

THE RIGHTS OF **TRANSGENDER PEOPLE**

in Washington State



The American Civil Liberties Union of Washington Foundation is the legal, research, and educational arm of the American Civil Liberties Union of Washington, a nonprofit, nonpartisan membership organization devoted to protecting the civil liberties of all people in Washington and extending rights to groups that historically have been denied equal treatment.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

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Endnotes

1 RCW 49.60, available at <http://apps.leg.wa.gov/rcw/default.aspx?cite=49.60>.

2 RCW 9A.36.080 (Malicious harassment), available at <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.080>; RCW 28A.300.285 (Harassment, intimidation, and bullying prevention policies), available at <http://apps.leg.wa.gov/rcw/default.aspx?cite=28A.300.285>

3 HUD's statement titled "Housing Discrimination against Lesbian, Gay, Bisexual, and Transgender Individuals and Families" can be accessed at: [http://portal.hud.gov/portal/page/portal/ HUD/program_offices/fair_housing_ equal_opp/LGBT%20Housing%20 Discrimination](http://portal.hud.gov/portal/page/portal/HUD/program_offices/fair_housing_equal_opp/LGBT%20Housing%20Discrimination)

4 The HRC's opinion is available at: [http://www.hum.wa.gov/FAQ/ FAQSexualOrientation3.html](http://www.hum.wa.gov/FAQ/FAQSexualOrientation3.html).

5 Washington has a policy identifying the process enabling transgender students to participate in high school athletics. This policy, which appears on page 46 of the WIAA's 2010-11 Official Handbook, is available at: [http:// www.wiaa.com/subcontent.aspx?SecID=350](http://www.wiaa.com/subcontent.aspx?SecID=350).

6 For more information, please visit the Washington State Department of Licensing at [http://www.dol.wa.gov/ driverslicense/change.html](http://www.dol.wa.gov/driverslicense/change.html).

7 For more information, please visit the SSA at: [http://ssa-custhelp.ssa.gov/app/answers/ detail/a_id/315](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/315) and [http://ssa-custhelp.ssa.gov/app/answers/ detail/a_id/1667/kw/gender%20 marker](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1667/kw/gender%20marker) and [http://ssa-custhelp.ssa.gov/ app/answers/detail/a_id/1667/kw/ change%20gender](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1667/kw/change%20gender).

This brochure is designed to help transgender persons understand their legal rights in Washington State. This brochure is not meant to provide legal advice.

The current legal system assumes individuals either identify as one gender, male or female. While this guide provides an understanding of the current legal system, the ACLU recognizes that many people do not identify as male or female. In fact, a transgender individual may identify with a specific gender, both genders or neither gender.

Additional Resources

For additional resources and information about transgender rights, please see:

- Washington State Human Rights Commission, <http://www.hum.wa.gov>;
- Ingersoll Gender Center, <http://www.ingersollcenter.org/>.

Discrimination & Harassment

▶ Are there laws that clearly prohibit discrimination against transgender people?

Yes. The Washington Law Against Discrimination (WLAD)¹ protects people from discrimination based on gender expression or actual or perceived gender identity in these areas:

- **places of public accommodation** (i.e., places that serve the public), including restaurants, hotels, and public schools;
- **housing**, including the renting, buying, and selling of homes;
- **employment**, specifically in state, municipal, and private workplaces with eight or more employees;
- the extension of **credit**;
- and **insurance** transactions.

Further, at least five cities and one county in Washington have passed their own laws prohibiting discrimination based on gender expression or identity, including:

- **Bellingham** (barring discrimination in public employment);
- **Burien** (barring discrimination in places of public accommodation, housing, and employment);
- **Olympia** (barring discrimination in housing);
- **Seattle** (barring discrimination in places of public accommodation, housing, and employment);

- **Tacoma** (barring discrimination in places of public accommodation, housing, employment, and education); and
- **King County** (barring discrimination in places of public accommodation, housing, employment, and education).

