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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Submission of ILGA-Europe¹, the European Region of the International Lesbian and Gay Association, to the Charter Convention²

1. Summary

ILGA-Europe's main recommendations are as follows:

The **non-discrimination article** of the Charter should include every ground of discrimination listed in Article 13 of the EC Treaty and Article 14 of the European Convention on Human Rights. The list in Article 13 EC, adopted in 1997, includes three important new grounds, **disability, age and sexual orientation**, which do not appear in the list in Article 14 of the Convention, adopted in 1950. However, ILGA Europe would wish to see the combined EC Treaty/Convention list supplemented in the European Union Charter by one additional ground, **gender identity**. We believe that this would serve to emphasise the need for protection from discrimination of a small, but very vulnerable group, transgendered people.

Article 13, Family Life of the draft Charter should be worded to recognise the **diversity of family life** in today's Europe.

2. NON-DISCRIMINATION

2.1 The inclusion of sexual orientation in the list of prohibited grounds of discrimination

The two main arguments for the inclusion of sexual orientation in the non-discrimination clause of the European Union Charter rest on the serious and wide-spread nature of the discrimination, and on the numerous precedents which now exist in European and national law for the inclusion of such a reference.

¹ ILGA-Europe is a non-governmental organisation that seeks to defend the human rights of lesbian, gay, bisexual and transgendered persons at European level. Its membership consists of over 150 non-governmental organisations, whose members are mainly lesbian, gay, bisexual and transgendered individuals, in over 30 European countries. It is a member of the Platform of European Social NGOs and enjoys consultative status with the Council of Europe.

² Drafted for the Board of ILGA-Europe by Nigel Warner, with the assistance of Dr. Robert Wintemute, School of Law, King's College, University of London, United Kingdom, and Dr. Kees Waaldijk, Faculty of Law, University of Leiden, Netherlands.

2.1.1 The seriousness of sexual orientation discrimination

ILGA Europe has recently published a comprehensive survey of discrimination against lesbian, gay and bisexual persons in Europe³. This reveals a most disturbing picture of the extent and seriousness of sexual orientation discrimination in Europe, whether among Member States of the European Union, the accession countries, or other European countries. For example:

- Discrimination on the basis of sexual orientation can be found in the laws or regulations of 7 Member States⁴, and 8 accession countries.⁵ The most common such provision, a discriminatory age of consent (4 Member States and 6 accession countries), has been ruled a violation of the European Convention on Human Rights by the European Commission on Human Rights.⁶
- 4 Member States and 2 accession countries⁷ have legal provisions or regulations that deny employment on the basis of sexual orientation in certain fields of state employment. The most common such provision, in the case of the armed forces (applying in 3 Member States and 2 accession countries), has been ruled a violation of the Convention by the European Court of Human Rights.⁸

³ "Discrimination Against Lesbian, Gay And Bisexual Persons In Europe" - A report by ILGA -Europe to the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe as a contribution to the preparation of its Report and Recommendations on the Situation of Lesbians and Gays in the of the Council of Europe (Motion for a Resolution - Doc. 8319) 16th February 2000 - available at:

<http://www.steff.suite.dk/ilgaeur.htm#Information>

⁴ Austria, Germany, Greece, Ireland, Luxembourg, Portugal, UK

⁵ Bulgaria, Cyprus, Estonia, Hungary, Lithuania, Poland, Romania, Turkey

⁶ European Commission of Human Rights report on Application No.25186/94, *Euan Sutherland against United Kingdom* (1 July 1997)

⁷ Germany, Greece, Luxembourg, Poland, Portugal, Turkey. In the case of Germany, a report in the *Tageszeitung* on 8th April 2000 suggests that the Ministry of Defence, faced with losing a case before the Federal Constitutional Court, is in the process of lifting the restrictions on homosexuals serving in the armed forces.

