

BRIEF IN SUPPORT OF BILL C-279

October 2014

**AMNESTY
INTERNATIONAL**



Brief in support of Bill C-279
An Act to amend the Canadian Human Rights Act and Criminal Code (Gender Identity)

9 October 2014

1. Summary

Amnesty International (Amnesty) urges the Standing Senate Committee on Legal and Constitutional Affairs to move Bill C-279, *An Act to amend the Canadian Human Rights Act and Criminal Code (Gender Identity)* to its third reading in the Senate, and unreservedly support its passage into law without delay. Bill C-279, a private member's bill introduced by Randall Garrison on 21 September 2011,¹ would play an important role in protecting transgender persons from discrimination and hate crimes. The purpose of this Bill is to include gender identity as a prohibited ground of discrimination under the *Canadian Human Rights Act* and as distinguishing characteristics protected under section 318 as well as aggravating factors listed under section 718.2 of the *Criminal Code*. The Bill is a welcome and extremely important step to bringing Canadian law into conformity with Canada's international human rights obligations towards transgender persons, existing provincial and territorial legislation, and the *Canadian Charter of Rights and Freedoms (Charter)*.

2. Background: Amnesty International's Work With Respect to Human Rights Violations Related to Sexual Orientation and Gender Identity

Amnesty has consistently called on States to fully extend human rights protections to lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, most notably by protecting individuals from discrimination and violence on the basis of their sexual orientation or gender identity or expression.²

Internationally, Amnesty has called for all 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 recognize 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.

3. Pervasive Discrimination and Violence on the Basis of Gender Identity

In North America, there is particular urgency to address the stigma, discrimination, and violence that result from bias or hatred toward transgender persons. According to a 2011 survey of over 6,450 members of the transgender community by the US-based National Gay and Lesbian Task Force, 78% of respondent children reported experiencing harassment, 35% reported having suffered from physical assault, and 12% were victims of sexual violence in school settings. The survey revealed that transgender individuals face double the rate of unemployment. Some 90% of respondents reported experiencing harassment, mistreatment or discrimination in the workplace, 47% recalled being fired, not hired, or denied a promotion because of their gender identity, and 16% felt that they had been compelled to work in the

underground economy (e.g. sex work or selling drugs) because of their difficulties in finding legal work. Respondents who experienced workplace discrimination were found to experience four times the rate of homelessness. In housing, 19% of the respondents had been refused a home or apartment because of their gender identity and 19% experienced homelessness. 53% of the respondents had been verbally harassed or disrespected in public accommodations such as hotels, restaurants, buses, airports, and government agencies, and 22% reported being harassed by police.³

Such occurrences are not unique to the US. Nowhere are these issues more visible than in the Canadian classroom. In 2011 the Egale Human Rights Trust reported that of over 3,700 LGBTI students across Canada it surveyed, 70% reported hearing homophobic and transphobic comments on a daily basis, 74% had been verbally harassed about their gender expression, 20% had experienced physical harassment or assault due to their perceived sexual orientation or gender identity, 49% reported being sexually harassed, and 64% felt unsafe at school.⁴ In 2014, the Canadian AIDS Society published a survey of 460 members of the LGBTI community, finding that over half of the respondents had incomes of less than \$20,000, 85% had experienced harassment for being transgender, 22% had been physically assaulted, and 19% had been sexually assaulted. Eleven percent of the respondents did not feel safe in their own homes, and 18% had mental health issues due to the regular transphobia they experienced.⁵

The human rights abuses faced by transgender persons around the world have not gone unnoticed by the United Nations (UN), which for over two decades has been advocating for States to implement laws to protect the human rights of LGBTI persons. In 2011, the UN Human Rights Council passed resolution 17/19, “expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity[.]”⁶ and requesting the UN High Commissioner for Human Rights to conduct a study “documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.”⁷ The resulting report, released in November 2011, recognized that “[i]n all regions, people experience violence and discrimination because of their sexual orientation or gender identity. In many cases, even the perception of homosexuality or transgender identity puts people at risk. Violations include – but are not limited to – killings, rape and physical attack, torture, arbitrary detention, the denial of rights to assembly, expression and information, and discrimination in employment, health and education.”⁸ The report proceeded to outline the main principles of international human rights law protection for members of the LGBTI community, which will be discussed below in this brief.

