

FIST Model Equality Act: Feminist Amendments to HR5/S788:

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Challenges

- Equality Act (HR5/S788) federal civil rights bill focusing on sexual orientation and gender identity, introduced in Congress, passed House 5/20/19
 - Not likely to pass Senate or override presidential veto
- Issues similar to state-level civil rights/non-discrimination laws, and litigation in federal courts (e.g. Harris case currently before SCT)
- Some feminists have chosen to work with organizations of the religious right such as Heritage Foundation and Concerned Women of America to combat gender identity, while only inconsistently supporting sexual orientation
- FIST principles include rejection of collaboration with religious right, anti-immigrant right, white supremacist right; views Christian right as most imminent threat to human rights

FIST Aims (as they evolved)

- To articulate a feminist position that addresses challenges to women's political existence and rights, as a result of gender identity ideology
- To distinguish a feminist position from a right-wing homophobic and transphobic position as well as from gender identity proponents
- To support the rights of lesbians, gay men, bisexual women and bisexual men and combat homophobia
- To support the claims of transgender people to non-discrimination within our feminist understanding of structural oppression based on sex, the relevance of sexed embodiment, and opposition to all sex stereotyping
- To plant seeds that promote the strengthening of women's and girls' rights generally within US law

Equality Act (HR5/S788)

- Would create federal civil rights protection for lesbians, gay men, bisexuals and transgender people, by defining 'sex' to include 'gender identity' and 'sexual orientation'
- Rule of construction prohibits 'denial of access to a shared facility, including a restroom, a locker room and a dressing room, that is in accordance with the individual's gender identity'
- Also included under 'sex' are 'pregnancy, childbirth or a related medical condition,' 'a sex stereotype' and 'sex characteristics, including intersex traits'
- Would eliminate the use of religious freedom claims to challenge civil rights obligations

Let's parse this from feminist perspective

- Separate sexual orientation from gender identity
- Separate gender identity – ideology that enshrines sex stereotypes, and misuse of subjective identity to undermine women's sex-based rights – from legitimate claims of transgender and other gender nonconforming people to protection against discrimination
- Ensure that sex classification remains legally possible and protect women's privacy, safety, affirmative action, cultural and political organizing
- Agree that pregnancy and childbirth are part of 'sex'; add 'lactation'
- Agree that religious freedom claims should not be used against civil rights obligations

FIST approach

- Two new categories (separate from ‘sex’ discrimination) – discrimination based on sexual orientation, and sex stereotyping
 - Prevents the confusion of sex with gender identity
 - Maintains an approach to sex discrimination that combats the structural oppression by males of females
- Definitions of ‘sex’, ‘female’, ‘male’, and ‘intersex’ according to reproductive structure and function, ‘accurately observed at or before birth with rare exceptions’
- Rules of construction that allow:
 - Sex classification based on observation recorded at birth only subject to correction in case of mistake about intersex persons; and inquiries about such sex classification
 - Female-only facilities, services and programs for privacy and safety reasons; and for women’s/girls’ advancement and development
 - Sex as bona fide occupational qualification
 - Programs exclusively for lesbians, gay men, bisexual women, bisexual men, transgender persons
 - Separate facilities for transgender individuals including ‘gender neutral’ facilities so long as availability and access to single-sex facilities for women/girls not diminished
 - Collection and publication of statistics based on biological sex

Issues and choices

- Linkage of sex, sexual orientation, sex stereotyping
 - Sex stereotyping includes expectation of heterosexual orientation
 - Sex stereotyping can constitute evidence of sex discrimination (following SCT precedent)
 - Separate categories create stronger protection and avoid abstraction and subjectification of 'sex' category
- Biology relevant both to combat structural oppression, and for equity where biology is directly relevant (health, design of goods, etc.) – CEDAW approach
- Sexual orientation defined based on attraction and/or intimate relationships (i.e. not an abstract identity)

Issues and choices 2

- Sex stereotyping defined both broadly and restrictively to allow broadest possible protection of gender nonconformity while ensuring sex can be ascertained for legitimate purposes
 - ‘Sex stereotyping includes the expectation that individuals will manifest behaviors, appearance, dress, grooming, interests and personality stereotypically associated with their sex and refrain from manifesting those associated with the other sex.’
 - ‘Sex stereotyping discrimination does not include merely recognizing or referring, accurately or in good faith, to the biological sex of an individual, or seeking to ascertain an individual’s biological sex for legitimate reasons consistent with this Act.’
 - Should protect against discrimination individuals who undergo body modification or otherwise present themselves socially as desired sex, as well as those who are intersex and those who are physical and social outliers, while maintaining accurate sex classifications

