



May 10, 2012

The Honourable Harinder Takhar M.P.P.
Minister of Government Services
c/o Ministry of Government Services
Room 4320, 4th Floor, Whitney Block
99 Wellesley Street West
Toronto, Ontario M7A 1W3

Dr. Shafiq Qadri M.P.P.
Parliamentary Assistant to the Minister of Government Services
c/o Ministry of Government Services
Room 4320, 4th Floor, Whitney Block
99 Wellesley Street West
Toronto, Ontario M7A 1W3

Dear Minister Takhar and Dr. Qadri,

Re: X.Y. v. Ontario, Sex-Designation Change for Birth Certificates in Ontario

We are members of the Board of the Canadian Professional Association for Transgender Health (CPATH), a professional organization devoted to the health care of individuals who are transgender, transsexual or who express their gender in non-stereotypical ways. Among the professionals included in our national membership are family physicians, endocrinologists, pediatricians, surgeons, mental health professionals, lawyers, sociologists, anthropologists, speech and voice therapists, and other related fields. We are the Canadian affiliate of the World Professional Association for Transgender Health (WPATH), recognized by the American Medical Association as the authority in this field.

As you are aware, the April 11, 2012, decision of the Ontario Human Rights Tribunal in the case of *X.Y. v. Ontario (Government and Consumer Services)*, 2012 HRTO 726, found that the *Vital Statistics Act (VSA)* requirement for “transsexual surgery” prior to granting a transsexual or transgender (trans) individual’s application to change sex designation on an Ontario birth certificate discriminated against trans people based on their sex. As a result, the tribunal ordered that the requirement was inapplicable and provided that the criteria for sex designation change on birth certificates be revised within 180 days from the date of the decision.

For the following reasons, we would respectfully urge your ministry to allow the decision to stand without judicial review and offer our organization’s expertise to assist in the development of an appropriate sex designation change policy that meets the needs of all stakeholders.

As clearly articulated by WPATH in their May 26th, 2010, statement,¹ “the expression of gender characteristics, including identities, that are not stereotypically associated with one’s assigned sex at birth, is a common and culturally-diverse human phenomenon which should not be judged as inherently pathological or negative”. In an October 2010 policy statement,² the Canadian Psychological Association affirmed that “all adolescent and adult persons have the right to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role. Moreover, all adolescent and adult persons have the right to free expression of their self-defined gender identity.”

Trans and gender non-conforming people come from every cultural, religious and ethno-racial background, live in all regions of the country, and are grandparents, parents, children and siblings, farmers and software developers, members of the clergy and social workers, accountants, doctors, lawyers, and sex workers, retirees and veterans, pipefitters and politicians. According to the Trans PULSE Project (Trans PULSE), a Canadian Institutes of Health Research funded study of the social determinants of health of trans people in Ontario, there are roughly an equal number of male-to-female and female-to-male trans Ontarians, with 20% of trans Ontarians identifying their gender as both male and female, neither male nor female, or fluid.³

Trans people’s gender identities are generally stable and long standing; 59% of trans Ontarians were under the age of ten when they knew that their gender did not match their body and a full 80% knew prior to the age of fourteen.⁴ An individual’s decision to transition their gender socially and/or medically is, as a general rule, taken very seriously, especially in light of the pervasive misunderstanding, stigma, discrimination, and harassment, regarding and against trans people in our society.

Sex Designation Change and Identification Documents

Birth certificates are foundational identity documents. The impugned requirement for “transsexual surgery” prior to a change of sex designation on birth certificates does not reflect the reality of transgender and transsexual people’s lives given financial and/or health barriers that may limit access to necessary surgeries. Furthermore, many, but not all, trans identified or gender non-conforming people have a medically necessary need for surgical care, irrespective of the stability of their gender identity or gender role. Finally, it should be noted that the requirement for “transsexual surgery” did not require that an applicant undergo sex reassignment surgery (orchiectomy and vaginoplasty for male to female trans people or oophorectomy, hysterectomy and metoidioplasty or phalloplasty for female to male trans

¹ <http://www.wpath.org/documents/de-psychopathologisation%205-26-10%20on%20letterhead.pdf>

² http://www.cpa.ca/aboutcpa/policystatements/#Gender_Identity

³ *Who are Trans People in Ontario?*, E-Bulletin Volume 1, Issue 1, Trans PULSE Project (June, 2010) www.transpulseproject.ca.

⁴ *Challenging the Binary: Gender Characteristics of Trans Ontarians*, E-Bulletin Volume 2, Issue 2, Trans PULSE Project (Dec 15, 2011), <http://transpulseproject.ca/documents/E4English.pdf>

people), that there was no requirement that the "transsexual surgery" result in sterility and that a number of non-genital surgical procedures were deemed to qualify as "transsexual surgery" under the VSA.