⁸ *Lustig-Prean & Beckett v. United Kingdom* (Applications nos. 31417/96 and 32377/96) (27 Sept. 1999)

- Studies in Sweden and the UK show that employment discrimination by individual employers is extensive. For example, a 1997 report by the Swedish Ministry of Labour included a survey of 650 lesbian, gay and bisexual persons. 12% said they had been turned down for a job as a result of sexual orientation, 8% had been denied promotion, and 8% had been forced to leave their job.⁹
- Homophobic violence is very common, as surveys in Ireland, Sweden and the United Kingdom have revealed.¹⁰ Typically, around a quarter of respondents in these surveys had been the victim of a violent attack. It is clear that in many European countries it can be very dangerous to identify oneself in public places as gay.
- Only 4 Member States and one accession country¹¹ accord a significant degree of legal recognition to same-sex partnerships (none of which is without discriminatory elements).

Inclusion of sexual orientation in the non-discrimination clause of the European Union Charter is made all the more necessary by:

- the failure of so many governments to recognise that sexual orientation discrimination is as pernicious and as damaging as other forms of prohibited discrimination, and to take steps to eliminate it both from their own laws and regulations, and to counter it in society generally;
- The fact that many people, both in public life, and as private citizens, still consider the expression of homophobic attitudes to be legitimate and respectable.

2.1.2 Precedents in European and National Law¹²

⁹ Arbetsmarknadsdepartementet. Stockholm (1997): Förbud mot diskriminering i arbetslivet på grund av sexuell läggning. Betänkande av utredningen mot diskriminering i arbetslivet på grund av sexuell läggning (SEDA). Statens offentliga utredningar 1997:175

¹⁰ Gay and Lesbian Equality Network and NEXUS Research Co-operative (1995) - Poverty, Lesbians and Gay Men: The Economic and Social Effects of Discrimination" Dublin: Combat Poverty Agency; Tiby, E and Lander, I (1996) – "Hat, hot, våd - utsatta homosexuella kvinnor och män. En pilotstudie i Stockholm. Stockholm: Folkhälsoinstitutet; Mason, A. and Palmer, A. (1996) - "Queer Bashing -- a national survey of hate crimes against lesbians and gay men". London: Stonewall;

¹¹ Denmark, France, Hungary, Netherlands, Sweden

¹² For a comprehensive survey of the national and

The European Community has express competence to combat sexual orientation discrimination under Article 13 of the EC Treaty, inserted by the Treaty of Amsterdam in 1997. This is a most important precedent, in the light of which the exclusion of sexual orientation discrimination from the non-discrimination clause of the Charter would be highly anomalous. Indeed, omission from the Charter would represent a signal that the Union had weakened its view as to the unacceptability of sexual orientation discrimination.

Although the European Convention on Human Rights does not make explicit mention of sexual orientation, a recent judgment of the European Court of Human Rights recognises that sexual orientation discrimination is a prohibited ground of discrimination under Article 14 of the Convention.¹³ Moreover, the Parliamentary Assembly of the Council of Europe voted in January 2000 to support a recommendation that sexual orientation be included in the list of prohibited grounds in the new draft Protocol No 12 to the Convention, which is currently under consideration by the Committee of Ministers. It took the view that explicit reference should be made to grounds of discrimination that were "especially odious", and that sexual orientation discrimination was amongst these.¹⁴

Since the 1970s, national anti-discrimination legislation and bills of rights in national constitutions, within and outside Europe, have increasingly recognised sexual orientation discrimination. Within the Member States of the European Union, the term "sexual orientation" (or a similar ground intended to cover sexual orientation) appears as a prohibited ground of discrimination in the legislation of 8 states: Denmark, Finland, France, Ireland, Luxembourg, the Netherlands, Spain and Sweden. It also appears in the legislation of one accession country, Slovenia, in that of two other European countries, Iceland and Norway, and in that of seven countries outside Europe,

international precedents, see Submission of ILGA - Europe to the Steering Committee for Human Rights (CDDH), Council of Europe (28 February 2000) on enshrining the principle of equality between men and women in the new Draft Protocol No. 12, and on the inclusion of sexual orientation discrimination in the list of prohibited grounds of discrimination. The submission can be accessed at: http://www.steff.suite.dk/Protocol_12_Submission1.doc

¹³ Salgueiro Da Silva Mouta C. Portugal - (Application no 33290/96) (21 Dec. 1999)

¹⁴ Opinion No. 216 (2000) – Assembly debate on 26 January 2000

Canada¹⁵, Australia¹⁶, the United States¹⁷, Israel, Namibia, New Zealand and South Africa. Moreover, in four countries, South Africa (1993), Ecuador (1998), Fiji (1998) and Switzerland (1999), sexual orientation (or a similar ground intended to cover sexual orientation) is included in the non-discrimination provision of the national constitution.

