

Policy Recommendation:

**Toward the Inclusion of Gender Identity and Expression as Protected Grounds in
*The Saskatchewan Human Rights Code***

The Avenue Community Centre for Gender and Sexual Diversity



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EXECUTIVE SUMMARY

At present, *The Saskatchewan Human Rights Code (Code)* provides protection on the basis of sexual orientation, sex, and gender, indicating that the latter two are equivalent. This document calls for an amendment to the *Code* to include ‘gender identity’ and ‘gender expression’ as prohibited grounds of discrimination. Considered in this report are the existing policies that affect the rights and dignity of transgender individuals and communities in Saskatchewan, as well as the potential implications of an amendment that might serve to alleviate the sociocultural obstacles and discrimination that transgender individuals and communities face on a daily basis.

In addition to the *Code*, there are a number of policies that are of concern to the transgender (trans) community and their allies. These policy arrangements have overlapping consequences for trans people, thereby creating intersecting barriers to full participation in society. A deeper investigation of trans identities and gender variance, reveals the wide range of medical, economic, and sociocultural impacts of living as trans in Saskatchewan and in other parts of Canada, as well as the value of a *Code* amendment as a means of ameliorating these impacts. In fact, policy changes in Ontario already demonstrate that trans-inclusive policies with respect to health, legal identity documentation, and explicit protections from discrimination, have mutually reinforcing benefits.

An amendment to *The Saskatchewan Human Rights Code* to include ‘gender identity’ and ‘gender expression’ may eventually provoke policy considerations surrounding health coverage, *The Vital Statistics Act*, and other policy areas. By taking these policy issues, the historical background, the current arrangements in Saskatchewan, and the existing models in another relevant jurisdiction into consideration, this report concludes that an amendment to the *Code* could produce positive and long-term results that increase sociocultural, political, and economic inclusion with respect to gender diversity in Saskatchewan.

INTRODUCTION

The Saskatchewan Human Rights Code (Code) includes explicit protection on the basis of sex and gender, where the two categories are indicated to be one and the same. However, the transgender (trans) community and its advocates claim that the Saskatchewan government and its current policies do not sufficiently protect the rights and dignity of trans persons. Among the most critical issues for trans communities in Saskatchewan are the following: discrimination in places of employment, housing, and places of public service and accommodation; access to medical coverage and care by informed and sensitive health professionals; and proper legal identity documentation (Gender Equality Society of Saskatchewan 2013). Although these are three separate policy areas, they have overlapping sociopolitical and economic implications that underpin discrimination against trans people in Saskatchewan, and therefore should be considered in collaboration.

The rights of all Canadians, including transgender persons (and other minority rights issues) are a federal concern (e.g. Bill C-279); however, these rights are also of concern to provincial governments, as individuals exercise their rights in sectors under provincial jurisdiction to which the provincial human rights codes apply. Provincial human rights codes serve as the primary recourse for people who have experienced discrimination in private transactions, as the *Canadian Charter of Rights and Freedoms*, (the Charter) applies to discrimination in government legislation and activities, and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 applies to matters within federal jurisdiction (Forseille 2014, 5). Moreover, other key areas of concern for the transgender community, including housing, education, health, and employment, involve the policies of provincial ministries.

In arguing for protections based on “Gender Identity and Expression” this report recognizes that protections based on “sex” and “sexual orientation” are not sufficient for the explicit protections of the rights of transgender and gender variant individuals. To clarify, “gender identity” refers to one’s private sense, and subjective experience of their own gender (see *psychological gender* below) while “gender expression” refers to the external manifestation of one’s internal gender identity, usually expressed through masculine, feminine, or androgynous behaviour, clothing, haircut, voice, and other physical characteristics. A policy change to include gender identity and expression within the *Code* thus serves as all-inclusive insofar as *all* people have gender identities and expressions, and we all express those identities differently.

UNDERSTANDING TRANSGENDER AND GENDER VARIANCE

There are many people who do not match society's binary understandings of gender and sex: i.e., man/woman or male/female. For the purpose of this report, *trans* is used as an umbrella term to encompass the wide variety of gender identities and expressions that exceed a binary understanding of gender and sexual identity. Trans identities include but are not limited to: transgender, transsexual, intersex, two-spirit, genderqueer, and cross dresser (see Appendix A for more information). In some cases Trans may refer to binary-identified (or transsexual) individuals, as well as to people who describe themselves as being on a gender continuum rather than identifying with the biological binary of "male" or "female," and/or the social binary of "man" or "woman." Trans individuals may or may not pursue and undergo hormone treatment and/or sex reassignment surgeries and may express their gender, sexual identity, and sexuality in a wide variety of ways.

A thorough understanding of trans identities and gender variance opens up a wide spectrum of personal identifications. However, generally we understand gender and sex according to four particular characteristics: biological sex, social gender, legal-institutional sex, and psychological gender (Lombardi 2001, 869).

Biological sex describes the biological classification of people as male or female. At birth, infants are usually assigned a sex based on genitals, but sex assignment can include a combination of other factors such as chromosomes, hormones, and internal reproductive organs. Parents and medical professionals usually assign intersex infants a sex and perform surgical operations to conform the infant's body to that assignment. Individuals whose biological sex is ambiguous at birth can be understood as 'intersex,' a term that has replaced the controversial term "hermaphrodite." There are many genetic, hormonal, and/or anatomical variations that can make a person's biological sex at birth ambiguous (e.g., Klinefelter Syndrome). As many as one in 100 infants are born with genital, chromosomal, or hormonal variations that do not correspond with standard male or female characteristics/criteria, and up to two in 1000 infants undergo surgery to "normalize" their genital appearance (Intersex Society of North America 2008).

