

**DRAFT PROTOCOL NO. 12 TO THE
EUROPEAN CONVENTION ON HUMAN RIGHTS:**

**THE IMPORTANCE OF INCORPORATING
THE PARLIAMENTARY ASSEMBLY'S OPINION NO. 216 (2000)**

**Submission of ILGA-Europe,
the European Region of the International Lesbian and Gay Association,
to the Steering Committee for Human Rights (CDDH),
Council of Europe¹**

28 February 2000

ILGA-Europe is a non-governmental organisation that seeks to defend the human rights of lesbian, gay, bisexual and transgendered persons at European level. It was granted consultative status with the Council of Europe in 1998. Its membership consists of over 150 non-governmental organisations, whose members are mainly lesbian, gay, bisexual and transgendered individuals, in over 30 European countries.

ILGA-Europe respectfully submits that the Steering Committee for Human Rights (CDDH) should amend Draft Protocol No. 12 so as to incorporate the Opinion of the Parliamentary Assembly on Draft Protocol No. 12 (Opinion No. 216, adopted by the Assembly on 26 January 2000), and should recommend to the Committee of Ministers the adoption of Draft Protocol No. 12, as so amended.

The Council of Europe's NGO Forum, held in Rome on 21-22 February 2000 (part of the preparatory work of the European Ministerial Conference on Human Rights marking the 50th anniversary of the European Convention on Human Rights, Rome, 3-4 November 2000), made the following recommendation, the first of eighteen, to the Drafting Group of the Steering Committee for Human Rights (CDDH-GR) under Sub-Theme 2(a) ("Threats to the principles of equality and non-discrimination"):

"The Committee of Ministers should accept Opinion 216 of the Parliamentary Assembly on Draft Protocol No. 12 ... and amend the Draft Protocol by adding a new Article 1(1) ('Men and women are equal before the law') and by adding 'sexual orientation' to the list of prohibited grounds in what would become Article 1(2)."

I. THE PRINCIPLE THAT "MEN AND WOMEN ARE EQUAL BEFORE THE LAW" SHOULD BE ENSHRINED IN DRAFT PROTOCOL NO. 12

Because women represent over 50% of the population, they are the largest group affected by discrimination, and discrimination based on sex against women is therefore probably the most common form of discrimination in the Member States of the Council of Europe. For this reason, it is important that a separate, symbolic principle that "Men and women are equal before the law" should be enshrined in Draft Protocol No. 12. Such a principle would reinforce rather than duplicate the

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prohibition of sex discrimination in the current text of Draft Protocol No. 12. Similar principles exist alongside prohibitions of sex discrimination in the following international treaties and national constitutions:

- International Covenant on Civil and Political Rights - Article 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of the civil and political rights set forth in the present Covenant."
- European Community Treaty - Article 2: "The Community shall have as its task ... to promote ... equality between men and women ..."; Article 3(2): "In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women."
- Finland - Constitution - Section 5: "Equality of the sexes shall be promoted in social activities and in working life ..."
- France - Preamble to Constitution of 27 October 1946: "La loi garantit à la femme, dans tous les domaines, des droits égaux à ceux de l'homme." ("The law guarantees women equal rights to those of men in all spheres.")
- Germany - Basic Law - Article 3(2): "Men and women shall have equal rights."
- Greece - Constitution - Article 4(2): "Greek men and women have equal rights and equal obligations."
- Malta - Constitution - Section 14: "The State shall promote the equal right of men and women to enjoy all economic, social, cultural, civil and political rights ..."
- Poland - Constitution - Article 33(1): "Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland."
- Russian Federation - Constitution - Article 19(3): "Man and woman shall have equal rights and liberties and equal opportunities for their pursuit."
- Sweden - Constitution - Chapter 1 ("Basic Principles"), Article 2(3): "The public administration shall guarantee equal rights to men and women ..."
- Switzerland - Constitution - Article 8(3): "L'homme et la femme sont égaux en droit." ("Men and women are equal before the law.")
- Ukraine - Constitution - Article 24: "Equality of the rights of women and men is ensured ..."
- Canada - Constitution - Canadian Charter of Rights and Freedoms - Section 28: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."
- South Africa - Constitution - Article 1: "The Republic of South Africa is one sovereign democratic state founded on the following values: ... (b) Non-racialism and non-sexism."

Mr. Erik Jurgens said in the Explanatory Memorandum that accompanied the draft Opinion adopted by the Parliamentary Assembly:² "In a modernised version of Article 14 it would seem that at least [the example of the German Basic Law] should be followed by formulating the equality of men and women separately, as something that is presupposed when discussing the content of human rights. The human race is made up of men and women. One cannot, therefore, equate men or women with a category or group."

² Doc. 8614, 14 January 2000, paragraph 34.