Washington law also protects against violence, threats, and bullying motivated by a victim's gender expression or identity.²

▶ **Do laws that prohibit sexual orientation discrimination protect transgender people?**

With regard to the Washington Law Against Discrimination, Yes. The WLAD prohibits discrimination based on “gender expression or identity,” which the law defines as: “having or being perceived to have 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.”

Charged with enforcing the WLAD, the Washington State Human Rights Commission (HRC) works to prevent and eliminate discrimination by investigating civil rights complaints and providing education and training opportunities throughout Washington. For information on how to file a formal complaint with the HRC, visit <http://www.hum.wa.gov/Complaint Process/Index.html> or call **1-800-233-3247**.

If you feel you have been the victim of discrimination based on your gender expression or identity, please consider contacting the ACLU of Washington in one of the following ways:

- **Online.** Submit a request for help online by visiting <http://www.aclu-wa.org/how-get-legal-help-aclu>.
- **By phone.** Call the ACLU of Washington's Intake and Referral Line at 206.624.2180 (open Monday through Thursday, 10:00am – 2:00pm).
- **By mail.** Write to American Civil Liberties Union of Washington, 901 Fifth Avenue, Suite 630, Seattle, WA 98164 and provide the following information: your name, mailing address, telephone number and e-mail address (if available); a brief description of the problem or issue about which you are contacting the ACLU of Washington, including any relevant dates and the names of any individuals or organizations involved; a description or copy of any relevant documentation; whether you are presently represented by an attorney in the matter you are writing about; whether you have taken any steps to resolve the matter you are writing about and, if so, a description of these steps; and a description of what you would like the ACLU of Washington to do concerning this matter.

ACLU of Washington

The American Civil Liberties Union of Washington is a nonprofit, nonpartisan membership organization devoted to protecting the civil liberties of all people in Washington and extending rights to groups that historically have been denied equal treatment.

As one of the ACLU's more than 50 local affiliates around the U.S., the ACLU of Washington works for equal rights and legal protections against discrimination and harassment for the LGBT community through litigation and legal advocacy, through lobbying at the state legislature and local governments, and by public education. The ACLU of Washington does not handle matters that arise outside of the state of Washington.

The ACLU of Washington offers information in response to specific inquiries or concerns and advice on how to assert individual rights and engage in advocacy; provides referrals to other organizations better able to offer such information or advice in specific situations; and undertakes impact litigation (i.e., pursues lawsuits that will defend or extend fundamental civil liberties and civil rights that will affect a large number of people).

▶ Do laws that prohibit sex discrimination protect transgender people?

Yes. The U.S. Ninth Circuit Court of Appeals – whose jurisdiction includes Washington – has made clear that transgender persons are protected from sexual harassment and discrimination based on their gender expression or identity under the federal Title VII law and other sex discrimination statutes, including the WLAD. And, recently the U.S. Department of Housing and Urban Development (HUD) indicated that a property manager's discrimination against a person on the basis of such person's gender expression or identity may constitute illegal discrimination on the basis of sex under the Fair Housing Act,³ though courts have yet to rule on this.

▶ Does the U.S. Constitution protect transgender people from discrimination?

Although the ACLU thinks the answer should be yes, the U.S. Supreme Court has never considered this question. The reality is that equality protections for transgender people are not yet nearly as strong as those for people of color and women. It is important to remember that constitutional protections – unlike the WLAD – cover only discrimination or mistreatment by the government, not by private entities.

The ACLU believes the U.S. Constitution's guarantee of equality should protect us from being treated differently (i.e., discriminated against or mistreated) because of our gender expression or identity. Further, we believe the First Amendment, which bars the government from censoring speech or expression, should protect our right to dress (an important form of personal expression) in a way consistent with our gender identity. Finally, we believe the Due Process Clause should recognize and protect our interests in determining and expressing our gender through personal appearance and mannerisms. However, the U.S. Supreme Court has not yet ruled on these issues.