Social gender describes the social classification of people as man or woman, masculine or feminine (Lombardi 2001, 869). Gender refers to the array of socially constructed roles and relationships, personality traits, attitudes, behaviours, values, relative power and influence that society ascribes to the two sexes on a differential basis.

Psychological gender refers to a person's sense of self and the sense of being male or female, man or woman, or neither. A person's psychological gender is different from their sexual orientation and may differ from a person's birth-assigned and/or biological sex. 'Cisgender' refers to a psychological gender that matches a person's birth-assigned sex (and the sex's typical gender expression).

Legal-institutional sex refers to a person's sex or gender designation on government-issued identification, legal forms, and other official documents. Legal-institutional sex usually correlates with a person's biological sex, but many people attempt to change their legal sex designation in order for their identification and documented information to match their felt and expressed gender identity. The ability to match one's legal sex designation and their expressed gender identity is a key step in avoiding discrimination and problems associated with having a gender identity and expression that does not resemble designated legal-institutional sex (Lombardi 2001, 869).

When speaking about gender variance and trans identities, each of these four categories play a role in how a person is understood as well as how they understand and are able to express themselves.

There is no clear evidence as to the approximate number of gender variant identities within the Saskatchewan population. According to Vancouver Coastal Health Authority, approximately 1 in 11,000 female born and 1 in 30,000 male born persons are diagnosed with gender identity disorder (Vancouver Coastal Health Authority). This ratio translates into 140 people living in Saskatchewan who have been diagnosed with gender identity disorder, now understood as gender dysphoria. Saskatchewan's birth estimate of 14,918 between 2012-2013 suggests that at least 1 person is born in Saskatchewan every year that will experience dysphoria that is severe enough to be diagnosed. However, it is crucial to note that people diagnosed with gender dysphoria represent only a fraction of the trans community. There are many trans people who are never diagnosed due to barriers to health coverage and access to informed and sensitive health care, which prevent trans people from seeking and obtaining diagnoses. As well, there are many non-binary identified trans people who do not seek diagnosis, as they are not pursuing sex reassignment surgery. However, Miki Mappin of TransSask Support Services Inc. has offered a population size estimate based on her community involvement:

My current estimates based on the people I know, and have been told about, are that there are at least 200 transgender individuals living in Saskatoon, and an equal number in Regina, with several more in each of La Ronge, Prince Albert, Melville, Moose Jaw and Estevan.

Moreover, there are many people who do not identify as trans and who are comfortable with their birth-assigned sex, but are still discriminated against because of their gender expression, notably those in the sexually diverse community.

In addition to these numbers, intersex rates are over 1 in 500, suggesting that there are over 2,006 individuals living in Saskatchewan who were born with varying degrees of intersex characteristics (that may or may not have been “corrected” to fit binary sex categories through surgical procedures at birth). That is not to say that intersex people always accrue psychological genders that differ from their assigned sex, but it is important to note that intersex identities represent only a small fraction of the trans community. This speaks to how underestimated the rate of gender variance is in Saskatchewan, as well as to the overall muting of gender/sex diverse communities and their experiences.

Socio-Cultural Context

Trans people are among the most disenfranchised in our society as they confront a multitude of barriers on a day-to-day basis. Canadian research finds that trans discrimination is a problem with severe health/physical, social, and economic implications. So far, few studies on the trans population in Saskatchewan have been conducted or published, and no studies have resulted in useful statistics with respect to measuring the size of the trans community or the frequency of discrimination that trans individuals face in Saskatchewan. This knowledge gap is partly due to a lack of allocated funding to trans research in the province and also a result of fear, hopelessness, and concerns surrounding anonymity that fuel a lack of willingness within the trans community to “come out,” mobilize, and participate in awareness-raising activities. As Miki Mappin of TransSask Support Services Inc. states:

Most are secretive about the fact that they are transsexual in an effort to protect themselves from loss of employment, loss of housing and from abuse and violence toward themselves and their family members. I have found that most transgender people in the province are isolated, and fearful of exposure. They have faced so many obstacles and so much rejection from the health system and society that they have become apathetic about

the prospects of change and are scared that speaking out might endanger what small security they may have been able to achieve.

In other words, discrimination seems to be an enormous barrier to collecting statistics and information on trans experiences in Saskatchewan.

Most Canadian research on gender diversity has taken place in Ontario and British Columbia. However, two major trans-specific studies were conducted in Manitoba (Taylor et al. 2006; Taylor 2009). Manitoba and Saskatchewan have similar population sizes, cultural atmospheres, social status quos, political environments, and policies that affect trans people (however, *The Human Rights Code* in Manitoba was recently amended to include 'gender identity' as a prohibited ground of discrimination). As such, Saskatchewan's climate of exclusion with respect to gender diversity roughly corresponds with the results of the Manitoba study.

