

Ontario Commission  
Human Rights ontarienne des  
Commission droits de la personne



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## **Toward a Commission Policy on Gender Identity**

**Discussion Paper**

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Ontario Human Rights Commission

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Prepared by the Policy and Education Branch

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## Executive Summary

### Introduction

Since the Ontario *Human Rights Code* (the “Code”) was first enacted in 1962, it has evolved to reflect both the changes in society and in our understanding of discrimination. However, while the protections in the *Code* extend to all people, those who are marginalised either on a group or individual basis are more likely to experience discrimination. This is the case with individuals and groups who identify as transgendered.

The Ontario Human Rights Commission (the “Commission”) has developed policy statements and guidelines that cover many of the grounds in the *Code*. However, issues related to transgendered persons remain largely unresolved in policy, procedures, and law.

The term ‘transgendered’ is used in the discussion paper to refer to a range of behaviours linked to gender identity and is used by individuals who are not comfortable with, or who reject, in whole or part, their birth-assigned sex.

### Background

Over the years the Commission has received human rights complaints from transgendered people in areas such as receipt of and access to services, employment, OHIP coverage for sex reassignment surgery and access to medical care, to mention a few. In the past, dialogue with various members and representatives of the transgendered community has resulted in somewhat inconsistent responses from the Commission regarding the processing of complaints and the understanding of the human rights issues faced by transgendered individuals. Eventually, the Commission did arrive at an *ad hoc* working position, namely that the *Code* does protect transgendered persons on the ground of sex.

In March 1998 at a conference held by the International Foundation for Gender Equality, Chief Commissioner Keith Norton spoke about the application of the *Code* as it relates to transgender issues. At that time, a commitment was made that the Commission would undertake policy development in consultation with the transgendered community. The Commission’s working position has been that the existing legal structure as set out in the *Code* can support a progressive understanding of the law and thereby protect transgendered people effectively. This progressive understanding is rooted in the profound relationship between sex discrimination and gender discrimination.

### Discussion

This discussion paper is a first significant step toward fulfilling the commitment made by the Chief Commissioner and subsequent obligations contained in the Commission’s

public accountability framework. In writing this discussion paper, policy staff reviewed jurisprudence, domestic and international legislation, literature, and other human rights commission policies. As well, they consulted with members and representatives of the transgendered community.

Research and consultation indicates that transgendered people experience negative stereotypes that have a pervasive and often traumatic impact on virtually every aspect of their daily lives. For transgendered people some of the fundamental things that we take for granted, like jobs, housing and family life, are potentially at risk because they decide to 'come out' or are involuntarily discovered.

## **Conclusion**

The discussion paper reaffirms the principles and aims articulated in the preamble of the *Code*. The development of a progressive policy within the legal framework of the *Code* would ensure protection of transgendered individuals given their very real experiences with both individual and systemic discrimination.

## TOWARD A POLICY ON GENDER IDENTITY

### Introduction

*One of the great myths of our culture is that at birth each infant can be identified as distinctly 'male' or 'female' (biological sex), will grow up to have correspondingly 'masculine' or 'feminine' behavior (public gender), live as a 'man' or a 'woman' (social gender role), and marry a woman or a man (heterosexual affective orientation). This is not so. There is much disagreement as to why this is not so, but a significant number of people in fact do not fit this simple idea of biological gender destiny.<sup>1</sup>*

This quote serves as a reminder that our knowledge and understanding of human rights has evolved over time. It is also a reminder that we must remain open to considering the most effective methods the Ontario Human Rights Commission (the "Commission") can use to give full meaning to the Ontario *Human Rights Code*<sup>2</sup> (the "Code").

The preamble of the *Code* provides that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

Research and consultation conducted by Commission staff in preparation for this paper shows that transgendered people experience negative stereotypes that have a pervasive and often traumatic impact on virtually every aspect of their lives. They are shunned by society and regarded with suspicion. Their jobs, housing and family lives are as threatened by the process of 'coming out' as by involuntary discovery. These are all issues that favour the development of a progressive policy to protect the human rights of transgendered persons within the legal framework of the *Code*.

Over the last two decades, there has been a growing societal awareness of people whose gender identity is different from accepted social norms. These people include pre- and post-operative transsexuals; transgenderists (transsexuals who have chosen not to pursue sex reassignment surgery) intersexed people, cross-dressers, female impersonators, and others who blur traditional gender lines. Along with emerging visibility is a growing appreciation of the problems that they face. Community, media and web sites dedicated to

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<sup>1</sup> Lees, L., *Gender: Exploring Diversity And Acceptance* <<http://www.msu.edu/~lees/handout.html>>  
Text Copyright 1997-9 by Lisa Josephine Lees.

<sup>2</sup> *Human Rights Code*, R.S.O. 1990, c. H.19.

gender identity report incidents of employment discrimination, harassment, violence, denial of services, higher risk of suicide, addiction and poverty.

By developing policy in this area, the Commission can:

- ✓ promote the dignity and equality of transgendered people,
- ✓ ensure that transgendered people are protected by the *Code*,
- ✓ promote awareness and prevent discrimination,
- ✓ identify areas of systemic discrimination,
- ✓ develop strategies to eliminate discrimination, and
- ✓ dispel myths that foster deep prejudice.

British Columbia was the first Canadian jurisdiction to propose 'gender identity' as a formal ground for protection in human rights law, and other jurisdictions are moving in this direction.<sup>3</sup> Australian discrimination laws as well as several American municipalities and states recognize transgendered people and have included the ground of gender identity or similar concepts in their human rights laws.<sup>4</sup>

### **Commission Involvement in Gender Identity Issues**

The Commission has been aware of gender identity issues as far back as 1984. The Commission has received complaints from transsexuals in areas such as access to services, employment, lack of OHIP coverage for sex reassignment surgery, and access to medical care. However, the Commission has not specifically tracked the number of complaints connected with this issue.

Since the early nineties, informal and formal dialogue with various representatives of the transgendered community has resulted in somewhat different approaches to and understanding of human rights issues. However, the Commission has never had a consistent, approved policy direction in this area with which it could address gender identity issues.

In March 1998 at a conference held by the International Foundation for Gender Equality, Chief Commissioner Keith Norton discussed the application of the *Code* as it relates to transgendered people.<sup>5</sup> At that time, a commitment was made that the Commission would undertake policy development in consultation with the transgendered community. The public accountability framework for the current fiscal year includes policy work on transgendered issues and human rights.<sup>6</sup>

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<sup>3</sup> See BC Human Rights Commission, *Human Rights for the Next Millennium*, (January 1998), recommendation 6.

<sup>4</sup> See Appendix 1.

<sup>5</sup> Keith C. Norton, *The Rights of Transgendered Persons*, unpublished (March 27, 1998).

<sup>6</sup> See the Ontario Human Rights Commission, *Annual Report 1997/1998* (Toronto: 1998) at 30.

Policy development and meetings with the transgendered community took place pursuant to Section 29 of the *Code*, which articulates the functions of the Commission, including the obligations to:

- 3 forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;*
- 3 promote an understanding and acceptance of and compliance with this Act;*
- 3 develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act; and*
- 3 examine and review any statute or regulation and any program or policy be made by or under a statute and make recommendations on any provision, program or policy that in its opinion is inconsistent with the intent of this Act.*

## **Methodology**

The methodology for this discussion paper included:

- consultation with members and representatives of the transgendered community,
- review of jurisprudence and legislation in Canada and in other jurisdictions,
- literature review, and
- review of other human rights commission policies.

Although the reviews of literature and case law were not exhaustive, the intention was to identify significant trends and developments related to the issue of gender identity.

The prime objective of the consultation was to identify human rights issues affecting transgendered persons. The consultations were conducted in face to face meetings and discussions. In total, approximately ninety people participated in the discussions. Four questions were used to initiate the discussions, but discussions also addressed other topics. The questions were:

1. What issues do you feel are important in advancing the human rights of transgendered people?
2. Are there specific laws or areas of law in Ontario that you consider a priority?
3. How do you think the Commission could best help to address the equality rights issues affecting the transgendered community?
4. Is there anything you would like to add that might assist the Commission to identify other areas of concern and plan possible strategic approaches to deal with issues of discrimination against people in the transgendered community?

Meetings with representatives of the transgendered community were informal and qualitative rather than quantitative and were intended to be the first of ongoing discussions. Meetings took place in Toronto, Ottawa, and South-western Ontario. Individual representatives included human rights advocates, educators, counsellors, and activists. As well, spouses and one parent of a transgendered person participated in the consultations. Four large group meetings were conducted on transgendered issues. Male to female transsexuals, female to male transsexuals, cross-dressers and intersexed individuals were also part of the consultations.

A staff member at the Gender Identity Clinic at the Clarke Institute of Psychiatry<sup>7</sup> contributed information on this issue. There were telephone discussions with selected government ministries. Finally, discussions with the British Columbia Human Rights Commission and with human rights advocates from that province who are working in the area of transgendered rights were conducted.

The discussion paper will be released to the consultees providing them with the opportunity to provide feedback its contents.

## **Background**

### **Historical Framework**

Transgendered people have existed throughout history. Several cultures have integrated behaviours related to sex and gender that today would be seen by North American culture as incongruent with socially acceptable behaviours.<sup>8</sup>

At the turn of the twentieth century, transsexualism became a medical phenomenon. German physician Magnus Hirshfield founded the Scientific Humanitarian Committee in 1897 to examine homosexuality, transsexualism, and other aspects of sexual and gender identity outside the expected norms of the day. Later the Diagnostic Statistical Manual on Psychiatric Disorders<sup>9</sup> (current edition referred to as “DSM IV”) included *Gender Dysphoria* to identify the lack of congruence between gender identity and birth-assigned sex.

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<sup>7</sup> This research institute is located in Toronto and is dedicated to research, education, and care relating to mental illness and mental health. The Gender Identity Clinic, located within the larger institution, is responsible for assessing, counselling and treating individuals who identify themselves as transgendered or are referred for treatment.

<sup>8</sup> See *Finding our Place: Transgendered Law Reform Project*, High Risk Project Society (March 1996) at 8. See generally L. Feinberg, *Transgender Warriors: Making History from Joan of Arc to RuPaul* (Beacon Press, Boston, 1996); See also *Niger: Les hommes se maquillent pour trouver une compagne*, GEO: Un nouveau monde: la Terre (aout, 1998). This edition looks at mating rites in different cultures that include female cultural practices for males such as make up.

<sup>9</sup> See *Diagnostic and Statistical Manual of Mental Disorders 4th edition* (Washington D.C.: American Psychiatric Association, 1994). This is an authoritative and comprehensive manual devoted to the classification of psychiatric illness. This manual precisely defines the differences between similar disorders and gives guidelines for making diagnoses.

In 1952, Christine Jorgensen was the first individual to publicly disclose her sex reassignment surgery. In 1966, Dr. Harry Benjamin, an endocrinologist, and sexologist published *The Transsexual Phenomenon*.<sup>10</sup> He notes, among other things, that psychotherapy is an ineffective 'cure' for transsexualism and that sex reassignment surgery could allow the transsexual to experience greater congruence between felt gender identity and birth assigned sex.

The Harry Benjamin International Gender Dysphoria Association now sets out minimum criteria for sex reassignment surgery. These criteria are the basis for standards in gender identity clinics including the Gender Identity Clinic at the Clarke Institute of Psychiatry.

For several decades, transgendered people have been assessed and identified in relation to a 'medicalised' identity or model.<sup>11</sup> For example, a transsexual is considered a medical phenomenon and not as a whole person with a distinct and variant gender identity. Transsexuals remain relatively invisible in society, except within the context of the gay, lesbian and bisexual communities where they are not necessarily identified as transgendered, nor are they always accepted.

Politicisation of transgender issues is also reflected in the grass roots-initiated *International Bill of Gender Rights*.<sup>12</sup> This document addresses areas of oppression for transgendered people as well as the following rights:

- the right to define gender identity;
- the right to free expression of gender identity;
- the right to control and change one's own body;
- the right to competent medical and professional care;
- the right to sexual expression;
- the right to form committed loving relationships and enter into marital contracts; and
- the right to conceive or adopt children, to nurture and have custody of children and exercise of parental rights.

