

Policy on preventing discrimination because of

GENDER IDENTITY

and

GENDER EXPRESSION

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Summary

People who are transgender, or gender non-conforming, come from all walks of life. Yet they are one of the most disadvantaged groups in society. Trans people routinely experience discrimination, harassment and even violence because their gender identity or gender expression is different from their birth-assigned sex.

Under the Ontario *Human Rights Code* (the *Code*) people are protected from discrimination and harassment because of gender identity and gender expression in employment, housing, facilities and services, contracts, and membership in unions, trade or professional associations.

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

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

Trans or **transgender** is an umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms. It includes but is not limited to people who identify as transgender, trans woman (male-to-female), trans man (female-to-male), transsexual, cross-dresser, gender non-conforming, gender variant or gender queer.

Discrimination happens when a person experiences negative treatment or impact, intentional or not, because of their gender identity or gender expression. It can be direct and obvious or subtle and hidden, but harmful just the same. It can also happen on a bigger systemic level such as organizational rules or policies that look neutral but end up excluding trans people. Friends, family or others who face discrimination because of their association with a trans person are also protected.

Harassment is a form of discrimination. It can include sexually explicit or other inappropriate comments, questions, jokes, name-calling, images, email and social media, transphobic, homophobic or other bullying, sexual advances, touching and other unwelcome and ongoing behaviour that insults, demeans, harms or threatens a person in some way. Assault or other violent behaviour is also a criminal matter. Trans people and other persons can experience harassing behaviour because of their gender identity or expression (gender-based harassment) and/or their sex (sexual harassment).

Social stereotypes about gender, and prejudice and fear towards trans people are often at the root of discrimination and harassment. Negative attitudes about a trans person's racial identity, family status or other grounds can combine or intersect to make things worse.

Everyone has the right to define their own gender identity. Trans people should be recognized and treated as the gender they live in, whether or not they have undergone surgery, or their identity documents are up to date.

An organization should have a valid reason for collecting and using personal information that identifies a person's gender. They should keep this information confidential. Trans people can have their name or sex designation changed on identity documents and other records. The criteria and process should not be intrusive or medically based.

Trans people should have access to washrooms, change rooms and other gender specific services and facilities based on their lived gender identity.

Dress code policies should be inclusive and flexible. They should not prevent trans people and others from dressing according to their expressed gender.

Organizations should design or change their rules, practices and facilities to avoid negative effects on trans people and be more inclusive for everyone. Any exceptions must be legitimate in the circumstances, and trans people must be provided any needed accommodation unless it would cause undue hardship.

The duty to accommodate the needs of trans people is a shared responsibility. Everyone involved should cooperate in the process, exchange only necessary information and explore options while respecting privacy.

Trans people and other gender non-conforming individuals should not be treated negatively while at work, at school, trying to rent an apartment, shopping, eating a meal in a restaurant, using health care services or shelters, dealing with law enforcement and justice services, or at any other time.

Organizations are liable for any discrimination and harassment that happens. They are also liable for not accommodating a trans person's needs unless it would cause undue hardship. They must deal with complaints, take steps to prevent problems and provide a safe, welcoming environment for trans people.

Organizations should learn about the needs of trans people, look for barriers, develop or change policies and procedures and undertake training. This will help make sure trans people and other gender non-conforming individuals are treated with dignity and respect and enjoy equal rights and freedom from discrimination.

1. Introduction

People who are transgender, or who otherwise don't conform to gender stereotypes, come from all walks of life. They are represented in every social class, occupation, race, culture, religion and sexual orientation, and live in and contribute to communities across Ontario and around the world.

Yet, "trans" people are one of the most disadvantaged groups in society. They routinely experience prejudice, discrimination, harassment, hatred and even violence. People who are in the process of "transitioning" or "coming out" are particularly vulnerable.¹ Many issues go to the core of human dignity. Courts and tribunals have recognized this as "substantial and disturbing."²

Trans people face these forms of social marginalization because of deeply rooted myths and fears in society about people who do not conform to social "norms" about what it means to be female or male. The impact is significant on their daily lives, health and well-being.

In 2010, the Trans PULSE Project³ conducted a detailed survey with 433 trans people across Ontario. Trans people reported barriers and discrimination in accessing employment and medical care.⁴ While a higher percentage of trans people had post secondary education, their income levels did not reflect this. The majority were living below the poverty line.⁵ They also reported lower levels of employment.⁶ Two-thirds said they had avoided public spaces that everyone else takes for granted such as malls or clothing stores, restaurants, gyms and schools because of a fear of harassment, being

¹ Also see section 13.2-Transitioning and Appendix B-Glossary of this Policy.

² *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 at para. 15 (CanLII). In this case, the Tribunal recognized that transgender persons are a "historically disadvantaged group." *Brodeur v. Ontario (Health and Long-Term Care)*, 2013 HRTO 1229 at para. 41 (CanLII). In this case, the Tribunal stated that "disadvantage and prejudice against transgendered persons in Ontario remains substantial and disturbing."

³ Trans PULSE is a community-based research project that was created to respond to problems identified within Ontario trans communities regarding access to health and social services. Funding for the project was provided by the Wellesley Institute, the Ontario HIV Treatment Network (OHTN), and the Canadian Institutes of Health Research (CIHR). To learn more see: <http://transpulseproject.ca/about-us/>

⁴ Jake Pyne *et al.*, "Improving the Health of Trans Communities: Findings from the Trans PULSE Project" (Presentation to the Trans Health Advocacy Summit, August 24, 2012), online: Trans PULSE <http://transpulseproject.ca/research/improving-the-health-of-trans-communities-findings-from-the-trans-pulse-project/>.

⁵ G. Bauer *et al.*, *Who are Trans People in Ontario?* Trans PULSE e-Bulletin, 20 July, 2010, 1(1), online: Trans PULSE www.transpulseproject.ca.

⁶ G. Bauer *et al.*, *We've Got Work to Do: Workplace Discrimination and Employment Challenges for Trans People in Ontario*, Trans PULSE e-Bulletin, 30 May, 2011, 2(1), online: Trans PULSE www.transpulseproject.ca.

“read” (perceived as trans), or “outed.” Washrooms were the most commonly avoided space.⁷ Over their lifetime, 77% reported they have had suicidal thoughts and 43% had attempted suicide.⁸

At the same time, broader social and legal change is underway. Society is beginning to recognize the value and importance of respecting every person’s gender identity and expression. International human rights standards, domestic legislation and legal decisions have confirmed the legal obligation to uphold the right to be free from discrimination and harassment based on gender identity and gender expression.

Ontario’s *Human Rights Code* (the *Code*) is a provincial law that sets out legal rights and obligations to protect people from discrimination. In 2012, three parties of the Ontario Legislature co-sponsored *Toby’s Act*, the Bill that added “gender identity” and “gender expression” as prohibited grounds of discrimination under the *Code*.⁹ The grounds make it clear that trans people and other gender non-conforming individuals are entitled to legal protections in the same way that people are protected from discrimination and harassment based on race, age, disability and all other prohibited grounds.¹⁰

2. About this policy

This policy is a complete revision and update of the Ontario Human Rights Commission’s (OHRC’s) original *Policy on discrimination and harassment because of gender identity* first published in 2000.

In keeping with the Preamble of the *Code*, this policy aims to:

- Promote recognition of the inherent dignity and worth of trans people
- Provide for equal rights and opportunities without discrimination and harassment because of gender identity and gender expression
- Create a climate of understanding and mutual respect, so that trans people feel they belong in the community and can contribute to it.

⁷ A. Scheim, G. Bauer & J. Pyne, *Avoidance of Public Spaces by Trans Ontarians: The Impact of Transphobia on Daily Life*, Trans PULSE e-Bulletin, 16 January, 2014. 4(1). online: Trans PULSE www.transpulseproject.ca.

⁸ Pyne *et al.*, *supra* note 4.

⁹ See Bill 33, *An Act to amend the Human Rights Code with respect to gender identity and gender expression* 1st Sess, 40th Leg, Ontario (assented to 19 June, 2012), S.O. 2012 C.7, online: Legislative Assembly of Ontario www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2574&isCurrent=false&ParlSessionID=40%3A1.

¹⁰ There are 17 protected grounds in the *Code*: race, colour, ancestry, creed, place of origin, ethnic origin, citizenship, sex (including pregnancy), sexual orientation, gender identity, gender expression, age, marital status, family status, disability, receipt of public assistance (in housing) and record of offences (in employment).

The policy promotes understanding and awareness about trans people and their rights. It can help employers, unions and other vocational associations, and housing and service providers understand and meet their legal responsibilities under the *Code* to prevent and address discrimination based on gender identity and gender expression.

Organizations can also use the policy to support the development of their own training materials and anti-discrimination and harassment policies.

The analysis and many of the examples in this policy are based on research, tribunal and court cases involving gender identity and gender expression, as well as consultations the OHRC undertook with trans people, other individuals and organizations.¹¹

See Appendix A for more about the purpose of OHRC policies.

3. Gender identity and gender expression

The *Code* does not define the grounds of gender identity, gender expression or sex. Instead, the understanding of these and other related terms, and the implications for the *Code* and OHRC policies, is evolving from tribunal and court decisions, social science research as well as self identity and common everyday use.

Sex is the anatomical classification of people as male, female or intersex, usually assigned at birth.

Gender identity is 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.

Gender expression is how a person publicly expresses or presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender. Others perceive a person's gender through these attributes.

A person's gender identity is fundamentally different from and not related to their sexual orientation.

Trans or **transgender** is an umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms. It includes but is not limited to people who identify as transgender, trans woman (male-to-female MTF), trans man (female-to-male FTM), transsexual, cross-dressers, or gender non-conforming, gender variant or gender queer.

¹¹ See the OHRC's consultation backgrounder: *Talking about gender identity and expression*, available online at www.ohrc.on.ca.

Gender non-conforming individuals do not follow gender stereotypes based on the sex they were assigned at birth and may or may not identify as trans.

“Lived” gender identity is the gender a person feels internally (“gender identity” along the gender spectrum) and expresses publicly (“gender expression”) in their daily life including at work, while shopping or accessing other services, in their housing environment or in the broader community. See section 13.3.3 of this policy: Recognizing lived gender identity.

For more information on these and other related terms see Appendix B: Glossary for understanding gender identity and expression.

4. Bias and prejudice

Trans people and other gender non-conforming individuals are often judged by their physical appearance for not fitting and conforming to stereotypical norms about what it means to be a “man” or “woman.” They experience stigmatization, prejudice, bias and fear on a daily basis. While some may see trans people as inferior, others may lack awareness and understanding about what it means to be trans.

“The notion that there are two and only two genders is one of the most basic ideas in our binary Western way of thinking. Transgender people challenge our very understanding of the world. And we make them pay the cost of our confusion by their suffering.”¹²

Bias and prejudice, or simply ignorance, can lead to isolation, vulnerability, disadvantage and discrimination at school, at work, in stores and other services, or even where people live. Trans people living in smaller towns or rural communities may even be more isolated.

4.1 Stereotyping

Many situations of discrimination happen because of negative attitudes, biases and stereotypes about people who are trans or gender non-conforming. Stereotyping is when assumptions are made about individuals based on assumptions about qualities and characteristics of the group they belong to.¹³ When people stereotype others, they do not see the real person. Stereotypes are often unfounded generalizations that come from misconceptions and incomplete or false information about people. Anyone can stereotype and not even realize it, even those who are well meaning.

¹² Barbara Findlay, as cited in John Fisher & Kristie McComb, *Outlaws & In-laws: Your Guide to LGBT Rights, Same-sex Relationships and Canadian Law* (Ottawa: Egale Canada Human Rights Trust, 2003), at 46.

¹³ The Supreme Court of Canada has recently said that “Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities.” *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61 at para. 326.

There are widespread stereotypes about trans people in society that often go unquestioned. These include wrong ideas that trans people are “abnormal” or “unnatural,” that they are “frauds,” deceptive and or misrepresent themselves. They may be seen as more likely to take part in criminal activity, be pedophiles, or have mental health problems. Some believe trans women to be a threat to other women.¹⁴

Anyone who engages in illegal activity including threatening or harassing behavior or assault should be dealt with accordingly under the law. This should not detract in any way from the rights of trans people.

False and harmful stereotypes are rooted in fear and uninformed attitudes and can lead to discrimination against trans people because of their gender identity or expression.

4.2 Transphobia

“Transphobia” is the aversion to, fear or hatred of trans people and communities. Like other prejudices, it is based on stereotypes that are used to justify discrimination, harassment and violence toward trans people.

Many trans Ontarians experience transphobia according to the Ontario-based Trans PULSE survey:

- 98% of trans Ontarians reported at least one experience of transphobia
- Nearly 75% of trans people have been made fun of for being trans
- Over 25% have experienced physical violence because they were trans
- Nearly 25% reported being harassed by police
- Trans women experience transphobia more often than trans men.¹⁵

4.3 Cisnormativity

“Cisnormativity” (“cis” meaning “the same as”) refers to the commonplace assumption that all people are “cisgender” (not trans). In other words, their gender identity is in line with or “matches” the sex they were assigned at birth, and everyone accepts this as “the norm.”

The term is used to describe stereotypes, negative attitudes and prejudice towards trans people that are more widespread or systemic in society and its institutions. This form of prejudice may even be unintentional and unrecognized by the person or organization responsible, making it all the more entrenched and difficult to address.

¹⁴ For more information see the OHRC’s 1999 Discussion paper: *Towards a Policy on Gender Identity*, online: OHRC www.ohrc.on.ca/en/discussion-paper-toward-commission-policy-gender-identity.

¹⁵ R. Longman *et al.*, *Experiences of Transphobia among Trans Ontarians*. Trans PULSE e-Bulletin, 7 March, 2013. 3 (2), online: Trans PULSE www.transpulseproject.ca.

“Cisnormative assumptions are so prevalent that they are difficult at first to even recognize... Cisnormativity disallows the possibility of trans existence or trans visibility. As such, the existence of an actual trans person within systems such as healthcare is too often unanticipated and produces a social emergency of sorts because both staff and systems are unprepared for this reality.”¹⁶

Society’s bias that there is only one right, normal or moral expression of gender underpins this form of prejudice and the discrimination that can result from it. Also see section 7.6 of this policy: Systemic discrimination.

5. Emerging human rights protections

5.1 Ontario

In 1999, the OHRC took the position that the ground of sex under human rights law could be interpreted to include the right of transgender people to be free from discrimination and harassment.

In 2000, the OHRC released its ground breaking *Policy on discrimination and harassment because of gender identity* (the original version of this policy). The OHRC and others successfully litigated that policy over the years, with tribunals and courts recognizing more and more the human rights of trans people.

During this time, the OHRC continued to call for explicit recognition of gender identity as a protected ground of discrimination in Ontario’s *Human Rights Code*.¹⁷ In 2012, Ontario added the grounds “gender identity” and “gender expression” to the *Code*.¹⁸

¹⁶ Greta Bauer et al., “I Don’t Think This Is Theoretical; This Is Our Lives”: How Erasure Impacts HealthCare for Transgender People” (2009) 20(5) *Journal of the Association of Nurses in AIDS Care*, 348 at 356, online: Trans PULSE http://webctupdates.wlu.ca/documents/39345/Trans_PULSE_How_erasure_impacts_HC_for_TG_people_JANAC_2009.pdf

¹⁷ See OHRC Discussion paper, *supra* note 14. Also see the OHRC’s statement to the Standing Committee on Social Policy on Bill 33, *Toby’s Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression)*, online: Legislative Assembly of Ontario www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&Date=2012-06-11&ParlCommID=8963&BillID=2574&Business=&DocumentID=26452#P158_35125.

