

Guideline on Gender Identity or Expression

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HUMAN RIGHTS COMMISSION
COMMISSION DES DROITS
DE LA PERSONNE DU NOUVEAU-BRUNSWICK

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Please Note:

The New Brunswick Human Rights Commission (“Commission”) develops guidelines as part of its mandate to prevent discrimination. These guidelines are intended to help individuals understand their legal rights and responsibilities under the New Brunswick *Human Rights Act* (“*Act*”).

This guideline gives the Commission’s interpretation of the provisions of the *Act* relating to discrimination on the basis of gender identity or expression. It is subject to decisions by boards of inquiry, tribunals and courts. Read this guideline in conjunction with those decisions and with the specific language of the *Act*. If there is any conflict between this guideline and the *Act*, the *Act* prevails. This guideline is not a substitute for legal advice. Direct any questions regarding this guideline to the Commission’s staff.

Introduction

On May 5, 2017, the *Act* was amended to include gender identity or expression as a prohibited ground of discrimination. While this is a new prohibited ground, gender identity and gender expression were previously covered by the *Act's* sex discrimination protections. The addition of gender identity or expression as a prohibited ground provides clear protections for trans persons, which includes transgender or transsexual persons (at any stage of their transition), and other people whose gender identity or expression is (or perceived to be) different from their birth sex or ambiguous. Neither surgery nor new/updated identification is required for a trans person to be protected under the *Act*.

Gender identity or expression is not defined in the *Act*. When interpreting and applying the *Act*, the Commission will use the Ontario Human Rights Commission's definitions of the ground's two components: gender identity and gender expression.

Gender identity is each person's internal and individual experience of gender. It is a person's sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex, and is fundamentally different from and not related to their sexual orientation.

Gender expression is how a person publicly expresses or presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender. Others perceive a person's gender through these attributes.¹

As with all human rights complaints, a complaint alleging discrimination on the basis of gender identity or expression cannot be based on mere speculation. A person filing a complaint must set out sufficient information in the complaint form to support the allegations of discrimination and a failure to do so may result in the complaint being dismissed at a preliminary stage of the process.

1.0 Gender Identity or Expression Discrimination

Gender identity or expression is a prohibited ground of discrimination in all the areas that the *Act* applies to. There is a duty to accommodate people on the basis of gender identity or expression to the point of undue hardship. What constitutes undue hardship will depend on the circumstances, and the employer, service provider, housing provider

¹ Ontario, Ontario Human Rights Commission, *Policy on preventing discrimination because of gender identity and gender expression*, (Toronto: Government of Ontario, 2014) at 7.
Online: <http://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression>

or association bears the burden of establishing that accommodation is not possible without incurring undue hardship. The duty to accommodate and the exceptions to it are discussed further in section 2.0, Duty to Accommodate and *Bona Fide* Qualifications, of this guideline.

1.1 Employment

The Act prohibits discrimination in employment by employers, co-workers, people acting on behalf of the employer, employment agencies, trade unions and employers' organizations. These individuals and entities cannot:

- Refuse to hire or continue to employ (even with notice) someone because of that person's gender identity or expression (e.g. refusing to hire someone who is trans, or firing someone who is starting the transitioning process);
- Demote, withhold a promotion, or fail to consider an employee for a promotion because of the employee's gender identity or expression;
- Prohibit or restrict a trans person from using the washroom or change facility that aligns with their gender identity;
- Have a dress code that requires all employees to wear clothes or uniforms that align with their biological sex;
- Harass an employee (including harassment that occurs online) with respect to that employee's gender identity or expression, or permit such harassment to occur;
- Refuse to refer to a trans employee by their preferred name or pronoun (e.g. continuing to refer to a male-to-female trans person as "he", "him" or their male name instead of "she", "her", "they" or their female name);
- Subject an employee to adverse treatment by taking advantage of that employee's gender identity or expression (e.g. threatening to disclose to others that the employee is trans);
- Violate a trans employee's right to privacy by disclosing their trans status to people who do not have a need to know;
- Post a job advertisement that indicates that trans persons should not apply;
- Make working conditions unacceptable for an employee on the basis of that employee's gender identity or expression, thereby forcing the employee to resign (e.g. subjecting the employee to regular harassment and creating a poisoned working environment); or
- In the case of a union or employers' organization, deny or place restrictions on membership, or not provide the full benefits of membership (e.g. failing to represent a member in grievance proceedings), for someone based on that person's gender identity or expression.

1.2 Accommodation, Services or Facilities Available to the Public

The *Act* prohibits discrimination in accommodation (e.g. hotels), services or facilities available to the public (e.g. stores, restaurants, schools, government programs, public spaces, shopping malls). Providers of these services and facilities cannot:

- Refuse service to people because of their gender identity or expression (e.g. refuse to serve someone who is trans);
- Prohibit or restrict a trans person from using the washroom or change facility that aligns with their gender identity;
- Harass a customer, client or patron (including harassment that occurs online) with respect to that person's gender identity or expression, or permit such harassment to occur;
- Place an advertisement for the service that indicates trans persons will not be provided the service;
- Violate a trans person's right to privacy by disclosing their trans status to people who do not have a need to know;
- Have a dress code that requires people receiving the service to wear clothes or uniforms that match their biological sex;
- Refuse to refer to a trans customer or client by their preferred name or pronoun (e.g. continuing to refer to a male-to-female trans person as "he", "him" or their male name instead of "she", "her", "they" or their female name).

There may be instances where a trans person's biological sex may be relevant to the provision of a service, such as when a trans person is seeking medical treatment. In these instances, the person's biological sex should only be used to the extent that it is necessary to perform the service, and the trans person's wishes with respect to their gender identity, preferred name and pronouns should be respected to the fullest extent possible.