One of the Manitoba studies measured trans experiences of discrimination in housing, employment, and education, as well as of their daily life experiences (Taylor et al. 2006). With respect to living situations and housing, more than 42.5% of the study's respondents moved to a different location within the province because of their trans identity. Reasons for relocation included verbal abuse, social pressures, fear of discovery and the repercussions, and physical violence, as well as increased access to a supportive community and to care or services. Twenty percent of the respondents left the province entirely at some point to gain access to a larger trans community and to sex reassignment related health care. Fifty-four percent of the respondents reported dissatisfaction with their living situation, all with reasons associated with their trans identity, ranging from loneliness and lack of support to the financial expense of sex reassignment surgery. One respondent wrote:

I live near a busy street with large crowds of people so I sometimes avoid that street because I fear being discovered as trans [...] my roommate does not treat me like a person [...] it is difficult to live in a place, with people, that are too ignorant (and in some cases arrogant) to accept me [...] I would like to live with friends or with a partner, but have not felt comfortable exploring this because of confusion about who I was/am. (Taylor et al. 2006)

Twenty-six percent of respondents reported having hidden their sex/gender identity out of fear of what would happen with their housing, while 15% reported that they had experienced harassment with respect to housing. Other housing problems were also

attributed to gender identity, including eviction, refusal to rent, and being refused a loan.

With respect to employment and income, 56% of the respondents were living on less than \$25,000 a year pre-tax income, and up to 47% had a total pre-tax income from their whole household of less than \$25,000 (Taylor et al. 2006). Only 47% reported that they were satisfied with their level of employment. The respondents often named ability to work in their chosen gender as a factor in their dissatisfaction. Forty-seven percent admitted to hiding their sex/gender identity at work for fear of being harassed or fired, others who are more open with, or less able to hide, reported specific negative events attributable to their sex/gender identity. For example, respondents reported experiences of harassment, not being hired, failing to get a raise or promotion, being reprimanded, and being laid off. Fourteen percent reported that difficulties surrounding their sex/gender identity led them to perform or consider performing acts for money that they would not have done otherwise, including sex trade work and shoplifting (Taylor et al. 2006).

With respect to education, 33% answered yes to the question “Was your education interrupted because of your sex/gender identity? (dropped out due to teasing/abuse, or skipped enough classes to affect your studies, etc).” Specific experiences in relation to education included verbal abuse, physical abuse, having specific needs ignored, being excluded, sexual abuse, emotional abuse, and feeling as though school staff were unaware of trans-related issues and/or uncomfortable with trans identities (Taylor et al. 2006).

Most alarmingly, 47% of the respondents reported having intentionally hurt themselves, 54% felt like committing suicide, 42% planned suicide at some point, and 28% attempted suicide (Taylor et al. 2006).

Also important are the different subjectivities that make up any data set. Trans identities are not homogenous, and various experiences intersect and overlap. For example, transwomen (born males) often have very different experiences than transmen (born females). While testosterone hormone therapies can effectively lower voices, increase body hair, and masculinize bone structure, estrogen hormone therapies do not accomplish the reverse, at least not to the same degree. After years of hormone therapies, transmen typically resemble cisgender men, whereas many transwomen continue to struggle with height, larger bone structures, male pattern baldness, Adam’s apples, facial hair, and deep voices. As such, most people do not notice that transmen

are trans and were born females, whereas transwomen have a much harder time “passing.” Consequently, many studies do not account for the fact that the positive trans accounts with respect to social acceptance might largely reflect the experiences of transmen rather than transwomen.

Race and ethnicity also affect the socioeconomic outcomes of trans and Two-Spirit identities. For example, another Manitoba study demonstrates that up to 56% of Aboriginal participants lived on less than \$10,000 a year income (Taylor 2009), and up to 78% on less than \$25,000, compared to 35% and 58%, respectively, for non-Aboriginal participants. Fifty-nine percent of Aboriginal participants in the study answered “Yes” to the question, “Was your education interrupted because of your sex/gender identity?” compared to 12.5% of non-Aboriginal participants (Taylor 2009). In other words, there are varying degrees of privilege and disadvantage within the trans community that must be taken into future considerations.

Health Context: Historical and Present

Many trans people seek a variety of medical treatments, including hormone therapy and sex reassignment surgery. Hormone therapy and sex reassignment surgery serve to alleviate discrimination against trans people insofar as these medical procedures help to match a person’s gender expression to their gender identity; this allows the public to perceive an individual’s gender identity more accurately and comfortably which, in turn, more easily facilitates a trans person’s full participation in society. However, coverage approval for these procedures typically relies on a jurisdiction’s policies, and most jurisdictions that do offer coverage for sex reassignment surgery require a medical diagnosis of Gender Identity Disorder (GID). *The Diagnostic and Statistical Manual of Mental Disorders* (DSM), published by the American Psychiatric Association as standard criteria for the classification of mental disorders, pathologizes psychological identities and social behaviours that do not adhere to a strict binary model of gender. In 1980, Gender Identity Disorder and its diagnostic criteria were placed within the DSM chapter on Sexual Dysfunctions and Paraphilic Disorders. According to the DSM, diagnostic features of GID include the persistent desire to be of the opposite sex or gender, the insistence that one is of the opposite sex or gender, and persistent discomfort about one’s assigned sex (American Psychiatric Association 2000, 576). However, there have been debates in recent years about the status of GID, particularly relating to whether gender should continue to be pathologized in this way given that it is increasingly understood as a social construction. That said there are still arguments that there are good reasons to keep the diagnosis of GID “on the books” (Butler 2004, 7).

