PROPOSED ADDITIONAL PROTOCOL
BROADENING ARTICLE 14 OF THE EUROPEAN CONVENTION: THE NEED FOR EXPRESS INCLUSION OF "GENDER IDENTITY"

Submission of ILGA-Europe,

the European Region of the International Lesbian and Gay Association,

to the Steering Committee on Human Rights, Council of Europe[1]

I. "GENDER IDENTITY" SHOULD BE INCLUDED AS AN EXPRESSLY PROHIBITED GROUND OF DISCRIMINATION IN THE NEW ARTICLE 14

ILGA-Europe respectfully submits that the new Article 14 should also include the ground "gender identity" so as to make it clear that people who are transsexual or transgender[2] are protected.

Transsexual and Transgender people are one of the most vulnerable minorities in Europe. Their relatively small numbers make it extremely difficult for them to obtain any protection against discrimination through new legislation. Like lesbians and gay men, they face violence, harassment and the denial of jobs or services because their gender identity or expression does not correspond with their recorded birth sex.[3] Further, much recorded homophobic discrimination and behaviour is in fact based upon perceptions of a person's apparent gender identity or expression, and hence implied sexual orientation rather than actual sexual orientation, which may well be unknown.

When a transsexual person undergoes gender reassignment, some member states of the Council of Europe refuse to acknowledge the change of their social gender and/or the change of their body morphology. In these states transsexual people are forced to endure the almost daily humiliation of revealing their birth sex in many practical areas of life, so making them vulnerable to discrimination and prejudice regardless of the success of their gender role transition. The European Court of Human Rights condemned this practice, where forced disclosure of birth sex is sufficiently frequent, by finding a violation of Article 8 in *B.* v. *France* (1992). In that case, the applicant could not legally change her male forename, and

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

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

could not prevent the disclosure of her birth sex (male) in documents such as her national identity card and her passport, and in her social security number.[4]

Additionally this failure to recognise their new gender role means that for many they are effectively unable, in law, to found families and to take on the full social responsibilities embedded within the family. The European Commission of Human Rights was to condemn this practice by finding a violation of Articles 8 and 14 in *X, Y and Z v United Kingdom* [1996]. Although the European Court was unable to agree with the Commission due to the facts of the particular case, they did however unanimously find that transsexual people were able to form de-facto families and hence should be afforded protection under Article 8[5].

A. APPLICATION OF 'SEX' OR 'SEXUAL ORIENTATION' IS NOT SUFFICENT

One approach to the protection of transsexual and transgender people would be to treat discrimination against them as a form of discrimination based on "sex". The European Court of Justice adopted this approach, in interpreting European Community sex discrimination law, in *P.* v. *S. & Cornwall County Council* (1996). The Court held that dismissal of a transsexual employee because she had announced her intention to undergo gender reassignment was

> "discrimination ... based, essentially if not exclusively, on the sex of the person concerned. ... To tolerate such discrimination would be tantamount ... to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard"[6].

The disadvantage of this approach is that it closely associates biological sex with gender role. Those states that do not legally recognise a change of social gender[7] maintain a situation whereby a transsexual person is still regarded as being of their recorded birth sex therefore any discrimination is based on recorded birth sex and resultant 'sex change' rather than new gender role[8]. Thus any claim by the transsexual person provides a field day for the mass media as an individual's 'change of sex' becomes a crucial evidential element in any claim made. In this way the judicial process becomes both a site for discriminatory treatment as individuals' (otherwise irrelevant) private medical histories are disclosed, and a source of further discrimination by others after such disclosure.

A tran

sgender person, who does not intend to, or is unable to, undergo gender reassignment, is not regarded as having any possible claim based on grounds of sex. As they have not sought to

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

5 X,Y and Z v UK Government (75/1995/581/667) [1997] ECHR

6 Case C-13/94 [1996] European Court Reports I-2143, I-2165, paras. 21-22.

7 A change of social gender takes place when a transsexual or transgender person commences living full time in their new gender role.

8 E.g. discrimination against a transsexual woman would be considered as if it was discrimination against a man who had then undergone gender reassignment rather than against her as a woman. See the decision in *P v S and Cornwall County Council* (see note 6 above) which effectively affords protection by virtue of P [a man] undergoing gender reassignment, rather than to P as a woman who happens to be a transsexual woman.

'change' their sex[9] therefore any discrimination is only construed in terms of their original recorded birth sex which again is revealed during the judicial process.