Likewise, a resolution adopted by the Organization of American States (of which Canada is a member) urges States to “ensure that acts of violence and human rights violations committed against individuals because of their sexual orientation and gender identity are investigated and their perpetrators brought to justice.”⁹ Most recently, the international community repeated its concern about the violence and discrimination faced by individuals on the basis of their sexual orientation and gender identity, and reaffirmed its commitment to protecting the rights of the LGBTI community in a UN Human Rights Council resolution passed 24 September 2014.¹⁰ The resolution commissioned an updated report “with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards[.]”¹¹ Canada was a co-sponsor of this resolution.

4. International Human Rights Law

(a) Non-Discrimination

The starting points for applying international human rights law to *any* situation are the principles of non-discrimination and universality enshrined in Article 1 of the *Universal Declaration of Human Rights (UDHR)*. Article 1 states: “**All** human beings are born free and equal in dignity and rights. They are endowed with reasons and conscience and should act towards one another in a spirit of brotherhood.”¹² Article 1 includes transgender persons, who are “entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of the person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly.”¹³

International human rights law has at its core the principle of non-discrimination, which is enshrined in the *Charter of the United Nations*,¹⁴ the *UDHR*,¹⁵ and core human rights treaties such as the *International Covenant on Civil and Political Rights*¹⁶ (*ICCPR*), the *International Covenant on Social, Economic and Cultural Rights*¹⁷ (*ICESCR*) and the *Convention on the Rights of the Child*¹⁸ (*CRC*). Canada has ratified all three of these treaties. Moreover, the *CRC* is the most widely ratified human rights treaty in history,¹⁹ and Canada played an integral role in the negotiations that led to its adoption in 1989.²⁰ The UN Human Rights Committee has observed that “[n]on-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.”²¹ While gender identity is not an enumerated ground of discrimination under international human rights treaties, the grounds listed in the *UDHR*, the *ICCPR* and the *ICESCR* are not exhaustive, indicated by the inclusion by States Parties of the ground of “other status.” This ground has been recognized by the UN to include gender identity.²² The UN Committee on Social, Economic and Cultural Rights has stated unequivocally that “gender identity is recognized as among the prohibited grounds of discrimination[.]”²³ Further, the UN Committee on the Rights of the Child,²⁴ the Committee against Torture,²⁵ and Committee on the Elimination of Discrimination against Women²⁶ have all recommended that States Parties end discrimination on the basis of sexual orientation and gender identity.

Discrimination in international law means:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in political, economic, social, cultural or any other field of public life.²⁷

Thus, any law or conduct that has the effect of nullifying or impairing the fundamental human rights of transgender persons as set out in core human rights treaties violates international human rights law.

(b) The Yogyakarta Principles

While core human rights treaties apply equally to transgender persons and all other individuals, the international community felt the “international response to human rights violations based on sexual orientation and gender identity was fragmented and inconsistent.”²⁸ To elucidate how these instruments applied to the situation of LGBTI persons, from 6 to 9 November 2006, the International Commission of Jurists and the International Service for Human Rights, comprised of lawyers, scholars, NGO activists and other experts, convened a meeting in Yogyakarta, Indonesia, and unanimously adopted the *Yogyakarta Principles on the*

*Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (Yogyakarta Principles).*²⁹

