province, but chest masculinization was not. He stated: “[t]hey’re looking at it like, ‘there’s an excess on this body that we need to get rid of,’ rather than, ‘we need to reconfigure this part of the body’”.¹⁰¹ He stated that after his mastectomy, without chest masculinization, he won’t have a male chest.¹⁰²

Residents of PEI have described the mastectomy without chest contouring as having left them disfigured and as aggravating their mental health and gender dysphoria.

¹⁰⁰ “Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the USA”, *supra* note 80 at 2–4.

¹⁰¹ Amanda Jess, “They’re looking at it wrong”, *The News* (22 May 2014), online: <<http://www.ngnews.ca/news/local/2014/5/22/theyre-looking-at-it-wrong-3734856.html>>.

¹⁰² *Ibid.*

B. Breast Reduction for Cis women vs. Trans men

If provincial health plans cover breast reduction for women who meet the approved criteria, which vary from province to province, the same should be available for trans men.

C. Breast Augmentation for Cis women vs. Trans women

Breast augmentation is rarely covered in provinces for cis or trans women. In some provinces cis women are funded for breast augmentation if they have breast aplasia (absence of breast growth). Ontario extends that funding to trans women who continue to have breast aplasia following a period of hormone treatments. That would be an appropriate approach in other jurisdictions as well.

D. Trans Men vs. Trans Women

If a province covers surgeries for trans women, comparable surgeries for trans men should also be available. The reverse is also true.

3. Is the approval process for coverage the same for cis and trans patients?

As indicated in the *M v BC* and *Flagg* cases, jurisdictions may have to review the approval process for gender affirming treatment or surgery.¹⁰³ Each jurisdiction may have their own process, but the process should not be discriminatory when compared to comparable treatments (including other out of province surgeries) for cis patients.

4. Are there policies in place which appear to treat everyone equally but which, in fact, have an adverse impact on trans people different from that of others?

One of the challenges to the availability of gender affirming surgery is the reality that genital reconstruction is a very specialized procedure. Currently there are only two surgeons in the country that undertake these procedures, although efforts are being made to increase this. Even in jurisdictions where the surgery is publicly funded, the wait times for service are extremely long.

In PEI, the province has indicated to people seeking gender affirming genital reconstruction surgery that it cannot be publicly funded because PEI has a policy to not approve procedures done in private hospitals.

¹⁰³ *M v BC*, *supra* note 94; *Flagg*, *supra* note 96.

When policies, which appear neutral on their face, impact one group of people who are protected under human rights legislation differently than those without the same characteristics, those seemingly neutral policies may be considered discriminatory.¹⁰⁴

Since private clinics are the only place this surgery is available, it is arguable that the impact of this policy on trans people is more significant than others who might prefer a private clinic over a public hospital when the services are, in fact, available in both. If the policy has a different impact on a trans person than it does on a cis person, then the policy may be seen as discriminatory.

Education

Enumerating gender identity and gender expression as protected grounds in human rights legislation is a positive step in providing clarity about rights and responsibilities. The fact that clarity was necessary in the first place, however, informs us that education is needed about what gender identity means and what it means to not discriminate. Many people believe if they do not intend to discriminate that is good enough, but we know that intention is not a consideration in human rights laws; it is not what we intend but the consequences of what we do that are relevant to human rights considerations.¹⁰⁵

Although there are some instances where discrimination occurs intentionally and with malice, it also occurs where there is a lack of understanding regarding one's obligations. Conscious and unconscious bias and stereotypes often influence people's actions. Employers often do not understand their accommodation requirements and service providers do not understand their obligations. As a result, education is necessary in a wide variety of sectors.

How often is the following narrative observed: "they can do what they want as long as they do not bother me"? How often are trans people the subject of jokes or harassment, such as when mothers hold their daughters closer when trans women enter the ladies' restroom? When employers are hiring, do they think 'I cannot hire a trans person because my customers would be uncomfortable around them'? When schools or businesses set up a special washroom and direct a trans person to use that one, are they meeting their obligations? Many of these actions are based on inappropriate stereotypes that create ongoing opportunities for harassment and discrimination.