¹⁸ See Bill 33, *supra*, note 9. Before the addition of the grounds gender identity and gender expression, discrimination against trans and transgender people had been addressed under the grounds of “sex” and “disability.” The use of the ground disability to address claims of discrimination against trans people has been recognized as problematic because it can imply a demeaning and medicalized approach to understanding gender identity.

5.2 Other Canadian jurisdictions

Some other jurisdictions in Canada also provide protection for trans people. Human rights legislation in Manitoba and the Northwest Territories includes the protected ground of “gender identity.” Nova Scotia’s human rights legislation includes both “gender identity” and “gender expression.” In jurisdictions without specified grounds, discrimination because of gender identity is being addressed under the ground of “sex.”¹⁹

5.3 International standards

Internationally, understanding of legal rights for trans people has advanced in recent years. The 2007 *Yogyakarta Principles*, developed by a group of international human rights experts, detail how international human rights law applies to gender identity and sexual orientation in a range of areas including discrimination in work, health, education and access to justice.²⁰

Several statements from international human rights organizations have recognized the fundamental human right to self-identify one’s gender, and the need for protection against discrimination based on gender identity and gender expression.²¹

In 2011, the United Nations Human Rights Council adopted a resolution, supported by 85 countries including Canada, to study the issue of human rights, sexual orientation and gender identity. Among other things, the resolution expressed concern about acts of violence and discrimination against individuals because of their gender identity. In a report later that year, the United Nations High Commissioner for Human Rights emphasized that governments have an obligation to protect people from discrimination because of gender identity.²²

¹⁹ In addition, in 2013, the Parliament of Canada passed a bill [Bill C-279, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)*] that would amend Canada’s *Human Rights Code* to include the ground “gender identity”. The bill also includes proposed changes to the *Criminal Code* to recognize violent crimes motivated by transphobia as hate crimes. At the time of this policy, Bill C-279 was before the Senate and had not yet received a final vote to become law. Under the bill, “gender identity” means... the individual’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex that the individual was assigned at birth. See Parliament of Canada: www.parl.gc.ca/legisinfo/BillDetails.aspx?billId=5122660&Mode=1&Language=E

²⁰ *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007), online: Yogyakarta Principles www.yogyakartaprinciples.org/principles_en.htm

²¹ See International Commission of Jurists, *Sexual orientation and gender identity in human rights law, references to jurisprudence and doctrine of the United Nations human rights system – 4th edition* (2010), online: International Commission of Jurists www.icj.org/sexual-orientation-and-gender-identity-in-human-rights-law-references-to-jurisprudence-and-doctrine-of-the-united-nations-human-rights-system-4th-edition/#!lightbox/0/. Also see: *Human Rights, Sexual Orientation and Gender Identity* Res.AG/RES.2504 (XXXIX-O/09), 4th Sess., Organization of American States (OAS),(2009), online: OAS <https://www.oas.org/en/iachr/lgtbi/links/>.

²² See *Human rights, sexual orientation and gender identity* HRC Res. 17/19, UN HRCOR, 17th Sess., UN Doc. A/HRC/RES/17/19 (2011); *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights*, UN HRCOR, 19th Sess., UN Doc. A/HRC/19/41, (2011) online: United Nations www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx at 5.

6. Ontario's *Human Rights Code*

6.1 Protections

Under the Ontario's *Human Rights Code*, trans people and other gender non-conforming individuals are protected from discrimination and harassment because of gender identity and gender expression in five social areas:²³

- When receiving goods, services and using facilities (section 1). "Services" is a broad category and can include privately or publicly owned or operated services including insurance, schools, restaurants, policing, health care, shopping malls, *etc.*
- When occupying housing accommodation (section 2). This includes private rental housing, co-operative housing, social housing and supportive or assisted housing
- When entering into a contract with others (section 3). This includes the offer, acceptance, price or even rejecting a contract
- In employment (section 5). This includes full time work, part-time work, volunteer work, student internships, special employment programs, probationary employment,²⁴ and temporary or contract work
- When joining or belonging to a union, professional association or other vocational association (section 6). This applies to membership in trade unions and self-governing professions, including the terms and conditions of membership, *etc.*

A fundamental aspect of the *Code* is that it has primacy over all other provincial laws in Ontario, unless the law specifically says that it operates notwithstanding the *Code*. This means where a law conflicts with the *Code*, the *Code* will prevail, unless the other law says otherwise.²⁵

²³ The grounds "gender identity" and "gender expression" address many types of human rights violations that were previously addressed under the grounds of "sex" and "disability." For example, see *Forrester v. Peel (Regional Municipality) Police Services Board et al*, 2006 HRTO 13 (CanLII) and *Hogan v. Ontario (Health and Long-Term Care)*, 2006 HRTO 32 (CanLII). In other jurisdictions, this type of discrimination is covered under the ground of "sex" or in some cases "disability."

²⁴ See *Adga Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC).

²⁵ Section 47 of the *Code* reads: (1) This Act binds the Crown and every agency of the Crown. (2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act. R.S.O. 1990, c. H.19, s. 47 (2).

6.2 Establishing discrimination

The *Code* does not define discrimination. Instead, the understanding of discrimination has evolved from tribunal and court decisions. To establish *prima facie* (on its face) discrimination the person making a claim must show:

1. They have a characteristic protected by one or more of the *Code* grounds (e.g. gender identity or gender expression)²⁶
2. They experienced adverse or negative treatment or impact in one of the social areas under the *Code* (e.g. in accessing a service, housing or employment)
3. The protected characteristic was a factor in the adverse treatment or impact.²⁷

Discrimination is not always direct and is often hard to detect. The claimant must show on a “balance of probabilities” (more likely than not) that adverse or negative treatment happened. The analysis should be flexible and look at all relevant factors in the situation including circumstantial evidence as well as the full impact on the affected person or group. While there may be evidence of “intent,” this is not needed to prove discrimination. Gender identity, gender expression or other protected characteristics need only be one of the factors in the negative treatment for discrimination to exist.²⁸

Once *prima facie* discrimination is established, the burden then shifts to the organization or person responsible to either provide a credible non-discriminatory explanation, or justify the conduct or practice using one of the defences available under the *Code* (also see sections 9 and 10 of this policy).

²⁶ The *Code* would also protect people who experience discrimination because of a relationship, association or dealings with a person because of that person’s gender identity or expression or other protected characteristic (See section XX on Forms of Discrimination below).

²⁷ *R.B. v. Keewatin-Patricia District School Board*, 2013 HRTO 1436 at para. 204. These requirements for establishing discrimination were drawn from *Moore v. British Columbia (Education)*, 2012 SCC 61. Note that in a few cases, most of which have challenged government services or have raised concerns that different treatment may not amount to discrimination in a substantive sense, disadvantage is not inferred or assumed from the circumstances but may need to be shown by the claimant to establish adverse treatment or impact: see, for example, *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII), *Ivancicevic v. Ontario (Consumer Services)*, 2011 HRTO 1714 (CanLII), *Klonowski v. Ontario (Community Safety and Correctional Services)*, 2012 HRTO 1568 (CanLII). However, the Court of Appeal for Ontario and HRTO have noted that in most cases under the *Code*, disadvantage can be assumed where there is adverse treatment based on a prohibited ground and that in most human rights cases it will not be necessary to go through a process of specifically proving what the disadvantage is; see *Hendershott v. Ontario (Community and Social Services)*, 2011 HRTO 482 at para. 45 (CanLII).

²⁸ *Gray v. A&W Food Service of Canada Ltd.* (1994), CHRR Doc 94-146 (Ont. Bd. Inq.); *Dominion Management v. Velenosi*, [1977] O.J. No. 1277 at para. 1 (Ont. C.A.); *Smith v. Mardana Ltd. (No. 1)* (2005), 52 C.H.R.R. D/89 at para. 22 (Ont. Div. Ct.); *King v. CDI Career Development Institutes Ltd.* (2001), 39 C.H.R.R. D/322 (Sask. Bd. Inq.).

6.3 Right to self-identify gender

International human rights principles are clear that every person has the right to define their own gender identity. A person's self-defined gender identity is one of the most basic aspects of self-determination, dignity and freedom.²⁹

For legal and social purposes, a person whose gender identity is different from their birth-assigned sex should be treated according to their lived gender identity.³⁰

The Human Rights Tribunal of Ontario (HRTO) has said that, “for transgendered people, insisting on their treatment in accordance with their birth gender for all purposes is discriminatory because it fails to take into account their lived gender identity.”³¹

7. Forms of discrimination

7.1 Direct, indirect and subtle discrimination

Discrimination may take many different forms. It may happen in a direct way. It can happen when individuals or organizations exclude trans people from housing, employment or services, withhold benefits that are available to others, or impose extra burdens that are not imposed on others, without a legitimate reason.

Discrimination may also happen indirectly. It may be carried out through another person or organization.

Example: A company contracting services from a temp agency takes on a worker who it later discovers is trans. The company tells the agency not to send any more workers who are trans or who don't look like “normal” men or women.

Both the organization or person that sets out discriminatory conditions, and the organization or person that carries out this discrimination, can be named together in a human rights claim and held jointly responsible.

There is much overt discrimination against trans people. More hidden, subtle or subversive forms happen as well but they are just as harmful. For more information about “subtle” discrimination, see section 3.3 of the OHRC's Policy on racism and racial discrimination.

²⁹ *Yogyakarta Principles*, *supra* note 20, Principle 3: The right to recognition before the law.

³⁰ See *Vanderputten v. Seydaco Packaging Corp.*, 2012 HRTO 1977 at paras. 66-67 (CanLII) (also citing *XY v. Ontario (Government and Consumer Services)*, *supra*, note 2) and *Sheridan v. Sanctuary Investments Ltd. (c.o.b. B.J.'s Lounge)*, [1999] B.C.H.R.T.D. No. 43, 3 C.H.R.R. D/467 at para 107: “transsexuals 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.”

³¹ *Vanderputten ibid.* at para. 66 (CanLII).

Discriminatory remarks are not always made openly. People don't necessarily voice their stereotypical views to explain their behaviour. Subtle discrimination might only be detected when looking at all of the circumstances to see if a pattern of behaviour exists.

Individual acts themselves may be ambiguous or explained away. But when viewed as part of a larger picture, they may lead to a conclusion that discrimination because of gender identity or expression was a factor in the treatment of a person. An inexplicable departure from the usual practices may support a claim of discrimination.³² Criteria applied to some people but not others may also be evidence of discrimination, if it can be shown that people and groups protected by the *Code* were singled out for negative treatment.

The cumulative effect of both overt and subtle discrimination is profoundly damaging to people who experience it.

7.2 Intersecting grounds

Discrimination may be unique or distinct when it involves two or more *Code* grounds. It is said to be "intersectional." The concept of intersectional discrimination recognizes that people's lives involve multiple interrelated identities, and that marginalization and exclusion based on *Code* grounds may exist because of how these identities intersect.

Trans people are also vulnerable because of their identification with other *Code* grounds, such as race,³³ family status,³⁴ sex (pregnancy and breastfeeding) or disability. They may experience unique forms of discrimination when they try to access housing, employment or services. Particular stereotypes develop around intersecting identities that put trans people at significant disadvantage.

Example: A female tenant identifies as a "Black person," as "trans" and as a "young" person. She experiences racial comments and threats of eviction from her superintendent whenever she asks to have maintenance work done. The property management company investigates. Other long-time Black tenants report no problems with the superintendent. The investigator concludes the young Black trans woman experienced discrimination because of her combined gender identity, race and relatively young age.

³² See *Johnson v. Halifax Regional Police Service* (2003), 48 C.H.R.R. D/307 (N.S. Bd.Inq.) at para. 57 for an example of a case where deviations from normal practice supported a finding of race discrimination.

³³ Jaime M. Grant *et al.*, *Injustice at Every Turn: A report of the national transgender discrimination survey* (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011). Online: www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

³⁴ "[T]he notion that a child will be harmed by a trans parent lingers in child custody decision-making, in family planning policy and practice, and in public opinion, and is experienced by trans parents as discrimination...." Jake Pyne, *Transforming Family: Trans Parents and their Struggles, Strategies and Strengths* (2012), online: LGBT Parenting Connection www.lgbtqparentingconnection.ca/resources.cfm?mode=3&resourceID=444bca3c-ba19-213b-d94e-e941220871c1&subjectID=59, at 8.

A person's experience of discrimination because of their gender identity can also intersect with their socio-economic status. Studies indicate higher levels of poverty among trans communities, in part resulting from workplace discrimination.³⁵ A trans person living with low income may face additional or unique forms of stigma and discrimination. Financial vulnerability is very relevant to understanding the impact of intersectional discrimination on people's lives.

Organizations have a duty to maintain environments that are free from discrimination and harassment. This includes taking into account the needs of people from diverse backgrounds, with a range of unique identities.

Organizations should look at whether their staff have cultural competency skills.³⁶ The ability to interact comfortably with people of diverse cultural backgrounds and identities is key to recognizing and meeting the human rights-related needs of different groups and communities, including trans people and other gender non-conforming individuals.

When interacting with people, organizations should use an individualized approach that recognizes the unique identity of each person, without relying on preconceived notions, assumptions or stereotypes.

7.3 Association

Some people face discrimination because of their association with someone who is trans or gender non-conforming.³⁷

Example: A tenant experiences harassing comments from a landlord because their new roommate is a trans person.

³⁵ See Bauer *et al.*, *supra*, note 6.

³⁶ "Cultural competence" may be defined as "an ability to interact effectively with people of different cultures and socio-economic backgrounds, particularly in the context of human resources, non-profit organizations, and government agencies whose employees work with persons from different cultural/ethnic backgrounds. Cultural competence comprises four components: (a) Awareness of one's own cultural worldview, (b) Attitude towards cultural differences, (c) Knowledge of different cultural practices and worldviews, and (d) Cross-cultural skills. Developing cultural competence results in an ability to understand, communicate with, and effectively interact with people across cultures." See *Cultural competence*, online: Wikipedia http://en.wikipedia.org/wiki/Cultural_competence (Retrieved: January 17, 2014).

³⁷ Section 12 of the *Code* states: A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

Discrimination because of association is prohibited under the *Code*.³⁸ This could apply to friends, family³⁹ or others such as someone advocating on behalf of trans people.

7.4 Gender-based harassment and sexual harassment

The *Code* prohibits harassment on various grounds including because of gender identity and gender expression (gender-based harassment) as well as because of sex (sexual harassment). Trans people, other gender non-conforming individuals as well as non-trans people (cisgender) can all experience harassment on any one or a combination of these and other grounds.

The *Code* defines harassment as “engaging in a course of vexatious⁴⁰ comment or conduct that is known or ought reasonably to be known to be unwelcome.” Harassment will have happened if the person carrying out the behaviour knew or should have known it was unwelcome. If the victim says the behaviour is unwelcome then the harasser “knows.” If the harasser didn’t know (or didn’t intend to harass), it is still harassment if a “reasonable” person would know such behaviour is unwelcome.⁴¹ What is considered “reasonable” includes the perspective of trans people and other gender non-conforming individuals.

