

Statement by Jennifer Levi, Esq.
Before the Joint Committee on the Judiciary in Support of H. 1728/S. 1687
An Act Relative to Gender-Based Discrimination and Hate Crimes

Honorable Co-Chairs Senator Creem, Representative O’Flaherty and Members of the Committee:

I am grateful for the opportunity to testify in strong support of H. 1728/ S. 1687, An Act Relative to Gender-Based Discrimination and Hate Crimes. This legislation would add “gender identity or expression” protections to the Massachusetts non-discrimination statutes, including the Massachusetts general anti-discrimination protections in employment, housing, credit and lending, Chapter 151B; the Massachusetts education laws, Chapters 71 and 76; the Massachusetts public accommodations laws, Chapter 272; and the Massachusetts hate crimes law, Chapter 22C. The proposed legislation updates Massachusetts non-discrimination and hate crimes laws to ensure that they clearly and uniformly protect all people, regardless of their gender identity or gender expression.

I am the Director of the Transgender Rights Project at Gay & Lesbian Advocates & Defenders (GLAD). As an attorney at New England’s leading legal rights organization dedicated to ensuring legal equality for lesbians, gay men, bisexuals, transgender people, and those living with HIV or AIDS, a key focus of my work has been addressing the pervasive discrimination faced by transgender people in employment, housing, public accommodations, education, and other areas. I am also a Professor of Law at Western New England College whose teaching and research interests focus on the subjects of this legislation. My goal today is to explain why it is so crucial that the legislature add the phrase “gender identity or expression” to the Massachusetts non-discrimination statutes.

I. Gender Non-Conforming People Desperately Need Legal Protection From Discrimination.

The need to protect people from discrimination and violence on the basis of gender identity or expression is great.

Every day across this country, transgender people are disproportionately the victims of non-random, targeted violence. They include Jamie Rondeau, a citizen of the Commonwealth, who just a short time ago was beaten on the streets of Lowell, Massachusetts. The attackers repeatedly called Jamie “faggot” and made sexual slurs directed toward their victim. They include people like Angie Zapata in Colorado, who while born male, began living as a woman six years ago. Last year, at the young age of 18, Angie was brutally beaten to death with a fire extinguisher when the perpetrator found out that she was transgender. And while it is difficult to accurately document the frequency of these crimes due to vast underreporting, it is clear that hate-based violence against transgender people is a widespread and significant problem.

Likewise, employment discrimination can severely undermine an individual’s ability to make a living and support his/her family. For example, Anthony Barreto-Neto, a decorated police officer in Vermont who had been recognized for his longstanding

public service was run off the police force by fellow officers after they learned about his transgender status through an internet search. After discovering that Mr. Barreto-Neto was born female and transitioned to male, fellow officers issued him faulty equipment and subjected him to a continuous pattern of harassment and inferior work conditions that became so severe he had to leave his job.

Unfortunately, these cases represent just the tip of the iceberg. Transgender people throughout Massachusetts, in cases which have not received the public attention of those just mentioned, face serious discrimination every day in jobs, housing, and public accommodations. I hear from these people every day when they call GLAD's Legal Infoline for help. Unfortunately, when they do call, I have to tell them there are no explicit protections for them in Massachusetts law. Because of this pervasive prejudice, discrimination and misunderstanding, transgender people need a law to allow them to do that which most people take for granted – walk safely on our streets, work, seek and find housing, and use public accommodations without being subjected to prejudice and discrimination.

Nothing could be further from the spirit of Massachusetts' commitment to freedom and liberty for its citizens. This law would make clear that such discrimination and violence is condemned by state policy.

II. Explicit Protections Are Needed To Fill A Void in Massachusetts Law.

There are no clear, explicit and established laws protecting transgender individuals in Massachusetts from discrimination – under either state or federal anti-discrimination laws. Explicit protections for transgender individuals will help affirm and clarify the Massachusetts anti-discrimination protections, so that it is clear to all that Massachusetts does not tolerate discrimination based upon a person's gender identity or expression. These are important provisions both for those covered by the laws and those subject to them.

While GLAD believes that transgender individuals should be protected under existing sex and disability discrimination protections in Massachusetts, which generally follows federal case law interpretation of sex discrimination under Title VII of the federal Civil Rights Act, see White v. Univ. of Mass., Boston, 410 Mass. 553, 557 (1991) (“The analysis of a discrimination claim is essentially the same under the State and Federal statutes.”), these legal protections have not been uniformly applied by courts to protect transgender individuals.

The modern national trend in case law interpreting sex discrimination protections is for both state and federal courts to interpret existing sex discrimination prohibitions to protect transgender individuals. See, e.g., Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008) (holding that an employer's refusal to hire employee because she informed them of her intention to transition from male to female was “literally discrimination ‘because of sex’”); Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6th Cir. 2004); Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995).