Other rights noted by advocates include:

- the freedom not to have to disclose details of gender role assignment unless necessary;
- the freedom to enjoy a job without fear of dismissal or harassment;

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<sup>10</sup> Dr. H. Benjamin, *The Transsexual Phenomenon* (New York: Julian Press, 1966).

<sup>11</sup> Term used in *Finding our Place* at note 8.

<sup>12</sup> The *International Bill of Gender Rights* (IBGR) was first drafted in committee and adopted by the International Conference on Transgender Law and Employment Policy (ICTLEP) at the organization's second annual meeting, held in Houston, Texas, August 26-29, 1993. The IBGR has been reviewed and amended in committee and adopted with revisions at subsequent annual meetings of ICTLEP in 1994 and on June 17, 1995. Copyright 1995 by ICTLEP <<http://www.msu.edu/~lees/ibgr.html>>.

- the right to human rights protection; and
- the right to be acknowledged at death in one's felt gender.

In 1998, The Canadian Task Force for Transgender Law Reform was founded. This group seeks to have amendments to the *Code*, provincial and federal legislation, and the *Canadian Charter of Rights and Freedoms*.<sup>13</sup> It also seeks a guarantee of rights and freedoms such as:

- freedom of gender expression;
- freedom of movement;
- the right to enter into marriage;
- the right to parent children;
- the right to self governance;
- the right to therapeutic care, and
- the right to appropriate health care.<sup>14</sup>

## Terminology

As with many emerging human rights issues, terminology is a powerful and, at times, a controversial tool. In consultation, one group of transsexuals expressed concern about the use of the term 'transgendered' to describe their experience because it covers so many different types of behaviour and can undermine the importance of individual or particular issues faced by transsexuals.

'Transgendered' is used here as a generic term to describe people who are not comfortable with or who reject, in whole or in part, their birth-assigned gender identities. The category includes transsexuals, cross-dressers, intersexed individuals, 'drag queens', 'drag kings' and may also include female impersonators. It should be noted that each of these groups has distinct issues in relation to discrimination in society. The term 'transgendered' is, in effect, a form of shorthand that refers to a wide range of people and experiences. However, it is important not to allow the use of a single term to imply that their needs are identical or that their human rights issues are all the same.

Accompanying the growing visibility of transgendered persons is a shift to the politicisation of the issue where advocacy groups assert their perspectives, which include changes in terminology. On one end of the terminology continuum is the term gender dysphoria, used by the Gender Identity Clinic at the Clarke Institute of Psychiatry<sup>15</sup> and at the other end are terms such as 'gender euphoria', 'gender

<sup>13</sup> *Canadian Charter of Rights and Freedoms* [Part 1 of the *Constitution Act, 1982*, R.S.C. 1985, App. 11. C. 44, enacted as Sched. B to the *Canada Act, 1982* (U.K.), c. 11].

<sup>14</sup> See Canadian Task Force for Transgendered Law Reform, *Charter of the Canadian Task Force for Transgendered Law Reform*; Draft 1.2 (Ottawa: unpublished, 1998).

<sup>15</sup> The Gender Identity Clinic at the Clark Institute of Psychiatry defines gender dysphoria as "A discontent with one's biological sex, the desire to possess the body of the opposite sex, and the wish to be regarded as a member of the opposite sex. These feelings may be expressed verbally, in assertions that

gifted' or 'whole gendered', which have become popular, liberating terms amongst members of the transgendered community.

## Definitions<sup>16</sup>

Transgendered people have clearly identified that they should be addressed based on the gender they present. Male to female transsexuals, transgenderists, and cross-dressers who present as women should be addressed as women. Female to male transsexuals, transgenderists and cross-dressers who present as men should be addressed as men.

- **Cross-Dresser** refers to people who dress in the clothes of the opposite sex for emotional satisfaction and psychological well being. Because of its association with medical identity, the diagnostic term 'transvestite' is not used favourably within the transgendered community.
- **Gender identity** refers to those characteristics that are linked to an individual's intrinsic sense of self that is based on attributes reflected in the person's psychological, behavioural and/or cognitive state. Gender identity may also refer to one's intrinsic sense of manhood or womanhood. It is fundamentally different from, and not determinative of, sexual orientation.
- **Gender reorientation** occurs when an individual moves from birth assigned sex to the felt gender. The process includes the adoption of the felt gender role, 'passing' as the opposite sex among strangers, using an opposite sex name, obtaining new personal identity documents that reflect the person's felt gender and/or new name, working in the opposite sex role and undergoing hormone treatment or surgery. Persons who have completed a gender identity clinic program and undergo sex reassignment surgery are considered members of their felt gender (and are sometimes referred to as transsexual).
- **Intersexed** means being born with the (full or partial) sex organs of both genders, or with underdeveloped or ambiguous sex organs. About 4 per cent of all births are intersexed to some degree. This word replaces the term 'hermaphrodite'.
- **Sex** refers to a person's genetic or anatomical sex; there are also associated psychological and behavioural norms related to a person's sex.

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one properly belongs to the opposite sex, or non-verbally, in cross-gender behaviour (e.g., dressing as the opposite sex). The extreme forms of gender identity disorders collectively referred to as *transsexualism*, usually involve the desire to live as a member of the opposite sex in society and to obtain hormonal and surgical treatment to approximate the external anatomy of the opposite biological sex. <[http://www.clarke-inst.on.ca/about\\_illnesses/gender\\_identity\\_disorder.html](http://www.clarke-inst.on.ca/about_illnesses/gender_identity_disorder.html)>.

<sup>16</sup> See Appendix 2.

- **Sexual orientation** refers to the choice of sexual partners and is distinct from gender identity. The ground of sexual orientation would likely not protect transgendered persons from discrimination based on gender identity.
- **Transsexuals** are those people who have a strong and persistent feeling that they are living in the wrong sex. A male transsexual has a need to live as a woman and a female transsexual has a need to live as a man.
- **Transgendered** describes individuals who are not comfortable with, or who reject, in whole or in part, their birth assigned gender identities. The term “transgendered” unifies people who identify as transsexuals, transvestites or “cross-dressers”, drag queens, *etc.*
- **Transgenderists** identify as the opposite gender but have decided not to undergo sex reassignment surgery.

## Demographics

Transgendered people come from all walks of life, and are represented in every race, class, culture, and sexual orientation. ‘Gender identity disorders’ have been identified in children as young as 3 years of age and in adults as old as 70. There is no definitive statistical information that speaks to the prevalence of ‘gender identity disorder’ in the general population. The statistical information that does exist varies both in terms of numbers and the sub-groups that are identified. Examples include the following; the known incidence of transgendered persons and specifically transsexual adults is 1 in 24,000 to 37,000 men and 1 in 103,000 to 150,000 women; 1 in 30,000 adult males and 1 in 100,000 adult females seek sex reassignment surgery;<sup>17</sup> and finally, according to statistics used by the Gender Identity Clinic at the Clark Institute of Psychiatry, the prevalence rate of transsexualism is about 1 case per 50,000 adults.<sup>18</sup>

However, representatives of the transgendered community highlighted that the prevalence of variant gender identities is probably underestimated because not all gender dysphoric people make themselves known to others or even acknowledge their identity to themselves.<sup>19</sup>

## ‘Coming Out’

‘Coming out’ as a transsexual person connotes a cycle or pattern of acknowledgement that one’s gender identity does not match one’s birth assigned sex. That cycle may begin, for example, with acknowledgement to one’s self and

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<sup>17</sup> See *DSM IV* at 535.

<sup>18</sup> See Gender Identity Clinic at the Clark Institute of Psychiatry <[http://www.clarke-inst.on.ca/about\\_illnesses/gender\\_identity\\_disorder.html](http://www.clarke-inst.on.ca/about_illnesses/gender_identity_disorder.html)>.

<sup>19</sup> See *Sexual and Gender Identity Disorders, Treatments of Psychiatric Disorders* (2nd ed.) (TPDII: 1995) Section 9.

move toward public acknowledgement. However, for many people, this process is not linear. It does not start with denial and end with acknowledgement. It may be a non-linear process where the individual struggles with denial and acknowledgement over a period of time until coming to terms with the true gender self. Many writers, as well as individuals who participated in the consultation, noted that there may be a childhood awareness of being different. This awareness may lead them into the 'closet', seeking to 'pass' through modelling behaviours that are consistent with their birth-assigned sex.

'Coming out' may involve behaviours ranging from occasional 'presenting' in one's felt gender identity to full transition to daily life in that gender. The latter may occur with or without sex reassignment surgery. For those who do not undergo sex reassignment surgery, but who nonetheless identify as the other gender, the transition may still be complete with respect to the manner in which the individual conducts his or her daily life.<sup>20</sup>

'Coming out' involves a lengthy process of self-discovery and requires patience and focus. This contrary to the notion of opponents of transgendered people, one often reflected in the media, that being transgendered is a whim, that it arises out of mental imbalance or that it is simply a matter of choice or preference. Although the process of self-realisation and acknowledgement as a transgendered person can be difficult, acceptance of one's identity and then disclosure to others allows greater congruence with one's self and with society.<sup>21</sup> 'Coming out' breaks not only internalised silence about the true nature one's self, but also the societal silence about the diversity of gender identity.

'Coming out' can also trigger discrimination and mistreatment, factors that point to the need to educate, for example, those who provide housing, service providers, those in the helping professions, members of the public service, employers and co-workers. For these reasons, public education about gender identity is crucial to both transgendered and non-transgendered people.

At different stages of 'coming out', there are risks such as increased harassment and negative treatment upon disclosure. For a transsexual who proceeds with surgery, it is inevitable that, at some point, they publicly come out and seek access to public services and facilities. Family, friends, employers and co-

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<sup>20</sup> See J. Evelyn, *Mom, I need to be a girl*, (California: Walter Trook Publishing, 1998) which outlines the true story of a young male to female transsexual. See also L. Masters (Blake), *Transgender Identity, A TransEqual Document: The application of new information about the origins of human gender identity, to transsexuals and transgenderists*, (Ontario: TransEqual, 1993); G. Ramsey, *Transsexuals: Candid Answers to Private Questions* (California: The Crossing Press, Freedom 1996); Brown, M.L. and Rounsley, C. A., *True Selves Understanding Transsexualism: For Families, Friends, Co workers, and Helping Professionals*, (San Francisco: Jossey Bass, 1996); J.J. Allen, *Inside the world of Cross dressing: The Man in the Red Velvet Dress* (New York: Birch Lane Press Book, 1996).

<sup>21</sup> See P. Califia, *Sex Changes: The Politics of Transgenderism* (San Francisco: Cleis Press, 1997); see also K. Bornstein, *Gender Outlaw, On Men, Women and The Rest of Us* (New York: Routledge, 1994); see also M. Rothblatt, *The Apartheid of Sex: A Manifesto on the Freedom of Gender*. (New York: Crown Publishers, 1995).

workers, caregivers, doctors, as well as members of one's spiritual community may witness and respond to this transition. At this stage, invisibility or non-disclosure is not usually a viable option.

## Myths and Facts

Recently, there has been more attention to the issues faced by transgendered people. Occasionally, some sources of the mainstream media have begun to address these issues in a more constructive fashion<sup>22</sup> but myths and misinformation persist and only serve to reinforce stereotypes.

Myths about transgendered people include:

- *Transsexualism is unnatural:* Human sexuality exists on a spectrum of physiological and psychological characteristics. Research indicates that throughout history there have been people whose gender identity was different from their birth assigned sex.
- *Transsexuals deceive people when they do not disclose themselves as transsexual:* Individuals who present themselves in their felt gender should have the right to decide whether to disclose their gender identity except in circumstances where there are *bona fide* and reasonable requirements.
- *Male to female transsexuals are men until they have had a sex change. Female to male transsexuals are women until they have had a sex change.* For the most part, most transsexuals do not identify with their birth assigned sex, although they may present as that sex during some part of their lives.
- *Transgendered people are part of the gay and lesbian community.* Historically, transgendered people were identified based on their perceived sexual orientation and subsequently were associated with gays, lesbians, and bisexuals. Although transgendered people are sometimes politically associated with the gay, lesbian and bisexual communities, their experiences with discrimination are not necessarily the same. This was noted in the consultations and is addressed in the popular literature as well.<sup>23</sup>

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<sup>22</sup> See for example Raphael, "The Cruellest Cut" *The National Post*, Wednesday (25 November 1998) B1; See also the October 1998 issue of *Utne Reader* that was dedicated to Gender Issues, LENS PUBLISHING CO., Minneapolis, Minnesota U.S.; see also Over the last twenty years, there has been growing visibility of transgendered issues appearing in mainstream culture. For example, R. Richards (with John Ames), *The Renée Richards Story: Second Serve* (New York: Stein and Day, 1983) which was also made into a television movie. The U.K. television dramatic series *Coronation Street* has a transgendered character named *Hayley Patterson* who first appeared in January 1998.

