



New Hampshire

Overview of Legal Issues
For Gay Men, Lesbians, Bisexuals
and Transgender People

April 2010

This document is intended to provide general information only and cannot provide guidance or legal advice as to one's specific situation. Moreover, the law is constantly changing and this publication is based upon the information that is known to us as of this printing. For guidance on your particular situation, you must consult a lawyer. You should not act independently on this information. The provision of this information is not meant to create an attorney-client relationship. Check our website, www.glad.org, for more information.

If you have questions about this publication, other legal issues or need lawyer referrals, call GLAD's Legal InfoLine weekdays between 1:30 and 4:30pm at:

800.455.GLAD (4523) or 617.426.1350

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New Hampshire Anti-Discrimination Law

Does New Hampshire have an anti-discrimination law protecting gay, lesbian, and bisexual individuals from discrimination?

Yes. On Jan. 1, 1998, New Hampshire's law banning sexual orientation discrimination in employment, public accommodations and housing came into effect. It only took three years to pass in the Legislature and had the support of the Roman Catholic Church.¹

Does it also protect people perceived of as gay, lesbian, and bisexual?

Yes, the law explicitly protects people perceived to be gay. The non-discrimination law defines "sexual orientation" as "having or being perceived as having an orientation for heterosexuality, bisexuality or homosexuality."² While the courts have not ruled on the meaning of the "perceived" language, it should mean, for example, that a person who is fired even while they are closeted, or because they are perceived to be gay (whether they are or not), may still invoke the protection of the anti-discrimination law to challenge the firing.

Does it also protect people associated with gay, lesbian, and bisexual individuals?

Not specifically. But in some situations, if a person is fired from a job or evicted from their home because they hang out with someone who is gay or lesbian, it may be possible to show that they were fired or evicted because the employer or landlord thought they, too, were gay or lesbian or perceived them to be so.

¹ See Norma Love, "Senate Passes Gay Civil Rights; Shaheen to Sign it," Foster's *Daily Democrat*, May 7, 1997.

² NH RSA 354-A:2, XIV-a

■ Employment

What does the law forbid? To whom does the law apply?

The non-discrimination law applies to employers (government based or private) who have at least 6 employees. It forbids employers from refusing to hire a person, or discharging them, or discriminating against them “in compensation, or in terms, conditions or privileges of employment” because of sexual orientation.³ This covers most significant job actions, such as hiring, firing, failure to promote, demotion, excessive discipline, harassment and different treatment of the employee and similarly-situated co-workers.

The law also applies to labor organizations (*e.g.* unions) and employment agencies.⁴

The equal employment opportunity program of the State Division of Personnel must ensure that the State employs qualified people regardless of sexual orientation.⁵ Moreover, the State is forbidden from discriminating in the classified service with respect to sexual orientation.⁶

As broad as the law is, there are several exemptions:

- The law does not apply to an employer with fewer than 6 employees. An employer’s spouse, parent, or child do not count as employees.⁷
- The law is not applicable to an employer which is a non-profit social club or a fraternal or religious association or corporation.⁸ Effective July 1, 2006, New Hampshire amended the definition of “employer” to include non-profit educational and charitable institutions.

³ NH RSA 354-A:7, I

⁴ NH RSA 354-A:7, II, III

⁵ NH RSA 21-I:42, XVI

⁶ NH RSA 21-I:52, I

⁷ NH RSA 354-A:2, VI, VII

⁸ NH RSA 354-A:2, VII

- There are no general occupational exemptions from the reach of the non-discrimination law. But an employer, agency or labor organization may defend against a discrimination claim by arguing that a “bona fide occupational qualification” of the particular job is that it have someone in it who is non-gay.⁹ While that defense is allowed in the law, it is strictly applied and very rarely successful.¹⁰

Does New Hampshire law forbid sexual harassment?

Yes, sexual harassment is expressly prohibited by state law;

“Unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal or physical conduct of a sexual nature constitutes sexual harassment when:

- a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
- b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- c. Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, or offensive working environment.”¹¹

Can a gay person be sexually harassed?

It is as unlawful to sexually harass a gay, lesbian or bisexual person as it is to harass a non-gay person. Some harassment is specifically anti-gay, and may be more fairly characterized as harassment on the basis of sexual orientation. Other harassment is sexual in nature and more appropriately categorized as “sexual harassment.” Both types of harassment can happen to the same person, and both are forbidden.

⁹ NH RSA 354-A:7, I, II, III

¹⁰ See, e.g., *Sarni Original Dry Cleaners, Inc. v. Cooke*, 388 Mass. 611, 447 N.E.2d 1228 (1983)

¹¹ NH RSA 354-A:7, V

The United States Supreme Court and other federal courts have found same-sex sexual harassment to violate sexual harassment laws.¹² Several state courts have reached the same result under their state non-discrimination laws.¹³

■ Public Accommodations

What is a “place of public accommodation”?

A place that caters or offers its services or facilities or goods to the general public is a place of public accommodation subject to the non-discrimination laws.¹⁴ Many types of places can be public accommodations, ranging from a motel, restaurant, rest area, highway or hospital.

What does the law say about discrimination in places of public accommodation?

Such places may not refuse, withhold or deny accommodations, advantages or facilities and privileges of the place of public accommodation because of a person’s sexual orientation.¹⁵

■ Housing

What is prohibited by the housing anti-discrimination law in New Hampshire?

The housing laws are intended to prohibit discrimination by those engaged in most aspects of the business of listing, buying, selling, renting or financing housing or commercial structure, whether for profit

¹² Compare *Oncala v. Sundowner Offshore Services*, 523 U.S. 75, 118 S.Ct. 998 (1998)(man can sue for sexual harassment by other men under federal sexual harassment laws); *Drew v. First Sav. of N.H.*, 968 F. Supp. 762 (D.N.H. 1997) (acknowledging claim under federal law which failed on the facts presented); *King v. Town of Hanover*, 959 F.Supp. 62 (D.N.H. 1996) (acknowledging claim under federal law)

¹³ *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285, 676 N.E.2d 45 (1997).

¹⁴ NH RSA 354-A:3, XIV.

¹⁵ NH RSA 354-A:17

or not.¹⁶ Most often, these claims involve a refusal by an owner, landlord or real estate broker to sell, or lease, or even negotiate with a person about the housing they desire to obtain. But other practices are forbidden, too, such as:

- a. misrepresenting the unavailability of a place when it is in fact available;¹⁷
- b. applying different terms or conditions based on sexual orientation;¹⁸
- c. printing or circulating discriminatory notices or advertisements;¹⁹
- d. evicting a tenant solely on the ground that he or she has AIDS or is regarded as having AIDS;²⁰ and
- e. making mortgage and real estate loans on a discriminatory basis,²¹ *i.e.* a form of credit protection.

There are several **exemptions** to the housing laws.

- a. A person who owns only one single family house may discriminate if they sell or rent the house without using the sales or services of any broker (or like person) and without circulating any discriminatory ads or notices.²²
- b. An owner who lives in 3-family, 2-family or 1-family unit is exempt from the law with respect to the rental of the other units.²³
- c. An owner may discriminate in the rental of rooms as long as they rent not more than 5 rooms and the owner lives in the dwelling.²⁴
- d. Religious organizations and organizations supervised by religious organizations which do not rent or sell for commercial (*i.e.*, profit) purposes, may give preference to persons of their same religion (with some exceptions).²⁵

¹⁶ NH RSA 354-A:10

¹⁷ A:10, IV

¹⁸ A:10, II

¹⁹ A:10, III

²⁰ A:10, VI

²¹ A:10, VII

²² NH RSA 354-A:13, I-a

²³ NH RSA A:13, I-b

²⁴ NH RSA A:13, I-c

²⁵ NH RSA A:13, II

- e. Private clubs which provide lodging for their members and not for profit may limit its rentals to such members, or give preference to its members.²⁶

■ Credit

There are no specific credit protections other than those related to mortgage and real estate loans discussed above.