A victim does not have to explicitly or directly object to harassment.⁴² They may be vulnerable and not speak out because of a threat or fear or because the person has some power or authority over them like a manager or landlord. Some may simply withdraw or walk away.

³⁸ See section 12 of the *Code*, *ibid*.

³⁹ See for example *Knibbs v. Brant Artillery Gunners Club*, 2011 HRTO 1032 (CanLII) (discrimination because of association with a person who had filed a disability discrimination claim); *Giguere v. Popeye Restaurant*, 2008 HRTO 2 (CanLII) (dismissal of an employee because her husband was HIV-positive); *Barclay v. Royal Canadian Legion, Branch 12*, 31 C.H.R.R. D/486 (Ont. Bd. Inq.) (punishment of a member because she objected to racist comments about Black and Aboriginal People); and *Jahn v. Johnstone* (September 16, 1977), No. 82, Eberts (Ont. Bd. of Inquiry) (eviction of a tenant because of the race of the tenant’s dinner guest).

⁴⁰ In *Murchie v. JB’s Mongolian Grill*, 2006 HRTO 33 (CanLII), the HRTO found that a serious single incident could constitute harassment. However, more often a single incident is treated as a form of discrimination (see the section on poisoned environment), see e.g. *Romano v. 1577118 Ontario Inc.*, 2008 HRTO 9 (CanLII) and *Haykin v. Roth*, 2009 HRTO 2017 (CanLII).

⁴¹ See *Reed v. Cattolica Investments Ltd. and Salvatore Ragusa*, [1996] O.H.R.B.I.D. No. 7. See also, *Gregory v. Parkbridge Lifestyle Communities Inc.* 2011 HRTO 1535 at para. 87 citing *Ghosh v. Domglas Inc. (No. 2)* (1992), 17 C.H.R.R. D/216 (Ont. Bd. Inq.) at paras. 43 to 48 and *Dhanjal v. Air Canada*, 1996 CanLII 2385 at p. 50 (CHRT).

⁴² In *Harriott v. National Money Mart Co.*, 2010 HRTO 353 at para.104, the HRTO found that the respondent’s continued sexualized and inappropriate comments and conduct were unwelcome in the workplace. The HRTO, citing earlier case law, also confirmed that a person is not required to protest or object to the harassing conduct for discrimination to be found; *ibid.* at para. 108.

Many trans people are vulnerable to harassment because of their gender identity and gender expression.⁴³ Trans people also experience harassment that is sexual in nature (sexual harassment) that may be because of their gender identity, gender expression and/or sex.

Gender-based harassment can involve:

- Derogatory language toward trans people or trans communities
- Insults, comments that ridicule, humiliate or demean people because of their gender identity or expression⁴⁴
- Behaviour that “polices and or reinforces traditional heterosexual gender norms”⁴⁵
- Refusing to refer to a person by their self-identified name and proper personal pronoun
- Comments or conduct relating to a perception that a person is not conforming with gender-role stereotypes
- Jokes related to a person’s gender identity or expression including those circulated in writing or by email or social media⁴⁶
- Spreading rumours about a person’s gender identity or expression including through the Internet⁴⁷
- “Outing” or threatening to “out” someone as trans
- Intrusive comments, questions or insults about a person’s body, physical characteristics, gender-related medical procedures, clothing, mannerisms, or other forms of gender expression
- Other threats, unwelcome touching, violence and physical assault.

Sexual harassment can involve:

- Intrusive or offensive questions or comments about a trans person’s sex characteristics, sexual identity, romantic relationships or sexual activity, or sexual orientation
- Jokes that objectify a trans or gender non-conforming person in a sexual way including those circulated by email or social media⁴⁸

⁴³ See paras. 165-166 of *XY*, *supra*, note 2, in which the HRTO accepted that trans persons as a group tend to face very high rates of verbal harassment and physical assault and are sometimes even murdered because of their transgender status. The HRTO also accepted various statements in the OHRC’s 2000 *Policy on discrimination and harassment because of gender identity* describing the prejudice, harassment and violence experienced by trans persons. Also see OHRC 1999 discussion paper, papers included in OHRC training session the Transpulse Survey.

⁴⁴ *Vanderputten*, *supra*, note 30.

⁴⁵ Elizabeth J. Meyer, “Gendered Harassment in Secondary Schools: Understanding Teachers’ (Non) Interventions,” (2008) 20(6) *Gender and Education*, 555, online: www.psychologytoday.com/files/attachments/31038/meyer2008gendered-harassment.pdf.

⁴⁶ See, for example, *Perez-Moreno v. Kulczycki*, 2013 HRTO 1074 (CanLII) re: posting discriminatory comments on Facebook. See also *Vanderputten*, *supra*, note 30, where a trans person was subjected to harassing bulletin board postings.

⁴⁷ *Perez-Moreno*, *ibid.*

⁴⁸ *Ibid.*

- Displaying or circulating pornography,⁴⁹ sexual pictures or cartoons,⁵⁰ sexually explicit graffiti,⁵¹ or other sexual images about trans people including through the Internet
- Leering or inappropriate staring⁵²
- Threats, unwelcome touching, violence and sexual assault.

Harassment against trans and other gender non-conforming individuals can be a mix of unwelcome gender-based and sexual behaviour at the same time. Harassment is often used to get people to follow traditional sex stereotypes. It is also used as a bullying tactic to ridicule, ostracize and exercise power over people based on how they dress, act, or express their gender.⁵³

Trans people are particularly vulnerable to gender-based harassment and sexual harassment during the time when they publicly transition to their felt gender identity, or if their trans history is disclosed to others.

Example: A factory worker transitioned from identifying and presenting as a man to identifying and presenting as a woman. Over a period of years during and after her transition, she alleges she was exposed to sexual conversations and pornography. Co-workers grabbed and touched her breasts, buttocks and genitals and called her names like “he-she.”⁵⁴

Harassment because of gender expression can affect people who are not trans.

Example: An outspoken, high-performing woman in a male-dominated professional accounting office was denied partnership and told to learn how to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewellery....”⁵⁵

⁴⁹ *Baylis-Flannery v. DeWilde*, 2003 HRTO 28 (CanLII); *Waroway v. Joan & Brian’s Upholstering & Interior Decorating Ltd.* (1992), 16 C.H.R.R. D/311 (Ont. Bd. Inq.); see also *Abdolalipour v. Allied Chemical Canada Ltd.* (1996), [1996] O.H.R.B.I.D. No. 31 (Ont. Bd. Inq.); *deSousa v. Gauthier* (2002), 43 C.H.R.R. D/128 (Ont. Bd. Inq.)

⁵⁰ *deSousa v. Gauthier* (2002), 43 C.H.R.R.D/128 (Ont. Bd. Inq.).

⁵¹ *Fleet Industries v. International Assn. of Machinists and Aerospace Workers, Local 171 (H. Grievance)*, [1997] O.L.A.A. No. 791.

⁵² *Harriott v. National Money Mart Co.*, 2010 HRTO 353 (CanLII) and *Garofalo v. Cavalier Hair Stylists Shop Inc.*, 2013 HRTO 170 (CanLII). Depending on the circumstances, consideration should be given to whether there are other plausible explanations for “inappropriate” staring. For example, a person with a visual or other disability may not be aware that they are staring.

⁵³ For a discussion of gender-based harassment and homophobic harassment in the school setting, see Meyer, *supra*, note 45.

⁵⁴ Leslie Fulbright, “Transsexual says ex-employer ignored harassment” *San Francisco Chronicle* (25 February 2009), online: SFGate www.sfgate.com/bayarea/article/Transsexual-says-ex-employer-ignored-harassment-3250009.php.

⁵⁵ *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), as discussed in Jennifer L. Berdahl, “The Sexual Harassment of Uppity Women,” (2007) 92(2) *Journal of Applied Psychology* 425 at 426. See also *Farris v. Staubach Ontario Inc.*, 2011 HRTO 979 (CanLII).

Harassment can be a hostile attempt to make someone feel unwelcome in their environment because of the way they express their gender. In some cases, it may take the form of homophobic bullying because others see the person's gender expression as an expression of their sexual orientation.

Example: A female high school student who is not trans wears her hair short with masculine clothes and is very athletic. She is repeatedly called a “dude,” “she-man” and “dyke” by groups of kids in her school and players on teams from other schools.

Harassment can happen between members of the same sex or gender identity. Male-to-male gender-based harassment, for example,⁵⁶ is aimed at men who appear more feminine, gay or otherwise “insufficiently” masculine based on stereotypes about gender.⁵⁷ The harassment will often involve homophobic slurs and taunting, no matter what the perpetrator or victim's sexual orientation, gender identity or expression.⁵⁸

In addition to the *Code's* explicit protection against harassment in housing and employment, harassment is also prohibited in services and other social areas.⁵⁹

Organizations have an obligation to maintain an environment free of harassment targeting people because of their gender identity or gender expression, whether or not anyone objects.⁶⁰

For more information see the OHRC's *Policy on preventing sexual and gender-based harassment*.⁶¹ Also see section 12 of this policy: Corporate liability.

⁵⁶ There are also cases of female-to-female harassment. See Janine Benedet, “Same-Sex Sexual Harassment in Employment”, (2000), 26 Queen's L. J. 101.

⁵⁷ As discussed in Margaret S. Stockdale, “The Sexual Harassment of Men: Articulating the Approach-Rejection Theory of Sexual Harassment,” in James E. Gruber & Phoebe Morgan, eds., *In the Company of Men: Male Dominance and Sexual Harassment*, (Boston: Northeastern University Press, 2005) 215 at 237.

⁵⁸ *Selinger v. McFarland*, 2008 HRTO 49 at para. 23 (CanLII): “Although the case was advanced on the ground of ‘perceived’ sexual orientation, in my view, there is no necessity to rely on the concept of perception in this case. In *Jubran*, the majority found that neither the sexual orientation of the complainant nor the perception of the alleged harassers was relevant in determining a complaint of sexual orientation discrimination. Comments and conduct that are derived from derogatory stereotypes of gay men, lesbians, bisexuals and transgendered people are captured by the prohibited ground of sexual orientation, regardless of the complainant's sexual identity or the perception of the respondent.” See also *Smith v. Menzies Chrysler Inc.* 2009 HRTO 1936 (CanLII); (reconsideration request denied in 2009 HRTO 2270 (CanLII)).

⁵⁹ See *Haykin v. Roth*, *supra*, note 40, confirming that harassment in services is prohibited under the *Code*.

⁶⁰ In the case of employment, the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1, s. 32.0.1 requires all employers with over five employees to establish policies on harassment and violence in the workplace and to review these annually. In *Berger v. Toronto (City)*, 2011 HRTO 625, the HRTO also confirmed that an organization has an obligation to accommodate mental health disabilities that arise due to workplace harassment or conflict, provided they are diagnosed by physician and accommodation is required based on medical evidence. This obligation exists regardless of whether the harassment is proven.

⁶¹ See OHRC's *Policy on preventing sexual and gender-based harassment*, online: OHRC www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment-0

7.5 Poisoned environment

While harassment generally involves a series of incidents, in some cases, one incident could be severe or serious enough to create a poisoned environment.⁶²

A poisoned environment is a form of discrimination. In employment, tribunals have held that the atmosphere of a workplace is a condition of employment as much as hours of work or rate of pay. A “term or condition of employment” includes the emotional and psychological circumstances of the workplace.⁶³ A poisoned environment can also happen in housing and services.

A poisoned environment may happen when unwelcome comment and conduct is ongoing or widespread throughout an organization. This can lead to a hostile or oppressive atmosphere for one or more people from a *Code*-protected group.

While ongoing exposure to harassment can be a factor, a poisoned environment is also based on the nature of the comments or conduct and the impact on an individual or group rather than just on the number of times the behaviour happens.⁶⁴

Behaviour need not be directed at any one person to create a poisoned environment. A person can experience it even if not a member of the targeted group. Failing to address discrimination and harassment may in itself cause a poisoned environment.⁶⁵

The consequence of a poisoned environment is that certain people or groups like trans people face negative terms and conditions of employment, tenancy, education or other services that other people do not experience. A poisoned environment might also cause a person to delay transitioning and can negatively affect other gender non-conforming individuals as well as friends and family.

A poisoned environment can happen because of the comments or actions of any person, regardless of their position of authority or status. It could involve a co-worker, supervisor, co-tenant, housing provider, member of the Board of Directors, fellow student, teacher, contractor, client, etc. Whoever is involved, the person in charge has a duty to address it.

⁶² In *Dhanjal v. Air Canada* (1996), 28 C.H.R.R. D/367 (C.H.R.T.), the tribunal noted that the more serious the conduct, the less need there is for it to be repeated. Conversely, the tribunal held the less serious the conduct, the greater the need to show its persistence. See also *General Motors of Canada Limited v. Johnson*, 2013 ONCA 502 (CanLII).

⁶³ *Smith v. Menzies Chrysler Inc.*, *supra*, note 58; *Dhillon v. F.W. Woolworth Co.* (1982), 3 C.H.R.R. D/743 at para 6691 (Ont. Bd. Inq.); *Naraine v. Ford Motor Co. of Canada (No. 4)* (1996), 27 C.H.R.R. D/230 at para. 50 (Ont. Bd. Inq.).

⁶⁴ See *Moffatt v. Kinark Child and Family Services* (1998) 35 C.H.R.R. D/205 (Ont. Bd. Inq.); *Kharoud v. Valle-Reyes* (2000) BCHRT 40; *Dhanjal*, *supra*, note 62.

⁶⁵ *Vanderputten*, *supra*, note 30; *McKinnon v. Ontario (Ministry of Correctional Services)*, [1998] O.H.R.B.I.D. No. 10.

Example: A trans woman was subjected to a poisoned work environment through harassing comments and being required to use the men’s change room. The company contributed to the poisoned environment by insisting that she be treated as a man in all respects until she completed surgery, and by failing to investigate and respond to her allegations of harassment.⁶⁶

Organizations have a duty to maintain an environment free from discrimination, to be aware of a poisoned environment that exists, and to take steps to respond and eliminate it.⁶⁷ This is the case even if no one objects, and even if there is widespread participation in the behaviour.⁶⁸ Managers who know or should know a poisoned atmosphere exists but allow it to continue are essentially promoting discrimination even if they are not directly involved (also see section 12 of this policy: Corporate liability).⁶⁹

7.6 Systemic discrimination

Discrimination is not always just between individuals. It can be more complex and systemic, embedded in patterns of behaviour, policies and practices that are part of the administrative structure or informal culture of an organization, institution or sector. It can be hidden to the people who don’t experience it. Sometimes a group’s historical disadvantage is a factor that gives rise or contributes to the systemic discrimination they experience.

These factors sometimes appear neutral on the surface but can have an adverse or negative effect, creating or continuing disadvantage and limiting rights and opportunities for trans and other gender non-conforming persons.⁷⁰

Example: A new recreational hockey league is divided into men’s and women’s teams. A trans man who plays in another women’s league wants to join the men’s team. The new league interprets the rules to mean you must play on the team that matches your birth-assigned sex.

⁶⁶ *Vanderputten*, *supra*, note 30.

⁶⁷ See for example *Vanderputten*, *supra*, note 30.