As you may be aware, the Ontario Ministry of Transportation's policy with respect to gender designation change originally had a surgical requirement; however, as a result of the 2006 settlement of a human rights complaint, the surgical requirement was removed. The current policy, which has been in place for almost 6 years (and without any known issues), requires a letter from a doctor who has examined the driver stating that the change of sex designation is appropriate.⁵

As a result of different sex designation change policies between various government ministries, many trans people possess disparate identification documents, for example a birth certificate that indicates female and a drivers licence that indicates male. Thus, the surgical requirement for sex designation change on Ontario birth certificates serves to obscure or muddy a person's identity rather than assist in identifying a person based on their gender identity and current gender role.

Discrimination against trans and gender non-conforming people is rampant; 18% of trans Ontarians were sure that they were turned down for a job because they were trans with an additional 32% who were unsure if being trans was the reason they were turned down for a job. 13% have been fired or constructively dismissed, with an additional 15% unsure if the decision not to hire them was because they were trans. For those who transition on the job, 58% found that they were always or mostly accepted by their co-workers, with 42% being accepted half the time or less, and 15% never finding the acceptance of their co-workers. Of trans Ontarians, 28% have at least some college or university education, with 36% having graduated from college or university, and 7% having obtained professional or graduate degrees. Despite this solid level of education, the barriers to employment that trans Ontarians experience result in a situation where 21% of trans Ontarians earn between \$15,000 and \$30,000 per year, and a full half earn less than \$15,000.⁶

While it is disconcerting to trans people to identify as one gender and have identification documents reflecting another gender, having incongruent identification also has a negative economic impact and creates barriers to trans people's full participation in economic life. Many trans people are unable to obtain academic transcripts (58%), or letters of reference (28%), with their current name and gender, and over a quarter of the time, trans Ontarians choose not to provide references because these references may out them as trans. In an employment environment with such pervasive discrimination, maintaining the confidentiality of one's trans status can, for some, be a strategy to avoid negative employment outcomes, however, having disparate identification can "out" someone as trans and create vulnerability to discrimination

⁵ <http://www.mto.gov.on.ca/english/dandv/driver/genderchange.shtml>

⁶ *We've Got Work to Do: Workplace Discrimination and Employment Challenges for Trans People in Ontario*, E-Bulletin Volume 2, Issue 1, Trans PULSE Project (May 30, 2011), <http://transpulseproject.ca/documents/E3English.pdf>

and harassment. The ability to demonstrate a birth certificate providing formal recognition of one's gender identity and lived gender could serve as a protective measure to counter this vulnerability.

Pursuant to s. 46(1) of the *Vital Statistics Act*,⁷ a certificate of birth is merely a reflection of a registration of sex which is “admissible in any court in Ontario as proof, **in the absence of evidence to the contrary**, of the facts so certified”. Consequently, in the event that an individual's sex was to be relevant to a legal determination of any matter before the courts, a court could look beyond the certificate. Of course, given that there are few, if any, remaining legal distinctions between the sexes, the relevance of an individual's sex in any legal context is limited or non-existent. One might reasonably query whether sex designation information ought to be used for birth statistics information only, without being referenced on birth certificates altogether.

Sex is no longer necessary to determine, *inter alia*, whether an individual can vote or inherit, if they are entitled to equal pay for equal work, or to determine who an individual may legally marry. Additionally, the registered sex designation of a trans person has little or no bearing on their legal rights. This is well illustrated in the British Columbia Human Rights Tribunal case of *Sheridan v. Sanctuary Investments Ltd.* (a decision which found that trans people are entitled to use washrooms in accordance with their gender identity) where the Tribunal stated, “transsexuals in transition who are living as members of the desired sex should be considered to be members of that sex for the purposes of human rights legislation”.⁸ Numerous court and tribunal decisions have affirmed this principle and the right of trans people to be free from discrimination and harassment because of their sex.⁹

There is a growing international trend to register the sex designation of trans people based on their gender identity regardless of what, if any, surgical procedures they have undergone. In the United Kingdom, the Gender Recognition Act 2004 allows for change of sex designation on birth certificates without a requirement for surgery. Recent changes to Australian¹⁰ and American¹¹ passport policy have also removed any surgical requirement prior to changing sex designation on those countries' passports. These new policies conform to the International Civil Aviation

⁷ R.S.O. 1990, Chapter V.4, as amended

⁸ *Sheridan v. Sanctuary Investments Ltd. (c.o.b. B.J.'s Lounge)*, (1999) C.H.R.R. D/467 (B.C.H.R.T.), cited with approval in a number of Ontario Human Rights Tribunal Decisions.

