

20 August 2010

Yves Leterme  
Prime Minister of Belgium  
Presidency of the European Union

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Re: Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation [*hereinafter* proposed Directive].

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Dear Prime Minister,

This letter is submitted to the Belgian Presidency of the Council of the European Union by ASTRA and the Center for Reproductive Rights (the Center), two non-governmental organizations working to advance reproductive health and rights. It concerns Recital 17(h) and Article 3.2, which exclude protection of reproductive rights related health care and other services from the scope of the Directive. Before discussing why the reproductive rights references are problematic and why we favor their removal, we would first like to commend the Belgian Presidency on addressing the proposed Directive during its Presidency of the Council of the European Union. ASTRA and the Center welcome the proposed Directive and efforts towards effective realization of its principles.

On 8 December 2008 ASTRA and the Center participated in hearings and meetings held in the European Parliament to advocate for the removal of the explicit exclusion of reproductive rights protection from the proposed Directive. Following those meetings, we sent letters to the Directorate-General for Employment, Social Affairs and Equal Opportunities, the European Parliament rapporteur Buitenweg and to the Swedish and Spanish Presidencies. In our advocacy, we put forward several arguments as to why explicitly excluding reproductive rights protection from the Directive is problematic. We would like to share those arguments with the Belgian Presidency. They support the removal of the references to reproductive rights in the proposed Directive.

We would like to begin by pointing out that the proposed Directive purports to “implement[] the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation” in various areas, *including in access to health care*. Yet, the proposed Directive excludes the protection of reproductive rights-related health care and other services. This is specifically noted in Recital 17(h), which states that the “Directive does not apply to...laws on reproductive rights.” It is again noted in Article 3.2, which affirms that the “Directive does not alter the division of competencies between the

European Union and the Member States [and]...does not apply to...laws on reproductive rights.” These references, which serve to exclude from the scope of the Directive protection against discrimination occurring in the context of a particular health care service, notably, reproductive health care, are problematic.

**ASTRA and the Center recommend the removal of the “reproductive rights” reference in Article 3.2(a) and Recital 17(h) for the following reasons:**

1. The Center and ASTRA would like to emphasize that reproductive health care is encompassed in the notion of reproductive rights, as recognized by international consensus documents such as the 1995 Beijing Platform for Action, and by human rights systems, such as the United Nations Treaty Monitoring Bodies. At the 1995 **Women’s Conference in Beijing** all current EU Member States<sup>1</sup> agreed to the following **definition of reproductive health**, which the European Community endorsed:<sup>2</sup>

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases.<sup>3</sup>

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<sup>1</sup> All current 27 EU Member States were represented at the Conference on Women, Beijing, 4-15 September 1995, and adopted by consensus the Beijing Declaration and Platform for Action. The only current EU Member State which made a reservation on the definition of reproductive health and reproductive rights (paras. 94 and 95 of the Beijing Declaration and Platform for Action) was Malta, which noted that the use of such terms as “reproductive health,” “reproductive rights” and “control of fertility” should be consistent with its national legislation, which considers the termination of pregnancy through induced abortion as illegal. Malta did not accept without reservation the expression “circumstances in which abortion is not against the law,” as induced abortion is illegal in Malta. See Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995, at 157-177, § 21, available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en> [hereinafter Beijing Report].

<sup>2</sup> The European Community was involved in the formulation of the Beijing Declaration and Platform for Action in the preparatory process and at the Conference. See Beijing Report, *supra* note 1, at 138-141, § 3; The European Commission has noted that “[t]he European Community has observer status at the UN, and therefore participated at the Conference and in its preparation as an observer. The Community’s work helped the Member States to agree on a common position for the European Union, which served as a crucial tool during the conference and adoption of the Beijing Platform for Action.” European Commission, Implementation by the European Community of the Platform for Action adopted at the Fourth World Conference on Women in Beijing 1995, Working document of the Commission Services, May 2000, at 3, available at <http://www.un.org/womenwatch/daw/followup/responses/euquestionnaire.pdf>. Furthermore, the Council of the European Union periodically reviews the implementation by the Member States and the EU institutions of the Beijing Platform for Action. See Council of European Union, Review of the implementation by the Member States and the EU institutions of the Beijing Platform for Action, - Indicators in respect of the Girl Child. Draft Council conclusions, Brussels, 26 May 2008, 9055/08 SOC 261 + COR 1, available at <http://register.consilium.europa.eu/pdf/en/08/st09/st09669.en08.pdf>.

<sup>3</sup> Beijing Report, *supra* note 1, at § 94.