■ Services

The patient's bill of rights now includes the right to receive appropriate care without regard to "sexual orientation."²⁷ The same protections apply to home health care providers.²⁸

■ Transgender/Gender Identity Discrimination

What protections exist for transgendered people under the discrimination laws?

There is no explicit protection in the law for transgendered persons in New Hampshire. However, even absent explicit protection, in some cases, an individual's gender identity may be regarded as "a gay issue" by a person or entity which is discriminating, and therefore allow a person to bring a sexual orientation claim.

In addition, in some cases a transgendered person may have a claim of sex discrimination if he or she is adversely treated at work, or in housing, or in a place of public accommodation, or in a credit transaction. If the adverse action is triggered by the sense that the individual does not meet the expectations of or act like a "real man" or

²⁶ NH RSA A:13, III

²⁷ NH RSA 151:21, XVI

²⁸ NH RSA 151:21-b, II-b

“real woman,” then this can be the basis for a sex stereotyping claim.²⁹ For more information, see GLAD’s publication, *Transgender Legal Issues in New England*, at: <http://www.glad.org/uploads/docs/publications/trans-legal-issues.pdf>.

■ Pursuing a Complaint

Can I file more than one type of discrimination complaint at once, for example, if I believe I was fired both because I am a lesbian and Latina?

Yes. The state non-discrimination laws for employment forbid taking an action against someone because of sexual orientation as well as because of age, sex, race, color, marital status, physical or mental disability, religious creed or national origin.³⁰ (Note, the housing non-discrimination laws also protect people based on their “familial status.”)

How do I file a complaint of discrimination?

You may file a complaint with the New Hampshire Commission on Human Rights (“CHR,” or “Commission”), 2 Chennel Drive, Concord, NH 03301. Information is available from (603) 271-2767. The complaint must be under oath, state the name and address of the individual making the complaint as well as the name and address of the entity he or she is complaining against (called the “respondent”). The complaint must set out the particulars of the alleged unlawful acts and (preferably) the times they occurred.³¹

Do I need a lawyer?

You do not need a lawyer at the CHR because the process is designed to allow people to represent themselves. However, GLAD strongly encourages people to find lawyers to represent them throughout the legal process, whether at the CHR or otherwise. Not only are there many

²⁹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); *Rosa v. Park West Bank*, 214 F.3d 213 (1st Cir. 2000)

³⁰ NH RSA 354-A:7

³¹ NH RSA 354-A:21

legal rules governing the CHR process, but employers and other defendants are likely to have legal representation.

What are the deadlines for filing a complaint of discrimination?

A complaint must be filed with the CHR within 180 days of the discriminatory act or acts.³² There are very few exceptions for lateness, and GLAD encourages people to move promptly in filing claims. The Attorney General can also file claims of discrimination.

What happens after a complaint is filed with the CHR?

The CHR assigns an investigator to look into your case, who may as part of the investigation send out written questions (interrogatories) to be answered under oath or request documents from the parties. If the case is not dismissed for technical reasons, a Commissioner will decide if there is probable cause to credit your allegations.

If probable cause is found, the case will be sent for “conciliation” or settlement proceedings. If negotiations fail to produce a settlement agreeable to all parties, the case proceeds further and the respondent will be asked to answer the complaint. After more discovery by the parties of each other’s positions, the Commission can hold a trial type hearing before 3 Commissioners. At that hearing, a person can be represented by a lawyer for the Commission or a private attorney.³³ A losing party can appeal to the Superior Court, and a winning party can file a case in Superior Court requesting enforcement of any CHR orders.

If the Commission does not find probable cause, a complainant may appeal to the Superior Court and must then show that the Commission’s decision is unlawful or unreasonable by a clear preponderance of the evidence.³⁴

³² NH RSA 354-A:21, III

³³ See generally NH RSA 354-A:21

³⁴ NH RSA 354-A:21, II-a

What are the legal remedies the NHCHR may award for discrimination if an individual wins his or her case there?

Whether a case involves employment, housing or public accommodations, the Commission may order the respondent to cease and desist from the unlawful conduct. The CHR may also order a respondent to do something affirmatively, such as hire, reinstate or upgrade an employee, restore a person to a labor organization, or extend a person the full advantages of a place of public accommodation. Employees may receive back pay, and all victims of discrimination are eligible for compensatory damages, including emotional distress damages. Finally, the Commission may impose an administrative fine (payable to the State), of up to \$50,000 depending on how many past offenses the respondent has committed.³⁵

Note that if a person's complaint is dismissed, and deemed frivolous, a respondent may seek to collect its reasonable costs and attorney's fees from the complainant.³⁶

Are there other agencies at which I can file a complaint for discrimination?

You may have other places to turn, but it depends on the facts of your particular situation. This publication concerns only New Hampshire non-discrimination law, and you may well have other rights.

1. Union: If you are a member of a union, your contract (collective bargaining agreement) may provide additional rights to you in the event of discipline, discharge or other job-related actions. In fact, if you obtain relief under your contract, you may decide not to pursue other remedies. Get and read a copy of your contract and contact a union steward about filing a complaint. Deadlines in contracts are strict. Bear in mind that if your union refuses to assist you with a complaint, you may have a discrimination action against them for their failure to work with you, or for failure of duty of fair representation.

³⁵ NH RSA 354-A:21, II-d

³⁶ NH RSA 354-A:21 II-f

2. Federal Agencies: Sometimes an action states a claim for a violation of federal law in addition to state law. For example, federal law forbids discrimination based on race, sex, age, religion and disability, but not on the basis of sexual orientation. Thus, a gay person with HIV who is fired from a job can file with the CHR (for sexual orientation and disability discrimination) as well as the Equal Employment Opportunity Commission (for disability discrimination). To file claims under federal law, the employer must have at least 15 employees, and complaints must be filed within 180 days of the discriminatory act, but if a person initially institutes his or her complaint with the CHRO, then the time limit for filing with the EEOC is extended to the earlier of 300 days or 30 days after CHRO has terminated the case. This does not, however, extend the 180 day limit for filing with the CHRO. (People who work for federal agencies are beyond the scope of this publication.)

3. State or Federal Court: After filing with the EEOC, as discussed above, a person may decide to remove his or her discrimination case from those agencies and file the case in court. There are rules about when and how this must be done. When claims of discrimination based on state law are removed from the CHR and filed in state superior court, either party may request a jury trial and the court may order the same relief as would the CHR.³⁷

For cases alleging violation of state non-discrimination laws, once a person has completed the CHR process, a party may file a new case in court to review the CHR decision or to seek enforcement of a CHR order.³⁸

In addition, a person may file a court case to address other claims which are not appropriately handled by discrimination agencies. For example, if a person is fired in violation of a contract, or fired without the progressive discipline promised in a handbook, or fired for doing something the employer doesn't like but which the law

³⁷ NH RSA 354-A:21-a

³⁸ NH RSA 354-A:22, I

requires, then these matters are beyond the scope of what the agencies can investigate and the matter should be pursued in court. If a person has a claim for a violation of constitutional rights, such as a teacher or governmental employee who believes his or her free speech or equal protection rights were violated, then those matters must be heard in court.

What can I do if my employer fires me or my landlord evicts me for filing a complaint of discrimination?

