



# THE EQUAL RIGHTS TRUST

1 Hammersmith Grove  
London W6 0NB  
United Kingdom

Tel.: +44 (0) 20 3178 4113  
info@equalrightstrust.org  
www.equalrightstrust.org

#### Board of Directors

Bob Hepple (Chair)  
Shami Chakrabarti  
Thomas Hammarberg  
Claire L'Heureux-Dubé  
Gay McDougall  
Anuradha Mohit  
Kate O'Regan  
Sonia Picado  
Michael Rubenstein  
Joseph Schull  
Theodore Shaw

The Equal Rights Trust  
is a company limited by  
guarantee incorporated  
in England. Company  
number 5559173.  
It is also a registered  
charity, number 1113288.

Dimitrina Petrova  
Executive Director

José Manuel Barroso,  
President of the European Commission,  
1049 Brussels,  
Belgium

London, 30 April 2008

Dear President Barroso,

## **RE: A Single Non-discrimination Directive Levelling up Protection on All Article 13 Grounds**

On behalf of The Equal Rights Trust (ERT), I write to you in relation to the legislative proposal which will be put forward by the European Commission in 2008 for a Council directive on the basis of Article 13 of the Amsterdam Treaty. ERT urges the European Commission to accept the following recommendations, motivated further in this submission:

**Recommendation 1:** The European Commission in its legislative proposals should introduce a single non-discrimination directive covering all grounds referred to in Article 13: age, disability, race, religion and belief, sex, and sexual orientation.

**Recommendation 2:** The single non-discrimination directive should provide protection against discrimination on all Article 13 grounds covering all areas outside employment, which are specified in Council directive 2000/43/EC in respect to race or ethnicity, and level up protection on all grounds to – at minimum – that afforded on the ground of race or ethnicity.

**Recommendation 3:** The principles and obligations contained in the UN Convention on the Rights of Persons with Disabilities should be incorporated into the single non-discrimination directive.

**Recommendation 4:** The single non-discrimination directive should be supplemented with a separate document providing guidelines on the application of the directive in respect to disability and focusing on meeting the specific challenges facing persons with disabilities.

**Recommendation 5:** A prohibition of multiple discrimination should be expressly set out within the single non-discrimination directive.

**Recommendation 6:** It should be set out plainly within the single non-discrimination directive that positive action and positive duties are not exceptions to but are an integral part of implementing the principle of non-discrimination set forth by Article 13.

**Recommendation 7:** The exceptions within the single non-discrimination directive should be limited, covering a range of circumstances and subject to a strict justification test.

## **I. Introduction**

The Equal Rights Trust (ERT) is an international non-governmental organisation which promotes equality and non-discrimination as a fundamental human right and a basic principle of social justice. The establishment of ERT was a response to two major problems: the drifting apart of the fields of equality and human rights; and the fragmentation of equality which has resulted in a hierarchy of protected grounds in law. The focus of ERT work is the complex and complementary relationship between different types of discrimination, and the development of strategies for translating the principles of equality into practice.

ERT is concerned that the commitments made by the European Commission as part of its 2008 Legislative and Work Programme,<sup>1</sup> namely, to 'level up' anti-discrimination protection for the grounds of age, disability, religion and belief, and sexual orientation are in danger of being unfulfilled within the Commission's 2008 agenda. This submission has been prompted by concerns expressed by civil society organisations, national equality authorities, national and European politicians and others that the Commission may be preparing to propose a directive covering only the ground of disability, but leaving out other Article 13 grounds.

Council Directive 2000/43/EC and Council Directive 2000/78/EC have made significant contributions to the advancement of anti-discrimination protection for individuals within the European Union (EU). However, levelling the scope of protection for age, disability, religion and

---

<sup>1</sup> See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Brussels, 23 October 2007, COM (2007) 640 final.

belief, sexual orientation and sex to the standards afforded to race is necessary to ensure that the EU maintains its role at the forefront of equality and social justice. ERT is concerned that the Commission may miss the opportunity to improve the protection from discrimination of people living in the EU if it puts forward a proposal which does not, at a minimum, seek to cover all grounds listed in Article 13.