Member States further recognized the inextricable **link between reproductive health and reproductive rights in paragraph 95 of the Beijing Platform for Action:**

Bearing in mind the above definition, reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community. The promotion of the responsible exercise of these rights for all people should be the fundamental basis for government- and community-supported policies and programmes in the area of reproductive health, including family planning. As part of their commitment, full attention should be given to the promotion of mutually respectful and equitable gender relations and particularly to meeting the educational and service needs of adolescents to enable them to deal in a positive and responsible way with their sexuality. Reproductive health eludes many of the world's people because of such factors as: inadequate levels of knowledge about human sexuality and inappropriate or poor-quality reproductive health information and services; the prevalence of high-risk sexual behaviour; discriminatory social practices; negative attitudes towards women and girls; and the limited power many women and girls have over their sexual and reproductive lives. Adolescents are particularly vulnerable because of their lack of information and access to relevant services in most countries. Older women and men have distinct reproductive and sexual health issues which are often inadequately addressed.<sup>4</sup>

The **United Nations** Treaty Monitoring Bodies, which monitor state compliance with UN human rights treaties, including those referenced in paragraph 2 of the proposed Directive's recital, have recognized reproductive health services as an essential aspect of health care. They have specifically recognized the discrimination one can face in access to reproductive health services and have asked states parties to remove barriers to reproductive health.<sup>5</sup> United Nations Treaty Monitoring Bodies have further specifically encouraged states to introduce non-discriminatory access to reproductive health care services,<sup>6</sup> and have noted that certain groups of women have more difficulty in accessing reproductive health care, among them groups that are covered by the proposed Directive, including women with disabilities and young women.<sup>7</sup> In addition, The Committee on Economic, Social and Cultural Rights has

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<sup>4</sup> *Id.* at § 95.

<sup>5</sup> See Committee on the Elimination of All Forms of Discrimination Against Women, *General Recommendation 24: Women and Health* (20<sup>th</sup> Sess., 1999), U.N. Doc. A/54/38 at 5, §§ 11 and 14, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24> [hereinafter CEDAW, GR 24]; Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health* (Art. 12) (22<sup>nd</sup> Sess., 2000), U.N. Doc. E/C.12/2000/4, §§ 11 and 12, available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> [hereinafter CESCR, GC 14].

<sup>6</sup> See, e.g., Human Rights Committee, *Concluding Observations on Poland* (66<sup>th</sup> Sess., 1999), UN. Doc. CCPR/C/79/Add.110, § 11, available at <http://www.unhcr.org/refworld/docid/3ae6b00918.html>.

<sup>7</sup> See CEDAW, GR 24, *supra* note 5, §§ 6, 23, 24 (on age), 25 (on disabilities). On the particular vulnerability of women with disabilities in access to health services in general, see also CESCR, GC 14, *supra* note 5. On the double discrimination that women with disabilities suffer in various fields including health, see CEDAW Committee, *General Recommendation No. 18: Disabled Women* (10<sup>th</sup> Sess., 1991), U.N. Doc. A/46/38, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom18>. See also Committee on Economic, Social and Cultural Rights, *General Comment 5: Persons with Disabilities* (11<sup>th</sup> Sess., 1994), U.N. Doc E/1995/22 at 19, reprinted in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 28, U.N.Doc.

noted that access to health care and underlying determinants of health, as well as access to means and entitlements for their procurement, should be ensured without discrimination on the ground of sexual orientation.<sup>8</sup>

We regret that the proposed Directive continues to exclude reproductive rights from its scope. The problem lies in the language of Article 3.2(a) and Recital 17(h), which state that the Directive “does not apply to...laws on reproductive rights.” This language categorically excludes a whole area of rights and health care from the scope of the Directive.

2. Exclusion of reproductive rights related to health care sets an unjustifiable precedent that could have many negative implications for access to health care. This is particularly so in light of the Directive’s intended application to access to health care.

Consider, for example, violence against women, the elimination of which is recognized as a priority by the European Union. According to a recent report from Sweden, for example, 31% of disabled women have been subject to violence.<sup>9</sup> Yet, the references to reproductive rights in the proposed Directive in effect mean that discrimination against a disabled woman would be prohibited when she is seeking access to health care for a broken arm, but that no protection would be accorded to her when accessing health services as a result of sexual violence, since this is part of reproductive rights-related health care.

Women are also victims of female genital mutilation (FGM),<sup>10</sup> often because of their young age,<sup>11</sup> with the causes including a mix of cultural, religious and social factors. The United Nations reports that FGM is usually inflicted on girls between the ages of 4 and 12,<sup>12</sup> and can lead to infertility and dangerous childbirths.<sup>13</sup> FGM has recently become a more serious issue in Europe, as recognized by the European Union itself. A reproductive rights exception in the Directive would deny young girls and women protection against discrimination in accessing the reproductive health care they need to address complications related to FGM, and would fail to prohibit the practice on grounds of age discrimination.