II. "SEXUAL ORIENTATION" SHOULD BE ADDED TO THE ENUMERATED GROUNDS OF DISCRIMINATION IN DRAFT PROTOCOL NO. 12

ILGA-Europe respectfully submits that sexual orientation should be included in the list of grounds in Draft Protocol No. 12, so as to reflect the Opinion of the Parliamentary Assembly. The European Convention on Human Rights, and the Court and Commission established to enforce it, were motivated by a fervent desire among the Member States of the Council of Europe never again to repeat the horrific human rights violations of the Second World War. It is important to remember that one of the categories of prisoner in Nazi concentration camps was that of *Homosexuell*, indicated by a pink triangle on the prisoner's uniform, and that the Nazi dictatorship established a *Reichszentrale zur Bekämpfung der Homosexualität und der Abtreibung* (Reich Office for the Combating of Homosexuality and Abortion) in 1936.³ This office dealt with "all manifestations of homosexuality" and "transvestites".⁴ The wrongfulness of Nazi persecution of such minorities as Jews, Roma, Communists, Jehovah's Witnesses, etc. was immediately recognised in 1950 by the express inclusion, as prohibited grounds of discrimination in Article 14 of the European Convention on Human Rights, of "race", "colour", "religion", "political or other opinion", "national origin", and "association with a national minority". However, it has taken many years for European societies to recognise that Nazi persecution of lesbian, gay, bisexual and transgendered persons was equally wrongful, and that discrimination based on sexual orientation or gender identity is a violation of human rights.

Indeed, homophobia and transphobia have been described as the last legitimate prejudices. Politicians, religious leaders and media commentators often make extremely hostile and offensive remarks about lesbian, gay, bisexual and transgendered persons that would be considered illegal "incitement to hatred" or "insults" if they were directed at an ethnic or religious minority. A recent example is a speech by Roman Catholic Cardinal Thomas Winning of Scotland during a visit to Malta. One newspaper quoted him as saying:

"All over Europe an active and militant homosexual lobby is pushing for greater power, and the threat to the Christian family is very real. I would ask you to cast your mind back to the dark days of World War II. The parallels with today are striking. In place of bombs of 50 years ago you find yourself bombarded with images, values and ideas which are utterly alien."⁵

If "Jewish lobby", "Muslim lobby" or "Roma lobby" were substituted for "homosexual lobby", these remarks would be universally condemned as completely unacceptable.

Remarks of this kind contribute to an atmosphere in which some individuals may feel encouraged to go beyond expressing prejudice and actively engage in violence,

³ See Günter Grau, *Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933-45* (Cassell, 1995), at 86-130.

⁴ *Ibid.* at 108.

⁵ See "Cardinal: Gays 'as dangerous as wartime bombs'" *The Independent* (24 January 2000), p. 6.

harassment or discrimination against lesbian, gay, bisexual and transgendered persons. Violent and often fatal attacks on such persons are common, particularly by gangs of neo-Nazi youths, and particularly in Central and Eastern Europe.⁶ A well-known example in the United Kingdom was the explosion of a nail bomb in a gay pub in London on 30 April 1999. Three persons were killed and over sixty were injured. Some suffered horrific injuries, including the loss of limbs and severe burns. The same person was probably responsible for bombings in Afro-Caribbean and Bangladeshi neighbourhoods in London in the preceding two weeks.⁷

Other forms of discrimination by public authorities and private individuals against lesbian, gay, bisexual and transgendered persons are widespread and ongoing, especially in criminal law, in employment, in the provision of goods, services, housing and education, and in family law. (For a detailed survey, see the attached report on "Discrimination against Lesbian, Gay and Bisexual Persons in Europe", submitted by ILGA-Europe to the Legal Affairs and Human Rights Committee of the Parliamentary Assembly on 16 February 2000.)

Although sexual orientation arguably comes within "sex" or "other status", protection through the application of these grounds is not sufficient. These grounds do not recognise the specific phenomenon of sexual orientation, and the fact that it has historically been, and continues to be, the basis of severe and widespread discrimination in Europe. Only express inclusion of the ground "sexual orientation" in Draft Protocol No. 12 can provide specific, symbolic condemnation of this historic and ongoing form of discrimination, and the hatred, fear and ignorance that lie behind it.

A. APPLICATION OF "SEX" OR "OTHER STATUS" IN ARTICLE 14 IS NOT SUFFICIENT

Until December 1999, the application of the current Article 14 to questions of sexual orientation discrimination was uncertain, because the European Court of Human Rights had considered only four cases of sexual orientation discrimination, and in all four found it unnecessary to consider Article 14. In the first three cases, *Dudgeon v. United Kingdom* (1981), *Norris v. Ireland* (1988), and *Modinos v. Cyprus* (1993), the Court held that blanket prohibitions of all private, consensual sexual activity between adult men (and implicitly also between adult women), which formed the legal basis for Nazi persecution of homosexual men, violate the right to respect for private life in Article 8 of the Convention. Because the interference with private life through a threat of imprisonment was so severe, the Court did not need to consider the discrimination inherent in the fact that private, consensual sexual activity was legal in each case between a man and a woman or two women. In the fourth case, *Lustig-Prean & Beckett v. United Kingdom, Smith & Grady v. United Kingdom* (27 Sept.

⁶ See Masha Gessen, *The Rights of Lesbians and Gay Men in the Russian Federation* (International Gay & Lesbian Human Rights Commission, 1994), at 22-23, 42-43 ("[w]hen they are not actively participating in antigay violence, police often stand by, letting it happen"); Andrzej Selerowicz, "Gay Perestroika: The Political Changes in Central and Eastern Europe and Their Effect on the Lesbian and Gay Movement" in Hendriks, Tielman & van der Veen, eds., *The Third Pink Book: A Global View of Lesbian and Gay Liberation and Oppression* (Prometheus Books, 1993), at 209: "Gangs of skinheads and hooligans see in homosexuals (especially their increasing visibility) an easy victim."

⁷ See *The Independent* (1 May 1999), p. 1.