The above Recommendations are justified under the Commission's treaty-based competency and as part of EU member states international legal obligations. Furthermore, they are necessary to empower victims of discrimination and inequality throughout Europe and to ensure legal certainty in implementing the principle of non-discrimination. ERT considers that the adoption of these recommendations is fundamentally important to ensuring full equality in practice prescribed by Council Directive 2000/43/EC<sup>2</sup> and Council Directive And 2000/78/EC<sup>3</sup>

## **II. The European Commission's Competency**

It is important that the European Commission takes the necessary steps to ensure that a legislative agenda which adopts a single non-discrimination directive covering all grounds referred to in Article 13 and harmonising protection across EU law is undertaken.

Legislative and policy proposals which do not seek to advance the protected status of all grounds under Article 13 in a uniform manner under a single non-discrimination directive can only serve to perpetuate discrimination and a hierarchy of protection within EU law. Adopting a multi-directive fragmented approach would constitute a set back to the progress made since the enactment of Council Directive 2000/43/EC and Council Directive 2000/78/EC. Moreover, it would perpetuate the ambiguities, inconsistencies and anxieties that exist in relation to current EU non-discrimination law.

The competency of the Commission to propose legislative policy to 'level up' the grounds of age, disability, religion or belief, sex and sexual orientation to the protection received on ground of race within a single non-discrimination directive is unambiguous. Article 13 of the Treaty of the European Union expressly states:

*"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*

---

<sup>2</sup> Article 5.

<sup>3</sup> Article 7.

*combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”*

While policy formulation must adhere to the principle of subsidiarity,<sup>4</sup> it has been the opinion of the Commission that EU level action “*in order to achieve a uniform level of protection against discrimination*” was justified on the grounds of subsidiarity.<sup>5</sup> On this basis, the European Commission proposed a Directive implementing the principle of equal treatment outside employment in its Legislative and Work Programme 2008.

Further, acknowledging the EU’s stated commitment to respect and protect fundamental rights,<sup>6</sup> strong legal and political justifications exist to ‘level up’ protection from discrimination for age, disability, religion and belief, sex and sexual orientation to the standard of race. The legal justifications within the EU Charter on Fundamental Rights are plain. In particular Article 1 (respect and protection of human dignity), Article 14 (right to education), and Article 21 (right to non-discrimination) present clear obligations to combat discrimination in all areas of social life, not merely employment. Similarly, the Treaty of Lisbon, which is set for ratification in January 2009, prescribes a commitment to equality within the preamble (Article 1) and sets out the foundations of the Union as being respect for human dignity, equality and human rights (Article 1a). Article 5b of the Treaty of Lisbon sets the future direction for policy and decision-making at the European level:

*“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”*

The significance of Article 5b must be asserted. Institutional competency and a compelling case clearly exist within the EU for the Commission to implement a legislative work programme which would introduce a directive to equalise protection from discrimination to the level currently secured by race. This legal competency is matched by a political drive by relevant actors in the European Parliament’s Employment and Social Affairs Committee.<sup>7</sup> ERT recommends that the European Commission introduces legislative proposals which create a single non-discrimination

---

<sup>4</sup> Article 5 of the Treaty establishing the European Community.

<sup>5</sup> See European Commission. “Completion of the EU anti-discrimination legal framework”, Priority Initiatives Roadmap, available at [http://ec.europa.eu/atwork/programmes/docs/clwp2008\\_roadmap\\_priority\\_initiatives.pdf](http://ec.europa.eu/atwork/programmes/docs/clwp2008_roadmap_priority_initiatives.pdf), accessed on 16 April 2008, p. 147.

<sup>6</sup> Article 6 (2) of the Treaty on European Union.