In response to these debates, the fifth edition of the DSM (DSM-5) published in May 2013, replaced GID with 'gender dysphoria' to maintain a diagnostic term that protects a trans person's access to medical care and coverage, while removing the connotation that the person in question is "disordered," which can be used against them in social, occupational, and legal areas (American Psychiatric Association 2013, 1-2). Moreover, the new edition separated gender dysphoria from the Sexual Dysfunctions and Paraphilic Disorders chapter, and gave gender dysphoria its own chapter. That is to say, as of 2013, gender variance is no longer being associated with sexual deviance when it comes to pathology.

Legal Identity Documentation & Sex Designation

Changing the sex/gender designation on a birth certificate is an important step for many trans people (especially those seeking full transition into the opposite sex/gender) as most official settings require people to disclose their sex or gender on application forms, informational documents, etc. In many cases, changing legal sex designation is necessary in order to be both legally and socially accepted as the gender with which a person identifies, and is thus imperative to preventing social alienation and discrimination. The requirements and processes to change sex/gender designation on a birth certificate (which is required in order to change the sex/designation on other identification cards and documents) vary from jurisdiction to jurisdiction.

In the 1970s, most Canadian provinces changed their laws so that trans people could change their birth certificates after undergoing sex reassignment surgery (Purdy 2014). However, new questions are being raised about birth certificate sex designations as this policy leaves out a number of cases, including trans children and youth under eighteen years of age (as most provinces require people to be eighteen years of age or older in order to be eligible for sex reassignment surgery); intersex infants whose parents do not wish to pursue the recommended surgeries and/or assign the intersex infant a male or female sex designation; non-intersex children whose parents do not want to assign a male or female sex designation to their children; trans adults who cannot afford, and thus have not yet undergone, sex reassignment surgery; as well as trans individuals who do not wish to physically alter their bodies in order to match the systemic binary model for sex and gender.

In recent years, there have been several movements in North America and Europe seeking to revise the policies for changing legal sex/gender designations so as to no

longer require sex reassignment surgery. Moreover, there are also new movements surfacing in pursuit of having sex/gender designations removed altogether from birth certificates, drivers' licenses, passports, and other legal identification documents. Opponents to this proposition argue that sex designations on birth certificates are helpful for tracking population trends, health outcomes, and other demographic measures (Gormley 2014). However, others note that, throughout history, birth certificates have listed other identification criteria, such as race and the father's occupation, but were later found to be unnecessary and to serve discriminatory purposes. Thus, many argue that a sex designation is just as archaic (Purdy 2014), and that most demographic measures can be done without needing legal sex designations, just as racial demographic measures and health outcomes can be measured without needing legal race designations.

Legal Protections Against Discrimination

Provincial human rights codes serve as the primary recourse for people who have experienced discrimination in private transactions, as the *Canadian Charter of Rights and Freedoms*, (the Charter) applies to discrimination in government legislation and activities, and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 applies to matters within federal jurisdiction (Forseille 2014, 5). More importantly, by explicitly outlining our rights and obligations with respect to minority and marginalized groups, human rights codes have sociocultural impacts:

Along with the deterrent regulatory functions, law also has an expressive function [...] empirical data and theoretical bases [support] the position that law can affect people's behaviour beyond deterrence. Law can change the way we interact within our own communities. (Rod Jackson in Ontario Hansard 2012)

Explicit legal protections against discrimination based on race and sexual orientation are not simply responses to widespread social tolerance and acceptance. Rather, they work to promote and strengthen diversity and inclusion in society. Moreover, there is no doubt that the number of cases reported to Human Rights Commissions represent only a very small percentage of the incidents of gender discrimination that take place. By explicitly stating that every person is entitled to the same rights regardless of their gender identity and its expression, Human Rights Codes serve to reduce the amount of reported and unreported discrimination.

At present, six provincial and territorial governments in Canada (Manitoba, Ontario, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, and Northwest Territories) have made amendments to their human rights codes to include 'gender identity' and/or 'gender expression' as prohibited grounds for discrimination in order to protect trans individuals from discrimination and harassment in employment, education, housing, public services, and other areas.

POLICIES AND PRACTICES IN SASKATCHEWAN

Health Coverage

In Saskatchewan, sex reassignment medical services are rarely covered, and coverage for hormone therapy is largely dependent on private insurance benefits. Hormone therapy coverage is typically treated like prescription medications insofar as coverage depends on the policies of private insurance companies, often provided through employment benefits. There is some help from the Sask Drug Plan, which provides a sliding-scale subsidization for low-income residents who apply. Still, given the fact that many trans people (notably trans women) in Saskatchewan are unemployed and thus do not have added health benefits, hormone therapy is largely unaffordable.

In terms of sex reassignment surgery (SRS), there are some systemic loopholes insofar as coverage for sterilization procedures (i.e. orchiectomy and hysterectomy) is possible since these procedures are not unique to trans patients. Even so, getting coverage depends on the ability of a physician and/or endocrinologist's ability to manoeuvre around bureaucratic obstacles. Most people do not receive coverage/reimbursement for trans-specific SRS procedures (i.e. genital reconstruction surgeries) that typically cost around \$20,000 (Ferguson 2008). These procedures are not performed in Saskatchewan, and most eligible SRS patients Canada-wide seeking genital reconstruction surgeries are referred to The Centre Metropolitain de Chirurgie Plastique in Montreal, Quebec. Saskatchewan Health claims to provide coverage for sex reassignment medical services based on assessment and positive recommendation from the Centre for Addiction and Mental Health (CAMH) – Gender Identity Clinic in Ontario, to which a person seeking sex reassignment surgery can obtain a referral from their family physician in Saskatchewan (Canadian Professional Association for Transgender Health 2011). That is to say, if a Saskatchewan trans citizen is approved to pursue transition through the CAMH process, and meets the CAMH eligibility requirements for sex reassignment surgery, then the cost of the surgeon and operating room time can be reimbursed (Hendrickson 2012), which usually works out to approximately twenty five percent of the total cost of the medical process.