<sup>23</sup> See note 21

Some other 'gender myths' were set out in an information flyer distributed by transsexual women who were protesting at a women's music festival that excluded male to female transsexuals. The flyer highlights the fact that there are also diverse views amongst women, some of which are exclusionary.

- *Transsexuals have surgery so they can have sex the way they want to.* How or with whom a person wants to have sex is usually not a significant factor in the desire for sex reassignment. Usually, people undergo sex reassignment - a difficult and painful process - in order to make their bodies conform more closely to the way they feel about their gender. Whether a transsexual is attracted to men or to women normally does not change with surgery.
- *Male to female transsexuals have been raised as boys, have never been oppressed as women, and cannot understand women's oppression.* Some male to female transsexuals were raised as girls for portions of their lives, appeared to the world as girls and were treated like girls. Some were beaten and raped both by their own family members and others because of their belief that they were girls or their desire to become girls. For most, the difference in the way they were treated when they appeared as men and after they began appearing as women brought sexism into sharp focus.
- *Women's space is not "safe" space if male to female transsexuals are allowed.* Women's space - and anyone's space for that matter - is not safe when behaviour is disrespectful or threatening. Transsexuals are no more likely to behave this way than others are. Individuals who behave inappropriately should be excluded rather than excluding an entire group because some of its members act in offensive ways.
- *Non- transsexual women have the right to decide whether transsexuals should be included in the women's community.* Each individual has a right to claim her own identity. While claiming this right for themselves, some members of the women's community would deny it to others. Transsexuals can and do include themselves in the women's community and the lesbian community without permission from non-transsexuals.<sup>24</sup>

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See *Gender Myths*, distributed at Michigan Womyn's [sic] Music Festival (undated).

## Current Issues

### Medical Treatment and Medicalisation of Identity

#### (a) Gender Dysphoria/Gender Identity Disorder

The cause of gender dysphoria is not known. Recent scientific evidence suggests that there are biological influences before birth. If so, gender identity, along with other physical characteristics, is established long before environmental factors influence individual socialisation.<sup>25</sup> A recent experiment suggests that both biology and some environment influences may play a role in determining gender identity.<sup>26</sup> Other experts, such as Professor Michael Gilbert (also known as Miqqi Gilbert) construct philosophical approaches. Professor Gilbert, a self-identified cross-dresser, looks at gender rationality and integration of the existence of the identified gender “coming together in a pan-gendered whole that will combine the best of both worlds”.<sup>27</sup>

In the medical model, transsexual men and women are diagnosed with *gender dysphoria* and *gender identity disorder*. In the *DSM IV* the American Psychiatric Association presents several components of what it calls ‘gender identity disorder’:

- a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex;
- not merely a desire for any perceived cultural advantages of being the other sex but evidence of a persistent discomfort about one’s biologically assigned sex; and
- clinically significant distress or impairment in social, occupational or other important areas of functioning.

While some forms of gender identity dysphoria may be temporary, transsexualism is immutable. Specialised medical clinics such as the Gender Identity Clinic at the Clarke Institute of Psychiatry treat individuals diagnosed with gender dysphoria.

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<sup>25</sup> See Moir, A. and Jessel, D., *Brain Sex: The Real Difference Between Men and Women* (New York: Viking Penguin, 1989).

<sup>26</sup> See S. Bradley, G. Oliver, K. Zucker, A. Cherniak, *Experiment of Nurture: Ablatio Penis at 2 months, Sex reassignment at 7 months and a psychosocial follow up in Young Adulthood*, in *PEDIATRICS* vol. 102, No 1, July 98, pg. 9.

<sup>27</sup> See M. Gilbert, *Beyond Appearances: Transgenderism and Gendered Rationality*, in *Gender Blending*, (Buffalo: Prometheus Press, 1997) at 58-69.

## **(b) The 'Real Life Experience', Gender Reorientation and Sex Reassignment Surgery**

Gender reorientation is a form of medical treatment that takes place in phases through what used to be called the 'real life test' and is now called the 'real life experience'. The phases of the 'real life experience' include *interpersonal transition* from the biologically assigned sex to the felt gender identity; *document transition*, which includes changes of birth certificate, driver's licence *etc.*; and *physical transition*, which includes hormone therapy and surgery. The 'real life experience' requires the pre-operative individual to 'live' in their felt gender for a prolonged period of about one to two years, depending on the criteria established by the gender identity clinic that is authorising the sex reassignment surgery.

Although there is some agreement that time and complete information are required for gender reorientation, there is significant controversy within the transgendered community about 'real life experience' and its medical necessity. Many, but not all, gender identity clinics, including the Gender Identity Clinic at the Clarke Institute of Psychiatry, use 'real life experience' as a prerequisite to sex reassignment surgery. In consultation, one individual with a medical background stated that the 'real life experience' does not provide useful information to the patient about what should be expected in sex reassignment surgery. It is rather a period of compliance with a rigid set of criteria. Several people did acknowledge that it takes time to make the decision to have sex reassignment surgery and what really should be provided to individuals is a process of informed consent, as with any other type of surgery.<sup>28</sup>

The costs of sex reassignment surgery vary. Female to male surgery in Toronto costs approximately \$10,000 to \$12,000.<sup>29</sup> In the UK, where the Gender Identity clinic of the Clark Institute of Psychiatry used to sent its clients, male to female surgery costs approximately £9,000 (approximately \$18,000 Canadian). The information that is available on costs of sex reassignment surgery indicates that in the United States male to female surgery can cost between \$10,000 and \$28,000 (U.S.). According to the 1996 British Columbia law reform project on human rights and the transgendered community<sup>30</sup>, male to female sex

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<sup>28</sup> See L. Master, *Extended Informed Consent*, (Transequal, 1994); See also Canadian Task Force for Transgendered Law Reform, note 14. For general discussion on the real life experience See L. H. Clemmensen, *The Real Life Test for Surgical Candidates*, M.A. Ch 7 1990 American Psychiatric Press U.S.A. Clinical Practice Number 14: *Clinical Management of Gender Identity Disorders in Children and Adults*) Ch 8, same book: *Hormone Treatment and Surgery* Robert Dickey, Betty W. Steiner; See also Blanchard, R. *Gender Identity Disorders in Adult Men, Clinical Management of Gender Identity Disorders*; Blanchard, et al., "Prediction of Regrets in Postoperative Transsexuals (34) Canadian J. of Psychiatry (Feb 1989); Blanchard et al., "Gender Dysphoria, Gender Reorientation, and the Clinical Management of Transsexualiam" J. of Counselling and Clinical Psychology at 295. See also referenced in note xiv above; Brown, M.L. and Rounsley, Chloe Ann, *True Selves Understanding Transsexualism: For Families, Friends, Co-workers, and Helping Professionals* (Jossey Bass, San Francisco: 1996).

<sup>29</sup> This surgery does not include a phalloplasty (a medical term that refers to the procedure to construct male external genitalia); at this time it is not medically recommended by the Gender Identity Clinic at the Clark Institute of Psychiatry.

<sup>30</sup> See note 8.

reassignment surgery ranges from between \$5,000 and \$10,000. Female to male sex reassignment surgery costs considerably more, ranging from \$20,000 to more than \$60,000.

In consultations with the transgendered community, a number of people expressed concerns with the Gender Identity Clinic at the Clarke Institute of Psychiatry and their use of a medical model for gender dysphoria and gender identity disorder. The Clinic was criticised for their stringent standards, for the timing of and access to hormone therapy and for eligibility requirements. Consultees felt that the requirements do not reflect the real life needs of most transsexuals and therefore are accessible to only a few. For example, presenting as the other sex is especially difficult for birth assigned men transitioning to women. Before hormone therapy has begun, and without a lengthy period of electrolysis, the likelihood that the person will 'pass' as a woman is low. The result is that living as one's felt gender can be highly stressful and may open the door to discriminatory treatment.

In *Myth, Stereotype, and Cross-Gender Identity in the DSM-IV*, Barbara Hammond notes that there is

*...substantial historical precedent for the enforcement of rigid gender roles by medical practitioners. For example, from the early to mid-1900's women who exceeded the bounds of gender conformity in demanding civil rights and the right to vote were discredited and often institutionalized with a diagnosis of "hysteria". Homosexuality ...was classified as mental illness until 1973, representing a violation of "appropriate" gender role. At the heart of the current medical policy is a presumption of gender essentialism, perpetuating the doctrine of two sexes, immutable, and determined by genitalia. A growing body of literature that considers gender a social construction, not a biological imperative...has been inexplicably disregarded.*

*Other social considerations include the power inequity in transsexual psychotherapy and the validation of medical caregivers...A therapist serving as a gatekeeper to the availability of surgical or hormonal treatment holds absolute power over a transsexual client. This undermines the therapeutic relationship, leaves the client little motivation for honest expression..., and creates a distorted view of transgenderism by psychiatric caregivers reflected in the current medical policy. Finally, medical practitioners and researchers have a self-interest in the present diagnostic categories, which are perceived to lend respectability to gender work...and legitimize association with transgendered subjects...<sup>31</sup>*

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<sup>31</sup> See B. Hammond & Wilson, *Myth, Stereotype, and Cross-Gender Identity*, 21st Annual Feminist Psychology Conference in Portland, Oregon (1996) <<http://www.transgender.org/tg/gic/awptext.html>>.

### (c) Legal and Medical Issues

In *Finding our Place: The Transgendered Law Reform Project*, the authors note that the legal system and the medical system have engaged in the 'medicalisation of identity'. For example, the courts ask whether, medically speaking, a person is a woman or a man:

*There is very little conceptual space in law for the idea that to ask if one is a "real man" or a "real woman" is to ask the wrong question... In order to protect themselves from lawsuits, the medical profession requires that a transsexual have a psychiatric diagnosis requiring the surgery. Though you may be able to have breast reduction or enhancement surgery, or facelift, etc. essentially on demand, you cannot have SRS [sex reassignment surgery] without a psychiatrist's letter saying you need it.<sup>32</sup>*

The legal preoccupation with a medicalised gender identity means that individual ability to self-identify is limited unless the person has supporting documentation. In Ontario, the government interpretation of the *Vital Statistics Act*<sup>33</sup> requires a medical letter and sex reassignment surgery before allowing a change in the birth certificate. Government policies for other documentation vary, but many ask for medical proof that the individual is transsexual rather than accept self-identification. Consultees reported instances of court cases such as custody disputes where the transsexual parent was required to undergo medical assessment to confirm the person's gender identity.

Problems arise when the medical profession is responsible for all aspects of gender identification rather than allowing self-identification by a person who has consistently identified themselves as transgendered. Despite self-identification as transsexual, for example, many institutions require medical certification of what an individual has already stated to be true. The law, in its enforcement and administration, allows for only a minimal capacity to self-declare as transgendered. Thus when dealing with official institutions (*i.e.* court system, corrections system) even if a person self identifies as transgendered they have no access to medical documentation to support their felt gender identity so that they can be dealt with in the appropriate manner.

Medicalisation means that a transgendered person must receive 'official' recognition from a gender identity clinic, which is not always accessible, in order to receive appropriate service or treatment from the health care system and other organizations that they may come in contact with. General practitioners often do not have the resources or expertise needed to provide appropriate services to transgendered patients. As a result, there are many transgendered individuals who self-medicate and self-treat with hormone therapy, which subsequently puts

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<sup>32</sup> See note 8.

<sup>33</sup> *Vital Statistics Act*, R.S.O. 1990, Chapter V.4.

their health at risk. Many individuals in this situation reported that they felt they have no other option.