On 7 November 2007, the *Yogyakarta Principles* were launched at UN Headquarters in New York, introduced by the governments of Brazil, Argentina, and Uruguay.³⁰ Consistent with the recommendations made in the *Yogyakarta Principles*, in 2008, 67 States, including Canada, voted in favour of a statement on sexual orientation and gender identity at the UN General Assembly which affirmed “the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity” and called “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.”³¹ Further pursuant to the recommendations of the *Yogyakarta Principles*, in December 2009, the UN High Commissioner for Human Rights for the first time made sexual orientation and gender identity issues a thematic priority in the Office’s 2010-2011 Strategic Plan.³² The *Yogyakarta Principles* have been endorsed and relied upon by numerous UN bodies and special procedures with respect to a spectrum of human rights issues.³³

Many States, including Brazil, Ecuador, Germany, the Netherlands, and Uruguay, have relied upon the *Yogyakarta Principles* to guide their policy responses to violence and discrimination against transgender persons.³⁴ Thus, the *Yogyakarta Principles* provide a reliable guide for the implementation of human rights safeguards for transgender persons, and for the definition of “gender identity” included in the text of Bill C-279. This is especially so given Canada’s acceptance of the Netherlands’ recommendation that it “[a]pply the Yogyakarta principles as a guide to assist in further policy development” during its 2009 Universal Periodic Review.³⁵

The *Yogyakarta Principles* define “gender identity” as:

each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chose, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.³⁶

The *Yogyakarta Principles* specify that gender identity “is integral to the realisation of equality between men and women and that States must take measures to seek to eliminate prejudices and customs based on the idea of the inferiority or the superiority of one sex or on stereotyped roles for men and women[.]”³⁷

Transgender persons are entitled to the same fundamental human rights as all other persons, without discrimination because of their gender identity. The *Yogyakarta Principles* reiterate the inherent dignity and rights of all human beings, as well as the principles of equality and non-discrimination in international law, which include gender identity as a prohibited ground.³⁸ In addition, the *Yogyakarta Principles* specify that the human rights of transgender persons include:

Principle 3: The Right to Recognition before the Law: Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientation and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

Principle 6: The Right to Privacy: Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding one's own body and consensual sexual and other relations with others.

Principle 12: The Right to Work: Everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.

Principle 13: The Right to Social Security and to Other Social Protection Measures: Everyone has the right to social security and other social protection measures, without discrimination on the basis of sexual orientation or gender identity.

Principle 16: The Right to Education: Everyone has the right to education, without discrimination on the basis of, and taking into account, their sexual orientation and gender identity.

Principle 17: The Right to the Highest Attainable Standard of Health: Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.

Principle 19: The Right to Freedom of Opinion and Expression: Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

Principle 22: The Right to Freedom of Movement: Everyone lawfully within a state has the right to freedom of movement and residence within the borders of the State, regardless of sexual orientation or gender identity. Sexual orientation and gender identity may never be invoked to limit or impede a person's entry, egress or return to or from any State, including that person's own State.

Principle 24: The Right to Found a Family: Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of sexual orientation or gender identity of any of its members.

Principle 26: The Right to Participate in Cultural Life: Everyone has the right to participate freely in cultural life, regardless of sexual orientation or gender identity, and to express, through cultural participation, the diversity of sexual orientation and gender identity.

Principle 28: The Right to Effective Remedies and Redress: Every victim of a human rights violation, including a violation based on sexual orientation or gender identity, has the right to an effective, adequate and appropriate remedy. Measures taken for the purpose of providing reparation to, or securing adequate advancement of, persons of diverse sexual orientations and gender identities are integral to the right to effective remedies and redress.

Principle 29: Accountability: Everyone whose human rights, including rights addressed in these Principles, are violated is entitled to have those directly or indirectly responsible for the violation, whether they are government officials or not, held accountable for their actions in a manner that is proportionate to the seriousness of the violation. There should be no impunity for perpetrators of human rights violations related to sexual orientation or gender identity.

