



Amnesty International's Brief in support of Bill C-389

An Act to amend the Canadian Human Rights Act and Criminal Code (gender identity and gender expression)

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1. Background

Amnesty International ("Amnesty") has consistently called on States to fully extend the protection afforded by human rights obligations and principles to gay, lesbian, bisexual and transgender persons, most notably by protecting individuals from discrimination and violence on the basis of their actual or imputed sexual orientation or gender identity or expression.¹

Internationally, Amnesty has called for an end to the criminalisation of homosexuality where such legislation remains and for the immediate and unconditional release of all prisoners of conscience held solely on the basis of their sexual orientation or gender identity. In addition, Amnesty International has called on States to:

- ensure that all allegations and reports of human rights violations based on sexual orientation or gender identity are promptly and impartially investigated and perpetrators held accountable and brought to justice;
- take all necessary legislative, administrative and other measures to prohibit and eliminate prejudicial treatment on the basis of sexual orientation or gender identity at every stage of the administration of justice;
- end discrimination in civil marriage laws on the basis of sexual orientation or gender identity and recognise families of choice, across borders where necessary; and
- ensure adequate protection of human rights defenders at risk because of their work on human rights and sexual orientation and gender identity.

In the North American context, there is particular urgency to addressing the stigma, discrimination and violence that are the result of bias or hate towards those expressing alternate expressions of gender identity. According to the US-based National Gay and Lesbian

¹ Amnesty defines gender identity as: "the complex relationship between sex and gender referring to a person's experience of self expression in relation to social categories of masculinity or femininity (gender). A person's subjectively felt gender identity may be at variance with their sex or physiological characteristics." See Amnesty International, Human Rights by Topic: Sexual Orientation and Gender Identity, available at: <http://www.amnesty.org/en/sexual-orientation-and-gender-identity>. The category of 'gender identity and gender expression' will thereafter be referred to as 'gender identity'.

Task Force, an average of two transsexual and transgender people are reportedly killed each month due to anti-trans violence in North America.² Transgender persons may not only be subject to serious acts of violence, but also to daily discrimination and hardship. In particular, a report by Amnesty documented serious patterns of misconduct in the interactions between the transgender population and law enforcement in the United States. Behaviour included the selective enforcement of laws, sexual and verbal abuse, and a failure by the police to respond to hate crimes and violence.³ Indeed, a United Nations special report describes the particularized situation of transgender people as “often subject to violence [...] in order to ‘punish’ them for transgressing gender barriers or for challenging predominant conceptions of gender roles.”⁴ The serious and pervasive human rights abuses that transgender persons are faced with demonstrate the importance of implementing measures to combat hate crimes and discrimination based on gender identity in Canadian law.

In this context, Bill C-389, *An Act to amend the Canadian Human Rights Act and Criminal Code (gender identity and gender expression)*, a private member’s bill introduced by Bill Siksay on January 26, 2009,⁵ would play an important role in protecting transgender persons from discrimination and hate crimes. The purpose of this bill is to include protections for gender identity and gender expression as prohibited grounds of discrimination under the *Canadian Human Rights Act* and as distinguishing characteristics protected under s. 318 as well as aggravating factors listed under s. 718.2 of the *Criminal Code*.

Amnesty supports the passage of Bill C-389. As explained below, the inclusion of gender identity as categories for protection within Canadian legislation is supported by Canadian and international human rights law and principles relating to non-discrimination and would ensure greater protection for a category of individuals who are particularly vulnerable to discrimination and hate crimes.

2. Bill C-389

Bill C-389 would amend two existing Canadian laws. First, it would amend the *Canadian Human Rights Act*, which provides that “all individuals” are to be treated equally and be free from discrimination in areas of federal jurisdiction and should not be placed at a disadvantage due to any of the eleven prohibited grounds of discrimination, including sexual orientation.⁶ The *Act* is

² Paisley Currah and Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers* (New York: National Gay and Lesbian Task Force, 2000).

³ Amnesty International, ‘Stonewalled: Police Abuse and Misconduct against Lesbian, Gay, Bisexual and Transgender People in the US’, AI Index AMR 51/122/2005, September 2005, available at: <http://www.amnestyusa.org/outfront/stonewalled.report.pdf>

⁴ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN General Assembly, 3 July 2001, UN. Doc. A/56/156 at para 17.