It is illegal to retaliate in these circumstances, and the employee could file an additional complaint against the employer for retaliation. “Retaliation” protections cover those who oppose unlawful conduct, or who have filed a complaint, testified, or assisted in any proceeding.³⁹

What can I do to prepare myself before filing a complaint of discrimination?

As a general matter, people who are still working with or residing under discriminatory conditions have to evaluate how filing a case will affect their job or housing, and if they are willing to assume those possible consequences. Of course, even if a person has been fired, or evicted, he or she may decide it is not worth it to pursue a discrimination claim. This is an individual choice which should be made after gathering the information and advice to make an informed choice.

Some people prefer to meet with an attorney to evaluate the strength of their claims before filing a case. It is always helpful if you bring to the attorney an outline of what happened on the job that you are complaining about, organized by date and with an explanation of who the various players are (and how to get in touch with them). It is also helpful to have a list of witnesses and other possible victims of discrimination. Try to have on hand copies of your employee handbooks or personnel manuals, any contracts, job evaluations, memos, discharge letters and the like. If you are concerned about a housing

³⁹ NH RSA 354-A:19. See also *Provencher v. CVS Pharmacy*, 145 F.3d 5 (1st Cir. 1998) (upholding federal retaliation claim of gay man)

matter, bring a copy of your lease, along with any notices and letters you have received from your landlord.

FAMILY LAW

■ Marriage & Civil Unions

Can same-sex couples marry in New Hampshire?

Yes. On June 3, 2009, the New Hampshire General Court approved and Governor Lynch signed a marriage equality bill (House Bill 436, An Act Relative to Civil Marriage and Civil Unions) that extended the right to marry to same-sex couples effective January 1, 2010. At the insistence of the Governor, the legislature also passed two other bills (HB 73 and HB 310) which affirm religious freedom protections with regard to marriage. In addition, the legislation ended the ability of same-sex couples to enter into New Hampshire civil unions on the same effective date and will automatically convert any existing New Hampshire civil unions into marriages effective January 1, 2011.

New Hampshire is now the fifth state that permits same-sex couples to marry—Massachusetts, Connecticut, Iowa, and Vermont are the other four.

The process for getting married in New Hampshire basically requires the following basic steps:

1. an eligible couple submits an application for a license in any town or city in New Hampshire⁴⁰;
2. the couple must pay the applicable fee and receive a marriage license from the clerk;
3. the couple must have the marriage solemnized (i.e., have a ceremony) within 90 days of filing the application;⁴¹

⁴⁰ NH RSA 457:22

⁴¹ NH RSA 457:26.

4. once the ceremony has been performed, the person who performed it has 6 days to send the license back to the city or town where it was issued;⁴² and
5. the clerk will then file the original, and the couple can receive an official certificate of their marriage.

The detailed process for getting married in New Hampshire, whether you should enter a marriage, and what it all means are questions that are addressed in GLAD's publication, *How To Get Married In New Hampshire*, at <http://www.glad.org/uploads/docs/publications/how-to-get-married-nh.pdf>

Can New Hampshire same-sex couples get married anywhere else?

Yes. Within the United States, it is now possible for same-sex couples to legally marry in Massachusetts, Connecticut, Vermont, Iowa and the District of Columbia. None of these states has a residency requirement for marriage, although they all have a residency requirement for divorce. GLAD has publications with detailed information about how to get married in any of the New England states where same-sex couples can marry at <http://www.glad.org/rights/publications/c/marriage>, and Lambda Legal (www.lambdalegal.org, 312-663-4413) has information about getting married in Iowa at http://data.lambdalegal.org/publications/downloads/fs_iowa-marriage-faq.pdf. Also contact Lambda Legal for information about getting married in the District of Columbia.

Canada allows same-sex couples to marry and has no residency requirement. For information about Canada see GLAD's publication, *What Do I Need to Know About Getting Married in Canada?* at <http://www.glad.org/uploads/docs/publications/canada-marriage-faq.pdf>.

In addition, the Netherlands, Belgium, Spain, South Africa, Norway and Sweden allow same-sex couples to marry, but for the most part each of these countries has requirements that make it difficult for non-citizens to marry.

⁴² NH RSA 5-C:49, I

How will the marriage of a same-sex couple be respected?

New Hampshire will generally respect the legal marriages of same-sex couples regardless of where the marriage was consecrated, and a New Hampshire marriage will be respected as a marriage in Massachusetts, Connecticut, New Hampshire, Vermont, Iowa and the District of Columbia. It will be respected as a civil union in New Jersey.

On November 19, 2009, the New York Court of Appeals, that state's highest court, unanimously affirmed the rulings of two lower courts that governmental agencies may continue to offer benefits to the same-sex spouses of public employees who legally marry outside the state. Over the objection of three of the seven members of the Court, the majority did not rule on the general issue of whether marriages of same-sex couples, valid where performed, are entitled to full legal recognition under New York's longstanding and expansive marriage recognition rule. Once again, as the New York court did three years ago in its *Hernandez* decision denying marriage equality to same-sex couples, the majority expressed its "hope that the Legislature will address this controversy." For more information about marriage recognition in New York, contact Lambda Legal at 212-809-8585.

However, because of the 1996 federal Defense of Marriage Act (DOMA), the federal government will not respect the marriage of any same-sex couple, and so married same-sex couples will not have access to the 1138 federal laws that pertain to marriage. On March 3, 2009, GLAD filed a federal lawsuit, *Gill et al. v. OPM et al.*, to challenge Section 3 of DOMA (see www.glad.org/doma for detailed information). Should GLAD succeed in this lawsuit, or should Congress repeal DOMA Section 3, some or all of the federal laws where marriage is relevant will be applicable to married same-sex couples who live in states where their marriage is respected.

What is happening with New Hampshire's civil unions?

Effective January 1, 2010, New Hampshire no longer issues civil union licenses, but it will continue to recognize civil unions (and comprehensive state domestic partnerships such as those from California, Oregon, Washington State and Nevada) and provide those

couples with all of the protections and responsibilities of marriage under New Hampshire state law.

Couples in a New Hampshire civil union have until January 1, 2011, to apply to the city or town clerk where their civil union is recorded to either get married or to have it legally designated and recorded as a marriage without needing to go through a marriage ceremony or to pay any fee.⁴³ Effective January 1, 2011, any existing New Hampshire civil unions that have not been annulled or dissolved will be converted into marriages by operation of law.⁴⁴ Civil unions from other states will not be converted into marriages, but will still be recognized and afforded all the same state protections and responsibilities as marriage.

For additional information about New Hampshire marriage and civil unions see GLAD's publication, *How To Get Married In New Hampshire*, at <http://www.glad.org/uploads/docs/publications/how-to-get-married-nh.pdf>.

■ Legal Protections for Same-Sex Couples

What steps can a couple take to safeguard their legal relationship in New Hampshire without joining in a marriage or civil union?

1. Relationship Agreement or Contract: Agreements regarding property and finances should be respected and honored according to ordinary rules of contract law, but it is important to note that the New Hampshire Supreme Court has not yet ruled on the subject. A number of other states have found such agreements enforceable, including Massachusetts.⁴⁵

2. Durable Power of Attorney: Any competent person may appoint another person as his or her “attorney-in-fact” for financial and/or matters in the event the one becomes incapacitated or disabled.⁴⁶ If no such appointment is made, then a “family”

⁴³ NH RSA 457:46, I

⁴⁴ NH RSA 457:46, II

⁴⁵ See *Wilcox v. Trautz*, 427 Mass. 316 (1998)

⁴⁶ NH RSA 506:6

member will be empowered to make decisions for the disabled or incapacitated individual. A power of attorney must be signed and notarized.

