



# NYCLU

NEW YORK CIVIL LIBERTIES UNION

## 2009 Legislative Memorandum

**Subject:**     **A.5710 / Gottfried**  
                  **S.2406 / DuaOne**

(AN ACT to amend the executive law, the civil rights law and the education law, in relation to prohibiting discrimination based on gender identity or expression; and to amend the penal law and the criminal procedure law, in relation to including offenses regarding gender identity or expression within the list of offenses subject to treatment as hate crimes)

**Position:**     **SUPPORT**

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New York’s civil rights laws are intended to promote the fundamental values that underlie our political system — including personal liberty, tolerance of diverse backgrounds and points of view, and respect for privacy. And above all else, civil rights laws should serve to protect members of minority groups most marginalized in our society. That protection should be available to individuals whether the defining factors of the minority group are race, ethnicity, national origin, disability, religious or political beliefs, sexual orientation, or gender identity or expression.<sup>1</sup>

However, transgender<sup>2</sup> and gender non-conforming individuals are currently denied the basic legal protections that are afforded other minority groups because gender identity and expression are not recognized as protected statuses under New York State’s civil rights laws.

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<sup>1</sup> Assembly Bill 6584-A/Senate Bill 3753-A, Section 3 - “The term ‘gender identity or expression’ means having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth.”

<sup>2</sup> Transgender People and the Law – Frequently Asked Questions, ACLU Lesbian, Gay, Bisexual, Transgender and AIDS Project, [http://www.aclu.org/lgbt/transgender/kyr\\_transgender.html](http://www.aclu.org/lgbt/transgender/kyr_transgender.html). “*Transgender* is frequently used to describe a broad range of identities and experiences that fall outside of the traditional understanding of gender. Therefore, in addition to those people who wish to transition from one gender to another or have done so (who are often described by the clinical term “transsexual”), *transgender* often is meant to encompass a larger community that includes, for example, cross-dressers and intersex individuals. Some transgender people prefer to describe themselves as *gender variant* or *gender nonconforming*.”

The state's non-discrimination statutes must be amended to correct this omission – and to accomplish this legislative objective, the NYCLU strongly supports passage of A.5710/S.2406.

When the Sexual Orientation Non-Discrimination Act (SONDA) was finally passed in 2002, it failed to include protections against discrimination based on gender identity and expression. This oversight has left transgender New Yorkers and those who do not conform to traditional understandings of masculinity and femininity vulnerable to harm – and without adequate legal recourse when victimized by discrimination. The persistence of such discrimination is greatly underappreciated; and even among law makers there is ignorance of the lack of explicit legal protections against such harm. A recent survey shows that more than two thirds of New Yorkers (71%) mistakenly believe it is already illegal in New York to fire someone because he/she is transgender.<sup>3</sup> In fact, transgender individuals regularly suffer discrimination that creates barriers to the most basic of services, including housing, employment and medical care. These barriers create a traumatic daily existence resulting in elevated levels of homelessness<sup>4</sup> and suicide<sup>5</sup> among transgender individuals. Sadly, transgender youth are equally at risk. Surveys show that transgender and gender non-conforming students report feeling unsafe in school in much greater numbers than other students<sup>6</sup> and data indicate that transgender teens attempt suicide at alarming rates.<sup>7</sup>

As discrimination against transgender and gender non-conforming individuals persists, the need for explicit legal protection is imperative. Promisingly, it has been argued that discrimination based on gender identity and expression is prohibited under a broad interpretation of existing federal and state laws – and the courts have ruled favorably in some cases.<sup>8</sup> Indeed, Title VII already prohibits some forms of sex-stereotyping against gender non-conforming individuals. However, these prohibitions are repeatedly challenged by those defending discriminatory acts.<sup>9</sup> The rulings protecting transgender and gender non-conforming individuals

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<sup>3</sup> The Global Strategy Group was commissioned by the Empire State Pride Agenda to conduct a statewide survey regarding transgender issues and the Gender Non-Discrimination Act in March 2008. Full survey results can be found at <http://www.prideagenda.org/tabid/304/default.aspx?c=346>.

<sup>4</sup> Ray, Nicholas, Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic in Homelessness, National Gay and Lesbian Task Force Policy Institute, 2006.