Another approach would be to treat discrimination against transsexual persons as a form of discrimination based on "sexual orientation". The Constitutional Court of South Africa adopted this approach, in interpreting the non-discrimination provision (Section 9(3)) of the 1996 Constitution of South Africa, in *National Coalition for Gay and Lesbian Equality* v. *Minister of Justice* (9 Oct. 1998). Justice Ackermann held that

> "[t]he concept 'sexual orientation' as used in [S]ection 9(3) ... 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 ..."[10]

The disadvantage of this approach is that transsexual and transgender people, like all other people, claim or express their sexual orientation in a variety of ways. Gender identity has little if any relation to sexual orientation other than that it can dictate how others perceive a person's sexual orientation. It would also not address issues such as arbitrary gender specific dress codes in the workplace or access to gender appropriate restroom facilities or recognition of any right of non-disclosure concerning gender reassignment. It would also fail to address situations involving discrimination on the grounds of sexual orientation, where such discrimination has not yet been made illegal[11].

The European Court of Human Rights has yet to adopt either of these approaches. Even if it were to adopt one of them, neither would provide symbolic recognition and condemnation of discrimination based on of the specific phenomenon of gender identity disorders and gender reassignment treatment, or simply just mistaken perceptions of gender identity. Only express inclusion of "gender identity" in Article 14 could do so.

B. THE GROWING NUMBER OF PRECEDENTS IN NATIONAL AND INTERNATIONAL LAW JUSTIFIES EXPRESS INCLUSION OF 'GENDER IDENTITY'

In spite of the extreme difficulties that transsexual people experience in attempting to invoke the legislative process, there have been in the 1990s a growing number of precedents for express protection. The anti-discrimination legislation of a number of cities in the USA includes "gender identity" as a prohibited ground[12]. In the US state of Minnesota, anti-

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9 E.g. a discrimination case brought by a male transgender person concerning dress codes in the workplace would fail as the question would lie as to what other uniform rules related to men in the workplace. See the decision in *P v S and Cornwall County Council* (see note 6 above) which only affords protection if a person 'intends to undergo, is undergoing or has undergone gender reassignment'.

10 National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others CCT11/98 (9 October 1998)

11 See the American case of Von Hoffburg v Alexander 615 F.2d 633 (1980) in which a service woman who married a female to male transsexual, who was legally male, was honourably discharged as it was held that the relationship disclosed her alleged homosexual tendencies. This seems a very illogical state of affairs as although her husband was a legal male he was held for the purposes of army regulations to be a biological female.

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

discrimination legislation defines "sexual orientation" as including "having ... a self-image or identity not traditionally associated with one's biological maleness or femaleness"[13] and in California gender and gender expression are protected categories under the state's Hate Crime's legislation[14].

Discrimination against transsexual persons is also expressly prohibited in South Australia[15] and in the Northern Territory of Australia[16] where the ground sexuality is defined to include 'transsexuality', and in the Australian Capital Territory, where "transsexuality" is a separate prohibited ground[17]. In New South Wales in Australia[18] discrimination is prohibited 'on transgender grounds' and the legislation refers to people as 'being transgender'.

The European Court of Justice has also found that it is no longer appropriate to discriminate against a transsexual person. Advocate General Tesauro has stated:

> "To my mind, the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise it risks imposing outdated views and taking on a static role. In so far as the law seeks to regulate relations in society, it must on the contrary keep up with social change, and must therefore be capable of regulating new situations brought to light by social change and advances in science. From that point of view, there is no doubt that for present purposes the principle of the alleged immutability of civil status has been overtaken by events. This is so in so far as and from the time that the fact that one cannot change one's sex for bureaucratic and administrative purposes no longer corresponds to the true situation, if only on account of the scientific advances made in the field of gender reassignment."[19]

There is throughout Europe ever wider recognition of transsexuality both by legislation and judicial decision and sex change surgery is allowed in every member state of the European Community. Advocate General Tesauro, when calling upon the European Court of Justice to afford protection to transsexual people said:

> " I am well aware that I am asking the Court to make a 'courageous' decision. I am asking it to do so, however, in the profound conviction that what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries: the irrelevance of a person's sex with regard to the rules regulating relations in society. Whosoever believes in that value cannot accept the idea that a law should permit a person to be dismissed because she is a woman, or because he is a man, or because he or she changes from one of the two sexes (whichever it may be) to the other by means of an operation which - according to current medical knowledge - is the only remedy capable of bringing body and mind into harmony. Any other solution would sound like a moral condemnation - a condemnation, moreover, out of step with the times - of transsexuality, precisely when

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

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

15 Equal Opportunity Act, 1984.

16 Anti-Discrimination Act (REPA007), 1996.

17 Discrimination Act No.81 of 1991.

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

19 P v S and Cornwall County Council Case C-13/94 [1996] European Court Reports I-2143, I-2165, para 9.

> scientific advances and social change in this area are opening a perspective on the problem which certainly transcends the moral one."[20]

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

> "all discrimination in the enjoyment of fundamental rights and freedoms is prohibited in accordance with Article 14 of the European Convention of Human Rights."[21]

Within the European Court of Human Rights there has been a gradual move towards recognising that transsexual people are suffering from violations of their human rights. The most recent decision of the Court rules only by the narrowest of margins that there had not been a violation of Article 8 of the convention[22].