3. Advance Directive for Health Care: Since medical care providers look to next-of-kin to make health care decisions for an incapacitated individual, an unmarried person must create an “advance directive” which includes durable powers of attorney and living wills for health care if they wish a person other than immediate family to make those medical decisions. Under state law⁴⁷, a person may appoint a health care “agent” to make those decisions for him or her upon incompetence, *i.e.*, when the person no longer able to do so.⁴⁸ People should give a copy of the advance directive for health care to their doctors and should also consider giving it to family members.

Within this document, a person can also deal with end of life issues. New Hampshire law permits a person to make advance decisions about artificial nutrition and hydration as well as life sustaining treatments without which the person would die.⁴⁹

The advance directive for health care must be signed by the person giving the power of attorney and two witnesses (not including the agent, the person’s spouse or heir, a beneficiary under the person’s will or trust, or more than 1 employee of the person’s health care provider).⁵⁰ It cannot be revoked except by the person who gave the power of attorney.⁵¹ If a guardian is later appointed for a person, the Court presumes the power of attorney for health care remains in the best interests of the person who gave it unless there is clear and convincing evidence to the contrary.⁵²

4. Will: Without a will, a deceased unmarried person’s property passes to: (1) his or her children; (2) his or her family; (3) if next-of-kin cannot be located, to the state. If the person wishes to

⁴⁷ NH RSA 137-J

⁴⁸ NH RSA 137-J:2, III

⁴⁹ NH RSA 137-J:20

⁵⁰ NH RSA 137-J:14

⁵¹ NH RSA 137-J:15

⁵² NH RSA 137-J:21

provide for others, such as his or her partner, a will is essential. Even if a person has few possessions, he or she can name in the will who will administer his or her estate. If a person has children, he or she can nominate the future guardian of the child in a will.

5. Funeral Planning Documents: Upon death, a person's body is given to his or her next-of-kin. This can mean that a person's own partner has no right to remove the body or make plans for a final resting place. To avoid confusion and persuade relatives to honor the deceased's wishes, a person can leave explicit written directions giving another person (such as their partner or a friend) control over the funeral and burial arrangements. While this document does not have to be respected, it should help avoid complications in any but the most adversarial families. Some people include these instructions as part of a will, but since a will may not be found for days after death, it is preferable to give the instructions to the person you want to take care of matters as well as to family members.

6. Guardianship: New Hampshire's broad guardianship laws allow, among other things, an individual to nominate another person as the guardian of their person, estate, or both.⁵³ The advantage of nominating a guardian in advance is that you are selecting the person to take over all aspects of your financial matters.

Does a person need an attorney to get these documents?

GLAD recommends working with an attorney on these documents. Although some forms are available, the form may not be suited to your individual needs and wishes. Moreover, attorneys may be able to help effectuate your goals, for example, by drafting a will in a way which is more likely to deter a will contest by unhappy family members, or drafting an advance direction for health care with specific instructions from you about health care.

⁵³ NH RSA 464-A:10

If a couple separates, what is the legal status of a Relationship/Partnership Agreement/Contract?

Upon separation, the terms of a Relationship or Partnership Agreement/Contract will come into play if the couple has one. Absent an agreement, couples can get involved in costly and protracted litigation about property and financial matters but without the divorce system to help them sort through it.

If a person changes his or her mind about who should be his or her attorney-in-fact under a durable power of attorney; or health care agent; or beneficiary or executor under a will; or funeral planner, then those documents should be revoked -- with notice to anyone who was given copies of those documents. New documents should be prepared which reflect the person's present wishes.

■ Domestic Partnership

What is domestic partnership?

Although it is a term used in many contexts, it most often means a status which recognizes an unmarried couple and their children as a family for certain limited purposes. In the workplace context, domestic partnership plans allow an employee to obtain certain fringe benefits for his or her partner which were previously limited to married spouses. Some states, cities and towns have also enacted domestic partner laws. In other contexts, "domestic partner" is also a shorthand term for family, replacing "lover," "friend," and "roommate." Some people call cohabitation agreements "domestic partner agreements." For more information, see GLAD's publications on domestic partnerships at <http://www.glad.org/rights/publications/c/relationships/>.

Does New Hampshire provide domestic partner benefits to state employees?

In May 2006, the Merrimack County Superior Court ruled in *Bedford and Breen v. New Hampshire Technical College System*, a case

filed by GLAD, that the denial of insurance and leave benefits to the families of two New Hampshire state employees constituted both disparate treatment and disparate impact violations of the New Hampshire law against sexual orientation discrimination in employment. Although the State of New Hampshire appealed this case to the New Hampshire Supreme Court, the State dropped its appeal in May 2007, in light of the passage of the civil union law, which requires that civil union spouses of state workers be provided access to health benefits, and the collective bargaining decision to extend benefits to the domestic partners of state workers.

Can cities and towns in New Hampshire provide domestic partner health insurance benefits to their own employees?

Yes, and some do. Also, like state workers, municipal employees who are in a civil union can obtain health benefits for their civil union spouse.

What kinds of domestic partner benefits may private employers provide?

Private employers can provide to domestic partners any benefits they wish -- whether health insurance, family medical or bereavement leave, equal pension benefits, relocation expenses, or access to company facilities.

Even when employers provide these benefits, though, sometimes federal laws require different tax or other treatment of the benefits for domestic partners as compared to spouses. For example, an employee must pay income tax on the value of his or her partner's health insurance benefits, but a spouse does not.⁵⁴ And for pensions, a domestic partner has the no right to sign off if their partner decides to name someone other than them as the beneficiary of a pension although a spouse would have that right. In addition, an employee can change his or her beneficiary designation without the domestic partner's consent or knowledge.

⁵⁴ See Internal Revenue Code, Private Letter Ruling 9603011 (Jan. 19, 1996)

■ Adoption

Can a single gay individual adopt a child in New Hampshire?

Yes. Although New Hampshire had a ban on gay people adopting or foster parenting children for many years, those laws were repealed in 1998.⁵⁵

Can same-sex partners together adopt a child in New Hampshire?

The question of joint or second parent adoption by a same-sex couple is not addressed expressly by the New Hampshire statutes on adoption or by any authoritative ruling by the state supreme court, though the New Hampshire Supreme Court rejected a petition to jointly adopt by a divorced heterosexual couple in 1987.⁵⁶ Second parent adoptions have been granted at the lower court level in Belknap, Carroll, Coos, Rockingham, Strafford and Sullivan Counties, but have generally been denied in Cheshire, Grafton, Hillsborough, and Merrimack Counties.⁵⁷ If you have been denied a second parent adoption by a New Hampshire court, please contact GLAD.

For couples who have a marriage or civil union, New Hampshire law allows step-parent adoptions.⁵⁸ Note: For more information about both adoption and second parent adoption see *Adoption Questions And Answers* at <http://www.glad.org/uploads/docs/publications/adoption.pdf>.

Do we need to do a second-parent adoption if we are married or have a civil union?

A child born to a couple with a marriage or civil union is presumed to be the child of both members of the couple. While that is good news, it

⁵⁵ NH RSA 170-B:4 (permitting an “unmarried adult” to adopt)

⁵⁶ *In Re Jason C.*, 129 N.H. 762, 533 A.2d 32 (1987). The court read the absence of any procedure for custody determinations within the adoption process to indicate that the legislature did not intend to grant adoptions under these circumstances. The court’s determination also turned on the fact that allowing a divorced couple to adopt jointly would not further the legislature’s intent to limit adoption to applicants who would most likely provide a unified and stable household for the child—an intent that would be fulfilled by a committed same-sex couple seeking to adopt together.