However, there is not complete uniformity across these court decisions, and some courts have found otherwise. See, e.g., Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007); Oiler v. Winn-Dixie Louisiana, Inc., Order and Reasons, 2002 WL

31098541 (E.D. La. Sept. 16, 2002). As a result, legal uncertainty and inconsistency exists in Massachusetts as to the extent of sex discrimination protections for transgender individuals.

By adding explicit protections for gender identity or expression alongside other characteristics in Massachusetts non-discrimination laws, H. 1728/ S. 1687 provides clarity to our courts and citizenry as well as promotes consistency in our laws. Employers, landlords, businesses, educators and all Massachusetts citizens deserve clarity in our laws. In addition, the specificity of language included in H. 1728/S. 1687 is necessary as a matter of due process for perpetrators to insure that transgender people are protected against targeted hate-based violence.

III. Gender Expression Is A Necessary Protection Under This Bill.

In this bill, "gender identity or expression" is defined as "a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth." This concept refers to people whose identification as either male or female does not match up with what they were assigned at birth, such as transsexual individuals. It also includes any person whose outward expression of their gender does not fall within society's stereotypes of what a man or woman should act like, such as a masculine woman and a feminine man.

The term gender identity without the addition of the phrase gender expression could potentially be interpreted to only include transsexual people -- people who have transitioned medically from one sex to another. If the phrase gender expression is left out -- it leaves out people who may have characteristics or mannerisms typically associated with the other gender but who identify with the gender that they were born. For example, that could potentially leave out women with short hair or men with high-pitched voices from protections against being fired for nothing related to their job performance.

Protections for a person's gender-related expression, appearance and behavior need to be broad because our past experience has shown that sex discrimination and race discrimination protections have been interpreted by some courts narrowly. For example, a recent federal appellate court ruled that an employer could fire a female employee for not wearing make-up. Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9TH Cir. 2006). This would not have been the case if there had also been broad protections based upon characteristics associated with a person's sex. This historical lesson demonstrates the need for broad protections for a person's gender expression.

Because such explicit language is necessary to provide complete protections not only to the transgender population but the entire population, protections based upon a gender-related appearance, expression or behavior have become a standard protection amongst the 13 states that including gender identity or expression in their antidiscrimination laws.

IV. All Individuals Deserve To Be Able To Use Public Restrooms In Safety And With Privacy; Nothing In H. 1728/ S. 1687 Undermines Anyone's Safety or Privacy

Everyone deserves to use restrooms in safety and with privacy. Transgender people pose no special safety risk to others who are using a restroom. In fact, transgender people are more likely to be the subject of harassment and safety threats in bathrooms, which is why explicit protections in the Massachusetts anti-discrimination law are all the more necessary.

And if there are instances of harassment or inappropriate use of bathrooms by any person – whether or not they are transgender – there are already civil and criminal laws to ensure people's safety in restrooms. Employers and public accommodations will continue to have an obligation to make restroom facilities safe and accessible for all people.

We should not allow safety concerns to become a proxy for prejudice against transgender people. A full 37% of the American population, in 13 states, live in an area covered by a transgender-inclusive anti-discrimination law,¹ and there have been no reported incidents involving a transgender person threatening the safety of anyone else in a restroom facility.

The Boston Area Rape Crisis Center, the Massachusetts Society for the Prevention of Cruelty to Children, the Massachusetts Chapter of the National Organization for Women, along with the Massachusetts Commission on the Status of Women have supported this bill and denounced opponents' arguments about bathrooms as meritless. It is time to ignore these frivolous and disrespectful attacks and focus on the real and pressing issue of discrimination and violence against a vulnerable sector of our community.

¹ See Cal. Penal Code § 422.56 (hate crimes), Cal. Civ. Code § 51 (public accommodations), Cal. Gov't Code §§ 12920, 12940 (housing/property and employment); Colo. Rev. Stat. § 18-9-121 (hate crimes), Colo. Rev. Stat. § 24-34-601 (public accommodations), Colo. Rev. Stat. § 24-34-502 (housing/property), Colo. Rev. Stat. § 24-34-502 (employment); Haw. Rev. Stat. § 489-2 et seq. & § 515-2 et seq.; 77 Ill. Comp. Stat. Ann. 5/1-103; Iowa Code Ann. § 216.2, § 216.6 et seq.; Me. Rev. Stat. Ann. tit. 5, § 4553 (definition), § 4591 (public accommodations), § 4581 (housing/property), § 4595 (credit), § 4571 (employment), & § 4601 (education); Minn. Stat. § 363A.03 et seq. (nondiscrimination laws) & Minn. Stat. §§ 609.2231, 609.595, 609.748, 611A.79 (hate crimes); N.J. Stat. Ann. § 10:5-4 et seq. (nondiscrimination laws) & N.J. Stat. Ann. § 2C:16-1 (hate crimes); N.M. Stat. § 28-1-2 (definition), § 28-1-7 (nondiscrimination laws), & § 31-18B-2 et seq. (hate crimes); Or. Rev. Stat. § 147.100 (definition), § 659A.030 (nondiscrimination laws), & § 166.155 (hate crimes); R.I. Gen. Laws § 34-37-3 (definition), § 11-24-2 (public accommodations), § 34-37-4 (housing/property), § 34-37-4.3 (credit) & § 28-5-7 (employment); Vt. Stat. Ann. tit. 1, § 144 (definition), Vt. Stat. Ann. tit. 9, § 4502 (public accommodations), Vt. Stat. Ann. tit. 9, § 4503 (housing/property), Vt. Stat. Ann. tit. 8, § 10403 (credit), Vt. Stat. Ann. tit. 21, § 495 (employment), & Vt. Stat. Ann. tit. 13, § 1455 (hate crimes); Wash. Rev. Code § 49.60.030 et seq.; D.C. Code § 2-1401.02 (definition), § 2-1402.11 et seq. (nondiscrimination laws), & § 22-3701 (hate crimes).

