

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
SJC No. 08860

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and Robert Compton, Michael Horgan and Edward
Balmelli, Maureen Brodoff and Ellen Wade, Gary
Chalmers and Richard Linnell, Heidi Norton and Gina
Smith, and Gloria Bailey and Linda Davies,

Appellants,

v.

DEPARTMENT OF PUBLIC HEALTH, and DR. HOWARD KOH, in
his official capacity as Commissioner of the
Department of Public Health,

Appellees.

ON APPEAL FROM A JUDGMENT
FROM THE SUPERIOR COURT, SUFFOLK COUNTY

**BRIEF OF AMICI CURIAE
INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS
ET AL.**

Coalition gaie et lesbienne du Québec, EGALÉ Canada
Inc., Fédération internationale des ligues des Droits
de l'Homme, Human Rights Watch, ILGA, ILGA-Europe,
ILGA-North America, Inter-American Center for Human
Rights, Interights, International Lesbian and Gay Law
Association, Japan Association for the Lesbian and Gay
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STATEMENT OF INTEREST OF AMICI CURIAE

This brief is submitted in support of the appeal from the May 9, 2002 summary judgment decision of the Superior Court, by the 16 international human rights organizations and 21 law professors (in the U.S. sense, except as otherwise indicated) listed in Appendix I. These human rights organizations and law professors are interested in the elimination of all forms of discrimination, including discrimination based on sex or sexual orientation, and are either based outside the United States or are familiar with legal developments outside the United States. They respectfully submit this Brief to ensure that the Court is fully aware of developments in international human rights law, and in national law outside the United States (hereinafter "human rights law"), with regard to sexual orientation discrimination, equal treatment of same-sex couples, and the opening up of civil marriage to individuals desiring to marry someone of the same sex.

SUMMARY OF ARGUMENT

The Amici Curiae respectfully submit, and will demonstrate below: (I) that subjecting the exclusion of persons desiring to marry someone of the same sex

from civil marriage in the Commonwealth of Massachusetts to strict scrutiny under the Massachusetts Constitution, whether because of the exclusion's reliance upon a sex-based classification or because sexual orientation is a "suspect classification" or because of the exclusion's impairment of a fundamental liberty interest, would be entirely consistent with human rights law in many countries outside the United States (pp. 2-14); (II) that requiring equal access to civil marriage for individuals desiring to marry partners of the same sex under the Massachusetts Constitution would be entirely consistent with the broad trend towards equal treatment of different-sex and same-sex couples in at least 19 industrialized democracies outside the United States (pp. 15-29); and (III) that, as the just and logical conclusion of this trend, the final appellate courts of several of these democracies are likely soon to end the exclusion of same-sex couples from civil marriage on constitutional grounds, as some of their legislatures have already begun to do (pp. 29-49).

ARGUMENT

- I. SEXUAL ORIENTATION IS INCREASINGLY TREATED AS A "SUSPECT CLASSIFICATION" UNDER INTERNATIONAL AND NATIONAL HUMAN RIGHTS LAW.**

During their reign of terror from 1933 to 1945, the Nazi regime in Germany established a Reichszentrale zur Bekämpfung der Homosexualität und der Abtreibung (Reich Office for the Combating of Homosexuality and Abortion), and made one of the categories of prisoner in their concentration camps that of Homosexuell, indicated by a pink triangle on the prisoner's uniform.¹ Since the 1970s, human rights laws outside the United States have gradually recognised that Nazi persecution of lesbian, gay and bisexual individuals was just as wrongful as Nazi persecution of Jews, Gypsies and Jehovah's Witnesses, and that discrimination based on sexual orientation should be taken just as seriously as discrimination based on race, religion or sex. This recognition has taken three forms: (A) courts are increasingly interpreting "privacy" or "equal protection" provisions of treaties and constitutions, such as those found in the Massachusetts Constitution², as prohibiting sexual orientation discrimination; (B) new constitutional equality

¹ See Günter Grau, Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933-45 86-130 (1995).

² See Mass. Const., Pt. 1, arts. I, VI, VII and X (as amended).

provisions are beginning to include "sexual orientation" as an expressly prohibited ground of discrimination; and (C) anti-discrimination legislation in many jurisdictions now includes "sexual orientation" as a prohibited ground.

A. Courts Are Increasingly Interpreting "Privacy" or "Equal Protection" Provisions of Treaties and Constitutions as Prohibiting Sexual Orientation Discrimination.

When faced with cases such as the one before this Court, courts and quasi-judicial bodies at both an international and national level have repeatedly recognized that discrimination on the basis of sexual orientation is just as serious and unacceptable as discrimination based on race, religion or sex. Specifically, the tribunals have found that sexual orientation discrimination violates the "privacy" and/or "equal protection" provisions of international human rights treaties and national constitutions that do not refer to sexual orientation expressly.

The European Court of Human Rights,³ which issues binding judgments affecting the 800,000,000 people living in the 44 Member States of the Council of

³ See <http://www.echr.coe.int>.

Europe⁴ (a separate international organization from the 15-member-state European Union/Community⁵), has developed a substantial body of case-law establishing a strict justification test for cases involving sexual orientation discrimination.⁶ In Dudgeon v. United Kingdom (1981), the Court invalidated Northern Ireland's legislation prohibiting all private, consensual sexual activity between adult men on the ground that it violated Article 8(1) of the European Convention on Human Rights: "Everyone has the right to respect for his private ... life ...".⁷

The Court extended this strict justification test under Article 8 of the Convention to employment in Smith & Grady v. United Kingdom (1999), overturning the dismissals of lesbian and gay members of the armed forces. The Court, finding a violation of Article 8, held that, "[because] the sole reason for the investigations ... and ... discharge was their sexual orientation[,] ... a most intimate aspect of an individual's private life, particularly serious reasons by

⁴ See <http://www.coe.int>.