Education needs to be conducted on many levels to ensure the most widespread impact and potential for reducing discrimination. The general public needs to understand what gender identity and gender expression include and that being trans

¹⁰⁴ See *Ontario Human Rights Commission (O'Malley) v Simpsons-Sears*, [1985] 2 SCR 536 at 551, 17 Admin LR 89 where this argument was made in the employment context specifically.

¹⁰⁵ *Ibid* at 549–50: "The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination."

or gender non-conforming is a reality as opposed to a “life style choice”. People need to think about their conscious or unconscious biases and explore stereotypes that may be influencing their actions. They need to understand their rights and responsibilities under human rights legislation.

Trans people similarly need to be informed of their rights under human rights legislation so that they are aware of what they should expect from employers, landlords or service providers and what recourse they can take if they experience discrimination.

Employers need to be informed of their responsibilities when dealing with a trans employee, client or customer. Employers often call the Labour or Employment Standards Boards to find out about their responsibilities to employees, yet they remain unaware of their responsibilities under human rights legislation.

Retailers need to understand their obligations to trans employees and trans customers. Landlords, hotel operators, and others who provide residential or vacation accommodations need to know that they cannot refuse to rent to someone because of the person’s gender identity.

Educators need to understand how to support and respect trans employees and students in their schools, particularly when those children are not being supported at home.

In 2014, the Canadian Medical Association passed a resolution calling for the “integration of sex/gender diversity education into medical school curricula and programs”.¹⁰⁶ There continues to be a need for all medical practitioners, including family doctors, specialists, nurses, nurse practitioners, dentists, psychologists, psychiatrists, and clinic and hospital staff to be aware that a trans person has the right to be known in a way which conforms with their gender identity and to be called by their preferred pronoun and name. They need additional support and training to understand the unique needs of trans patients and to assist trans patients to navigate the medical world, whether in relation to general medical care, trans related assessment and care, supportive counselling, or appropriate gender affirming medical treatment.

Health authorities and medical governing/licencing bodies have the responsibility to ensure medical practitioners are aware of the rights of trans people and that medical practitioners have the capacity and knowledge to treat their patients and/or, when necessary, refer their patients to other professionals who can provide necessary services. Where trained professionals are limited, efforts should be made to provide access to services out of province or to consider a team approach so that qualified practitioners from a variety of disciplines can provide services to reduce delay and barriers to treatment.

Lawyers and judges need to be sensitive to gender issues and must gain a better understanding of the rights of trans people. As recently as two years ago, a trans

¹⁰⁶ *Public Funding of Transgender Health Care in Canada*, *supra* note 63 at 3 in “Appendix”.

woman reported in an interview with staff at the PEI Human Rights Commission that a judge had told her not to express her gender identity in front of her children if she expected to continue the custody/access arrangements which were being determined by the court.

The Canadian Judicial Council and the National Judicial Institute should include current information for judges in their diversity training about trans-rights, and judicial diversity training should address how to appropriately communicate with trans individuals who appear before the courts, such as by emphasising usage of the correct pronoun.

Lawyers, both while in law school and in continuing education should have access to diversity training on these issues. It is important when hiring lawyers or staff, or when meeting trans clients, that members of law firms are not influenced by stereotypes and biases. For example, there are family law cases that have addressed custody issues involving trans parents and trans children. Lawyers should be aware that being a trans person does not impact the parent's ability to participate and share custody of their children,¹⁰⁷ and that lack of understanding and support for a child's gender identity issues may impact custody or access arrangements.¹⁰⁸

Governments need to be aware of human rights jurisprudence so that they can review and revise their policies. It is particularly important for governments to consider the potential for systemic discrimination and its adverse impact on trans people when they are applying what appear to be neutral policies. Treating everyone the same may not be appropriate. It is important to make information and education about services that are offered easily accessible.

Education can take the form of presentations to groups or organizations, including professional development or continuing medical or legal education opportunities. Written materials and access to online training are important educational tools.

Holding public information sessions may attract some participants, but engaging in a community development strategy, where the educators go to the community (geographic, cultural or otherwise) at times and locations that are designated by the community, is often a more productive approach.

