

MASSACHUSETTS CATHOLIC CONFERENCE
WEST END PLACE

150 Staniford Street, Boston, MA 02114-2511
Phone (617) 367-6060
FAX (617) 367-2767

LEGISLATIVE TESTIMONY

To: Members of the Joint Committee on the Judiciary
From: Daniel Avila., Esq., Associate Director for Policy & Research
Re: A Preliminary Legal Analysis of H. 1722, “An Act Relative to Gender Based
Discrimination and Hate Crimes”
Date: March 4, 2008

House 1722, “An Act Relative to Gender Based Discrimination and Hate Crimes,” proposes among other actions to add to various non-discrimination mandates in Massachusetts law newly protected categories of “gender identity and expression,” defined as “gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s assigned sex at birth.”¹

If approved, this broad language would nullify all public and many private policies² that in any way affect an individual’s desire to identify, appear, express, or behave in any manner associated to “gender,” of which sexuality, according to Webster’s Dictionary, is an essential definitional component.³

Given the definitional link between gender and sexuality, leaving the term “gender” statutorily undefined, and using that term to modify “identity, appearance, expression, or behavior,” extends the legislation’s scope of application to all policies concerning in any way sexual identity, sexual features, sexual organs, sexual function, sexual intercourse, and sexual exhibition.

Thus, for example, it is my legal opinion that laws against public nudity and indecent exposure in public places would be invalidated since any assessment of “nudity” or “indecency” is necessarily a product of gender-related norms concerning personal appearance that regulate the

¹ House 1722, Section 7. The bill would also amend state laws governing hate crimes, employment, credit, housing, education, and public accommodations.

² Sections 24-26 of House 1722 would amend the statute prohibiting discrimination in places of public accommodations, defined as “any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public.” M.G.L. c. 272, § 92A. There is no distinction made between governmental offices and other public spaces such as sidewalks and parks, and private places open to the public, such as businesses. See *id.*, listing “public library” as one example of a place of public accommodation. In addition, House 1722 would apply to public schools, including charter schools (sections 3-6), among other settings.

³ “Gender . . . 2a: sex <the feminine *gender*> b: the behavioral, cultural, or psychological traits typically associated with one sex.” Merriam-Webster’s Online Dictionary at <http://www.merriam-webster.com/dictionary/gender>; The Merriam-Webster Online Dictionary links the word “sex” as used in the “gender” definition to the Online Dictionary’s definition of “sex:” “Sex . . . 1: either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures 2: the sum of the structural, functional, and behavioral characteristics of organisms that are involved in reproduction marked by the union of gametes and that distinguish males and females 3 a: sexually motivated phenomena or behavior b: sexual intercourse 4: genitalia.” *Id.* at <http://www.merriam-webster.com/dictionary/sex>.

public exposure of sexual organs. In addition, females would have the “civil right”⁴ to go topless on public property and in all private places of public accommodation since any relevant clothing requirement would necessarily be related to “gender.” Restrictions against sexual conduct in places open to the general public would run afoul of the new mandate by interfering with behavior that undoubtedly is, because it is sexual, a particular form of “gender expression.” Government agencies would lose their power to classify and regulate as pornography any publicly accessible media representations involving sexual conduct since the exercise of any such power in the public forum would conflict with the newly created and unlimited “civil right” to freely engage in any gender-related “expression.” The legislation extends these and other extraordinary appearance and behavioral “rights” to the public school setting, thus implicating even more directly the moral interests of children.⁵

These unprecedented, dramatic and disturbing legal effects would accrue in addition to what undoubtedly garners the greatest public attention when such laws are proposed. House 1722 would expressly overturn the practice of limiting access to public restrooms according to one’s biological sex (thus giving males “expressing” themselves as females the right to access female-only bathrooms and vice versa in the case of male-only bathrooms).⁶ In addition, faith-based places of public accommodation would be subject to threat of litigation and regulatory actions forcing them to accommodate “protected” expressions or behavior in violation of their religious, ethical and moral principles.⁷

Finally, sponsors of House 1722 argue that it would only codify current executive policy as promulgated by the Massachusetts Commission Against Discrimination (MCAD).⁸ There appears to be only two MCAD rulings, both of which dealt with narrower claims of employment-related harassment of persons undergoing sex change treatment and identifying themselves as “transsexual,” and none of which addressed claims of protection as broad as those contemplated by the undefined references describing the would-be protected class in House 1722.⁹ For example, despite the earlier MCAD rulings, the Gay & Lesbian Advocates & Defenders (GLAD) recently advised that the organization “is presently unaware of any cases in New England addressing the issue of what legal recourse a transgender person may have if denied access to a safe and appropriate public restroom.”¹⁰ Thus GLAD’s analysis bolsters my opinion that the

⁴ See M.G.L. c. 272, § 98 (“recogn[izing] and declare[ing] to be a civil right . . . the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement”).

⁵ House 1722, Sections 3-6.

⁶ “The exceptions to the prohibitions of sex discrimination stated herein [referring to single-sex bathrooms etc] shall only apply to the extent such places of public accommodation, resort or amusement allow persons the full enjoyment of the accommodations consistent with an individual’s gender identity or expression.” House 1722, section 25.

⁷ See Barbara Feder Ostrov, “Transgender Woman Sues Hospital: Catholic-Owned Seton Won’t Let Her Get Breast Surgery,” Mercury News, Jan. 5, 2008, available at http://www.mercurynews.com/religion/ci_7889303 (reporting on California litigation filed against Catholic hospital, claiming unjust discrimination due to hospital’s refusal to allow surgery to alter sexual organs for man seeking to express himself as a woman).

⁸ See Massachusetts Transgender Political Coalition, Talking Points: “An Act Relative to Gender Based Discrimination and Hate Crimes,” (n.d.) available at http://www.glad.org/rights/MTPC_TalkingPoints.pdf.

⁹ *Jette v. Honey Farms Mini-Market*, 23 Mass. Discrim. L. Rep. 229 (2001); *Millett v. Lutco, Inc.*, 23 Mass. Discrim. L. Rep. 231 (2001)

¹⁰ GLAD, *Transgender Legal Issues: New England* at p. 20 (Jan. 2008), available online at http://www.glad.org/rights/Transgender_Legal_Issues.PDF.

proposed legislation would, in addition to expanding personal license in other areas of the law, create a new right of access to public restrooms that is not already established in current policy.

As indicated by the preliminary legal analysis, House 1722 would abolish a broad range of legal limits flowing from long-accepted norms of public behavior. Its negative impact on all of society will be far-reaching. The introduction of this bill is the direct consequence of redefining marriage. Fresh from their successful campaign to alter the long-accepted dimensions of that institution, and seemingly without even taking a breath, advocates for same-sex marriage¹¹ now immediately propose as a legislative follow-up what many in Massachusetts feared would be the inevitable fall-out, the complete dismantling of public norms governing sexual morality. The world can now take note that, as verified in Massachusetts by the filing of this bill, this is where the legal revolution on marriage is intended to lead.

In light of the foregoing, indicating the bill's substantial and detrimental public impact, this Committee respectfully is urged to give an unfavorable report recommending that House 1722 ought not pass.

¹¹ Groups at the forefront of the same-sex marriage campaign in Massachusetts that now are backing this bill include MassEquality, GLAD, the state ACLU chapter, NOW, Human Rights Campaign, Mass. Gay & Lesbian Political Caucus, and the state chapter of the National Association of Social Workers, among others. See membership list of the Massachusetts Transgender Political Coalition (<http://www.masstpc.org/legislation/legcoalition.shtml>).