⁵⁷ AnnMarie Timmins, *Adoption Law Is Up For Interpretation*, Concord Monitor, Apr. 10, 2006, at www.concordmonitor.com/apps/pbcs.dll/article?AID=/20060410/REPOSITORY/604100308.

⁵⁸ NH RSA 170-B:4, IV.

is still extremely important to adopt because another state might not respect the presumption if the couple moves. Adoption is a court judgment creating a parent-child relationship and is very likely to be respected by other states, even if these states are otherwise hostile to same-sex couples or parenting.

- *Miller-Jenkins Sidebar*

Relying on a partner's good will, or even on the fact that a child was born into a civil union, is not the best way to ensure ongoing parental rights of both parents if a couple later separates. A case in point is *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt.,2006), cert. denied, 127 S.Ct. 2130 (2007); *Miller-Jenkins v. Miller-Jenkins*, 49 Va.App. 88 (2006), cert. denied 128 S.Ct. 1127 (2008). This case has been in litigation since 2004, has involved two state Supreme Courts (Vermont and Virginia), and has already made several trips to the U.S. Supreme Court. Proceedings are ongoing.

In that case, Janet and Lisa had a child, Isabella, while they were in a civil union. Janet did not adopt. After the couple separated, Lisa moved to Virginia and used both the lack of an adoption, and Virginia's laws hostile to same-sex relationships to thwart Janet's contact with their daughter.

In November, 2009, the Vermont Family Court issued an order granting Janet responsibility for the day-to-day care of Isabella while granting Lisa liberal visitation rights. The transfer of custody was to have taken place on January 1, 2010. However, Lisa failed to appear at the appointed time, and an arrest warrant has been issued.

On March 8, 2010, Liberty Counsel filed on Lisa's behalf an appeal of the custody order with the Vermont Supreme Court, and GLAD has filed a response on behalf of Janet. GLAD and local counsel represent Janet in the Vermont proceedings. For more information about the case, go to <http://www.glad.org/work/cases/miller-jenkins-v-miller-jenkins>.

If same-sex parents raise a child together, but only one is the “legal” parent (because of birth or adoption), then what rights does the other parent have vis-à-vis the child?

These are tricky cases, but the New Hampshire courts have recognized they have the power to grant visitation rights to a person who is not an immediate family member if it is in the best interests of the child.⁵⁹ This logic has been applied to allow separating lesbian co-parents to have their visitation disputes heard in court.⁶⁰

Given recent developments in this area of law at the United States Supreme Court level, a court cannot allow visitation simply because it thinks visitation is in the child’s best interests: the court will need to ascertain whether there are special factors which justify the court overriding a fit parent’s choice to refuse contact.⁶¹

Regardless of the status of a person’s legal rights, it is critical to remember that children form strong attachments to their parental caregivers regardless of legal labels. Separating a child from a person who has acted as their parent can be a devastating loss for a child. Moreover, court proceedings to establish de facto parenthood will be painful and costly, so anything people can do outside of court to make decisions together about a child’s interests is strongly encouraged. For more information, see GLAD’s publication, *Protecting Families: Standards for Child Custody in Same-Sex Relationships*, at <http://www.glad.org/uploads/docs/publications/protecting-families.pdf>.

Short of joint adoption or second parent adoption, how can a family protect the interests of the child vis-à-vis his or her second parent?

There are a number of steps which can be taken, although none offer the security of a second parent adoption.

⁵⁹ *Roberts v. Ward*, 126 N.H. 388, 392, 492 A.2d 478, 481 (1985)

⁶⁰ See e.g. *P.B. v. P.D.R.*, Merrimack (N.H.) Super. Ct., No. 94-M-615, Order (Sept. 21, 1994)(permitting visitation for non-biological lesbian mother over biological mother’s objection); *Comeau v. Grondin*, Stafford (N.H.) Super. Ct., No. 94-M-1161, Order on Defendant’s Motion to Dismiss (Apr. 11, 1995) (allowing lesbian co-parent into court to make visitation claim).

⁶¹ *Troxel v. Granville*, 120 S.Ct. 2054 (2000)(plurality)

- a) **Co-parenting agreement:** An agreement setting out the parents' expectations about each other's roles, and their plans in the event of separation, disability or death. While these agreements may not be given effect by courts, they are important indicators of what the couple believed was in the best interests of the child, and thus may be influential (although not binding) on a court.

Note also that New Hampshire has a specific law about surrogacy. It prohibits payment of a fee to surrogates, other than expenses like lost earnings or medical expenses due to pregnancy and attorney's fees and court costs.⁶² It also imposes mandatory contract terms on surrogacy agreements, and makes it clear that the surrogate may keep the child in certain specified circumstances.⁶³

- b) **Co-guardianship:** This process allows a parent to name the other non-legal parent as a co-guardian so that he or she may secure medical attention and health insurance for the child and in all other ways act with the legal authority of a parent.⁶⁴ The best interest of the child standard controls appointments of guardians.⁶⁵ The guardian must annually file a report on the minor's welfare.⁶⁶ This status is not permanent, and any person, including the legal parent, may petition to have a guardian removed.⁶⁷

- a) **Wills:** The legal parent may nominate a guardian of the child upon the parent's death. These wishes are given strong preferences by courts. Of course, if the child has another legal parent living, then that person would have priority over the nominated guardian.

⁶² NH RSA 168-B:25, V

⁶³ See NH RSA 168-B:25, I-IV

⁶⁴ See NH RSA 463:10 (allowing appointment of appropriate persons, including "co-guardians may be appointed when in the best interests of the minor"), 12 (rights of guardian)

⁶⁵ NH RSA 463:8

⁶⁶ NH RSA 463:12

⁶⁷ NH RSA 463:14-16

■ Custody and Visitation

If I have a child from a former heterosexual relationship, and I am now involved with a same-sex partner, can my “ex” use this against me to deny me custody or visitation of my kids?

The New Hampshire Supreme Court has not yet squarely addressed this issue. States around the country are split on the issue, with a majority deciding the issue based on whether there is evidence of direct harm to the best interests of the child because of the parent’s sexual orientation, and some others assuming harm. As a matter of logic and experience, a parent’s sexual orientation should not in itself be grounds for denying custody or visitation.

One state Supreme Court case addressed the fact of gay parenting in the context of a constitutional challenge to New Hampshire’s now-repealed law forbidding gay people from adopting. The opinion is from an era in which fear of AIDS was rampant, and the opinion did not directly address the issue of how a parent’s sexual orientation would influence a custody contest between two parents. In the case, known as *Opinion of the Justices*, the court reasoned that the state’s adoption ban was permissible because of the state’s interest in providing for the “health, safety and proper training for children.”⁶⁸ It reasoned further that parents are the primary role models for children and having a gay parent could influence a child’s sexual identity.⁶⁹ But the Court drew a distinction between children in state-approved or state-licensed adoption and foster care programs for whom the State had a special responsibility, and children in already existing families. In the Court’s words, “this opinion is not meant to suggest that the State might have . . . authority to delve into the privacy of existing . . . custodial relationships.”⁷⁰

What are the factors for making custody determinations generally?

In a divorce, the court treats the parents as equals and encourages the parents to create a “parenting plan” that allows both parents to share

⁶⁸ 129 N.H. 290, 296, 530 A.2d 21, 24 (1987)

⁶⁹ 129 N.H. at 296-98, 530 A.2d at 25-26

⁷⁰ *Id.* at 298, 530 A.2d at 27

in the rights and responsibilities of raising their children.⁷¹ A court may also award visitation or custody to step-parents or grandparents.⁷²

The court's decisions are based on the best interest of the child standard and the safety of the parties.⁷³ The court may appoint a guardian ad litem to represent the best interests of the child.⁷⁴

How is “sexual orientation” used in custody proceedings?