1999), the Court held that a blanket policy of dismissing all lesbian, gay and bisexual employees of the armed forces contravened Article 8. Again, because the interference with private life (intrusive questioning about the applicants' sexual lives and the subsequent loss of their careers) was so severe, the Court did not need to consider under Article 14 the discrimination inherent in the fact that heterosexual men and women are permitted to serve openly in the armed forces. The Court did, however, hold that interferences with an individual's sexual orientation are hard to justify under Article 8:

"It is common ground that the sole reason for the investigations conducted and for the applicants' discharge was their sexual orientation. Concerning as it did a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required ..."⁸

The Court also drew a very clear analogy between racial prejudice and prejudice against lesbian, gay and bisexual persons:

"To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes [of heterosexual members of the armed forces towards their homosexual colleagues] cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicant's rights outlined above, any more than similar negative attitudes towards those of a different race, origin or colour."⁹

From 1955 to 1996, the European Commission of Human Rights applied Article 14 in over 20 cases of sexual orientation discrimination and found no violation.¹⁰ However, in its Report in *Sutherland v. United Kingdom*, adopted on 1 July 1997, the Commission for the first time found a violation of Article 14, combined with Article 8 (right to respect for private life), in a case involving sexual orientation discrimination. It held that the age of consent to male-male sexual activity in United Kingdom criminal law, which is 18 rather than 16¹¹ for male-female or female-female sexual activity, violated the Convention. The Commission observed that "[t]he different minimum ages for lawful sexual relations between homosexuals and heterosexuals are a difference based on sexual orientation. In terms of Article 14 ..., it is not clear whether this difference is a difference based on 'sex' or on 'other status'. ... The Commission ... considers that it is not required to determine whether a difference based on sexual orientation is a matter which is properly to be considered as a difference on grounds of 'sex' or of 'other status'. In either event, it is a difference in respect of which the Commission is entitled to seek justification."¹² (The *Sutherland* case has been suspended, to permit the Government to attempt to amend the offending legislation, and thus has not yet been heard by the Court.)

⁸ *Lustig-Prean & Beckett*, paragraph 83; *Smith & Grady*, paragraph 90.

⁹ *Lustig-Prean & Beckett*, paragraph 90; *Smith & Grady*, paragraph 97.

¹⁰ See Pieter van Dijk, "The Treatment of Homosexuals under the European Convention on Human Rights" in Waaldijk & Clapham (1993), note 2 above, at 194-200; Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford University Press, paperback edition, 1997), at vii-viii, 121-124; Laurence Helfer, "Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights" (1990) 65 *New York University Law Review* 1044, 1075-1086.

¹¹ The age is 17 in Northern Ireland.

¹² *Sutherland*, paragraph 50.

On 21 December 1999, in *Salgueiro da Silva Mouta v. Portugal*, the Court for the first time found a violation of Article 14 in a case of sexual orientation discrimination. The Court held that a decision of the Lisbon Court of Appeal, treating a gay father's sexual orientation as a negative and determining factor in denying him custody of his daughter, was incompatible with Article 14 and Article 8 (right to respect for family life):

"La Cour ne peut dès lors que conclure qu'il y a eu une différence de traitement entre le requérant et la mère de M., qui reposait sur l'orientation sexuelle du requérant, notion qui est couverte, à n'en pas douter, par l'Article 14 de la Convention. La Cour rappelle à cet égard que la liste que renferme cette disposition revêt un caractère indicatif, et non limitatif, dont témoigne l'adverbe 'notamment' ..."

("The Court can only conclude that there has been a difference of treatment between the applicant and the mother of M., which was based on the applicant's sexual orientation, a concept which is covered, it cannot be doubted, by Article 14 of the Convention. The Court recalls in this regard that the list contained in this provision has an indicative rather than exhaustive character, as the phrase 'any ground such as' suggests.")¹³

"Force est donc de constater ... que la cour d'appel a opéré une distinction dictée par des considérations tenant à l'orientation sexuelle du requérant, distinction qu'on ne saurait tolérer d'après la Convention (voir, *mutatis mutandis*, l'arrêt Hoffmann précité, p. 60, paragraphe 36)."

("It must be acknowledged ... that the Court of Appeal made a distinction dictated by considerations relating to the sexual orientation of the father, a distinction which cannot be tolerated under the Convention (see, *mutatis mutandis*, the Hoffmann judgment cited above, paragraph 36).")¹⁴

In *Hoffmann v. Austria* (1993), the Court held that a mother's being a Jehovah's Witness could not be held against her in a child custody decision, and said in paragraph 36: "Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable."

While the Court has implicitly drawn an analogy between discrimination based on sexual orientation and discrimination based on religion in *Salgueiro*, and between prejudice against lesbian, gay and bisexual persons and racial prejudice in *Lustig-Prean, et al.*, the Court did not say in *Salgueiro* whether a distinction based on sexual orientation is a distinction based on "sex" (which can only be justified by "very weighty reasons"),¹⁵ or on "other status". In view of the judgment of the Court of Justice of the European Communities in *Grant v. South-West Trains* (1998),¹⁶ which held that a distinction based on sexual orientation did not also involve sex discrimination, the European Court of Human Rights may implicitly have held in *Salgueiro* that distinctions based on sexual orientation can only be on the ground of "other status".

¹³ *Salgueiro*, paragraph 28 (unofficial translation into English from the French text).

¹⁴ *Salgueiro*, paragraph 36 (unofficial translation into English from the French text).

