

## **II JUSTIFICATION**

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### **Background**

In 2001, a representative of the New Mexico Gender Identity Information Network (NMGAIN) met with staff of the Albuquerque Human Rights Office (AHRO) to apprise the staff of the work of the organization, as well as to educate the staff on transgender issues.

In addition to the educational opportunity, a number of other benefits were derived from that meeting:

- a. The AHRO staff suggested community organizations for NMGAIN to contact as part of its effort to inform and educate the community about gender identity issues;
- b. NMGAIN followed up with the Albuquerque Chapter of the National Organization for Women (NOW), the New Mexico Human Rights Coalition, the Open and Affirming Committee of the United Church of Christ-Southwest Area Conference, the Lutheran Church, and others; and
- c. The AHRO produced a gender identity educational program as part of its Human Rights Focus television series. Two representatives of NMGAIN were guests on the program, which aired several times on Albuquerque's GOV TV 16. The program is AHRO's library of human rights focus videos and which are available for loan to the public.

Subsequently, on July 17, 2001, NMGAIN representatives made a presentation to the Human Rights Board at its quarterly meeting.

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NMGAIN's educational presentations were invaluable to the AHRO staff and the Board, most especially as it brought to their attention a human rights issue that heretofore had not been widely raised in Albuquerque.

In 2002, NMGAIN representatives met with staff of the Office to seek support for an amendment to the Albuquerque Human Rights Ordinance amended to include gender identity. Together, NMGAIN and the Human Rights Office agreed that the Office would research other governmental entities on laws prohibiting gender identity discrimination.

### **Purpose**

The purpose of this research was to gather information to give the Albuquerque human rights board, the mayor, and city council a solid foundation for ensuring the human rights protections of individuals in Albuquerque who are confronted with gender identity discrimination. This information will also provide guidance to the board, the mayor, and the city council in addressing issues that may be raised as regards the differences between gender identity and other protected classes, the use of sex-specific facilities, and/or what, if any, gender identity exemptions would be appropriate.

It is hoped that this research and review will not only prove helpful to the Albuquerque Human Rights Board and the Albuquerque city government, but that it will be of value and assistance to the governmental entities that participated in this review, and others who are considering enacting legislation prohibiting gender identity discrimination.

### **III METHODOLOGY**

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#### **Selecting the Governmental Entities**

The governmental entities selected for the gender identity research were primarily identified by NMGAIN. They included one state, one county, and 12 municipalities. All but two had enacted gender identity legislation during the years 2001 and 2002.

#### **Information Sought from the Governmental Entities**

The information and documents obtained as part of the research and review related to:

- a. Whether the entity has employment, public accommodations, and housing laws that apply and include gender identity discrimination prohibitions;
- b. Whether the local entity has an ordinance, rule, or policy prohibiting gender identity discrimination that applies only to its employment practices, provision of services, and/or its government funded contractors.
- c. Brief information about the entity's jurisdiction, i.e. state-wide, city limits, or limited to city/county government; information about its human rights commission, enforcement agency or office that handles discrimination complaints.
- d. Other bases of discrimination, in addition to gender identity, that the entity has established as prohibited unlawful discrimination.
- e. Whether the law, rule, or policy contains definitions for gender identity.

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- f. Whether the law, rule, or policy contains definitions for sexual orientation.\*
  
- g. Whether the law, rule, or policy of the entity contains any information, requirements, or references relative to sex-specific facilities.
  
- h. Whether the entity’s law, rule, or policy includes gender identity related exemptions or exclusions.

\*Definitions pertaining to sexual orientation were sought only because several governmental entities had combined gender identity with sexual orientation. (Appendix B).

#### **IV RESEARCH AND REVIEW SUMMARY**

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Between 1975 and November 2002, a total of 58 governmental entities adopted gender identity non-discrimination laws, policies, or rules: seven states, six counties, and 45 cities. This statistical information was derived from charts of the Transgender Law and Policy Institute, the Human Rights Campaign, and from emails on gender identity announcements provided by NMGAIN. (Attachment 1).

##### **Laws, Rules, and/or Policies**

Rhode Island and most of the local governmental entities reviewed have laws that prohibit gender identity related discrimination in employment, housing, and public accommodations, and contracting within its state/city limits (Attachment 2 and Appendix A). A few other local governments have such laws, rules and/or policies that are limited to the governmental entities themselves in its employment, provision of services and contracting. (Attachment 2 and Appendix A).

Generally, all of the governmental entities prohibit discrimination in employment, housing, public accommodations, services, and/or contracting that are based on race, color, religion, sex, gender identity, age, national origin, physical or mental handicap, and sexual orientation. The gender identity discrimination prohibitions were added through amendments or enactment of new laws, rules, and/or policies.