2.2 Gender Identity¹⁸

2.2.1 ILGA-Europe submits that the non-discrimination article of the EU Charter should also include the ground “gender identity” so as to make it clear that people who are transsexual or transgender¹⁹ are protected and in recognition of the particular vulnerability of this group.

2.2.2 The seriousness of discrimination

Transsexual and transgender people are one of the most vulnerable minorities in Europe. Their relatively small numbers make it extremely difficult for them to obtain any protection against discrimination through new legislation. They face violence, harassment and the denial of jobs or services because their gender identity or expression does not correspond with their recorded birth sex.²⁰ The discrimination they face can be quite as severe as that faced by other groups who traditionally are accorded specific protection by national and international anti-discrimination legislation.

When a transsexual person undergoes gender reassignment, some countries refuse to acknowledge the change of their social gender and/or the change of

their body morphology²¹. In these states transsexual people are forced to endure the almost daily humiliation of revealing their birth sex in many practical areas of life, so making them vulnerable to discrimination and prejudice regardless of the success of their gender role transition. The European Court of Human Rights condemned this practice, where forced disclosure of birth sex is sufficiently frequent, by finding a violation of Article 8 in *B. v. France* (1992). In that case, the applicant could not legally change her male forename, and could not prevent the disclosure of her birth sex (male) in documents such as her national identity card and her passport, and in her social security number.²²

Additionally this failure to recognise their new gender role means that for many they are effectively unable, in law, to found families and to take on the full social responsibilities embedded within the family.

2.2.3 Increasing recognition at the European and national level

There is throughout Europe ever wider recognition of transsexuality both by legislation and judicial decision and sex change surgery is allowed in every member state of the European Community.

In 1989 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1117 on discrimination against transsexuals and a Resolution on the condition of transsexuals, which in cases of transsexualism called on Member States to introduce legislation whereby

“all discrimination in the enjoyment of fundamental rights and freedoms is prohibited in accordance with Article 14 of the European Convention of Human Rights.”²³

Moreover, despite the extreme difficulties that transsexual people experience in attempting to invoke the legislative process, there have been in the 1990s a growing number of precedents within countries for express protection. The anti-discrimination legislation of a number of cities in the USA includes “gender identity” as a prohibited ground²⁴. In the US state of

¹⁵ In legislation at the federal level, in 9 of 10 provinces, and in 1 of 3 territories; in addition the Supreme Court of Canada has ordered that it be “read into” the legislation of the 3 remaining jurisdictions.

¹⁶ In the legislation of 5 of 6 states and in both territories

¹⁷ In the legislation of 11 of 50 states, the District of Columbia, and most major cities

¹⁸ For a more detailed statement of the arguments, see “*Proposed Additional Protocol Broadening Article 14 Of The European Convention: The Need For Express Inclusion Of “Gender Identity”*” (A submission by ILGA-Europe to the Steering Committee on Human Rights, Council of Europe – accessible at: <http://www.steff.suite.dk/art14trans.htm>)

¹⁹ The term transgender is used as an umbrella term that includes both pre-and post-surgical reassignment transsexual people. It also includes transsexual people who choose not or who, for some other reason, are unable to undergo genital reconstruction. It further includes all persons whose perceived gender or anatomic sex may conflict with their gender expression, such as masculine-appearing women and feminine-appearing men.

²⁰ See Melanie McMullan & Stephen Whittle, *Transvestism, Transsexualism and the Law*, 2d ed. (London: The Beaumont Trust, The Gender Trust, 1995).

