



# Including the term *Gender Identity* in Canadian Statutes: Bill C-279

Submitted to the Senate Standing Committee  
 on Legal and Constitutional Affairs (LCJC)  
 regarding Bill C-279, an *Act to amend the  
 Canadian Human Rights Act  
 and the Criminal Code (gender identity)*

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## Introduction

The Trans Equality Society of Alberta (TESA) offers its formal support for Bill C-279, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)*. Bill C-279 clarifies crucial protections for a community that often slips through legislative and regulatory cracks. The Trans Equality Society of Alberta appreciates the opportunity to provide this testimony to the Senate's Standing Committee on Legal and Constitutional Affairs (LCJC) in support of this bill.

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 testimony as part of such discussion and consultation.

## Equality rights

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 clear protections to sexual minorities until *Egan v. Canada* (1995) established sexual orientation as an analogous protected ground to those listed in Section 15 of the *Charter* 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 *Canadian Human Rights Act* 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 term “gender identity” to the *Canadian Human Rights Act* would help clarify that sex discrimination *also includes* discrimination on the ground of gender identity. Likewise, Bill C-279's addition of the term “gender identity” 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)).

TESA notes that since the introduction of Bill C-279's precursor--Bill C-389, introduced to Parliament on May 15, 2009--other Canadian jurisdictions have made great leaps to make trans issues visible. Within Alberta, multiple school boards have chosen to protect explicitly "gender identity" for families, students, and staff. The Alberta government has produced a fact sheet noting that "[d]iscrimination on the basis of gender identity is a violation of human rights legislation" (*Transphobic Bullying*, 2014, p.2). The Alberta Court of Queen's Bench has ruled that Alberta Vital Statistics' practises regarding amending birth certificates for trans-identified Albertans "contribute to the disadvantage experienced by transgendered persons by perpetuating the prejudice and stereotyping to which they are subject" (C.F. v. Alberta (Vital Statistics) at para. 59) and determined that these practises are of no force and effect as they "infring[e on the] Charter s.15(1) right to equal protection and benefit of the law" (at para. 60). Taken individually, these changes could be interpreted as minor, but in light of the "prejudice and stereotyping" that pervades life for many trans people, the potential for relief from such is of incalculable value.

The government of Canada, through the passage of Bill C-279, has the opportunity to establish national clarity regarding these issues, ensuring that they neither remain invisible nor unaddressed. Allowing the issues to continue to remain invisible at a federal level is untenable and unreasonable.

## Amendments to Bill C-279

During debate and discussion in the House of Commons and the Parliamentary Standing Committee on Justice and Human Rights (JUST), objections were raised that Bill C-279 did not contain a definition of the term "gender identity" and was thus unsuitable for inclusion within Canadian law. Observations that other existent grounds for discrimination under the *Canadian Human Rights Act* or identifiable group under the *Criminal Code* such as "race" or "religion" are not defined were ignored in favour of amending Bill C-279 to include a definition of "gender identity" based on international human rights analysis. Bill C-279 originally also included the term "gender expression", but was amended to remove this term from its text.

TESA remains concerned regarding both amendments. Regarding adding a definition of "gender identity" to Bill C-279, TESA questions the wisdom of requiring a definition for only a single term in statutes that contain a number of terms that remain undefined, noting concerns that the possibility of such a singular definition applied to interpret protections for "gender identity" too narrowly may defeat the Bill's usefulness as an amendment to provide greater clarity and inclusion for everyone.

TESA also notes that Alberta was the location of three widely-reported examples of actions that could be attributed to bias, prejudice or hate with regards to gender expression. In May 2010, a male high school student from Raymond, Alberta was initially denied permission to attend his graduation wearing a kilt. In July of 2012, a gay male from Edmonton, Alberta who wears makeup and describes his gender expression as feminine was attacked physically and verbally by people using homophobic slurs. In November 2013, a male temporary foreign worker from Indonesia was found dead of blunt force trauma in an Edmonton hotel room: staff who discovered the body thought the victim was a woman. It is important to note that in none of these examples do these young people identify themselves as being trans, yet TESA would be remiss not to bear witness to their experiences of discrimination--possibly also leading to death--on the basis of gender expression. These examples underscore the need to ensure that Bill C-279, when enacted, is interpreted as broadly as possible to ensure that everyone in Canada may indeed enjoy the full benefit of Canadian equality rights.

## Refuting objections

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

### **Terminology**

As noted earlier, objections were raised to Bill C-279 not including a definition of the term "gender identity." The Bill was then amended to include a definition of the term "gender identity" adopted from the *Yogyakarta Principles*. A coalition of human rights organisations and the International Commission of Jurists and International Service for Human Rights developed the *Yogyakarta Principles* to analyse and address 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).