▶ Does the law protect a transgender person’s right to use the restroom consistent with their gender identity?

It remains somewhat unclear. In 1993, the highest court in Washington upheld the right of an employer to prohibit a transgender employee from using the restroom consistent with her gender identity until after she had undergone sex reassignment surgery. A court might rule differently if such a case arose today. We now have a state law—the WLAD—that specifically protects against discrimination in employment and places of public accommodation based on one’s gender expression or identity. Moreover, the Washington State Human Rights Commission (HRC)—the organization responsible for enforcing the WLAD—publicly supports the right of transgender persons to use the restroom consistent with their gender identity.⁴

As a practical matter, many businesses, universities, and other public places are installing single-use, unisex (or “gender neutral”) restrooms, which alleviate many of the difficulties that transgender people experience when seeking safe restroom access.

▶ Are there laws that specifically protect transgender students from discrimination?

Yes, Washington law protects transgender students in public schools from discrimination, intimidation, bullying, and harassment. Since the WLAD took effect in 2006, the nondiscrimination policies of Washington public schools have included gender expression and identity. And 2010, the Washington Legislature passed a law requiring that public schools’ bullying and harassment policies protect transgender students.

Further, the ACLU believes that under the WLAD public school officials should be required to allow transgender students to wear clothing that matches their gender identity, call transgender students by the

Gender Identity: One’s internal, personal sense of being a man or a woman (or a boy or a girl), or another gender.

Gender Identity Disorder (GID): The diagnosis given to transgender or gender-variant people as a prerequisite for transition-related medical care and often considered offensive for treating a normal human variation as an illness. Replaces the outdated term “gender dysphoria.”

MTF or Transwoman: A person who transitions from male to female (MTF) and should be referred to as “she.”

Transgender: An umbrella term including transsexuals, crossdressers, and others who don’t fit gender norms. Transgender people may or may not choose to alter their bodies hormonally and/or surgically. “Transgender” does not refer to sexual orientation (i.e., transgender people may be heterosexual, lesbian, gay, or bisexual). Note that transgender is an adjective (“a transgender person”) and not a noun (“a transgender”).

Transition: The process of beginning to live socially in the gender that matches one’s gender identity, which includes making some or all of the following cultural, legal, and medical adjustments: telling others; changing one’s name in day-to-day life; changing one’s name and/or sex on legal documents; changing one’s body morphology via hormone therapy and/or other procedures.

Sex: Whether a person is classified as “male” or “female,” defined by a number of criteria including internal and external genitalia, chromosomes, hormones, secondary sex characteristics, and gender identity.

Sex Reassignment Surgery (SRS): Surgical alteration of body characteristics, which is one small part of Transition (see above). There is not one SRS procedure, but rather various options. Preferred term to “sex change operation.”

marriage (valid under state law)—the federal government has no basis for refusing to recognize the marriage for immigration purposes.

Notes on Words and Phrases Used

When talking about transgender people, we sometimes use words relatively unfamiliar to non-transgender people. To avoid confusion, here is what we mean by the following terms:

Crossdresser: A man (woman) who occasionally wears clothing associated with women (men) but has no intent to live full-time as a woman (man). Use this rather than the older term “transvestite,” which is generally considered to be a derogatory term.

FTM or Transman: A person who transitions from female to male (FTM) and should be referred to as “he.”

Gender: In the U.S., the cultural constructions of “man” and “woman” (i.e., the social organization of different kinds of bodies into different categories of people). Gender is historical (i.e., it changes through time), varies from place to place and culture to culture (e.g., Native American cultures had three to four social genders), and is contingent (i.e., it depends on many different and seemingly unrelated things coming together). A central tenet of transgender politics is that having a certain body does not bear any necessary or deterministic relationship to the social category in which a person lives.