Another example of the negative implications the references to reproductive rights may have relates to pap smear screening for cervical cancer. Under the current screening guidelines, lesbians require pap smears as often as heterosexual women. However, studies show that lesbian women receive less pap screening than heterosexual women, in part due to physicians omitting routine gynecological testing under the arguably discriminatory assumption that lesbian women do not need screening.<sup>14</sup> This assumption is faulty because many lesbians have had intercourse with men and because HPV can be

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HRI/GEN/1/Rev.5 (2001), available at <http://www.unhcr.ch/tbs/doc.nsf/0/4b0c449a9ab4ff72c12563ed0054f17d>. On adolescent access to reproductive health care, see Committee on the Rights of the Child, *General Comment 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (33<sup>rd</sup> Sess., 2003), U.N. Doc. CRC/GC/2003/4, available at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.4.En); Committee on the Rights of the Child, *General Comment 9: The Rights of Children with Disabilities*, (43<sup>rd</sup> Sess., 2006), U.N. Doc. CRC/C/GC/9, §§ 59-60, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.GC.9.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.GC.9.En?OpenDocument).

<sup>8</sup> See CESCR, GC 14, *supra* note 5, at § 18.

<sup>9</sup> European Women’s Lobby, *Examples of existing Discrimination Against Women in EU Member States Outside the Area of Employment*, page 3, available at [http://ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/org/ewl\\_en.pdf](http://ec.europa.eu/employment_social/fundamental_rights/pdf/org/ewl_en.pdf).

<sup>10</sup> Harmful Traditional Practices Affecting the Health of Women and Children, Fact Sheet No. 23 (1995), Office of the High Commissioner for Human Rights, available at <http://www.unhcr.ch/html/menu6/2/fs23.htm> [hereinafter Harmful Traditional Practices]; World Health Organization Female Genital Mutilation, Fact Sheet No. 241 (May 2008), available at <http://www.who.int/mediacentre/factsheets/fs241/en> [hereinafter WHO, FGM Fact Sheet].

<sup>11</sup> Harmful Traditional Practices, *supra* note 11.

<sup>12</sup> UNICEF and UNFPA Fact Sheet #3, What is Female Genital Mutilation? (Oct. 2000), available at <http://www.un.org/geninfo/faq/factsheets/FS3.HTM>; See also WHO, FGM Fact Sheet, *supra* note 11.

<sup>13</sup> Harmful Traditional Practices, *supra* note 11.

<sup>14</sup> Health care needs of gay men and lesbians in the United States, *Journal of the American Medical Association*, 1996; 275 (17):1354-1359.

transmitted from woman to woman.<sup>15</sup> Still, because of the proposed references to reproductive rights, the Directive would not protect gay women from providers refusing to conduct such standard reproductive healthcare services.

Yet another example involves coerced sterilization, which is a violation of reproductive rights and a form of discrimination against women, as recognized by the United Nations.<sup>16</sup> When coerced or forced sterilization occurs against a woman because of her race, it is also a form of race discrimination,<sup>17</sup> and is prohibited under the EU Race Directive. However, the proposed Directive does not provide the same protection to a woman who is coercively sterilized because of her disability, because unlike the Race Directive, they exclude reproductive rights-related health care from protection.

Finally, while women are most impacted by the exclusion of reproductive rights from the scope of the Directive for biological reasons and because they are often the victim of multiple discrimination, men may be affected as well. For example, a spinal cord injury is a debilitating disability with the potential to impact a man's ability to biologically reproduce.<sup>18</sup> Artificial insemination techniques could assist men with such injuries to biologically reproduce. Nevertheless, if reproductive rights are excluded, this Directive would not prohibit discrimination against men with disabilities in accessing such reproductive health services.

3. While it is recognized that health care regulation generally falls within the competence of Member States, the European Union anti-discrimination legal framework illustrates that the Union does have the competence to legislate on some aspects of healthcare, as is reflected in the proposed Directive and the Race Directive (2000/43/EC). National competence does not and should not preclude European level legislation against discrimination in access to the broad range of lawful reproductive health care services provided for by Member States. In addition, unlike education, marital status and family law, reproductive rights are not expressly qualified in the EU documents accompanying the proposed Directive as an area that does not fall under EC competence.<sup>19</sup> Therefore, the call for the exclusion of reproductive rights protection from the scope of the proposed Directive is unwarranted.