¹⁵ See *Abdulaziz v. United Kingdom* (1985), Series A, No. 94, para. 78.

¹⁶ Case C-249/96 [1998] European Court Reports I-621.

Including sexual orientation within the scope of "other status" does not provide sufficient protection, because it is clear from the case law of the Court that "other status" can include any conceivable ground of distinction between persons. The Court has held that Article 14 "prohibits ... discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other".¹⁷ Putting sexual orientation under "other status" lumps it with many distinctions that might be relatively trivial or generally justifiable or infrequently used. For example, in *Larkos v. Cyprus* (18 Feb. 1999),¹⁸ the Court found a violation of Article 14 in conjunction with Article 8 ("respect for home") where legislation made a distinction between tenants in government-owned dwellings and tenants in privately-owned dwellings. It would be hard to argue that "tenants in government-owned dwellings" as a group face widespread discrimination, for that sole reason, throughout Europe.

Relegating sexual orientation to the residual category of "other status" in Draft Protocol No. 12 would fail to acknowledge that sexual orientation is, like sex, race and religion, a very sensitive ground of distinction, and that discrimination based on sexual orientation has been historically, and continues to be, one of the more serious kinds of discrimination in Europe. Specific, symbolic condemnation of this kind of discrimination requires the express inclusion of sexual orientation in Draft Protocol No. 12. The Parliamentary Assembly recognised the necessity of express inclusion in its Opinion:

"[The Assembly] believes that the enumeration of grounds in Article 14 is, without being exhaustive, meant to list forms of discrimination which it regards as being especially odious. Consequently the ground 'sexual orientation' should be added."¹⁹

Similarly, Mr. Erik Jurgens said in the Explanatory Memorandum that accompanied the draft Opinion adopted by the Parliamentary Assembly:

"Clearly the issue of discrimination because of sexual orientation has, since 1950, become accepted as being of the same magnitude as the grounds listed in the original text of Article 14. Sexual orientation appears as a prohibited ground of discrimination in the legislation of eleven member States. However, lesbians and gay men are still victims of severe discrimination in some other European countries and only express recognition of the ground 'sexual orientation' could protect them."²⁰

"[The grounds included in Article 14] have been selected because we have learnt to regard discrimination on these grounds to be the most insidious and obnoxious forms of discrimination. That is the reason why sexual orientation should now be added to the list."²¹

¹⁷ *Kjeldsen v. Denmark* (1976), Series A, No. 23, para. 56.

¹⁸ Application No. 29515/95.

¹⁹ Opinion, paragraph 6.

²⁰ Doc. 8614, 14 January 2000, paragraphs 22-23.

²¹ Doc. 8614, 14 January 2000, paragraph 35.

B. THE GROWING NUMBER OF PRECEDENTS IN NATIONAL AND INTERNATIONAL LAW JUSTIFIES EXPRESS INCLUSION OF SEXUAL ORIENTATION

Since the 1970s, national anti-discrimination legislation and bills of rights in national constitutions, within and outside Europe, have increasingly recognised that sexual orientation discrimination is as serious and generally unjustifiable as discrimination based on sex, race and religion. (For official citations for the national, state and provincial legislation and constitutions discussed below, see the Appendix at the end of this submission.) Within the Member States of the Council of Europe, the term "sexual orientation" (or a similar or broader ground intended to cover sexual orientation or same-sex sexual orientation) appears as a prohibited ground of discrimination in the legislation of 11 states: Denmark, Finland, France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Slovenia, Spain, and Sweden. The broader ground "way of life" ("*Lebensform*", "*mode de vie*", "*modo de vita*") appears in the new (18 April 1999) Federal Constitution of Switzerland. In Canada, "sexual orientation" appears in legislation at the federal level, in 9 of 10 provinces, and in 1 of 3 territories, and the Supreme Court of Canada has ordered that it be "read into" the legislation of the 3 remaining jurisdictions.²² In Australia, it appears in the legislation of 5 of 6 states and in both territories. In the United States, it appears in the legislation of 11 of 50 states, the District of Columbia, and most major cities (including Boston, Chicago, Cleveland, Denver, Detroit, Kansas City, Los Angeles, Minneapolis, New Orleans, New York, Philadelphia, Phoenix, Pittsburgh, Portland, Saint Louis, San Diego, San Francisco, Seattle, and Tampa). It also appears in legislation in Israel, Namibia, New Zealand and South Africa, and in a number of cities in Argentina, Brazil and Mexico.

Since 1989, the trend in national anti-discrimination legislation has been reflected in the bills of rights of national constitutions, or of the constitutions of individual states within federal countries. The first national constitution in the world to include sexual orientation in its non-discrimination provision was the transitional Constitution of South Africa in 1993. Sexual orientation was retained when the final Constitution of South Africa was adopted in 1996. Section 9(3) of the final Constitution reads as follows:

"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, **sexual orientation**, age, disability, religion, conscience, belief, culture, language and birth."

South Africa is a country in which the majority of people have long and bitter experience of racial discrimination. Those who adopted the transitional and final Constitutions recognised the similarity between discrimination based on race and discrimination based on sexual orientation.

²² In *Vriend v. Alberta*, [1998] 1 Supreme Court Reports 493 (<http://www.droit.umontreal.ca/doc/csc-scc/en/index.html>), the Supreme Court of Canada held that the non-discrimination provision (Section 15(1)) of the Canadian Charter of Rights and Freedoms, part of Canada's federal Constitution, requires that sexual orientation be "read into" the anti-discrimination laws of the three remaining jurisdictions (Alberta, the Northwest Territories, and Nunavut) in which it does not already appear expressly.

