

THE MANITOBA
HUMAN RIGHTS
COMMISSION



LA COMMISSION DES
DROITS DE LA PERSONNE
DU MANITOBA

Protections from discrimination based on gender identity

Your rights Your obligations

Guidelines on protections from
discrimination on the basis of gender identity
under *The Human Rights Code* (Manitoba)
in employment, services and housing.

Introduction

The Human Rights Code (“*The Code*”) prohibits discrimination on the basis of gender identity in areas such as employment, housing and the provision of services. Protection from discrimination on the basis of gender identity falls under the protected characteristic of “sex” under *The Code*. Complaints on the basis of gender identity may also be accepted under s. 9(1)(a) of *The Code*, which provides for an open-ended definition of discrimination and protects some classes or groups of people on the basis of personal characteristics not specifically listed under s. 9(2).

Employers, landlords and service providers can be held responsible for the discriminatory actions of their employees.

What is the *The Human Rights Code*?

The Code is administered by the Manitoba Human Rights Commission and is the provincial law that protects individuals and groups in Manitoba from discrimination. It sets out a process for filing a human rights complaint. There is no charge for filing a human rights complaint or for seeking advice about a human rights concern. *The Code* has special status over all other laws of the Province of Manitoba.

This guideline sets out the Manitoba Human Rights Commission’s interpretation of protections from discrimination under *The Code* with respect to gender identity. It is subject to the specific language of *The Code* and to interpretations by adjudicators and the courts. If there is any conflict between this guideline and *The Code*, *The Code* prevails.

What are the protections from discrimination based on gender identity?

It is unlawful under *The Code* to discriminate against a person in employment, housing or the provision of services, on the basis of that person's actual or perceived gender identity, without reasonable cause. It is also unlawful to discriminate against someone based on their association with someone with a particular actual or perceived gender identity, without reasonable cause.

What is "gender identity"?

Gender identity is a person's internal, individual experience of gender.¹ Gender refers to the "roles, behaviour, activities and attributes that a particular society considers appropriate for men and women."²

Persons who are transgender have a gender identity that differs from their biological sex. Persons who are transsexual have a gender identity that differs from their biological sex and take steps, or seek to take steps, to align their physical appearance with their felt sense of being male or female. Steps might include changes to their physical appearance and dress, and medical treatment such as hormonal therapy and surgery. Persons who are gender variant have an expression of gender identity that does not conform to the dominant norms for boys and girls, men and women.

Persons who are intersex are born with both male and female sex attributes. Some persons who are intersex take steps, or seek to take steps, to align their physical appearance with their felt sense of being male or female, including changes to their physical appearance and dress, and medical treatment.

¹ See *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007), Page 6.

² The World Health Organization

Some Aboriginal persons who are gay, lesbian, bisexual or transsexual (GLBT) identify themselves as Two Spirit.

Expressions of gender identity include dress, speech and mannerisms.³

Gender identity and sexual orientation

Gender identity refers to a person's internal, individual experience of gender. Sexual orientation refers to whether a person's romantic, affectional or sexual attraction is heterosexual ("straight"), homosexual ("gay", "lesbian") or bisexual ("bi"). *The Code* also prohibits unreasonable discrimination based on sexual orientation.

What is discrimination?

Discrimination under *The Code* is treating a person or group differently, to their disadvantage and without reasonable cause, in a protected activity such as employment, on the basis of a protected characteristic such as sex, including gender identity. Other protected characteristics are ancestry, nationality, ethnic origin, religion, sex (including pregnancy), gender-determined characteristics, sexual orientation, marital or family status, source of income, political belief and physical or mental disability.

Failure to reasonably accommodate a special need that is based on a protected characteristic, such as sex, including gender identity, is also discriminatory. Harassment on the basis of a protected characteristic is also prohibited.

Who is legally responsible for discrimination?

The Code does not only place responsibility for a discriminatory act on the person whose conduct is discriminatory. Employers, landlords and service providers can be responsible for the discriminatory actions of their employees.

³ See *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007), Page 6.