<sup>7</sup> See, for example, press release by Liz Lynne MEP, “MEPs welcome European Commission’s plans for new anti-discrimination Directive”, available at: [http://www.lizlynne.org.uk/news/000984/meps\\_welcome\\_european\\_commissions\\_plans\\_for\\_new\\_antidiscrimination\\_directive.html](http://www.lizlynne.org.uk/news/000984/meps_welcome_european_commissions_plans_for_new_antidiscrimination_directive.html), accessed on 16 April 2008.

directive that harmonises protection across all Article 13 grounds. ERT views this as the only way to ensure that the EU treaty based obligations are met in full.

A single non-discrimination directive is necessary if the principle of legal certainty is to be maintained. The UK experience provides a useful illustration of this point. An independent report on equality legislation in the UK in 2000 found that the complexity of anti-discrimination law had resulted in calls for more comprehensible and user-friendly legislation.<sup>8</sup> The research recommended that instead of the patchy and inconsistent legal instruments in force, there should be a single equality act in Britain.<sup>9</sup> Similarly, a 2007 review into equality legislation<sup>10</sup> called for the harmonisation of equality legislation in order to make it simpler and more coherent. In order, therefore, to create a more effective, coherent and purposeful framework for EU non-discrimination law for plaintiffs, practitioners and the judiciary alike, the harmonisation of protection on all Article 13 grounds to that afforded to race is necessary.

In addition, it is impractical and counterproductive to maintain a disparity between domestic and EU legal provisions. Many EU non-discrimination legal provisions relating to race have already been transposed also with regard to other discrimination grounds by a number of member states. The progressive tendency observable at the national level to adopt comprehensive multi-ground equality legislation would clash with a remaining patchiness of EU equality legislation, creating tension and confusion between EU and domestic law. The adoption of a single directive which upgrades the protection to the highest available level will mitigate the practical difficulties arising from the current disparities between EU and domestic non-discrimination law. Furthermore, this disparity is counterproductive to EU-wide goals such as gender mainstreaming which rely on continuity between EU and domestic law to ensure its full and effective implementation.

Therefore, with regard to the competency of the Commission and in order to avoid the difficulties spelled out above ERT recommends:

- The European Commission in its legislative proposals should introduce a single non-discrimination directive covering all grounds referred to in Article 13: age, disability, race, religion and belief, sex, and sexual orientation.

---

<sup>8</sup> See Hepple, B. Coussey, M. and Choudhury, T. "Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-discrimination Legislation, 1999.

<sup>9</sup>Ibid., Recommendation 1, p. xvii.

<sup>10</sup> See "Fairness and Freedom: The Final Report of the Equalities Review", 2007. This approach was also set out in the UK Government's Discrimination Law Review. See Department for Communities and Local Government. "Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain", 2007.

- The single non-discrimination directive should provide protection against discrimination on all Article 13 grounds covering all areas outside employment, which are specified in Council directive 2000/43/EC in respect to race or ethnicity, and level up protection on all grounds to that afforded on the ground of race or ethnicity.

### III. Human Rights Law Obligations

Both international and European human rights law create clear obligations on EU member states to implement legislative and other measures to combat discrimination on Article 13 grounds. It is necessary for the European Union to be an identifiable leader in pursuing the domestic implementation of international and regional human rights norms.

The EU (through its capacity as signatory or through the obligations binding its member states) has clear international law obligations ensure that necessary measures and legislative protections are in place to comprehensively protect against discrimination on grounds covered by Article 13. Each of the grounds covered in Article 13 has reached a status of prohibited ground of discrimination beyond the sphere of employment under international and European human rights law, as follows:

#### Age

Discrimination on grounds of age is prohibited as discrimination on the basis of ‘other status’ under Articles 2 and 26 of the International Covenant on Civil and political Rights (ICCPR). It has also been an area of concern for the Committee on Economic, Social and Cultural Rights (CESCR), particularly in the field of tertiary education.<sup>11</sup> CESCR has set out that:

*“[W]hile it may not yet be possible to conclude that discrimination on the grounds of age is comprehensively prohibited by the Covenant, the range of matters in relation to which such discrimination can be accepted is very limited.”<sup>12</sup>*

In addition, General Comment 6 of CESCR sets out that states should determine the nature and scope of problems affecting older persons within a state through monitoring and adopting policies, enacting legislation when necessary and eliminated any discriminatory legislation.<sup>13</sup>

---

<sup>11</sup> Committee on Economic, Social and Cultural Rights. “General Comment 6: The economic, social and cultural rights of older persons”, Thirteenth Session, 1995, para. 12.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid, para. 18.