The *Yogyakarta Principles* emphasize States' obligations to promote public education to eliminate prejudicial or discriminatory attitudes or behaviours related to stereotypical gender norms, and stress that "notions of public order, public morality, public health and public security are not [to be] employed to restrict, in a discriminatory manner, any exercise of

freedom of opinion and expression that affirms diverse sexual orientations or gender identities.”³⁹

Passing Bill C-279 would reaffirm Canada’s commitment to the international human rights principles of equality and non-discrimination, and promote the protection of all fundamental human rights for transgender people as laid out in the *Yogyakarta Principles*.

5. Provincial and Territorial Legislation and the Need for Federal Legislation

Six provinces and one territory have legally established “gender identity” as a prohibited ground of discrimination. The Northwest Territories added sexual orientation and gender identity to its *Human Rights Act*⁴⁰ in 2002. Manitoba added gender identity to its *Human Rights Code*⁴¹ in 2012. Gender identity became a prohibited ground of discrimination in Ontario’s *Human Rights Code*⁴² in 2012 through the passing of *Toby’s Act*.⁴³ Nova Scotia added gender identity to its *Human Rights Act*⁴⁴ in 2012, Newfoundland in 2013,⁴⁵ and Prince Edward Island’s *Human Rights Act*⁴⁶ was amended to include gender identity as a prohibited ground of discrimination in 2013.

Since the passing of *Toby’s Act* in Ontario in 2012, there have been a significant number of claims before the Human Rights Tribunal of Ontario (HRTTO) on the grounds of gender identity. From the start of the HRTTO’s 2012 fiscal year to the present, the Tribunal has received over 6,000 complaints of discrimination.⁴⁷ Of those complaints, 284 raised allegations of discrimination on the ground of gender identity.⁴⁸ This high volume of cases is due in part to the HRTTO’s direct access complaints system, and the work of the Ontario Human Rights Commission in public education on issues such as LGBTI rights. A significant number of cases raising gender identity discrimination are also heard by Ontario’s various administrative tribunals like the Health Services Review Board, Workplace Safety and Insurance Board, the Ontario Social Benefits Tribunal, the Child and Family Services Review Board, and the Consent and Capacity Board, which have jurisdiction to apply the *Ontario Human Rights Code* to their decisions.⁴⁹

Significant HRTTO cases include *XY v. Ontario (Government and Consumer Services)*.⁵⁰ *XY* was a successful challenge to section 36 of Ontario’s *Vital Statistics Act*’s requirement that in order to change the sex designation on a birth certificate, a person must undergo “transsexual surgery.” The HRTTO ordered the government to revise the criteria for changing sex designation on a birth registration to remove the discriminatory effect of requiring “transsexual surgery.” In *Salsman v. London Sales Arena Corp.*,⁵¹ the HRTTO found that a market manager had discriminated against transgender stall owners on the ground of gender identity. Part of his discriminatory behaviour included comments on a radio show that the market was a family place and that it did not have washroom facilities for “these people,” referring to the applicants. The HRTTO ordered the manager to undergo human rights training and to ensure transgender persons access to washroom facilities of the gender with which they identify.

Prior to *Toby’s Act*, Ontario recognized transgender rights under the prohibited grounds of sex and disability. *Hogan v. Ontario (Health and Long-Term Care)*⁵² (*Hogan*) involved the government’s decision to amend the *Health Insurance Act* to delist Sex Reassignment Surgery from the Schedule of Benefits under the Ontario Health Insurance Plan. The HRTTO found the government’s decision discriminated against the applicants on the ground of disability. In *Forrester v. Peel (Regional Municipality) Police Services Board et al.*,⁵³ the respondents conceded they had unintentionally violated the *Code* on the ground of sex by not allowing a transgender detainee the choice of a female or male officer to conduct a strip search on them.

The HRTO ordered the respondents to revise their policy on strip searches in order to make them compliant with the *Code*.

While case law from other jurisdictions is not as readily available, the Northwest Territories Human Rights Adjudication Panel recently found in *Landrie v Miltenberger*⁵⁴ that the applicant was discriminated against when she was denied access to school facilities customarily available to the public on the basis, at least in part, of her gender identity.

