

# LEGAL SERVICES

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## MEMORANDUM

March 28, 2017

**SUBJECT:** State Commission for Human Rights: Definition of term "sex"  
(Work Order No. 30-LS0779)

**TO:** Senator Berta Gardner  
Attn: Megan Holland

**FROM:** Linda M. Bruce   
Legislative Counsel

You requested an opinion on whether the term "sex" under AS 18.80 includes sexual orientation or gender identity. The short answer is that this issue is currently unresolved.<sup>1</sup>

The human rights laws under AS 18.80.200 - 18.80.255 prohibit discrimination based on "sex" in certain places or for certain activities, but do not explicitly include sexual orientation and gender identity. There is no existing definition, in Alaska Statutes, for the term "sex." I was not able to find any Alaska Supreme Court decisions resolving claims of discrimination under AS 18.80.200 - 18.80.255 based specifically on sexual orientation or gender identity. However, in *Rodriguez v. Alaska State Commission for Human Rights*, the Supreme Court noted, in resolving a claim of racial discrimination, that AS 18.80.220(a) "does not include discrimination based on a complainant's sexual orientation."<sup>2</sup>

The State Human Rights Commission (commission) administers AS 18.80.200 - 18.80.255. According to its website, the commission frequently processes complaints alleging sex discrimination prohibited by AS 18.80.200 - 18.80.255. On November 2, 2016, the commission passed a resolution that would interpret sex discrimination to include gender identity and sexual orientation, which is the interpretation used by the U.S. Equal Employment Opportunity Commission under Title VII of the 1964 Civil

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<sup>1</sup> Note that HB 139 and HB 19, introduced in the 28th Legislature and the 29th Legislature respectively, sought to resolve this issue by explicitly adding discrimination based on sexual orientation, gender identity, and expression to AS 18.80.200 - 18.80.255.

<sup>2</sup> 354 P.3d 380, 386 (Alaska 2015) (note that the court did not specifically analyze whether the term "sex" implicitly includes sexual orientation and gender identity).

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Rights Act.<sup>3</sup> The resolution also calls on the Alaska State Legislature to "prohibit discrimination on the basis of sexual orientation or gender identity and expression."<sup>4</sup> I do not know if the commission has actually received or investigated complaints of discrimination based on sexual orientation or gender identity since the resolution passed.

It is unclear whether an Alaskan court would uphold the commission's interpretation of "sex" to include gender identity and sexual orientation. To resolve any doubt about whether the protections of AS 18.80 apply to a person's sexual orientation or gender identity, these classes should be explicitly included under AS 18.80.200 - 18.80.255.

If I may be of further assistance, please advise.

LBB:mlp  
17-158.mlp

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<sup>3</sup> I have been unable to locate a copy of the resolution passed by the commission. See Anne Hillman, *Alaska Human Rights Commission proposes regulation changes to protect LGBTQ community*, ALASKA PUBLIC MEDIA (Nov. 7, 2016), <http://www.alaskapublic.org/2016/11/07/alaska-human-rights-commission-proposes-regulation-changes-to-protect-lgbtq-community/>

<sup>4</sup> *Id.*