Human rights commissions should play a role in this education. In his commentary, *Renewing Human Rights Law in Canada*, Dominique Clément wrote:

Human rights commissions need to reinvigorate their education mandate, which was a cornerstone of the original model. Every inquiry into the

¹⁰⁷ *Forrester v Saliba*, 10 RFL (5th) 34 at 40, 2000 CanLII 28722 (CanLII) (Ont Ct J): “the applicant’s transsexuality, in itself, without further evidence, would not constitute a material change in circumstances, nor would it be considered a negative factor in a custody determination.”

¹⁰⁸ See *Ireland v Ireland*, 2007 ONCJ 11 at para 13, [2007] OJ No 109 (QL) where the father’s “lack of insight and sensitivity” was a factor, among others, in a custody/access decision.

enforcement of federal and provincial human rights law in Canada has found that there is an over-emphasis on individual complaints...Similarly [in 2000] the Canadian Human Rights Act Review Panel argued that

one of the most important aspects of promoting equality is the need to educate those who must provide equality and those who need equality about the meaning and intent of the Act with respect to how equality should be achieved.¹⁰⁹

As the Canadian Human Rights Act Review Panel noted, “when individuals understand their rights and the rights of others they are less likely to violate those rights”.¹¹⁰

With proper funding, human rights commissions could be doing more outreach to communities and organizations. Unfortunately with dwindling resources, responding to complaints often overshadows education mandates. Both outreach and handling complaints are responsibilities that must be sufficiently staffed and funded. Partnering with local trans advocate groups is an effective way of communicating the lived experience of those whom we are trying to protect while at the same time applying a human rights lens to the situation.

Conclusion

As this paper demonstrates, progress is being made in relation to protecting the rights of trans people, but much more needs to be done. Offering greater protection and opportunities through legislation is an important step, but Canada is a long way from giving effect to those protections in a way which eliminates the discrimination and violence experienced by trans and gender non-conforming people.

There are other issues, some of which have been introduced here, that are beyond the scope of this paper, including what rights children have to change their identification documents,¹¹¹ to access appropriate health care, and to do so when they do not have family support. Other issues include how tribunals will deal with competing rights, such as gender identity and religion, and what additional steps can be taken to ensure people who identify as non-binary or gender non-conforming are not discriminated against.

Community, government and educational institutions will have to face issues they may not have considered before as more individuals identify as trans, non-binary

¹⁰⁹ Dominique Clément, “Renewing Human Rights Law in Canada”, (2017) 54 Osgoode Hall LJ 1311 at 1331–32, citing Canadian Human Rights Act Review Panel, *Report of the Canadian Human Rights Act Review Panel* (Ottawa: Parliamentary Research Branch, 2000) at 41.

¹¹⁰ *Ibid* at 1334 citing Canadian Human Rights Act Review Panel, *Report of the Canadian Human Rights Act Review Panel*, (Ottawa: Parliamentary Research Branch, 2000) at 42.

¹¹¹ Some provinces provide for this and others do not. See the *Vital Statistics Acts*, *supra* notes 20–22.

or gender non-conforming. For instance, how will correctional facilities meet the needs of trans people? How will community care and nursing homes ensure their residents understand the need to provide non-discriminatory access to services? How will sports teams treat trans players? In all of these situations there is a need to learn, to look for and eliminate barriers, and to explore policies and take all necessary action to ensure that all people are able to enjoy access to services and employment.

It is now up to us to share this information, educate ourselves and others, and challenge ourselves to understand gender in a much broader context. I challenge readers to be aware of how often they are asked to indicate their gender and to think about how challenging that question is for some individuals.

I was at a book club meeting where the book and discussion related to gender identity. We started discussing how often we were asked to indicate our gender on forms and how irrelevant gender should be in relation to accessing services and employment. One of the participants was pregnant and I thought it ironic that in the midst of our discussion about the relevance of gender, we still wanted to know if she knew whether she was having a boy or a girl. Perhaps we will never stop asking such a question, but perhaps, someday, we will be certain that however that child ultimately identifies, the child will not be harassed or discriminated against.