Discussion/Next steps

- Your thoughts?
 - Is this useful to articulate feminist position, i.e. not homophobic and not transphobic, disagrees with gender identity because of impact on women and girls immediately and ability to fight for liberation from structural oppression?
 - Can this help in our fight against both religious right and gender identity as anti-feminist movements simultaneously gaining ground?
- FIST is working on plans to circulate and promote – ideas welcome!
 - What kind of materials needed to understand and discuss knowledgeably?
 - Where and how?
- To join FIST fill out web form: <https://feministstruggle.us20.list-manage.com/subscribe?u=9b5f6cd05accb79cfc65187bc&id=00a47e28bb>
 - You will be added to email announcement list and receive information on further steps to join Feminist Assembly for active involvement and participation in decision-making

Annexes – text excerpts from FIST Model Equality Act

Purpose

- “It is the purpose of this Act to establish two new protected classes under federal Civil Rights laws, sexual orientation and sex stereotyping, in order to strengthen sex-based rights for women and girls, to clarify, confirm and create greater consistency in the protections and remedies against discrimination on the basis of all covered characteristics, to provide guidance and notice to individuals, organizations, corporations, and agencies regarding their obligations under the law, and to resolve conflicts of rights among members of protected classes.”

Definition of sex and related terms

- “(3) SEX.—The term ‘sex’ (also referred to as ‘biological sex’ herein) refers to an individual’s status of being female or male, based on primary physical characteristics that distinguish females from males on the basis of their reproductive organs and structure, including the gametes that an individual’s body is configured to produce. Sex is ordinarily determined at conception and is accurately observed at or before birth, with rare exceptions. Sex cannot be changed.
- “(4) SEX DISCRIMINATION.—The term ‘sex discrimination’ used with respect to an individual or group of individuals means discrimination based on the sex of that individual or individuals, and includes discrimination based on pregnancy, childbirth, lactation or a related condition. Sex stereotyping may be considered as evidence to prove a claim of sex discrimination
- “(5) FEMALES/WOMEN/GIRLS.—Refer to members of the sex that typically has the capacity to bear offspring and/or produce large gametes called eggs.

“(6) MALES/MEN/BOYS.—Refer to members of the sex that typically has the capacity of producing small, usually motile gametes called sper
- “(7) INTERSEX. - People with differences of sexual development, sometimes referred to as ‘intersex’, should ordinarily be classified as male or female on the same basis as others based on reproductive structure and function. In situations where specific measures or adjustments are warranted to fulfill the rights of the individuals concerned in light of their particular intersex conditions, measures should be devised that do so while preserving the sex-based rights of women and girls.”

Definition of sexual orientation

- “(8) SEXUAL ORIENTATION.—The term ‘sexual orientation’ means lesbianism, male homosexuality, heterosexuality, or bisexuality, based on whether a person is attracted to or in intimate relationships with persons of the same and/or other sex.”

Definition of sex stereotyping

- “(9) SEX STEREOTYPING.— ‘Sex stereotyping’ means the use of sex stereotypes in determinations made about an individual, or other discrimination based on an individual’s nonconformity with sex stereotypes. ‘Sex stereotypes’ also known as ‘gender roles’ or ‘gender norms’, mean notions of proper behaviors, appearance, mannerisms, dress and grooming socially imposed on males and females respectively. Sex stereotypes are particularly harmful to women and girls as they help maintain and justify sex discrimination and women’s subordinate roles relative to men; however, sex stereotypes can be restrictive to men and boys as well and discriminatory toward lesbians, gay men, bisexuals and transgender people, who do not conform to these stereotypes and/or may otherwise reject the stereotypes assigned to their sex. Dress and grooming codes or standards of behavior or appearance by employers or schools that are sex-specific and/or treat men and women differently discriminate on the basis of sex stereotyping.
- (A) Sex stereotyping includes the expectation that individuals will manifest behaviors, appearance, dress, grooming, interests and personality stereotypically associated with their sex and refrain from manifesting those associated with the other sex. Discrimination based on an individual’s nonconformity with such expectations constitutes sex-stereotyping discrimination. Sex stereotyping also includes the notion that sexual orientation will be heterosexual for both sexes (i.e. part of the stereotype of masculinity is being attracted to women, and part of the stereotype of femininity is being attracted to men).
- (B) Sex stereotyping discrimination does not include merely recognizing or referring, accurately or in good faith, to the biological sex of an individual, or seeking to ascertain an individual’s biological sex for legitimate reasons consistent with this Act, irrespective of whether that person holds a deeply personal sense of identity that conflicts with or denies their biological sex.”

Resources

- <https://feministstruggle.org>
- <https://feministstruggle.org/principles/>
- <https://feministstruggle.org/contact-us/>
- tminkowitz@earthlink.net