⁵ See <http://europa.eu.int>.

⁶ All cited judgments of the Court are available at <http://hudoc.echr.coe.int/hudoc>, Access HUDOC, Title = name of plaintiff, Search.

⁷ Dudgeon, 45 Eur. Ct. H.R. 149 (1981) at para. 52.

way of justification were required".⁸ The Court re-
jected the hostility of heterosexual members of the
armed forces as a sufficient justification:

To the extent that they represent a predis-
posed bias on the part of a heterosexual ma-
jority against a homosexual minority, these
negative attitudes cannot, of themselves, be
considered by the Court to amount to suffi-
cient justification for the interferences
with the applicants' rights ..., any more
than similar negative attitudes towards
those of a different race, origin or colour.⁹

Having expressly analogized between racial and
sexual orientation discrimination in Smith & Grady,
the Court implicitly analogized between religious and
sexual orientation discrimination in Mouta v. Portugal
(1999). There, the Lisbon Court of Appeal had trans-
ferred custody of an eight-year-old girl from her gay
father (the plaintiff, Mr. Mouta) to her heterosexual
mother, citing his being gay and his living with an-
other man as negative factors. The Court of Human
Rights concluded "that the Court of Appeal made a dis-
tinction based on considerations regarding the appli-
cant's sexual orientation, a distinction which is not
acceptable under the Convention (see, mutatis mutan-

⁸ Smith & Grady [1999] IRLR 734 at para. 90.

⁹ Id. at para. 97.

dis, the Hoffmann judgment ... [para.] 36)."¹⁰ As in the earlier Hoffmann case, which involved a mother who was a Jehovah's Witness,¹¹ the Court concluded that Mr. Mouta's rights had been violated under Article 14 of the Convention ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour ... religion, ... national ... origin, ... or other status."), combined with Article 8 ("Everyone has the right to respect for his ... family life ...").¹²

The United Nations Human Rights Committee similarly has found that discrimination on the basis of sexual orientation violates the International Covenant on Civil and Political Rights (which the United States ratified on June 8, 1992). In Toonen v. Australia (1994),¹³ the Committee held that the State of Tasmania's blanket prohibition of all private, consensual

¹⁰ Mouta [2001] 1 FCR 653 (Eur. Ct. H.R. Dec. 21, 1999) at para. 36.

¹¹ In Hoffmann v. Austria [1993] Eur. Ct. H.R. 127875/87, the Court found a similar violation of Articles 14 and 8 where the trial court had cited as a negative factor in a child custody decision the fact that the mother was a Jehovah's Witness.

¹² The Massachusetts Constitution also protects family privacy. Mass. Const., Pt. 1, art. X.

sexual activity between adult men violated both Article 17 of the Covenant, ("No one shall be subjected to arbitrary or unlawful interference with his privacy ..."), and Article 2(1) of the Covenant, ("[e]ach State Party ... undertakes to respect and to ensure to all individuals ... the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, ... religion, ... national ... origin, ... or other status").¹⁴ The Committee also held that "the reference to 'sex' in Articles [2(1)] and 26 [of the Covenant] is to be taken as including sexual orientation".¹⁵ Article 26 of the Covenant provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, ... religion, ... national ... origin, ... or other status.

Similarly, at the national level, the Supreme Court of Canada has recognized that the bill of rights of the Canadian Constitution implicitly prohibits dis-

¹³ Communication No. 488/1992, 1 I.H.R.R. 97 (March 31, 1994), U.N. Doc. CCPR/C/50/D/488/1992.

¹⁴ Id. at paras. 8.6, 9.

¹⁵ Id. at para. 8.7.

crimination on the basis of sexual orientation although sexual orientation is not expressly mentioned. The Court held unanimously (9-0) in Egan v. Canada (1995)¹⁶ that sexual orientation is an "analogous ground" to race, religion and sex under Section 15(1), the equal protection provision of the Canadian Charter of Rights and Freedoms, and that discrimination based on sexual orientation is implicitly prohibited by Section 15(1): "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national ... origin, colour, religion, sex," Four judges held that "... whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs ...".¹⁷

Five judges took the view that:

[t]he historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and ver-

¹⁶ [1995] 2 S.C.R. 513, http://www.lexum.umontreal.ca/csc-scc/en/pub/1995/vol2/html/1995scr2_0513.html.

¹⁷ Id. at para. 5.

bal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation ... They have been discriminated against in their employment and their access to services. ... The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life. ... [T]he isolation, harassment and violence imposed by the public and the rejection by their families has caused young homosexuals to have a higher rate of attempted and successful suicide than heterosexual youths. ... [H]omosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.¹⁸

Thus, courts and quasi-judicial bodies at both the international and national levels have repeatedly recognized that privacy and equal protection principles implicitly prohibit discrimination on the basis of sexual orientation.

B. New Constitutional Equality Provisions Are Beginning to Expressly Prohibit Discrimination on the Ground of "Sexual Orientation."

The second form of recognition that sexual orientation discrimination is just as unacceptable as discrimination based on race, religion or sex, has been the express inclusion of "sexual orientation" or a

¹⁸ Id. at paras. 173-75.

similar ground in the equal protection provisions of state and national constitutions.¹⁹

The first national constitution in the world to expressly prohibit discrimination on the basis of sexual orientation was the transitional Constitution of South Africa in 1993. Section 9(3) of the final Constitution of South Africa, adopted in 1996, reads as follows:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, sex, ..., colour, **sexual orientation**, ... religion....
(Emphasis added.)