## Disability

A broad range of international instruments also impose the prohibition of discrimination against disabled people. Paramount among these is the Convention on the Rights of Persons with Disabilities<sup>14</sup> (the Disability Convention). The European Community<sup>15</sup> signed the Disability Convention on 30 March 2007. In order to fulfil its obligations regarding, *inter alia*, Article 9 (accessibility), Article 21 (access to information), Article 24 (education) and Article 30 (participation in cultural life, recreation, leisure and sport) it will be necessary for the EU to adopt measures and legislation to protect the rights of individuals who fall under the scope of the Disability Convention. Within European human rights law, the European Social Charter provides the right of persons with disabilities to independence, social integration and participation in the life of the community<sup>16</sup> and a right to non-discrimination.<sup>17</sup>

The single non-discrimination directive must incorporate the obligations and principles contained within the Convention on the Rights of Persons with Disabilities. In order to harmonise protection across Article 13 grounds and incorporate the specific requirements of the Disability Convention, the Commission, in addition to the single non-discrimination directive, could develop specific guidelines on disability in a document which is supplemental to but separate from the directive. This approach would combine the benefits of harmonising EU non-discrimination law with those of complying, the European level, with international legally binding norms upholding and strengthening the rights of persons with disabilities.

Engaging with the rights of persons with disabilities in this manner would have a number of positive effects, including: (a) it would ensure that the rights of persons with disabilities are a central concern of EU non-discrimination law and not a tangential consideration, (b) it would enable decision and policy makers to take specifically targeted action to develop policy and ensure the rights of persons with disabilities above and beyond the limits of the law, (c) it would provide the necessary legal continuity and harmonisation for the EU to address issues which often have the greatest effect for persons with disabilities, such as multiple or intersectional discrimination, and

---

<sup>14</sup> It will enter into force on 3 May 2008.

<sup>15</sup> At the time of writing, 16 April 2008, two EU Member States, Hungary and Spain, have ratified the Disability Convention, while 24 of the remaining 25 Member States have signed it.

<sup>16</sup> Article 15.

<sup>17</sup> Article E – although Article E does not explicitly state disability as a protected ground of discrimination, the European Committee on Social Rights has accepted as admissible an application on this ground. See *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Complaint No. 41/2007.

(d) it would recognise that concern for specific aspects of discrimination against persons with disabilities is more appropriately addressed through targeted policy based action.

### **Religion or Belief**

Several international obligations exist in respect to protection from discrimination on the ground of religion or belief.<sup>18</sup> The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief adopted by General Assembly resolution 36/55 of 25 November 1981 provides that states should enact legislation to prohibit discrimination and take all appropriate measures to combat intolerance on the grounds of religion or belief<sup>19</sup> and condemn discrimination on grounds of religion or belief as an affront to human dignity.<sup>20</sup> Within European human rights law, the European Court of Human Rights has provided protection under Article 14 from discrimination on the ground of religion in areas outside employment.<sup>21</sup> In a similar fashion, the European Social Charter provides protection from discrimination on the ground of religion.<sup>22</sup>

### **Sex/Gender**

The international obligations in respect to protection from discrimination on the ground of sex in a very broad range of areas beyond employment and the provision of goods and services are long standing and well established. The International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) sets out extensive obligations of state parties<sup>23</sup> to combat sex or gender-based discrimination.<sup>24</sup> Moreover, Article 2 and 26 of the ICCPR, Article 2(2) of

---

<sup>18</sup> See, for example, Articles 2 and 26 of the International Covenant on Civil and Political Rights and Article 2 of the International Covenant on Economic, Social and Cultural Rights.

