



# Adding the terms “Gender Identity” and “Gender Expression” to Canadian Laws

Submitted to the Parliamentary Standing  
Committee on Justice and Human Rights (JUST)  
Re: Bill C-279, an *Act to amend the Canadian  
Human Rights Act and the Criminal Code (gender  
identity and gender expression)\*\**

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## Introduction

The Trans Equality Society of Alberta (TESA) offers its formal support to Bill C-279--*An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity and gender expression)*. Bill C-279 clarifies crucial protections for a community that often slips through legislative and regulatory cracks. The Trans Equality Society of Alberta applauds the Government of Canada for bringing this bill through second reading and hopefully to fruition.

TESA's mission is to be a witness to and a voice for matters concerning trans-identified Albertans. As changes to the *Canadian Human Rights Act* and the *Criminal Code* both have implications for Albertans, we believe Bill C-279 falls within our mandate for further discussion and consultation. TESA is pleased to submit this summary as part of such discussion and consultation.

We present the following information for the Standing Committee on Justice and Human Rights (JUST), and request the opportunity to speak further to this issue.

## Charter protections

Canada's *Charter of Rights and Freedoms* frequently states that “Everyone has ...” the rights described within it. The Equality Rights explicitly enumerated in S.15 include “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” (*Charter*, S.15(1)). However, these enumerated rights proved inadequate to offer protections to sexual minorities until *Egan v. Canada* (1995) established sexual orientation as an analogous protected ground to those listed in Section 15 by the inclusion of “sexual orientation” in the *Canadian Human Rights Act (CHRA)*, S.2).

Discrimination on the grounds of sex is clearly enumerated within the *Charter* (S.15), yet the *CHRA* also further elaborates that sexual discrimination includes the “ground of ... pregnancy or childbirth ...” (*CHRA*, S.3(2)), suggesting that confusion may have existed as to whether discrimination involving pregnancy or childbirth was sex discrimination.

These two examples suggest that despite the *Charter's* frequent use of the word “everyone,” some confusion has existed as to whether “everyone” includes people of a particular sexual orientation or people who are pregnant or people who are undergoing childbirth. While TESA concurs that discrimination against trans-identified people may be sex discrimination, we also recognise that further clarification is called for.

Bill C-279, by adding the terms “gender identity” and “gender expression” to the *Canadian Human Rights Act* would help clarify that sex discrimination *also includes* discrimination on the grounds of gender identity and gender expression. Likewise, Bill C-279's addition of the terms “gender identity” and “gender expression” to the *Criminal Code* provides authorities the opportunity to make appropriate charges in the case of criminal action against an identifiable group.

## Clarifying protections

TESA is not alone in the opinion that trans-identified people would benefit from greater clarification around “sex” as a protected ground in Canadian human rights law.

As early as 2000, the Canadian Human Rights Act Review Panel recommended “that gender identity be added to the list of prohibited grounds of discrimination in the [Canadian Human Rights] Act” (“La Forest Report”, Annex C, Summary of Recommendations #123). The panel, chaired by the Honourable Gérard V. La Forest, noted that “We agree with the view that transgendered individuals are protected from discrimination on the ground of sex or the combined grounds of sex and disability. However, to leave the law as it stands would fail to acknowledge the situation of transgendered individuals and allow the issues to remain invisible” (LaForest, Black, Dupuis, & Jain, 2000, Chapter 17(d)).

Allowing the issues to remain invisible is untenable.

## Refuting objections

Three primary objections have been raised before the House of Commons and in public discourse regarding considering rejecting passage of Bill C-279. These objections relate to terminology, prior grounds, and criminal allegations.

### **Terminology**

The first objection is that terms such as “gender identity” and “gender expression” are not defined and thus unsuitable for inclusion within Canadian law. TESA respectfully notes that legislation frequently contains terms that are, for whatever reason, undefined. However, “gender identity” is a well-established concept in international human rights law. The International Commission of Jurists and International Service for Human Rights, along with a coalition of human rights organisations, developed the *Yogyakarta Principles*, which analyses and addresses the application of international human rights law in relation to sexual orientation and gender identity.