Many within the trans community in Saskatchewan have pointed to the obstacles to receiving coverage through this policy. Once patients are referred to the CAMH Gender Identity Clinic, they are required to travel to Ontario for an assessment, though the travel costs associated with this are not covered. After patients are approved through this assessment (receive a diagnosis of Gender Identity Disorder or gender dysphoria),

they are then required to fulfill CAMH's other requirements before being eligible for sex reassignment surgery. However, these additional requirements align with some Ontario policies that are not entirely applicable to Saskatchewan and its current policies. For example, CAMH requires patients to complete a continuous Gender Role Experience (or GRE) that ranges from one year to two years. The Gender Role Experience is multidimensional and includes documented activity of a patient's community living in a role congruent with their gender identity. The patient must demonstrate an ability to participate in society through employment or formal education as the gender to which they are seeking to transition. An important and highly recommended feature of the GRE is obtaining a first name and a legal sex designation congruent with their identity. This requires changes to a person's birth certificate, drivers' licence, etc., as it is difficult to seek employment and full participation in society with a legal sex designation that does not align with a person's gender expression. However, in Saskatchewan *The Vital Statistics Act, 2009*, S.S. 2009, c. V-7.21 requires a person to undergo sex reassignment surgery before changing their legal sex designation. Ontario does not have this requirement. Moreover, seeking SRS through the CAMH process also puts Saskatchewan patients on the CAMH waiting list, which includes all Ontario trans patients seeking Ontario coverage for SRS, and patients from other provinces that also only provide coverage through CAMH recommendations.

Many trans people seek complete private funding for their sex reassignment surgery, as reimbursement of roughly twenty five percent (without guarantee) does not seem worth the obstacles. People in Saskatchewan often seek direct referral to The Centre Metropolitain de Chirurgie Plastique in Montreal, rather than going through the CAMH procedures first, and many do not obtain surgery at all as it is not affordable.

Whether trans people go through CAMH or not, many lack access to the funds required, either for the total cost (for those not seeking a Saskatchewan Health reimbursement), or the upfront cost and the remaining seventy five percent (for those seeking a Saskatchewan Health reimbursement). Bank loans typically require permanent employment and steady income and, as mentioned earlier, employment is difficult for trans people to obtain without having undergone some SRS procedures (e.g. mastectomy for trans men with large breasts), and without a legal sex designation that matches a person's gender expression.

Legal Identity Documentation and Sex Designation

In Saskatchewan, changing a sex designation on a person's birth certificate is possible as long as a person undergoes sex reassignment surgery (i.e. sterilization procedures and genital re-construction surgeries). According to *The Vital Statistics Act, 2009*, S.S. 2009, c. V-7.21 an individual who has undergone sex reassignment surgery may apply to have the designation of sex amended to be consistent with the results of the surgery. Two medical certificates must accompany the application. The first certificate must be from a physician who is licensed to practice in the jurisdiction in which the surgery took place, and who performed the surgery on the applicant in question. The physician must explain the surgical procedures carried out, certify that he or she performed the surgical procedures on the applicant, and affirm that the designation of the sex of the applicant should be changed as a result of the surgery. The second certificate must be from a physician who did not perform the surgery on the applicant or assist in performing that surgery. This physician must certify that he or she examined the applicant to the conclusion that their sex designation should be changed. They must also verify that sex reassignment surgery has been performed on the applicant (*The Vital Statistics Act, 2009*, S.S. 2009, c. V-7.21).

In sum, many trans people in Saskatchewan find themselves in a "catch 22" situation. *The Vital Statistics Act, 2009*, S.S. 2009, c. V-7.21 expects citizens to fit neatly into male and female sex categories, but the sex reassignment surgery (required in order for many people to align themselves to this binary) is hardly funded by the government. Simultaneously, *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 does not provide explicit protections in employment for gender expressions that do not match a person's biological sex, which creates and sustains high rates of unemployment within the trans community in Saskatchewan. These three policy context create obstacles for trans people seeking full participation in society, notably those who have not yet undergone sex reassignment surgery, or those who do not wish to physically alter their bodies in order to match a systemic gender/sex binary.

Legal Protections Against Discrimination

The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1 (the *Code*) currently lists 'sex' and 'sexual orientation' as prohibited grounds for discrimination in settings of employment, the purchase of property, housing accommodations, public service accommodations, education, publications, and contracts. However, 'gender identity' or 'gender expression' are not included in the list of prohibited grounds for discrimination. On November 20, 2013 a petition calling for 'gender identity' and 'gender expression' to

be included in the *Code* as prohibited grounds for discrimination was rejected during a sitting of the legislature. The petition was rejected based on the premise that the existing wording, with 'sex' and 'sexual orientation' as prohibited grounds, is sufficient in order to protect transgender persons from discrimination. Further, the argument was made that transgender people are protected under the *Code* and its existing wording because the Supreme Court of Canada has established that the *Charter* should be interpreted broadly and liberally in order to protect minority rights, so the same applies for provincial human rights codes.