Those who adopted the transitional and final Constitutions recognised the similarity between racial discrimination and sexual orientation discrimination.²⁰

In National Coalition for Gay and Lesbian Equality v. Minister of Justice (1998), the Constitutional Court of South Africa relied on Section 9(3) of the South African Constitution to strike down common-law

¹⁹ See Appendix II.

²⁰ See Edwin Cameron, "Sexual Orientation and the Constitution", 110 S. Afr. L.J. 450, 468-69 (1993) (the draft Bills of Rights of the two main black-majority political parties, the African National Congress led by Nelson Mandela and the Inkatha Freedom Party, both expressly prohibited sexual orientation discrimination).

and statutory provisions banning sexual activity between men, finding that:

The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection. ... Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. ... Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men.²¹

In 1997, the Fiji Islands became the second country to add sexual orientation to the non-discrimination provision of its national constitution, and Ecuador was the third in 1998. In Ireland, a review of the Constitution has recommended an amendment to Article 40.1, the equality provision, which would add a list of prohibited grounds of discrimination, including sexual orientation.²² In the Netherlands, the government has indicated that it will prepare a memorandum on the possibility of amending Article 1 of

²¹ 1998 (12) BCLR 1517, <http://www.concourt.gov.za/judgments/1998/gayles.pdf> (Const. Ct. Oct. 9, 1998) (paras. 25-26, 28).

²² Report of the Constitution Review Group (May 1996), p. 230.

the Dutch Constitution providing for equal treatment to include an express prohibition of "sexual orientation" discrimination.²³ And at least five states in countries with federal systems have added sexual orientation or a similar ground to the non-discrimination articles of their constitutions: two in Brazil (the States of Mato Grosso and Sergipe in 1989), and three in Germany (the States of Brandenburg, Thuringia and Berlin in 1992, 1993 and 1995, respectively). A prohibition of discrimination based on the broader ground "way of life" ("Lebensform", "mode de vie", "modo de vita") appears in Article 8(2) of the new (April 18, 1999) Federal Constitution of Switzerland.

At the international level, the first treaty to expressly address sexual orientation discrimination was the Treaty of Amsterdam, signed by the 15 Member States of the European Union/Community (EU/C) (which have combined populations of over 370,000,000) on October 2, 1997.²⁴ This Treaty inserted the following new Article 13 into the European Community Treaty (under which most European Union law is made, and which

²³ Letter of the Minister for the Interior of 5 April 2002 to the Lower House of Parliament, Kamerstukken II (parliamentary papers of the Lower House), nr. 28000 XVI - 112.

is considered a "constitutional charter" by the European Court of Justice):

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

(emphasis added.)²⁵

On December 7, 2000, the 15 Member States authorised the solemn proclamation of the Charter of Fundamental Rights of the European Union.²⁶ The Convention on the Future of Europe is currently debating whether to incorporate it as a legally binding bill of rights into one of the existing treaties or a new Constitution of the European Union.²⁷ Article 21(1) of the Charter provides:

Any discrimination based on any ground such as sex, race, colour, ... religion ... or **sexual orientation** shall be prohibited. ...
(Emphasis added.)

²⁴ The Treaty entered into force on May 1, 1999.

²⁵ See http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf.

²⁶ See <http://db.consilium.eu.int/df/default.asp?lang=en>.

²⁷ See <http://european-convention.eu.int/enjeux.asp?lang=EN> (the Laeken Declaration).

C. Anti-Discrimination Legislation in Many Jurisdictions Now Includes "Sexual Orientation" as a Prohibited Ground.

The third form of recognition that sexual orientation discrimination is invidious has been the addition of the ground "sexual orientation" to legislation prohibiting discrimination in such areas as employment, education, healthcare, housing, or the provision of goods and services, both in the public sector and in the private sector.²⁸ Among the 44 Member States of the Council of Europe, 15 Member States have already passed legislation prohibiting sexual orientation discrimination in at least one such area.²⁹ A further 7 Member States³⁰ must do so by December 2, 2003, to comply with Council Directive 2000/78/EC.³¹ The Directive was adopted on Nov. 27, 2000 under Article 13 of the

²⁸ See Appendix II. Recognizing the inherent unacceptability of such discrimination, the Massachusetts legislature also has enacted legislation explicitly prohibiting discrimination based on sexual orientation. See, e.g., Mass. G.L. c. 151B.

²⁹ See Robert Wintemute (ed.) & Mads Andenæs (hon. co-ed.), Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law at 784-87 (2001) (The Czech Republic, Denmark, Finland, France, Hungary, Iceland, Ireland, Lithuania, Luxembourg, the Netherlands, Norway, Romania, Slovenia, Spain, and Sweden).

³⁰ Austria, Belgium, Germany, Greece, Italy, Portugal, and the United Kingdom.

European Community Treaty and prohibits sexual orientation discrimination in public and private sector employment.³²

In Canada, "sexual orientation" appears in anti-discrimination legislation at the federal level, in 9 of 10 provinces, and in 1 of 3 territories, and the reasoning of a Supreme Court of Canada decision requires that it be "read into" the legislation of the 3 remaining jurisdictions.³³ In Australia, "sexual orientation" or a similar ground appears in the legislation of all 6 states and both territories. The same is true at the national level in Israel, New Zealand, and South Africa.

II. THE BROAD TREND IN OTHER DEMOCRATIC SOCIETIES IS TOWARDS EQUAL TREATMENT OF INDIVIDUALS IN DIFFERENT-SEX AND SAME-SEX COUPLES.

³¹ See http://europa.eu.int/eur-lex/en/search/search_lif.html (Directives, Year = 2000, Number = 78).

³² Six other Member States (Cyprus, Estonia, Latvia, Malta, Poland, and Slovakia) will have to implement the Directive once their applications to join the E.U. are approved. The remaining 16 Member States, including the Russian Federation, will have to do the same if they wish to join the E.U.