<sup>5</sup> Bockting, Walter and Eric Avery, Transgender Health and HIV Prevention, Haworth Press, 2005. Because of limitations in survey instruments and personal information forms there is a paucity of data on transgender individuals.

<sup>6</sup> Rankin, Susan R., Campus Climate for Gay, Lesbian, Bisexual and Transgender People: A National Perspective, National Gay and Lesbian Task Force, Policy Institute, 2003 and The Gay, Lesbian and Straight Education Network, 2005 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools, 2005.

<sup>7</sup> Blumenfeld, Warren J. and Laurie Lindop, "Gay, Lesbian, Bisexual, Transgender Youth Suicide," reprinted on outProud, [http://www.outproud.org/article\\_suicide.html](http://www.outproud.org/article_suicide.html) and "Transgender Experiences: The Third Way," Transgender/Transsexual Policy Group, Queens University Human Rights Office, [http://www.queensu.ca/humanrights/tgts/tgts\\_experiences.htm](http://www.queensu.ca/humanrights/tgts/tgts_experiences.htm).

<sup>8</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Smith v. City of Salem*, 378 F.3d 566 (6<sup>th</sup> Cir. 2004); *McGrath v. Toys "R" Us, Inc.*, 356 F.3d 246 (2d Cir. 2004).

<sup>9</sup> For example, see *Schroer v. Library of Congress*, 424 F. Supp. 2d 203 (D.D.C. 2006). In this case, the ACLU represents a decorated officer in the U.S. Army, Retired Colonel Schroer, in her suit against the Library of Congress for discrimination in employment because she is transgender. While it has been unsuccessful, the defendant has repeatedly sought to dismiss the case based on the argument that transgender individuals are not a protected class under Title VII. Although the court denied yet another motion to dismiss in November 2007, explicit protections

from insidious discrimination are not certain, and residents of New York State should not have to rely on a gamble in the courts as their only recourse in the face of discrimination. For this reason, New York State law must be clear that discrimination based on gender identity and expression is illegal.

Further, the expansion of state non-discrimination laws to include gender identity and expression is neither radical nor novel. Thirteen states and the District of Columbia have already acted to protect their transgender and gender non-conforming residents.<sup>10</sup> Closer to home, seven New York cities and counties have done the same<sup>11</sup> but inexcusably, the legislature has failed to pass explicit statewide protections. As a result, almost half of all New Yorkers (47%) live in areas where discrimination on the basis of gender identity and expression is not clearly prohibited by law.<sup>12</sup> While the localities should be applauded for their more inclusive statutes, it is the responsibility of the state legislature to ensure the safety and fair treatment of all New Yorkers -- 78% of whom would support statutory protections against discrimination based upon gender identity and gender expression.<sup>13</sup>

Equal opportunity to fulfill one's potential is a bedrock principle articulated in the U.S. Constitution; this principle is embraced as a core value of the American way of life. And yet transgender and gender non-conforming individuals have not been guaranteed this opportunity; their continued struggle in the absence of clear, enforceable legal protections is a betrayal of the promise of equality upon which this country was built, and its civil rights laws were written.

The NYCLU urges the legislature to pass A.5710 / S.2406 – and to address a critical omission in the Sexual Orientation Non-Discrimination Act by ensuring that the state's civil rights laws protect individuals against stigma and discrimination based upon gender identity or gender expression.

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under the law would definitively secure the rights of transgender individuals in the employment, housing, public accommodations, and credit arenas.

<sup>10</sup> “Jurisdictions with Explicitly Transgender-Inclusive Nondiscrimination Laws”, National Gay and Lesbian Task Force, July 2007, [http://www.thetaskforce.org/all\\_jurisdictions](http://www.thetaskforce.org/all_jurisdictions). Minnesota, Rhode Island, New Mexico, California, Illinois, Maine, Hawaii, New Jersey, Washington, Oregon, Vermont, and Colorado.

<sup>11</sup> Ibid. Albany, Buffalo, Ithaca, New York, Rochester, Suffolk County and Tompkins County.

<sup>12</sup> Empire State Pride Agenda, <http://www.prideagenda.org/IssuesExplained/Transgender/tabid/77/Default.aspx>.

<sup>13</sup> Global Strategy Group survey, March 2008, <http://www.prideagenda.org/tabid/304/default.aspx?c=346>.