Employers, landlords and service providers are encouraged to inform their employees about the requirements of *The Code* and to ensure that their obligations under *The Code* are being met.

What if there is no intention to discriminate?

It is possible to discriminate without intending to violate the law. Systemic discrimination is a form of discrimination that is often not intended. It takes place when a policy or practice that seems neutral has a greater negative effect on some people based on their protected characteristic, such as sex, including gender identity, without reasonable cause.

Examples of policies or practices that might adversely affect persons based on gender identity, where there may be no intention to discriminate are:

- a hospital's practice of always assigning patients having a particular surgery to a given ward, which results in patients of a particular sex being grouped together, regardless of whether that is consistent with a patient's gender identity; and
- public washroom facilities that only provide sex-segregated and multi-user washrooms and do not include a gender-neutral, single-user washroom option.

Flexibility with respect to washroom use policies in services and workplaces may be necessary to ensure that persons who are transgender or transsexual have access to a washroom that is as safe and comfortable as that available to other employees or users of a service. Providing a private gender-neutral washroom option is also a way to be more inclusive.

Many different forms unnecessarily request that a person check off whether they are male or female. This can be problematic for persons who are transgender. Employers, service providers and landlords are encouraged to consider whether information about gender is really needed before including such a question in their forms. If there is an important reason for asking persons to state their sex, allowing for self-identification is preferable to requesting that either male or female be selected.

What about threats or harm to someone who complains about discrimination?

The Code protects the right of a person or group to file a complaint alleging discrimination. It is illegal to threaten to cause, or to cause, a detriment or harm or loss of benefit to someone because they have filed a complaint, or are participating in a proceeding under *The Code*. A person or group so threatened or harmed may file a "reprisal complaint" under *The Code*.

Employment and protections from discrimination based on gender identity

What is discrimination in employment?

It is discrimination under *The Code* to treat a person or group differently, to their disadvantage, in employment on the basis of a protected characteristic, such as sex, including gender identity, unless the discrimination is based on *bona fide* ("in good faith") and reasonable occupational requirements or qualifications. *Bona fide* and reasonable occupational requirements or qualifications for a job are those that are required in good faith and are reasonably necessary to the safe and efficient performance of the employment or occupation.

Examples of discrimination based on gender identity in employment include:

- not hiring or promoting a person based on their gender identity;
- terminating an employee on the basis of their gender identity; and
- denying an employee who is transsexual access to washroom facilities appropriate to their gender identity.

Failure to reasonably accommodate a special need that is based on a protected characteristic is also discriminatory. An example of a special need based on gender identity is the request of an employee who is transgender for a leave to accommodate medical treatment related to gender identity.

Harassment on the basis of a protected characteristic is also contrary to *The Code*. Examples of harassment based on gender identity are derogatory name-calling, inappropriate physical contact, or the ongoing use of inappropriate forms of address and pronouns by coworkers when speaking to an employee who is transgender.

What does the protection from discrimination in employment extend to?

The Code prohibits unreasonable discrimination in all aspects of full-time, part-time, permanent, casual or probationary employment regardless of whether or not the discrimination is intentional.

The prohibition against discrimination in employment applies to both paid and unpaid or volunteer employment, and to employers, employment recruiters and agencies, trade unions and occupational associations. Discrimination in recruitment, hiring, wages (including fringe benefits), lay-offs, suspensions, terms and conditions of employment, dress codes, employee benefit plans, training, promotions, dismissals and seniority is prohibited.

(For further information on employment recruitment and hiring, please see our guidelines on pre-employment inquiries: “*Pre-employment inquiries: You can respect human rights in hiring*”.)

What about workplace dress codes?

Dress codes do not generally contravene *The Code*. If an employer, however, without reasonable cause, requires all employees to wear a standard sex-specific uniform, it may result in discrimination against employees who are adversely affected by this policy based on their gender identity and who do not have a uniform option of comparable comfort and dignity to that of other staff. An alternative approach might be to allow for more individual expression of gender within a broader range of uniform options.

What about workplace standards, rules or policies?