³³ In Vriend v. Alberta, [1998] 1 S.C.R. 493 (<http://www.droit.umontreal.ca/doc/csc-scc/en/index.html>), the Supreme Court of Canada held that Section 15(1) of the Canadian Charter of Rights and Freedoms requires that sexual orientation be "read into" the anti-discrimination law of Alberta. The same reasoning would apply to the Northwest Territories' Fair Practices Act, and Nunavut Territory's Fair Practices Act (Nunavut).

Courts and legislatures in other democratic societies are increasingly recognising that lesbian women and gay men have the same human capacity as heterosexual women and men to fall in love with another person, to establish a long-term emotional and sexual relationship with them, to set up a joint home with them, and to raise children with them. Openly gay Justice Michael Kirby of the High Court of Australia (the highest federal appellate court of Australia), who has lived with his male partner for over thirty years, has written:

Once the lid of criminal punishment and social repression was lifted, people came to know their gay and lesbian fellow citizens. They came to realise that, boringly enough, they have all the same human needs as the heterosexual. The needs for human love, affection and companionship; for family relationships and friendships; for protection against irrational and unjustifiable discrimination; and for equal legal rights in matters where distinctions cannot be affirmatively justified. . .

It can only be in the interests of society to protect stable and mutually supportive relationships and mutual economic commitment. It is against society's interests to penalise, disadvantage and discourage them. Australia is accepting this truth.³⁴

³⁴ Justice Michael Kirby, "Same-Sex Relationships: An Australian Perspective on a Global Issue" in *Wintermute*, at 8, 21.

Lawmakers in Australia and other democratic societies are gradually yet methodically extending to persons in same-sex couples some, most, or all of the rights and obligations enjoyed by married different-sex couples: (A) courts have done so through the application of constitutional or statutory prohibitions of discrimination based on sex or sexual orientation and through statutory interpretation; and (B) legislatures have done so (1) by extending specific rights and obligations to same-sex couples, or (2) by creating new institutions permitting the registration of relationships (some of which are open to same-sex couples only and some of which are also open to unmarried different-sex couples), or (3) by opening up the existing institution of civil marriage to same-sex couples.³⁵

Consequently, requiring equal access to civil marriage for persons desiring to marry persons of the same sex under the Massachusetts Constitution would be entirely consistent with the broad trend towards equal treatment of persons in same-sex couples in at least

³⁵ See generally Wintemute; Yuval Merin, Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States (2002).

19 industrialized democracies outside the United States.

A. Courts Outside the United States Are Increasingly Requiring Equal Treatment of Persons in Same-Sex and Different-Sex Couples.

The Constitutional Court of South Africa has held repeatedly that differential treatment of unmarried same-sex partners and married different-sex partners is prohibited by that country's Constitution. The highest courts of at least three other countries have used constitutional or statutory non-discrimination principles to hold that an unmarried same-sex partner must be treated in the same way as an unmarried different-sex partner.

In El-Al Israel Airlines, Ltd. v. Danilowitz (1994),³⁶ the Supreme Court of Israel interpreted legislation prohibiting discrimination based on sexual orientation in employment as requiring an airline to provide the same free flight benefits to the unmarried same-sex partners of its employees as to the unmarried different-sex partners of its employees. Chief Justice Barak said:

³⁶ H.C. 721/94, El-Al Israel Airlines, Ltd. v. Danilowitz 48(5) P.D. 749 (Hebrew); http://www.tau.ac.il/law/aeyalgross/legal_materials.htm (unofficial translation).

The grant of the benefit to the employee for his [different-sex] spouse or [different-sex] common law spouse is based on the notion that a benefit - in the form of a flight ticket - should be given to the employee for the one with whom he shares his life, with whom he maintains a common household, with whom he parts when leaving for flights and to whom he returns when the work has ended. This is the common characteristic of the spouse and the common law spouse. The purpose of the benefit is not to strengthen the marriage institution. ... Thus, the grant of the benefit is based on the notion of shared life for a certain period ... which demonstrates a strong social unit, based on cooperative life. ... [D]enial of this benefit [to] a same sex domestic partner constitutes discrimination and inequality. ... This difference is of no relevance whatsoever ... [and] constitutes an arbitrary and unfair distinction. Is leaving a same sex domestic partner easier than leaving a spouse of the opposite sex? Are shared life [sic] of two of the same sex different from those belonging to opposite sexes, concerning the cooperative relationship and the operation of the social unit?³⁷

. . . [O]ne cannot doubt the fact that the discrimination at hand is based on the 'sexual orientation' of the ... employee. ... [I]f a benefit is granted to a male employee who sustains a steady and continuous relationship with a woman, the same benefit must be given to a male employee who sustains a steady and continuous relationship with another man.³⁸

On March 13, 1995, the Constitutional Court of Hungary considered whether a draft law on domestic

³⁷ Id. at para. 15.

³⁸ Id. at para. 17.

partnership (defined as "a woman and a man living together in a common household in an emotional and economic community outside a marriage")³⁹ could include unmarried different sex partners but not unmarried same sex partners.⁴⁰ The Court held that:

[a]n enduring union for life of two persons may constitute such values that it should be legally acknowledged on the basis of the equal personal dignity of the persons affected, irrespective of the sex of those living together. ... The cohabitation of persons of the same sex, which in all respects is very similar to the cohabitation of partners in a [different-sex] domestic partnership - involving a common household, as well as an emotional, economic and sexual relationship ... - gives rise today, albeit to a lesser extent, to the same necessity for legal recognition as it did in the 1950s for those in a [different-sex] domestic partnership. ... The sex of partners ... may be significant when the regulation concerns a common child or ... a marriage with another person.⁴¹ However, if these excep-

³⁹ Article 578/G, Act No. 4 of 1959 on the Civil Code, as amended in 1977 (unofficial translation).

