
BILL TO PREVENT GENDER IDENTITY AND EXPRESSION DISCRIMINATION PASSED BY HOUSE OF COMMONS

*By Barry Kwasniewski**

A. INTRODUCTION

On February 9, 2011, the House of Commons passed Bill C-389, which will amend the *Canadian Human Rights Act*¹ and the *Criminal Code*² extend protection from discrimination on the basis of gender identity and gender expression. A copy of Bill C-389 can be found online at www.2parl.gc.ca. Introduced as a private member's bill by NDP MP Bill Siksay in 2009, the bill was passed by a vote of 143 for and 135 against. The bill will now proceed to the Senate for review. If passed by the Senate, the bill will become law on a date to be proclaimed.

B. SUMMARY OF AMENDMENTS

Bill C-389 will amend section 2 and subsection 3 (1) of the *Canadian Human Rights Act*. Section 2 will extend the prohibition against discriminatory practices on the basis of gender identity and expression. Subsection 3 (1) will provide:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity, gender expression, marital status, family status, disability and conviction for which a pardon has been granted.

* Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters' Ottawa office.

¹ R. S., 1985, c. H-6

² R. S., 1985, c. C-46

As well, the bill will amend subsection 318 (4) and subparagraph 718.2 (a) (i) of the *Criminal Code*. These changes to the *Criminal Code* will add “gender identity” and “gender expression” to the provisions dealing with hate speech, as well as sentencing for crimes where hate, bias or prejudice were motivating factors in the commission of the crime.

C. APPLICATION OF THE CANADIAN HUMAN RIGHTS ACT

The *Canadian Human Rights Act* applies to all federal and federally-regulated works and industries. Accordingly, this legislation protects Canadian residents from discrimination by any of the following institutions and businesses:

- ◆ federal department, agencies, and Crown corporations;
- ◆ chartered banks;
- ◆ airlines;
- ◆ television and radio stations;
- ◆ interprovincial communications and telephone companies;
- ◆ buses and railways that operate between provinces; and
- ◆ other federally-regulated industries, such as certain mining operations, aeronautics, and fisheries.

If the amendments are passed, gender identity and gender expression will be prohibited grounds for discrimination in the provision of goods, services, or facilities; as well as the provision of residential accommodation or commercial premises; and employment.

D. GENDER IDENTITY AND GENDER EXPRESSION

The terms “gender identity” and “gender expression” are not defined in the amended legislation. However, the Ontario Human Rights Commission developed a policy in the year 2000³ defining those terms as follows: “Gender identity is linked to an individual’s intrinsic sense of self, particularly the sense of being male or female. Gender identity may or not conform to a person’s birth assigned sex. Personal characteristics that are associated with gender identity include self-image, physical and biological appearance, expression, behaviour, and conduct, as they relate to gender”

³ Ontario Human Rights Commission, *Policy on Discrimination and Harassment Because of Gender Identity* (30 March 2000), online: <http://www.ohrc.on.ca/en/resources/Policies/PolicyGenderIdent>.

The term “gender expression” is intended to deal with how a person expresses their gender identity (eg: by the way a person dresses or behaves). Therefore, if the legislation is passed, courts called upon to address this issue, will likely adopt this, or a very similar definition.

E. CONCLUSION

If passed by the Senate, federal institutions and undertakings will be expressly prohibited from discrimination based on gender identity and expression. In other Canadian jurisdictions, only the Northwest Territories has expressly listed gender identity as a prohibited ground.⁴ While some provincial human rights tribunals have interpreted existing legislation to include gender identity as a prohibited ground of discrimination, the legal protection afforded to affected individuals remains as issue of social, political and legal debate in Canada.

⁴ Human Rights Act, S.N.W.T 2002, c.18