Many of the governmental entities also include one or more various types of prohibited forms of discrimination: condition of pregnancy, marital status, height or weight, source of income, family responsibility, educational association, HIV, military status, children, political affiliation or ideology, alienage or citizenship, creed, arrest or conviction, status as a victim of domestic violence, bias-related harassment, sexual harassment, domestic partner status, or use of service animals. In addition to the governmental entities contacted for this review, the AHRO received information that four other local governments had amended or enacted ordinances to

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include gender identity as a protected class in their human rights laws, rules or policies. It was also learned that one state had passed a hate crimes law that included gender identity and sexual orientation.

### **Gender Identity Definitions**

Almost all of the governmental entities reviewed have some type of gender identity related definition. Several either include “gender identity and expression” or define gender identity and expression separately. One local government included gender identity as part of its gender (sex) definition and a couple have gender identity combined with their sexual orientation definitions. Some of the entities also have various other definitions (in addition to their gender identity definition) that relate to gender identity. (Attachment 3).

Two local governmental entities have a set of definitions that further define and expand upon their gender identity definitions.

More than half of the governmental entities have gender identity definitions that are similar in language ranging from basic to similar and somewhat detailed. (Attachment 4).

### **Sex-specific Facilities References**

The majority of the governmental entities make no gender identity related reference to sex specific facilities in their laws, rules, or policies. Those that do make references to sex-specific facilities do so to establish a prohibited basis of discrimination in the use of sex-specific facilities against individuals who have transitioned and are post-operative. In addition, they require that in the use of sex-specific facilities, reasonable accommodations be made to individuals who are in transition. One entity allows sex-based restrictions of certain facilities and participation in certain events.

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Sex-based would most likely equally apply to sex (gender) and gender identity protected classes. (Attachment 5).

##### **Gender Identity Related Exemptions/Exceptions**

About a third of the governmental entities have exemptions/exceptions that relate to sex/gender (male and female) and not specifically to gender identity. However those exemptions/exceptions also would include gender identity because gender identity is a sex/gender issue. An equal number have no gender identity related exemptions/exceptions. (Attachment 6).

Those with gender related exemptions/exceptions have only one such exemption/exception that applies either to work place dress codes or housing accommodations. One local government's exemption/exception ensures that gender identity coverage cannot be construed to interfere with or impose any duty on the local government in its duties relative to the health and safety of incarcerated persons.

By adding gender identity to its sexual orientation definition, one local government has applied all of its sexual orientation exemptions/exceptions to gender identity whether or not such exemptions/exceptions would appropriately apply to that protected class.

## **V DISCUSSION**

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### **General**

It is impressive to see that many cities and counties and states have adopted some type of gender identity ordinance or policy and the list is growing. (Attachment 1). In 2003, at least three more local governments have passed gender Identity Inclusion in Anti Discrimination legislation.

Overall, it is apparent that headway steadily is being made across the country to provide protection to victims of discrimination based on gender identity. The citizenry who have taken the lead in advocating for gender identity inclusion in anti discrimination laws and the government officials across the nation who have shown courage and foresight to enact legislation to “stamp out” yet another vestige of discrimination that plagues our nation, are to be commended.

The research reflects that there has not been any serious or significant opposition to including gender identity in the various governmental entities’ anti discrimination laws, rules or policies. In most of the local governments there is unanimous commitment to broad anti discrimination laws, rules, or policies.

There are some significant differences in the approach local governments are taking to address gender Identity Inclusion in Anti Discrimination. Some are amending their existing laws to add gender identity as a protected class; others are enacting new laws that would apply throughout their governmental jurisdiction or enacting laws, rules and/or policies, that are limited to their governmental operations.

The definitions, coverage, and exemptions also vary. Some are clearly establishing gender identity as a distinct protected class; others are adding gender identity to a protected class that exists in their current laws.

Gender identity national advocacy organizations, in their campaign to promote awareness of governments throughout the nation who are considering and/or adopting gender identity anti discrimination laws appear to be providing limited information. While the information provided is important and useful, more detailed information would

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be beneficial to local advocacy groups and to local governments in their efforts to enact complete and comprehensive gender identity anti discrimination legislation.

In addition to standard and applicable elements of most anti discrimination laws, there are “**three primary elements**” that need to be considered when developing gender identity anti discrimination legislation, rules, or policies:

- a. Definitions for gender identity;
- b. Access to sex-specific facilities on a non discriminatory basis, ensuring reasonable accommodations as appropriate; and
- c. Limited and narrowly tailored exemptions for bona fide purposes.

With this in mind, it would be of immense value and help if there existed a cohesive sample model of language, definitions, and coverage available to organizations advocating for gender identity protections, as well as for governmental entities that are developing and enacting anti discrimination gender identity legislation.