Gender Expression: External manifestation of one’s gender identity, usually expressed through what is considered to be “masculine” or “feminine” behavior, clothing, hair, voice, or body characteristics.

appropriate name and pronoun, provide transgender students with access to a safe and appropriate restrooms and locker rooms (or appropriate alternative places in which to change for gym class), and accommodate transgender athletes.⁵

Further, we believe that discrimination or harassment directed at transgender students may violate the Equal Protection Clause of the federal Constitution, under which we think schools should be held responsible for protecting transgender students from harassment on an equal basis with all other students; Title IX of the Education Amendments of 1972, which we think should protect all students from harassment and discrimination based on gender expression or identity; or other constitutional provisions of the federal Constitution, including the First Amendment, which we think should protect the right of students’ to dress in accordance with their gender identity; and the Due Process Clause, which we think should protect students’ liberty interest in their personal appearance.

If you are being harassed, intimidated, or bullied in school, keep a record of each incident and report them to your principal or counselor. To talk to someone outside of your school or to get information on strategies to stop harassment, call the Safe Schools Coalition at **1.877.SAFE.SAFE** (1.877.723.3723) or visit http://www.safeschoolscoalition.org/help_harassed.html.

To get information on your legal rights and how to enforce them, please contact the ACLU of Washington at **206-624-2180** or visit <http://www.aclu-wa.org>.

Name Change and Identity Documents

▶ Can a person change their name to reflect their gender identity?

Yes. In Washington, any person over the age of 18 can choose and use any name the person wishes, as long as the purpose of the name change is not to commit fraud. Through what is called a “common law name change,” a person may simply change their name by using a new name consistently and exclusively for all purposes. This method is free and easy, but because many government institutions require documentation proving that a valid name change has been made, it may not create the kind of solid paper trail needed to change important identifying documents.

The other way a person can change their name is by court order, which requires the filing of a petition and the completion of an Order for Name Change for the judge to sign—this process is uniform among Washington counties, the only difference being the filing fee. After filing, the court clerk will schedule a date when the person seeking the name change can appear before a judge or a court commissioner. Most judges will allow a name change as long as they are convinced that the purpose of the change is not to evade debts or the authorities.

▶ Can a person get their name and gender marker changed on their birth certificate?

Yes. A court-ordered *name* change (as discussed above) is necessary to change the name on a birth certificate.

With regard to changing the *gender marker*, Washington law does not specify what should be done. The Department of Health’s policy has been to issue an amended certificate upon submission of a letter from a treating physician that verifies that the person seeking the change has undergone sex reassignment surgery.

On the federal level, the U.S. Bureau of Prisons has a policy of providing hormones at the level the prisoner was getting them before incarceration.

Immigration

▶ May a transgender immigrant be granted asylum in the United States because of anti-transgender harassment in the individual’s country of origin?

Yes. More and more transgender immigrants are being granted asylum after making the case that they have been persecuted at home because of their failure to conform to cultural gender roles and/or sexual orientation.

Although many of the courts addressing the issue confuse sexual orientation with gender identity or expression, it is clear that transgender people are a “particular social group” entitled to the protection of asylum laws.

A transgender person, however, must do more than show that they are transgender and was persecuted because of it in order to get asylum. The individual must also prove either that the government persecuted them or that the government refused to do anything to stop the abuse.

▶ May a married couple in which one spouse is transgender obtain a spousal visa?

Yes. In 2005, the Board of Immigration Appeals issued a ruling that protects the right of transgender people to obtain spousal visas when a U.S. citizen is married to an immigrant. The Board ruled that—when a transgender person (1) has a valid birth certificate showing that their home state recognizes their gender and (2) is in a legal, heterosexual

Rights in Prison

▶ Are prison officials required to place a transgender inmate in the facility that matches the inmate's gender expression or identity?

Not expressly. Washington does not have a comprehensive policy for transgender inmates in prison. But transgender persons who have not had sex reassignment surgery are generally classified according to their birth sex for purposes of prison housing, and transgender persons who have had sex reassignment surgery are generally classified and housed according to their reassigned sex.