⁵ Bill C-389, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity and gender expression)*, Second session, Fortieth Parliament, 57-58 Elizabeth II, 2009, First Reading, May 15, 2009.

⁶ “About the Canadian Human Rights Act”, Canadian Human Rights Commission, available at: <http://www.chrc-ccdp.ca/faq/page3-en.asp>.

administered through the Canadian Human Rights Commission, which is responsible for monitoring and investigating allegations of discrimination. If the evidence gathered by the Commission warrants further investigation, then the case is referred to the Canadian Human Rights Tribunal or to conciliation to assist in reaching a settlement. Bill C-389 would amend the following sections of the *Act* to explicitly include gender identity as a prohibited ground of discrimination:

- Section 2 of the *Act* would be replaced by the following excerpt: “[...] all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated...without being hindered in or prevented from doing so by discriminatory practices based on [...] gender identity, gender expression...”;
- Subsection 3.1 of the *Act* would be replaced by: “For the purposes of this Act, the prohibited grounds of discrimination are [...] gender identity, gender expression [...]”;

Second, Bill C-389 would amend the *Criminal Code* to include gender identity as an identifiable group within its hate crime provisions, ensuring that a targeted attack against a person due to perceived gender identity or expression would be further stigmatized and merit a harsher punishment:

- Subsection 318(4) of the *Criminal Code* would be replaced by: “In this section, “identifiable group” means any section of the public distinguished by colour, race, religion, ethnic origin, gender identity, gender expression or sexual orientation.” and;
- Subparagraph 718.2(a)(i) of the *Criminal Code* would be replaced by: “evidence that the offence was motivated by bias, prejudice or hate based on [...] gender identity, gender expression [...]”.

Amnesty believes that these amendments could play an important role in transgender Canadians from discrimination and hate crimes. Moreover, as explained below, Amnesty believes that these amendments are consistent with Canada’s non-discrimination obligations under Canadian and international law as well as the practice of other jurisdictions.

3. Gender Identity Protection under Canadian and International Law

The obligation to protect gender identity flows from the broader obligation under Canadian and international human rights law to protect all persons against discrimination.

Section 15(1) of the Canadian *Charter of Rights and Freedoms* provides that: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

The Supreme Court of Canada has long recognized that the grounds of protection from discrimination in section 15(1) were not exhaustive. In two cases from the 1990s, the Supreme Court explained the obligation of protecting individuals from all grounds of discrimination, including sexual orientation. In *Egan v. Canada*,⁷ the Supreme Court commented on the effect of discriminatory legislation, Alberta's *Individual Rights and Protection Act (IRPA)*, which denied protection to certain groups of persons:

In excluding sexual orientation from the IRPA's protection, the Government has, in effect, stated that "all persons are equal in dignity and rights", except gay men and lesbians. Such a message, even if it is only implicit, must offend section 15(1), the section of the Charter, more than any other, which recognizes and cherishes the innate human dignity of every individual.⁸

In another case involving the *IRPA*, *Vriend v. Alberta*, the Supreme Court held that the exclusion of sexual orientation as a ground of protection from discrimination had the effect of protecting all persons, except gays and lesbians, and thus violated section 15 of the *Charter* by failing to include sexual orientation as a ground for discrimination. The Court stated that the legislation was "under-inclusive" and therefore contrary to the *Charter*.⁹

In sum, although the issue has yet to have been litigated, there is little doubt that gender identity, like sexual orientation, amounts to an analogous ground of protection from discrimination under section 15(1) of the *Charter*.

A similar conclusion can be reached under international human rights law as well. The right to protection against discrimination is recognized in a number of international instruments to which Canada is a signatory or party, including the *International Covenant on Civil and Political Rights*.¹⁰ Article 26 of the *Covenant* thus provides that:

[...] all persons are equal before the law and are entitled without any discrimination to the equal protection of the law [...] the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. [emphasis added]

The UN Human Rights Committee has observed that: "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."¹¹

Although international human rights law does not explicitly include the term 'gender identity' as a ground for protection from discrimination, the category of 'other status' enshrined within the non-discrimination provisions of international human rights treaties is included for the

⁷ [1995] 2 S.C.R. 519.

⁸ *Ibid.* at para 128.