Proponents for the amendment claim that even if the Saskatchewan Human Rights Commission will protect trans people and their human rights complaints, the inclusion of 'gender identity' and 'gender expression' is about more than just solidifying the SHRC's responsibility to protect trans people from discrimination. They argue that the amendment is about the recognition of marginalized identities, and providing clarity and transparency so that employers, property managers, teachers, administrators, service providers and all Saskatchewan citizens understand their obligations with respect to gender and its expression.

It is important to note that there are many gender diverse people who do not need or wish to seek access to medical treatments and surgeries in order to express their gender identity and/or address body dysphoria, and many who do not wish to change their legal sex designation. Hence, the proposed amendment to the code includes protection on the basis of gender identity *and* expression. Such an amendment ensures that trans individuals as well as those who are gender variant in other capacities will be fully protected. Furthermore, explicit protections against discrimination serves as a policy option that attempts to indirectly (through the broader socioeconomic implications) address discrimination against *all* trans individuals, and even those who do not identify as trans. For example, if a woman-identified non-trans person is not comfortable wearing a uniform designated for female employers, 'gender expression' protections ensure her right to wear an appropriate, but non-binary uniform.

The amendment's all-inclusiveness is not to say that policy changes should not be made with respect to health coverage and *The Vitals Statistics Act*. Rather, an amendment to the *Code* would serve as the least controversial solution, and a relatively simple and all-inclusive option for alleviating widespread discrimination. Moreover, the overlapping implications of each of these policy areas suggest that a change to *The Human Rights Code* might provide the valuable groundwork for future policy changes in other sectors

with respect to gender identity and expression (i.e. health coverage, *The Vital Statistics Act*, specific employment and housing policies etc.)

POLICY DISCUSSION: TOWARD THE INCLUSION OF GENDER IDENTITY AND EXPRESSION

Taking into account the historical, socio-cultural, health, and legal contexts in Saskatchewan, it is clear that a human rights code amendment is both needed and appropriate. For this policy option, it is important to measure the technical feasibility (attainability using currently existing technology/infrastructure), budgetary feasibility, sociopolitical feasibility, and the short-term and long-term implications

Technical Feasibility

An amendment to *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 to include 'gender identity' and 'gender expression' as prohibited grounds for discrimination is technically feasible insofar as *Code* amendments can be implemented through the existing policy infrastructure. *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, as a policy instrument for protecting people from discrimination, would remain intact.

Budgetary Feasibility

An amendment to *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 to include 'gender identity' and 'gender expression' as prohibited grounds for discrimination would be relatively low cost, as the only resources necessary would be the political procedures associated with implementing the change. However, there could be some broader cost benefits (see Short-term and Long-term Impact).

Sociopolitical Feasibility

With respect to the potential *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 amendment to include 'gender identity' and 'gender expression' as prohibited grounds for discrimination, there does not seem to be much public opposition as the proposed wording would not directly infringe on the legal/human rights of any other actors. The Saskatchewan government and the Saskatchewan Human Rights Commission (SHRC) continue to assert that the *Code* already protects trans people, so the issue is not so much a question of whether the SHRC should be obligated to protect trans people from discrimination, as it is a question of whether those protections need to be explicit.

Short-term and Long-term Impacts

Although stigma takes decades to dismantle, an amendment to *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 would likely produce some key changes with respect to awareness and its relationship to acceptance and (conversely) discrimination. Media coverage of an amendment would spread the word to the province that the SHRC will protect trans people. This will increase awareness within the trans community and society at large regarding the repercussions for future discrimination. Although the SHRC argues that trans people are already protected by the *Code*, an amendment making this protection explicit will act as a means of empowerment within the trans community. At the very least, explicit protections provide leverage for someone who is being discriminated against in places of employment, housing, and public service.

For example, after an incident of discrimination, a trans employee can easily point to their explicit rights, making these rights apparent to their employer, and providing the employer with the opportunity to address the situation appropriately before a complaint is reported to the SHRC. In the short-term, an amendment would provide clarity to the people of Saskatchewan so that everyone understands their rights and obligations with respect to gender diversity and its expression. As such, while the SHRC already serves as the primary recourse for incidents of discrimination based on gender identity, further clarity and transparency, through explicit protections, serve a preventative function.

Repercussions aside, explicit legal protections play a key role in awareness-raising. As mentioned earlier, an amendment to the *Code* to include ‘gender identity’ and ‘gender expression’ represents a governmental acknowledgement of marginalized identities, a recognition that trans people do exist as members of our communities, and an official assertion that trans people deserve the same treatment as everyone else. This will broaden social awareness and thus acceptance, and may result in more institutions and organizations seeking education, workshops, and sensitivity training surrounding trans issues. If increased training within the health sector were to occur, doctors and health professionals would become more educated about trans-specific needs with respect to primary health care, and trans people would face far less discomfort and feelings of alienation in health care settings.