Considering gender identity under the prohibited ground of disability violates the *Yogyakarta Principles*, which specify that gender identity should not be treated “as a medical condition to be treated, cured, or suppressed.”⁵⁵ And lumping gender identity under the prohibited ground of “sex” creates uncertainty as to the relative meaning of “gender” and “sex,” which are two distinct concepts. “Sex” “refers to the biological and physiological characteristics that define men and women[,]”⁵⁶ whereas, as per international law and the definition adopted by Bill C-279, “gender identity” is a very personal and subjective matter referring to a person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth.

Thus, while transgender persons are entitled to protection on the ground of sex or disability in provinces⁵⁷ that do not have “gender identity” as a prohibited ground of discrimination, protection on these grounds is inconsistent with international human rights law.

Federally,⁵⁸ Bill C-279 would bring some much-needed clarity to defining differences between terms like or “gender” and “sex,” and bring harmony to Canadian legislation across provinces. It would also bring Canadian law into conformity with international human rights law.

Moreover, due to Canada’s federal division of powers as set out in sections 91 and 92 of the *Constitution Act, 1867*,⁵⁹ individuals who are discriminated against in areas of federal jurisdiction, for instance in their employment or when receiving a federally-provided service, would not have recourse to provincial human rights legislation. Areas of exclusive federal jurisdiction include the postal service, regulation of trade and commerce, aeronautics, broadcasting, immigration and refugee matters, the military, navigation and shipping, telecommunications, savings banks, bankruptcy and insolvency, anything occurring on Aboriginal reserves, and many aspects of criminal law.

6. Canadian Charter of Rights and Freedoms

Section 15(1) of the *Charter* provides that “[e]very individual is equal before and under the law and has the right to 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.”⁶⁰

The test for discrimination under section 15 of the *Charter* has changed and evolved over the years. Currently, the test is as follows. First, the court must determine whether the impugned law or government action creates a distinction between a claimant and others on the basis of an enumerated or analogous ground.⁶¹ Second the court must consider whether the distinction creates a disadvantage.⁶² If the answer is “yes” in both inquiries, the impugned law or government action is considered to be discriminatory and in violation of section 15 of the *Charter*. Impact on human dignity and the perpetuation of prejudice or stereotyping could be contextual indicators of discrimination, and the previous requirement of a mirror comparator group is a helpful, but not always necessary, interpretive aid to determining whether discrimination exists.⁶³

Gender identity has not yet been recognized by the courts as an enumerated or analogous ground under the *Charter*. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, the Supreme Court of Canada held that an analogous ground is “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.”⁶⁴ It is in recognition that sexuality is not a matter of choice but rather an inherent personal characteristic that the Supreme Court of Canada recognized sexual orientation as an analogous ground for the purpose of section 15. In *Vriend v. Alberta*, the Supreme Court held that the exclusion of sexual orientation as a prohibited ground of discrimination in Alberta’s *Individual Rights and Protection Act (IRPA)* was contrary to section 15 of the *Charter*. The Court stated:

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.⁶⁵

Similar to sexual orientation, gender identity is an immutable characteristic, which transgender persons cannot change without suffering significant psychological and physical distress, as recognized by the definition of “gender identity” in the *Yogyakarta Principles* and Bill C-279. Principle 3 of the *Yogyakarta Principles* specifies that “[e]ach person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”⁶⁶ Gender identity was recognized as an immutable characteristic by the HRTO in *Hogan*.⁶⁷ Like sexual orientation, as required by international law, and as an expression of the Canadian public through its government domestically and internationally, Amnesty would urge the Senate to pass Bill C-279 and recognize “gender identity” as a prohibited ground of discrimination.