<sup>19</sup> Article 4.

<sup>20</sup> Article 3.

<sup>21</sup> See, for example, *Hoffmann v Austria* (Application No. 12875/87), or *Canea Catholic Church v Greece* (Application No. 25528/94).

<sup>22</sup> Article E, which is to be read in conjunction with other Charter rights, for example, the highest standards of health (Article 11) or social security (Article 12).

<sup>23</sup> All EU member states are party to CEDAW.

<sup>24</sup> Under to Article 2, states parties “agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women” and to this end, undertake, among other things, to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; and take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.



ICESCR as well as European human rights law treaties<sup>25</sup> explicitly require states to secure the enumerated rights contained within each treaty without discrimination on the grounds of sex.

### **Sexual Orientation**

The jurisprudence of the Human Rights Committee has affirmed that sexual orientation is a protected ground under Article 26 of the ICCPR.<sup>26</sup> Similarly, the Committee on Economic Social and Cultural Rights made it clear that in respect to the highest attainable standard of health, Article 2(2) and Article 3 of the ICESCR proscribe any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the ground of sexual orientation.<sup>27</sup> Under European human rights law, while sexual orientation is not explicitly protected under Article 14 of the European Convention of Human Rights, the jurisprudence of the Strasbourg Court has found violations of Article 14 on grounds of sexual orientation outside the employment field.<sup>28</sup>

In view of the foregoing, ERT recommends:

- The European Commission in its legislative proposals should introduce a single non-discrimination directive covering all grounds referred to in Article 13: age, disability, race, religion and belief, sex, and sexual orientation.
- The single non-discrimination directive should provide protection against discrimination on all Article 13 grounds covering all areas outside employment, which are specified in Council directive 2000/43/EC in respect to race or ethnicity, and level up protection on all grounds to that afforded on the ground of race or ethnicity.
- The principles and obligations contained in the UN Convention on the Rights of Persons with Disabilities should be incorporated into the single non-discrimination directive.
- The single non-discrimination directive should be supplemented with a separate document providing guidelines on the application of the directive in respect to disability and focusing

---

<sup>25</sup> See, for example, Article 14 of the European Convention of Human Rights and Article E of the European Social Charter.

<sup>26</sup> See, for example, *Toonen v. Australia*, Communication No. 488/1992, 31 March 1994, para. 8.7.

<sup>27</sup> See Committee on Economic Social and Cultural Rights. "General Comment no. 14: The right to the highest attainable standard of health", 11 August 2000.

<sup>28</sup> See, for example, *Karner v Austria*, Application No. 40016/98, 24 July 2003.

on meeting the specific challenges facing persons with disabilities. The adoption of a single non-discrimination directive covering all grounds referred to in Article 13.

#### **IV. Empowering Victims of Discrimination**

In order to empower victims of discrimination and achieve full equality in practice, the single non-discrimination directive should include measures and concepts which are necessary to meet the existing and emerging challenges of discrimination and inequality.

To be sure, fragmented approaches to protection from discrimination invariably lead to gaps and a hierarchy of protected grounds in law. A *prima facie* examination suggests a fragmented approach fails to plug existing legal loopholes within national legal systems and results in a disparity of protection across jurisdictions.<sup>29</sup> Similarly, such an approach will ultimately have negative repercussions for long-term EU and national policy implementation strategies, including on combating multiple discrimination, implementing positive action, preventing the abuse of exceptions and providing legal certainty.