During the consultation, one pre-operative transsexual woman and one intersexed woman showed letters written by their doctors. The letter 'introduced' the individual, advised that the individual had been diagnosed as having 'gender identity disorder' and that people should address the individual as a woman. These two individuals indicated that they carried this letter at all times in the event that they were stopped by the police, stopped when using women's change rooms or washroom facilities, questioned at government agencies or in any other official setting.

A growing number of people who are transgendered no longer consider sex reassignment surgery as a suitable option for them either due to cost, medical risks, medical barriers, or on principle. Many do not wish to assimilate into a society with rigid bifurcated standards of sex and gender congruence, but rather ask that society accepts and adapts to transgendered people. Nevertheless, a large number of transsexuals in Ontario seek sex reassignment surgery but due to a recent change in government policy, and economic and medical barriers, they cannot access it. These factors also effectively preclude transgendered people from accessing hormone therapy.

#### **(d) Disability Diagnosis**

Although cross-dressing and transsexualism are considered psychiatric disorders, there is controversy about treating either as a disability. However, a diagnosis of gender identity disorder is the 'disability' that must be established for sex reassignment surgery. Many jurisdictions (including Ontario) limit access to health insurance coverage for medically approved procedures to those procedures available from a gender identity clinic. Medicalisation may also be a barrier to an individual's ability to self-determine and self-declare a gender identity that varies from their birth assigned identity.

British advocate and law professor Stephen Whittle supports the move away from the medical model that focuses on disorder - and hence disability - toward a rights-based approach that focuses on accommodating persons based on their gender identity:

*Transsexuals are seeking for the law to acknowledge that they have rights, not as transsexuals, but as men and women who have finally become appropriately recognizable through medical intervention. They are seeking for the law to recognize the gender assertions they have made through seeking reassignment.*<sup>34</sup>

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<sup>34</sup> S. Whittle, *Legislating for Transsexual Rights: A Prescriptive Form*, PRESS FOR CHANGE, 6/3/98 <<http://www.pfc.org.uk/legal/whittle3.htm>>.

During the consultation, some individuals indicated that they were not in conflict with the diagnosis of gender dysphoria. Indeed, the diagnosis facilitated their ability to identify in their felt gender and allowed them to access sex reassignment surgery. One group involved with transgendered individuals who are homeless, street workers or living with HIV/AIDS stated that the medical diagnosis is especially important for lower income transsexuals who cannot afford private medical care or who are employed during the transition from the birth assigned sex to their felt gender. Others were, at the very least, concerned with the negative stereotyping attached to a diagnosis of a psychiatric disability.

Most community members stated that access to medical services for sex reassignment should not be barred even if the psychiatric diagnosis is removed. One group made an analogy between the accommodation of medical needs related to aligning one's physical appearance to one's gender identity on the one hand and the medical care that is required during pregnancy on the other. The Supreme Court of Canada in *Brooks*<sup>35</sup> recognized pregnancy as a health issue rather than a disability and required that accommodation be provided on the former basis. Similarly, it is argued that transgendered persons should be able to obtain accommodation without being 'pigeon-holed' as persons with disabilities.

## **Social**

### **(a) HIV/AIDS**

HIV/AIDS is a significant health consideration for transgendered individuals who engage in high-risk behaviours such as unprotected sexual activity or intravenous drug use. This issue is highlighted by a research report done in Vancouver, which indicated that 70 to 80 per cent of transgendered sex trade workers are HIV positive.<sup>36</sup>

### **(b) Transgendered Youth**

Transgendered youth have limited access to professionals who understand the nature of gender identity and how to support a transgendered individual. Continued homophobia and transphobia in the social services directed to gay, lesbian and bisexual and transgendered youth compound this. This was stated several times in the consultations. One woman related the story of her incarceration in youth group homes before her sex reassignment surgery. She was told to act like a man, disciplined for not doing so, and survived the process simply by denying her transgendered status.

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<sup>35</sup> *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1289.

<sup>36</sup> A. V. Scott, *HIV/AIDS in the Transgendered Prison Population: A Comprehensive Strategy* (Toronto: Prisoners' HIV/AIDS Support Action Network [PASAN], 1998). See also: K. Namaste, *Access Denied: A Report on the Experiences of Transsexuals and Transgenderists with Health Care and Social Services in Ontario*, Submitted to *Project Affirmation*, July 1995; HIV/AIDS and Transgender Communities in Canada (Ontario: Genderpress, 1995).

Further, consultees stated that the educational system does not understand transgendered issues. Transgendered youth and transgendered parents both face barriers dealing with the school system. Some social service agencies are beginning to recognize the need to address these issues. For example, the Catholic Children's Aid of Metropolitan Toronto has developed a policy that includes transgendered youth in its intervention policy. The policy states that all staff care providers and volunteers must undergo training with regard to the needs, concerns, language, symbols and culture of gay, lesbian, bisexual and transgendered youth and families. Issues concerning sexuality that arise in service delivery to transgendered youth should be treated with the same respect, concern, sensitivity, and confidentiality accorded to heterosexual youth and families.<sup>37</sup>

### **(c) Services and Media**

Service delivery to the transgendered community is generally reported to be poor.<sup>38</sup> In consultations, individuals reported that they had been stopped by the police and told to identify who they were. Hospital workers show prejudicial attitudes in treatment once the birth assigned sex of the individual is discovered. Insurance companies give differential treatment once the transsexual identity of an individual is discovered. Transgendered women have difficulty accessing women's shelters and other social service agencies. Families of transgendered people, including spouses, children and parents also lack the resources to obtain the support and understanding they need and to be free from discrimination.

The media generally shows a misunderstanding of the issues faced by transsexuals. There is often confusion of terminology used to describe individuals, *i.e.* not distinguishing between the issues of transsexuals, cross-dressers, etc. The result is that derogatory or sensationalistic language is frequently used when reporting on issues that are related, in whole or part, to transgender issues.

### **(d) OHIP Coverage**

From 1970 to 1998, OHIP coverage had been provided for sex reassignment surgery for individuals approved by the Clarke Institute of Psychiatry. Ontario's Ministry of Health treated most aspects of sex reassignment surgery, including out-of-province procedures, as reimbursable services under OHIP. Section 7 of the *Health Insurance Act*<sup>39</sup> outlines that breast enlargement, augmentation, mammoplasty or breast reconstruction in a male to female conversion is not an insured benefit unless prior authorisation is received from the Ministry of Health. In all cases, health coverage for sex reassignment surgery in Ontario was

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<sup>37</sup> A. V. Scott, *Do Transgendered Youth wish to be part of a Harassment and Discrimination Policy, which includes Gay, Lesbian and Bisexual Youth?* (Unpublished, April 8, 1996).

<sup>38</sup> See also: K. Namaste at note 36.

<sup>39</sup> *Health Insurance Act*, R.S.O. 1990, Chapter H.6.

contingent upon having completed the program at the Gender Identity Clinic at the Clarke Institute of Psychiatry and having been recommended by the Clinic for sex reassignment surgery.

In October 1998, the Ontario government decided to remove sex reassignment surgery from the list of services covered by provincial health insurance. This decision was met with public outcry from the transgender community and is interpreted as a statement that the government does not consider the issues of transgendered people as valid, significant, or important. This decision has a profound impact on transgendered people who are part of a highly marginalised community and who are also often in a lower income bracket which means they lack the financial resources to pay for surgery.

The Ministry of Health has not provided any rationale behind the decision to delete health insurance coverage for sex reassignment surgery. An article in the Toronto Sun, based on information apparently provided by the government, states that the savings will be applied to cardiac surgery.<sup>40</sup> However, the public funds allocated for sex reassignment surgery are insignificant when compared to the budget of the Ministry of Health. The article ignores the fact that qualified professionals have identified surgery to be a medical necessity. Moreover, the consequences of not covering surgery may include additional or increased costs in other areas such as counselling and health care. It may also result in an elevated risk of suicide in the transgendered community because individuals are unable to obtain appropriate services.

### **(e) Fear of discovery**

Transsexuals and transgenderists fear discovery of their birth-assigned sex. Likewise, for cross-dressers, the fear of being discovered is a significant concern. The repercussions of being discovered can include termination of employment, loss of housing, loss of services, social isolation and other forms of discrimination, harassment and possibly violence.

### **(f) Hate Crimes and Transgendered Individuals**

Crime statistics indicate that transgendered people are victims of hate crimes that may also involve violence. Furthermore, such crimes may not be taken as seriously or dealt with appropriately. As noted in a draft brief by the Canadian Task Force for Transgendered Law Reform:

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<sup>40</sup> See J. Harder, "Sex change surgery gets axe: Ontario cuts funding for expensive 'lifestyle' procedure", Toronto Sun (3 Oct 1998) 18; also see letter from Dr. Paul E. Garfinkel, President of the Clarke Addiction Research Foundation to Sandra Lang, Deputy Minister of Health, Ministry of Health, dated Oct 20, 1998.

*Many live in a constant state of fear for their lives and physical security. Should they openly acknowledge who they are, they risk not only hateful retaliation but the loss of their family, relationships and jobs.<sup>41</sup>*

Author Ki Namaste notes that 'a perceived violation of gender norms is at the root of many instances of assault, harassment and discrimination'. She also notes that when female to male transsexuals are assaulted, rape is part of the violence endured and that a high percentage of transgendered individuals are the victims of violence.<sup>42</sup> The Ottawa police's Hate Crimes Unit has begun to record incidents of transgendered hate crime as a specific category.<sup>43</sup> It would appear that to date, this is the only Ontario unit known to do so; others likely include incidents in the category of sexual orientation. A one page memo regarding transsexual issues notes that human rights violations and acts of violence range from verbal abuse to murder and are perpetrated daily against transgendered and transsexual people in Canada. The memo highlighted the 1996 murders in Toronto of Shawn Keagan and Deanna Wilkinson, who were transgendered prostitutes.<sup>44</sup>

Other jurisdictions have recognized the issue of hate crimes against transgendered people. In 1998, the state of California passed a hate crimes bill which clarified the protection for transgendered people.<sup>45</sup> In March 1999 a bill entitled the *Hate Crimes Prevention Act of 1999*,<sup>46</sup> which includes the ground 'gender', was introduced in the U.S. House of Representatives and is currently being reviewed in committee.

### **(g) Poverty**

There is no statistical data about the rates of poverty for transgendered people. However, it was noted during consultation that transgendered persons experience severe economic hardship. This could be due to the difficulties in

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<sup>41</sup> See note 8.

<sup>42</sup> See K. Namaste, *Genderbashing: sexuality, gender, and the regulation of public space*, Environment and Planning D: Society and Space (1996) Volume 14, pages 221-240.

<sup>43</sup> See note 8.

<sup>44</sup> See information flyer distributed at the Toronto Human Rights Film and Video Festival (December 1998).

<sup>45</sup> On September 28, 1998, Governor Pete Wilson signed into law AB 1999, a bill which clarifies that gender and gender expression are protected categories under California's existing hate crimes laws. District attorneys in San Francisco and Los Angeles counties, who supported AB 1999, already prosecute such hate crimes under existing law, but other district attorneys do not use this interpretation of the statute. The new law creates uniformity of application of the broader reading of the law across the state.

<sup>46</sup> The *Hate Crimes Prevention Act of 1999* was introduced in the U.S. House of Representatives on March 11, 1999. This *Act* would: provide new authority for federal officials to investigate and prosecute cases in which the hate violence occurs because of the victim's real or perceived sexual orientation, gender, or disability; and remove the overly-restricted obstacles to prosecution by eliminating the current proof requirement that the victim was attacked because he or she was engaged in a federally-protected activity, such as going to vote. The *Act* is currently before the Senate Judiciary Committee.

accessing medical and insurance services, discrimination in the workplace, and social and economic marginalisation.<sup>47</sup> Mirha-Soleil Ross, the co-ordinator of 'Meal Trans' a program for transgendered people in Toronto, states that 90% of those people who utilise the program earn less than \$10,000 a year.