If a standard, rule or policy an employer is using might have a discriminatory effect based on a protected characteristic such as sex, including gender identity, adopting an alternative approach that avoids or limits the discriminatory effect, such as individual testing or a more individually sensitive standard, will help to ensure compliance with *The Code*.

Employers must ensure that any standards, policies or rules they adopt for the employment:

- 1) are rationally connected to the performance of the job;
- 2) are adopted in an honest and good faith belief that they are necessary to the fulfillment of a legitimate work-related purpose; and
- 3) are reasonably necessary to accomplish the legitimate work-related purpose.

Employers must also reasonably accommodate any special needs that are based on protected characteristics under *The Code*, such as sex, including gender identity.

(For more information on reasonable accommodation, please see our reasonable accommodation guidelines “*You can remove barriers to equality of opportunity and participation: What process to use; What to do*”.)

Services and protections from discrimination based on gender identity

What is discrimination in services based on gender identity?

It is contrary to *The Code* to discriminate on the basis of sex, including gender identity, in the provision of a service available to the public or a section of the public, without *bona fide* (“in good faith”) and reasonable cause. Examples of services include stores, theatres, restaurants, police services, sports associations, healthcare services, government services, food banks, schools, rehabilitation programs and insurance services.

Discrimination in the provision of services includes failing to reasonably accommodate special needs that are based on gender identity. Harassment in services on the basis of gender identity is also prohibited.

What if a service user requests to be called by a name other than their legal name?

If a person who is transgender or transsexual asks to be called by a name that differs from their legal name, *The Code*’s requirement for reasonable accommodation of special needs based on sex, including gender identity, means that service providers must reasonably accommodate such requests, to the point of undue hardship.

Examples include:

- a university allows a student who is transsexual to have their preferred name listed in its online directory; and
- at the request of a patient who is transgender and has a legal first name not usually associated with their gender identity, a medical clinic changes its practice of calling out patients’ first and second names as they appear on Manitoba Health Registration cards.

What about children, youth and gender identity?

It is contrary to *The Code* to discriminate, without reasonable cause, in the provision of services to children and youth based on age and/or gender identity, including in health services, education, recreation, police services and child protective services. Children who are intersex are also protected from unreasonable discrimination on the basis of their age and gender identity.

What about provision of medical services to children who are transgender or intersex?

It is contrary to *The Code* for service providers to require that a child undergo medical or psychological treatment that discriminates against that child based on gender identity, without reasonable cause. In applying *The Code*’s protections from unreasonable discrimination, the Manitoba Human Rights Commission will consider international agreements that Canada has entered into, such as the United Nations Convention on the Rights of the Child.

It is contrary to *The Code* for healthcare providers to, without reasonable cause, irreversibly alter a child's body through medical procedures to assign a gender identity. One way that reasonable cause may be shown is if, as suggested by the expert panel in The Yogyakarta Principles, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (March 2007), such treatment is done with the full, free and informed consent of the child, taking into account the child's age maturity and best interests.

What about children and youth in schools who are transgender, transsexual, Two Spirit or gender variant?

Children and youth in schools and educational institutions and services have a right to access these services without discrimination or harassment on the basis of gender identity. Reasonable accommodation of special needs based on gender identity must also be provided.

An example of a reasonable accommodation of a special need based on gender identity is a teacher calling a student who is transgender by that student's preferred first name, and referring to that student by the pronoun that corresponds to his or her self-identified gender.

Other examples of ways schools can be gender identity inclusive are:

- providing private, non-gendered washroom and changing room options for students;
- dividing students into groups for activities in ways other than into groupings of boys and girls; and
- ensuring that harassment prevention policies and procedures specifically prohibit harassment based on gender identity.

Sports and gender identity

It is contrary to *The Code* to discriminate on the basis of gender identity in recreational and competitive sports, unless *bona fide* and reasonable cause exists.

Where sports teams or leagues are divided on the basis of sex, refusing to allow a participant who is transgender to play on a sport team according to their self-identified gender, without reasonable cause, is contrary to *The Code*.