In 1997, the Fiji Islands became the second country to add sexual orientation to the non-discrimination provision of its national constitution, and Ecuador became the third in 1998. In Ireland, a review of the Constitution has recommended an amendment to Article 40.1, adding a list of prohibited grounds, including sexual orientation.²³ And at least five states in federal countries have added sexual orientation to the non-discrimination articles of their constitutions: two Brazilian states (Mato Grosso and Sergipe) in 1989, and three German states (Brandenburg, Thuringia and Berlin) in 1992, 1993 and 1995.

Developments in national law, and in the case law of the European Court of Human Rights, have now been reflected at the United Nations level. In *Toonen v. Australia* (1994),²⁴ the United Nations Human Rights Committee observed, in finding that a blanket prohibition of all private, consensual sexual activity between adult men violated Article 17 ("privacy") of the International Covenant on Civil and Political Rights, that "the reference to 'sex' in Articles [2(1)] and 26 is to be taken as including sexual orientation".

Perhaps the most compelling evidence of this international trend was the decision of the 15 Member States of the European Union to sign the Treaty of Amsterdam on 2 October 1997, which inserted (from 1 May 1999) the following new Article 13 into the European Community Treaty:

"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**."

The Commission of the European Communities has already proposed the adoption by the Council of the European Union of a Directive prohibiting employment discrimination based on, among other grounds, sexual orientation.²⁵ If adopted, this Directive would require seven European Union Member States (Austria, Belgium, Germany, Greece, Italy, Portugal and the United Kingdom) to pass legislation prohibiting sexual orientation discrimination in employment.

In finalising Draft Protocol No. 12, the Council of Europe must look to evidence of international consensus as to what grounds should appear in a list of prohibited grounds of discrimination in an international treaty, a national constitution, or national legislation. In 1950, when the Convention was adopted, there was certainly no international consensus that sexual orientation should be treated like sex, race or religion. In 1982, when the Canadian Charter of Rights and Freedoms was adopted, it was still too early to say that there was such an international consensus. The fact that

²³ *Report of the Constitution Review Group* (May 1996), p. 230.

²⁴ 1 International Human Rights Reports 97, para. 8.7.

²⁵ See the Commission's "Proposal for a Council Directive .../EC establishing a general framework for equal treatment in employment and occupation", http://europa.eu.int/comm/dg05/news_en.htm (2 Dec. 1999). For examples of discrimination in the 15 Member States of the European Union, see ILGA-Europe, *Equality for Lesbians and Gay Men: A Relevant Issue in the Civil and Social Dialogue* (1998); Kees Waaldijk, "The Legal Situation in the Member States" in Waaldijk & Clapham, eds., *Homosexuality: A European Community Issue* (Martinus Nijhoff, 1993).

only Norway (in 1981) had adopted legislation prohibiting sexual orientation discrimination at the national level (as opposed to the state, provincial, city or county level), and only Québec (in 1977) had done so among the 10 provinces within Canada, probably explains why sexual orientation was not mentioned in the non-discrimination provision of the Canadian Charter (Section 15(1)) in 1982. If Canada were to amend Section 15(1) today, nearly two decades later, sexual orientation would almost certainly be included, as it was in South Africa in 1993 and 1996. Indeed, the Supreme Court of Canada held in *Egan v. Canada* (1995),²⁶ that sexual orientation is an "analogous ground" under Section 15(1), similar to sex, race and religion, and that discrimination based on sexual orientation is implicitly prohibited by Section 15(1).

It is important to note that the judicial addition of sexual orientation was only necessary in *Egan* because the list of express grounds had been closed in 1982 and it was unlikely that Section 15(1) of the Charter would be amended so soon after its adoption. When an existing list of grounds is reviewed, as should be the case in connection with Draft Protocol No. 12 (see Part II.D below), those conducting the review should not rely on potential judicial addition of other grounds, but should endeavour to determine which kinds of discrimination are considered the most serious at the time of the review. In 2000, it is clear that there is sufficient international consensus, particularly within Europe, that sexual orientation is a ground similar to sex, race or religion, and that any list of prohibited grounds of discrimination should include it.

C. EXPRESS INCLUSION WILL NOT PREVENT THE COURT FROM DETERMINING THE JUSTIFIABILITY OF DISTINCTIONS BASED ON SEXUAL ORIENTATION ON A CASE-BY-CASE BASIS

Including sexual orientation in Draft Protocol No. 12 will not mean that the Court must find that every distinction based on sexual orientation automatically violates the Convention. The Court established in the *Belgian Linguistic Case* (1968) that a difference in treatment on any ground, including grounds expressly mentioned, may be permitted under Article 14, provided that the difference in treatment has an objective and reasonable justification and is proportionate to a legitimate aim.²⁷ The Court will still be able to consider in each case whether, in light of the consensus among Council of Europe Member States regarding the particular issue, and the resulting breadth of the margin of appreciation of the Member States,²⁸ there is an objective and reasonable justification for the particular distinction based on sexual orientation, which renders the distinction non-discriminatory. For example, in *Casado Coca v. Spain* (1994), the Court upheld a ban on advertising by lawyers under Article 10, observing that "[t]he wide range of regulations and the different rates of change in the Council of Europe's member states indicate the complexity of the issue. Because of their direct, continuous contact with their members, the Bar authorities and the country's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved ..." The Court applies the same analysis in the context of Article

²⁶ [1995] 2 Supreme Court Reports 513 (<http://www.droit.umontreal.ca/doc/csc-scc/en/index.html>).