⁶⁸ See *Smith v. Mardana Ltd. (No. 1)*, *supra*, note 28, and *Naraine v. Ford Motor Company*, *supra*, note 63.

⁶⁹ *Ghosh v. Domglass Inc.* (1992), 17 C.H.R.R. D/216 at para. 76 (Ont. Bd. Inq.).

⁷⁰ In *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court of Canada reaffirmed its earlier definition of systemic discrimination set out in its seminal 1987 decision *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at p. 1138-1139 as, “practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics.” The OHRC uses “systemic discrimination” when referring to individual institutions, or a system of institutions, that fall under the jurisdiction of the *Code* (e.g. the education system).

Systemic discrimination may include aspects of overt as well as adverse effect discrimination that overlap and compound the problem.⁷¹

Example (continued): The new hockey league’s governing board denies the trans man’s application based on their interpretation of the rules. They also claim that dressing rooms would be a problem. The chair of the board has not kept the matter confidential and is advising other leagues in the area to keep trans people from playing on the “wrong” team.

Organizations and institutions have a positive obligation to make sure they are not engaging in systemic discrimination. They should prevent barriers by designing policies and practices inclusively up front. They should also review their systems and organizational culture regularly and remove barriers where they exist.

Organizations must also address new problems when they come up. To the greatest extent possible, this means changing policies and practices to include and accommodate⁷² more people instead of merely making exceptions for people who don’t “fit” in the existing system.⁷³

Example (continued): The recreational hockey league still has separate women’s and men’s teams, but changes its policy to permit players to play on the team that matches their lived gender identity.

8. The duty to accommodate

Under the *Code*, employers and unions, housing and service providers have a legal duty to accommodate the needs of people because of their gender identity or gender expression, unless it would cause undue hardship. The goal of accommodation is to help everyone have equal opportunities, access and benefits. Failure to accommodate may lead to a finding of discrimination under the *Code*.

Employment, housing, services and facilities and related requirements should be designed inclusively up front to minimize the need for individual accommodation. They must be adapted when people have accommodation needs related to their gender

⁷¹ *Pivot Legal Society v. Downtown Vancouver Business Improvement Assn. (No. 6)* (2012), CHRR Doc. 12-0023, 2012 BCHRT 23, para 581: “To summarize, I find that systemic discrimination, like individual discrimination, may include components of direct, as well as adverse effect discrimination.”

⁷² For more information about the duty to accommodate see sections 8, 9 and 10 of this policy.

⁷³ The *Supreme Court of Canada* has been clear that systems must be designed to be inclusive of all persons and to reflect differences among individuals. Standards should provide for individual accommodation, if reasonably possible. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [“*Meiorin*”].

identity or expression. This should always be done in a way that best promotes the person's integration and full participation. Most accommodations are not difficult, and should not cause a major burden for those responsible.

Many trans people will not require any accommodations at all. It will depend on the needs of the particular person and the situation.

8.1 Procedural and substantive duties

The duty to accommodate has both a procedural component (the process) and a substantive component (the accommodation provided). Both are equally important.⁷⁴

The procedural duty involves the considerations, assessments and steps taken to respond to an accommodation need.⁷⁵ The courts have said that, "a failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the 'procedural' duty to accommodate."⁷⁶

The substantive duty is about the appropriateness or reasonableness of the chosen accommodation as well as the reasons for not providing an accommodation, including proof of undue hardship.⁷⁷

8.2 Principles

The duty to accommodate is made up of several principles including respect for dignity, individualization, integration and full participation.

8.2.1 Respect for dignity

Human dignity involves many factors, including respect for trans people and other gender non-conforming individuals and their self-worth as well as their physical and psychological integrity and empowerment. It is also about privacy, confidentiality, comfort, autonomy, individuality and self-esteem.

⁷⁴ See *Meiorin*, *ibid* at paras. 65-6 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868, at paras. 22 and 42-45 ("Grismer"). See also *Adga Group Consultants Inc. v. Lane*, *supra*, note 24.

⁷⁵ In *Gourley v. Hamilton Health Sciences*, 2010 HRTO 2168 (CanLII), the adjudicator stated: "The substantive component of the analysis considers the reasonableness of the accommodation offered or the respondent's reasons for not providing accommodation. It is the respondent who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate the employee to the point of undue hardship..." (at para. 8).

⁷⁶ *Adga Group Consultants Inc. v. Lane*, *supra*, note 24, at para. 107 (ON SCDC).

⁷⁷ See *Gourley*, *supra*, note 75, at para. 8.

Dignity includes considering how accommodation is provided and the person's own participation in the process. Organizations responsible for providing accommodation should consider the different ways people may need accommodation in their workplace, housing environment or when accessing a service.

8.2.2 Individualization

There is no set formula for people who might require accommodation because of their gender identity and expression. Each person's needs are unique and must be considered when an accommodation request is made. While some accommodations may only meet one person's needs, organizations will find that many of the changes they implement will benefit others as well.

8.2.3 Integration and full participation

Employment, housing, services and facilities should be designed, and may need to be adapted, to accommodate the needs of trans people in a way that best promotes their integration and full participation.⁷⁸ Segregated treatment is less dignified and is unacceptable unless it can be shown it's the best way to achieve equality in the circumstances.⁷⁹

8.2.4 Inclusive design

Achieving integration and full participation requires barrier-free inclusive design up front as well as removing existing barriers. Good inclusive design will minimize the need for people to ask for individual accommodation. The Supreme Court of Canada has said that standards should be designed to reflect all members of society, to the extent that this is reasonably possible.⁸⁰

Organizations should design inclusively for the needs of trans people when they develop or change policies, programs, procedures, standards, requirements and facilities. They should not create new barriers.

Example: Organizations should make sure their forms do not ask for a person's sex or gender unless they can show it is necessary for providing the service.

⁷⁸ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 ["Eaton"].

⁷⁹ *Ibid.* The Supreme Court stated that "integration should be recognized as the norm of general application because of the benefits it generally provides" (at para. 69). However, the Court found that in Emily Eaton's circumstances, segregated accommodation was in her best interests. The Court was of the view that this was one of those unusual cases where segregation was a more appropriate accommodation.

⁸⁰ *Meiorin*, *supra*, note 73, at para. 68.

8.2.5 Appropriate accommodation

Where barriers continue to exist because it is not possible to remove them at a given point in time, then accommodations must be provided, unless this causes undue hardship.

Accommodation is a process and a matter of degree. Different options can be seen along a continuum. The most appropriate accommodation will be the one that best respects dignity, meets individual needs, and promotes inclusion and full participation.

An organization should first identify what is the most appropriate or ideal accommodation in the circumstances before considering whether it would cause undue hardship. It must put in place the most appropriate accommodation unless it is not possible in the circumstances, or would cause undue hardship. In that case, the organization must consider and put in place next-best, phased-in or interim solutions.

Example: A fitness club member is in the process of transitioning to identifying publicly as a woman. She no longer feels it's appropriate or safe to use the men's change room but is not yet comfortable using the women's change room. The club manager explores interim solutions with her, such as a privacy curtain or partition in the women's or men's shower and change areas, or access to private staff space.

The club is also looking at more universally inclusive options for the future such as building an accessible privacy stall in each change room, and/or a universal single-user gender-neutral washroom with a shower and space for changing. These could be used by anyone who needs them such as a person who is transitioning, a person with a disability, a family, or others.

This approach allows a trans member to use the facilities based on their lived gender identity and have options while transitioning. It also provides greater privacy options for all members. The club also develops a policy addressing the rights of trans members and educates staff about the policy.

In some cases, the most appropriate accommodation may involve changing policies, practices and other requirements so they are more inclusive. It may require flexibility when enforcing rules and requirements or otherwise proof of why the requirement is legitimate and necessary in the circumstances (also see section 9 of this policy: Reasonable bona fide requirements). This type of accommodation may come up, for example, when a trans person requests a change to administrative documents and electronic records and databases to reflect their lived gender and chosen name (also see section 13.3 of this policy: Identity documents).

Organizations will find that inclusive design, barrier removal and individual accommodations often benefit larger numbers of people.

8.3 Roles and responsibilities

Accommodation is a multi-party process and shared responsibility.⁸¹ Everyone must work together cooperatively and respectfully to explore and implement appropriate accommodation solutions.

The person seeking accommodation is responsible for:

- Telling the accommodation provider (employer, landlord, service provider, etc.) when they have *Code*-related needs that require accommodation
- Providing information relevant to their needs and meeting any agreed-upon standards once accommodation has been provided
- Cooperating in the accommodation process to the best of their ability.

Accommodation providers are responsible for:

- Accepting requests for accommodation in good faith (unless there is evidence the request is not genuine)
- Making reasonable requests for only information that is necessary to clarify the nature and extent of the accommodation needed for the situation
- Making sure that information related to accommodation is kept confidential and shared only with people who need the information for their role in implementing the accommodation
- Acting in a timely way and taking an active role in looking for solutions
- Covering any appropriate costs related to the accommodation.

Keeping information about someone's trans identity private and confidential is critical because of the stigma and stereotypes that trans people often face.

9. Reasonable *bona fide* requirements

The *Code* prohibits discrimination that results from requirements, qualifications, or factors that may appear neutral but have an adverse or negative effect on people identified by *Code* grounds.⁸²

At the same time, the *Code* allows an organization to show that the requirement, qualification or factor is nevertheless "reasonable and *bona fide*" in the circumstances. However, to do this, the organization must show that the needs of the person cannot be accommodated without undue hardship.⁸³

⁸¹ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

⁸² See section 11 of the *Code*: Constructive discrimination.

⁸³ The test for undue hardship is set out fully in the OHRC's *Policy and guidelines on disability and the duty to accommodate*, and is discussed in greater detail in section 10.3 of this policy.

The legal test

The Supreme Court of Canada has set out a framework for deciding whether a *prima facie* (on its face) discriminatory requirement⁸⁴ is reasonable and *bona fide* (legitimate) in the circumstances. The organization must show on a balance of probabilities (more likely than not) that the requirement:

1. Was adopted for a purpose or goal that is rationally connected to the function being performed
2. Was adopted in good faith, in the belief that it is necessary to fulfill the purpose or goal
3. Is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

Ultimately, the person who wants to justify a discriminatory requirement, rule or standard must show that accommodation was incorporated into the standard to the point of undue hardship. This means the requirement was designed or changed to include as many people as possible, and that any remaining individual needs were accommodated, short of undue hardship.

Example: In the case *XY v. Ontario (Government and Consumer Services)*, the Human Rights Tribunal of Ontario (HRTO) found that requiring trans people to have transsexual surgery to change their sex designation on a birth certificate (under the *Vital Statistics Act*) was not reasonable and *bona fide* and discriminated against trans people.

The HRTO said: “the respondent has not established that allowing transgendered persons to change the sex designation on their birth registrations and birth certificates without surgery would make vital event data less accurate and reliable than it is under the current system, let alone to the point of imposing undue hardship on the respondent.”⁸⁵

In this case, the Province of Ontario failed the third part of the test and could not show the requirement was “reasonably necessary....”

⁸⁴ See section 6.2 of this policy, Determining discrimination, for an explanation of *prima facie* discrimination.

⁸⁵ *XY v. Ontario (Government and Consumer Services)* 2012 HRTO 726 at paras. 238 and 240 (CanLII). See also *Finan v. Cosmetic Surgicentre (Toronto)*, 2008 HRTO 47 at paras. 42-50 (CanLII) for a case where the HRTO found the respondent met the three-step test, therefore justifying *prima facie* discriminatory treatment in services. See also *Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Maison des jeunes À-Ma-Baie Inc. (No 2)* (1998), 33 C.H.R.R. D/263 (T.D.P.Q.) for a case where an employer did not meet the three-step test and could not establish a genuine and *bona fide* occupational requirement related to gender identity.

10. Other limits on the duty to accommodate

10.1 Failing to participate in the accommodation process

Everyone involved in the accommodation process has a duty to cooperate to the best of their ability. In some cases, an organization may have met its procedural and substantive duty to accommodate where the person requesting accommodation did not sufficiently take part in the process, refused or otherwise could not take part at all. While a person may ask for a certain type of accommodation, both sides should be willing to explore options that appropriately meet the person's needs.

Before concluding that a person has failed to cooperate in the accommodation process, organizations should consider if there are any disability or other *Code*-related factors that may prevent the person from taking part. The organization may need to accommodate these factors as well. They should also consider whether there is a need to adjust the accommodation because it is not working.

10.2 Balancing competing rights

Generally, when a person makes an accommodation request, the organization or institution responsible for accommodation will be able to provide the accommodation without it affecting the legal rights of other people.

Sometimes, however, a request for accommodation may result in a “competing human rights” situation if the rights of another person or group are also affected.

Organizations have a legal duty to take steps to prevent and respond to situations involving competing rights. The OHRC's *Policy on competing human rights* sets out a framework for dealing with competing human rights situations as well as preventing conflicts from happening.⁸⁶ Part of the analysis involves considering whether there is a legislative exemption for the situation, or whether the interference with the rights of another person or group is significant or substantial.

Example: In a case that went to the British Columbia Court of Appeal, the Vancouver Rape Relief Society decided not to train a trans woman as a volunteer because she had lived part of her life as a man. They argued the restriction was a legitimate requirement for the position because they provide services specifically to women who have experienced violence from men.

⁸⁶ For more information, see the OHRC's *Policy on competing human rights* online: OHRC www.ohrc.on.ca/en/policy-competing-human-rights.

The Court discussed the impact on both sides (the volunteer and the clients) and found that while the organization had appeared to discriminate against the trans woman, an exemption in the BC *Human Rights Code*, which is designed to address competing rights, protected the organization from liability in this situation.⁸⁷

Each competing rights situation must be examined and decided on its own merits giving serious consideration to the specific context. A different set of facts could mean a different outcome in another situation.

10.3 Undue hardship

Organizations have a duty to accommodate the needs of trans people and other gender non-conforming individuals, unless it would cause undue hardship.

Undue hardship is difficult to prove. The *Code* prescribes three factors to decide whether an accommodation would cause undue hardship:

- Cost
- Outside sources of funding, if any
- Health and safety requirements, if any.

Only these three factors can be used to assess undue hardship. The onus of proving it lies with the organization.⁸⁸ They cannot rely on impressionistic views or stereotypes,⁸⁹ anecdotal evidence or after-the-fact justifications.⁹⁰ Nor can an organization speculate as to what might or might not happen if the accommodation is provided.⁹¹ The evidence to prove undue hardship must be real, direct, objective, and in the case of costs, quantifiable.

The cost standard is a high one.⁹² An organization would need to show in an objective way that the cost of the accommodation, for example, would alter the essential nature of what it does or would substantially affect its viability. In making this assessment, organizations should consider:

- What is the size of the operation? What might prove to be a cost amounting to undue hardship for a small organization will not likely be the same for a larger organization.
- Can the costs be recovered in the normal course of operation?

⁸⁷ *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601, application for leave to appeal to SCC dismissed 2007 CanLII 2772 (SCC).

⁸⁸ *Grismer*, *supra*, note 74, at para. 42.

⁸⁹ *Meiorin*, *supra*, note 73, at para. 78-79 and *Grismer*, *supra*, note 74, at para. 41. Cases since *Meiorin* and *Grismer* have also applied this stringent requirement for objective evidence; see, for example, *Miele v. Famous Players Inc.* (2000), 37 C.H.R.R. D/1 (B.C.H.R.T.).