What about service standards, rules or policies?

If a standard, rule or policy a service provider is using might have a discriminatory effect on a service user based on a protected characteristic, including gender identity, adopting an alternative approach, which avoids or limits the discriminatory effect, such as individual testing and/or a more individually sensitive standard, will help to ensure compliance with *The Code*.

Service providers must ensure that any standards, policies or rules they adopt for the service:

- 1) are rationally connected to the provision of the service;
- 2) are adopted in an honest and good faith belief that they are necessary to the fulfillment of a legitimate service-related purpose; and
- 3) are reasonably necessary to accomplish the legitimate service-related purpose.

Service providers must also ensure that reasonable accommodation of any special needs, which are based on protected characteristics under *The Code*, such as gender identity, has been made.

Rental housing and protections from discrimination based on gender identity

What is discrimination in rental housing?

It is contrary to *The Code* for a landlord, rental agent, or a tenant who sublets, to discriminate against someone on the basis of gender identity, including unreasonably refusing applicants for tenancy on the basis of gender identity. Discrimination in rental housing under *The Code* includes failing to reasonably accommodate special needs of a tenant that are based on protected characteristics. Harassment based on a protected characteristic, such as gender identity, is also prohibited.

(For further information, please see our guidelines “*You Can Support Human Rights in Rental Housing: Your Rights; Your Obligations*”.)

Sample policy

ABC Softball League: Mixed Slo-Pitch

Policy Prohibiting Discrimination and Harassment on the Basis of Gender Identity

ABC Softball League, in accordance with *The Human Rights Code*, prohibits unreasonable discrimination in its services on the basis of sex, including gender identity. Discrimination includes harassment on the basis of gender identity. ABC Softball League will also reasonably accommodate special needs of participants that are based on gender identity, to the point of undue hardship.

Participation in league play

Players, including players who are transgender, transsexual, Two Spirit, or intersex, can participate in men’s, women’s or coed recreational or competitive play according to their self-identified gender identity, unless there is *bona fide* and reasonable cause to refuse such participation.

Harassment

ABC Softball League will not tolerate harassment on the basis of a participant’s real or perceived gender identity in any of its activities. ABC Softball League will take all reasonable steps to terminate any such harassment that it is made aware of.

Procedure

Players or other participants who believe that they have been discriminated against and/or harassed on the basis of gender identity are asked to please report the problem to [*names, contact information of designated staff/representatives of ABC Softball League*].

Players or other participants who require reasonable accommodation of a special need based on gender identity are asked to make their request to [*names, contact information of designated staff/representatives of ABC Softball League*].

ABC Softball League will take a player’s or participant’s complaint or request seriously, and will look into the matter in a timely manner, while treating the complaint or request in as confidential a manner as possible.

For further information, players or participants may also wish to contact the Manitoba Human Rights Commission, at 945-3007 (Winnipeg) / 1-888-884-8681 (toll-free) or TTY: 1-888-897-2811.

Who can I call for more information?

For further information, please contact the Manitoba Human Rights Commission. This guideline is available on the Manitoba Human Rights Commission website at <http://www.manitoba.ca/hrc>. Sample policies prohibiting discrimination and harassment in employment, services or rental housing are also available under “public education”.

The location of Manitoba Human Rights Commission offices are:

Winnipeg: 7th Floor - 175 Hargrave Street
Winnipeg, MB R3C 3R8
Phone: (204) 945-3007 Fax: 204-945-1292

Brandon: Rm 341 - 340 Ninth Street
Brandon, MB R7A 6C2
Phone: (204) 726-6261 Fax: 204-726-6035

The Pas: 2nd Floor - Otineka Mall
P.O. Box 2550
The Pas, MB R9A 1M4
Phone: (204) 627-8270 Fax: 204-623-5404

TOLL FREE: 1-888-884-8681
TTY: 1-888-897-2811

All Manitoba Human Rights Commission guidelines are available online and can be found on our website.

www.manitoba.ca/hrc

Le présent guide est également disponible en français

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