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### **The Real ID Act: Bad Law for Our Community**

The “so-called” Real ID Act (H.R. 418) contains a number of provisions of concern for our community. The first is its impact on asylum applicants. The second is its requirements for new, uniform policies in regards to state identification documents.

While the bill may have originally been conceived from legitimate security concerns about terrorists utilizing false identification documents, the resulting Act seems to do little more than a) scapegoat immigrants, b) burden already over stretched state budgets, and c) likely create additional problems for transgender people trying to legitimately acquire or change identification documents.

Since the Act was only recently signed into law, it is unclear what its exact effects will be. Clearly, it creates additional barriers for asylum applicants at the same time that it narrows judicial review of administrative denials of applications. It also creates, for the first time, national standards for state identity documents, moving us as close as the current political climate will allow us to a national identity document. These national standards are likely to have unintended consequences for people seeking identification that corresponds to their gender identity. **Importantly, states have three years to comply with the identification provisions of the Act; it does not in anyway invalidate identification you already have.**

Below, we detail some of the possible and likely outcomes of this law and highlight the ways in which it could be used to harm our community, intentionally or unintentionally.

#### **Transgender Immigrants Seeking Asylum**

Due to positive court decisions recognizing the scope of persecution that transgender people face in countries around the world, asylum has become a very important program for members of our community. Hundreds of transgender people who suffered persecution in their home country and/or who would suffer persecution if they were returned to their home country have been granted asylum in the last five years. However, following in the wake of negative actions taken by Congress in the mid-90s, the Real ID Act further narrows who can qualify for asylum.

The Act gives asylum officers broad discretion in requesting that “the applicant should provide evidence which corroborates otherwise credible testimony.” In other words, the asylum seeker may be required to seek proof of persecution from those in their home country who have been their persecutors. In the past, such evidence was not necessary so long as the applicant was deemed credible by the asylum officer.

For transgender asylum applicants, this discretion could be particularly harmful. Most asylum officers do not receive training about transgender issues and therefore are ill-equipped in evaluating a transgender applicant’s claim. Asylum officers have been known to ask transgender applicants irrelevant questions about their sex lives or their “coming out” experience (a concept that does not exist in all cultures or countries). The applicant oftentimes has a hard time answering these questions due to their irrelevance or inapplicability. In a post-Real ID Act world, these offices will be more likely to request corroborating evidence when the answers they get to these questions are not sufficient.

At the same time that officers are exercising this discretion, courts will have less power to review incorrect decisions. The Real ID Act limits the ability of a judge to determine credibility for themselves unless the judge determines that an applicant’s testimony is so strong that “a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.” This standard is one that few, if any, applicants will be able to meet through testimony alone.

## **Identity Documents**

The Real ID Act also creates, for the first time, broad requirements that individual states must meet in order to have their identification documents recognized for all federal purposes. This means that if a state is found not to be in compliance with the requirements of the Real ID Act a person’s drivers license or state identification card from that state may be rejected by federal airport screeners, federal benefit providers (Medicaid or Medicare for instance), and even security guards at federal facilities.

The requirements mandate the types of documents that can be used for obtaining (and possibly renewing) a license or ID card.<sup>1</sup> They also require states to verify these documents – a process that will require undeterminable amounts of personnel hours and expense. Finally, they require all licenses to contain a minimum amount of information and a magnetic data strip on the back.

The requirements also force states to make electronic copies of all documents used to support a license or state ID application. It is likely that states will also make copies of documents used to change the name and/or gender marker on a license. These electronic copies will then be available in a national database to an undefined group of people. State, and local law enforcement officials (as well as federal officials probably) will have access to these records. These electronic records must be available for at least 10 years.

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<sup>1</sup> To meet the requirements of this section, a State shall require, at a minimum, presentation and verification of the following information before issuing a driver’s license or identification card to a person: (A) A photo identity document, except that a non-photo identity document is acceptable if it includes both the person’s full legal name and date of birth. (B) Documentation showing the person’s date of birth. (C) Proof of the person’s social security account number or verification that the person is not eligible for a social security account number. (D) Documentation showing the person’s name and address of principal residence.

Fortunately, the Act does not specifically address the ability of a state to issue licenses that reflect a person's gender identity. This means that most states that currently issue licenses post-transition can continue to do so. However, the chilling effect of this legislation and the severe consequences of being found to be out of compliance may lead some states that have had fairly liberal policies to tighten those policies significantly.

## **Conclusion**

While it is far too early to determine exactly how this new law will be used, the current administration has proven a lack of concern for the needs of transgender people in the United States. Therefore, it is likely that under the current administration this expansion of discretion in the asylum context and imposition of brand-new requirements in the identification context will likely create additional barriers for our community.

As the Departments of Homeland Security and Justice create policies and rules around the implementation of "Real ID", NCTE and TLC will continue to monitor the use of this law and the effects it has on our community. Even now, a broad coalition is forming to curb the worst excesses of the Real ID Act. We encourage everyone to push their elected representatives to be active participants in this effort.

For the actual language of the Real ID Act, go to [www.nctequality.org/documents\\_Real\\_ID.asp](http://www.nctequality.org/documents_Real_ID.asp).

*This document relies heavily on research conducted by the ACLU's Lesbian and Gay Rights Project. NCTE and TLC thank them for their continued efforts on behalf of transgender communities throughout the U.S. We also take sole responsibility for any errors in this document.*