⁴⁰ 14/1995 (III.13.) AB határozat. See L. Sólyom & G. Brunner, Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court at 316-21 (2000) (unofficial translation).

⁴¹ The Constitutional Court was not yet ready in 1995 to hold that the exclusion of same-sex couples from civil marriage violated the Hungarian Constitution: "[i]n recent decades ... homosexuality has been decriminalized, ... movements have been started to protest against negative discrimination with respect to homosexuals ... [and] changes can be observed in the traditional family model ... [But] [a]ll these are not reasons for the law to diverge from the legal concept of marriage ... preserved in traditions to this day, ... common in today's laws and ... in harmony with the

tional considerations do not apply, the exclusion from regulations covering ... [different-sex] domestic partnership ... is arbitrary and violates human dignity; therefore it is discrimination contrary to Article 70/A [of the Hungarian Constitution, which provides that "(1) [t]he Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, color, gender, ... religion, ... national ... origins, ... or on any other grounds whatsoever."⁴²] ... The benefits (social and social security) that can be given only on the basis of a domestic partnership cannot depend only on the sex of the two people living together.⁴³

To comply with the Constitutional Court's decision, the Parliament of Hungary added to the Civil Code a new Article 685/A: "Partners ... are two people liv-

notion of marriage according to public opinion and in everyday language." See Solyom & Brunner, at 318. The Court's decision relied on case-law of the European Court of Human Rights with regard to marriage by transsexual persons which was changed dramatically by Goodwin on July 11, 2002 (see III.A.2. below), and was made at a time when Hungarian criminal law still discriminated between different-sex sexual activity (age of consent of 14) and same-sex sexual activity (age of consent of 18). The Constitutional Court struck down the discriminatory age of consent on September 3, 2002. Thus, in light of Goodwin and the Court's own decision with respect to the age of consent it is possible that the Court could reach a different conclusion if faced with a similar question today.

⁴² See http://www.uni-wuerzburg.de/law/hu00000_.html (unofficial English translation).

⁴³ See Solyom & Brunner, at 319-20.

ing in an emotional and economic community in the same household without being married."⁴⁴

Similarly, in M. v. H. (1999),⁴⁵ the Supreme Court of Canada had to decide whether the Ontario Family Law Act (FLA) could define "spouse" as including, for the purpose of financial support obligations after a relationship ends, only a legally married different-sex partner or "either of a man and woman who are not married to each other and have cohabited [lived together in a conjugal relationship] ... continuously for a period of not less than three years". A lesbian woman, who was financially dependent on her former female partner, was precluded by this definition from seeking financial support after their relationship of at least five years ended. She argued that this was discrimination based on sexual orientation, which was contrary to Section 15(1) of the Canadian Charter of Rights and Freedoms ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national ... origin, colour, religion, sex,") and

⁴⁴ Act No. 42 of 1996 (unofficial translation).

⁴⁵ [1999] 2 S.C.R. 3, <http://www.lexum.umontreal.ca/>

could not be justified under Section 1 ("The Canadian Charter ... guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society").

Implicitly departing from its decision of only four years prior in Egan v. Canada (a 5-4 decision that there was discrimination but that it was justifiable)⁴⁶, the Court agreed by 8 votes to 1 that there was unjustifiable discrimination:

57. The definition clearly indicates that the legislature decided to extend the obligation to provide spousal support beyond married persons ... to include those relationships which: (i) exist between a man and a woman; (ii) have a specific degree of permanence; (iii) are conjugal. ... 58. Same-sex relationships are capable of meeting the last two requirements. Certainly same-sex couples will often form long, lasting, loving and intimate relationships. The choices they make in the context of those relationships may give rise to the financial dependence of one partner on the other. ... 62. ... Members of same-sex couples are denied access to this system [of court-enforced financial support] entirely on the basis of their sexual orientation. ... 72. ... [T]he interest protected by ... the FLA

csc-scc/en/index.html.

⁴⁶ In Egan v. Canada, at para. 175, the Court held unanimously (9-0) that discrimination based on sexual orientation is implicitly prohibited by Section 15(1) of the Canadian Charter. However, a majority of the Court (5-4) found that the discrimination at issue was justifiable.

is fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence. ... 73. The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from ... the FLA promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. As the intervener EGALÉ submitted, such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.

Laying the groundwork for M. v. H. was the decision of a majority of the earlier Egan court rejecting a distinction for purposes of interpreting the nondiscrimination provisions of the Canadian Charter between "status" (being a lesbian, gay or bisexual individual) and "conduct" (forming a long-term emotional and sexual relationship with a same-sex partner):

Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a 'status' that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner. The Charter protects religious beliefs and religious practice as aspects of religious freedom. So, too, should it be recognized that sexual orientation encompasses aspects of 'status' and 'conduct' and that both should receive protection. Sexual orientation

is demonstrated in a person's choice of a life partner, whether heterosexual or homosexual. It follows that a lawful relationship which flows from sexual orientation should also be protected.

The Constitutional Court of South Africa cited M. v. H. a few months later in National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs (1999),⁴⁷ holding unanimously (11-0) that Section 9(3) of the 1996 South African Constitution ("The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... marital status ... [and] sexual orientation ...") does not permit the Government of South Africa to allow only married different-sex partners of permanent residents to immigrate, while threatening the unmarried same-sex partners of permanent residents with deportation. The Court ordered that "section 25(5) of the Aliens Control Act[,] [No.] 96 of 1991, is to be read as though the following words appear therein after the word 'spouse': 'or partner, in a permanent same-sex life partnership' ... [with] effect from the moment of the making of this order".