## **(h) International Persecution of Transgendered People**

The social rejection of transgendered persons manifests itself internationally through cross-border issues of recognition of transgendered individuals as refugees and related issues of returning them to their country of origin under international law. For example, a transgendered woman who claimed refugee status in Canada was deported to Mexico although she alleged fear of persecution if returned.<sup>48</sup>

The International Gay and Lesbian Human Rights Commission (IGLHRC) frequently reports on human rights violations against sexual minorities, including transgendered people. For example, in June 1998 their newsletter reported the failure of ambulance personnel to assist a transvestite, Marcela, who had been stabbed and was left bleeding in the street for two hours until she died. There are also reported incidents of human rights violations toward transgendered women in Argentina, incidents of gay and transgendered people being murdered in Guatemala and police abuse in Turkey.<sup>49</sup>

## **Commission's Framework and Current Position**

### **(1) Introduction**

The framework for developing Commission policy in the area of gender identity is the *Code*, with the preamble being of particular importance:

*it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.*

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<sup>47</sup> San Francisco Human Rights Commission, *Investigation into Discrimination against Transgendered People*, Chapter 4 - Findings and Recommendations (California: San Francisco, 1994).

<sup>48</sup> See note 44. (Info flyer in part references the recent deportation of transsexual community activist Shadmith Manzo by the Canadian government to Mexico where she now lives in hiding, unable to leave her place of residence without fearing for her life).

<sup>49</sup> See International Gay and Lesbian Human Rights Commission, Newsletter Vol. III, Issue 1 (June 1998). See also Human Rights Watch IGLHRC, *1997 Year in Review*.

The Commission has developed policy statements and guidelines for many of the grounds in the *Code*. However, for the most part, the human rights of transgendered persons have not been addressed in policies, procedures, or law.

## **(2) The Commission's 'Working Policy' on Gender Identity Issues**

Since March 1998, the Commission's working position has been that the existing legal structure set out in the *Code* can support a progressive understanding of the law and thereby protect transgendered people effectively. Although gender identity is not explicitly set out in the *Code*, this progressive understanding is rooted in the profound relationship between sex and gender. This approach was recently successfully used by the British Columbia Human Rights Tribunal in a case involving a complaint from a individual who although living full-time as a woman but not having undergone sex reassignment surgery, was not allowed to use the woman's washroom in a nightclub. In ruling in favour of the complainant the tribunal found 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 concluded by stating that "discrimination against a transsexual constitutes discrimination because of sex."<sup>50</sup>

Given that there is no express ground of gender identity, there is no impediment in the *Code* to an interpretation of sex discrimination that includes gender discrimination. In other words, 'sex' is not limited to biological/genetic sex, but has been extended to include gender characteristics. The Commission's 1996 *Policy on Sexual Harassment and Inappropriate Gender-based Comment and Conduct* is official Commission policy and already supports an analogous view. Areas of particular relevance to gender identity are emphasised in the following excerpt:

*Freedom from sexual harassment and other forms of unequal treatment expressed through demeaning comments and **actions based on gender is, therefore, a fundamental human right... Sex discrimination may also include harassing comments or conduct made to a person because of his or her gender.***

[The following] list...should assist in identifying what may constitute sexual harassment or **inappropriate gender-related comments and conduct**:

- i) gender-related comments about an individual's physical characteristics or mannerisms;
- ii) unwelcome physical contact;
- iii) suggestive or offensive remarks or innuendoes about members of a specific gender;
- iv) propositions of physical intimacy;

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<sup>50</sup> *Sheridan v. Sanctuary Investments Ltd. et al.* January 8, 1999 (B.C. Human Rights Tribunal) from <<http://www.bchrt.gov.bc.ca/sheridan2.htm>>.

- v) gender-related verbal abuse, threats, or taunting;**
- vi) leering or inappropriate staring;
- vii) bragging about sexual prowess;
- viii) demands for dates or sexual favours;
- ix) offensive jokes or comments of a sexual nature about an employee, client, or tenant;
- x) display of sexually offensive pictures, graffiti, or other materials;
- xi) questions or discussions about sexual activities;
- xii) paternalism based on gender, which a person feels undermines his or her self respect or position of responsibility;**
- xiii) rough and vulgar humour or language related to gender.<sup>51</sup>**  
**(Emphasis added.)**

In the *Shaw*<sup>52</sup> case, the Commission successfully argued before a board of inquiry that issues related to gender should be included under the ground of sex. This case dealt with a woman who was subjected to non-sexual remarks but those remarks nonetheless were intended to make her feel less attractive and therefore were related to her sex and stereotypes about being a woman.

Traditionally, many human rights commissions, including Ontario's, used the ground of disability or sexual orientation when a complaint related to gender identity was made. The Commission has discontinued the practice of automatically using these grounds unless the complainant specifically makes such requests. This change occurred as a result of Commission staff developing a better understanding of transgendered issues.

## **Moving Forward**

### **Issues**

#### **(1) The Ontario Human Rights Commission**

The Ontario Human Rights Commission is a central figure in the advancement of human rights in Ontario. The Commission is currently developing, implementing and operationalising policies and procedures related to transgendered issues.

At the time of writing, no human rights commission in Canada had an approved public policy on gender identity, although the British Columbia Human Rights Commission has formally proposed an amendment to include 'gender identity' as a protected ground. This protection would extend to transsexuals, intersexed individuals, cross-dressers, and others who are transgendered.

<sup>51</sup> Ontario Human Rights Commission, *Policy on Sexual Harassment and Inappropriate Gender Based Comment and Conduct* (1996).

<sup>52</sup> *Shaw v. Levac Supply Ltd.* (1990) 14 C.H.R.R. D/36 (Ont. Bd. of Inquiry).

Other Commissions have made use of a variety of options, some of which are not possible under the Ontario Code. Manitoba, for example, has a ground of 'other' which is used to accept complaints from transgendered persons. In 1982, the Quebec Commission used the ground of 'civil status' and more recently has dealt with a complaint based on both civil status and sex.<sup>53</sup> The Canadian Human Rights Commission took complaints on the ground of disability or perceived disability until 1992 and now uses the ground of 'sex.'<sup>54</sup>

The recent Quebec decision, *M.L. et Commission des droits de la personne*, draws an analogy between decisions that extended the ground of 'sex' to include pregnancy in the late 1980s to transgenderism. The Tribunal states that:

*[S]ex does not include just the state of a person but also the very process of the unification and transformation that make up transsexualism. As we have already seen, the psychological and psychosocial components of sex in regard to transsexualism appear to be in total conflict with other genetic, hormonal and anatomical elements, which, at birth allow a person to be distinguished as indisputably belonging to one sex.*

*Drawing upon the aforementioned principles of interpretation of human rights, especially the inherent dignity of the human being, we can say that a transsexual person who is a victim of discrimination based on his being a transsexual may benefit from provisions against discrimination based on sex, once his transformations have been completed or...once his identification is perfectly unified.*

*What is more, discrimination, even based on the process of the unification of disparate and contradictory sexual criteria, may also constitute sex-based discrimination while sex is at its most vaguely defined...*

*Referring, for the purpose of analogy, once again to the question posed by Dickson C.J. in Brooks, in respect to pregnancy...we can affirm that it is not clear how discrimination based on transsexualism or on the process of transsexualism could ultimately be anything other than sex based.<sup>55</sup>*

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<sup>53</sup> See *M.L. and Commission Des Droits de la personne et des droits de la jeunesse du Quebec v. Maison des jeunes*, Quebec Human Rights Tribunal, District of Montreal, Rivet, J. Assessors: C. Gendreau and K. Hyppolite, July 2, 1998 at p. 45. UNOFFICIAL TRANSLATION. This case was advanced the grounds of 'sex', and 'civil status'. See also *La Commission des Droits de la personne v. Anglsberger* (1982) 3 C.H.R.R. D/892. The respondent restaurant owner refused the complainant service. The court held that the respondent did not distinguish between prostitutes and the complainant. The respondent was found in violation of article 10 of the Quebec Charter because they refused to recognise the civil status of the complaint, although she had all the characteristics of a person of the female sex.

<sup>54</sup> See *Reid* (1986), 56 O.R. (2d) 61 (Ont. Div Ct.).

<sup>55</sup> See note 53.

In April 1996, the European Court of Justice confirmed that it is against European law to discriminate against a transsexual person in employment.<sup>56</sup> This case originated in Britain with an individual who was transitioning and was terminated just before the completion of her sex reassignment surgery. The court held that while the law before them only uses the term 'sex' this should be read to include transgender and therefore precludes dismissal of a transsexual for a reason related to gender reassignment.

Several consultees expressed a need for a separate ground of protection because its absence implies 'permission' to discriminate against transgendered individuals. Some people in the consultation process expressed concern or scepticism about the addition of a new ground as a means to protect transgendered people from discrimination. The definition of gender identity should be broad and all encompassing, to include potential incidences of discrimination against all transgendered persons including, for example, discrimination against cross-dressers.

By adding the ground 'gender identity' to the *Code*, there would be no doubt legally or politically that transgendered people have the same protections as everyone else. Unfortunately, using the ground of 'sex', while it does not properly convey the meaning of 'gender identity', is the only reasonable alternative available at present until such time as the legislature sees fit to amend the *Code*.

In British Columbia, the consultation report that included the recommendation for a protected ground of 'gender identity' quotes community representative, Dr. R. Stevenson, of the Centre for Sexuality, Gender Identity and Reproductive Health at the Vancouver Hospital, who stated:

*There is little doubt that many of our patients experience discrimination and harassment, whether it be within the context of employment, housing or other fundamental aspects of their lives...I am aware that existing grounds (disability, sex, sexual orientation) may not be applicable in all cases. Therefore, it follows that adding a new ground for protection such as gender identity would better serve the needs of our patients.*

*The adoption of gender identity as a prohibited ground will not silence the attacks, but it will blunt them in much the same way as has happened with sexual orientation.*<sup>57</sup>

## **(2) Education**

Misunderstanding and lack of awareness of the issues faced by transgendered people occur in virtually every institution, agency, and sector. The public has

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<sup>56</sup> *P v. S and Cornwall County Council*, C.J.E.C. C-13/94.

<sup>57</sup> See note 3.

little understanding of the distinctions between transsexuals, cross-dressers, and female impersonators. There is also a lack of understanding of the distinctions between gender identity and sexual orientation. Within the gay and lesbian community, with whom transgendered people have frequently been identified, there are also deep political schisms in appreciating the distinct issues of transgendered people.<sup>60</sup>

Most professionals, including medical professionals, have little expertise in the area of gender identity. The media also portrays transgendered people in a negative light. Consultations revealed many incidents of mistreatment that show a lack of understanding of the issues for transgendered people. These ranged from not addressing the individual in the gender they present, to threats and harassment, to concerns around losing employment or housing, to discriminatory treatment by officials.

Lack of awareness leads to problems such as accessing services, transitioning in the workplace, maintaining or securing housing, personal security and harassment. It may also be linked to the marginalisation of transgendered people and to the social problems faced by transgendered individuals and youth in coming to terms with their identity. Marginalisation may in turn lead to problems such as homelessness and being forced, because of circumstances, to work in the sex trade in order to access hormones for use in self-treatment.

Broad-based education on the issues faced by transgendered people is critical to the long-term prevention of human rights violations against them. Many 'gender myths' perpetuate stereotypes and result in discrimination against transgendered people. Common gender myths equate transgendered identity with sexual orientation or as viewing transgendered people as unbalanced and mentally unstable. Transgendered people also object to the failure to distinguish between sex and gender and to the presumption that that changing one's gender identity is a fad or a whim and not a medical necessity. These myths in combination with media treatment shed a sensationalist light on the lives of transgendered people.

Several individuals interviewed in the transgendered community expressed the importance of public education and professional education. This could be undertaken in conjunction with the Commission's current public education and communications strategy by promoting positive examples in relation to gender identity. This may also be achieved by reviewing the possibility of amending the *Policy on Sexual Harassment and Inappropriate Gender-Based Comment and Conduct* as well as a 'plain-language' version of that policy to reflect an expanded definition of sex to include gender identity and transgendered persons.