In the longer-term, the inclusion of ‘gender identity’ and ‘gender expression’ could result in company/institution-specific policy changes surrounding segregated

washrooms, gendered uniform policies in places of employment, segregated sports enrolment policies, and the like. Moreover, not only would employers, property managers, teachers, administrators, service providers, and all Saskatchewan citizens increasingly recognize their obligations not to discriminate based on gender identity and gender expression, but explicitly recognizing gender diverse individuals as minority identities could also serve to expand the politics of diversity. Institutions and businesses will begin to view trans people as an asset to their policies and images of diversity with respect to employment, enrolment, etc. (e.g. affirmative action). This increased awareness may bolster funding for trans-specific research in Saskatchewan (an area that is grossly lacking), bully-prevention initiatives, and many other areas of importance to gender and sexual diversity in Saskatchewan.

Amendments to the *Code* have overlapping implications with documents related to health, identification, and others. As stated above, an amendment to *The Vital Statistics Act, 2009*, S.S. 2009, c. V-7.21 so that one does not need sex reassignment surgery to change their legal sex designation would make the positive health and social outcomes of an accurate legal sex designation more attainable. Further, this would provide trans people with improved societal participation, and would dissolve the barriers trans people face in official settings (e.g. traveling, encounters with police, application processes, etc). In the long-term, an amendment might decrease rates of discrimination, and increase opportunities for trans people in employment, housing, and places of public service.

For now, however, an amendment to the *Code* serves as the first step toward alleviating discrimination against trans individuals and gender and sexually diverse communities in Saskatchewan. This policy option is not only cost-effective, but is also non-controversial and all-inclusive insofar as *all* people have gender identities, and we all express those identities differently. The inclusion of gender identity and expression, will produce long-term social, political, and economic changes by improving the capacity of trans individuals to fully participate in society, and thus the economy, through decreased reliance on The Saskatchewan Assistance Program, and increased rates of employment, housing, and spending in areas of public service and accommodation.

MODELS IN OTHER JURISDICTIONS: ONTARIO

Provincial and Territorial Governments across the country are engaging in discussions about how best to support the rights and dignities of trans persons, and Saskatchewan has the opportunity to be a leader in this wave of social and legal change. With respect to legal protections against discrimination, on June 19, 2012, the Ontario legislature amended the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 to add new protected grounds of 'gender identity' and 'gender expression', with the amendments collectively known as *Toby's Act* (Edmonds 2012, 1). *Toby's Act* was passed with sponsorship of all parties in the Ontario Legislative Assembly. All debates were in favour, with arguments that are applicable to the current debates in Saskatchewan over the potential amendment. Mr. Yasir Naqvi first argued for clarity:

Under the definition of "sex," their rights are [already] protected. So what we're doing today by approving this bill is nothing earth-shattering. What we're doing is bringing more clarity [...] so there is no ambiguity, so there is absolute clarity when it comes to the rights of trans people in the province of Ontario, so nobody can discriminate against members of the trans community, so that their rights are protected when it comes to employment, when it comes to accommodation, when it comes to just living their daily lives, being who they are. (Ontario Hansard 2012)

Ms. Cheri Dinovo suggested that the amendment would serve as the first step toward dismantling the barriers that prevent trans people from fully participating in society with dignity:

You ask, "Well, what will it affect?" I can think of a number of ways. One of the struggles for trans people is around identification. We heard lots of testimony about identification issues. This will help them get an OHIP card, get a driver's license. It will help them there. The Diagnostic and Statistical Manual for psychiatrists: This could open up a challenge to that. There are all sorts of ways in which this bill could begin to change the scenario for trans people in the way that trans folk are viewed and the experience that trans folk have. (Ontario Hansard 2012)

Months later, on October 5 2012, ServiceOntario revised its requirements to change a person's sex designations on a birth certificate so that sex reassignment surgery is no

longer necessary to legally identify as the opposite sex/gender (ServiceOntario 2012). This was in response to an April 2012 ruling of the Ontario Human Rights Tribunal that the existing *Vital Statistics Act*, R.S.O. 1990, c. V.4 in Ontario, requiring a person to undergo “transsexual surgery” and provide medical certificates from two doctors certifying that “transsexual surgery” was performed on the person, was an infringement on a trans person’s right to be free from discrimination (*XY v Ontario* 2012). The Tribunal ordered that the criteria for changing the sex designation on a birth certificate must be revised within 180 days so as to remove the discriminatory effects of the current system. The decision posits that requiring sex reassignment surgery adds to the disadvantage and stigma experienced by members of the trans community, and reinforces the stereotype that transgender persons must undergo physical alterations in order to live in their felt gender. The decision also found that the goals of the *Vital Statistics Act*, R.S.O. 1990, c. V.4 would not be harmed by removing this requirement (*XY v Ontario* 2012).

As such, Ontario no longer requires sex reassignment surgery in order to change a person’s sex/gender designation on legal documents. In addition to the required application, all that is required to change the sex designation on an individual’s birth certificate is a letter from a licensed and practicing physician or psychologist confirming that the applicant in question has been psychologically evaluated, confirming that their gender identity does not accord with the sex designation on the applicant’s birth registration, and affirming that a change of legal sex designation on legal documents is both appropriate and recommended.

With respect to sex reassignment surgery coverage, the Ontario Health Insurance Plan (OHIP) provides full financial coverage for patients who go through the CAMH process. Since 2008 when SRS coverage was reinstated, full coverage is provided for both sterilization procedures (hysterectomy, orchiectomy) and genital reconstruction surgeries (vaginoplasty, labiaplasty, phalloplasty, metoidioplasty).