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 existing rights related to gender identity and by extension, gender expression. The La Forest Report underscored the importance of making such protection explicit 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 the issue at hand may be as simple and routine as citizens interacting with their government.

The *Yogyakarta Principles* contain a longer definition of “gender identity” than the definition proposed by Bill C-279, noting that “gender identity” may also relate to “other expressions of gender” which 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 2013 Edmonton murder case shows the necessity of understanding that identity is also tied with expression: while we do not know the gender identity of the deceased, the gender expression at the time of death appears to be clear. Again, TESA underscores the need for Bill C-279 to be interpreted broadly so as to ensure that gender expression remains visible as a locus of discrimination.

Even so, removing “gender expression” and adding a definition for “gender identity” has not quietened controversy. Bill C-279’s definition of “gender identity” for the purposes of amending the *Canadian Human Rights Act* states that “‘gender identity’ means, in respect of an individual, the individual’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex that the individual was assigned at birth.” The same definition is used for the purposes of amending the *Criminal Code*, with the substitution of the words “person” and “person’s” for the words “individual” and “individual’s.”

Now that “gender identity” has been defined within Bill C-279, the objection to terminology centres on application of the term. Some object that “gender identity” is subjective and therefore unsuitable for inclusion within Canadian law. Others object that “gender identity” is somehow only applicable to those making claims to being trans-identified. TESA respectfully notes that even if “gender identity” is an objectively subjective claim, at least one precedent may be found in the form of “religion” as a protected ground from discrimination in the *Canadian Human Rights Act* and in the enumeration of identifiable groups in the *Criminal Code*. The notion that Canadian law is unable to sustain subjectivity within its scope is demonstrably false. Likewise, the notion that an individual or person’s “deeply felt internal and individual experience of gender” somehow could only apply to those transitioning from a sex other than what was assigned at birth is ludicrous. Bill C-279 would apply to any person within Canada who has a gender identity and who needs to assert their rights as part of “everyone” referred to

as having equal rights under Canada's *Charter*.

### **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.

Lack of clarity is not a problem limited to Canada. "Notwithstanding the extent to which applicable legal standards have been clarified and articulated, the response of States and intergovernmental organisations to the human rights violations based on sexual orientation or gender identity has been equivocal and inconsistent" (O'Flaherty & Fisher, 2008, pp. 227-228). O'Flaherty & Fisher (2008) describe an incident where a human rights committee made an inquiry regarding "violence against transsexuals [and] observed there was no mention of such people in the [European Convention on Human Rights]. The inference seemed to be that such people had a lesser entitlement to protection. Any such view is, of course, untenable" (p. 221). TESA concurs with this position, noting that many trans Albertans have made comments to the effect that they are not recognised as having valid claims to be free from discrimination on the basis of their gender identity or gender expression because these terms are not affirmed explicitly in legislation, with the implication that their trans-identified status somehow annuls their status as part of "everyone" to enjoy equal rights in Canada.

Bill C-279 would address the need for the clarification regarding gender identity, and open possibilities for clarification regarding gender expression.

### **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 or change rooms and the implied harm that would then ultimately befall the target(s) of such behaviour.

TESA notes that predators and those determined to engage in unlawful activities will do so no matter what legislation is enacted. Enacting legislation that clarifies rights does not by default encourage--nor absolve--consequences for those who choose to engage in criminal behaviour.

No credible, substantiated evidence has been presented that such accusations are founded. Indeed, these accusations are strikingly similar to those put forward to legitimise historical exclusionary practises with other marginalised groups. TESA holds that the rights of one group does not trump the rights of another, and no "rights" somehow override the opportunity to charge and or prosecute an individual for unlawful behaviour.

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 and some Honourable Senators have felt it appropriate to further--and repeat--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” is a reasonable and justifiable step toward ensuring any person or individual in Canada facing discrimination on the ground of “gender identity” 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). TESA trusts this testimony will benefit the Senate's Standing Committee on Legal and Constitutional Affairs (LCJC) in their study of Bill C-279 and thanks the Honourable Senators for their thoughtful consideration of this unresolved issue.

## Recommendations

TESA calls on the Senate's Standing Committee on Legal and Constitutional Affairs (LCJC) to accept TESA's testimony in favour of adopting Bill C-279, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)* as a reasonable and justifiable step towards clarifying Equality Rights in Canada.

TESA calls on the Senate's Standing Committee on Legal and Constitutional Affairs (LCJC) to consider favourably the need and justification for Bill C-279, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)* to clarify and articulate the need for explicit protection for gender identity in Canadian statutes.

TESA calls on the Senate's Standing Committee on Legal and Constitutional Affairs (LCJC) to recommend Bill C-279, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)* be adopted by the Senate.



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