



Celebrating 45 Years

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Gender Identity and Gender Expression: Best Practices for Employers and Service Providers

By: Hicks Morley

The federal government recently [amended the *Canadian Human Rights Act*](#) to add gender identity and gender expression to the list of prohibited grounds of discrimination. The increased focus on issues of gender identity and gender expression at all levels of government has brought greater awareness of a person's right to be accommodated, and of the importance of ensuring employers/service providers create an atmosphere conducive to the promotion and productivity of – and delivery of service to – all persons, regardless of gender identity and gender expression.

Legislative Background

Gender expression and gender identity have been protected in Ontario under the *Human Rights Code* (Code) since 2012, when all three parties of the Ontario Legislature co-sponsored *Toby's Act*. [This legislation](#) added gender identity and gender expression as prohibited grounds of discrimination under the Code. Currently, almost every province and territory has amended their human rights legislation to provide gender identity and gender expression protections. Manitoba, Saskatchewan and the Northwest Territories have only added gender identity, while the Yukon has yet to add either term.

Recent Legislative and Policy Initiatives

In early 2016, the Ontario Human Rights Commission released its *Policy position on sexualized and gender-specific dress*

codes, which led to significant discussion across Ontario on the utilization and legitimacy of gender-specific dress codes, the role of the protections of gender expression and the effect of gender-specific dress codes on staff and patrons of restaurants.

In March 2017, the [Ontario Human Rights Commission published *Not on the Menu*](#), its Inquiry Report on sexualized and gender-based dress codes in restaurants. In the Inquiry Report, the Commission notes that throughout 2016, it worked with the Ontario Municipal Human Resources Association (OMHRA) and many large restaurant/hospitality chains to discuss and address gender-based dress codes. The Inquiry Report indicates that the reaction to its *Policy* was largely positive and many large chains implemented the changes identified by it in a move to create more gender inclusive workplaces.

Best Practices for Employers and Service Providers

With greater societal awareness of gender identity and expression issues, and changes to human rights legislation, we encourage employers and service providers to adopt the following best practices in supporting trans employees, students, customers and those individuals accessing services:

1. **Revise policies:** Review your organization's discrimination and harassment policies to ensure they include "gender identity" and "gender expression" as protected grounds.
2. **Review Human Resources forms and documents:** Gender identifiers on application forms, benefits enrolment forms, communications forms, including employee work records, identification cards, email accounts and office directories, should be updated to ensure options are provided for employees, service recipients and job applicants who do not exclusively identify as either male or female (e.g. "X"), and gender identifiers should be eliminated where they are not required.
3. **Ensure compliance:** Ensure managers, supervisors, coworkers and/or service providers comply with discrimination and harassment policies, and provide training. This may be particularly important when someone has transitioned or realigned their gender after becoming an employee or customer. While mistakes happen, condoning the intentional or careless misidentification of a trans person may constitute discrimination.
4. **Ask for input:** As gender identity and expression are deeply personal and can change over time, it may be necessary and appropriate to ask people which pronouns they use, how they would like to be addressed, or what type of accommodation(s) they need.
5. **Use chosen names and pronouns:** People's preferred names and pronouns may not match their given names or assigned sex. While some people prefer the pronouns she/her or he/him, others opt for gender-neutral terms such as they/their or zhe/ze/hir. Chosen names and pronouns should be used in conversation and communications including employee work records, identification cards, email accounts and office directories.
6. **Take an intersectional approach:** Gender identity and gender expression do not exist in a vacuum. When providing accommodations on this basis, consider whether other grounds under the *Code* might apply and may also require accommodation.
7. **Provide suitable accommodations:** Allow employees, service recipients and customers who have realigned their gender to access corresponding gender-specific accommodations, such as restrooms and change rooms. In certain circumstances, it may be appropriate to offer gender non-specific, single-stall or single-occupant facilities.
8. **Review your dress code:** Assess existing dress codes to determine whether they are gender-specific (e.g. require men and women to wear different uniforms). If you have a gender-specific dress code, consider whether it is reasonable and justified by workplace requirements. Keep in mind that employees and customers have the right to dress in conformance with their gender identity.
9. **Protect privacy:** Review your document retention and access policies to ensure that the privacy of employees, service recipients, and customers who have realigned their gender is adequately protected.

FTRQ&A – Bill C-45, the *Cannabis Act*

With: Hicks Morley

As we previously reported, the federal government introduced [Bill C-45, the *Cannabis Act*](#) on April 13, 2017.

What changes will the legislation bring?

Once the *Cannabis Act* comes into force, Canadians will be able to access marijuana for recreational use – not just for medicinal purposes. Amounts will be restricted (i.e. you can possess or share up to 30 grams, or cultivate up to four plants not exceeding one metre) and only those over the age of 18 may access non-medicinal marijuana. This age limit may be higher depending upon the province. Details regarding availability and access are still in the works.

Does this affect an employer's existing duty to accommodate the use of medical marijuana?

No. The duty to accommodate will continue to apply when marijuana is used to treat an illness and/or injury falling under the definition of "disability" within the applicable provincial/federal human rights legislation. There is no obligation, however, to accommodate non-medical marijuana use.

When will the *Cannabis Act* come into force?

The Act is expected to come into force on or before July 1, 2018.

Our company is provincially-regulated – will the changes apply to us?

Yes. Provincial governments can adopt certain regulations under the *Cannabis Act*, but once the legislation passes, recreational marijuana use will be available across the country. Certain portions of the *Criminal Code* will also be amended to address impaired driving and related issues.

We already have to accommodate medicinal use of marijuana, what does the legislation bring to the mix – anything that we need to do differently?

Employers should review their workplace policies. Amendments may be required for policies strictly prohibiting the use of recreational marijuana. Marijuana will soon be treated much like alcohol – off-duty use is permissible, but on-duty impairment is not.

As always, employers should be vigilant regarding issues of impairment in the workplace to ensure the safety of their employees and others within the workplace.

We encourage employers to be proactive. Your Hicks Morley lawyer would be pleased to assist you in auditing your existing policies or updating them as necessary.

Quick Hit – Changing Workplaces Review: A Bill 148 Timeline

Date	Developments
February 17, 2015	The Ontario government announces the launch of public consultations on the changing nature of the modern workplace.
May 14, 2015	The Ontario government formally commences the Changing Workplaces consultations first announced in February. Government-appointed Special Advisors – Mr. Justice John Murray and Mr. Michael Mitchell – are appointed to undertake the Changing Workplaces Review (Review) to consider the changing nature of the workplace, the causes behind those changes, and whether the <i>Labour Relations Act, 1995</i> (LRA) and the <i>Employment Standards Act, 2000</i> (ESA) need to be amended to meet challenges created by the changes. In particular, the Special Advisors are tasked with considering non-standard working relationships, the expanding service sector, globalization and trade liberalization, technological change and workplace diversity.



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