



13 January 2009

Kathalijne Buitenweg
Member of the European Parliament
European Parliament
Office 8G309
Wietzstraat
B-1047 Brussels
Belgium
Fax: +32-2-284-9266

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)

Dear Ms. Buitenweg,

This letter is a follow-up to our meeting and the hearing held in the European Parliament on 8 December 2008 regarding the above-referenced proposed directive. ASTRA and the Center for Reproductive Rights (the Center), two non-governmental organizations working to promote and advance reproductive health and rights, submit this letter with regards to Article 3.2 of the proposed directive, particularly the reference to ‘reproductive rights’. We would like to first take the opportunity to express our support for this proposed directive and efforts towards its realization. We commend your work in moving this initiative forward and appreciate your commitment to ensuring participation by civil society in its development.

Below please find **I**) a short justification for the removal of the reproductive rights reference in Article 3(2) of the proposed directive, **II**) four examples illustrating the implication that this reference could have, if it is kept in **III**) an internationally accepted definition of reproductive rights and **IV**) two short additional arguments for the removal of the reproductive rights language in Article 3(2).

I. Remove the “reproductive rights” reference in Article 3(2) for the following reasons:

- While the proposed directive prohibits discrimination in access to health care, Article 3.2, as drafted, explicitly excludes from such protection a *very broad* category of health care, reproductive health care, on all four grounds covered by this directive (see definition of reproductive rights and reproductive health below). As drafted it would exclude from protection access to reproductive health care services as they relate to marital and family status, which is problematic as it is very often by virtue of one’s marital or family status that discrimination in access to health care occurs and this is true not just on the grounds

of sexual orientation but also on the grounds of age and religion. Moreover, the imprecise formulation of Article 3.2 could be interpreted to exclude from protection non-discrimination in access to *all* reproductive health care services on *all* four grounds. Thus, a whole category of health care would be exempted from protection under this directive. This is an unprecedented and unjustifiable exemption.

II) The following examples illustrate the implications that this exemption could have:

- Violence against disabled women is a growing problem in Europe. A recent report from Sweden shows that 31% of disabled women have been subject to violence.¹ The proposed directive would in effect, prohibit discrimination against a disabled woman when accessing health services to care for a broken arm but would not grant her this same protection when accessing health services as a result of sexual violence, as this care is part of reproductive health care.
- Lesbians require regular pap smear screening for cervical cancer at the current screening guidelines used for heterosexual women. Studies show that lesbian and bisexual women receive less pap screening than do heterosexual women², in part due to physicians omitting routine gynecological testing under the arguably discriminatory assumption that lesbian women don't need screening.³ Lesbians are at risk for cervical cancer because many have had intercourse with men and because HPV can still be transmitted from woman to woman.⁴ The proposed directive would not protect gay women from providers refusing to conduct such standard reproductive healthcare services.
- Women are victims of female genital mutilation (FGM)⁵ often because of their young age⁶ with the causes often including a mix of cultural, religious and social factors related to marital status.⁷ The United Nations reports that it is usually inflicted on girls between the ages of 4-12.⁸ The impact on the reproductive health of young women is debilitating and can lead to infertility and dangerous childbirths.⁹ Because of immigration, FGM has recently become more problematic in Europe, as recognized by the European Union itself.¹⁰ The reproductive rights exception under Article 3.2 could in effect not protect discrimination against young girls and young women from accessing reproductive health care they need to address complications related to FGM as well as prohibit the practice on grounds of age discrimination.
- A spinal cord injury (SCI) is a debilitating disability which can affect a man's ability to biologically reproduce.¹¹ The type and level of injury both can play a role on the degree of impact this has. Use of artificial insemination techniques is one means by which such men would be able to biologically reproduce. This proposed directive would not prohibit discrimination against men with disabilities in accessing such reproductive healthcare services.
- Coerced sterilization is a violation of reproductive rights and is a form of discrimination against women, as recognized by the UN.¹² When coerced or forced sterilization occurs against a woman because of her race, it is also a form of race discrimination,¹³ and is prohibited under the EU Race Directive. However, this proposed directive would not provide the same protection to a woman who is coercively sterilized because of her disability because unlike the Race Directive, this proposed directive excludes the whole category of reproductive health care from protection.

III) Definition of Reproductive Rights

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 States¹⁴, agreed to the following **definition of reproductive health**, to which the European Community endorsed:¹⁵

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.¹⁶

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.¹⁷

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 and have asked states parties to remove barriers to access to health services, including in the area of reproductive health.¹⁸ They have specifically encouraged states to introduce non-discriminatory access to reproductive health care services.¹⁹ 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.²⁰ In addition, The Committee on Economic, Social and Cultural Rights, has noted that access to health care and underlying determinants of health, as well as to means and entitlements for their procurement should be ensured without discrimination on the ground of sexual orientation.²¹

The above internationally recognized definition of reproductive health and rights shows how the imprecise formulation of Article 3.2 could exclude from protection access to a broad range of health care services.