#### **Multiple Discrimination**

Very often discrimination occurs due to an individual possessing an economic, social, cultural (including ethnic) or political trait which results in their identification for discriminatory and disadvantaging treatment or exclusion. On many other occasions, however, the nature of discrimination is rather more complex, wherein an individual is subjected to discrimination on multiple grounds which combine to violate an individual's dignity.<sup>30</sup>

A fragmented approach adversely affects the ability of EU and its member states to combat multiple discrimination.<sup>31</sup> Any legislative proposal by the Commission following a fragmented approach to non-discrimination law will force applicants who have faced discrimination to make choices as to which ground-specific protection is to be pursued. For instance, if an Asian woman faces discrimination in education for reasons of both race and sex, under current EU law she is only capable of pursuing legal redress on grounds of her race. This requires the victim to place herself, in her legal pleadings, in a category (in this case, race). If the category does not reflect the victim's

---

<sup>29</sup> See European Commission. "Developing Anti-Discrimination Law in Europe: The 25 EU Member States Compared", prepared by Bell, M. Chopin, I. and Palmer, F. 2007.

<sup>30</sup> See, for example, the UK case of *Bahl v (1) Law Society (2) Robert Sayer (3) Jane Betts (2004) EWCA Civ 1070, (2004) IRLR 799*.

<sup>31</sup> Paragraph 14 of the Preamble to Council Directive 2000/43/EC sets out that one purpose of implementing equal treatment is to counter multiple forms of discrimination.

perception of her identity, she will be required to describe herself in terms with which she does not necessarily identify.<sup>32</sup> By creating and maintaining a hierarchy of protected grounds EU law narrows the scope victims have to address multiple discrimination. The current fragmented approach to EU law requires victims to disregard their unique discriminatory experience and plead on the ground which provides the greatest scope of protection. Legal and policy research into the phenomenon of multiple discrimination recognises and supports the argument that a fragmented hierarchal approach limits the effectiveness of protecting against multiple discrimination.<sup>33</sup>

While a shift to a 'levelled-up' single non-discrimination directive will go some way to mitigating the negative experiences of people currently facing multiple discrimination, in order to effectively combat the issue, the directive must explicitly prohibit multiple discrimination. If discrimination in this form is to be effectively challenged by EU law, the Commission's legislative proposal needs to (a) create an environment wherein grounds of discrimination can receive equal protection and (b) expressly prohibit multiple discrimination.

In response to the above concerns ERT recommends:

- A prohibition of multiple discrimination should be expressly set out within the single non-discrimination directive.

## **Positive Action**

ERT believes that the concept of positive action (and therefore positive duties) should not be regarded as an exception to the principle of non-discrimination in Article 13. Instead, it should be viewed as an ordinary tool for achieving the aims of non-discrimination law: ensuring full equality in practice. Positive action is part of the realisation of the principle of non-discrimination under Article 13 and should be considered simply as a positive affirmation of the principle of non-discrimination.<sup>34</sup>

Treating positive action as an exception to the principle of non-discrimination unduly and incorrectly limits the scope of that principle. The principle of non-discrimination under Article 13

---

<sup>32</sup> See Uccellari, P. "Multiple Discrimination: How Law can reflect Reality", *The Equal Rights Review*, Vol. 1, 2008, pp. 24 – 49.

<sup>33</sup> See also European Commission. "Tackling Multiple Discrimination: Practices, Policies, Laws", 2007, available at [http://ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/pubst/stud/multidis\\_en.pdf](http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/multidis_en.pdf), accessed on 16 April 2007. Recommendation No. 2 of this report suggests that in order to address multiple discrimination EU and national anti-discrimination legislation should cover the grounds of age, disability, religion or belief and sexual orientation in the fields of (a) social protection, including social security and healthcare; (b) social advantages; (c) education; (d) access to and supply of goods and services which are available to the public, including housing.

<sup>34</sup> This is the manner in which positive action and positive duty are legally interpreted under United Kingdom law. See, for example, section 71 of the Race Relations (Amendment) Act 2000.

possesses both positive and negative content. While the prohibition of direct and indirect discrimination imposes negative obligations not to discriminate, positive action requires taking necessary steps to give effect to the principle of non-discrimination.<sup>35</sup> ERT believes that the treatment of positive action in a manner which does not recognise it as inherent to the principle of non-discrimination departs from the well-established idea that as an international norm the principle of non-discrimination is both positive and negative in character.