²¹ See Amicus Brief by Liberty in the Sheffield and Horsham case - <http://www.pfc.org.uk/legal/lib-amic.htm>

²² *B v France* [1992], Ser. A, No. 232-C, paras. 25-26, 59-63. The Court noted, at para. 12, that the applicant was “unable to find employment because of the hostile reactions she aroused”.

²³ Recommendation 1117, 1989, Parliamentary Assembly of the Council of Europe

²⁴ These cities include Minneapolis, San Francisco, Evanston (Illinois), Louisville (Kentucky) and Houston

Minnesota, anti-discrimination legislation defines “sexual orientation” as including “having ... a self-image or identity not traditionally associated with one’s biological maleness or femaleness”²⁵ and in California gender and gender expression are protected categories under the state’s Hate Crime’s legislation²⁶. Discrimination against transsexual persons is also expressly prohibited in South Australia²⁷ and in the Northern Territory of Australia²⁸ where the ground sexuality is defined to include ‘transsexuality’, and in the Australian Capital Territory, where “transsexuality” is a separate prohibited ground²⁹. In New South Wales in Australia³⁰ discrimination is prohibited ‘on transgender grounds’ and the legislation refers to people as ‘being transgender’.

2.3 A Non-Exhaustive List of Grounds

The Charter’s non-discrimination article will establish a general non-discrimination principle for the EU. Such a general principle can only be established if the list of grounds in the article is open-ended or non-exhaustive, as is the case in Article 14 of the European Convention (“on any ground such as ... or other status”), Article 2 of the Universal Declaration of Human Rights (“without distinction of any kind, such as ... or other status”), or Article 26 of the International Covenant on Civil and Political Rights (“on any ground such as ... or other status”).

The current draft of the Charter’s non-discrimination article – Draft Article 19(1) (CHARTE 4137/00 – CONVENT 8) is not open-ended. It should therefore be reworded as follows:

“1. Any discrimination based on any ground such as ... or other status shall be prohibited.”

3. PRIVATE AND FAMILY LIFE

The European Convention on Human Rights includes respect for private and family life in one article, with the following wording: “the right to respect for private and family life”.

The most recent draft of the text covering private and family life available at the time of writing (CHARTE 4149/00 CONVENT 13) separates the right to respect for family life from that for private life by placing it in Article 13, Family Life, and refers to “privacy” rather than “private life”. We believe that it would be

²⁵ See Minn. Stat. Ann. s. 363.01(45).

²⁶ Calif. Stat. AB 1999, signed on the 28th September 1998.

²⁷ Equal Opportunity Act, 1984.

²⁸ Anti-Discrimination Act (REPA007), 1996.

²⁹ Discrimination Act No.81 of 1991.

³⁰ Anti-Discrimination Act No 48 of 1977, as amended by the Transgender (Anti-Discrimination and Other Acts Amendment) Act No. 22 of 1996, Schedule 1.

preferable for the Charter to follow the approach used in the Convention:

a. “Private life” is a concept that has been interpreted by the European Court and Commission of Human Rights in a large number of published decisions. “Privacy”, found in Article 26 of the International Covenant on Civil and Political Rights, may or may not have the same breadth as “private life”, and has been interpreted in relatively few cases by the United Nations Human Rights Committee.

b. “Private life” should also appear in the same article as “family life”, to emphasise, as the European Court of Human Rights has done in its case law, that family life can exist between cohabiting partners in the absence of a marriage. In both Article 2 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights, the reference to “privacy” is followed immediately by a reference to “family”. This is logical in that “family life” is one of the most important aspects of a person’s “private life”.

4. RIGHT TO MARRY AND TO FOUND A FAMILY

The most recent draft of the article on Family Life (CHARTE 4149/00 CONV 13) reads as follows:

“Article 13. Family life

1. Everyone has the right to respect for his family life.
2. Everyone has the right to marry and to found a family, according to the laws of the Member States governing the exercise of this right.
3. Protection of the family on a legal, economic and social level shall be ensured.”

As noted above, we believe that the “right to respect for family life” should be moved to Article 12, Respect for Private Life.