²⁷ (1968), Series A, No. 6, p. 34, para. 10. See Laurence Helfer, "Lesbian and Gay Rights as Human Rights: Strategies for a United Europe" (1991) 32 Virginia Journal of International Law 157, 189-190.

²⁸ See Helfer (1990), note 6 above, at 1052-1059; Laurence Helfer, "Consensus, Coherence and the European Convention on Human Rights" (1993) 26 Cornell International Law Journal 133, 136-140.

14, and would almost certainly do so under Draft Protocol No. 12 (if it is adopted and comes into force). The Court has frequently held that the Member States "enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances ... one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States."²⁹

D. SEXUAL ORIENTATION SHOULD BE INCLUDED WHETHER OR NOT ANY OTHER GROUNDS ARE ADDED

One argument that might be made against the inclusion of sexual orientation is that the current list of 13 grounds is long enough, and is non-exhaustive. If the original list of grounds, adopted in 1950, is opened up, there will be no end to the additions that could be proposed. It is better to leave the addition of new grounds to the European Court of Human Rights.

This argument must be rejected, because it assumes that the list of grounds of discrimination the Convention can explicitly condemn, by including them in Article 14 or Draft Protocol No. 12, was frozen for all time in 1950. This is completely contrary to the European Court of Human Rights' approach to interpreting the Convention, which is to ensure that it grows with changing social conditions in Europe. The Court has said that "the Convention is a living instrument which, ... must be interpreted in the light of present-day conditions".³⁰ Draft Protocol No. 12 gives the Council of Europe a rare opportunity to continue the growth of the Convention by bringing its text up to date, so that it better reflects the kinds of discrimination deemed most serious in Europe in the year 2000, fifty years after the original text of Article 14 was adopted. The current list of grounds in Article 14 was taken directly from Article 2 of the Universal Declaration of Human Rights (1948), with only one addition ("association with a national minority") to take account of conditions in Europe.

If the Steering Committee for Human Rights deems it appropriate to use this once-in-fifty-years opportunity to add grounds other than sexual orientation to the text of Draft Protocol No. 12, ILGA-Europe would respectfully propose that "disability" and "age" be added. These grounds are listed, along with "sexual orientation", in Article 13 of the European Community Treaty.

If the Steering Committee for Human Rights decides not to consider any grounds for inclusion in Draft Protocol No. 12, other than those already listed in Article 14 and the additional ground recommended by the Parliamentary Assembly in its Opinion, ILGA-Europe respectfully submits that the Steering Committee for Human Rights would be entirely justified in adding only "sexual orientation" to Draft Protocol No. 12. The Parliamentary Assembly has reviewed the list of grounds in Draft Protocol No. 12, knowing of other grounds that might be included, and has concluded that discrimination based on sexual orientation is an "especially odious" form of discrimination, and that "sexual orientation" should be added to the list of grounds in Draft Protocol No. 12.

²⁹ See e.g. *Petrovic v. Austria*, [1998-II] Reports of Judgments and Decisions, No. 67, p. 587, para. 38.

³⁰ *Tyrer v. United Kingdom* (1978), Series A, No. 26, para. 31.

By adding "sexual orientation" to Draft Protocol No. 12, the Steering Committee for Human Rights would be showing respect for the Opinion of the Parliamentary Assembly, and the contribution of elected members of the legislatures of the Member States of the Council of Europe to the process of finalising Draft Protocol No. 12. The Parliamentary Assembly has limited the amendments it recommends in its Opinion to the two, relatively small changes it considered the most important. And the Steering Committee for Human Rights would be correcting the historic omission of "sexual orientation", a ground which ought to have been included in Article 14 in 1950. At the beginning of a new millennium, the Council of Europe would be acknowledging the suffering of the "pink triangle victims" of Nazi persecution, as well as the violence, harassment and discrimination suffered by many lesbian, gay, bisexual and transgendered³¹ persons throughout Europe over the last fifty years.

³¹ Discrimination against transgendered persons can be viewed as discrimination based on "gender identity", "sex" (see the judgment of the Court of Justice of the European Communities in *P. v. S. & Cornwall County Council*, Case C-13/94 [1996] European Court Reports I-2143), or "sexual orientation" (see State of Tasmania, Australia, Anti-Discrimination Act 1998, No. 46, s. 3, <http://www.thelaw.tas.gov.au>: "sexual orientation" means - (a) heterosexuality; or (b) homosexuality; or (c) bisexuality; or (d) transsexuality). The Constitutional Court of South Africa reached the same conclusion as the legislature of Tasmania in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (9 Oct. 1998), <http://www.law.wits.ac.za>. Justice Ackermann held, at paragraph 21, that "[t]he concept 'sexual orientation' ... must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to persons who are bi-sexual, or transsexual ..."

