

RESOLUTION 06-02-2017 (REVISED)

DIGEST

Penal Code: Redefines “Sex” As “Gender”

Amends Penal Code section 422.57 to globally define “sex” as meaning “gender” when used in the Penal Code.

RESOLUTIONS COMMITTEE ANALYSIS

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 422.57 to include a definition of “sex” which is consistent with other California statutes. This resolution should be approved in principle because “sex” needs to be defined consistently with other laws which already define “sex” as “gender” to ensure consistent application and enforcement of law.

Title 11.6 of the Penal Code addresses the issue of civil rights and hate crimes. Penal Code section 422.55 defines hate crime as one committed against a victim because of certain characteristics. These characteristics, whether actual or perceived, include disability, nationality, race or ethnicity, religion, sexual orientation, and gender. Penal Code section 422.57, which applies to the entire Penal Code, not just Title 11.6, states that “gender” has the same meaning as in Penal Code section 422.56—which says gender “means sex, and includes a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” This resolution is necessary because “sex” is not defined, and “sex” should have the same meaning as “gender” as defined in section 422.56—in other words, “gender” means “sex” and “sex” means “gender.” Health and Safety Code section 1365.5, subdivision (b) equates “sex” with “gender,” but no similar definition of “sex” appears in the Penal Code. This resolution would do the same for the Penal Code, eliminating confusion and inconsistent interpretation, application and enforcement.

The Resolutions Committee initially recommended disapproval of this resolution. The full Conference voted to approve.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 422.57 to read as follows:

- 1 § 422.57
- 2 For purposes this code, unless an explicit provision of law or the context clearly requires
- 3 a different meaning, “gender” has the same meaning as in Section 422.56 and “sex” shall have
- 4 the same meaning as “gender” as defined under Section 422.56.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Penal Code section 422.56 currently states, “‘Gender’ means sex, and includes a person’s gender identity and gender expression. ‘Gender expression’ means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” However, the Penal Code does not explicitly define “sex” while other CA statutes defining “sex” make it clear that “sex” means “gender”. At least one statute references the definition of “sex” to mean “gender” as defined under penal code section 422.56. (See, e.g., Health and Saf. Code, § 1365.5(b).)

California law prohibits any program or activity that receives state financial assistance from discriminating on the basis of sex (See, Gov. Code, § 11135(a)). However, the penal code does not explicitly define “sex”, which has caused some confusion for law enforcement as to what constitutes “sex” in regards to policies and procedures.

In practice, most law enforcement departments and agencies define “sex” to mean an individual’s genitalia, which runs afoul of the clear understanding of “sex” as it is defined in other California codes. Other state laws provide comprehensive nondiscrimination protections based on gender identity and expression, including requiring that transgender and intersex people be recognized as the sex that corresponds to their gender identity in virtually every facet of society, including employment, housing, education, public accommodations, insurance contracts, hate crimes, and even death certificates. (See, e.g., Gov. Code, § 12940(a); Gov. Code, § 12955(a); Civ. Code, § 51(b); Educ. Code, § 221.5(f); Health and Saf. Code, § 1365.5(b); Educ. Code, § 200 *et seq.*; Civ. Code, § 51.7; Pen. Code, § 422.55(a)(2); Health & Saf. Code, § 102875 (“[A] person completing the [death] certificate shall record the decedent’s sex to reflect the decedent’s gender identity.”).)

California criminal justice and penal systems use search procedures to determine a person’s anatomy for the misguided, problematic and invasive purpose of identifying a person’s “sex”. Nowhere has this issue been more apparent as when a transgender or intersex person comes into contact with the criminal justice system. In every other facet of their lives in California, transgender and intersex people are treated in a manner consistent with their gender identity, and not their anatomy. In fact, California Gov. Code §11135 prohibits discrimination based on sex and gender identity, yet it is commonplace to discriminate based on these classifications in California law enforcement and correctional facilities.

The Solution: This resolution would make the Penal Code consistent with other statutes, rules and regulations, which define “sex” to mean “gender” and “gender” to mean “sex”. By explicitly defining “sex” in the Penal Code to mean “gender”, there will no longer be any confusion regarding law enforcement and correctional policies and procedures as they relate to sex and gender. It would make the Penal Code consistent with other California comprehensive nondiscrimination protections based on gender identity and expression, including requiring that

transgender people be recognized as the sex that corresponds to their gender identity in every facet of society.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known

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