In addition, we suggest that Draft Article 13(3) should be amended as follows:

“3. Protection of families on a legal, economic and social level, and recognition of their diversity, shall be ensured.”

It is abundantly clear at the dawn of the 21st century that we can no longer speak of “the family”, as if every family in the EU consisted of a married heterosexual couple and their children living together. We would not speak of “the religion”, because there are different religions in the EU. Similarly, there is now a variety of forms of “families” in the EU, and the EU Charter must provide for the recognition of this social reality.

5. LEGAL STATUS OF CHARTER

ILGA-Europe considers that the Charter must be incorporated in the European Union Treaties, so as to avoid amounting to no more than an ineffectual declaration.

6. THIRD COUNTRY NATIONALS

ILGA-Europe supports the complete and express recognition of the fundamental rights of third country nationals within the territory of the European Union.

UK TO ACCEPT ADOPTION BY GAY COUPLES

By Eben Black, Chief Political Correspondent Sunday Times (April 24th)

Tony Blair is preparing to make it easier for gay couples to adopt children, a move that would be seen as putting them on a par with married heterosexuals.

He is planning a new national adoption scheme that would force councils to consider gay would-be parents' applications, which most reject outright at present.

The disclosure dismayed family campaigners. Valerie Riches, director of Family and Youth Concern, said: "This government is beholden to the gay lobby. It is very serious for the institution of marriage, which is the safest and best way to bring up children." The government announced last year that it was to review adoption after figures showed that there were more than 50,000 children in care homes. The initiative was given added impetus in the wake of a sex abuse scandal at care homes in north Wales, where at least 150 children were abused.

A summit meeting of adoption workers and council social services professionals will be hosted in Downing Street by John Hutton, the health minister, on Tuesday.

By making adoption easier, Blair aims to end the frustration that many couples feel at the delays and curbs placed on their applications. At present, nearly 1,300 would-be parents are waiting to adopt, although there are 5,000 children who have been approved to join families.

In British law there is nothing to stop a gay man or woman from individually adopting a child, subject to approval by the adoption agency, whether they live with a lover or not. In practice, however, very few applications are granted. In 1998 Cardiff University

researchers found that only three out of 2,000 approved adoptions were by gays.

Under the new national adoption plan, which will replace individual rules and criteria imposed by local councils, officials will have to treat gay would-be parents on the same basis as anybody else, provided they fulfilled criteria such as good health, parenting skills, regular income and a stable relationship. "This is about making adoption easier and it includes gay adoption," a Downing Street source said.

The move follows a landmark legal judgment by the law lords last year which said a gay couple should be treated as a family. Dame Elizabeth Butler-Sloss, the new president of the family division of the High Court, also said that children could be successfully adopted by gay couples.

Gay rights campaigners estimate there could be thousands of homosexual couples who could benefit from a shift that would end prejudice against gays adopting. In Denmark and Holland, gays can adopt in the same way as married couples. Germany is considering a similar change.

Hutton last night said Britain was currently bound by a convention signed in 1967 that only individuals or married couples can adopt. He insisted there was no immediate intention of changing that.

But he added: "We are revisiting the legislation. If there is to be any substantial reform to adoption law, we need legislation. If there is prejudice it has to be looked at. What we will certainly be looking at is how local authorities vet prospective adopters."

Felicity Collier, chief executive of the British Agencies for Adoption and Fostering, which has been commissioned by the health department to draw up the national guidelines, said it was "unhelpful" to exclude any group on "arbitrary grounds". "There are not enough families coming forward for the children waiting to be adopted," she said. "We don't think you should exclude people in gay and lesbian relationships."

Easing the adoption process for gays will raise questions about whether gay couples should be treated as a "family" for other purposes, and even bring up the controversial subject of whether gay marriages should be allowed in Britain.

Blair is determined to sweep away rules imposed by councils, which have included banning people weighing over 15st from adopting, introducing age limits such as 35 years - despite the limit being within child-bearing age - or declaring would-be parents to

be either "too black" or "too white" for mixed-race or ethnic-origin children.

Critics are concerned about adopted children in gay relationships suffering from lack of a mother or father role model. Rosemary Keenan, of Westminster Catholic Children's Society, said: "Children need a male and female role model."