4. Lastly, we submit that while it has been stated that the proposed Directive is based on the Race Directive (2000/43/EC) in that it seeks to eliminate inequalities in non-discrimination protection, the Race Directive does not exclude from protection a whole category of rights and healthcare. Consistency in European Union legislation should be a guiding principle in developing this Directive so as not to create differences between levels of protection on the various grounds of discrimination and perpetuate what it seeks to eliminate. While the European Union is generally moving towards strengthening anti-

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<sup>15</sup> The risk factors for cervical cancer are: multiple male partners or partners who have had multiple sex partners, first intercourse at an early age, unprotected sex, and infection with the human papilloma virus (HPV). Peterkin A. & Risdon C., *Caring for Lesbian and Gay People: A Clinical Guide*, 2003, University of Toronto Press Inc., Toronto, Ontario; Lee R., *Health Care Problems of Lesbian, Gay, Bisexual, and Transgender Patients*, *Western Journal of Medicine*. 2000; 172:403-408; Solarz, A.L. Ed., *Lesbian Health: Current Assessment and Directions for the Future*, Washington DC, National Academy Press, 1999; Roberts S.J., *Lesbian Health Research: A Review and Recommendations for Future Research*, *Health Care for Women International*. 2001; 22:537-552.

<sup>16</sup> *AS v. Hungary*, CEDAW Committee Decision, 29 August 2006, available at

<http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%204-2004%20-%20English.pdf>.

<sup>17</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation 25: Gender-related Dimension of Racial Discrimination* (56<sup>th</sup> Sess., 2000), U.N. Doc. A/55/18, annex V at 152, available at <http://www2.ohchr.org/english/bodies/cerd/comments.htm>.

<sup>18</sup> *Sexual Function for Men with Spinal Cord Injury – Infosheet #3* (May 2007), available at <http://www.spinalcord.uab.edu/show.asp?durki=22405>.

<sup>19</sup> See The Council of the European Union, 11531/08 ADD 1 of 7 July 2008, Commission Staff Working Document accompanying the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment, SEC(2008) 2181, at 30-31, available at <http://register.consilium.europa.eu/pdf/en/08/st11/st11531-ad01.en08.pdf>.

discrimination mechanisms, the proposal indicates it is moving backwards on reproductive health and rights. This not only undermines women's equality but is also discriminatory, since it is mostly women in need of reproductive health care and it is mostly women who face barriers in accessing such care. In addition, by exempting such a broad category of rights and health care from protection, the proposal set a bad precedent for future European level legislation.

We were pleased to learn that the report of 20 March 2009 issued by European Parliament rapporteur Buitenweg on the proposed Directive recognized that including specific references to reproductive rights in the Directive is problematic. As was noted in that report, "the Commission proposal would...permit discrimination in connection with reproductive rights, such as sterilisation...this [is] undesirable."<sup>20</sup> The European Parliament hence, introduced amendments on 2 April 2009 to remove the reproductive rights references contained in the Directive. Consequently, we hope that the Belgian Presidency, particularly in light of its commitment to gender equality and ending violence against women, will carefully consider supporting the removal of the reproductive rights language from the Commission proposal.

In addition, the recently adopted European Parliament resolution on Equality between women and men in the European Union – 2009, which references the Treaty of the European Union and the Charter on Fundamental Rights, recognizes that equality is a fundamental principle of the European Union. The resolution specifically notes that control over sexual and reproductive rights, including measures and actions to improve access to sexual and reproductive health services, which implies eliminating discrimination in access to health services, is part of achieving equality.<sup>21</sup>

## Conclusion

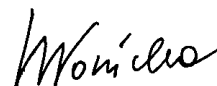
Article 3.2(a), as drafted, would exclude from protection a whole category of health care and lead to legal uncertainty on the part of providers and potential victims of discrimination. While both men and women need and seek reproductive health care services, this proposed directive would perpetuate discrimination against women, since women are often the victims of multiple discrimination (see recital paragraph 13 of the proposed Directive), and are for biological reasons most impacted by such an exclusion.

We hope that the above information is useful in supporting the removal of the reproductive rights reference in Article 3.2(a) of the proposed Directive and in paragraph 17(h) of its recital. Should you need further information, please do not hesitate to contact us.

Respectfully yours,



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<sup>20</sup> European Parliament, Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS)), rapporteur Kathalijne Buitenweg, 20 March 2009.

<sup>21</sup> See European Parliament resolution of 10 February 2010 on equality between women and men in the European Union – 2009 (2009/2101(INI)), A7-0004/2010, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0021+0+DOC+XML+V0//EN>.

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