⁹ Including but not limited to: *M.L. and Commission des droits de la personne et des droits de la jeunesse du Québec c. Maison des jeunes*, [1998] J.T.D.P.Q. No. 31 (Qué. H.R.T.), *Ferris v. Office and Technical Employees Union, Local 15*, [1999] B.C.H.R.T. No. 55, *Mamela v. Vancouver Lesbian Connection*, (1999) 36 C.H.R.R. D/318 (B.C.H.R.T.), *Montreuil v. National Bank of Canada*, (2004) 2004 CHRT 7 (CanLII), 32 C.C.E.L. (3d) 290 • 48 C.H.R.R. 436, *Hogan v. Ontario*, (2006) 2006 HRTO 32, and *Kavanagh v. Canada (Attorney General)*, (2001) 41 C.H.R.R. D/119.

¹⁰ <https://www.passports.gov.au/web/sexgenderapplicants.aspx>

¹¹ <http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm> - announcement of policy, U.S. Department of State Foreign Affairs Manual Volume 7, Consular Affairs 7 FAM 1300 Appendix M Gender Change (CT:CON-404; 04-13-2012) (Office of Origin: CA/OCS/PRI). This new policy was “based on standards and recommendations of the World Professional Association for Transgender Health (WPATH), recognized by the American Medical Association as the authority in this field.”

Organization (ICAO) passport standards for sex identification. American consular reports of birth abroad of citizens of the United States of America, which are birth certificates subject to the jurisdiction and administration of the U.S. Federal Government, are also governed by this new U.S. policy. In addition, the Australian policy allows for the registration of an individual's sex as indeterminate/unspecified/intersex, which is indicated by an X marked on the passport.

A recent report in *La Presse*¹² indicates that in light of these international developments, Passport Canada is reviewing its sex designation change policy for trans and intersex people. The report also states that the Province of Quebec is considering the removal of its current surgical requirement for sex designation change on its birth certificates.

Conclusions

In light of the above, we would submit that the decision reached in the *X.Y. v. Ontario* case was just and fair. It is in accordance with the solid body of Canadian jurisprudence that has developed over the last decades which clearly affirms the protection of trans people under provincial and federal human rights legislation. Consequently, it is our opinion that a judicial review of the decision is not in the best interest of Ontarians. And though we do not wish to comment on the likelihood of success of a judicial review, we see no ground or reason for a court to set aside the decision.

Viewed more positively, the decision has presented an opportunity to reconsider the sex designation requirements for Ontario birth certificates. These legislative and policy changes will streamline and improve identity verification for transgender, transsexual and gender non-conforming people and enhance the legitimate security measures that are of vital importance to all Canadians. Finally, the development of appropriate legislative and policy changes in accordance with the *X.Y. v. Ontario* decision would allow trans Ontarians to acquire consistent identity documents, which would in turn reduce their vulnerability to stigma, discrimination and harassment, and facilitate their full participation in economic and social life in Ontario.

With our organization's expertise and in consideration of the statements of WPATH and CPA referenced above, we wish to ensure that any new policy does not add to the stigma that trans people experience by the medicalization of trans identities. Consequently, we would suggest that a hybrid policy be created allowing for an application based on a statutory declaration from the applicant with respect to their lived gender and either a medical statement confirming the appropriateness of the change of sex designation, or, a guarantor's statement confirming the applicant's residence in Ontario and lived gender over a fixed period of time appropriate to

¹² <http://www.lapresse.ca/actualites/quebec-canada/national/201205/06/01-4522597-vers-un-troisieme-sexe-sur-les-passeports-canadiens.php>

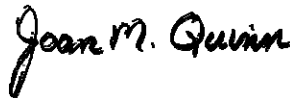
indicate the permanence of the change.¹³ The hybrid policy would satisfy the requirements set out in the X.Y. v. Ontario decision, and would allow for an applicant and guarantor to be held accountable for any false statement made in the application. The net effect would be a policy that allows for appropriate changes that reflect an individual's lived gender while protecting the validity of and public confidence in the registrations.

We thank you for your consideration of the information presented above and would be happy to consult with your Ministry to clarify any issues or to assist in the development of any policy. If you have any questions, please do not hesitate to contact us.

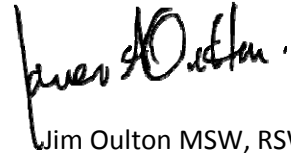
Yours sincerely,



Françoise Susset MA Psychologist
President



Joan Quinn MD, FRCP
Past President



Wim Oulton MSW, RSW
President Elect



Dana Roberts CD, MA
Treasurer



Bev Lepischak SW
Secretary

¹³ While perhaps outside of the scope of the sex designation change criteria themselves, consideration should also be given to providing a certificate of sex designation change when an application is granted. Like Ontario's change of name certificate, a sex designation change certificate would substantiate a chain of identification and provide a document that could be relied upon by applicants who are resident in Ontario (and therefore under Ontario jurisdiction for name and sex designation change) but whose births are registered elsewhere.