### **(3) Medicalisation of Identity**

To what degree is identification based on gender a reasonable requirement? Application forms, identity cards, and government forms frequently stipulate

gender identity. However, the Canadian Task Force for Transgendered Law Reform has stated that:

*The current practice of demanding that an individual declare their gender on public and private requests for services or other forms and applications is a subtle form of harassment that affects all Canadians. There is no need for gender to be declared on a driver's license for example. Where gender must be declared all Canadians should have a third neutral option, which allows them to express that they do not wish to be identified as either female or male.*<sup>58</sup>

The Commission can play a role in encouraging a non-medical focus and a system that balances legitimate institutional identification needs with the individual's freedom to self-identify. For a pre-operative transsexual, a transgenderist, or an intersexed person, the requirement that such identity must be attested to or otherwise supported by medical opinion creates a particular disadvantage. Changing gender designation on documentation has significance impact because recognition in law is often an indication of - or at least a precursor to - social acceptance. Corrections to gender identity on documentation can help a transgendered person to live more congruently in a society that relies heavily on personal data collection that frequently refers to gender.<sup>59</sup>

For example, in Ontario the *Vital Statistics Act*<sup>60</sup> states

*s. 36.(1) Where the anatomical sex structure of a person is changed to a sex other than that which appears on the registration of birth, the person may apply to the Registrar General to have the designation of sex on the registration of birth changed so that the designation will be consistent with the results of the transsexual surgery.*

*(2) An application made under ss. (1) shall be accompanied by,*  
*(a) a certificate signed by a medical practitioner legally qualified to practise medicine in the jurisdiction in which the transsexual surgery was performed upon the applicant, certifying that,*  
*(i) he or she performed transsexual surgery on the applicant,*  
*(ii) as result of the transsexual surgery, the designation of sex of the applicant should be changed on the registration of birth of the applicant;*  
*(b) a certificate of a medical practitioner who do did not perform the transsexual surgery but who is qualified and licensed to practise medicine in Canada certifying that,*  
*(i) he or she has examined the applicant*

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<sup>58</sup> See note 14.

<sup>59</sup> See, M. Petersen and R. Dickey, *Surgical Sex Reassignment: A Comparative Survey of International Centres*: Archives of Sexual Behaviour, Vol. 24, No. 2 (Ontario: Plenum Publishing, 1995).

<sup>60</sup> See note 33.

(ii) the results of the examination substantiate the transsexual surgery was performed upon the applicant, and  
(iii) as a result of the transsexual surgery, the description of the sex of the applicant should be changed on the registration of birth of the applicant;

(c) evidence satisfactory to the Registrar General as to the identity of the applicant.

Therefore, to change gender on the birth certificate, a medical letter is necessary to verify that sex reassignment surgery has resulted in the sex of the applicant having changed.

Consultees indicated that the *Change of Name Act*<sup>61</sup> is another important piece of legislation but that it is inconsistently applied. It is interesting to note that it is easier to change a first name than the last name, even before sex reassignment surgery has occurred. The Ministry of Consumer and Commercial Relations confirms that transgendered individuals can change their first and last names without barriers pertaining to gender.<sup>62</sup>

Administrative rules make it more difficult to change one's sex on a driver's licence and a health card unless the birth certificate has already been changed. Transgendered individuals usually require medical documentation in order to have their official identification cards reflect their felt gender.

### **(3) OHIP COVERAGE**

In October 1998, the regulations to the *Health Insurance Act*<sup>63</sup> were modified, removing coverage for sex reassignment surgery. A clause in the new regulation allows coverage for all people who had completed the program the Gender Identity Clinic at the Clarke Institute of Psychiatry and had been recommended for surgery as of October 1, 1998.

The removal of OHIP coverage is unfortunate. The decision to undergo sex reassignment surgery is not made quickly, nor is the decision of a gender identity clinic to approve the surgery a medical whim. For some individuals sex reassignment surgery is often the last step which allows them to reconcile the incongruence between their felt gender identity and their anatomical sex characteristics. The assessment and decision to undergo sex reassignment surgery is, for some, basic to their life identity and is not a 'lifestyle' procedure. It is hoped that, in consultation with medical professionals who work in this very complex field, the Ministry of Health will reconsider its position.

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<sup>61</sup> Change of Name Act, R.S.O. 1990, Chapter C.7.

<sup>62</sup> Telephone discussions with Antonia Schmidt, Office of the Registrar, Ministry of Consumer and Commercial Relations (December 17 & 18, 1998).

<sup>63</sup> See note 39.

Further examination of OHIP policies may determine whether the current practice and new regulations amount to an infringement of the *Code*. The effect this practice may give rise to complaints based on gender identity, as interpreted under the ground of sex in the *Code*. For example, a pre-operative transsexual in the State of Iowa recently won the right to sue the state of Iowa for denying Medicaid benefits for sex reassignment surgery. One of the issues at question in the case is whether or not sex reassignment surgery is a medical necessity. The Court accepted that a question of fact exists as to whether those diagnosed with gender dysphoria, such as the plaintiff, improve with surgery and therefore make sex reassignment surgery a medically necessary treatment (a final judgement has not yet been made in this case).<sup>64</sup>

#### **(4) Services and Facilities**

This area was identified as a major source of concern for the consultees. Gender-segregated services and facilities present an obvious and practical problem for transgendered individuals, particularly in;

- (i) washrooms, change rooms and sex-segregated sports or community facilities;
- (ii) sex segregated institutions, such as corrections facilities; and
- (iii) women's shelter services, for abused male to female transsexuals.

Insurance services, hospital care, funeral services (discussed below in the area on family law), clothing stores and restaurants create barriers for transgendered people. Refusal to provide facilities and services based on gender identity is a *prima facie* case of discrimination based on sex. Sex segregated facilities may create problems of constructive discrimination and raise accommodation issues.

In relation to services and facilities, both non-transgendered women and transgendered people raise issues of public safety and public decency. There is potentially a safety issue for transgendered people if they use the washroom, facilities, or shelters of their birth assigned sex, which result in them being put at risk of transphobic reactions.

The *Code* allows for restriction of facilities by sex, but only on the ground of public decency:

*s. 20(1) The right under section 1 to equal treatment with respect to services and facilities without discrimination because of sex is not infringed where the use of the services or facilities is restricted to persons of the same sex on the ground of public decency.*

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<sup>64</sup>

A. S. Leonard, *Pre-Op Transsexual Wins Right to Seek Medicaid Funding for SRS*, LESBIAN GAY LAW NOTES <<http://www.gender.org.gain>>.

Transgendered people should be accepted in the facilities designated for their felt gender. In practice however, they encounter a higher risk of rejection or refusal when they use these facilities.

The definition of 'public decency' in a human rights context is an issue that needs clarification in light of section 20(1) of the *Code*. For example, indecency, indecent exposure, or obscenity as defined in the Canadian *Criminal Code*,<sup>65</sup> would likely constitute a violation of public decency. There is no reason related to public decency why a transsexual woman should be refused access to women's facilities. The use of facilities assigned to a person's felt gender should not result in a violation of the law as it relates to public decency. The use of facilities should not cause a problem unless standards of public decency, as defined above, are breached.

In the case of pre-operative transgendered individuals and transgenderists, there may be instances where an employer or service provider will have a duty to accommodate them, short of undue hardship. For example, this might mean the providing a private cubicle that would use curtains. Accommodation need not be difficult or cause unnecessary distress to others, including non-transgendered people.

#### **(i) Washrooms, Change Rooms, Sports and Community Facilities**

Male to female transgendered participants in the consultation reported experiences of having been stopped when using women's washrooms.

In sports facilities, one participant noted that an arrangement had been reached with the YWCA in Toronto to allow transsexual women (pre- and post-operative) to use the facilities. A participant from a small urban area explained that there has been a long-standing practice for transgenderists and transsexuals to use the women's change rooms at a local community centre.

Employers sometimes respond to the transition of an individual to their felt gender by segregating facilities all together. For example, one participant in the consultations stated that an employer arranged for the use of a washroom, but in a construction site far removed from the main building. Such measures raise concerns about the dignity and safety of individuals. Complete segregation is often an implicit statement by the employer that they are not supportive of a transsexual in transition. This is in contrast with a supportive employer who shows respect for the dignity of person in transition by educating staff about issues relating to gender identity.

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<sup>65</sup> *Criminal Code*, R.S.C. 1985, c. C-34.

## (ii) Sex Segregated Institutions: Corrections Facilities and Hospitals

Institutions such as hospitals and prisons usually have gender-segregated facilities and services. These pose special challenges in adapting and accommodating to the needs of transgendered individuals. Transgendered people may be placed with those of the sex with which they do not identify. In a recent criminal law decision, a judge recommended to prison authorities that the convict, a birth assigned male who was transitioning to a female, serve time in a woman's prison.<sup>66</sup>

In correctional institutions, the sex segregation of facilities is a concern for transgendered inmates, particularly when the person is pre-operative male to female transsexual. The Ministry of Correctional Services has no written policy to address this type of situation. Pre-operative male to female transsexuals may be subject to solitary confinement not because they are a threat to others but for their own protection. While this is obviously a systemic disadvantage, it is not clear what the alternatives are available in light of some of the safety issues.

The standing practice appears to be to allow post-operative male to female transsexuals to stay in women's correctional facilities, and in all other situations, to deal with transgendered individuals on a case by case basis. However, unless full sex reassignment surgery has been undertaken, the individual will be placed in a facility according to his or her birth-assigned gender in a segregated area.

A brief from PASAN to the Solicitor General of Canada pointed out that the federal correction system does not provide accommodation to transgendered individuals with respect to dress codes, hormone therapy, access to sex reassignment surgery, increased risk of sexual assault or specialised counselling.<sup>67</sup>

In "Transsexuals within the Prison System: An International Survey of Correctional Services Policies,"<sup>68</sup> the authors reviewed survey findings of the policies of correctional facilities as they relate to transsexual inmates. The study covers Europe, Australia, Canada, and the U.S. Some of the findings include;

- 29 of 64 correctional institutions stated they would maintain existing hormone therapy provided this had been prescribed prior to admission to prison.
- 62 indicated that all inmates must wear the clothing appropriate to the institution regardless of the inmate's felt gender.
- 53 jurisdictions reported that reassignment surgery would never be considered while 11 reported that in certain specific circumstances, sex

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<sup>66</sup> See note 53.

<sup>67</sup> See note 36.

<sup>68</sup> See M. Petersen *et al.*, *Transsexuals within the Prison System: An International Survey of Correctional Services Policies*, Behavioral Sciences and the Law, Vol. 14 (Toronto: Clarke Institute of Psychiatry, 1996) 219-229.

reassignment surgery would be permitted. For example, under court order or where the inmate could afford to pay the cost himself or herself.

- The perception of risk of assault and sexual assault against transsexual inmates was mixed, some estimated the risk to be higher while several estimated it was no higher than that faced by non-transsexual inmates.

As noted in this study:

*Of the 64 corrections departments that responded to our survey, only 20% reported any kind of formal policy in the housing or treatment of incarcerated transsexuals with another 20% reporting an informal policy. Perhaps in itself this should not be surprising since the incidence of transsexualism within the general population is relatively small. However, given the complexities of dealing with such inmates within a prison population, one would have to wonder at the lack of formal policy planning.*

### **(iii) Access to Women's Shelters for Abused Male to Female Transsexuals**

The exclusion of transsexual women from shelters for battered women was another concern raised in the consultation. In 1995, a survey sent to several shelters revealed that there is no consistent manner in the way they deal with transsexual women. Some shelters indicated that they did not know enough about transsexual women to be able to discuss a policy on accepting transsexual women in their shelter. Some shelters took the position that the client must identify as a woman, whereas others indicated that sex reassignment surgery must be complete. Many shelters simply did not respond.<sup>69</sup>

In 1997, *Siren Magazine*,<sup>70</sup> a Toronto lesbian community publication, stated that:

*A recent study of women's shelters in the Toronto area found that, of the shelters that responded to the survey, none had a written policy prohibiting discrimination on the basis of gender identity. The fact that only 5 of 20 shelters that were sent surveys bothered to respond speaks volumes about the importance placed on transsexual/transgender issues.*

During consultation, it was noted that many of the transsexual women who require access to shelters are poor. These women are not in a position to afford sex reassignment surgery or to have electrolysis and so may appear male, although they identify as female.

From a human rights perspective, section 11 of the *Code*, which deals with constructive discrimination, may apply to this situation. Transsexual women

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<sup>69</sup> M. Ross, *Investigating Women's Shelters*, in *Gendertrash* #3, Winter (1995).

<sup>70</sup> See *Siren Magazine*, (Apr/May 1997/p.8).

present as women and should not be excluded from shelters unless the restrictions are reasonable and *bona fide*, and cannot be accommodated without causing undue hardship, subject to considerations of cost, outside sources of funding, and health and safety requirements, if any.

