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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 or Directive].

Dear Ms. Lund,

This letter is submitted to the Swedish 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 the drafting suggestions of the Swedish Presidency of 10 July 2009 regarding the proposed Directive. In particular, it concerns the references to *reproductive rights* contained in Recital 17(h) and Article 3.2 of the drafting suggestions of the Swedish Presidency. References to reproductive rights are also found in Recital 17 and Article 3.2 of the Directive as originally presented by the Commission on 2 July 2008. These references, which serve to exclude the protection of reproductive rights from the scope of the Directive, are problematic.

Before discussing why the reproductive rights references are problematic and why we favor their removal, we would first like to commend Sweden on advancing the Directive through the legislative process during its Presidency of the Council of the European Union. ASTRA and the Center welcome the proposed Directive and any efforts towards its realization.

On 8 December 2008 we 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 also sent letters to the Directorate-General for Employment, Social Affairs and Equal Opportunities and European Parliament rapporteur Buitenweg. In our advocacy, we put forward several arguments as to why explicitly excluding reproductive rights protection from the Directive is troubling. We would like to share those arguments with the Swedish Presidency. They

support the removal of the references to reproductive rights made in the drafting suggestions of the Swedish Presidency and in the Directive as presented by the Commission.

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”¹ in various areas, *including in access to health care*.

As presented by the Commission, the Directive excludes the protection of reproductive rights from its scope when such protection would interfere with national laws on the issue by stating in Recital 17 and Article 3.2 that it is “without prejudice to national laws...on reproductive rights.” Since reproductive health and health care form an integral part of reproductive rights this means that the Directive, at least where national laws come into play, does not prohibit discrimination in a very broad category of health care.

We regret that the drafting suggestions of the Swedish Presidency take the exclusion of reproductive rights from the scope from the Directive even further. We support the first sentence of the drafting suggestions for Article 3.2, which merely reflects the legal reality of the European Union by noting that the “Directive does not alter the division of competences between the European Community and the Member States.” The problem lies with the suggestions for the second sentence of Article 3.2 and the first sentence of 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. Unlike in the Commission proposal, reproductive rights are not only excluded when they are with prejudice to national laws, but also when there is no such prejudice.

The explicit exclusion of reproductive rights from the scope of the Directive, especially in the form proposed by the drafting suggestions of the Swedish Presidency, but certainly also in the manner proposed by the Commission, is disconcerting. This is particularly so in light of the Directive’s intended application to access to health care. It sets an unjustifiable precedent that could have many negative implications.

Consider, for example, violence against women, the elimination of which is recognized as a priority by the Swedish Presidency. According to a recent report from Sweden, 31% of disabled women have been subject to violence.² Yet, the references to reproductive rights in the drafting suggestions of the Swedish Presidency and in the Directive as presented by the Commission 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 health care.

Women are also victims of female genital mutilation (FGM),³ often because of their young age,⁴ 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 4-12,⁵ and can lead to infertility and dangerous childbirths.⁶ As a result of immigration, 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.⁷ This assumption is faulty because many lesbians have had intercourse with men and because HPV can be transmitted from woman to woman.⁸ 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.⁹ When coerced or forced sterilization occurs against a woman because of her race, it is also a form of race discrimination,¹⁰ and is prohibited under the EU Race Directive. However, neither the drafting suggestions of the Swedish Presidency, nor the language presented by the Commission would provide the same protection to a woman who is coercively sterilized because of her disability, because unlike the Race Directive, they exclude reproductive 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 since 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.¹¹ 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.

The second argument we put forth for the removal of the reproductive rights references in the drafting suggestions of the Swedish Presidency and the Directive as presented by the Commission relates to the division of competences between the Member States and the European Union. 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.¹² Therefore, the drafting suggestions of the Swedish Presidency and the Commission proposal calling for the exclusion of reproductive rights protection from the scope of the Directive are unwarranted.

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 Article 13 legislation should be a guiding principle in developing this Directive so as not to create differences between levels of protection on the different grounds of discrimination and perpetuate what it seeks to eliminate. While the European Union is generally moving towards strengthening anti-discrimination mechanisms, the Swedish drafting suggestions and the Commission proposal indicate 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 women who face barriers in accessing such care. In addition, by exempting such a broad category of rights and health care from protection, the Swedish drafting suggestions and the Commission 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."¹³ The European Parliament hence, introduced amendments on 2 April 2009 to remove the reproductive rights

references contained in the Directive as presented by the Commission. The drafting suggestions of the Swedish Presidency likewise permit discrimination in the area of reproductive health and rights. Consequently, we hope that the Swedish Presidency, particularly in light of its commitment to gender equality and ending violence against women, will carefully consider removing the explicit references to reproductive rights from its drafting suggestions and will support the European Parliament amendments of 2 April 2009 removing the reproductive rights references from the Commission proposal.

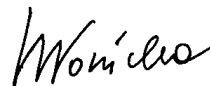
If due to political constraints progress in the area of reproductive health and rights cannot be achieved at this point in time, we encourage the Swedish Presidency to at least work to maintain the status quo and secure that there is no backlash in ensuring access to reproductive health care and women's exercise of their reproductive rights throughout Europe.

We hope that the information provided by us will be useful as you move this directive forward. Should you require any additional information on this issue, please do not hesitate to contact us.

Respectfully yours,



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¹ Title of initial legislative document, 2008/0140 (CNS), 2 July 2008.

² *Examples of existing Discrimination Against Women in EU Member States Outside the Area of Employment*, European Women's Lobby, page 3, available at http://ec.europa.eu/employment_social/fundamental_rights/pdf/org/ewl_en.pdf.

³ Harmful Traditional Practices Affecting the Health of Women and Children, Fact Sheet No. 23, Office of the High Commissioner for Human Rights, available at <http://www.unhchr.ch/html/menu6/2/fs23.htm>; World Health Organization Female Genital Mutilation, Fact Sheet No. 241 (May 2008), available at <http://www.who.int/mediacentre/factsheets/fs241/en/>.

⁴ Harmful Traditional Practices Affecting the Health of Women and Children, Fact Sheet No. 23, Office of the High Commissioner for Human Rights, available at <http://www.unhchr.ch/html/menu6/2/fs23.htm>.

⁵ UNICEF and UNFPA Fact Sheet #3, What is Female Genital Mutilation?, available at <http://www.un.org/geninfo/faq/factsheets/FS3.HTM>; See also World Health Organization, Female Genital Mutilation, Fact Sheet No. 241 (May 2008), noting that the practice is mostly carried out on young girls sometime between infancy and age 15 years, available at <http://www.who.int/mediacentre/factsheets/fs241/en/>.

⁶ Harmful Traditional Practices Affecting the Health of Women and Children, Fact Sheet No. 23, Office of the High Commissioner for Human Rights, available at <http://www.unhchr.ch/html/menu6/2/fs23.htm>.

⁷ Health care needs of gay men and lesbians in the United States. *Journal of the American Medical Association*. 1996; 275 (17):1354-1359.

⁸ 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.

⁹ *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>.

¹⁰ Committee on the Elimination of Racial Discrimination, General Recommendation XXV.

¹¹ Sexual Function for Men with Spinal Cord Injury, available at

<http://www.spinalcord.uab.edu/show.asp?durki=22405>.

¹² 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>.

¹³ 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.