

Recommendations for Improvements to the City of Hamilton Proposed Protocol for Gender Identity and Gender Expression; Transgender and Gender Non-Conforming Persons

Author: I am a native of Hamilton. I was born here at St. Joseph's Hospital; lived my first 23 years within the City; went to elementary and high school here; enjoyed swimming lessons, playing on a baseball team and taking music lessons here; worked my first job, volunteered, trained with the Royal Hamilton Light Infantry, was part of a church and completed my undergraduate degree here; all in this beautiful City, which remains "home" to me.

I am a constitutional lawyer, with a law degree from the University of Ottawa, a Master of Laws degree from Osgoode Hall and a Certificate in Human Rights Law from the same institution.

Documents Reviewed: I have reviewed the proposed City of Hamilton Protocol for Gender Identity and Gender Expression; Transgender and Gender Non-Conforming Persons (hereinafter "the Protocol"). I have also reviewed the City of Hamilton Human Resources Report to the Audit Committee which accompanies the Protocol, the Ontario Human Rights Code, the Ontario Human Rights Commission's Policy on preventing discrimination because of Gender Identity and Gender Expression (2014), the OHRC's Policy on discrimination and harassment because of gender identity (2000, updated 2009), and the OHRC's paper, "The shadow of the law: Surveying the case law dealing with competing rights claims".

Summary: What follows in this report are observations on the strengths of the Protocol and recommendations for improving the Protocol. While there are some sections in the Protocol that can be commended, there are sections that require amendment in order to improve and strengthen the document. In particular, the Protocol lacks proper balancing of rights (a major requirement of human rights law); underplays the role of the Ontario Human Rights Code in protecting spaces segregated by sex; fails to account for other constitutional rights and protections (including freedom of expression); employs vague and ambiguous clause construction such that clarity on rights and obligations is lacking; and failed to consult with other reasonable stake-holders for broader perspectives.

In order to avoid duplication, the discussion below will only focus on the Customer Service Guidelines (pages 4-7) and will not be repeated for the corollary found in the Employee Guidelines (pages 8-12).

Strengths of the Protocol:

1. Protocol, page 1: “The City has a legal and moral responsibility to maintain environments that are free from discrimination and harassment for community members and employees.” Agreed. This should be done in accordance with the *Ontario Human Rights Code* (hereinafter, “the *Code*”), and should equally apply to all members of the City.
2. Section 1. Privacy and Confidentiality (Protocol, page 4): This entire section is well-worded and fully endorsed. In particular, section 1.4 is necessary and its inclusion should be applauded.
3. Subsection 5.2 (Protocol, page 6): This subsection is appreciated, particularly because the way it is worded helps to mitigate the possibility of imposters taking advantage of this Protocol. In particular, the use of the word “and” which links “self-identified” and “lived gender identity” requires the gender identity to be something sincerely and consistently held for a longer period. The construction of this clause also allows for reasonable analysis and investigation. However, it does seem to conflict with a plain reading of Subsection 5.5 and seems to conflict with a plain reading of the Code (see discussion for amendments below).
4. Subsection 5.3 (first part): The commitment by the City of Hamilton to provide all-gender, single-stall washrooms is to be applauded. It is good policy in today’s culture for the City to move towards single-stall washrooms and change rooms. Obviously, this will require time for the 1,400 facilities across the City to be updated. However, the second part of subsection 5.3 has issues for improvement, discussed below.
5. Subsection 5.6 (Protocol, page 7): This subsection is an excellent addition to the Protocol. The drafters are to be commended for including it and its forceful construction.