Albeit that there may not as yet be an international consensus that 'gender identity' should be treated like sex, race or religion, there is undoubtedly a growing awareness of and a recognisable trend towards acknowledging the extent of the discrimination that transsexual and transgender people face. When the existing list of grounds within Article 14 of the Convention are reviewed, those conducting the review must recognise the limitations the European Court of Human Rights have faced in attempting to provide protection through other articles of the Convention. Because of the fundamental failure of many nation states to afford recognition of the 'change of sex' of transsexual and transgender people, gender identity in itself becomes an irrelevance within arguments based around recorded birth sex. As such, although the treatment individuals complain of is inevitably concerned with the contradictory appearance of civil documentation or legal status and the morphology of the person who has to daily represent themselves, the Court is unable to consider them as being treated any differently from any other person of the same recorded birth sex. It is only by adding to Article 14 that there will be no discrimination based on gender identity that nation states will be obligated to initiate some steps towards addressing this contradiction and the other legal anomalies that transgender and transsexual people face.

However including 'gender identity' will not mean that the Court will be obligated to find that every distinction based on 'gender identity' automatically violates the Convention. The Court has established that a difference in treatment on grounds expressly included in Article 14 may be permitted provided that the difference in treatment has an objective and reasonable justification and is proportionate to a legitimate aim[23]. The Court will still be able to consider, in each case, the consensus amongst the Council of Europe member states regarding the particular issue and the resulting breadth of the margin of appreciation that should be afforded member states.

II. THE LIST OF GROUNDS IN ARTICLE 14 DOES NOT INCLUDE SERIOUS KINDS OF DISCRIMINATION RECOGNISED IN EUROPE SINCE 1950 AND THEREFORE NEEDS TO BE REVISED.

One argument that might be made against the inclusion of 'gender identity' is that the current list of 13 grounds contained within Article 14 is long enough, and is non-exhaustive. If the

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20 Ibid. para 24.

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

22 Sheffield And Horsham V. The United Kingdom (31-32/1997/815-816/1018-1019) [1998] ECHR

23 Belgian Linguistic Case [1968] Ser.A, No.6.

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.

However in 1950 it would not have been possible to consider including the grounds proposed, as transsexualism had only just been recognised within medical circles, albeit as a form of pseudo-hermaphroditism[24]. The text of the Convention, itself, had been taken from the Universal Declaration on Human Rights written in 1948 before even that recognition of this particular human condition. At that time, the emphasis was inevitably to be concerned with those particular matters that had led to the horrors of the war and the holocaust. Albeit that people with 'gender differences' had also been the target of the Nazi killing squads, it was not until the early 1980s that there was any recognition of that fact[25]. The Convention is a text of its time and yet it was intended that it be a text for a new Europe not the old one. We are now in that new Europe and as such the text needs updating for new social conditions and new social experiences.

To freeze the Convention at that historical moment in 1950 would fetter the Convention in a way that the European Court of Human Rights has itself rejected[26]. The Court's approach to interpreting the Convention has been to ensure that it grows with changing conditions in Europe. It may well be asking the Council to take that 'courageous step' called for by Advocate General Tesauro, of the European Court of Justice. But, just as the ECJ did not shy away from providing the educational thrust called for, it is also an appropriate time to make improvements to Article 14 of the Convention to recognise both the social changes that have taken place and which are still needed in the future. Amending Article 14 will provide a way for the Council of Europe to better reflect the Europe of the next millennium rather than a Europe petrified for all time at the end of the Second World War.

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24 The term 'transsexual' was not coined until 1950 when the Convention was being written. David Cauldwell, a populist medical writer invented the term 'psychopathia transexualis' and the associated word transexual(sic). It was not used in a scientific paper until 1953, when the endocrinologist Harry Benjamin used the word 'transsexual' to describe a patient. Transsexualism was not seperately categorised as a medical condition until its appearance in the *Revised Third Edition of the Diagnostic Statistical Manual of the American Psychiatric Association* in 1979.

25 The publication of *The Men with the Pink Triangle* (Heinze Heger, 1980) finally disclosed that homosexual people, and those perceived as homosexual (which would include transvestites and other people who were perceived as homosexual by their gender behaviour and who might have now considered themselves to be transgender or transsexual) were also victims of the Nazi killing machine.

26 The Court has said "the convention is a living instrument …..which must be interpreted in the light of present day conditions" (*Tyrer v United Kingdom [1978] Ser.A, No. 26, para. 31)*