Ontario’s policy arrangements demonstrate the overlapping implications of policies that affect trans people. Ontario serves as an applicable model for Saskatchewan, as Canadian provinces share historical contexts, political cultures, legal procedures, social status quos, and share economic interests and income distribution standards. Moreover, Ontario and Saskatchewan governments both have similar jurisdictional powers and responsibilities, and they both adhere to the same federal policies. So long as the population and budgetary size differences are taken into consideration, social and health policy models across Canada are relevant and potentially suitable.

SUMMARY

The most critical issues for trans communities in Saskatchewan are the following: discrimination in places of employment, housing, and places of public service and accommodation; access to medical coverage and care by informed and sensitive health professionals; and the strict requirements for changing legal sex designation. Although coverage for sex reassignment surgery, *The Vital Statistics Act, 2009*, S.S. 2009, c. V-7.21, and *The Saskatchewan Human Rights Code* are three separate policy areas, they have overlapping and mutually reinforcing implications that underpin socioeconomic and political marginalization, and thus discrimination against trans people in Saskatchewan.

These policy arrangements have overlapping consequences for trans people, thereby creating intersecting barriers to full participation in society. A deeper investigation of trans identities and gender variance, reveals the wide range of medical, economic, and sociocultural impacts of living as trans in Saskatchewan and in other parts of Canada, as well as the value of a *Code* amendment as a means of ameliorating these impacts. In fact, policy changes in Ontario already demonstrate that trans-inclusive policies with respect to health, legal identity documentation, and explicit protections from discrimination, have mutually reinforcing benefits.

Through a full examination of the technical feasibility, budgetary feasibility, sociopolitical feasibility, and the short-term and long-term impacts of an amendment to *The Saskatchewan Human Rights Code*, it is clear that such a change is not only possible, but an important step for Saskatchewan. In taking this step forward, Saskatchewan will join six provincial and territorial governments in Canada (Manitoba, Ontario, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, and Northwest Territories) that have already made amendments to their human rights codes to include 'gender identity' and/or 'gender expression' as prohibited grounds for discrimination. We urge Saskatchewan to join these governments in making explicit the protection of transgender (trans) and gender variant persons, protection which supports the gender identities and expressions of *all* Saskatchewan residents and their communities.

APPENDIX A - TERMINOLOGY

Sex: describes the biological classification of people as male or female. At birth, infants are assigned a sex based on a combination of bodily characteristics including: chromosomes, hormones, internal reproductive organs, and genitals.

Gender: describes the social classification of people as man or woman, masculine or feminine. Gender refers to the array of socially constructed roles and relationships, personality traits, attitudes, behaviors, values, relative power and influence that society ascribes to the two sexes on a differential basis.

Gender identity: refers to person's sense of self, and the sense of being male or female, man or woman, or neither. A person's gender identity is different from their sexual orientation and may differ from a person's birth-assigned and/or biological sex.

Gender expression: refers to the external manifestation of one's internal gender identity, usually expressed through masculine, feminine, or androgynous behavior, clothing, haircut, voice and other physical characteristics.

Cisgender (adj): refers to a gender identity that matches a person's birth-assigned sex (and the sex's typical gender expression).

Gender identities that differ from their birth-assigned sex include but are not limited to the following:

Transgender (adj): A term to describe individuals who are uncomfortable and disagree with, in whole or in part, their birth-assigned sex and/or their socially prescribed gender identities. This may include people who identify as transsexual, or people who describe themselves as being on a gender continuum rather than identifying with the biological labels of "male" or "female", and/or the social binary of "man" or "woman". Transgender individuals may or may not pursue and undergo hormone treatment and/or sex reassignment surgeries.

Transsexual (adj): A term to describe individuals who feel strongly that they are living in the wrong biological sex, and who identify strongly with the socially constructed gender typically assigned to the opposite sex. Transsexuals often seek or undergo medical treatments or procedures in order to align their bodies with their internally felt

identity, such as hormone therapy, sex-reassignment surgery or other procedures.

Two Spirit (adj): An English language umbrella term for a wide range of mixed gender roles found in some First Nations and Aboriginal cultures. This concept may incorporate sexual orientation, gender identity and gender expression.

Intersex: Individuals whose biological sex is ambiguous. There are many genetic, hormonal, and/or anatomical variations that make a person's biological sex at birth ambiguous (e.g., Klinefelter Syndrome). Parents and medical professionals usually assign intersex infants a sex and perform surgical operations to conform the infant's body to that assignment. Intersex has replaced the controversial term "hermaphrodite." Currently, there is debate over whether the term intersex should be used to describe an individual or to describe a medical condition (intersex person, or person born with intersex). Because of this, it is best to ask the person the usage they prefer.

Cross Dresser (n): Someone who occasionally wears clothes traditionally associated with people of the other sex. Cross-dressers are usually comfortable with the sex they were assigned at birth and do not wish to change it.

Genderqueer (adj): Refers to people who "blur" gender norms through non-conformity to the gender binary (male/female, masculine/feminine). Genderqueer people may identify as either male, female, both, neither or may reject gender altogether.

Trans (adj): An umbrella term that encompasses all of the above identities, and more.

Trans Man or Transman (n): A person whose biological sex assigned at birth was female, but whose gender identity is male.

Trans Woman or Transwoman (n): A person whose biological sex assigned at birth was male, but whose gender identity is female.

Passing: refers to the ability of a trans person to be perceived by society as either a cisgender man or cisgender woman.

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