⁹⁰ See *Buttar v. Halton Regional Police Services Board*, 2013 HRTO 1578 (CanLII).

⁹¹ *Adga Group Consultants Inc. v. Lane*, *supra*, note 24.

⁹² *Grismer*, *supra*, note 74, at para. 41.

- Can other divisions or departments of the organization help absorb the cost?
- Can the costs be phased in over a longer time period?
- Can the organization set aside a certain percentage of money every year in a reserve fund to be used for accommodation?

To offset costs, an organization has an obligation to consider any outside sources of funding or in-kind resources available to make the accommodation. A person seeking accommodation is also expected to take advantage of any available outside resources that could help cover expenses related to the accommodation.

Health and safety concerns will amount to undue hardship if they are shown to be real and significant. Organizations have a legal obligation to protect the health and safety of all their employees, clients, tenants and others.⁹³ They should consider whether changing or waiving a health and safety requirement or providing any other type of accommodation might result in a serious health or safety risk. An organization should look at:

- The nature and severity of the risk
- The likelihood of it happening, and who might be affected
- If the risk only involves the person asking for accommodation, would they be willing to assume it?
- How does the risk compare to other risks allowed within the organization or already tolerated in society as a whole?

Organizations must try to mitigate or reduce risks where they exist. The amount of risk that exists after accommodations have been made and precautions have been taken to reduce the risk (short of undue hardship based on cost) will determine whether there is undue hardship.⁹⁴

Example: A trans female employee makes an accommodation request for some physical changes to the washrooms as well as the corporate policy on their use. The employer denies the request, claiming undue hardship for “safety” reasons. However, it appears they are speculating and have no evidence of a real risk. Also, the employer hasn’t shown why it couldn’t deal with a safety issue even if one did come up.

⁹³ For example, see *Occupational Health and Safety Act*, *supra*, note 60.

⁹⁴ For more information about undue hardship, see the OHRC’s *Policy and guidelines on disability and the duty to accommodate* online: OHRC www.ohrc.on.ca/en/policy-and-guidelines-disability-and-duty-accommodate

11. Complaints and reprisal

Trans people and other gender non-conforming individuals who believe they experienced discrimination or harassment should try to raise the matter or make a complaint with their employer, union or other vocational association, landlord or service provider. If this is not possible or the problem is not addressed, they can ask the Human Rights Legal Support Centre⁹⁵ for advice or make a complaint – called an application – to the Human Rights Tribunal of Ontario⁹⁶ within one year from the last alleged incident.

The *Code* protects people if they experience reprisal or threats of reprisal for claiming their rights.⁹⁷ A reprisal is an action or threat that is intended as retaliation or punishment for claiming or enforcing a right under the *Code*. However, there is no strict requirement that someone who alleges reprisal must have already made an official complaint or claim under the *Code*.⁹⁸ Also, to prove reprisal, a person does not have to show their rights were actually infringed.⁹⁹

People associated with people who have experienced or complained about discrimination are also protected from discrimination and reprisal (also see section 7.3 of this policy: Association).¹⁰⁰

12. Corporate liability

Organizations have a legal duty and ultimate responsibility to maintain an environment free from discrimination and harassment because of gender identity and expression. They must take steps to prevent and respond to violations of the *Code* or they may be held “liable” and face monetary penalties or other orders from a tribunal or court.

It is unacceptable to choose to remain unaware, ignore or fail to address potential or actual human rights violations, whether or not a complaint is made.¹⁰¹

⁹⁵ www.hrlsc.on.ca/en/Default.aspx

⁹⁶ www.hrto.ca/hrto/

⁹⁷ See section 8 of the *Code*: Reprisal. Also see section 7(3)(b) which also prohibits reprisal for rejecting a sexual solicitation or advance, where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

⁹⁸ *Noble v. York University*, 2010 HRTO 878 at paras. 30-31, 33-34 (CanLII). Reprisal is established if:

- An action was taken against, or a threat was made to, the claimant
- The alleged action or threat was related to the claimant having claimed, or trying to enforce a *Code* right, and
- There was an intention on the part of the respondent to retaliate for the claim or the attempt to enforce the right.

⁹⁹ *Ibid.* See also *Bertrand v. Primary Response*, 2010 HRTO 186 (CanLII).

¹⁰⁰ *Knibbs v. Brant Artillery Gunners Club*, *supra*, note 39.

¹⁰¹ *Re Dupont Canada Inc. and Kingston Independent Nylon Workers Union*, [1993] O.L.A.A. No. 426 at para. 67; *Alberta v. Alberta Union of Provincial Employees (Banack Grievance)*, [1999] A.G.A.A. No. 74 at para. 86.

Under section 46.3 of the *Code*, a corporation, trade union or occupational association, unincorporated association or employers' organization will be held responsible for discrimination, including acts or omissions, committed by employees or agents in the course of their employment. This is known as "vicarious liability."

Responsible parties violate the *Code* where they directly or indirectly, intentionally or unintentionally infringe the *Code*, or where they otherwise authorize, condone or adopt behaviour that is contrary to the *Code*.

Multiple organizations may be held jointly liable where they all contribute to discrimination. Tribunals and courts may also find organizations liable because they failed to respond appropriately to discrimination and harassment. Organizations may face higher damages as a result.¹⁰²

Vicarious liability does not apply to the parts of the *Code* dealing with harassment. However, since a poisoned environment is a form of discrimination, when harassment amounts to or results in a poisoned environment, vicarious liability is restored. The "organic theory of corporate liability" may also apply. That is, an organization may be liable for acts of harassment carried out by its employees if it can be proven that management was aware of the harassment, or the harasser is part of the management or "directing mind" of the organization.¹⁰³

Generally speaking, anybody with authority or significant responsibility for the guidance of others will be considered part of the "directing mind."

13. Preventing and responding to discrimination

13.1 Organizational reviews, policies and education

Corporate liability involves more than individual instances of discrimination and harassment. Organizations also risk violating the *Code* if they do not address underlying problems such as systemic barriers, a poisoned environment or an organizational culture that condones discrimination.

There are several steps organizations can take to make sure they are following the *Code* and human rights principles related to gender identity and expression. Strategies can include developing and implementing:

- A barrier prevention, review and removal plan
- Anti-harassment and anti-discrimination policies
- An accommodation policy and procedure

¹⁰² *Smith v. Menzies Chrysler Incorporated*, *supra*, note 58.

¹⁰³ *Olarte v. DeFilippis and Commodore Business Machines Ltd. (No. 2)* (1983), 4 C.H.R.R. D/1705 (Ont. Bd. Of Inq.), *aff'd* (1984), 14 D.L.R. [4th] 118 (Div. Ct.).

- An internal complaints procedure
- An education and training program¹⁰⁴
- Ongoing monitoring and evaluation.

Under the *Occupational Health and Safety Act*, all workplaces in Ontario are expected to develop harassment policies and review these at least once a year. Harassment policies should specifically recognize protection for gender identity and expression among other *Code* grounds.¹⁰⁵

For more information about these types of strategies, see the OHRC's *Policy primer: guide to developing human rights policies and procedures*.¹⁰⁶

Organizations should also consider developing policies and procedures to deal with the specific needs of trans people related to transitioning, identity documents, washrooms and change facilities, privacy and confidentiality, etc. These issues were raised during the OHRC's public consultation¹⁰⁷ and are covered in more detail in the next sections of this policy. Addressing them will help remove significant barriers for trans people in their daily lives.

Also see Appendix C: Best practices checklist on these issues and on dress codes, collecting data on sex and gender as well as workplace gender transition guidelines and individual plans.

13.2 Transitioning

Transitioning refers to the activities and process that people may follow to help them live their felt gender identity. This can be very different for each person and some may always be in a state of transition (also see Appendix C: Glossary).

People who are transitioning may need distinct forms and degrees of accommodation along the way. They may ask for recognition of their preferred gender and name while waiting for formal changes to official identity documents. Some may need temporary access to private single-user washrooms and change rooms or housing facilities. They may also need time away for medical procedures or other activities to support their transition. Generally, these will be temporary until the person is ready to access regular services and facilities according to their lived gender identity.

¹⁰⁴ This should include training and education that specifically focuses on the stereotypes and discrimination that trans people face [see *Forrester v. Regional Municipality of Peel (Police Services Board)*, *supra*, note 23, at paras. 473 and 476]. Also see the *Yogyakarta Principles*, *supra* note 20, at Principle 17, which calls for implementing education and training programs to enable all health care practitioners to deliver the highest attainable standard of health care, with full respect for each person's gender identity.

¹⁰⁵ Also see *Occupational Health and Safety Act*, *supra*, note 60.

¹⁰⁶ See the OHRC's *Policy primer: guide to developing human rights policies and procedures* online: OHRC www.ohrc.on.ca/en/guidelines-developing-human-rights-policies-and-procedures

¹⁰⁷ See OHRC Consultation backgrounder, *supra*, note 11.

Transitioning can be a very difficult and stressful time for trans people. They are “coming out” to live their felt gender identity making them particularly vulnerable to discrimination and harassment. Issues like name and gender recognition and access to washrooms go to the core of people’s human dignity.

Respect, understanding and confidentiality is everyone’s responsibility during transition and the accommodation process. Organizations should be alert to preventing and addressing any harassment that may happen. Developing policies and training staff will also help prevent problems during transition.

13.3 Identity documents

13.3.1 Barriers

Many identity documents such as birth certificates, health cards, passports, drivers’ licences, school and medical records, etc., show a person’s sex or gender. For trans people, these documents may not match their lived gender identity.

Discrepancies on official documents can create significant barriers, disadvantage and even health and safety risks for trans people.

Example: In *XY v. Ontario (Government and Consumer Services)*, the HRTO said: “A non-transgendered woman can confidently produce a birth certificate when she is required to do so (or when it would be convenient to do so) without having to contend with a sex designation that is incongruent with her lived experience. Her gender identity accords with the sex assigned at birth and is not open to question or challenge. For a transgendered woman, however, this simple act is fraught with risk. Will she be perceived differently as a result of producing a birth certificate that shows that ‘officially’ she is a different gender from the one that she presents? Will her gender identity be questioned or challenged by the person viewing her birth certificate? Will she even perhaps be subject to ridicule or humiliation as a result of producing a government issued document that states that she is a different gender than the one in which she presents herself?”¹⁰⁸

Trans people may face invasive questions from schools, shelters, hospitals, potential employers or even police about why their gender expression doesn’t “match” the gender designation on a document. An organization might be unwilling to recognize the person’s chosen name and gender. The person may be placed in the “wrong” sex segregated setting such as dorms or hospital rooms that don’t match their lived gender.

An organization should have a valid reason for collecting and using personal information that identifies a person’s gender. They should keep this information confidential.

¹⁰⁸ *XY v. Ontario (Government and Consumer Services)*, *supra*, note 2, at paras. 147-48.

13.3.2 Changing a name or sex designation

International human rights standards¹⁰⁹ and Ontario case law confirm that a trans person cannot be expected to go through sex reassignment surgery, or any other medical procedure, as a condition to change the gender designation on their identity documents.

Example: In *XY v. Ontario (Government and Consumer Services)*, the HRTO found the requirement under the *Vital Statistics Act* that a person must certify they had sex-reassignment surgery before being able to change the sex designation on their birth certificate was discriminatory because it resulted in disadvantageous treatment or impact and perpetuated stereotypes about trans people.¹¹⁰ The Tribunal said:

The message conveyed is that a transgendered person's gender identity only becomes valid and deserving of recognition if she surgically alters her body through "transsexual surgery." This reinforces the prejudicial view in society that, unless and until a transgendered person has "transsexual surgery," we as a society are entitled to disregard their felt and expressed gender identity and treat them as if they are "really" the sex assigned at birth.¹¹¹

While the Ontario Government has not amended the *Vital Statistics Act*, it has made changes to the criteria for changing sex designation on an Ontario birth registration. Sex reassignment surgery is no longer required. A practicing physician or psychologist need only certify that a change in sex designation is appropriate given the person's lived gender identity.¹¹²

Criteria for changing the name and or sex designation on identity documents should be respectful, non-intrusive, and need not necessarily be medically based.

Example: Many types of professionals – social workers, nurses, school or college or university officials, therapists, employers, members of one's family, faith community or others – could confirm a person is trans and living publicly in the gender matching the change they are requesting.¹¹³

¹⁰⁹ See *Yogyakarta Principles*, supra note 20, at Principle 3. See also, Report of the United Nations High Commissioner for Human Rights, supra note 22, at p.22, 25.

¹¹⁰ *XY v. Ontario (Government and Consumer Services)*, supra, note 2, at paras. 14-15.

¹¹¹ *Ibid.* at para. 172.

¹¹² As of the publication date of this policy, the Government of Ontario has not yet amended the discriminatory section 36 provision of the *Vital Statistics Act*, R.S.O. 1990, c. V.4. To learn more about the Government of Ontario's revised requirements for changing the sex designation on a birth certificate see: Service Ontario, *Changing your sex designation on your birth registration and birth certificate* online: Service Ontario www.ontario.ca/government/changing-your-sex-designation-your-birth-registration-and-birth-certificate (retrieved February 19, 2014).

¹¹³ See the OHRC's response to the Ministry of Government Services' consultation document on revised criteria for change of sex designation on an Ontario birth registration, online: OHRC www.ohrc.on.ca/en/re-consultation-document-%E2%80%93-revised-criteria-change-sex-designation-ontario-birth-registration.

Other requirements related to changing a name or sex designation, such as public disclosure, should not negatively affect trans people.

Example: In 2006, the OHRC raised concerns that public disclosure requirements under the *Change of Name Act* were having a discriminatory impact on trans people, effectively “outing” them in public records. To address this, the Government of Ontario amended the legislation and changed the related regulations, accommodating trans people by allowing for a non-publication option.¹¹⁴

13.3.3 Recognizing lived gender identity

Sometimes, a person may choose not to change their name and gender on their identity documents. In other instances, different documents may indicate different names and/or gender designations. Regardless of what is recorded on a person’s identity documents, a trans person should be addressed in person by their chosen name and gender.

Organizations should accommodate if a trans person asks them to have documents recognize a name that differs from their legal name.

Example: A trans student requests that class lists reflect their lived gender identity and chosen name. This would help make sure teachers and other staff and students address them appropriately.

Depending on the circumstances, the *Code* may allow for limits on the duty to accommodate, especially if a person chooses not to change their legal name. An organization would have to show their criteria for recognizing a person’s gender identity is legitimate and they were unable to accommodate short of undue hardship (see sections 9 and 10 of this policy on reasonable *bona fide* requirements and the duty to accommodate). A person’s chosen name and gender might still be used alongside their legal name, again, if appropriate in the circumstances.

Example: A trans client requests that electronic health records at their local walk-in clinic reflect their lived gender identity and chosen name alongside current health card information that shows a different name and gender. This would help make sure healthcare professionals and other staff address them appropriately in person.

For prescriptions and other documents, ordering medical procedures and referrals to other health care practitioners, the clinic believes the name and gender shown on the person’s health card is also necessary to avoid any health and safety risk from mistakes that might happen.