In a divorce or paternity proceeding, a parent may argue that the other parent's sexual orientation is causing detriment to the child. Any number of reasons can be cited, such as that the gay or lesbian parent's sexual orientation is causing other people to tease or ostracize the child, or that the parent is a bad role model. Or a parent may argue that the ex's new partner is not good for the child. In the overwhelming majority of circumstances, these matters can be answered to the satisfaction of a judge in a way which does not penalize the gay parent or the child. Contact GLAD for further resources.

Does it matter if my “ex” knew or suspected I was gay or lesbian before we separated?

It can make a difference with respect to future modification of court orders for custody. People can seek to modify permanent court orders for custody in a number of circumstances, including when “clear and convincing evidence that the child's present environment is detrimental to the child's physical, mental, or emotional health, and the advantage to the child of modifying the order outweighs the harm likely to be caused by a change in environment.”⁷⁵ If a spouse did not know of your sexual orientation at the time of the court proceedings but learns it later, he or she may argue that the circumstances surrounding the child's welfare have changed and that the custody issues should be litigated anew. Of course, if your spouse or former heterosexual partner knew of your

⁷¹ NH RSA 461-A:2

⁷² NH RSA 461-A:6, V

⁷³ *Place v. Place*, 129 N.H. 252, 525 A.2d 704 (1987); *See also*, NH RSA 461-A:6, I

⁷⁴ NH RSA 461-A:6, VI

⁷⁵ NH RSA 461-A:11, I (c)

sexual orientation at the time of the court proceedings establishing custody, a modification petition on those grounds would be pointless.

Can a court keep my kids from visiting when my partner is present?

The standard for restrictions on visitation, and in all matters, is what is in the best interests of the child with no concern for the adults. Courts have enormous discretion in visitation matters and certainly have the power to restrict visitation. But unless the partner is causing harm to the child -- a very high standard -- visitation *should not* be restricted.

■ Domestic Violence

What is domestic violence?

Under the law, “abuse” covers a variety of activities. These generally include:

- a. attempting to cause, or recklessly or purposely causing bodily injury or serious bodily injury;
- b. placing another in fear of imminent bodily injury or attempting to do so by physical menace or threats;
- c. attempting to or engage in involuntarily sexual relations under threat or force;
- d. in some circumstances, attempting to or committing kidnapping, criminal restraint or false imprisonment;
- e. attempting to or in fact destroying the property of a person eligible for protection under the domestic violence laws;
- f. attempting to or in fact entering onto a person’s property when not authorized to do so where that person is eligible for protection under the domestic violence laws;
- g. repeated communication with the purpose to annoy or alarm another.⁷⁶

⁷⁶ NH RSA 173-B:1, I

Do the domestic violence laws apply to people in same-sex relationships?

Generally yes, spouses and ex-spouses in marriages and civil unions are explicitly covered and most other same-sex relationships are covered. “Abuse” includes the acts defined above if they occur between people who are:

- a. “family or household members” -- including people who live together or formerly did so; and
- b. “current or former sexual or intimate partners” -- which includes people who are presently or were formerly in a romantic relationship, regardless of whether or not the relationship was “sexually consummated.”⁷⁷

How do I get a court order protecting me from an abusive partner?

You can get a protective order from the District Court in the town where you or the abuser lives, as well as the Superior Court in the county where you or the abuser lives. If you live in Rockingham County or Grafton County, you must go to the Family Division Court. If you have fled your home, you can go the court closest to your temporary home. Note that the Court will keep your address confidential – you need to let them know if you move so they know how to contact you.

To apply for a protective order, ask the clerk of the court for a Domestic Violence Petition. Simply write down what happened to you as clearly and in as much detail as possible. You must include the date, the time and the location of the important facts about the abuse. You will have to swear what you have written is true, so don’t guess about something if you don’t know for sure. Ask for additional pages to write down all of the facts, past and present, of abuse that you can think of.

If you ask for emergency orders, the clerk will take the papers to a judge. If you see the judge, just tell him or her simply and honestly what happened to you and why you are in danger. If the judge finds that you are in danger, he or she may immediately issue temporary protective

⁷⁷ NH RSA 173-B:1, II

orders, directing the abuser no to abuse you and not to enter your residence, workplace or school. The court may also issue an emergency order granting you temporary custody of your children and ordering the abuser to turn over to a peace officer any guns or other deadly weapons he or she could use to harm you. You will get a copy of the order from the clerk of court and you should keep it with you at all times.

A copy of the protective order will be sent to the Department of Safety by computer. The State Police must make information regarding the protective order available to your local police and Sheriff. The local police must promptly serve your abuser with a copy of the temporary protective order. There is no charge for this service, and the orders are in effect state-wide in New Hampshire.

What can I do if the courts are closed?

If you are in immediate danger of abuse and no court is open, you may get an emergency protective order by contacting the nearest police department. A police officer can help you fill out the forms and will contact a judge by telephone. Everything said in response to the above question remains true about how the process works. The one difference is that an order issued over the telephone will only be effective until the close of business on the next regular court business day. For the protection order to remain in effect, you must go to the nearest District, Family or Superior Court before the close of the next business day to ask for a new protective order.

What happens after I obtain a temporary order?

A full hearing will be heard on your petition within 30 days of when you file it or within 10 days of the date the petition is served on your abuser, whichever is later. The abuser may also ask for a hearing within 3 to 5 days, which you must attend.

You have the right to bring a lawyer to represent you at the hearing. It is a good idea to see a lawyer if you think custody or child support will be disputed, or if you have been severely injured or expect an injury to last a long time.

Where can I go to get help?

If you cannot afford a lawyer, a domestic violence program in your area may be able to refer you to a lawyer who will do the case for free. The DOVE Project (Domestic Violence Emergency Project) of the New Hampshire Bar Association can provide referrals. Contact them at (866) 644-3574, or www.nhbar.org. Their mailing address is 2 Pillsbury Street, Suite 300, Concord, NH 03301-3502.

Does domestic violence play a role in custody decisions?

Yes. Evidence that a parent has in the past, or is presently, abusing the other parent or the child is a factor showing that a parent should not be presumed to be entitled to joint legal custody, as discussed above.⁷⁸ As “parental conduct,” it is also a factor that will affect the analysis of what is in the best interests of the child.

⁷⁸ NH RSA 458:17, II (c)

HATE CRIMES, SEX LAWS & POLICE

■ Hate Crimes & Violence

Does New Hampshire have a hate crimes law?

Yes, New Hampshire has a law providing for increased penalties for hate-motivated violence.⁷⁹ If a person was “substantially motivated to commit the crime because of hostility towards the victim’s religion, race, creed, sexual orientation . . . , national origin, or sex,” penalties may be increased. The defendant must be notified of the possibility of an enhanced penalty prior to the trial.⁸⁰

What other laws provide protection against hate-motivated violence?

A. General Criminal Laws: Hate crimes can sometimes be prosecuted under existing criminal laws, such as assault and battery, assault and battery with a dangerous weapon, murder, etc. These generic laws do nothing to address the fact that an assault was hate-motivated, but they provide for some level of criminal accountability. But New Hampshire does allow a sentence to be increased when the crime is bias-motivated.