7. Conclusion

Amnesty unreservedly supports the passage of Bill C-279 into law without delay. It is a welcome and extremely important step to bringing Canadian law into conformity with Canada’s international human rights obligations towards transgender persons, existing provincial and territorial legislation, and the *Canadian Charter of Rights and Freedoms*.

As stated by former UN High Commissioner for Human Rights and justice of the Supreme Court of Canada, Louise Arbour, at the 2006 International Conference on LGBT Human Rights held in Montreal,

[n]either the existence of national laws, nor the prevalence of custom can even 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.⁶⁸

Canada has the opportunity with Bill C-279 to break that silence, and to make a statement that the human rights of transgender persons are of equal value as the rest of Canadian citizens.

¹ *House of Common Debates*, 41st Parl, 1st Sess, No 017 (21 September 2011) at 1510 (Randall Garrison).

-
- ² See, most recently Amnesty International, *The State Decides Who I Am: Lack of Legal Gender Recognition for Transgender People in Europe* (Index: EUR 01/001/2014) January 2014 online: < <http://www.amnesty.org/en/library/asset/EUR01/001/2014/en/13af83a1-85f5-476f-9fe9-b931f2b2a9f3/eur010012014en.pdf>>; See also Amnesty International, *Because of Who I Am: Homophobia, Transphobia and Hate Crimes in Europe* (Index: EUR 01/014/2013) September 2013 online: < <http://www.amnesty.org/en/library/asset/EUR01/014/2013/en/c256ac8a-9555-4955-8131-c1d2deee6d5d/eur010142013en.pdf>>. Amnesty has also initiated its first “Individuals at Risk” campaign with respect to a transgender person, on behalf of John Jeannette Solstad of Norway. See online: < <http://www.amnesty.ie/content/norway-transgender-woman-seeks-legal-gender-recognition>>.
- ³ Jaime M Grant, Lisa A Mottet, Justin Tanis, Jack Harrison, Jody L Herman, and Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011) at 3-6.
- ⁴ Catherine Taylor and Tracey Peter, *Every Class in Every School: Final Report on the First National Climate Survey on Homophobia, Biphobia, and Transphobia in Canadian Schools* (Toronto: Egale Human Rights Trust, 2011) at 15-17 online: <<http://egale.ca/wp-content/uploads/2011/05/EgaleFinalReport-web.pdf>> .
- ⁵ Sue Scruton, *Trans Needs Assessment Report* (Ottawa: Canadian AIDS Society, 2014) at vii online: <[http://www.cdnaids.ca/files.nsf/pages/trans-needs-assessment-report-eng/\\$file/trans%20needs%20assessment%20FINAL.pdf](http://www.cdnaids.ca/files.nsf/pages/trans-needs-assessment-report-eng/$file/trans%20needs%20assessment%20FINAL.pdf)>.
- ⁶ United Nations Human Rights Council, *Resolution adopted by the Human Rights Council: 17/19 Human rights, sexual orientation and gender identity*, 70th Sess, UN Doc A/HRC/RES/17/19 (14 July 2011).
- ⁷ *Ibid* at para 1.
- ⁸ United Nations Human Rights Council, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 19th Sess, UN Doc A/HRC/19/41 (17 November 2011) at para 1 [A/HRC/19/41].
- ⁹ Organization of American States, *Human Rights, Sexual Orientation and Gender Odentity*, GA Res 2504 XXXIX- 0/09 (4 June 2009) at para 2.
- ¹⁰ United Nations Human Rights Council, *Human rights, sexual orientation and gender identity*, 27th Sess, UN Doc A/HRC/27/L.27/Rev.1 (24 September 2014).
- ¹¹ *Ibid* at para 2.
- ¹² *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) [emphasis added] [UDHR].
- ¹³ A/HRC/19/41 *supra* note 8 at para 5.
- ¹⁴ 24 October 1945, 1 UNTS XVI art 1(3).
- ¹⁵ UDHR, *supra* note 12 art 2.
- ¹⁶ 16 December 1966, 999 UNTS 171 arts 2, 26.
- ¹⁷ 16 December 1966, 993 UNTS 3 art 2(2).
- ¹⁸ 20 November 1989, 1577 UNTS 3 art 2.
- ¹⁹ *R v Sharpe*, 2001 SCC 2 at para 177, [2001] 1 SCR 45.
- ²⁰ Foreign Affairs, Trade and Development, “Children’s Human Rights” online: < <http://www.international.gc.ca/rights-droits/kids-enfants/index.aspx?lang=eng>>.
- ²¹ United Nations Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th Sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989) at para 1 [*General Comment 18*].
- ²² A/HRC/19/41 *supra* note 8 at para 16.
- ²³ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 42nd Sess, UN Doc E/C.12/GC/20 (2 July 2009) aff’d in A/HRC/19/41 *supra* note 8 at para 17 [*General Comment 20*].
- ²⁴ United Nations Committee on the Rights of the Child, *General Comment No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child*, 33rd Sess, UN Doc CRC/GC/2003/4 (1 July 2003) at para 6.
- ²⁵ United Nations Committee Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 2*, UN Doc CAT/C/GC/2 (24 January 2008) para 22.
- ²⁶ United Nations Committee on the Elimination of Discrimination against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010) at para 18.
- ²⁷ *General Comment 18*, *supra* note 21 at para 6; *General Comment 20*, *supra* note 23 at para 7; *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 art 1; *Convention on the Rights of Persons with Disabilities*, 24 January 2007, UN Doc A/RES/61/106 art 2; United Nations Office of the High Commissioner for Human Rights, *Born*

Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law (New York and Geneva: United Nations, 2012) at 40.

²⁸ International Commission of Jurists, *Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007) online: <http://www.refworld.org/docid/48244e602.html> [*Yogyakarta Principles*]

²⁹ *Ibid.*

³⁰ Paula L. Ettelbrick, Esq and Alia Trabucco Zerán, “The Impact of the Yogyakarta Principles on International Human Rights Law Development” (2010) online: < http://www.ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf>.

³¹ United Nations General Assembly, *Statement on Human Rights, Sexual Orientation and Gender Identity* (18 December 2008) online: < <http://www.refworld.org/docid/49997ae312.html>> at paras 3, 10.

³² United Nations Office of the High Commissioner for Human Rights, *High Commissioner’s Strategic Management Plan 2010-2011, Published December 2009* (Geneva: United Nations, 2010) online: < <http://www.ohchr.org/Documents/Press/SMP2010-2011.pdf>>.

³³ *General Comment 20, supra* note 23 at footnote 25; A/HRC/19/41, *supra* note 8 at footnote 137; United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, 22nd Sess, UN Doc A/HRC/22/53 (1 February 2013) at para 38; United Nations Committee against Torture, *Report of the Committee against Torture*, 45th Sess, UN Doc A/66/44 Supplement No. 44 (1-19 November 2010); United Nations Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical health and mental health, Anand Grover*, 14th Sess, UN Doc A/HRC/14/20 (27 April 2010) at footnotes 6, 11; United Nations General Assembly, *Protection of human rights and fundamental freedoms while countering terrorism*, 64th Sess, UN Doc A/64/211 (3 August 2009) at para 48, footnotes 16, 105; United Nations High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (Geneva: United Nations, 2008) at paras 5, 9, 12, footnotes 4, 5, 13, 16, 20, 29.

³⁴ A/HCR/19/41, *supra* note 8 at para 75. Further, Albania, Argentina, Brazil, Chile, South Korea, Indonesia, Israel, Colombia, Croatia, Austria, Poland, Cuba, the Czech Republic, Germany, Hungary, Montenegro, Serbia, Sweden, Denmark, Estonia, Iceland, Latvia Lithuania, Norway, Sweden, Cyprus, Italy, Malta, Portugal, Serbia, Spain, the Netherlands, Kosovo, Australia, New Zealand and the United Kingdom all have laws protecting gender identity and/or allow legal recognition of gender without the requirement of medical intervention. Transgender persons can also change their legal gender and name in Mexico City. The United States and Puerto Rico prohibit discrimination on the ground of gender identity in employment and health care insurance, and have included “gender identity” in their hate crime laws.