Recommendations for Improvement:

1. Subsection 2.2 (Protocol, page 4): raises a *prima facie* violation of section 2(b) of the *Canadian Charter of Rights and Freedoms* (hereinafter, “the *Charter*”). The City may not mandate or compel language, particularly with regard to gender and pronouns. While reference to a personal name could be justified under section 1 of the *Charter*, compelling the reference to preferred genders and pronouns would not be justified. I recommend amending section 2.2 (and its corollary) to read as follows: All persons must be referred to by their preferred name, ~~gender and pronoun~~.
2. Subsection 5.1 (Protocol, page 6): In order to properly balance rights, in light of the City’s statutory obligations for safe and private space for all – including for vulnerable children in spaces with a reasonable expectation of privacy – amend Subsection 5.1 (and corollary) by adding the word “all” and striking the last eight words, as follows: The City of Hamilton will make all efforts to ensure that all persons can use washrooms with safety, privacy and dignity, ~~regardless of their gender identity or gender expression~~.

3. Subsection 5.3: The phrase “but this option [single-stall washrooms] should not be imposed upon an individual because of the individual’s gender identity” is problematic for two reasons:
 - a. The phrasing confuses gender identity with sex. Washroom and change room facilities are segregated according to sex, not gender. The *Ontario Human Rights Code* makes this clear in sections 20.(1) which states: *The right under section 1 to equal treatment with respect to services and facilities without discrimination because of sex is not infringed where the use of the services or facilities is restricted to persons of the same sex on the ground of public decency.* **Note well:** The *Code* was amended in 2012 to add the terms “gender identity” and “gender expression” to it, but the Ontario Legislature intentionally did *not* add these terms to this particular section of the *Code*, nor to subsections 20.(3) and 21.(2) of the *Code*. This was done intentionally: the *Code* contains broad prohibitions against discrimination in services, accommodation, employment, etc., but then goes on to list a number of exceptions. These exceptions are carefully crafted to give full protection to other competing rights and constitutional protections including religious and associational rights and the rights of privacy, particularly for women. That’s what section 20 of the *Code* is for. The Protocol fails to properly account for this legal reality.
 - b. Since every human being has a gender identity (the majority of humans have a gender identity that corresponds to their biological sex, but these cis-gendered individuals still have a “gender identity”), the current wording of section 5.3 effectively states that no sex-segregated facility can ever be imposed upon any individual ever. To use myself as an example, I am a cisgender biological male. The last sentence in section 5.3 states clearly that a male washroom, change room or shower facility *cannot* be imposed upon me because of my gender identity. Let me state clearly: it should be! If left unchanged, subsection 5.3 will be bad public policy.

Recommendation: cut the second sentence of the clause to read as follows: Where available, the City will provide an all-gender, single stall washroom/change room for use by any persons who desire it. ~~The use of all gender, single stall washroom/change room could be an option that people may choose, but this option should not be imposed upon an individual because of the individual’s gender identity.~~
4. Subsection 5.4: This section is ambiguous about which person is required to make the request for reasonable accommodation. For example, if an adult biological male, with male anatomy but with a female gender identity, were to enter the female shower rooms at a public swimming pool, would an 8-year-old girl who feels uncomfortable with that person’s presence be the one required to seek accommodation, or is the person with the male anatomy the one that should have to seek accommodation? **Recommendation:** Clarify on whom the onus lies when seeking accommodation with regard to the use of sex-segregated facilities. The onus should be on the person with male anatomy seeking entrance to spaces where there’s a reasonable expectation of privacy for female people.

5. Subsection 5.5: Strike the phrase “including a challenge to the person’s right to access the washroom/change room space because of their gender identity or gender expression.”. This phrase adds unnecessary confusion to the Protocol, and also conflicts with section 5.2 which allows for reasonable verification of lived gender identity. Furthermore, subsection 5.5 does not make clear (and certainly leaves the unreasonable impression) that a simple offer of the availability of a single stall washroom would itself be discriminatory. This subsection requires amendment and clarification.

Final Recommendation: That the Audit Finance & Administration Committee not approve the draft Protocol. Instead, the Audit Finance & Administration Committee request Human Resources to revisit the Protocol in light of the recommendations above and in so doing, to extend consultations to other stakeholders in order to properly accommodate all citizens and to properly balance competing rights.

I remain committed to enhancing human rights in cities across this country. If I can be of any further help to the City of Hamilton in improving its draft Protocol or any other human rights documents, I am most willing to assist.

All of which is respectfully submitted,



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