



March 22, 2017

Minister of Justice and Attorney General
Tracy-Anne McPhee
P.O. Box 2703
Whitehorse, Yukon Y1A 2C6

Minister of Health & Social Services
Pauline Frost

by email

Dear Ministers McPhee and Frost,

Re. Consultation Response regarding Discussion Document: Amendments to the *Human Rights Act* and *Vital Statistics Act*

The Yukon Human Rights Commission (the “Commission”) is an independent statutory agency, created under the *Human Rights Act*, and part of the human rights system in Yukon. The mission of the Commission is to promote equality and diversity through research, education, and enforcement of the *Human Rights Act*. The Commission is respected as a trusted, impartial, and impactful agency which provides accessible public information and educational materials about human rights, partners proactively with individuals and institutions to improve understanding of and respect for human rights, and provides a fair and effective process for the enforcement of complaints under the *Human Rights Act* in Yukon.

The Commission applauds the Government of Yukon’s goal of enhancing the rights of transgender persons. The Commission further supports the Government of Yukon’s stated commitment to review its laws, policies, and practices to eliminate discrimination based on gender identity or gender expression.

While amendments to the *Human Rights Act* and *Vital Statistics Act* are an important first step, the Commission urges the Government of Yukon to take immediate and concrete steps to implement these changes to legislation through comprehensive government-wide operational reviews of policies and procedures, as well as necessary allocation of resources towards addressing inequalities and areas of systemic discrimination based on gender identity and gender expression.

Currently, all other provinces and territories in Canada offer statutory protections against discrimination on the basis of “gender identity” and a majority of those include the additional ground of gender expression. At the federal level, Bill C-16, currently before the Legal and Constitutional Affairs Standing Committee of the Senate, would add gender identity and gender expression to the list of prohibited grounds of discrimination under the *Canadian Human Rights Act*. Yukoners who are transgender should have the same right to live a full and productive life, free of discrimination. The proposed amendments to the *Human Rights Act* will serve as a preventative measure, denouncing and dissuading discrimination and prejudice against transgender individuals.

Discussion Questions

Human Rights Act [Questions in bold, responses below]

- 1. We are proposing to amend section seven of the *Human Rights Act* to prohibit discrimination based on gender identity or gender expression. What do you think?**

The Commission's long-held position is that the protected ground of "gender identity or gender expression" should be added to section seven of the *Human Rights Act*, in order to meet the objects of the *Act* which are to discourage and eliminate discrimination, to promote the recognition of the inherent dignity and worth and of the equal and inalienable rights of all members of the human family, these being the principles underlying the *Charter of Rights and Freedoms* and the *Universal Declaration of Human Rights* and other solemn undertakings, international and national, which Canada honours, as well as to further in Yukon the public policy that every individual is free and equal in dignity and rights.

The Commission encourages the Government of Yukon to adopt both distinct grounds of "gender identity" and "gender expression," which encompass an individual's sense of their gender and their public presentation of their gender, to avoid unproductive distinctions and confusion in the interpretation of the amendments proposed.

Vital Statistics Act [Questions in bold, responses below]

- 2. We are considering two age categories for those applying for a change in sex designation: 19 years old and over (adult) and under 19 years old (child). The age of legal majority in Yukon is 19. What do you think of this option?**

The Commission's position is that it is discrimination to treat any individual or group unfavourably on any of the protected grounds set out in section seven of the *Human Rights Act*, which includes age, and that it is contrary to section nine of the *Act* to discriminate when offering or providing services to the public. This prohibition against discrimination is contextualized by a duty to accommodate up to the point of undue hardship, which may be determined by balancing the advantages and disadvantages of legislation or policy by reference to such factors as: safety, efficiency, or disruption to the public.

It is important to note that other Yukon legislation relating to consent in medical care does not appear to distinguish between adults and minors: eg. the *Care and Consent Act*, sections three and six. In that *Act*, everyone is presumed capable of giving consent unless otherwise found incapable by the care provider. It is possible that a provision that distinguished between applicants for a change in sex designation through the *Vital Statistics Act* on the basis of age could potentially constitute discrimination.

- 3. We are proposing that applications from adults (over 19 years of age) include a letter from a supporting person who has known the applicant for at least two years (similar to applying for a passport), which states that the sex designation requested is consistent with the person's gender identity. What do you think of this proposal?**

See response to Question two above.