Justice Ackermann reasoned:

⁴⁷ 1999(3)BCLR 280(c); 1999(3)SA 173(c), <http://www.concourt.gov.za/judgments/1999/>

38. ... The respondents' submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to express that orientation in a relationship of their own choosing. ...

40. ... [T]he fact that no [immigration] benefit is available to gays and lesbians engaged in the only form of conjugal relationship open to them in harmony with their sexual orientation represents discrimination on the grounds of sexual orientation. ...

42. ... The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. ...

49. The impact of section 25(5) [of the Aliens Control Act] is to reinforce harmful and hurtful stereotypes of gays and lesbians. 'The classification of lesbians and gays as 'exclusively sexual beings' stands in stark contrast to the perception of heterosexual [spouses or] parents as people who, along with many other activities in their lives, occasionally engage in sex.'

51. From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning

to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with pro-created children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy. ...

53. ... Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms including affection, friendship, eros and charity ... They are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household ... Finally, ... they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses. ...

In 2002, the Constitutional Court of South Africa has applied this analysis in two other cases. In Satchwell v. President of the Republic of South Africa,⁴⁸ the Court held (by 10 votes to 0) that the denial of spousal benefits, including a surviving (legally married) spouse's pension, to the female partner of a female judge was inconsistent with the Constitution and ordered that "sections 8 and 9 of the Judges'

⁴⁸ 2001 (12) BCLR 1284 (T) (Const. Ct.)
<http://www.concourt.gov.za/judgments/2002/satchwell.pdf>.

Remuneration and Conditions of Employment Act, [No.] 88 of 1989[,] are to be read as though the following words appear therein after the word 'spouse' - 'or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support'". Likewise, in Du Toit v. Minister for Welfare and Population Development,⁴⁹ the Court held (by 11 votes to 0) that legislation preventing two female partners from jointly adopting two children placed with them, because only "a husband and his wife" could do so, was inconsistent with the Constitution, and ordered that "section 17(a) of the Child Care Act[,] [No.] 74 of 1983[,] is to be read as though the following words appear therein ...: 'or by the two members of a permanent same-sex life partnership jointly'".

B. Legislatures Outside the United States Are Increasingly Providing Equal Treatment of Different-Sex and Same-Sex Couples.

Non-binding recommendations of the Parliamentary Assembly (PACE) of the 44-member-state Council of Europe, and of the European Parliament (EP) of the 15-member-state European Union/Community (EU/C), provide

⁴⁹ See 2002 (CC) <http://www.concourt.gov.za/judgments/2002/dutoit.pdf>.

clear evidence of a European consensus that differences in treatment based on sexual orientation should be taken very seriously. In 2000, the PACE recommended: (a) in Recommendation 1470, that all Council of Europe Member States "review their policies in the field of social rights and protection of migrants in order to ensure that homosexual partnership[s] and families are treated on the same basis as heterosexual partnerships and families";⁵⁰ and (b) in Recommendation 1474, that these Member States "adopt legislation which makes provision for registered [same-sex] partnerships".⁵¹

The EP addressed the rights of same-sex partners for the first time in 1994, when it called on the European Commission (the executive branch of the EU/C in Brussels) to draft a Recommendation seeking to end "the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework, [and guarantee instead] the full rights and benefits of

⁵⁰ Recommendation 1470 (2000) referring to the "Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe", <http://stars.coe.fr/Main.asp?Link=/asp/doc/AT-Menu.asp?Language=E>.

marriage, allowing the registration of [same-sex] partnerships".⁵² In 2000, the EP urged the 15 EU/C Member States "to amend their legislation recognising registered partnerships of persons of the same sex and assigning them the same rights and obligations as exist for registered partnerships between men and women" and "to amend their legislation to grant legal recognition of extramarital cohabitation, irrespective of gender".⁵³

In addition, there is a strong argument that EU/C Council Directive 2000/78/EC,⁵⁴ (which bars sexual orientation discrimination in employment), prohibits any difference in treatment between the unmarried same-sex partners of employees and the unmarried different-sex partners of employees with regard to employment benefits.⁵⁵

⁵¹ Recommendation 1474 (2000) referring to the "Situation of lesbians and gays in Council of Europe member states", URL id.

⁵² "Resolution on equal rights for homosexuals and lesbians in the EC" (8 Feb. 1994), Official Journal [1994] C 61/40 at 42, para. 14.

⁵³ "Resolution on respect for human rights in the European Union (1998-1999)" (16 March 2000), A5-0050/00, para. 57, http://www.europarl.eu.int/plenary/default_en.htm (Texts adopted).

⁵⁴ See supra n. 31.

⁵⁵ Any difference in treatment of same sex and different sex partners of employees would constitute direct discrimination based on sexual orientation in relation

In sum, statutes that do not merely prohibit discrimination based on sexual orientation (see I.C. above), but expressly or impliedly recognise same-sex couples in at least one area of the law, have been passed at the national or regional level or both in Austria (criminal law only), Belgium, Denmark, Finland, France, Germany, Hungary, Iceland, the Netherlands, Norway, Portugal, Spain,⁵⁶ Sweden, Switzerland,⁵⁷ and the United Kingdom (Scotland).⁵⁸ Appendix III further details legislation extending some or all of the rights and duties of unmarried different-sex couples to unmarried same-sex couples.

to "pay" for the employee, and will not be compatible with the Directive once the deadline for implementation expires on December 2, 2003. See, e.g., Wintemute, at 645-46 (Kees Waaldijk), 667, 669-70 (Mark Bell). The Directive is likely to overrule the decision of the European Court of Justice in Grant v. South West Trains Case C-249/96, [1998] E.C.R. I-621, <http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en>.

⁵⁶ Spain has national legislation on a few specific issues, especially tenancy succession, and more general regional laws in Aragón, Asturias, the Balearic Islands, Catalonia, Madrid, Navarra and Valencia. See Appendix III.