Relevant considerations of safety include legitimate concerns raised by shelters about preventing the further traumatization of their clients. These concerns arise because residents have been victims of violence perpetrated by men (some have been repeatedly victimised) and exposing them to pre-operative transsexuals may trigger a traumatising event. However, there may be ways to allocate shelter space that would accommodate battered transsexual women. Types of accommodation measures could include staff education, sensitisation of shelter residents and use of separate rooms.

## **(5) Employment**

This section applies to the social area of employment, but some principles could equally apply to housing and accommodation, services generally, and entering into contracts. Some of the key issues in employment include the following:

### **(a) Non-Hiring /Dismissal upon Discovery of Identity**

Transgendered individuals may lose their jobs during their transitioning period. Except in situations outlined in the *Code* where gender-based discrimination is allowed, transitioning to one's felt gender should not be grounds for dismissal from work. Similarly, under the *Code* customer preference is not a valid factor for refusing to hire, dismissing or not promoting an individual who is transgendered.

In a recent Quebec decision *M.L. and Commission des droits de la personne*, July 2, 1998, the complainant alleged that her contract of employment as a street worker with youth was terminated a result of her sex reassignment surgery. The Tribunal found that the employer's behaviour was the discriminatory and it fell into the category of sex discrimination. Part of the respondent's rationale for the dismissal related to concerns about her work with youth. However, the Tribunal noted that after the complainant's termination she returned to meet with the youth and told them about her transsexuality. She says they took it very well, and that they told her they already knew.<sup>71</sup>

### **(b) Duty to Accommodate during Transition**

The duty to accommodate may arise in two ways. First, it may arise in connection with a duty to accommodate on the ground of sex under s. 11 of the *Code*. In much the same way as pregnant women must be accommodated without being seen as having a 'disability', a person's medical or other

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<sup>71</sup> See note 53.

requirements may lead to an accommodation request under s. 11 of the *Code*. Secondly, a complainant may have been diagnosed with gender identity disorder and may choose to make a complaint based on handicap. In this case, the duty to accommodate is individualised according to s. 17 of the *Code*, which deals with handicap.

As discussed above, during, and after the period of transition, the issue of gender segregated facilities and services might arise. The individual should be able to use the facilities of the gender with which he or she identifies. Segregation is rarely appropriate unless the individual has specifically requested it. This is because segregation may reinforce myths that transgenderism is 'freakish', that transgendered people should keep their distance, or that they are objects of curiosity that should be kept separate from everyone else. In some instances, the individual making the transition prefers or requests a separate washroom until the period of transition is complete. However, if this accommodation is imposed and not requested by the person it may undermine their dignity.

The person seeking accommodation is required to indicate what measures he or she is seeking. For example, employers should be advised of the time required away from work for surgery. Accommodation needs may also be identified during the transition process. In some places of employment where the individual has worked in the other gender for a long time, it may be useful and important for the employer to initiate training or sensitisation for staff. Since there is a risk that accommodation requests may compromise the transgendered individual's privacy, efforts to sensitise others should only take place in consultation with the transgendered person.

### **(c) Fear of Reprisal**

In the consultation meetings with the transgendered community, both self-identified transsexuals and cross-dressing individuals raised concerns about reprisal resulting from disclosure and the exercise of their rights. The *Code* protects individuals from reprisal in situations where they seek to claim or enforce their rights under the *Code*. This also protects individuals who support or assist a transgendered person and are subjected to a reprisal.

## **(6) Family Law**

### **(a) Recognition of marriage**

At this time court decisions involving transgendered people have not been favourable. For example, a transsexual living with her female spouse might be considered to be in a same sex relationship based on the transsexual's felt gender. From the perspective of a transsexual who becomes female and remains married to her partner, this is a same sex marriage. Married transgendered persons sometimes find that their marriages are annulled upon

transition to one's felt gender. Some cases have held that if both parties are of the same birth assigned sex, there cannot be a legal marriage.<sup>72</sup> Either way, if same sex marriage gains legal recognition it may go a long way toward resolving the marriage issue.

Gender identity clinics often require that parties divorce, in part for reasons linked to their liability in assisting the transgendered person to transition. Where the transgendered person is still oriented to the same gender after transition, the union will become a same-sex partnership. Some medical clinics state that they cannot support the existence of same sex marriages, as they are not legal.

### **(b) Custody and Access Pre- and Post Surgery**

Sex reassignment frequently results in the dissolution of the marriage; custody and access disputes also arise. During consultation, some participants noted judicial biases against transgendered parents having custody or liberal access. However, in 1996 an Ontario court ruled that one's transsexual identity is not a factor that should be used for deciding custody issues.<sup>73</sup>

### **(c) Recognition of Parenthood**

In an interesting British test case, a female to male transsexual underwent sex reassignment surgery. He was in a long-term relationship and raised two children with his partner, their biological mother. The case was an appeal from a decision that had denied his request to be designated as the legal father on the birth certificates of the children.<sup>74</sup> Another 1995 decision regarding same sex adoption rights of lesbian partners, one of who was the natural mother, may provide a basis for parental recognition where one partner is the natural mother.

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<sup>72</sup> See *Corbett v. Corbett* (1970) 2 All E.R. 33. This case remains the leading authority and is applied in Canada. In *Corbett*, the House of Lords ruled that for legal purposes, including adjudicating the validity of marriage, sex is fixed at birth, is tied to chromosomal makeup, and cannot be changed. The marriage involving a transsexual person was annulled on these grounds. In *M. v. M. (A)* (1984) 42 R.F.C. (2d) 55 (P.E.I.S.C.) the wife, a latent transsexual, started to live as a man and intended to undergo surgery. On the husband's application to annul the marriage, the court granted annulment noting that the "capacity for natural heterosexual intercourse is an essential element of marriage". In a more recent family law case, an Ontario court refused support to a transsexual person who had been living as the spouse of a woman for more than 20 years: *B.v.A.* (1990) 1 O.R. (3d) 569. The Court believed that only a radical and irreversible change to all reproductive organs could constitute a sex change within the meaning of *the Vital Statistics Act*. In *R. v. Owen* (1995) 110 D.L.R. (4th) 339, Owen, a biological male, lived as a female for 40 years with her male companion. Owen was initially awarded a pension upon the death of her companion. On application by the Crown, the court disallowed the pension, stating that to be considered a spouse one actually had to be a member of the opposite sex.

<sup>73</sup> See note 53. See also *Morgan v. White* Ont. Court (Gen. Div.) Family Court London, Ontario Apr 26, (1996) O.J. No. 1510 indexed in QUICK LAW.

<sup>74</sup> *X, Y AND Z v. THE UNITED KINGDOM*, European Court of Human Rights, April 27, 1997 (75/1995/581/667) from <<http://www.pfc.org.uk/legal/xyzjudge.htm>>.

## **(7) Intersectionality and Cross-Cultural Issues**

Intersectionality or multiple forms of discrimination occurring simultaneously, raise especially important issues for this already marginalised community.

For example, the HIV /AIDS legal network draft discussion paper, issued in November 1998, noted that transgendered people have specific issues and challenges when living with HIV/AIDS.<sup>75</sup>

Some individuals who begin transitioning stay married to their partners. If, for example, a transgendered individual undergoes MTF sex reassignment surgery, then she may also 'come out' as a lesbian. While there are fewer incidents reported of female to male transsexuals, there are incidents where the female to male transition is also accompanied by the process of 'coming out' as a gay man. Transgendered individuals from racial or national minority cultures may face multiple forms of discrimination from both mainstream society and their own community.

### **Conclusion**

Mr. Justice Sopinka once noted that human rights legislation is,

*often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed.*<sup>76</sup>

There are, arguably, few groups in society today who are as disadvantaged and disenfranchised as the transgendered community. Transphobia combined with the hostility of society to the very existence of transgendered people are fundamental human rights issues. The Ontario Human Rights Commission is in a unique position to provide concrete support and assistance, and at a minimum, acknowledgement of both their difference and their humanity.

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<sup>75</sup> See Canadian HIV/AIDS Legal Network: *Legal, Ethical, and Human Rights Issues Raised by HIV/AIDS: Where do we go from here? Planning for 1998-2003*, A Draft Plan (November 1998).

<sup>76</sup> See *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

## Appendix 1

The following information provides a limited sampling of how 'gender identity' (and related terms) is viewed in various jurisdictions.

### United States of America

The **City and County of San Francisco** includes, among other grounds 'gender identity' in their *City and County of San Francisco 1996 Charter*. The *Charter* is the fundamental law of the City and County to which all ordinances and regulations with respect to municipal affairs must comply. The City of San Francisco also has a number of ordinances, which extend the protection of individuals on the ground of 'gender identity' into various aspects of City activity. An example is found in the *Administrative Code Chapter 12B Nondiscrimination in Contracts HRC-12B-101 (4-97)* which requires companies providing products or services to, or acquiring a real property interest from, City government to agree not to discriminate against specified groups for specified reasons, and to include a similar provision in subcontracts and other agreements.

**Iowa City, Iowa**, has a population of approximately 63,000. The Iowa City Human Rights Commission enforces the *Human Rights Ordinance, Title 2 (1995), Iowa City Municipal Code*. The *Human Rights Ordinance* is Iowa City's anti-discrimination law. The law gives the Human Rights Commission the jurisdiction to investigate allegations of discrimination in the areas of employment, credit transactions, education, public accommodations and housing. It is the mission of the Human Rights Commission to eradicate discrimination in Iowa City, based on age, colour, creed, disability, marital status, national origin, race, religion, sexual orientation or gender identity. In the area of housing, discrimination based on familial status, presence or absence of dependants or public assistance source of income is also prohibited. The *Ordinance* defines 'gender identity' as "A person's various individual attributes, actual or perceived, in behaviour, practice or appearance, as they are understood to be masculine and/or feminine". The Iowa City Human Rights Commission lists among its accomplishments in fiscal year 1997 the following;

- 5. Provided training on gender identity to employers and the Iowa City Police Department, the Johnson County Sheriff's Department, Campus Security, and the Coralville Police Department.
- 6. Taped interviews with individuals participating in the Human Rights Commission's film on gender identity.
- 9. Attended National Transgender Conference to discuss gender identity protection under Iowa City's Human Rights Ordinance.

In **Minnesota** the *Minnesota Statutes 1998, Chapter 363 HUMAN RIGHTS* Subd. 45. defines sexual orientation as "having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such

*attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."* There is also a section in the legislation, which states that *"nothing in this chapter shall be construed to: mean the state of Minnesota condones homosexuality or bisexuality or any equivalent lifestyle; or authorise the recognition of or the right of marriage between persons of the same sex."*

In the **City of Pittsburgh, Pennsylvania**: discrimination is covered under the *Pittsburgh Code of Ordinances, Title Six – Conduct Article V: Chapter 651 (Ord. 20-1992)*. This Ordinance covers the exercise of the City's powers for the protection of the public safety and the general welfare, for the maintenance of peace and good government and for the promotion of the City's trade, commerce and manufacturers, to assure the right and opportunity of all persons to participate in the social, cultural, recreational and economic life of the City, and to assure equal opportunity for all persons to live in decent housing facilities, free from restrictions because of race, colour, religion, ancestry, national origin, place of birth, sex, sexual orientation, familial status, age, or disability or use of service dogs because of the blindness of the user. In 1997 the ground of 'sex' was defined as follows; "the gender of a person, as perceived, presumed or assumed by others, including those who are changing or have changed their gender identification." It is interesting to note that the *Ordinance* contains what could be described as a disclaimer which states the following; *"Nothing in this article shall be construed as supporting or advocating any particular doctrine, position, point of view, life style, or religious view. To the contrary, it is the intention of this article that all persons are treated fairly and equally and it is the express intent of this article to guarantee fair and equal treatment under law to all people of the City."*

## **United Kingdom**

In **Britain**, on May 1, 1999 the *Sex Discrimination (Gender Reassignment) Regulations 1999* under the *Sex Discrimination Act 1975* came into force. The regulations clarify the law relating to gender reassignment. Their effect is to insert into the *Sex Discrimination Act 1975* a provision which extends the *Act*, insofar as it refers to employment and vocational training, to include discrimination on gender reassignment grounds. Thus, for the purposes of employment and vocational training, discrimination on grounds of gender reassignment constitutes discrimination on grounds of sex, and is contrary to the *Sex Discrimination Act (1975)*. This regulation reflects a ruling by the European Court of Justice that the dismissal of an employee undergoing gender reassignment is contrary to the European Equal Treatment Directive. The UK (and all Member States) is obliged to implement such European law.