⁹ [1998] 1 S.C.R. 493.

¹⁰ adopted 16 December 1966, UNGA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976, arts 2, 4(1) and 26.

¹¹ Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th session, 10 November 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003), at para. 1.

precise reason of expanding the non-exhaustive grounds for protection from discrimination.¹² The term ‘gender identity’ has thus often been included under this category, both in international instruments and domestic legislation.¹³ Most notably, the Committee on Economic Social and Cultural Rights has made it clear that the term “other status” in article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*,¹⁴ to which Canada is also a party, includes ‘gender identity’ as one of the prohibited grounds of discrimination:

“Other status” as recognized in article 2(2) includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.¹⁵ [emphasis added]

In addition, there are a number of international human rights instruments that provide support for the inclusion of ‘gender identity’ as a ground for protection from discrimination. In December 2008, 67 States, including Canada and almost all Western States, voted in favour of a statement on sexual orientation and gender identity at the U.N. General Assembly which included the following passages:

We affirm the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity

[...]

We call upon all States and relevant international human rights mechanisms to commit to promote and protect human rights of all persons, regardless of sexual orientation and gender identity.¹⁶

Although the statement was not adopted by the U.N. General Assembly, it does evince the recognition by these states of their responsibility to ensure freedom from violence, harassment, exclusion, discrimination, stigmatization and prejudice based on gender identity. Likewise, a resolution adopted by the Organization of American States (of which Canada is a member) on *Human Rights, Sexual Orientation, and Gender Identity* has also recognized that human rights violations can be directed against individuals based on sexual orientation and gender identity. Paragraph 2 of this statement urges States to “ensure that acts of violence and human rights

¹² International Commission of Jurists, *Practitioners Guide No.4: Sexual Orientation, Gender Identity and International Human Rights Law* (Geneva, 2009) available at: <http://www.icj.org/IMG/PractitionersGuideonSOGI-2.pdf>, at p. 41.

¹³ *Ibid.*, at p. 46.

¹⁴ adopted 16 December 1966, UNGA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976.

¹⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, U.N. Doc. E/C.12/GC/20 (2009), at para. 32.

¹⁶ UN General Assembly Statement on sexual orientation and gender identity, General Assembly: 70th and 71st plenary meeting, 18 December 2008, at paras. 3 and 10.

violations committed against individuals because of their sexual orientation and gender identity are investigated and their perpetrators brought to justice.”¹⁷

Finally, the *Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity* also provide support for the inclusion of gender identity as a prohibited ground of discrimination.¹⁸ The Principles were adopted by international human rights law experts in 2007 in an effort to develop and promote international standards on gender identity and are commonly cited by UN bodies and national courts, making them an unofficial guiding tool for defining international standards on gender identity.¹⁹ Principle 2 brings attention to the fact that the exclusion of gender identity from protection before the law amounts to discrimination and thus recommends that States adopt the appropriate legislative responses for prohibiting and eliminating all forms of discrimination based on gender identity. Principle 3 expands on this notion of the right to recognition before the law by recommending that States take all necessary legislative measures to protect persons based on gender identity. Principle 5 addresses the right to security of the person and recommends that States impose criminal penalties for violence, threats of violence, incitement to violence and related harassment, based on gender identity.

The recognition of gender identity as one of the universally protected discrimination grounds ultimately flows from general human rights obligations and principles and the right to freedom from non-discrimination. The UN High Commissioner for Human Rights has thus rightly stated that the failure to provide protection to transgender persons from discrimination is in itself fundamental denial of internationally recognized human rights:

Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bisexual, and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.²⁰

4. Gender Identity Protection in Other Jurisdictions

A number of Canadian provinces and territories also include gender identity in the list of categories deserving of human rights protection. The Ontario Human Rights Commission has

¹⁷ *Human Rights, Sexual Orientation and Gender Identity*, adopted 4 June 2009 by the Organization of American States, GA Res. 2504 XXXIX –0/09, at para. 2. See also *Human Rights, Sexual Orientation and Gender Identity*, adopted 3 June 2008 at the 4th Plenary Session, GA RES. 2435 XXXVIII –0/08.

¹⁸ *Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity*, 2007, available at: http://www.yogyakartaprinciples.org/principles_en.htm.

¹⁹ Michael O’Flaherty and John Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles,” (2008) 8(2) *Human Rights Review* 207-248.