⁵⁷ Switzerland has legislation in the Cantons of Geneva and Zürich. See Appendix III. Legislation has been proposed at the federal level and in the Cantons of Bern, Basel-Landschaft and Valais.

⁵⁸ Scotland has legislation in two areas. See Appendix III. The whole United Kingdom has executive regulations permitting the immigration of partners legally unable to marry (mainly same-sex). England and Wales

III. SOME FINAL APPELLATE COURTS ARE LIKELY SOON TO END THE EXCLUSION OF PERSONS WISHING TO MARRY SOMEONE OF THE SAME SEX FROM CIVIL MARRIAGE ON CONSTITUTIONAL GROUNDS, AS SOME LEGISLATURES HAVE ALREADY BEGUN TO DO.

The broad trend in many industrialized democracies towards the equal treatment of persons in same-sex couples is beginning to reach its just and logical conclusion: the opening up of civil marriage to persons wishing to marry someone of the same sex, thereby ending their discriminatory exclusion from an important public institution. Their exclusion can be ended both (A) by final appellate courts applying the non-discrimination principles of constitutions or international human rights treaties, and (B) by legislatures amending existing marriage legislation.

A. Some Final Appellate Courts Outside the United States Are Likely Soon to End the Exclusion of Same-Sex Couples from Civil Marriage on Constitutional Grounds.

A final appellate court is most likely to end the exclusion of same-sex couples from civil marriage if:

(i) the court sits in a jurisdiction where sexual orientation discrimination in relation to criminal law, employment, housing, education, and access to public accommodations has already been prohibited; (ii) the

have executive regulations on criminal injuries com-

court has both the constitutional power to strike down the discriminatory exclusion and a tradition of exercising this power; and (iii) the court is presented with a suitable case by one or more same-sex couples seeking the right to marry. All of these factors are present currently in Massachusetts⁵⁹ and could soon be present in Canada and South Africa. However, one or more of these factors has been missing, to date, in several other nations that have addressed the issue of same-sex marriage.

1. Canada and South Africa Are Two Nations Where All of the Factors Could Soon Be Present, Making it Likely that a Final Appellate Court May End the Exclusion of Persons Seeking to Marry Persons of the Same Sex from Civil Marriage.

Two jurisdictions where the three factors identified above could soon be present are Canada and South Africa. In both countries, (i) the equality provision of the Constitution expressly or impliedly prohibits sexual orientation discrimination (see I.A. above) and is supplemented by legislation containing similar prohibitions (see I.B. and I.C. above); (ii) the final appellate court on constitutional matters (the Supreme Court of Canada and the Constitutional Court of South

pensation.

Africa) has both the constitutional power to strike down the discriminatory exclusion and a tradition of exercising this power; and (iii) constitutional litigation by same-sex couples seeking to contract a civil marriage could soon reach the final appellate court.

Three same-sex marriage cases are pending in Canada, and could reach the Supreme Court of Canada by late 2004 or early 2005.⁶⁰ In all three, the trial court has issued its judgment. In the first case, EGALE Canada Inc. v. Canada (Att'y Gen.),⁶¹ Pitfield J. of the Supreme Court of British Columbia (a trial court) found that the exclusion of same-sex couples from civil marriage is sexual orientation discrimination violating Section 15(1) of the Canadian Charter of Rights and Freedoms (the equality and non-discrimination provision), but can be justified under

⁵⁹ See Appellants' Brief.

⁶⁰ In Canada, most federal constitutional cases are litigated first in provincial trial courts rather than the Federal Court Trial Division (which has a very limited jurisdiction), then can be appealed to the Court of Appeal of the province (the province's highest court), and subsequently to the Supreme Court of Canada (a federal court). Constitutional equality litigation is generally under the federal Constitution (which includes the Canadian Charter of Rights and Freedoms), because no province has a bill of rights in its Constitution (unlike in Massachusetts).

⁶¹ See <http://www.courts.gov.bc.ca/jdb-txt/SC/01/13/2001BCSC1365.htm> (Oct. 2, 2001).

Section 1 of the Charter ("The Canadian Charter ... guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"), because "the one factor in respect of which there cannot be similarity is the biological reality that opposite-sex couples may, as between themselves, propagate the species and thereby perpetuate humankind. Same-sex couples cannot."⁶²

In the second case, Halpern v. Canada (Att'y Gen.),⁶³ three judges of the Ontario Superior Court of Justice (Divisional Court) (a trial court) held unanimously that the exclusion of same-sex couples from civil marriage is sexual orientation discrimination violating Section 15(1) of the Canadian Charter (Constitution) and cannot be justified under Section 1. Writing for the Court, LaForme J. rejected the British Columbia court's reasoning that the purpose of marriage is procreation:

238. I do not agree that the evidence ... supports the [government's] proposition that procreation is the essential objective of marriage. Indeed, the evidence actually

⁶² Id. at para. 205.

⁶³ Nos. 684/00, 39/2001;

http://www.sgmlaw.com/userfiles/filesevent/file_1413620_halpern.pdf (Ontario Super. Ct. July 12, 2002).

demonstrates that it was only recently - when same-sex couples began to advance claims for equal recognition of their conjugal relationships - that some courts began to infer that procreation was an essential component to marriage. There is simply no evidence that convinces me that those earlier courts, when developing the common law rules regarding the validity of marriage and capacity, viewed procreation as the purpose of marriage.

239. By way of example, it is well-established in annulment cases that a marriage is valid and not voidable despite the fact that one spouse refuses to have sexual intercourse, or is infertile, or insists on using contraceptives when having sexual intercourse. ...