IV) Additional following arguments for the removal of the reproductive rights exemption in Article 3.2 of the proposed directive and in paragraph 17 of its recital:

- 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 it does have competency 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.²²
- 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 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. In addition, by exempting such a broad category of health care from protection, the proposed directive sets a bad precedence for future European level legislation.

Conclusion

Article 3.2, 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 for biological reasons, women as opposed to men are most impacted by such an exclusion.

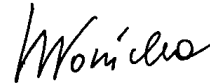
We hope that the above information is useful in supporting the elimination of reproductive rights reference to Article 3.2 of the proposed directive and to paragraph 17 of its recital. Should you need further information, please do not hesitate to contact us.

Respectfully yours,



Christina Zampas
Senior Manager and Legal Adviser for Europe
Center for Reproductive Rights

czampas@reprorights.org
tel: +46-8-668-9320



Wanda Nowicka
Coordinator
ASTRA Network

Warsaw, Poland
nwanda@federa.org.pl
tel: +48-22-635-93-95

cc: Liz Lynne, MEP

¹ *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

² Jeanne M. Marrazzo, MD, MPH, Laura A. Koutsky, PhD, Nancy B. Kiviat, MD,

Jane M. Kuypers, PhD, and Kathleen Stine, NP, *Papanicolaou Test Screening and Prevalence of Genital Human Papillomavirus Among Women who Have Sex With Women*, American Journal of Public Health, June 2001, Vol.91, No. 6 available at

<http://www.ajph.org/cgi/reprint/91/6/947?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=1&author1=Stine&andorexacttitle=and&andorexacttitleabs=and&andorexactfulltext=and&searchid=1&FIRSTIND EX=0&sortspec=relevance&fdate=1/1/2000&tdate=1/31/2002&resourcetype=HWCIT>; Valanis BG, Bowen DJ, Bassfort T, Whitlock E, Charney P, Carter RA. Sexual orientation and health: comparisons in the women's health initiative sample. Archives of Family Medicine. 2000;9(9):843-53;

³ Id., [Council on Scientific Affairs, American Medical Association]. Health care needs of gay men and lesbians in the United States. Journal of the American Medical Association. 1996;275(17):1354-1359.

⁴ The risk factors for cervical cancer are multiple male partners or partners who have had multiple sex partners, 1st 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 Incorporated. Toronto, Ontario; Lee R. Health care problems of lesbian, gay, bisexual, and transgender patients. Western Journal of Medicine. 2000;172:403-408; Solarz, AL Ed. Lesbian Health: Current Assessment and Directions for the Future. Washington DC. National Academy Press; 1999; Roberts SJ. Lesbian health research: a review and recommendations for future research. Health Care for Women International. 2001;22:537-552.

⁵ 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>

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 WHO Female Genital Mutilation, Fact Sheet No. 241 (May 2008), available at

<http://www.who.int/mediacentre/factsheets/fs241/en/>

⁸ 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/>

⁹ 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>

¹⁰ Female Genital Mutilation, What Europe Can and Should Do. Speech by Commissioner Anna Diamantopoulou, 29 November 2000, available at

http://ec.europa.eu/employment_social/speeches/2000/001129ad.pdf; 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>

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

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

¹² AS v Hungary, CEDAW Committee decision, 29 August 2006

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

¹³ Committee on the Elimination of Racial Discrimination, General Recommendation XXV.

¹⁴ 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, accepted that 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>

¹⁵ 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 Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 at 138-141, § 3, available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>; The European Commission has noted that "The 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>.

¹⁶ Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 at para. 94, available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>

¹⁷ Id. at para. 95

¹⁸ See Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation 24: Women and Health (20th Sess., 1999), paras. 11 and 14 available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>; Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health *Art. 12) (22nd Sess. 2000) paras 11 and 12, available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En)

¹⁹ See for e.g. Poland, 29/07/99, UN. Doc. CCPR/C/79/Add.110 para.11, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.110.En](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.110.En)

²⁰ See CEDAW Committee, *General Recommendation No. 24* (20th session, 1999) (article 12 : Women and health), paras 6, paras 23 and 24 (on age), para 25 (on disabilities), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>. On the particular vulnerability of women with disabilities in access to health services in general, *see also* Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (22nd Sess., 2000), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 90, U.N.Doc. HRI/GEN /1/Rev.5 (2001), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En); on the double discrimination that women with disabilities suffer in various fields including health, *see* CEDAW Committee, *General Recommendation No. 18* (tenth session, 1991) Disabled women, 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* (11th Sess., 1994), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 28, U.N.Doc. HRI/GEN/1/Rev.5 (2001), available at <http://www.unhchr.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*, U.N. Doc. CRC/GC/2003/4 (2003), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.4.En](http://www.unhchr.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*, 43rd Sess., paras. 59-60, U.N. Doc. CRC/GC/2006/9 (2006), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.GC.9.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.GC.9.En?OpenDocument).

²¹ *See* Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (22nd Sess., 2000), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 90, para. 18, U.N.Doc. HRI/GEN/1/Rev.5 (2001)

²² *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>.