¹¹⁴ Bill 152, *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006* amended ss. 8(1)(a) and 13 of the *Change of Name Act*, R.S.O. 1990, c. C.7 as well as the regulations (R.R.O. 1990, Reg. 68, s. 6).

In many cases, organizations will not need corroboration or proof of a person's lived gender identity to recognize a person's chosen name and gender in their administrative system. A person's request should usually be enough.

Example: The University of Toronto has a policy that allows students to change their name and gender on academic records, class lists and online student databases by writing a letter to their college registrar, requesting this change. The university will require the student to establish and authenticate their identity.¹¹⁵

A person's self-identified gender should be accepted genuinely in good faith even if identity documents do not match their lived gender. An organization would need a serious reason to doubt someone's self-identified gender.¹¹⁶

13.4 Washrooms and change rooms

13.4.1 Access based on lived gender identity

Access to washrooms is a basic physical need at the core of human dignity for everyone. Yet washrooms cause significant barriers for trans people and are one of the public spaces they avoid most.¹¹⁷

The *Code* allows for restriction of services or facilities to persons of the same sex for reason of "public decency."¹¹⁸ Facilities such as washrooms, change rooms and locker rooms are typically segregated based on sex. Trans people have the right to access these facilities based on their lived gender identity.

An organization's washroom facilities and any related policy should not negatively affect trans people. A trans person who identifies and lives as a man should have access to the men's washrooms and change rooms. A trans person who identifies and lives as a woman should have access to the women's washrooms and change rooms.

Example: In a case that went to the British Columbia Human Rights Tribunal, a trans person living as a woman entered a lounge and used the women's washroom. When she came out, a bouncer told her not to do so again or she would be asked to leave. Later, the manager made a policy that patrons must use the washroom matching their anatomy.

The Tribunal found that the policy discriminated against the trans woman and the lounge had a duty to accommodate her needs to the point of undue hardship. The

¹¹⁵ *University of Toronto's Statement Concerning Changes of Student Personal Information in Official Academic Records (Approved April 16, 2009)*, online: University of Toronto <http://sgdo.utoronto.ca/resources/resources-for-trans-people-u-of-t/>

¹¹⁶ See for example *Forrester, supra*, note 23.

¹¹⁷ See *Scheim et al., supra*, note 7.

¹¹⁸ See section 20(1) of the *Code*: Restriction of facilities by sex

Tribunal said that “transsexuals in transition 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” and that “Taking this view, the Complainant was a woman and, therefore, her choice of the women’s washroom was appropriate.”¹¹⁹

A trans person should not be required to use a separate washroom or change room because others express discomfort or transphobic attitudes, such as, “trans women are a threat to other women.” Trans people themselves are at risk of harassment and violence when using these facilities.¹²⁰ Education and awareness will help dispel these kinds of stereotypes.

Example: In the case of *Ferris v. O.T.E.U., Local 15 (1999)*, the British Columbia Human Rights Tribunal said: “I accept that transgendered people are particularly vulnerable to discrimination. They often bear the brunt of our society's misunderstanding and ignorance about gender identity. In the context of the workplace, washroom use issues are often contentious and, in the absence of knowledge, sensitivity and respect for all concerned, can inflict a great deal of emotional harm on the transgendered person.”¹²¹

13.4.2 Accommodation and inclusive design

A trans person does not need to “ask” to use the washroom. They have the right to use the one that matches their lived gender identity. Some people, however, may need accommodation, temporary or otherwise, to access washrooms, change-rooms or other type of sex-segregated facility.

Example: While going through a transition process, and because of concerns about harassment from others, a trans employee requests access to the single-user gender-neutral accessibility washroom normally reserved for use by persons with disabilities.

An employer or service provider has a duty to accommodate such requests unless there is proof it would cause undue hardship.¹²²

¹¹⁹ See *Sheridan, supra*, note 30, at paras. 102 and 107 (B.C.Trib.). But see *obiter* comments in *Vanderputten, supra*, note 30, at para. 68.

¹²⁰ See Jody L. Herman “Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People’s Lives” (2013) 19(1) *Journal of Public Management and Social Policy* 65 online: *Journal of Public Management and Social Policy* www.jpmsp.com/volume-19/vol19-iss1

¹²¹ *Ferris v. O.T.E.U., Local 15 (1999)*, 36 C.H.R.R. D/329 at para.16 (B.C.H.R.T.).

¹²² See *Sheridan, supra*, note 30, at para. 102.

The Ontario Building Code Regulation¹²³ already recognizes standards for single-user gender-neutral washrooms (a washroom with one toilet that can be used by either sex) as well as “universal” washrooms (a washroom accessible for people with disabilities with a wash basin and one toilet). The standards only apply to new buildings and major renovations.

Changes to the Building Code Regulation, effective January 1, 2015, will require at least one universal washroom in all new buildings or major renovations, and, for multi-storey buildings, at least one for every three floors. The Building Code Regulation also permits single-user gender-neutral washrooms for everyone instead of separate male and female washrooms.¹²⁴ These changes will help meet the needs of trans people and others.¹²⁵

More and more organizations are taking the initiative up front to design, add or convert facilities to be more inclusive with a range of options for everyone. Putting the Building Code standards and other best practices in place sooner will reduce the need for individual accommodation requests and benefit a wide range of people.¹²⁶ Examples include:

- More privacy options in traditional men-only and women-only washrooms and change rooms such as individual shower and changing stalls with curtains or doors, that are also accessible and available to everyone
- Gender-neutral single-user washroom or gender-neutral multi-stall washrooms that anyone can use: these options also improve access for people whose gender identity or expression does not fit into “man” or “woman.” They also allow parents with children of opposite genders to enter the washroom together
- “Universal” washrooms: this single-user option also provides accessibility for people with disabilities as well as families and privacy for anyone who needs it regardless of gender identity

Washrooms and change rooms need to be inclusive, accessible and safe spaces for everyone, including trans people and other gender non-conforming individuals.

¹²³ *Building Code Act, 1992*, S.O. 1992, c. 23, O.Reg. 332/12.

¹²⁴ *Ibid.*, ss. 3.7.4.2.(8), (9) & (10) online: e-laws www.e-laws.gov.on.ca/html/regs/english/elaws_regs_120332_e.htm

¹²⁵ See the section on “Washrooms” in the OHRC’s 2012 Submission to the Ministry of Municipal Affairs and Housing on proposed changes to the Ontario Building Code, online: OHRC www.ohrc.on.ca/en/ohrc-submission-mmah-proposed-changes-ontario-building-code

¹²⁶ See the 519 Church Street Community Centre *Washroom Signage Policy* online: The 519 Church Street Community Centre www.the519.org/resources. See University of Western Ontario Equity & Human Rights Services *Gender-Neutral Washrooms at Western* online: University of Western Ontario www.uwo.ca/equity/.

13.5 Dress codes

Some employers, educational institutions, service providers like swimming pools, or residential facilities like hospitals or even jails may have rules about what people wear. These requirements can be legitimate depending on the circumstances but they should not negatively affect trans people and others protected under the *Code*. Any specific dress codes, such as uniforms or protective gear, must be genuine and reasonably necessary and should not be based solely on gender stereotypes.¹²⁷

Dress code policies need to be inclusive of everyone, including trans people. Organizations must allow trans people and other gender non-conforming individuals to dress according to their expressed gender. Dress codes must also accommodate women who have a masculine gender expression and men who have a feminine gender expression. Others may identify as gender non-conforming, and should not be required to dress in clothing either stereotypical of men, such as a tie, or women, such as a skirt. Dress codes that are gender-inclusive and flexible are the best approach.

13.6 Shelter services

Trans people sometimes face barriers and discriminatory treatment when accessing shelter services. Trans males, for example, have reported that they are unsafe in men's shelters and unwelcome in women's.¹²⁸ Some shelters ask invasive questions about a trans person's transition status. Shelter staff may have little training about transgender-related issues, needs and terminology.¹²⁹ Some youth report being required or feeling compelled to conform to their birth-assigned sex to access shelter services.¹³⁰

The *Code* has exceptions that might permit organizations like homeless, transitional and youth shelters or shelters for abused women to restrict their residential accommodation or other services to persons of the same sex. A trans person should have access to the shelter that matches their lived gender identity.¹³¹ A shelter might even limit its service to just helping trans people.¹³² A shelter cannot otherwise discriminate based on a person's gender identity or expression.

¹²⁷ Cases have recognized that requiring an employee to dress in a sexualized, gender-specific way can be a form of sexual harassment or discrimination. See for example: *Mottu v. MacLeod and others*, 2004 B.C.H.R.T. 67; *Doherty and Meehan v. Lodger's International Ltd.* (1981), 3 C.H.R.R. D/628 (N. B.); *Giouvanoudis v. Golden Fleece Restaurant & Tavern Ltd.* (1984, 5 C.H.R.R. D/1967; and *Ballentyne v. Molly 'N' Me Tavern* (1982) 4 C.H.R.R. D/1191.

¹²⁸ The FTM Safer Shelter Project Research Team, *Invisible Men: FTMs and Homelessness in Toronto* (2008), online: The Wellesley Institute www.wellesleyinstitute.com/publication/ftms_and_homelessness_in_the_city_of_toronto_-_research_report/.

¹²⁹ Ilona Alex Abramovich, "No Safe Place to Go LGBTQ Youth Homelessness in Canada: Reviewing the Literature" (2012) 4(1) *Canadian Journal of Family and Youth* 29.

¹³⁰ See I. Alex Abramovich, "Teal's Story", online: ilona6 www.ilona6.com/artsinformed.php (retrieved February 18, 2014).

¹³¹ If a competing rights situation comes up, the shelter would have to show any restriction on a group is legitimate (reasonable and *bona fide*) in the circumstances and how else they might accommodate (also see sections 9 and 10 of this policy).

¹³² See sections 14, 18 and 21 of the *Code*

Example: A young person seeks services at a youth shelter that has a “male” and “female” floor. Her birth assigned sex is male but she identifies as female. She requests to stay on the female floor, and the shelter agrees. The shelter also takes steps to educate clients and staff in the shelter about gender identity and human rights.

Safety from harassment and violence inside shelters is also a pressing concern for people who use them. Trans people are particularly vulnerable.¹³³

Example: A trans man may not feel safe in a men’s shelter and may ask for access to a women’s shelter, or to a separate space within a men’s or a women’s shelter.

Shelter rules and requirements should be inclusive as possible to avoid negatively affecting trans clients. Organizations also have a duty to accommodate any needs trans clients may have unless it would cause undue hardship. Accommodation needs might involve changes to policy requirements, practices or systems and facilities such as washrooms, change rooms, sleeping quarters, or security procedures, as well as identity records or other matters.

Shelters should look for barriers, develop or change policies and procedures and undertake training to deal effectively with access and safety needs of all clients, including trans people and other gender non-conforming individuals.¹³⁴

Example: Section 4.7 of the City of Toronto’s Shelter Standards addresses the needs of trans clients and reads in part: “It is expected that all shelters be accessible to the transgendered / transsexual/two-spirited (TS/TG/2-S) residents in their self-defined gender, and that shelters will work toward improving access to this group. Shelters will support the choices of TG/TS/2-S residents to gain access to services in the gender they identify will best preserve their safety.”

Shelters will be required to identify how they will respond to people who are TS/TG/2-S seeking service including developing a process, that may include a policy, staff training, designated beds, referrals, etc. done in consultation with TS/TG/2-S communities.¹³⁵

¹³³ See Abramovich, *supra*, note 129.

¹³⁴ *Ibid.*

¹³⁵ Toronto Community and Neighbourhood Services, *Toronto Shelter Standards* online: City of Toronto www1.toronto.ca/city_of_toronto/shelter_support_housing_administration/files/pdf/shelter_standards.pdf at 14.

13.7 Health care services

Trans people have a wide range of health care needs like anyone else. But they face barriers in accessing health care services on many levels.

Trans people report that family doctors and hospital emergency services often do not understand or respect their lived gender identity. It can be common for trans people to avoid seeking medical assistance, even in dire circumstances, for fear of a degrading experience in the health care setting.¹³⁶

Research points to systemic social exclusion of trans people within the healthcare system. Services are often designed as if trans people do not exist. Little to no information is collected on their health care needs. This often results in policies and practices that may be discriminatory and create barriers for trans people to access care.¹³⁷

Example: Hospital staff refuse to recognize a trans person's chosen name and lived gender during a visit to emergency with a broken arm. Staff assign the trans patient to the "wrong" sex-segregated room and ask invasive and unnecessary questions about her body.

Trans people and other gender non-conforming individuals have a right to access health care services free of discrimination and harassment. Hospitals and other healthcare providers have an obligation not to discriminate or condone discrimination, including harassment, because of someone's gender identity or gender expression. They also have a duty to accommodate any needs trans patients may have unless it would cause undue hardship.

Health care providers should take steps to identify and remove barriers as well as develop policies and procedures to prevent discrimination faced by trans people.

Example: Toronto's Mount Sinai Hospital has an anti-discrimination policy that provides guidelines on the treatment of all trans, intersex and two-spirit patients (see Appendix B: Glossary for an explanation of these terms) to make sure they are treated with equality, dignity, and respect, in accordance with the *Code*. The policy provides guidance in several areas, including:

- All patients have the right to be identified and addressed by their lived gender
- Patients who are trans, intersex or two-spirit are to be given a range of bed accommodation options (e.g. private or semi-private room) according to their lived gender identity
- All patients have the right to use washrooms or change rooms based on their lived gender. Information is provided on the location of universal (single-user gender-neutral) washrooms

¹³⁶ See Bauer *et al.*, *supra*, note 16, at 357.

¹³⁷ *Ibid.*

- Health care practitioners only request and disclose a patient's birth-sex and/or other related information when directly related to their health care
- Admitting services provide options for identification that include trans, intersex and two-spirit.¹³⁸

Trans people also face barriers in accessing specialized health care services unique to their health care needs as a trans person.

The Ontario Health Insurance Plan (OHIP) covers sex reassignment surgery (SRS). Trans people can only access SRS if they complete a designated program, available at only one institution in Ontario, the Centre for Addiction and Mental Health.¹³⁹ There is currently a wait list of several months to access this program.¹⁴⁰

Trans people may seek other body-changing procedures that are not covered by OHIP.¹⁴¹ A few cases have come to the Human Rights Tribunal of Ontario alleging the lack of OHIP coverage for medical procedures related to transitioning gender identity is discriminatory.¹⁴²

Example: The HRTTO dismissed two claims alleging the government's failure to fund breast augmentation, voice therapy and facial laser hair removal for male-to-female transsexuals was discriminatory. The HRTTO found no evidence these procedures were medical needs that fell within the purpose of OHIP.¹⁴³

All health care providers, including those offering elective procedures not covered by OHIP, should be aware of the health care needs of trans people and adapt their services where appropriate. Health care providers must not exclude trans people unless they can show they do not have the competency (skills or experience) needed to safely provide the services.¹⁴⁴

¹³⁸ For more information see Mt. Sinai Hospital, *Gender Identity Policy*, online: Mt. Sinai Hospital www.mountsinai.on.ca/about_us/corporate-information/policies/Gender%20Identity%20Policy%20-%20I-e-30-36.pdf/view

¹³⁹ See Ministry of Health and Long Term Care, *Bulletin 4480 Relisting of Sex Reassignment Surgery under OHIP* (20 June 2008) online: Ministry of Health and Long Term Care www.health.gov.on.ca/en/pro/programs/ohip/bulletins/4000/bulletin_4000_mn.aspx.