### **Laws, Rules, and/or Policies**

Rhode Island, the only state government included in the research and review, has a statewide human rights law that appears to be on par with other states’ protected classes and coverage. Its gender identity coverage, which was added in 2001, overall appears to have taken the same limited approach as many of the local governments with citywide ordinances.

Only nine of the 13 local governments with ordinances that provide broad protection against discrimination in employment, housing, and public accommodations to the long-established protected classes, most with minimal exemptions/exceptions, have also extended the same protection to gender identity. All but one of the remaining four

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local governments have gender identity based anti discrimination protections that are limited primarily to government employment.

### **Definitions**

Gender identity, because of its many facets and transition related stages in determining and applying the protective provisions of anti discrimination laws, requires more “defining” than is the norm for other protected classes. Gender identity itself may require additional sub definitions and, with particular regard to “transition,” because of the complexities and stages of an individual’s “transitioning.” Determining what “transition” means and who would be included also requires separate and more detailed definitions. In addition to its gender identity and gender variance definitions, Denver has four gender identity related definitions. San Francisco has about 12 sub definitions to its transgender definition (Attachment 7).

Because of misconceptions and issues that can arise relative to gender identity and gender identity discrimination i.e. dress codes, appearance, perceptions, it is important that the definition be clear in that non gender allegations of discrimination should not be accepted as gender identity complaints. In defining gender identity and establishing prohibited forms of gender identity based discrimination, using the phrase “gender-related” throughout the definition will help to prevent those seeking to file complaints relative to appearance, expression, etc. that are not connected to gender-related issues. (See definitions of Boston and Rhode Island in Attachment 4).

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Several of the governmental entities have generally added or applied their standing prohibitions against discrimination by adding or combining gender identity to

other definitions already existing in their laws. For example, Dallas added the phrase “gender identity” to its sexual orientation definition, Houston has a combined sexual orientation and gender identity definition, and New York incorporated gender identity into its definition of gender.

With the exception of obvious limitations of combining and defining gender and gender identity together, without perhaps having the appropriate sub definitions, including gender identity as one facet of gender and gender related discrimination makes a lot of sense. First, it must be remembered that gender is synonymous with the term sex (male and female). The term gender is gradually being more widely used in lieu of sex as the means of ensuring a distinct difference between one’s gender and sexual harassment. Secondly, gender identity is an issue of one’s gender (male or female). Although, clearly, there are some differences relating more to transitioning, many exemptions/exceptions, including sex-specific facilities, that would be included in anti discrimination legislation would apply equally to gender (male and female) and to gender identity. (Attachment 8).

Sexual orientation and gender identity are two distinct and different protected classes. Combining gender identity with sexual orientation should be avoided because it is totally inappropriate. Gender identity, as well as gender, is a matter of one’s sex, male or female. Conversely, by combining sexual orientation and gender identity, exemptions/exceptions that would be unique for one class would end up applying to the other. As the NMGAIN explains:

***“While a distinction is important, the difference between sexual orientation and gender identity can be stated simply. A person’s sexual orientation deals directly with his or her preference for a partner. Transgender individuals can be straight, gay, or bisexual***

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*but their gender identity leans, in varying degrees, opposite of their birth sex. Sexual orientation, or sexual attraction, is not a contributing factor nor a cause of gender identity.” (see Attachment 9 for complete explanation)*

In definitive 2001 rulings by the Massachusetts Commission Against Discrimination, the Commission clarified that gender identity is related to gender and not to sexual orientation. In that case before the Massachusetts Commission, the complainant (a male-to-female transsexual) alleged discrimination on the basis of her sex and sexual orientation. The Massachusetts Commission concluded that transsexuality is not a sexual orientation under Massachusetts’s law and that “sex discrimination (under laws against discrimination) includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.”

### **Sex-Specific Facilities**

An important aspect of providing protection against discrimination based on gender identity, as well as ensuring that individuals in whatever stage of their transition, are not discriminated against on the job and/or in public accommodations, relates to sex-specific facilities. Regretfully, it would appear that most governments who are enacting gender Identity Inclusion in Anti Discrimination laws are not clearly establishing gender identity based discrimination and/or failing to provide reasonable accommodations relative to sex-specific facilities as an unlawful discriminatory practice. Only four of the governmental entities included in the review have clearly established that discrimination based on gender identity and/or failing to provide reasonable accommodations would be an unlawful discriminatory practice. For the most part, the others’ laws, rules, and/or policies are silent on this important protection.

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Any legislation that includes gender identity as a protected class should include, with the appropriate required accommodations and/or necessary minimal exemptions, that discrimination in sex-specific facilities would be an unlawful practice.

The absence of such language in the legislation might lead to confusion and indecisiveness on the part of enforcement agencies as well as to unnecessary legal challenges if enforcement agencies try to enforce a provision that is not stated or defined in their respective laws.