V. Nothing in this Bill Undermines an Employer's Ability to Enforce Reasonable Dress, Grooming and Appearance Requirements

An employer or school may require employees to follow reasonable dress codes and reasonable grooming standards; nothing in this bill changes that. Transgender individuals will still be required to follow an employer's reasonable and lawful dress codes for men and women. The transgender employee or student simply must be permitted to conform to the dress code and standards of the gender with which they identify.

The reality is that social norms about dress and appearance are changing and courts have had to deal with complaints by both men and women about the restrictiveness of enforced and sometimes outdated social norms about appearance requirements. In cases where a dress code objectifies women or creates a perception that women are less professional than men, some courts have disallowed such gender-based dress codes. See Carroll v. Talman, 604 F.2d 1028, 1032-33 (7th Cir. 1979), cert. denied, 445 U.S. 929 (1980) (“[T]he disparate treatment is demeaning to women. While there is nothing offensive about uniforms Per se, when some employees are uniformed and others not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes.”) Where dress codes simply differentiate between men and women employees but do not affect either group adversely, most courts have upheld such rules.

The importance of this legislation is that it ensures that transgender people who are well-qualified and capable of working are permitted to work and can do so with the dignity they deserve. This bill does not change the fact that if a gendered appearance requirement in the workplace is currently permissible, it may be enforced. It simply ensures that transgender people will be allowed to perform in those workplaces effectively.

Some opponents of this legislation have said that this bill will encourage people to cross-dress in the workplace or “flip-flop” in their appearance. These scenarios simply do not happen in reality. There has been no outbreak of cross-dressing or flip-flopping in the workplace in the jurisdictions and states that have adopted similar anti-discrimination provisions. The City of Minneapolis has had a transgender-inclusive non-discrimination law since 1975, and there has been no increase of cross-dressing activity in the workplace in that or any other jurisdiction.

VI. Massachusetts Will Join Other States And Local Jurisdictions That Ensure Freedom From Discrimination Based On Gender Identity or Expression.

Massachusetts need not fear that by explicitly prohibiting discrimination based on gender identity or expression, it will be entering into uncharted territory. Instead, Massachusetts will join the growing number of state and local governments that have already recognized that preventing discrimination based on gender identity and expression is both necessary and desired and therefore should be addressed explicitly in law. In passing H. 1728/ S. 1687, Massachusetts would become the 14th state to explicitly prohibit discrimination against transgender people, joining Iowa, Minnesota,

Maine, Rhode Island, Vermont, California, Hawaii, Illinois, New Jersey, New Mexico, Colorado, Oregon and Washington. The District of Columbia also has a comparable non-discrimination law.

Over 30 years ago, Minneapolis became the first municipality to adopt transgender-specific non-discrimination language. Since then, the number of additional jurisdictions that have adopted similar measures has grown at a dramatic rate. In addition, there are hundreds of employers and dozens of universities with non-discrimination policies protecting transgender people.²

It is time for Massachusetts to join this national movement towards equality and freedom from discrimination and violence for all citizens, regardless of their gender identity or expression.

July 14, 2009

Submitted by:

Jennifer Levi, Esq.
Director, Transgender Rights Project
Gay & Lesbian Advocates & Defenders
jlevi@glad.org

² A small sampling of Massachusetts universities and employers with non-discrimination policies protecting transgender people includes: Harvard University, Brandeis University, Bridgewater State College, Massachusetts Maritime Academy, M.I.T., American Express, Bank of America, Walgreens, Staples, Harvard Pilgrim Healthcare, and Raytheon. For a complete list see <http://www.transgenderlaw.org/college/index.htm#policies> and <http://www.transgenderlaw.org/employer/index.htm>.