It is important to further note that there is no requirement for such a letter under the *Change of Name Act*. The requirement for a letter from a supporting person if this condition only applies to transgender individuals may potentially be considered unfavourable treatment that constitutes discrimination. Yukon Government should review what the reason for requesting a letter from a supporting person is in this situation, and consider whether that would be a factor that could establish a reasonable cause for potential discrimination.

- 4. We are proposing that custodial parents would apply on behalf of children under 19 years of age. The application would need the consent of all custodial parents. Do you agree or disagree? Why?**

See response to Question two above.

The consent of custodial parents does not appear to be required under the *Care and Consent Act*, unless a person is found incapable under section six of that Act. However, the Commission notes that the proposed amendment would be partially consistent with sections 4(a) and 5 of the *Change of Name Act*. Section 5 of the *Change of Name Act* provides that “any of the following persons who have lawful custody of an unmarried child may apply to the registrar for a change of the legal name of the child [...]” One clear distinction from the provisions of the *Change of Name Act* is the proposed amendment would require the consent of all custodial parents. If this requirement is only applied to children who are transgender and their custodial parents, then it could potentially form unfavourable treatment based on a protected ground which may constitute discrimination.

- 5. We are proposing that applications for children (under 19 years of age) include one letter from a supporting person who has known the child for at least two years and one letter from a list of individuals that could include: medical practitioner, psychologist, nurse, nurse practitioner, school counsellor, teacher, social worker, lawyer, or a chief or counsellor of a Yukon First Nation. What do you think of this proposal?**

As stated in the response to Question four above, if this requirement is only applied to children who are transgender and their custodial parents, then it could potentially form unfavourable treatment based on a protected ground which may constitute discrimination. No such requirement for a letter from a supporting person is required for a change of name for a child under the *Change of Name Act*, for example.

- 6. We are proposing that applications made for children over the age of 12 will require the written consent of the child. Do you agree or disagree?**

This proposed amendment is consistent with the provisions in section seven of the *Change of Name Act*.

- 7. Many transgender youth do not have the support of their custodial parents. We are proposing to allow youth to apply on their own if they do not have the consent of their custodial parents. They would have to get an order from court stating that parental consent is not needed. Do you think this is a good idea?**

While the recognition of the potential for a youth who is transgender to seek a change of gender without participation or support of their custodial parents is an important and positive step,

however, the requirement for a court order stating that parental consent is not needed is an onerous one, and without adequate resources in the area of access to justice it is potentially an insurmountable barrier for many youth.

The Commission urges to Yukon Government to consider the necessity of dedicating adequate resources to access to justice services for youth, in order to make legal supports available to support youth who are transgender.

The Commission further notes that Subsection 8(2) of the *Change of Name Act* states: "In an application under subsection (1) with respect to the legal name of a child, the best interests of the child shall be the primary consideration of the judge in considering the application." Inclusion of similar language in this provision is recommended.

8. We are proposing to introduce a gender-neutral option for sex designation i.e., male, female, or X (unspecified) for all Yukoners. What do you think of this option?

The Commission supports the proposal to increase the options for sex designation in Yukon to include male, female, and an unspecified option.

However, the Commission notes that there are many circumstances where Yukoners are asked to provide personal information related to sex or gender unnecessarily. Historically, many jurisdictions in Canada collected and included in basic identification information about one's religion, or racial background. Over time, there has been a recognition that the collection of this type of information on basic identification such as birth or baptismal certificates served no rational purpose, and that unless personal information is relevant it should not unnecessarily be collected or displayed on government identification. We no longer list religion, race, or colour on our basic personal identification – the Commission suggests that the Government of Yukon consider what purpose sex designation serves on modern identification, and if there is no clear and rational connection to a reasonable policy objective that this personal information simply be omitted.

9. Intersex babies are babies who are born with ambiguous sexual reproductive organs. We are thinking of allowing for identification at birth as other than male or female. Do you think this is a good idea?

The Commission strongly supports the proposal to allow for identification at birth as other than male or female. Further, the Commission supports a definition of "intersex" consistent with medical research and best practices that is necessarily broader than only visibly ambiguous external sex organs, and could include consideration of, for example: internal sex organs, endocrine, or chromosomal differences or other relevant medical criteria. Please refer to the answer for Question eight regarding the recommendation for the Government of Yukon to assess whether personal information is being collected for a necessary and legitimate purpose – if no clear purpose is present, then it is better to simply stop collecting that particular information.

Thank you for considering this important and urgent issue.

Sincerely,
YUKON HUMAN RIGHTS COMMISSION
[original signed by Jessica Lott Thompson for Russell Knutson]

Russ Knutson
Chair