



I G L H R C

International Gay and Lesbian Human Rights Commission
80 Maiden Lane, Suite 1505, New York, NY 10038
Website: www.iglhrc.org



rue de la Charité 17
Brussels B-1210
Belgium
Website: www.ilga-europe.org

July 16, 2008

**Recommendation to the CEDAW Committee from IGLHRC¹ and ILGA-Europe²
on the scope of art. 2 of CEDAW on Equality:**

Equality. Inequality derives from the larger culture of patriarchy, which has institutionalized unequal power relations between men and women, resulting in the historical oppression of the female gender through the enactment, administration, and implementation of laws and customary practices in most countries. The human rights framework is premised on fundamental freedoms and human rights enjoyed by able-bodied heterosexual and often, white men. The scope of art. 2 on equality should be expanded to allow for the dismantling of the patriarchal view of human rights, and protect all people, including sexually marginalized women, particularly female born sexual minorities.

Who is left out? A General Recommendation on art. 2 should explicitly expand the concept of equality and list all categories of women who experience discrimination not only based on sex but also on multiple and intersecting characteristics, including **sexual orientation and gender identity**,³ as well as others that are listed in international law and jurisprudence (e.g. race, ethnicity, religion, etc). An “other status” category should be added in order to allow protections

¹ **IGLHRC—The International Gay and Lesbian Human Rights Commission**—works to secure the full enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status. A US-based nonprofit, nongovernmental organization, IGLHRC effects this mission through advocacy, documentation, coalition building, public education, and technical assistance.

² **ILGA-Europe—an organization with UN consultative status**—is the European Region of the International Lesbian and Gay Association, a nongovernmental umbrella organization which represents over 220 member organizations at the European level. ILGA-Europe works towards a world in which the human rights of all people are respected and everyone can live in equality and free from discrimination on the grounds of sexual orientation, gender identity or expression.

³ IGLHRC and ILGA-Europe support the definition of gender identity and sexual orientation as elaborated in the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (www.yogyakartaprinciples.org), Preamble:

“UNDERSTANDING ‘**sexual orientation**’ to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;

UNDERSTANDING ‘**gender identity**’ to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”

for women whose situations we might not be able to identify and remedy today, but whose inequality will be documented and voiced in the future.

A lesbian woman is subject to discrimination both because she is perceived as a woman (her gender) and as a lesbian (her sexual orientation).

We have seen time after time in all cultures and on all continents that whenever equality does not explicitly include sexual orientation and gender identity, various people are left unprotected at domestic level by laws or judicial decisions. They include lesbian, transgender, intersex women and other gender variant people who have been known in other cultures by different names (e.g. *toms* and *katoey* in Thailand, *bissu* and *waria* in Indonesia, *kanisi* in East Africa, *travesti* in Argentina).

CEDAW precedent. By including sexual orientation and gender identity in regards to the scope of Art. 2 of the Convention, the CEDAW Committee will observe the precedent it already has set by explicitly referencing **sexual orientation** in several concluding observations on the **topics of asylum** (Sweden, A/56/38, July 31, 2001), **criminalization of consensual sexual relations among women** (Kyrgyzstan, A54/38, August 20, 1999; Mexico A/53/38, May 14, 1998), and protection through **anti-discrimination legislation** (Ireland, A/54/38, July 1, 1999; Canada, A/52/38/Rev.1, August 12, 1997; New Zealand, A/49/38, April 12, 1994). (Please see exact references in Appendix 1).

Precedent from other UN treaty bodies. The following UN human rights treaty bodies have referred explicitly to sexual orientation in General Comments: CESCR, *General Comment No. 18: The Right to Work (Art. 6)*, U.N. Doc. E/C.12/GC/18, 6 February 2006; ¶ CESCR, *General comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11, 20 January 2003; ¶ CESCR, *General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2000/4, 11 August 2000; ¶ Committee on the Rights of the Child, *General Comment No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child*, U.N. Doc. CRC/GC/2003/4, 1 July 2003; ¶ Committee on the Rights of the Child, *General Comment No. 3 (2003): HIV/AIDS and the rights of the child*, U.N. Doc. CRC/GC/2003/3, 17 March 2003 (see exact references in Appendix 2).

In addition to the Committee on Economic, Social, and Cultural Rights (CESCR), and the Committee on the Rights of the Child (CRC), the Human Right Committee, the Committee Against Torture, and the Committee on the Elimination of Racial Discrimination made explicit reference to **sexual orientation or gender identity** in Concluding Observations, Communications, and Reports.⁴

The CEDAW Committee has very effectively and diligently challenged governments to not only take measures to protect women from discrimination but to also take measures to promote equality for all women and enable an environment of respect for women's equality in society. We ask the Committee to consider the same standard of due diligence for women's right to express their **sexual orientation and gender identity** without fear or experience of violence by the state,

⁴ For exact references, please see International Commission of Jurists, *Sexual Orientation and Gender Identity in Human Rights Law—References to Jurisprudence and Doctrine of the United Nations Human Rights System*, Third updated ed., 2007, available at www.icj.org. All references to UN treaty bodies in this document are excerpted from this ICJ publication; emphasis in the text is added.

community or family, without persecution by religious authorities, without being forced into marriage, and without being denied the right to choose who they partner with.