²⁰ Statement of the Office of the UN High Commissioner for Human Rights to the International Conference on LGBT human rights, Montreal 26 July 2006, available at: www.unhchr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C?opendocument

interpreted the Ontario Human Rights Code so that discrimination against or harassment of persons based on gender identity is included under the prohibited ground of 'sex':

People who are discriminated against or harassed because of gender identity are legally protected under the ground of 'sex'. This includes transsexual, transgender and intersex persons, cross-dressers, and other people whose gender identity or expression is, or is seen to be, different from their birth-identified sex.²¹

The only explicit reference in Canadian law to prohibited discrimination based on gender identity is in the *Human Rights Act* of the Northwest Territories. The preamble states:

And whereas it is recognized in the Northwest Territories that every individual is free and equal in dignity and rights without regard to his or her race, colour, ancestry, nationality, ethnic origin, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, marital status, family status, family affiliation, political belief, political association or social condition and without regard to whether he or she has had a conviction for which a pardon has been granted [...].²²

Furthermore, under section 5(1) of the same *Human Rights Act*, gender identity is explicitly mentioned as a prohibited ground of discrimination:

For the purposes of this Act, the prohibited grounds of discrimination are race, colour, ancestry, nationality, ethnic origin, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, marital status, family status, family affiliation, political belief, political association, social condition and a conviction for which a pardon has been granted.²³

A number of foreign jurisdictions and government bodies have emphasized the importance of including gender identity as a prohibited ground for discrimination within human rights legislation. In particular, Australia has various jurisdictions that have included the term gender identity as a protected category within their legislative frameworks. The *Discrimination Act 1991* specifically identifies gender identity as a prohibited ground of discrimination.²⁴ Part 67 of the *Act* addresses "serious vilification offences – race, sexuality, etc" and states that a person commits an offence when "the person is reckless about whether the act incites hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following characteristics of the person or members of the group: race, sexuality, gender identity, HIV/AIDS status."²⁵ In the United Kingdom, explicit reference to protection against gender identity discrimination is found in the area of employment. The *Sex Discrimination (Gender Reassignment) Regulations (1999)* supplement the *Sex Discrimination Act (1975)* by stating a provision which extends the *Act* to cover protection against discrimination on grounds of gender reassignment in employment and vocational training.²⁶ Finally, in the United States,

²¹ "Gender Identity: Your Rights and Responsibilities", Ontario Human Rights Commission, available at http://www.ohrc.on.ca/en/issues/gender_identity.

²² *Human Rights Act*, S.N.W.T. 2002, c.18.

²³ *Ibid.*, s.5(1).

²⁴ *Discrimination Act 1991*, R32, effective 20 January 1992, Part II, s.7(1)(c)

²⁵ *Ibid.*, s. 66 (1)(c), 67 (1)(d)

²⁶ Ontario Human Rights Commission. October 1999. *Toward a Commission Policy on Gender Identity: discussion paper*, Prepared by the Research and Policy Branch, available at http://www.ohrc.on.ca/en/resources/discussion_consultation/genderidentity/pdf, Annex 1.

the first federal law to protect transgender persons was passed in 2009. The *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act* expands the US federal hate crime law to include gender identity and sexual orientation. The law also requires the FBI to track statistics on hate crimes against transgender persons.²⁷

5. Conclusion

The inclusion of 'gender identity' as a protected category under the *Canadian Human Rights Act* and as an identifiable group under the *Criminal Code* is thus in accordance with the obligations, values and principles reflected in the Canadian *Charter of Rights and Freedoms* as well as the international human rights treaties which Canada has ratified. The practice of international bodies as well as developments in other jurisdictions also support efforts explicitly to protect transgender persons from discrimination and hate crimes. In addition, the continued discrimination and violence targeted at the transgender community underscore the urgency and importance of having legislative protection for this population vulnerable to human rights abuses.

Bill C-389 would enable Canada to fully extend the right to freedom from discrimination to all persons and would play an important role in protecting transgender persons from discrimination and hate crimes. For these reasons, Amnesty supports Bill C-389 and calls on all Members of Parliament to vote in favour of it.

²⁷ *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, 2009, Public Law No. 111-84, available at: http://www.hrc.org/laws_and_elections/5660.htm