¹⁴⁰ Centre for Addiction and Mental Health, *Gender Identity Clinic* online: Centre for Addiction and Mental Health www.camh.ca/en/hospital/care_program_and_services/hospital_services/Pages/gid_guide_to_camh.aspx (retrieved February 10, 2014).

¹⁴¹ See SRS and Trans Health Policy Group, *Information on Sex Reassignment Surgery (SRS) and Trans Health Care in Ontario* (2009) online: Rainbow Health Ontario www.rainbowhealthontario.ca/resources/searchResults.cfm?mode=3&resourceID=85313d1e-3048-8bc6-e8bd-be8677d01c3a

¹⁴² For example, see *Brodeur v. Ontario (Health and Long-Term Care)*, 2013 HRTTO 1229 (CanLII) and *Hogan v. Ontario (Health and Long-Term Care)*, 2006 HRTTO 32 (CanLII).

¹⁴³ *Brodeur*, *ibid.* at paras 24, 27 and 41.

¹⁴⁴ For example, the Clinic Head of the Gender Identity Clinic at the Centre for Addiction and Mental Health wrote an open letter to family doctors requesting they start prescribing hormone therapy so patients can begin the process without seeking specialty care. Dr. Christopher McIntosh & Dr. Nicola Brown, *Open Letter to Family Doctors regarding Hormone Therapy* online: Centre for Addiction in Mental

Example: In a case that went to the HRTO, two women alleged a doctor, who performs elective cosmetic plastic surgery including on the genitals of both women and men, refused them services because they were trans. One woman was inquiring about plastic surgery on her labia and the other was interested in breast augmentation.

The HRTO found the trans women did experience *prima facie* discrimination as the doctor denied the surgeries because they were trans. However, the HRTO accepted the doctor's justification that he was not qualified to safely perform the surgeries the trans women were seeking and found there is no expectation that he go get the necessary skills.¹⁴⁵

The international Yogyakarta Principles recognize that access to specialized health care services for trans people is part of the right to the highest standard of health. This includes governments helping to facilitate access to body modifications related to gender reassignment.¹⁴⁶

13.8 Education system

Trans youth can face a wide range of prejudice and discriminatory treatment at a very challenging time in their life. This can include educators and fellow students not addressing them by their chosen name and pronoun, and a lack of access to appropriate and safe washrooms and change room facilities. Trans youth are especially vulnerable to harassment and bullying from peers.

A 2011 Canadian survey found:

- 78% of trans students feel unsafe in their schools
- 74% of trans youth had been verbally harassed because of their gender identity
- 49% had experienced sexual harassment in school because of their gender identity
- 37% had been physically harassed or assaulted because of their gender identity or expression.¹⁴⁷

Trans youth want but don't always have the support of their teachers and school administration to help them during transition to their felt gender. Sometimes they may not have the support of their family either, making a welcoming school environment all the more important.

Health, www.camh.ca/en/hospital/care_program_and_services/hospital_services/Pages/Open-Letter-to-Family-Doctors-regarding-Hormone-Therapy.aspx (retrieved February 18, 2014).

¹⁴⁵ See *Finan v. Cosmetic Surgicentre (Toronto)*, 2008 HRTO 47 paras 42-50 (CanLII).

¹⁴⁶ *Yogyakarta Principles supra*, note 20, Principle 17(g).

¹⁴⁷ C. Taylor, et al., *Every Class in Every School: The First National Climate Survey on Homophobia, Biphobia, and Transphobia in Canadian Schools. Final Report* (2011) online: Egale Canada Human Rights Trust <http://egale.ca/category/youth-and-safer-schools/national-survey/>

Ontario's *Accepting Schools Act*¹⁴⁸ amended the *Education Act* to provide explicit protection for students from bullying because of gender identity and gender expression among other grounds. The legislation requires school boards to develop and implement equity and inclusive education policies that address all forms of discrimination and harassment based on *Code* protected grounds, including gender identity and gender expression.¹⁴⁹

All youth have a right to self-identify and express their lived gender identity while accessing education services. Under the *Code*, school boards, colleges and universities as well as other educational institutions have a responsibility to take steps to prevent and respond to discrimination and harassment of students because of their gender identity or gender expression. They also have a duty to accommodate any trans students' needs related to gender identity and expression.

Educational institutions should develop policies and procedures to recognize, among other things, that:¹⁵⁰

- Trans students have the right to be addressed by their chosen name and pronoun
- Official records should reflect a student's lived gender, chosen name and pronoun as much as possible
- Trans students have the right to access washrooms and other facilities and take part in physical education and other classes in accordance with their lived gender identity
- If they wish, trans students can also request accommodations such as access to gender inclusive washrooms, or private spaces within change rooms
- More privacy options such as individual changing stalls and showers with curtains or doors would benefit all students
- Students have a right to privacy, and schools must keep a student's transgender status confidential. It should not be communicated to others unless they have a "need to know" to fulfill a specific accommodation need, or if the student requests it

¹⁴⁸ *Accepting Schools Act*, 2012, S.O. 2012 C.5, online: Legislative Assembly of Ontario http://ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2549

¹⁴⁹ For more information see the Ministry of Education, *Policy and Program Memorandum No. 119, Developing and Implementing Equity and Inclusive Education Policies in Ontario Schools* online: Ministry of Education www.edu.gov.on.ca/extra/eng/ppm/ppm.html. Also see the OHRC's remarks to the Ontario Legislative Standing Committee on Social Policy regarding Bill 13 and Bill 14 on bullying online: OHRC www.ohrc.on.ca/en/ohrc-remarks-ontario-legislative-standing-committee-social-policy-regarding-bill-13-and-bill-14

¹⁵⁰ See Toronto District School Board (TDSB), *Guidelines for the Accommodation of Transgender and Gender Non-Conforming Students and Staff: An Administrative Guideline of the Toronto District School Board* online: TDSB www.tdsb.on.ca/AboutUs/Innovation/GenderBasedViolencePrevention/AccommodationofTransgenderStudentsandStaff.aspx. See also Genny Beemyn, *Transgender Checklist for Colleges and Universities* online: Campus Pride. <http://www.campuspride.org/tools/transgender-checklist-for-colleges-universities/> (retrieved on February 19, 2014).

- School dress codes and uniforms should be flexible and inclusive of all students regardless of their sex, gender identity or gender expression
- Where educational institutions have student residents, trans students should be able to choose housing based on their lived gender identity. It is also beneficial to have gender inclusive housing options where students share a facility regardless of their sex or gender identity.

13.9 Law enforcement and justice services

Trans people are especially disadvantaged and vulnerable when dealing with police, correctional institutions and other service providers in positions of power.¹⁵¹

It is vital that law enforcement services develop policies as well as education and training for police and correctional service staff, to address the discrimination, harassment and violence that trans people report facing in law enforcement situations.¹⁵²

To effectively promote and protect the rights of trans people, justice institutions and other legal services also need to learn about their needs.

13.9.1 Strip searches

In law enforcement situations requiring strip searches, police and correctional institution officers need to offer trans persons a choice of the sex of the officer(s) who searches them. This should include the option of only male officer(s), only female officer(s), or a “split search” with both male and female officers. A split search might involve, for example, male officers examining a detainee’s “male” lower body and female officers examining the person’s “female” upper and/or lower body. The HRTO confirmed this approach to conducting searches with trans individuals.

Example: The HRTO found that a detainee, who self-identified as a trans woman, experienced discrimination when police refused her requests for strip-searches to be conducted by female officers.¹⁵³ The HRTO said that in these types of situations detainees must be offered a choice of the sex of the officer who searches them.¹⁵⁴

The HRTO set out appropriate criteria for verifying identity and conducting strip searches. It also identified some exceptions for dealing with high security risk situations and for rare circumstances where an officer might opt out because they have a valid competing right.¹⁵⁵

¹⁵¹ A. Scheim *et al.*, *Joint Effort: Prison Experiences of Trans PULSE Participants and Recommendations for Change*. Trans PULSE e-Bulletin, 22 April, 2013. 3 (3) Online: Trans PULSE www.transpulseproject.ca.

¹⁵² In *Forrester, supra*, note 23, the HRTO noted the importance of training all police officers on trans issues at paras. 468 and 473.

¹⁵³ See *Forrester, ibid.* at para. 416.

¹⁵⁴ *Ibid.* at para. 476.

¹⁵⁵ *Ibid.* at paras. 467 and 476.

13.9.2 Correctional institutions

In correctional settings, trans people are at higher risk of experiencing harassment and violence both from other inmates as well as from institutional staff.¹⁵⁶ Sometimes, trans people may be held in segregation units for their own protection. However, this can often isolate them and prevent them from having the same privileges or access to services available to others within the general prison population.¹⁵⁷

Inmates whose gender identity is different from their birth-assigned sex should be assessed and accommodated on an individual basis. To the greatest extent possible, institutions should provide trans inmates with housing that is appropriate for their lived gender identity. Accommodation options should consider both their safety as well as the safety of all inmates. Assessment of safety risk should be based on evidence and not speculation or stereotypes.

Prison authorities should also make sure that forms of protective segregation are not unjustly used to deny trans inmates the rights and privileges that other prisoners have.

The importance of accommodating trans inmates is supported by the case law.

Example: A case that went to the Canadian Human Rights Tribunal (CHRT) dealt with a trans inmate who identified and lived as a woman, but was placed in a men's prison. The CHRT found that Correctional Service Canada had a duty to accommodate trans inmates, especially because of their vulnerability to violence. The CHRT said:

Any policy dealing with this uniquely vulnerable group must recognize the differential effect that housing inmates in accordance with their anatomy has on transsexual inmates. The policy also needs to acknowledge their susceptibility to victimization within the prison system. Finally, it must require the individualized assessment of each transsexual inmate by corrections officials, in consultation with qualified medical professionals, as to the appropriate placement of the individual within the various types of facilities available in the male prison system, and the steps that are necessary to ensure their safety.¹⁵⁸

Trans inmates should also have access to health care services related to transitioning while incarcerated.

¹⁵⁶ As Human Rights Watch has found, "empirical data on prison sexual violence suggest that it is not a random activity, but arises from the choosing of particular victims who...are believed to be more vulnerable." Human Rights Watch, *No Escape: Male Rape in United States Prisons* (2001) as cited in Human Rights Watch, *Transgender Prisoners, Identity, and Detention: Policy Recommendations* (2006) online: www.outcast-films.com/films/cu/transgender_prisoners.pdf; A. Scheim et al., supra note 151.

¹⁵⁷ Kara Sandor von Dresner et al., "Providing Counseling for Transgendered Inmates: A Survey of Correctional Services" (2013) 7(4) *International Journal of Behavioural Consultation and Therapy* 38.

¹⁵⁸ See *Kavanagh v. Canada (Attorney General)*, 2001 CanLII 8496 (CHRT) at para 166.

Example (continued): The CHRT also found that Correctional Service Canada's blanket prohibition on sex reassignment surgery had a discriminatory effect on trans-identified inmates, and that it was unable to justify such a policy. As a result, the CHRT ordered Correctional Service Canada to develop a health care services policy that ensures that the needs of transsexual inmates are identified and accommodated.

13.10 Other services

The *Code* also protects trans people and other gender non-conforming individuals from discrimination in other areas involving services, goods and facilities¹⁵⁹ including retail stores.

Example: In a complaint that went to the Saskatchewan Human Rights Commission, a trans woman alleged a bridal shop refused to let her try on dresses as she planned her wedding. The complaint was successfully resolved once the business owner better understood the human rights issues.¹⁶⁰

Retailers and other service providers must not discriminate because of gender identity or expression when providing their services. They too have a duty to accommodate needs that customers or clients may have related to their gender identity and expression, unless it would cause undue hardship.

13.11 Housing

Trans people are vulnerable to discrimination from landlords because of their gender identity or gender expression when applying for housing, exercising their rights as a tenant,¹⁶¹ or when trying to access other housing-related services (see also section 13.6 of this policy: Shelter services).

While discrimination may not always be direct or overt, prejudicial attitudes and related treatment can make it hard for trans people and other gender non-conforming individuals to access and maintain housing. This in turn can have a harmful cascading effect on other aspects of their lives, including health, education and employment.

The *Code* says that every person has a right to equal treatment in housing without discrimination because of gender identity and gender expression.¹⁶² Landlords, their agents and other housing providers must not deny housing to people because of their gender identity or gender expression.

¹⁵⁹ See section 1 of the *Code*.

¹⁶⁰ Saskatchewan Human Rights Commission, *Mediation Achieves Resolution For Transgender Woman's Complaint* (11 September 2013) online: Saskatchewan Human Rights Commission http://saskatchewanhumanrights.ca/+pub/documents/news/2013/20130911_MediationAnnouncement_MediaRelease.pdf.

¹⁶¹ See Grant *et al.*, *supra*, note 33.

¹⁶² See section 2 of the *Code*: www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm

Example: A trans woman calls a landlord and makes an appointment to see an apartment for rent. During the appointment, the landlord asks what her real name is and says he only rents to women. When the trans woman follows up the next day, he abruptly tells her the apartment was now rented to someone who supposedly came to see it sooner.

As well, landlords must not discriminate in how they treat tenants, including decisions about renewing leases or evictions. They must also address any discrimination or harassment related to gender identity and gender expression that may happen within the housing environment. This could include dealing with the behaviour of other tenants, agents of the landlord such as building supervisors, or others such as maintenance workers.

Example: A worker doing repairs in the apartment of a trans woman makes ongoing comments about her body and sexual practices. Shortly after, the tenant discovers transphobic graffiti on the wall of the parking garage. She complains to the landlord that she is being harassed, but the landlord says there isn't much he can do about it.

If landlords become aware of discrimination or harassment through complaints or other means, they must respond appropriately. Landlords who fail to take steps to address problems may be found liable by a tribunal or court.¹⁶³

13.12 Employment

Trans people report facing discriminatory treatment in employment. The Ontario-based Trans PULSE survey found:

- 18% of survey respondents said they were turned down for a job because of their trans identity
- 13% said they were fired from their job or constructively dismissed because they were trans¹⁶⁴

Discrimination is often based on unfounded stereotypes or negative assumptions such as: trans people will make other co-workers and clients uncomfortable; they will not be a good “fit” for the workplace; or, they have accommodation needs that will be difficult and expensive.

The *Code* says that every person has a right to equal treatment in employment without discrimination and harassment because of gender identity and gender expression.¹⁶⁵ This includes any accommodation that may be necessary and applies at all stages of employment from hiring, to retention, pay and benefits and dress codes, to training and promotion, performance management and termination.

¹⁶³ For more information see OHRC's *Policy on human rights and rental housing* online: OHRC www.ohrc.on.ca/en/policy-human-rights-and-rental-housing

¹⁶⁴ G. Bauer *et al.*, *supra* note 6

¹⁶⁵ See section 5 of the *Code*.

13.12.1 Hiring

Employers must make sure that overt and subtle or hidden discrimination against trans people or other gender non-conforming individuals does not happen during hiring or they can be held liable.

Example: In a case that went to the Canadian Human Rights Tribunal, a trans woman had applied for a job as a customer service representative in a bank. She underwent a three-step interview process and was led to believe she would be hired. Later when she found out she did not get the job, the bank did not explain why. Meanwhile, they had not filled the position and continued to look at applicants who had the same qualifications as the trans woman.