A growing number of prison systems are developing more respectful housing policies, in part because they fear being held liable in court if they fail to protect transgender inmates from rape and other forms of abuse. For example, guidelines adopted by King County, Washington, in 2006 indicate that transgender inmates who express concern for their safety—or those whose transition has progressed so far that they no longer appear as their original gender—could be placed in administrative segregation (and retain access to services).

▶ Do transgender prisoners have a right to get hormone therapy?

There is no definitive answer yet. Because Washington does not expressly prohibit the use of government funds to provide hormone therapy or sex reassignment surgery for prisoners, some transgender prisoners may be able to receive hormone treatment in prison. Further, the U.S. Ninth Circuit Court of Appeals has suggested that deliberately denying access to transgender-related health care for prisoners can amount to cruel and unusual punishment in violation of the Eighth Amendment and that a constitutional violation may exist where a prisoner's course of hormone therapy is abruptly cut off.

▶ Can a person get their name and gender marker changed on their driver license or state-issued identification card?

Yes. To change the *name* on a Washington driver license or identification card, a person must submit a written request to the Department of Licensing, and this request must be accompanied by an original or certified copy of a court-ordered name change.

To change the *gender marker* on a Washington driver license or identification card, a person must mail a written request to the Department of Licensing.⁶

▶ Does changing the gender marker on one's birth certificate legally change one's sex?

It is unclear because Washington courts have not expressly addressed this issue. Although changing the gender marker on one's birth certificate should put to rest once and for all the question of one's legal gender, courts outside of Washington have, in certain circumstances, ignored the corrected birth certificate. To deal with this potential problem, some individuals obtain a court order declaring a legal change of gender. (To save time and money, some advocates recommend doing this when petitioning for a court-ordered name change.) The good thing about a court order is that, unlike a birth certificate or other identity document, courts and agencies in other states are supposed to follow it. There is still no guarantee, however, that such a court order will force any given court to consider one's sex legally changed when deciding the validity of a marriage.

▶ Can a person change their name and gender marker with the Social Security Administration (SSA)?

Yes. To change their *name*, a person needs to provide proof of a court-ordered name change, U.S. citizenship, and identity.

To change the *gender marker*, the SSA requires proof of gender (as can be provided, for example, by a birth certificate or a letter from a surgeon verifying that sex reassignment surgery has been completed), U.S. citizenship, and identity.⁷

▶ Is it advisable to change one's name and gender with the SSA?

Yes. Ensuring that the SSA's record of one's gender is consistent with the gender marker on other identity documents will help avoid problems.

The risk of problems caused by not changing SSA records is particularly high in the work context. The SSA contacts an employer when it notices that the personal information it has about a social security number (usually name, but sometimes gender) does not match the information being reported by the employer. These so-called “No-Match” letters often end up “outing” a transgender employee at work.

For more information about “No-Match” letters, see “I-9 No-Match Letters: Frequently Asked Questions” at the website of the National Center for Transgender Equality, www.nctequality.org.

▶ What does the law say about insurance companies denying coverage for routine medical treatments because one has undergone procedures for purposes of gender transition?

Washington law prohibits discrimination against transgender people in insurance transactions. It follows that, under Washington law, insurers may not refuse to issue insurance coverage, may not decline to renew insurance coverage, may not cancel insurance coverage, and may not offer different amounts of benefits payable, terms, rates, conditions, or types of insurance coverage on the basis of a person's gender expression or identity.

Criminal Law

▶ Are there laws that prohibit hate crimes against transgender people?

Yes. Washington passed a hate crime law including transgender people in 2009, and a federal law protecting transgender people from hate crimes was signed into law by President Obama in 2009.

▶ Is crossdressing against the law?

No. Crossdressing is not against the law in Washington.

Health Care Coverage

▶ Do any government health care programs cover transition-related surgery or other transition-related medical treatment?