B. “Civil Rights Law”: On the civil side, New Hampshire law permits the Attorney General (but not a private person on his or her own) to bring a civil action seeking a protective order or other relief when an attacker -- because of the sexual orientation, race, color, religion, national origin, ancestry, gender or disability of the victim -- interferes with a person’s rights granted them under state or federal law.⁸¹ The Attorney General may also bring claim against minors.⁸² There is no doubt these laws can be used to seek

⁷⁹ NH RSA 651:6 I-g

⁸⁰ NH RSA 651:6, II

⁸¹ NH RSA 354-B:1

⁸² NH RSA 354-B:2, II; B:5

protection from further gay bashing incidents. In addition, a person who violates the law may be ordered to pay a fine (to the State) of up to \$5,000, as well as out-of-pocket expenses incurred by the victim (to the extent those have not been paid by another).⁸³ Violation of a court-issued restraining order or injunction is a criminal offense.⁸⁴

Where can I call if I think I've been a victim of a hate crime?

In addition to contacting the local police, you may contact the 24-hour hotline operated by the Attorney General's Office at (603) 271-1241. You may also call the Criminal Division of the Attorney General's office at (603) 271-3658. Be sure to explain all of the factors that make you think this was a crime of bias.

For support and advocacy, contact:

- a. the New Hampshire Attorney General's Office, Office of Victim/Witness, 33 Capitol St., Concord, NH 03301-6397, (603) 271-3671;
- b. New Hampshire Coalition Against Domestic and Sexual Violence, (800) 277-5570.

In what ways might the recently passed federal hate crimes law help to investigate and prosecute hate crimes?

The *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*⁸⁵ was passed by Congress on October 22, 2009 and was signed into law by President Obama on October 28, 2009. It expands the 1969 United States federal hate crime law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity or disability.

First, and perhaps foremost, the Act allows local and state law enforcement agencies to apply for the following federal assistance from the U.S. Attorney General:

⁸³ NH RSA 354-B:3

⁸⁴ NH RSA 354-B:4

⁸⁵ See H.R. 2647 at <http://thomas.loc.gov/cgi-bin/query/F?c111:6:./temp/~c111X7TYvf:e1999565:>

- investigative, technical, forensic or prosecutorial support for criminal investigations and prosecutions,
- grants for extraordinary expenses associated with the investigation and prosecution of hate crimes, and
- grants to combat hate crimes committed by juveniles.

In providing assistance to local and state authorities, the priorities are hate crimes:

- where the offender(s) has committed crimes in more than one state, or
- that occur in rural areas which do not have the resources needed to prosecute such crimes.

Second, for hate crimes that in some way involve crossing state or national borders, or involve or affect interstate commerce, and where a state does not have jurisdiction or has requested federal assumption of jurisdiction, or where the federal government feels that justice has not been served or that U.S. prosecution is in the public interest, the Act authorizes the federal government to prosecute the case.

The Act also requires the Federal Bureau of Investigation to track statistics on hate crimes on the basis of gender and gender identity (statistics for the other groups are already tracked) and on crimes committed by and against juveniles. This is the first federal law to explicitly extend legal protections to transgender persons.

■ Criminal Sex Laws

Does New Hampshire have a sodomy law?

No.

If it's not illegal for gay people to have sex, why are gay people still getting arrested?

Gay people are subject to the full range of laws as are non-gay people, so sex in public, or with underage persons, or without consent,

or with force, are all illegal. Sex for pay -- as either the customer or the provider -- *i.e.*, prostitution, is also illegal.

Some gay people are arrested for violating the “indecent exposure and lewdness” law.⁸⁶ This law targets behavior which is either:

- a. fornication (*i.e.*, intercourse), exposure of the genitals, or “any other act of gross lewdness” if the circumstances are such that a person should know those acts “will likely cause affront or alarm”; or
- b. purposely performed in front of a child less than 16 years old.

As a general matter, a violation of the indecent exposure law is a misdemeanor. However, if a person performs a sex act in front of a child who is 12 years old or younger, or if a person has previous convictions for indecent exposure in New Hampshire or elsewhere (for similar offenses), then the person can be prosecuted for a felony.⁸⁷

What kinds of activity are forbidden in public?

The State has a legitimate law enforcement interest in protecting the general public from open displays of sex -- whether the sex is between people of the same-sex or of a different-sex. But socializing and expressions of same-sex affection between adults that does not involve the touching of genitals or buttocks or exposure of those is not illegal, *regardless of where it occurs*. No one should be arrested or hassled for hand-holding, or cruising, or talking, or flirting, toe-tapping or other non-sexual touching.

Sex is not illegal simply because it takes place outdoors, in parked cars, or on public lands. It all depends on the circumstances. For example, a person secreted in a private area, far off of a path behind bushes, or beyond fenced areas, has demonstrated by his or her actions a *lack of intent* to be seen by others, and can argue the circumstances are such that there was no reason to know his or her activities would cause shock or alarm. Or activity may take place in a cruising area where

⁸⁶ NH RSA 645:1

⁸⁷ NH RSA 645:1, II, III

there is a reasonable expectation that the people present would not be alarmed by or take offense to the activity.

As a practical matter, regardless of one's rights, having sex outdoors is a risky business. For one, based on numerous reports to us, we believe that some police will overlook sexual activity of non-gay people occurring outdoors, but arrest gay people engaged in sexual activity in the same types of venues. Another concern is that some police "hunt" for gay people having sex outdoors in park lands and rest areas -- sometimes in uniform and sometimes as undercover decoys. Either way, a person can be charged with a violation of the sex laws.

What is the age of consent for sexual activity?

Generally, the age of consent for sexual activity is 16.⁸⁸ However, if the person is in a position of authority it can be 18.⁸⁹

Does New Hampshire have a "sex offender registry" type of law?

Yes. Every state now has such a law, although the terms differ from state to state.

What types of crimes are deemed to be "sex offenses"?

As you would expect with a law designed to ensnare dangerous and violent predators, most of the crimes involve violence or sex with children. A single conviction under the indecent exposure law is not a registrable sex offense. *But if you have been convicted under that law of performing a sex act in front of a child who is 12 or younger, or you have previous convictions for indecent exposure in New Hampshire or elsewhere, you are deemed to be a sex offender.*⁹⁰

⁸⁸ NH RSA 632-A:3 (sexual "penetration" of person under age 16 is a felony); *State v. Berry*, 117 N.H. 352, 373 A.2d 355 (1977)(statutory rape when sexual activity occurs with person under age 16)

⁸⁹ NH RSA 632-A:2 I(k)

⁹⁰ For a full list of sex offenses, see NH RSA 651-B:1

How can I find out what charges I have been convicted of?

You can contact the New Hampshire Department of Public Safety, Division of State Police, Central Repository for Criminal Records, 10 Hazen Dr., Concord, NH 03305; (603) 271-2538. They have their own form, which you must have notarized, and you must pay a \$10 fee. You may request your records in person or by mail.

What obligations are imposed on “sex offenders”? What information is available?

A sex offender must report his or her mailing address and residential address within 30 days of release of custody or of moving to New Hampshire, and then again every year. Some will have to do so more often. In addition, sex offenders must inform the Department of Safety whenever they move, change their name or if they are using an alias. All convicted offenders are registered with the Department of Safety when the Department receives information about a conviction.⁹¹

A convicted sex offender must register for a minimum of ten years and some must do so for life, especially if their crime involved children or if they have multiple convictions.⁹²

The State Police also maintain a separate list of people convicted of certain offenses (including of the indecent exposure law where the exposure is before someone 12 or younger, or where there are multiple convictions for this or a like offense in NH or elsewhere).

The information recorded includes personal data, *i.e.*, the name and address of the individual and the offense for which the individual was convicted (and when and where the individual was convicted). If the information is available, then the list will also include a physical description or photo of the person, information about other convictions and a profile of the victims.