**APPENDIX OF INTERNATIONAL TREATIES,
NATIONAL CONSTITUTIONS, AND NATIONAL LEGISLATION
PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION³²
(OR AUTHORISING SUCH A PROHIBITION)**

1. INTERNATIONAL TREATIES

European Union

Treaty establishing the European Community, Rome, 25 March 1957, Article 13
(inserted as Article 6a by Article 2(7) of the Treaty of Amsterdam, 2 October
1997, and renumbered as Article 13 by Article 12(1) and the Annex of the
Treaty of Amsterdam) ("sexual orientation") (in force on 1 May 1999)

2. NATIONAL (AND STATE) CONSTITUTIONS

Brazil

Mato Grosso - Constitution, 1989, Article 10.III ("*orientação sexual*")
Sergipe - Constitution, 1989, Article 3.II ("*orientação sexual*")

Ecuador - Constitution, 1998, Article 23(3) ("*orientación sexual*")

Fiji Islands - Constitution Amendment Act 1997, s. 38(2)(a) ("sexual orientation")

Germany

Berlin - Constitution, 1995, Article 10(2) ("*sexuelle Identität*")
Brandenburg - Constitution, 1992, Article 12(2) ("*sexuelle Identität*")
Thuringia - Constitution, 1993, Article 2(3) ("*sexuelle Orientierung*")

South Africa - Constitution of the Republic of South Africa Act, No. 200 of 1993,
Section 8(2) (transitional Constitution) ("sexual orientation")
- Constitution of the Republic of South Africa, 8 May 1996 (as amended on
11 Oct. 1996), Sections 9(3), 9(4) (final Constitution) ("sexual orientation")

Switzerland - Federal Constitution, adopted on 18 April 1999, Article 8(2)
 ("*Lebensform*", "*mode de vie*", "*modo de vita*", or "way of life")

³² Or a similar or broader ground which is intended to cover sexual orientation (or same-sex sexual orientation). This Appendix is an updated version of Appendix II in Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford University Press, paperback edition, 1997), at x-xi, 265-267. Sexual orientation or a similar or broader ground was added by the later amending law, where more than one is listed, unless otherwise indicated.

3. NATIONAL (AND STATE, PROVINCIAL, TERRITORIAL, LOCAL) LEGISLATION

Australia

- Australian Capital Territory - Discrimination Act 1991, No. 81, s. 7(1)(b) ("sexuality")
- New South Wales - Anti-Discrimination Act 1977, No. 48, as amended by Anti-Discrimination (Amendment) Act 1982, No. 142, s. 5, Schedule 2, Anti-Discrimination (Amendment) Act 1994, No. 28, s. 3, Schedule 4 ("homosexuality" added in 1982)
- Northern Territory - Anti-Discrimination Act 1992, No. 80, s. 19(1)(c) ("sexuality")
- Queensland - Anti-Discrimination Act 1991, No. 85, s. 7(1)(l) ("lawful sexual activity")
- South Australia - Equal Opportunity Act, 1984, No. 95, ss. 5(1), 29(3), as amended by Equal Opportunity Amendment Act, 1989, No. 68, Schedule ("sexuality" included in 1984)
- Tasmania - Anti-Discrimination Act 1998, No. 46, s. 16 ("sexual orientation" and "lawful sexual activity")
- Victoria - Equal Opportunity Act 1995, No. 42, s. 6(d) ("lawful sexual activity")

Canada

- Federal Level - Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 2, 3(1), as amended by S.C. 1996, c. 14 ("sexual orientation")
- British Columbia - Human Rights Act, S.B.C. 1984, c. 22, ss. 3-6, 8-9, as amended by S.B.C. 1992, c. 43, ss. 2-7 ("sexual orientation")
- Manitoba - Human Rights Code, S.M. 1987-88, c. 45, s. 9(2)(h) ("sexual orientation")
- New Brunswick - Human Rights Act, R.S.N.B. 1973, c. H-11, as amended by S.N.B. 1992, c. 30, ss. 1-8 ("sexual orientation")
- Newfoundland - Human Rights Code, R.S.N. 1990, c. H-14, ss. 6-9, 12, as amended by S.N. 1997, c. 18, s. 2 ("sexual orientation")
- Nova Scotia - Human Rights Act, R.S.N.S. 1989, c. 214, s. 5(1)(n), as amended by S.N.S. 1991, c. 12, s. 1 ("sexual orientation")
- Ontario - Human Rights Code, R.S.O. 1990, c. H.19, ss. 1-3, 5-6 ("sexual orientation" originally added by S.O. 1986, c. 64, s. 18)
- Prince Edward Island - Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 1(1)(d), as amended by S.P.E.I. 1998, c. 92, s.1 ("sexual orientation")
- Québec - *Charte des droits et libertés de la personne*, R.S.Q. c. C-12, s. 10 ("*orientation sexuelle*" originally added by S.Q. 1977, c. 6, s. 1)
- Saskatchewan - Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, ss. 9-19, 25, 47(1), as amended by S.S. 1993, c. 61, ss. 4-15, 18 ("sexual orientation")
- Yukon Territory - Human Rights Act, S.Y.T. 1987, c. 3, ss. 6, 34 ("sexual orientation")

Denmark - Law of 9 June 1971, nr. 289, as amended by Law of 3 June 1987, nr. 357; extended to private employment by Law of 12 June 1996, nr. 459 ("*seksuelle orientering*" added in 1987)