CANADIAN PARTNER BILL PASSES HOUSE OF COMMONS

By Rex Wockner

Canadian legislation that will equalize gay and straight couples passed its final reading in the House of Commons April 18 by a vote of 174 to 72.

The measure grants gay couples all federal benefits received by common-law opposite-sex spouses and extends to gay and straight common-law couples many marriage rights that neither group currently has. It rewrites some 70 federal statutes in areas ranging from pensions and insurance to income tax and prison visits.

The bill is a response to several court decisions, including last year's Supreme Court ruling that Ontario's definition of "spouse" was unconstitutionally heterosexual.

"This legislation is about respect," said Justice Minister Anne McLellan. "It's about tolerance. It's about fairness."

The measure must pass through the unelected Senate, which is expected to rubberstamp it, before it becomes law.

UK HOUSE OF LORDS OK EQUAL AGE OF CONSENT

By Rex Wockner

A measure to equalize the ages of consent for gay and straight sex at 16 received an unopposed second reading in Britain's anti-gay House of Lords April 11. Currently gay-male sex is not legal until age 18.

The Lords still oppose the bill but because they have blocked it repeatedly in the past, the government now has the authority to invoke the little-used Parliament Act to change the law without the Lords' approval.

The Parliament Act can be used only when the unelected Lords repeatedly vote down a bill that began in and passed the elected House of Commons. The act has been used five times since 1911. Had the Lords

blocked the consent bill again, the government would have invoked the act immediately.

The measure still faces a third reading before the Lords but it is not expected to encounter further serious opposition.

The Lords likely will seek their revenge against Prime Minister Tony Blair's Labour government by continuing to block repeal of Section 28, a 10-year-old law that prohibits cities from "intentionally promot[ing] homosexuality" or teaching "the acceptability of homosexuality as a pretended family relationship" in schools.

Because the Section 28 repeal bill began in the House of Lords, the Lords' vote on it cannot be overridden via the Parliament Act.

LETTER TO SELECTED MEMBERS OF THE EUROPEAN PARLIAMENT

By ILGA-Europe

We, the European Region of the International Lesbian and Gay Association (ILGA -Europe) are writing to you to express our concerns over one part of the Naranjo Escobar draft opinion (PE 233.002) on the Non-Discrimination Action Programme for the Budgets Committee. The opinion is due to be voted by the Budget Committee on 22 May, with a deadline for amendments of 3 May.

Whilst the tone of the opinion is generally supportive towards organisations working on non-discrimination issues, we are very worried by the ramifications of amendment 7, which relates to the Annex of the proposed Action Programme - Strand 2, Capacity Building.

Amendment 7 proposes to reduce the level of co-funding for core activities of European NGOs proposed by the European Commission from up to 90% to 50%.

If this amendment is carried, it will have a catastrophic impact upon European NGOs working on behalf of the most vulnerable groups in society. Organisations affected would include those working against discrimination on the grounds of race and ethnicity, disability, gender, sexual orientation, and age. The effectiveness of many of these organisations to work to improve the lives of the victims of discrimination would be seriously diminished by a 50% co-financing requirement, as it is highly unlikely that they would be able to secure such high levels of co-financing from other sources.

We believe that this amendment undermines the aim of Article 13 to put in place measures which will counter the growth of discrimination. European-level NGOs in this field play a vital role in fostering a pan-European solidarity against discriminatory actions, a role which is particularly critical in the context of the present political climate.

We would like to request your support, and that of your group, in opposing amendment 7 and reverting to the original wording of the Commission proposal. We would be very grateful for the opportunity to meet with you to discuss this important issue, and its ramifications for the fight against discrimination. We will contact you to see whether such a meeting could be arranged.

The 10 % co-financing requirement already provided for in the proposal of the Commission is certainly the maximum a relatively small organisation such as ILGA-Europe could cope with, provided for that in-kind contribution would be possible under any projects co-financed by the Commission.

We thank you very much for your support. For any further query, please, contact us at the following e-mail address: ieboard@egroups.com