Those governmental entities that make specific gender identity related references to sex-specific facilities generally require that an individual who has transitioned must be treated

on an equal basis, without discrimination, and they also require that reasonable accommodations for the use of sex-specific facilities i.e. bathrooms and locker rooms, be made to individuals who are in the process of gender transition.

### **Exemptions/Exceptions**

Most of the governmental entities do not have specific exemptions/exceptions directly related to gender identity; however, as mentioned previously, six of the governments have exemptions/exceptions relating to sex/gender (male and female) that would also include gender identity. Those primary exemptions/exceptions apply to organizations, associations, etc. that are legally limited to members of only one sex sex-segregated sports and housing; certain religious institutions relative to promoting their religious principles for which they were established; certain housing accommodations that are legally limited to persons of one sex; mandatory joint use of sex-specific facilities by both sexes and owner-occupied housing. (Attachment 6).

Governmental entities considering gender identity related exemptions or exceptions, depending on the specific and uniqueness of the circumstances, should do so

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in the traditional manner of “narrowly tailoring” the exemptions/exceptions in anti discrimination legislation to bona fide purposes, as well as to minimize wide scale and inappropriate discrimination against individuals because of their gender identity.

## **VI OTHER EQUAL OPPORTUNITY INFORMATION**

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It is interesting to note that apparently many governmental entities across the country still have one or more viable and functioning programs for affirmative action, contract compliance, and/or minority and women-owned business enterprises. Some now refer to affirmative action as diversity and/or equal opportunity. Dallas, Houston, Multnomah County, Philadelphia, Providence, Portland, Rhode Island, and Seattle are among the governmental entities that have one or more such programs.

In addition to its ordinance covering contractors doing business with the city, Seattle also has an all-encompassing Fair Contracting Practices Ordinance that applies to all contracting activities undertaken between business entities located in or doing business in Seattle.

Information relative to affirmative action, contract compliance and minority and women-owned businesses is also vital and important to governmental entities concerned with all areas of equal opportunities for their citizens and their minority and women-owned businesses. However, as the focus of this research was gender identity coverage, no effort was made to obtain additional information.

## **VI RECOMMENDATIONS**

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It is recommended that:

- a. In considering gender identity inclusion in anti discrimination laws, rules, and/or policies, governmental entities should treat gender identity as a separate protected class to ensure that the legislation is appropriate and will provide full protection against discrimination based on gender identity. To accomplish this, governmental entities should:
  1. Avoid combining gender identity definitions with definitions of other protected classes, and include sufficient gender identity related definitions.
  2. Include language that will appropriately address sex-specific facilities, while at the same time ensuring that discrimination in sex-specific facilities or failure to provide reasonable accommodations, as appropriate, should be an unlawful discriminatory practice.
  3. When considering possible gender identity related exemptions, ensure that such exemptions are narrowly tailored to meet the specific and unique circumstances of the jurisdiction. In general, with the exception of reasonable accommodation issues, exemptions already established for sex/gender (male and female) should apply.
  
- b. Governmental human rights enforcement agencies whose state and local governments do not have gender identity inclusion in anti discrimination laws should take the initiative to provide their government officials with information about gender identity and the need for such legislation. They also should provide suggested legislation that would be consistent with current anti discrimination laws, rules, and policies for their jurisdiction.

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- c. Local and state governments that have established equal opportunity rules or policies providing for non discrimination on the basis of gender identity, in their governmental operations, should also include and/or initiate a mandatory gender identity training program for its management, supervisory, and non-supervisory employees. Other local and state governments that do not have such equal opportunity rules or policies should initiate a mandatory gender identity program for its employees at all levels of government.
  
- d. The local and state human rights enforcement agencies of governmental entities that have enacted gender identity anti discrimination laws that are applicable city/county wide or statewide, should develop a gender identity training program that they can provide to the public at large. Other local and state governments human rights enforcement agencies should develop a gender identity training program and offer it to the public at large.
  
- e. Local and state governments governmental entities with correctional facilities may want to consider including an exemption that would limit their liability when actions are taken to protect the health and safety of incarcerated persons. (See San Francisco’s exemption in Attachment 6).
  
- f. State and local governmental human rights enforcement agencies should explore ways in which they could benefit from a better network for communication and sharing of information on gender identity and other topical human rights issues, complaints, and other enforcement related procedures.

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- g. National and local gender identity advocacy groups, in conjunction with governmental human rights enforcement agencies, develop a sample model of gender identity language, definitions, and coverage that can serve as a guide to state and local governments.
  
- h. National and local gender identity human rights advocacy groups, in conjunction with national associations of governmental human rights enforcement agencies, such as the International Association of Official Human Rights Agencies (IAOHRA), develop a model for federal gender identity inclusion in anti discrimination legislation. If it does not now exist, the advocacy groups and the governmental agencies also should develop a coordinated strategy to promote the enactment of federal gender identity inclusion in anti discrimination legislation.