- Finland** - Penal Code (as amended by Law 21.4.1995/578), c. 11, para. 9, c. 47, para. 3 ("*sukupuolinen suuntautuminen*" or "sexual orientation")
- France** - Nouveau Code pénal, arts. 225-1, 225-2, 226-19, 432-7; Code du travail, arts. L. 122-35, L. 122-45 (originally added by Loi No. 85-772, 25 July 1985, Loi No. 86-76, 17 January 1986) ("*moeurs*" or "morals, manners, customs, ways")
- Germany**
- Saxony-Anhalt - Gesetz zum Abbau von Benachteiligungen von Lesben und Schwulen (Law on Reducing Discrimination Against Lesbians and Gay Men), 22 Dec. 1997 (public sector only) ("*sexuelle Identität*")
- Iceland** - General Penal Code, No. 19/1940, s. 180, as amended by Act No. 135/1996, s. 1, and Act No. 82/1998, s. 91 ("sexual orientation" added in 1996)
- Ireland** - Unfair Dismissals Act, 1977, No. 10, s. 6(2)(e), as amended by Unfair Dismissals (Amendment) Act, 1993, No. 22, s. 5(a); extended to other aspects of employment by Employment Equality Act, 1998, No. 21, s. 6(2)(d) ("sexual orientation" added in 1993)
- Israel** - Equal Opportunities in Employment Act 1988, as amended by Book of Laws, No. 1377 of 2 Jan. 1992 ("*neti'ya minit*" or "sexual orientation")
- Luxembourg** - Code pénal, arts. 454-457, added by Law of 19 July 1997 ("*orientation sexuelle*" and "*moeurs*")
- Mexico**
- Mexico City - Penal Code, art. 281 (in force on 1 Oct. 1999) ("*orientación sexual*")
- Namibia** - Labour Act, 1992, No. 6, s. 107 ("sexual orientation")
- Netherlands** - Penal Code, arts. 137f, 429 *quater* (inserted by Law of 14 Nov. 1991, Staatsblad 1991, nr. 623); General Equal Treatment Act, arts. 1, 5-7 (Law of 2 March 1994, Staatsblad 1994, nr. 230) ("*hetero- of homoseksuele gerichtheid*" or "hetero- or homosexual orientation")
- New Zealand** - Human Rights Act 1993, No. 82, s. 21(1)(m); New Zealand Bill of Rights Act 1990, No. 109, s. 19, as amended by Human Rights Act 1993, No. 82, ss. 21(1)(m), 145, Second Schedule ("sexual orientation")
- Norway** - Penal Code, para. 349a, Law of 8 May 1981, nr. 14 ("*homofile legning, leveform eller orientering*" or "homosexual inclination, lifestyle or orientation")
- Slovenia** - Penal Code (1 Jan. 1995), art. 141; Law About Work Relations (in force 24 Oct. 1998), art. 6 ("*spolni usmerjenosti*" or "sexual orientation" added in 1995)

South Africa - Labour Relations Act, 1995, No. 66, s. 187(1)(f) (dismissal); extended to other aspects of employment by Employment Equity Act, 1998, No. 55, s. 6 ("sexual orientation" added in 1995)

Spain - Penal Code, Organic Law of 23 Nov. 1995, No. 10/1995, arts. 314, 511-12 (see also arts. 22(4), 510, 515(5)) ("*orientación sexual*")

Sweden - Criminal Code, c. 16, para. 9, Law of 4 June 1987, SFS 1987:610 ("*homosexuell läggning*" or "homosexual inclination"); extended to employment by Law of 11 March 1999, SFS 1999:133 ("*sexuell läggning*" or "sexual inclination")

United States

California - Fair Employment and Housing Act, Government Code, ss. 12920-12921("sexual orientation" originally added to Labor Code in 1992)

Connecticut - Conn. Gen. Stat. ss. 4a-60a, 45a-726a, 46a-81b to 46a-81r ("sexual orientation" added in 1991)

District of Columbia - D.C. Code Ann. ss. 1-2501 to 1-2533 ("sexual orientation" originally added in 1973)

Hawaii - Haw. Rev. Stat. ss. 378-1, 378-2 ("sexual orientation" added in 1991)

Massachusetts - Mass. Gen. Laws Ann. ch. 151B, ss. 3, 4 ("sexual orientation" added in 1989)

Minnesota - Minn. Stat. Ann. ss. 363.01(45), 363.03 ("sexual orientation" added in 1993)

Nevada - Nev. Rev. Stat. (e.g.) s. 613.330 ("sexual orientation" added in 1999)

New Hampshire - N.H. Rev. Stat. Ann. (e.g.) ss. 21:49, 354-A:7, 354-A:10, 354-A:17 ("sexual orientation" added in 1997)

New Jersey - N.J. Rev. Stat. ss. 10:5-5.hh.-kk., 10:5-12 ("affectional or sexual orientation" added in 1991)

Rhode Island - R.I. Gen. Laws (e.g.) ss. 11-24-2 to 11-24-2.2, 28-5-2 to 28-5-7.3, 28-5-41, 34-37-1 to 34-37-5.4 ("sexual orientation" added in 1995)

Vermont - Vt. Stat. Ann. tit. 1, s. 143; tit. 21, s.495 ("sexual orientation" added in 1991)

Wisconsin - Wis. Stat. Ann. ss. 101.22, 111.31 to 111.36 ("sexual orientation" added in 1982)

Major U.S. cities with prohibitions of sexual orientation discrimination extending to private sector employment include Baltimore, Boston, Chicago, Cleveland, Denver, Detroit, Kansas City, Los Angeles, Minneapolis, New Orleans, New York, Philadelphia, Phoenix, Pittsburgh, Portland, Saint Louis, San Diego, San Francisco, Seattle, and Tampa. See <http://www.hrc.org/issues/workplac/nd/ndjuris.html>.