During the hearing, the bank said it did not hire the trans woman because she was supposedly over qualified, had an attitude during the final interview that “was not that of a person who wishes to serve the public” and wanted to “use the position to promote the rights of transgendered persons.”¹⁶⁶

The CHRT said these reasons were disingenuous and an excuse for bias and prejudice because she was trans.¹⁶⁷ The CHRT found that discrimination had happened. It said that where a trans person is qualified and someone else, no better qualified, is selected (or where the organization rejects the trans person but continues to seek applicants with the same qualifications), the organization will need to provide a non-discriminatory explanation for not hiring the trans person.

13.12.2 Transitioning employees

Trans employees are particularly vulnerable to discrimination when their identity becomes known to employers or when they begin to transition to their felt gender identity.

Employees who are transitioning publicly can experience a great deal of stress during this time, including at work. This is due in part to their experience and fear of discrimination and harassment. Employers may find an excuse to fire or demote transitioning employees instead of providing accommodation. They sometimes discriminate in other ways, such as assigning less lucrative or prestigious files and clients, or denying training and promotion opportunities. It may be difficult for a trans employee to prove that this type of subtle discrimination happened,¹⁶⁸ but the negative impact is real.

¹⁶⁶ *Montreuil v. National Bank of Canada*, 2004 CHRT 7 at para. 56 (CanLII).

¹⁶⁷ *Ibid.* at paras. 57-73.

¹⁶⁸ See *Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Maison des jeunes À-Ma-Baie Inc. (No 2)*, *supra*, note 85. In this case, the employee was fired after she told her employer about her transition.

Example: In an HRTO case, an employee was taking steps to transition to identifying and presenting as a woman. During this time, she experienced ridicule and harassing comments and conduct from co-workers in the change room and the workplace at large. She complained to her employer about the harassment and the need for separate change facilities. Her employer refused to address the harassment and later fired her.¹⁶⁹

The HRTO found the employer had discriminated and contributed to the harassment and a poisoned work environment by insisting the employee use the men's change room, even though she was living as a woman and faced ongoing harassment from co-workers. The HRTO also found the employer failed to investigate and respond reasonably to the employee's complaints of harassment.¹⁷⁰

Example: An employee intends to transition and speaks to their manager to inform them and discuss what types of accommodation they may need during the transition period. The employee asks for time off so that they may return to work presenting in their new gender. The employer accommodates the employee by working cooperatively to develop a transition plan to address different issues that may arise in the workplace, such as changing the employee's name in electronic directories, washroom use, and to provide education and training for other employees.

13.13 Vocational associations

The *Code* says that every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of gender identity or gender expression.¹⁷¹

Example: In a case that went to the British Columbia Human Rights Tribunal, a trans employee was involved in a dispute with her employer (that initially related to a complaint that was made about her use of the women's washroom). The person did not feel that her union's actions on her behalf regarding this dispute were adequate. She alleged that the union discriminated against her in its response to the incident, both initially and with respect to the events that followed the initial dispute, and in the way it responded to the employer's handling of the complaint made against her.

The Tribunal found that the union had treated her worse than it would have treated other union members in similar circumstances, and that her status as a trans person was a factor in her treatment. The Tribunal ordered the union to stop contravening the human rights law and to pay her damages for lost wages and the injury it had done to her dignity, feelings and self-respect.¹⁷²

¹⁶⁹ *Vanderputten, supra*, note 30.

¹⁷⁰ *Ibid.*

¹⁷¹ See section 6 of the *Code*.

¹⁷² *Ferris v. O.T.E.U., Local 15, supra*, note 121.

Appendix A: Purpose of OHRC policies

Section 30 of the *Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*. The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to comply with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.¹⁷³ Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (HRTO) may consider policies approved by the OHRC in a human rights proceeding before the HRTO. Where a party or an intervenor in a proceeding requests it, the HRTO *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject matter of a human rights application, parties and intervenors are encouraged to bring the policy to the HRTO's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the HRTO is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the HRTO to have the HRTO "state a case" to the Divisional Court to address the inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and the HRTO,¹⁷⁴ applied to the facts of the case before the court or the HRTO, and quoted in the decisions of these bodies.¹⁷⁵

¹⁷³ Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that take place after a document's publication date will not be reflected in that document. For more information, please contact the Ontario Human Rights Commission.

¹⁷⁴ In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the Tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

¹⁷⁵ For example, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45 (Sup.Ct.). See also *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361 (CanLII) and *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which both the HRTO and the Court applied the OHRC's *Policy and guidelines on disability and the duty to accommodate*, available at: www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2. The HRTO has cited the OHRC's earlier gender identity policy on a number of occasions, see among others *Vanderputten, supra*, note 30, *Brodeur, supra*, note 142, and *XY, supra*, note 2.

Appendix B: Glossary for understanding gender identity and expression

The words people use to describe themselves and others are very important. The right terms can affirm identities and challenge discriminatory attitudes. The wrong ones can disempower, demean and reinforce exclusion. While these terms and explanations are considered current and appropriate at the publication of this policy, their meaning and use can evolve and change over time. Generally, when in doubt, asking a person how they self-identify is the most respectful approach.

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.

Sex and gender: whereas "sex" is a person's physical characteristics, "gender" is about what it means to be a man or woman in society.¹⁷⁶ It is the expectations and stereotypes about behaviours, actions and roles linked to being a "man" or "woman." Social norms related to gender can vary depending on the culture and can change over time.¹⁷⁷

Gender binary: a social system whereby people are thought to have either one of two genders: man or woman. These genders are expected to correspond to birth sex: male or female. In the gender binary system, there is no room for interpretations, for living between genders, or for crossing the binary. The gender binary system is rigid and restrictive for many people who feel that their natal sex (sex they were labelled with at birth) does not match up with their gender or that their gender is fluid and not fixed.¹⁷⁸

Gender norms: the gender binary influences what society considers "normal" or acceptable behaviour, dress, appearances and roles for women and men. Gender norms are a prevailing force in everyday lives. Strength, action and dominance are stereotypically seen as "masculine" traits, while vulnerability, passivity and receptiveness are stereotypically seen as "feminine" traits. A woman expressing masculine traits may be stereotyped as overly "aggressive," while a man expressing "feminine" traits may be labeled as "weak." Gender norms can contribute to power imbalances and gender inequality in the home, at work and in communities.¹⁷⁹

¹⁷⁶ There are various social and medical theories about what constitutes sex and what constitutes gender, and there is no consensus or single definition for these terms. See Australian Human Rights Commission, *Sex Files* (2009) online: Australian Human Rights Commission www.humanrights.gov.au/sex-files-sex-gender-diversity-project-2008.

¹⁷⁷ See World Health Organization, *Health Topics: Gender* online: World Health Organization www.who.int/topics/gender/en/ (retrieved February 19, 2014). See also Anne Enke, *Transfeminist Perspectives in and beyond Transgender and Gender Studies* (Philadelphia: Temple University Press, 2012).

¹⁷⁸ N. Teich, *Transgender 101: A Simple Guide to a Complex Issue* (New York: Columbia University Press, 2012) at 5.

¹⁷⁹ MenEngage, *Engaging Men, Changing Gender Norms: Directions for Gender-Transformative Action* (2012) online: MenEngage Alliance

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 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:¹⁸⁰ 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.

Trans man and trans woman: A person whose sex assigned at birth is “female” and identifies as a man may also identify as a trans man (female-to-male FTM). A person whose sex assigned at birth is “male” and identifies as a woman may also identify as a trans woman (male-to-female MTF).

Transsexual: a person whose gender identity differs from their sex assigned at birth. They may or may not undergo medically supportive treatments to align their bodies with their gender identity, such as hormone therapy, sex reassignment surgery or other procedures. They may also undertake other changes to align their external attributes and appearance with their gender identity.

Transitioning: refers to a host of activities that some trans people may pursue to affirm their gender identity. This may include changes to their name, sex designation, dress, the use of specific pronouns, and possibly medically supportive treatments such as hormone therapy, sex-reassignment surgery or other procedures. There is no checklist or average time for a transition process, and no universal goal or endpoint. Each person decides what meets their needs.

Intersex: a term used to describe a person born with reproductive systems, chromosomes and/or hormones that are not easily characterized as male or 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.¹⁸¹

¹⁸⁰ Gender queer: “those who identify their gender outside of traditional gender categories and may not identify as either trans men or trans women. Some gender queer individuals pursue medical transition options and some do not.” Pyne, *supra* note 34, at 9.

¹⁸¹ Rainbow Health Ontario, *RHO Fact Sheet: Intersex Health*, online: Rainbow Health Ontario www.rainbowhealthontario.ca/admin/contentEngine/contentDocuments/Intersex_final.pdf

“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.

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

Sexual orientation and gender identity are different: sexual orientation describes human sexuality, from gay and lesbian to bisexual and heterosexual orientations.¹⁸² A person’s gender identity is fundamentally different from and not related to their sexual orientation. Because a person identifies as trans does not predict or reveal anything about their sexual orientation. A trans person may identify as gay, lesbian, queer, straight or bisexual, just as people who do not identify as trans.

Two-Spirit: a term used by Aboriginal people to describe from a cultural perspective people who are gay, lesbian, bisexual, trans or intersex. It is used to capture a concept that exists in many different Indigenous cultures and languages. For some, the term Two-Spirit describes a societal and spiritual role that people played within traditional societies, such as: mediators, keepers of certain ceremonies, transcending accepted roles of men and women, and filling a role as an established middle gender.¹⁸³

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.

Transphobia: the aversion to, fear or hatred or intolerance of trans people and communities. Like other prejudices, it is based on stereotypes and misconceptions that are used to justify discrimination, harassment and violence toward trans people.

¹⁸² Sexual orientation is also a protected ground under the *Code*

¹⁸³ 2-Spirited People of the 1st Nations, *Our Relatives Said: A Wise Practices Guide* (2008) online: 2-Spirited People of the 1st Nations, www.2spirits.com.

Appendix C: Best practices checklist

Privacy and confidentiality

- Maximize privacy and confidentiality of any information related to a trans person's gender identity, or to the extent the trans person wishes. This includes information that directly or indirectly identifies that a person's sex is different from their gender identity.
- Keep a person's transgender history and medical information private and confidential, and limited to only relevant information and people directly involved in helping to meet the person's needs.
- All information should remain exclusively with designated personnel (such as the human resources person) in a secure filing system to protect the person's confidentiality.

Identification documentation and records

- Recognize a trans person's preferred name and gender in all administrative systems and documents (including hard copies and electronic).
- Show how any requirement for a person's "legal" name and gender is legitimate (reasonable and *bona fide*) in the circumstances.
- Undertake system reviews to identify how electronic databases, IT systems and other relevant information processes can be modified to recognize a person's chosen name and gender when it does not match legal documents.

Collecting data on sex and gender

- Consider whether there is a legitimate need to ask for and collect information about sex/gender. If yes, provide options beyond the binary of male/female or man/woman.¹⁸⁴
- To the greatest extent possible, allow people to self-identify their sex or gender identity.¹⁸⁵ The option of a blank box, for example, is the most inclusive.
- Protect any information indicating transgender status as confidential.

¹⁸⁴ See ACT Law Reform Advisory Council, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT, Report 2* (2012) online: ACT Law Reform Advisory Council www.justice.act.gov.au/resources/attachments/LRAC_Report_7_June.pdf, at 48. See also Human Rights Campaign Foundation, *Transgender Inclusion in the Workplace*, 2nd ed.(2008), online: Human Rights Campaign Foundation www.fs.fed.us/cr/HRC_Foundation_-_Transgender_Inclusion_in_the_Workplace_2nd_Edition_-_2008.pdf.

¹⁸⁵ Human Rights Campaign Foundation, *ibid.* For more detailed information on data collection methods that are inclusive and respectful of diverse gender identities, see also Rainbow Health Ontario, *RHO Fact Sheet: Designing Surveys and Questionnaires*, online: Rainbow Health Ontario www.rainbowhealthontario.ca/resources/searchResults.cfm?mode=3&resourceID=9901094e-d737-dde8-0d8c-8166b3780517.

Dress code policy

- Do not base it on gender stereotypes, and apply it consistently to all people, regardless of their gender identity or expression.
- Make it inclusive of trans people, and identify that everyone may dress in accordance with their lived gender identity or gender expression.

Washrooms and change facilities policy

- Recognize the right of trans people to access facilities based on their lived gender identity.
- Communicate that a trans person will not be required to use a separate facility because of the preferences or negative attitudes of others.
- Make clear that accommodation options will be provided on an individualized basis, if a trans person requests.
- Provide privacy options that anyone in a change room may choose to use.
- Provide information on where people can find accessible, all-gender washrooms.

Organization gender transition guideline¹⁸⁶

- Guidelines should be in place before a transitioning employee comes forward. They provide clear direction for managers on how to generally help transitioning employees, while still recognizing the obligation to take the individual's needs into account. This sends a signal to everyone that transitioning employees will be supported.
- Guidelines should address:
 - A lead contact person to assist the transitioning employee
 - What a transitioning employee can expect from management
 - Expectations of management and other staff, transitioning employees in facilitating a successful workplace transition
 - Related policies and practices for assisting with the transition process, such as: washroom policies, dress code policies, confidentiality and privacy, recognizing the person's new name in documentation and records, anti-harassment policies, dealing with any individual accommodation needs as well as training for management, staff and clients.

¹⁸⁶ For more information on best practices for employers see Canadian Labour Congress, *Workers in Transition: A Practical Guide About Gender Transition for Union Representatives*, online: Canadian Labour Congress www.canadianlabour.ca/news-room/publications/workers-transition-practical-guide-union-representatives; Canadian Autoworkers Union, *Workers in Transition: A Practical Guide for Union Representatives* online: Canadian Autoworkers Union <http://www.caw.ca/en/9201.htm>. See also the international sources: Human Rights Campaign Foundation, *supra* note 197; Government of New Zealand, Department of Labour, *Transgender People at Work*, online: Human Rights Commission www.hrc.co.nz/human-rights-environment/action-on-the-transgender-inquiry/discrimination-and-marginalisation.

Individualized gender transition accommodation plan

- Working together, the employee, employer and union representatives (where the employee has asked for their involvement) may wish to create a transition plan to address what, if any, accommodations may be needed in the workplace related to the steps the employee is taking in the transition process.
- Each trans person's situation will vary, and an individualized transition plan will make clear what steps will be taken given the needs of the particular employee.
- It can be useful to discuss timelines and dates when the employee would like to:
 - Be addressed by their new name and new pronoun
 - Begin expressing their gender identity through clothing, in keeping with the workplace dress code
 - Use washroom and other facilities in their lived gender identity
 - Able to take time off work for any medical treatments related to their transition, if needed.
- The plan should also address:
 - When and how any related employment records, documents and databases will be updated to reflect the person's new name and gender (e.g. human resources and administrative records, email and phone directories, business cards, etc.)
 - If, when and how other employees and clients will be informed of the person's new name and gender identity
 - Anti-harassment planning – a simplified process to deal quickly and effectively with any harassment the transitioning employee may experience
 - When and how training for other employees, clients or managers will be provided to help them understand the transition process, if appropriate
 - How management and the union will show support for the transitioning employee.