

COMMONWEALTH ★ ★ ★ POLICY CENTER ★ ★ ★

Questioning Sexual Orientation laws

Sexual orientation and gender identity (SOGI) nondiscrimination laws would elevate homosexual and transgender behavior to civil rights status on par with race and ethnicity. SOGI specifically protects open homosexuality in areas of housing, employment and public accommodations. Consider several questions people of goodwill are asking:

Are SOGI laws necessary?

Answer: No. There are very few, if any documented cases of otherwise well-qualified homosexuals denied employment or fired based merely on their sexuality. SOGI laws have been invoked when there have been obvious cases of harassment or assault. But there are already laws on the books against harassment or assault.

Isn't protecting sexual orientation and cross-dressing the same as protecting minorities in the workplace or in housing?

Answer: No. Gender identity and sexual orientation are unlike other characteristics protected in civil rights laws. The Civil Rights Act of 1964 bars discrimination based on race, color, national origin, sex, and religion. The first four of these are immutable, intrinsic characteristics assigned at birth. The last category—religion is explicitly protected by the First Amendment to the U.S. Constitution. “While sexual *attractions* may be involuntary, neither homosexual conduct nor transgender behavior meets any of the other criteria. Skin complexion, ethnicity, and gender cannot be changed (so-called transgender surgery is superficial; it does not change the genetic and thus defining characteristics of the persons gender).”ⁱ

Doesn't science prove that sexual orientation is not a choice?

Answer: No. While many studies have attempted to link sexual orientation to genetics, there are no credible scientific studies that support the idea.ⁱⁱ There is no scientific consensus on how to define sexual orientation, and the various definitions proposed by experts produce substantially different groups of people.ⁱⁱⁱ Sexual orientation and gender identity are subjective, self-disclosed, and self-defined. Employers should be able to reasonably take into account the behavior of employees. This is a core personnel decision best left to businesses themselves, not the government.

Don't SOGI protections create a more tolerant climate?

Answer: No. SOGI laws create a climate of intolerance and intimidation. They have been frequently used to bully bakers, florists and photographers to accommodate homosexual weddings or gay pride events. SOGI laws fail to protect the religious liberties.

Don't SOGI laws protect and keep personal sex lives private?

Answer: No. SOGI laws drag private sexual behavior into the workplace. If employers shouldn't ask about a prospective employee's private sex life and they don't bring this up, then how can employers be held accountable for failing to hire somebody based on their sexual orientation? On the other hand, what if a prospective employee does bring up their private sexual practices in the workplace and they aren't hired for other reasons? Would this be grounds for a discrimination charge?

Why should employers worry about such laws?

SOGI laws tend to be overly broad and subjective. There is no clear definition of what kind of conduct is acceptable or what kind of conduct might be penalized. To underscore this point and further muddy the issue, the city of Boise, Idaho now prohibits indirect acts that make another person feel he is being "treated as not welcome."^{iv} Laws based on perception will create a fearful and unproductive workplace environment.

SOGI laws could be used to punish employers who are publicly known for high moral standards in their workplace—think Chick-fil-A and Hobby Lobby. Such business could become a target or test case for homosexual activists who might push the envelope. In today's tough economic climate it doesn't make sense to create laws that would be easy to abuse and invite lawsuits against businesses of all kinds.

Do SOGI laws protect cross-dressing in the workplace or public accommodation settings?

Answer: In some cases the law protects the rights of cross dressers over the rights of privacy of women in public locker rooms. Consider that in 2012, a 45-year old male who identifies and dresses as a woman at Evergreen College in Washington exposed himself in a women's locker room. Evergreen spokesman Jason Wettstein said "The College has to follow state law. The College cannot discriminate based on the basis of gender identity. Gender identity is one of the protected things in discrimination law in this state."^v

Could the laws potentially punish business owners who refuse to materially participate through their products or services in gay weddings or gay pride events?

Answer: Yes. SOGI laws have been used in many cities and states to coerce and punish those who refuse to materially participate in same-sex weddings through their time, creative talents, goods and services. Consider that Robert and Cynthia Gifford were fined \$13,000 for refusing to permit a same-sex wedding ceremony on their well-known agri-tourism farm in 2012. New Mexico photographer Elaine Huegenin was fined \$6,637.94 for refusing to do the photo shoot of a lesbian wedding in 2008. Blaine Adamson of Hands On Originals was found guilty of violating Lexington, Kentucky's SOGI ordinance in 2014 when he declined to fill a T-shirt order for a gay pride event sponsored by the Gay and Lesbian Services Organization (GLSO).

Gender identity laws undermine the rights of businesses to set dress and grooming standards. Such bills sometimes purport to protect such rights. However, dressing and grooming in a way that is culturally appropriate for the individual's biological sex is the most fundamental such standard there can be. This is particularly relevant for situations involving customer service or contact with other clients, because the adoption of the gender identity of the opposite sex is often highly unconvincing and therefore disturbing to others.

Do SOGI laws extend to public schools?

Answer: Yes. Massachusetts passed a SOGI law in 2012—shortly after the state school superintendent issued an order requiring all public school bathrooms, locker rooms, and changing areas for the gender with which they identify. Transgender students would also be allowed to participate in the sports team of which they most identify.^{vi}

SOGI laws have also extended to Kentucky schools. In June 2013, Louisville's Atherton High School Site Based Decision Making Council enacted a policy to allow transgender students to use the bathroom and locker room facilities of the opposite sex.^{vii}

ⁱ www.frc.org/issuebrief/sexual-orientation-and-gender-identity-sogi-laws-a-threat-to-free-markets-and-freedom-of-conscience-and-religion

ⁱⁱ www.focusonthefamily.com/socialissues/defending-your-values/understanding-same-sex-attractions/is-sexual-orientation-fixed-at-birth

ⁱⁱⁱ www.thepublicdiscourse.com/2013/07/10636/

^{iv} www.nationalreview.com/article/371329/bake-us-cake-or-else-ryan-t-anderson-leslie-ford

^v ABC News affiliate KOMO. <http://abcnews.go.com/blogs/headlines/2012/11/transgender-student-in-womens-locker-room-raises-uproar/>

^{vi} www.bostonglobe.com/metro/2013/02/17/transgender/FHmjIUISZo0LCMy02xF97M/story.html

^{vii} www.courier-journal.com/story/news/local/2014/06/05/atherton-high-school-restroom-policy-transgendered-students-holds-final-reading/10023241/