⁹¹ NH RSA 106-B:14

⁹² NH RSA 651-B:6

All of this information is updated and sent monthly to local law enforcement agencies, who then make the information available to “interested members of the public upon request.”⁹³ Among other things, a person may request information about a specific named individual or about all listed individuals residing in a specific city or town.⁹⁴

■ Police Harassment

I am often told by police to “move along” from public areas. Is that legal?

Not necessarily. If the area is public and not posted as having particular hours, you generally have a right to be there as long as you are engaged in lawful activity. Public places belong to everyone. Even if police officers want to deter crime, or suspect some kind of unlawful intent, they have no general right to request people to move from one place to another *unless there is unlawful conduct*.⁹⁵

What are the general rules about interaction with police?

The presence of individuals who appear to be gay, lesbian, bisexual or transgendered -- whether because such individuals are displaying symbols such as a rainbow flag or pink triangle or for any other reason should not trigger any special scrutiny by a police officer, other than a concern for the safety and well-being of those persons that the officer would have for any other park or rest area patron.

Police may of course approach a person, and make inquiries when they suspect a person has committed, is committing, or is about to commit a crime.⁹⁶ But even if a person has been convicted of a past offense, or fails to respond, or responds in a way which does not satisfy the officer, the person cannot be arrested without probable cause to believe the person committed a crime.

⁹³ See generally NH RSA 651-B:7

⁹⁴ NH RSA 651-B:7, IV

⁹⁵ *Kent v. Dulles*, 357 U.S. 116, 126 (1958); see generally NH Const., pt. 1, art. 19 (Searches and Seizures Regulated).

⁹⁶ NH RSA 594:2

If an officer has “reasonable suspicion” that a crime has been committed or is about to be committed, he or she may briefly detain an individual, or stop the person for purposes of investigation.⁹⁷

According to the New Hampshire Supreme Court, such a brief detention is a permissible intrusion on a person’s liberty when the police officer can point to specific and articulable facts which, taken together with all rational inferences from those facts, warrant the intrusion. A hunch is not enough.⁹⁸

An arrest can only occur upon “probable cause” that a crime has been committed.⁹⁹

What can I do if I believe I have been improperly treated by the police?

There are several places you can call to discuss your options. One is GLAD at (800) 455-GLAD. Another is the NH Civil Liberties Union at (603) 225-3080.

Complaints may be made to any individual police department for matters concerning its officers. In addition, you may contact the 24-hour hotline operated by the Attorney General’s Office at (603) 271-1241.

Complaints to the New Hampshire State Police may be made to State Police Headquarters, over the telephone or in writing. A supervisor will call back the complaining person to further process the complaint. If the State Police act further on the complaint, the complainant will have to come into the office to make a written statement. Contact State Police Headquarters, 10 Hazen Dr., Concord, NH 03301, (603) 271-2575. Please let GLAD know whenever you make a complaint so that we can track the responsiveness of the various police departments.

⁹⁷ *State v. White*, 119 N.H. 567, 571-572, 406 A.2d 291 (1979). *Terry v. Ohio*, 392 U.S. 1, 16 (1968)

⁹⁸ *See e.g. State v. Maya*, 126 N.H. 390, 493 A.2d 1139 (1985)(three minute investigative stop in which officer did not more than preserve the status quo did not violate art. 19 since three minutes is the minimal time for establishing identity and assessing the plausibility of a person’s story)

⁹⁹ *See* NH RSA 594:10 (police can arrest without warrant if probable cause to believe misdemeanor offense committed in officer’s presence, or if person will destroy evidence of misdemeanor crime, and may arrest if reasonable grounds to believe a felony has been committed). “Reasonable grounds” is the same as “probable cause.” *State v. Vachon*, 130 N.H. 37, 533 A.2d 384 (1987)

In some cases, an individual may decide to pursue a lawsuit -- because of injuries, improper detainment, or for some other reason. These matters are highly specialized, and GLAD can make attorney referrals.

People can also file complaints with the Attorney General's Office, Criminal Division at (603) 271-3658. They may participate in an investigation or refer a matter back to the chief of the particular police department at issue.

STUDENTS' RIGHTS

■ Harassment and Discrimination at School

Are there any laws protecting gay students in New Hampshire?

While there are no laws which explicitly protect students based on their sexual orientation, a law which became effective in January 2001 might be of assistance to students who are physically or verbally taunted because of their sexual orientation.

Under the Pupil Safety and Violence Prevention Act, each local school board must develop a “pupil safety and violence prevention policy” and the State School Board must prepare an advisory to help school districts implement their policies.¹⁰⁰

In addition to developing policies, school employees or people who contract with schools are obliged to report incidents of harassment or bullying to the school principal which they themselves have seen or which they believe have occurred based on reliable information. The principal must report such incidents to the Superintendent. Harassment includes “insults, taunts, or challenges, whether verbal or physical in nature, which are likely to intimidate or provoke a violent or disorderly response...”.¹⁰¹ This law may provide the basis for more a more immediate and thorough response to harassment.

Are there other laws which may protect me from discrimination and harassment because of my sexual orientation?

Possibly. Under federal law, public schools which receive federal funds may not discriminate on the basis of sex. Sometimes, the harassment of a gay student will be sexual harassment forbidden by this federal law, known as Title IX. Complaints can be made to your school Title IX coordinator, as well as to the federal Dept. of Education, Office

¹⁰⁰ NH RSA 193-F:3, I; NH RSA 186:11, XXXVI

¹⁰¹ NH RSA 193-F:3, II

of Civil Rights, in Boston. A student's constitutional rights may be violated by some kinds of discrimination and harassment.

What can I do if I'm being discriminated against at school?

There are many ways to approach the issue. One is to ask for support from a friend, teacher or counselor and talk to the people who are bothering you. That is not an option, however, if you don't feel safe doing so.

Take a look at your school policies and notify whoever is supposed to be notified -- usually a vice principal or Title IX coordinator. You should document any incidents of harassment or discrimination in writing. Once you meet with the right officials, make a note of what you told them and on what date and ask when they will be getting back to you with a response. If they don't help you or don't follow through, you may wish to write to the principal and superintendent and ask for them to end the discrimination.

You may also want to contact the State Dept. of Education at (603) 271-3494 or at <http://www.ed.state.nh.us/>. If you want to consider legal action against the town, contact GLAD.

■ **Gay/Straight Alliances**

Do students have the right to form Gay Straight Alliances in their schools even if the principal or community opposes it?

Students have broad rights to form groups. In particular, a federal law known as the "Equal Access Act" provides that secondary school students in schools that receive federal funding and have extra-curricular groups must allow students to form other extra-curricular groups without discriminating based on the religious, philosophical, political or other content of the speech at meetings. GLAD brought and won a case for students who wanted to start a Gay Straight Alliance at West High in Manchester, New Hampshire on this very basis.

Gay & Lesbian Advocates & Defenders (GLAD) is the leading legal rights organization in New England dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. Through impact litigation, education and public policy work, GLAD seeks to create a better world that respects and celebrates diversity—a world in which there is equal justice under law for all.

GLAD's Legal InfoLine and publications are provided *free of charge* to all who need them. We hope that those who are able will make a contribution to ensure that GLAD can continue the fight for equal justice under the law.

To make a tax-deductible contribution, visit our website at www.glad.org, or call us at (800) 455-GLAD (4523) with your credit card, or mail your check, payable to GLAD to 30 Winter Street, Suite 800, Boston, MA 02108. If your workplace has a matching gift program, please be sure to have your donation matched. Please contact us if you would like more information on becoming a GLAD partner.

Thank You!



GLAD



EQUAL JUSTICE UNDER LAW

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