In order to ensure that the application of the principle of non-discrimination in EU law is consistent with other progressive international norms, ERT recommends:

- It should be set out plainly within the single non-discrimination directive that positive action and positive duties are not exceptions to but are an integral part of implementing the principle of non-discrimination envisaged in Article 13.

## Exceptions

The issue of exceptions is often the subject of political rather than legal consideration. Subsequently, any legislative proposal which seeks to incorporate a broad range of exemptions, or overarching criteria in which various exceptions can be put forwarded, should be avoided. The Commission in its legislative proposal should limit the number of permissible exemptions and such exceptions should be subject to a strict justification test.

ERT believes that a stringent approach to exemptions is necessary for the following reasons. First, recognising that exceptions often have political rather than legal justification, they are often excessive and overbearing in scope. Second, observing that exceptions to discrimination often reinforce the most systematic and entrenched forms of discrimination, there is a need to implement a strict justification test to discern genuine social and economic necessities from entrenched and subtle forms of discrimination. Third, it is necessary to remove arbitrary interpretation from the decision making process and provide the greatest possible clarity and legal certainty.

In this regard ERT recommends that:

- The exceptions within the single non-discrimination directive should be limited, covering a range of circumstances and subject to a strict justification test.

---

<sup>35</sup> See, for example, European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, para. 42, where the European Committee on Social Rights opined that Article E (non-discrimination) “imposes an obligation of taking into due consideration the relevant differences and acting accordingly. This means that for the integration of an ethnic minority as Roma into mainstream society measures of positive action are needed.” Also Professor Sandra Fredman argues that real progress in respect to the equality guarantee can only be made through a unified approach to equality, one which includes both positive and negative duties. See Fredman, S. “Equality”, Chapter 7 in *Human Rights Transformed*, Oxford University Press, 2008, pp. 175 – 203.

## V. Conclusion

European Union non-discrimination law has been regarded as a driving force for the development of non-discrimination law generally. Moreover, in recent years it has provided guidance for states developing equality law provisions as well as securing protection and tangible outcomes for individuals seeking redress for violations of their fundamental rights. It would be regrettable if the European Commission fails to make the most of the existing opportunity for advancing EU equality law and for reaffirming the institutional role of the EU as an advocate for social justice.

We hope that the Commission will seriously consider and accept the recommendations formulated above. ERT will follow with interest the development of the Commission's non-discrimination proposals and will be willing to participate in any further consultations.

Yours Sincerely,



Dr Dimitrina Petrova  
Executive Director

- c.c. Franco Frattini (Vice-president, European Commission)  
Vladimir Špidla (Commissioner, Employment, Social Affairs and Equal Opportunities)  
Jan Andrsson MEP (Chairman, Committee on Employment and Social Affairs)  
Gérard Deprez MEP (Chairman, Committee on Civil Liberties, Justice and Home Affairs)  
Liz Lynne MEP (Vice-President, Committee on Employment and Social Affairs)  
Nikolaus van der Pas (Director General, DG Employment, Social Affairs and Equal Opportunities)  
Jérôme Vignon (Director, Directorate E, DG Employment, Social Affairs and Equal Opportunities)  
Armindo Silva (Director, Directorate F: DG Employment, Social Affairs and Equal Opportunities)

Belinda Pyke (Director, Directorate G, DG Employment, Social Affairs and Equal Opportunities)

Fay Devonick (Head of Unit G1, DG Employment, Social Affairs and Equal Opportunities)

Daniela Bankier (Head of Unit G2, DG Employment, Social Affairs and Equal Opportunities)

Johan Ten Geuzendam (Head of Unit G3, DG Employment, Social Affairs and Equal Opportunities)

Stefan Olsson (Head of Unit G4, DG Employment, Social Affairs and Equal Opportunities)