
DISCRIMINATION BASED ON GENDER IDENTITY OR EXPRESSION TO BE PROHIBITED IN ONTARIO

*By Barry W. Kwasniewski**

A. INTRODUCTION

On June 13, 2012, the Ontario Legislature passed third reading of Bill 33, which will amend the Ontario Human Rights Code (the “Code”) to prohibit discrimination in Ontario on the basis of gender identity or expression. The Bill, entitled “Toby’s Act (Right to be Free from Discrimination and Harassment because of Gender Identity or Gender Expression), 2012,” received support from all parties, and will come into force upon receiving Royal Assent.¹ It is expected the amendments will become law later this year. Once in force, charities and not-for-profits, operating in Ontario will be subject to these amendments.

As a result of Bill 33, the Code will provide that every person has the right to equal treatment without discrimination because of “gender identity” or “gender expression” with respect to employment, services, accommodation, contracts and memberships in vocational associations (such as a trade unions, trade or occupational association or a self-governing professions). As well, harassment on the basis of gender identity and expression, both in the workplace and in residential accommodation, will be prohibited.

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

¹ A copy of the Bill can be viewed at

http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2574&detailPage=bills_detail_the_bill.

B. WHAT IS “GENDER IDENTITY” AND “GENDER EXPRESSION”?

The terms “gender identity” and “gender expression” are not specifically defined in the Code. However, the goal of the amendments is to extend legal protections to people who identify themselves as “transgendered.” According to the Ontario Human Rights Commission, which released its “Policy on Discrimination and Harassment Because of Gender Identity” in March, 2000,² the term “gender identity” means:

“Gender identity is linked to an individual’s intrinsic sense of self and, particularly the sense of being male or female. Gender identity may or may not conform to a person’s birth-assigned sex. The personal characteristics that are associated with gender identity include self-image, physical and biological appearance, expression, behaviour and conduct, as they relate to gender.

At birth, a child is assigned a gender by a health care professional based on observation of the child’s genitalia. Society makes the assumption that based on this medical assessment a child will grow up to exhibit correspondingly masculine or feminine behaviours and appearances. However, this is not always the case. A person’s felt identity or core identity may differ in part or in whole from their birth assigned sex. Individuals whose birth-assigned sex does not conform to their gender identity include transsexuals, transgenderists, intersexed persons and cross-dressers.

A person’s gender identity is fundamentally different from and not determinative of their sexual orientation.”

While the term “gender expression” is not specifically referred to in the Ontario Human Rights Commission Policy, it is understood to mean the manner by which a person expresses their gender identity, including how they dress, behave, speak and interact with others.

C. CONCLUSION

The amendments to the Code by Bill 33 seek to remove any legal doubt as to human rights protections afforded to transgendered people. While provincial human rights tribunals in Ontario³ and other provinces have consistently held over the past several years that current human rights statutes must be interpreted to prohibit discrimination on the basis of gender identity and expression (primarily under the current “sex” or “sexual orientation” prohibited grounds of discrimination), Ontario will be the first province in Canada to specifically include these two new grounds in its provincial human rights laws. Therefore, charities and not-

² This policy is available online at <http://www.ohrc.on.ca/en/policy-discrimination-and-harassment-because-gender-identity>.

³ See, for example: XY v. Ontario (Government and Consumer Services), 2012 HRTO 726 (CanLII).

for-profits will need to be mindful of these changes and, subject to the existing exemptions, adapt their internal human rights policies accordingly. It should be noted that the exemptions in the Code pursuant to s. 18 with respect to services and facilities provided by special interest organizations (such as churches, educational and fraternal organizations), and pursuant to s. 24 with respect to employment, will continue to apply.