³⁵ “Canada’s Universal Periodic Review Response to Recommendations” (19 June 2013) online: < <http://www.pch.gc.ca/eng/1357240238548/1357240560833>>.

³⁶ *Yogyakarta Principles, supra* note 28.

³⁷ *Ibid.*

³⁸ *Ibid.*, Principles 1, 2

³⁹ *Ibid.*, Principle 19.

⁴⁰ NSW 2002, c 18, preamble.

⁴¹ CCSM c H175, s 9(2).

⁴² RSO 1990, c H.19, ss 1, 2, 3, 5, 6, 7.

⁴³ Bill 33, *Toby’s Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression)*, 1st Sess, 40th Leg, Ontario, 2012 (assented to 19 June 2012, SO 2012 c 7).

⁴⁴ RSNS 1989, c 214 s 5(1).

⁴⁵ *Human Rights Act, 2010*, SNL 2010, c H-13.1, s 9(1).

⁴⁶ RSPEI 1988, c H-12, preamble, ss 1, 13.

⁴⁷ Ontario Human Rights Tribunal, “Fiscal Year 2012-2013” online: <<http://www.hrto.ca/hrto/index.php?q=en/node/203>>; Ontario Human Rights Tribunal, “Fiscal Year 2013-2014” online: <<http://www.hrto.ca/hrto/index.php?q=en/node/234>>.

⁴⁸ *Ibid.*

⁴⁹ *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14 at para 13, [2006] 1 SCR 513.

⁵⁰ 2012 HRTO 726.

⁵¹ 2014 HRTO 775

⁵² 2006 HRTO 32

⁵³ 2006 HRTO 13

⁵⁴ 2013 CanLII 29312

⁵⁵ *Yogyakarta Principles, supra* note 28, Principle 18.

-
- ⁵⁶ World Health Organization, “What do we mean by ‘sex’ and ‘gender’?” online: <<http://www.who.int/gender/whatisgender/en/>>.
- ⁵⁷ See, e.g. *Vancouver Rape Relief Society v BC Human Rights Commission*, 2000 BCSC 889; *Magnone v British Columbia Ferry Services and others (No 3)*, 2008 BCHRT 191 at para 175.
- ⁵⁸ See, e.g. *Kavanagh v Canada (Attorney General)*, 2001 CanLII 8496 (CHRT); *Ferris v Office and Technical Employees Union, Local 15* (1999) 36 CHRR D/329 (BCHRT); *Mamela v Vancouver Lesbian Connection* (1999) 36 CHRR D/318 (BHRT); *Sheridan v Sanctuary Investments Ltd* (1999) 33 CHRR D/467.
- ⁵⁹ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
- ⁶⁰ *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982, c 11.
- ⁶¹ *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*]; *Withler v Canada*, 2011 SCC 12, [2011] 1 SCR 396; *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 [*Quebec v A*].
- ⁶² *Kapp*, *supra* note 61; *Quebec v A*, *supra* note 61
- ⁶³ *Ibid.*
- ⁶⁴ [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1.
- ⁶⁵ [1998] 1 SCR 493 at para 104; 156 DLR (4th) 385.
- ⁶⁶ *Yogyakarta Principles*, *supra* note 28, Principle 3.
- ⁶⁷ *Hogan*, *supra* note 52 at para 129.
- ⁶⁸ Louise Arbour, “keynote address” (Presentation by the United Nations High Commissioner for Human Rights, Madam Louise Arbour delivered at the International Conference on LGBT Human Rights [Lesbians, Gays, Bisexuals and Transgendered], 26 July 2006) online: < http://montreal2006.info/en_louise_arbour.html>.