We are aware of the difficult role the CEDAW Committee has had to play. Even as the legitimacy of women's sexual rights continue to be attacked, the Committee has defended and promoted women's rights to equality in civil, social, cultural, political, and economic arenas. We are also aware that the Committee has not always enjoyed the full support of the United Nations, let alone Member States, in demanding that women have full equal rights as that of men. To include **sexual orientation and gender identity** as protected categories along with sex, race, ethnicity, age, class, etc. is to risk upsetting the whole cart of other rights entitled to women because patriarchy deems that women have no right to sexual autonomy. But this Committee has already defended the rights of women to sexual autonomy by holding States accountable for not protecting women's right to live free of domestic violence, sexual violence, forced marriage, and customary practices that harm women and girls. We ask that the Committee continue this trend and recognize the right of women to express their sexual orientation in all of its diversity without jeopardy, including the rights of lesbians and all female born sexual minorities.

Appendix 1

Explicit references to sexual orientation, lesbianism, homosexuality, and sexual preference in Concluding Observations from CEDAW

Concluding Observations: Sweden, A/56/38, July 31, 2001

334. The Committee commends the Government for passing legislation that provides residence permits to individuals who have a well-founded fear of persecution on the basis of **sexual orientation or gender**, particularly in cases that involve discrimination against women.

Concluding Observations: Kyrgyzstan, A/54/38, August 20, 1999

127. The Committee is concerned that **lesbianism** is classified as a sexual offence in the Penal Code.

128. The Committee recommends that lesbianism be reconceptualized as a **sexual orientation** and that penalties for its practice be abolished.

Concluding Observations: Ireland, A/54/38, July 1, 1999

(a) Introduction by the State party

162. [...] The representative explained that the 1998 Employment Equality Act outlawed discrimination on nine grounds, including gender, marital status, family status, **sexual orientation** and membership in the "traveller" community.

Concluding Observations: Mexico, A/53/38, May 14, 1998

420. The Committee requests information in the next report on whether **homosexuality** is penalized in the criminal code.

Concluding Observations: Canada, A/52/38/Rev.1, August 12, 1997

310. [...] A recent amendment to the Canadian Human Rights Act granted protection against discrimination on the basis of **sexual orientation**.

Concluding Observations: New Zealand, A/49/38, April 12, 1994

612. The Government had passed a new Human Rights Act in 1993, extending the grounds of prohibited discrimination. Its grounds would now cover gender issues, including pregnancy,

childbirth, sexual harassment, marital and family status, **sexual orientation**, disability, age, race, religion, employment status and political opinion.

The Act would come into force in 1994. (...)

Concluding Observations: Netherlands, A/49/38, April 12, 1994

253. (...) Members were favourably impressed by the fact that, one year before presenting each subsequent report to the Committee, the Government would have to report to Parliament, and they commended the concern that was shown about the issue of **sexual preference**. (...)

Appendix 2

Explicit references to sexual orientation in General Recommendations
from UN human rights treaty bodies other than CEDAW

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

**General Comment No. 18: The Right to Work (art. 6), E/C.12/GC/18,
February 6, 2006**

12. The exercise of work in all its forms and at all levels requires the existence of the following interdependent and essential elements, implementation of which will depend on the conditions present in each State party:

(b) *Accessibility*. The labour market must be open to everyone under the jurisdiction of States parties. Accessibility comprises three dimensions:

(i) Under its article 2, paragraph 2, and article 3, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), **sexual orientation**, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality.[...]

**General Comment No. 15: The Right to Water (arts. 11 and 12), E/C.12/2002/11,
January 20, 2002**

Non-discrimination and equality

13. The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (Art. 2, para. 2), and **equally between men and women** (Art. 3), pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), **sexual orientation** and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water. The Committee recalls paragraph 12 of General Comment No. 3 (1990), which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

**General Comment No. 14: The Right to the Highest Attainable Standard of
Health (Art. 12), E/C.12/2000/4, August 11, 2000: “Special Topics of Broad
Application”**

Non-discrimination and equal treatment

18. By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their

procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), **sexual orientation** and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. (...)

COMMITTEE ON THE RIGHTS OF THE CHILD

General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, CRC/GC/2003/4, July 1, 2003

The right to non-discrimination

6. States parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (art. 2), including with regard to “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”. These grounds also cover adolescents’ **sexual orientation** and health status (including HIV/AIDS and mental health). Adolescents who are subject to discrimination are more vulnerable to abuse, other types of violence and exploitation, and their health and development are put at greater risk. They are therefore entitled to special attention and protection from all segments of society.

General Comment No. 3: HIV/AIDS and the Rights of the Children, CRC/GC/2003/3, March 17, 2003

The right to non-discrimination (art. 2)

8. Of particular concern is **gender-based discrimination combined with taboos or negative or judgmental attitudes to sexual activity of girls**, often limiting their access to preventive measures and other services. Of concern also is discrimination based on **sexual orientation**. In the design of HIV/AIDS related strategies, and in keeping with their obligations under the Convention, State parties must give careful consideration to prescribed gender norms within their societies with a view to eliminating gender-based discrimination as these impact on the vulnerability of both girls and boys to HIV/AIDS. States parties should in particular recognize that discrimination in the context of HIV/AIDS often impacts girls more severely than boys.