## **Australia**

In **Australia** the Commonwealth Parliament's Senate Legal and Constitutional Committee held an inquiry into sexual discrimination as a result of the introduction of the *Sexuality Discrimination Bill* (1995). This Bill proposed changes to Commonwealth legislation in order to protect against transgender discrimination. While there were some useful terms and forms of protection in State and Territory anti-discrimination legislation, discussions identified a need for Commonwealth legislation that would; formally meet Australia's international 'obligations'; provide a standard for Australia that would overcome less progressive legislation; and minimise confusion and expense by providing a comprehensive law. To date this Bill has not progressed past the committee stage.

**New South Wales** has a single statute, *Anti-Discrimination Act 1977*, which prohibits discrimination on the grounds of sex, race, racial vilification, age, compulsory retirement, pregnancy, marital status, transgender, transgender vilification, homosexuality, homosexual vilification, disability, HIV/AIDS vilification and who you are related to or associated with. The *Act* covers discrimination in employment, partnerships, trade unions, qualifying bodies, employment agencies, education, access to places and vehicles, provision of goods and services, accommodation and registered clubs.

In the province of **South Australia** has the *Equal Opportunity Act 1984*. This legislation is intended to promote equality of opportunity between the citizens of this State; to prevent certain kinds of discrimination based on sex, sexuality, marital status, pregnancy, race, physical or intellectual impairment or age; to facilitate the participation of citizens in the economic and social life of the community. In the *Act* "sexuality" means heterosexuality, homosexuality, bisexuality, or transsexuality; and further defines "transsexual" as a person of the one sex who assumes characteristics of the other sex.

## Appendix 2

### Glossary of Gender

This glossary was compiled by Transgender Nation (San Francisco, California). The organization is a diverse group of transgendered and non-transgendered people united “in anger” and resolved to directly empower all transgendered people by direct political action.

**assigned gender at birth** - the gender one is considered to be at birth, due to the presence of whatever external sex organs. Once this determination is made, it becomes a label used for raising the child in either one gender image or the other.

**bigendered** - meaning those who feel they have both a male and a female side to their personalities. Some bigendered people cross-dress, while others evolve into transsexuals and have sex reassignment surgery. Christine Jorgensen - wasn't the first to have sex reassignment surgery, but was the first person to be widely known for having done so. News of her sex change in 1952 brought hope to many other transsexuals around the world.

**clock(ed)** - you are clocked when someone detects you are transgendered, as in the following example: an MTF TS is in public, living in the preferred female image, when someone calls out, ‘that's a man’. This is embarrassing at the least, and devastating at the worst. The word clocked apparently comes from the phrase, read me like a clock. Read is a synonym. Contrast with pass.

**clock my T** - means I was clocked.

**cross-dresser (CD)** - someone who from time to time wears the clothes of the opposite (of their physical anatomical) gender, to relieve gender discomfort. Cross-dressers want to appear as convincing as possible as their other selves. A large subset of this group are men who enjoy dressing as women and have otherwise ordinary marriages with wives who are not transgendered. Many say this term is preferable to transvestite, which means the same thing.

**estrogen** - the female sex hormone. Actually, both men and women have estrogen in their systems; women just have a great deal more of it. Estrogen can be administered in both pill and injection form.

**former transsexual** - some say that [1] once a transsexual has completed surgery; they are no longer transsexuals. Contrast with definition 2 of transsexual. A compromise view might be that a former transsexual is [2] one who has completed surgery, and no longer wants anything to do with the transsexual community.

**FTM** - [1] female-to-male (transvestite or transsexual). Example: Billy Tipton. It is more politically correct (sic) to use the abbreviation rather than the complete phrase, except to explain it to someone who doesn't know what FTM stands for. Also abbreviated as F2M. FTM is also [2] the name of a group that is for FTM TSs and TVs.

**full-time transvestite** - same as definition [1] of transgender.

**gender** - there are perhaps five broad categories of gender: [1] physical anatomy, or sex organs, [2] secondary sex characteristics that develop at and after puberty, [3] fashion choices, [4] movement and behaviour, and [5] the mind including gender identity. Sometimes we have to make it clear which of these we are talking about. Gender is also used as a prefix.

**gender assignment** - see assigned gender at birth.

**gender bender** - anyone crossing the gender line who does not care about appearing convincing. Example: a man wearing a dress, who looks like a man wearing a dress, and doesn't care if he does look like a man wearing a dress. Drag queens are the major group within this category.

**gender clinic** - a medical clinic where transsexual health care services (at least hormones or hormone prescriptions) are made available. Counselling may or may not be part of the services available there. Surgery is usually referred elsewhere.

**gender community** - the community of all cross-dressers, transsexuals, and gender benders, and anywhere they meet.

**gender discomfort** - like gender dysphoria, but not quite that bad. Occasional cross-dressing often provides sufficient relief.

**gender dysphoria** - literally, it's being unhappy with the gender you are (physically anatomically, prior to changing anything. Full-blown gender dysphoria syndrome is the same as transsexualism.

**gender identity** - the hard-to-define sense of being male or being female that is usually in accord with, but sometimes opposed to, physical anatomy. There is no clear agreement on how gender identity is formed, but most current theories say that gender identity is formed before birth.

**genetic** - [1] refers to the chromosomal endowment of the individual, with emphasis on the sex chromosomes (XX in women and XY in men). This word is also used to mean [2] someone who is not transgendered, for example, "This is Georgina, a cross-dresser, and her partner Lee, who is a genetic woman", or

worse yet, "She's genetic". Since we are all generally something, the use of genetic this way is both politically and technically incorrect.

**Harry Benjamin, Dr.** - an endocrinologist, sexologist, and gerontologist, and one of the first researchers in transsexualism. In 1966, his *book The Transsexual Phenomenon* was published, it was first serious work on the subject.

**HBIGDA** - Harry Benjamin International Gender Dysphoria Association.

**in transition** - [1] in the process of transition. [2] A synonym for pre-op incurable transsexual - any transsexual without hope of access to sex-reassignment techniques, including those living in the Third World without western-style medical care available, and all transsexuals who lived and died before 1952.

**intersex** - born with the (full or partial) sex organs of both genders, or with underdeveloped or ambiguous sex organs. About 4 per cent of all births are intersex to some degree. This word replaces the politically loaded term 'hermaphrodite'.

**irreversible** - no sex-change can change a person 100 per cent into the opposite anatomical gender. An MTF can never bear a child; an FTM can never sire one. While there is technically nothing to stop a post-op from going back, the results are not the same as when one started-one ends up essentially like a post-op of the opposite direction. This is what is meant by irreversible, and is one of the reasons why many providers make transsexual services hard to obtain.

**manufactured transsexual** - some babies are born with (full or partial) sex organs of both genders, or with underdeveloped or ambiguous sex organs (see intersex). Usually, the doctor decides what is going to be, and performs corrective surgery without even consulting or getting the approval of the parents. A few of these babies grow up deciding "they took away everything I wanted, and left me with the parts I have no use for". These people are the manufactured transsexuals.

**metamorph** - an alternative word for transsexual, mainly used by those who are uncomfortable being called transsexuals. Not frequently used.

**MTF** - male-to-female (transvestite or transsexual). Example Christine Jorgensen. It is more politically correct to use the abbreviation rather than the complete phrase, except to explain it to someone who doesn't know what MTF stands for. Also abbreviated as M2F.

**new man** - [1] post-operative FTM transsexual. Also sometimes used to mean [2] an FTM transsexual who is well along in the transition process.

**new woman** - [1] post-operative MTF transsexual. First used in a 1952 newspaper article in reference to Christine Jorgensen. Also sometimes used to mean [2] an MTF transsexual who is well along in the transition process.

**non** - a word used by transsexuals to mean a person who is not a transsexual. Example: "Me? I'm not a non." Some say it is more correct to say person who is not transsexual.

**non-op** - same as non-surgical transsexual.

**non-surgical transsexual** - transsexuals who seek sex reassignment through hormones and who cross-live, but stop just short of surgery. Some [1] have concerns about major surgery, which is not always successful. Others [2] have been unable obtain the money necessary and have essentially given up on this final step. Yet others [3] feel they are complete without surgery and are the same as definition 1 of transgender. Others who [4] cannot have surgery due to special health problems, such as AIDS.

**pass** - means to be in your preferred gender image, and to be able to do convincingly. Example an FTM TV, who looks like a man, not like a woman.

**passing woman** - [1] chiefly used in the historical sense to refer to a non-transgendered woman living as a man in order to have access to careers and lifestyles only available to men at that time. [2] Some historical figures who would today be more accurately called FTM transsexuals or transsexual men are sometimes referred to as passing women.

**post-op** - a transsexual who has had his or her sex-change operation(s), and now has the physical anatomy desired.

**pre-op** - a transsexual who has not yet had their sex-change operation(s), but who is working towards it.

**read** - a synonym for clock(ed). Examples: "I was read yesterday. I hope they don't read me today." This word has been mainly replaced by clock(ed).

**sex-reassignment surgery (SRS)** - sex-change operation.

**Standards of Care (SOC)** - [1] a set of guidelines established by HBGDA regarding the way transsexual services are made available. These guidelines are slanted towards making it difficult to obtain a sex change, under the idea that only the most qualified and most persistent should be allowed to proceed. Some feel these guidelines are too restrictive. [2] The Transgender Law Conference has issued an alternative Standards of Care which amount to little more than signing an informed consent form.

**testosterone** - the male sex hormone. Actually, men and women have testosterone, men just have a great deal more. Some testosterone is necessary to have sex drive. Since it is destroyed by stomach acid, most supplemental testosterone is delivered via injections.

**T-friendly** - any organization or institution that is accepting of the transgendered people, and their needs. Contrast with transphobic.

**transgender (TG)** - originally, this word meant [1] what are also known as full-time cross-dresser or non-surgical transsexuals, people who live and work in the opposite (of their physical anatomical) gender continuously and for always. Now it also means [2] the group of all people who are inclined to cross the gender line, including transsexuals, cross-dressers, and gender-benders. This is the main use for the word, and is referred to as the umbrella as it covers everyone. A few use the word as [3] a synonym for transsexual.

**transgenderist** - same as definition [1] of transgender. Those who mean definition [1] of transgender now tend to use transgenderist to avoid confusion.

**transition** - the process of changing sex, including hormones, cross-living (see), and finally surgery. A practical minimum for this process is about two years, but usually it takes longer, sometimes much longer.

**transphobia/transphobic** - the groundless fear and hatred of cross-dressers, transsexuals and gender benders and what they do and everything that results from this disrespect, to denial of rights and needs, to violence.

**transsexual (TS)** - anyone who [1] wants to have, [2] has had, or [3] should have a sex-change operation. The third definition is for those in denial. This word also includes [4] non-surgical transsexuals. TSs want to appear convincing as their new selves. Dr. Harry Benjamin was the first serious researcher in this area.

**transsexual health care** - hormones and SRS are the essentials. Many transsexuals believe counselling is not an essential item, but that it should be available to those who want it.

**transsexual female/woman** - an MTF TS- The medical literature tends to use the extremely demeaning term 'male transsexual' to mean the same thing. Note that you can usually tell the preferred form is in use when the gender word comes after the "T" word.

**transsexual male/man** - an FTM TS. The medical literature tends to use the extremely demeaning term 'female transsexual' to mean the same thing. Note that you can usually tell the preferred form is in use when the gender word comes after the "T" word.

**transvestite (TV)** - same as cross-dresser. Most feel cross-dresser is the preferred term.

**true transsexual** - [1] one who will be happy living the rest of his or her life in a new gender image, and will not regret going through transition, as opposed to one for whom a sex change is just a passing fancy. [2] If you want a sex-change operation, this is what you have to convince doctors you are. This easily becomes an obstacle in its own right and has been called jumping through hoops.

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