According to the *Yogyakarta Principles*, “[g]ender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms” (*Yogyakarta Principles*, 2006). As noted in this definition, “other expressions of gender” may include dress, speech and mannerisms. For reasons that should be obvious, concerns related to gender identity may also relate to concerns related to gender expression.

The *Yogyakarta Principles* outline “(i) all necessary legislative, administrative and other measures to

eradicate impugned practices; (ii) protection measures for those at risk; (iii) accountability of perpetrators and redress for victims; and, (iv) promotion of a human rights culture by means of education, training and public awareness-raising” (O’Flaherty & Fisher, 2008, p. 235). The legal framework supporting each of the *Yogyakarta Principles* is tied to the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the two multilateral treaties that undergird the principles outlined in the *Universal Declaration of Human Rights* (UDHR).

As Canada is a signatory to both the ICCPR and the ICESCR, TESA believes Canada has a clear obligation to uphold rights related to gender identity and gender expression. The La Forest Report underscored the importance of such explicit protection when it noted that “We heard numerous instances of discrimination on the ground of gender identity. We were told about the difficulty of seeking changes to government documents and officials’ lack of respect for the privacy of transgendered persons seeking government services. We heard about the problems transsexuals experience in the workplace ...” (LaForest, Black, Dupuis, & Jain, 2000, Chapter 17(d)). Clearly, existing protections under the ground of “sex” are proving inadequate, even when individuals interact with their government.

### **Prior grounds**

The second objection is that “sex” is already a prohibited ground for discrimination in the *Charter* and the *Canadian Human Rights Act*, and that “sex” is already under consideration for aggravating circumstances when sentencing an offender (*Criminal Code*, S. 718.2(a)(i)) and thus Canada does not need to add further terms to either the *CHRA* or the *Criminal Code*. However, as explained previously, Canada has already undertaken to provide greater clarification regarding whether “everyone” in our *Charter* includes people of a particular sexual orientation and, in the *CHRA*, whether discrimination involving pregnancy or childbirth is sex discrimination.

Likewise, as events such as the Transgender Day of Remembrance acknowledge, deadly violence directed towards “[t]hose who transgress gender norms” (O’Flaherty & Fisher, 2008, p. 209) poses a demonstrated need for explicit understanding of gender identity and gender expression as aggravating circumstances in the *Criminal Code*.

Bill C-279 would address the need for these clarifications.

### **Criminal allegations**

The final objection relates to unwarranted and unsubstantiated accusations of illegal activities by trans-identified people, such as accusations of predatory behaviour in washrooms. No credible, substantiated evidence has been presented that such accusations are founded and indeed, these accusations are strikingly similar to those put forward to legitimise historical exclusionary practises with other marginalised groups. TESA condemns this baseless fearmongering and remains disappointed that during debate and discourse regarding current and prior iterations of this Bill, some elected Members of Parliament have felt it appropriate to further such unsubstantiated allegations.

## Conclusion

Canada has an obligation to ensure that the “everyone” spoken of in our *Charter* does indeed apply to everyone. Amending the *Canadian Human Rights Act* and the *Criminal Code* to include “gender identity” and “gender expression” is a reasonable and justifiable step toward ensuring trans Canadians can “have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practises ...” (*CHRA*, S. 2). We trust this submission will benefit the Standing Committee on Justice and Human Rights (JUST) in their study of Bill C-279 and thank the Committee for their thoughtful consideration of this issue.

## Recommendations

TESA calls on the Standing Committee on Justice and Human Rights (JUST) to invite representatives of TESA to speak as witnesses to the objections raised with regards to Bill C-279--*An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity and gender expression)*.

TESA calls on the Standing Committee on Justice and Human Rights (JUST) to consider Bill C-279--*An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity and gender expression)*--favourably.

TESA calls on the Standing Committee on Justice and Human Rights (JUST) to approve Bill C-279--*An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity and gender expression)*--for third reading in the House of Commons.

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