1.3 Housing and Sale of Property

The *Act* prohibits discrimination by housing providers (e.g. landlords, property management corporations, a condominium's board of directors) and those selling property (e.g. home owners, condominium unit owners). These individuals and entities cannot:

- Refuse to rent or sell property to people because of their gender identity or expression (e.g. refuse to rent to someone who is trans);
- Prohibit a unit owner from renting or selling to a trans person, or include terms or conditions in a contract or conveyance that restricts the sale of property on the basis of gender identity or expression;
- Prohibit or restrict a trans person from using the washroom or change facility that aligns with their gender identity;
- Place an advertisement for renting or selling property that indicates that trans persons will not be able to rent or buy the property;

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- Harass a tenant, owner or prospective buyer (including harassment that occurs online) with respect to that person's gender identity or expression, or permit such harassment to occur;
- Violate a trans person's right to privacy by disclosing their trans status to people who do not have a need to know;
- Refuse to refer to a trans tenant by their preferred name or pronoun (e.g. continuing to refer to a male-to-female trans person as "he", "him" or their male name instead of "she", "her", "they" or their female name).

1.4 Professional, Business or Trade Associations

The *Act* prohibits discrimination by professional, business and trade associations (e.g. professional accreditation or certification bodies, chambers of commerce). These organizations cannot:

- Deny or place restrictions on membership for people because of their gender identity or expression (e.g. refuse membership to someone who is trans);
- Restrict or limit opportunities or benefits because someone is a trans person;
- Prohibit or restrict a trans person from using the washroom or change facility that aligns with their gender identity;
- Harass a member (including harassment that occurs online) with respect to that person's gender identity or expression, or permit such harassment to occur;
- Violate a trans person's right to privacy by disclosing their trans status to people who do not have a need to know;
- Refuse to refer to a trans member by their preferred name or pronoun (e.g. continuing to refer to a male-to-female trans person as "he", "him" or their male name instead of "she", "her", "they" or their female name).

2.0 Duty to Accommodate and *Bona Fide* Qualifications

The *Act* requires that policies having a discriminatory effect on people on the basis of gender identity or expression be avoided. It also imposes a duty to accommodate people on the basis of gender identity or expression to the furthest point possible short of undue hardship. The search for an accommodation is a collaborative one that involves the person requiring accommodation (e.g. an employee or customer/client) and those providing the accommodation (e.g. an employer or service provider), and may include unions, health care professionals, or others as required. A person is only entitled to a reasonable accommodation, not a perfect one.

Conduct may be found to be non-discriminatory if it can be shown that the limitation, specification or preference is based upon a *bona fide* ("in good faith") qualification ("BFQ").

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In order to be a BFQ the standard adopted by the organization must pass the “*Meiorin Test*”. This three-part test requires establishing that the standard:

1. Was adopted for a purpose or goal that is rationally connected to the function being performed;
2. Was adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
3. Is reasonably necessary to accomplish its purpose or goal, in the sense that the employer, service provider, housing provider or association cannot accommodate persons with the characteristics of the person without incurring undue hardship.

The third part of the test requires individually assessing the needs of the person to determine whether it is possible to accommodate that person without incurring undue hardship.

What constitutes undue hardship will depend on the circumstances, but examples could include:

- Extremely high financial costs;
- A serious disruption to a business;
- Health and safety considerations, including obligations pursuant to a federal or provincial statute;
- A very long absence of indefinite duration;
- A substantial interference with the rights of others, including employees, customers or tenants;
- Inability to renovate the facilities to accommodate the person;
- Inability to interchange, alter or substitute duties within the workforce;
- The extent to which the inconvenience would prevent the business from carrying out the purpose of that business.

Trans persons have a right to privacy. There is no obligation for trans persons to disclose the fact that they are trans unless it is necessary as part of the accommodation process. In many instances, it will not be necessary for trans persons to reveal that they are trans when requesting an accommodation (e.g. an accommodation to attend medical appointments that are part of the transition process), although documentation indicating the need for accommodation (e.g. a doctor’s note) may still be required.

In situations where a trans person does need to disclose that they are trans, or chooses to disclose that information voluntarily, the employer, service provider, housing provider or association may only share that information with those who have a need to know, unless the trans person has clearly authorized disclosing it to those not directly involved in the accommodation process.

Requesting or requiring someone to identify their gender (e.g. on an application form) should be avoided unless it is reasonably necessary and undue hardship would be incurred without this information. In situations where it is necessary to gather that information, employers, service providers, housing providers and associations should

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provide a broader range of gender options in addition to the binary male/female designations to accommodate those whose gender is not accurately characterized as either male or female.

A trans person may seek accommodation with respect to a washroom or change facility if they are not comfortable using one of the available men's or women's washrooms (e.g. due to safety or privacy concerns, or because they are going through the transitioning process). Possible accommodations could include providing access to a single-stall washroom that may not normally be available (e.g. a washroom reserved for management staff). However, a trans person cannot be required to use a separate washroom or change facility from everyone else if they wish to use the one that corresponds with their gender identity. To provide an inclusive environment for everyone, businesses and organizations are encouraged to explore providing unisex washrooms, and privacy curtains or barriers in locker rooms and change rooms for all employees, customers and others on site.

Concerns that others will be uncomfortable sharing facilities with a trans person is insufficient to amount to undue hardship. As noted above, the employer, service provider, housing provider or association bears the burden of establishing that accommodation is not possible without incurring undue hardship. Sufficient information must be provided to demonstrate that undue hardship would result from the accommodation.

For More Information

For further information about the *Act* or this guideline, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at <http://www.gnb.ca/hrc-cdp> or email us at hrc.cdp@gnb.ca

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