Although *Medicare* explicitly excludes coverage for sex reassignment surgery, transgender people have been successful in securing *Medicaid* coverage for the costs of transition-related care in Washington. This may be about to end, however: in 2010, Medicaid officials announced their plan to rewrite regulations to make it clear that the state will no longer cover sex reassignment surgery (although state-funded plans will continue to cover other services, such as hormone treatment and psychotherapy, for people diagnosed with Gender Identity Disorder).

The managed health care program for active duty and retired armed forces members (formerly known as the Civilian Health and Medical Program of the Uniformed Services) excludes all services related to Gender Identity Disorder, including therapy, prescription drugs (e.g., hormones), and surgery.

▶ Does private health insurance cover transition-related surgery or other transition-related medical treatment?

It depends on what the health insurance company's contract says. Today, most insurance contracts either expressly exclude many forms of transition-related services or are unclear about whether such services are covered. Some transgender people have successfully forced insurance companies to pay for transition-related surgery when the contract did not clearly exclude this coverage.

Additionally, the increasing possibility that a federal identification card system will be developed increases the likelihood that, in the near future, a person's SSA gender marker will be considered the last word on the person's gender.

▶ Can a person change their name and gender on their passport?

Yes. To change their name, a person must provide a copy of a court-ordered name change.

To change the gender marker on his or her passport, a person must show that they have undergone the clinical treatment determined by their health care provider(s) to be appropriate to facilitate gender transition; this can be accomplished by submitting a letter from the person's treating physician stating that the person has had the appropriate treatment. No specific treatment is required, and the details of an individual's treatment (e.g., details about surgery, hormone treatment) need not be included in the letter.

It should be noted that, when changing a gender marker, the State Department often simply "stamps over" the previous gender marker, indicating that a change of sex took place on a particular date. For this reason, it is advisable to request a new passport, instead of a passport amendment. We recommend that a letter explaining why a new passport (and not a "stamp over") is needed should be submitted along with any additional documents required by the State Department.

Family Matters

▶ If one spouse in a marriage undergoes sex reassignment surgery, is the couple still legally married?

Yes. Generally speaking, the validity of a marriage is determined by the couple's status at the time the marriage is performed. Therefore, as long as the couple was legally entitled to marry when they entered into the marriage—which, in Washington, still means that the couple was opposite-sex—they remain married until death, divorce, or annulment. (It would make sense that the same principle be applied to couples who enter into domestic partnerships.) It follows that, if the spouses were of different sexes at the time of their marriage, the marriage should remain valid even if one spouse later transitions to become the same sex as their spouse.

Even without a divorce or annulment, however, legal problems can arise from a spouse's transition. For example, employers have been known to refuse health benefits to a spouse who is now of the same sex as the employee. Likewise, when one spouse dies, the surviving spouse may have problems collecting inheritance or tax benefits restricted to married couples. To date, there is very little law on these issues.

▶ Is the marriage of a person who has undergone sex reassignment surgery to a person of a different sex legal?

Washington law doesn't expressly address the rights of transgender people to marry. But because Washington expressly recognizes a person's gender identity as their gender in some situations (e.g., changing the gender marker on a driver license or birth certificate), it seems likely that a transgender person who has undergone sex reassignment surgery can

legally marry based on their gender identity. (The same rules likely apply to domestic partnerships—a person who has undergone sex reassignment surgery should be able to enter a domestic partnership based on their gender identity.)

▶ Does undergoing sex reassignment surgery during marriage affect parental rights?

Not necessarily. Many transgender parents retain custody of their children, and Washington courts have indicated that a trial court cannot restrict a parent's rights based on the fact that the person is transgender. However, transgender parents sometimes still fare poorly in custody and visitation disputes, where judges base their decisions on what they believe to be in the children's best interest. At least one Washington court has upheld a trial court's consideration of the impact of a parent's impending gender transition in determining primary residency; it held that although it is inappropriate to focus on the parent's transgender status per se, it is appropriate for a court to focus on the children's current discomfort with the transition and its unknown future effects.