240. I reach the same conclusion when I look to those cases where the husband is unable to consummate the marriage due to impotence resulting from advanced age. In those cases, Canadian courts have consistently ruled that the marriage is understood to be for the purpose of "companionship" and is therefore valid, and not voidable. ...

242. In sum, I do not accept that the objective of procreation is a basis that can support the restriction against same-sex marriage. Rather, it could reasonably be argued ... that it appears to be a mere pretext used to rationalize discrimination against lesbians and gays.

243. One could reasonably reach the conclusion that the real, although unstated, purpose of the restriction is to preserve the exclusive privileged status of heterosexual conjugal relationships in society. If that was an underlying purpose - and I do not go so far as to decide that it is - it could not be justified in a free and democratic society ... [and] would itself be discriminatory and contrary to Charter values ...

He then considered the fit between the end (promoting procreation) and the means (excluding same-sex couples from civil marriage):

248. Assuming [contrary to the above conclusion] that part of what constitutes the purpose of marriage is to foster and provide institutional support for adult relationships that allow for the possibility of procreation and child-rearing - the restriction against same-sex marriage, I find, is not rationally connected to this objective. There is simply no evidentiary basis to support the proposition that granting same-sex couples the freedom to marry would either diminish the number of children conceived by heterosexual couples, or reduce the quality of care with which heterosexual couples raise their children.

249. Same-sex couples experience, and raise children as a result of a variety of reproductive and parenting arrangements, none of which is unique to same-sex partners. Both same-sex and heterosexual couples foster children, adopt children, conceive children by means of assisted conception and surrogacy, and form blended families with children from previous relationships. The fact that many heterosexual couples also conceive children through heterosexual intercourse is not, I find, a rational basis for distinguishing between all heterosexual and same-sex couples by granting only the former access to the institutional supports of marriage.

250. ... I find that, the restriction against same-sex marriage fails the rational connection test because it is both: overinclusive in that it allows non-procreative heterosexuals to marry; and underinclusive because it denies same-sex parents and intended parents the right to marry.

Balancing the exclusion's deleterious effects against its benefits, he concluded:

261. The restriction against same-sex marriage is an offense to the dignity of lesbians and gays because it limits the range of relationship options available to them. The result is they are denied the autonomy to choose whether they wish to marry. This in turn conveys the ominous message that they are unworthy of marriage. For those same-sex couples who do wish to marry, the impugned restriction represents a rejection of their personal aspirations and the denial of their dreams.

262. There is no meaningful evidence that points to any legitimate benefit to the rights denial. ...

Having found unconstitutional discrimination, the three judges in Halpern disagreed as to the remedy. LaForme J. would reformulate the common-law rule⁶⁴ so that it would define civil marriage as "the lawful union of two persons to the exclusion of all others", and would order the immediate issuance of marriage licenses to the plaintiff same-sex couples. Blair R.S.J. would also reformulate the common-law rule in this way, and ultimately order the issuance of marriage licenses, but only after giving the federal Government two years to introduce legislation amending

⁶⁴ The federal Parliament has never exercised its constitutional power to incorporate this rule into a federal statute for the 9 provinces and 3 territories

the common-law rule. Smith A.C.J. would give the federal Government two years to introduce legislation that would remedy the constitutional violation. Because LaForme J. would clearly prefer the remedy of Blair R.S.J., the majority decision on the remedy is that same-sex couples in the Province of Ontario will be entitled to marriage licenses on July 12, 2004, if the federal Government has not acted by then.

In the third case, Hendricks v. Québec (Procureur Général) (Att'y Gen.),⁶⁵ Lemelin J. of the Superior Court of Québec (District of Montréal) (a trial court) agreed with the conclusion of the three Ontario judges that the exclusion of same-sex couples from civil marriage is sexual orientation discrimination contrary to Section 15(1) of the Canadian Charter and cannot be justified under Section 1. In finding that there was "discrimination", she rejected the argument that existing Québec and federal legislation provided sufficient rights and duties to same-sex couples. This existing legislation allows same-sex couples to contract a "civil union" which is identical to civil marriage

with common-law systems (as opposed to Québec's Civil Code).

for all purposes of provincial law.⁶⁶ Moreover, unmarried different-sex couples and same-sex couples in Québec are generally treated under Canadian federal law, after one year of cohabitation, in the same way as married different-sex couples.⁶⁷

Despite this "almost but not quite equal" situation, Lemelin J. concluded that there is a difference in treatment which is discriminatory:

133. These laws correct certain inequities and confirm social acceptance of a new reality. It remains the case that Mr. Hendricks and Mr. LeBoeuf do not have the right to marry each other ... They are thus deprived of the choice of the type of union in which they wish to live their union ...⁶⁸

She noted that, under Québec law, they have the choice of being "de facto spouses" or "civil union spouses", but cannot be "married spouses". Different-sex couples in Québec have all three options. She then quoted Linden J. of the Federal Court of Appeal:

⁶⁵ No. 500-05-059656-007, <http://www.jugements.qc.ca/cs/200209fr.html> (Cour Super., Montreal, Quebec Sept. 6, 2002).

⁶⁶ See infra n. 90.

⁶⁷ See Modernization of Benefits and Obligations Act, Statutes (S.) of Canada 2000, chapter (c.) 12, http://www.parl.gc.ca/36/2/parlbus/chambus/house/bills/government/C-23/C-23_4/C-23_cover-E.html; Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 12(1), http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-11/C-11_4/C-11_cover-E.html.

One cannot avoid the conclusion that offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of the separate but equal doctrine. That appalling doctrine must not be resuscitated in Canada four decades after its much heralded death in the United States.⁶⁹

With regard to the remedy, Lemelin J. agreed with Smith A.C.J. of the Ontario court and gave the federal Government two years to remedy the constitutional violation, without specifying what would happen on September 6, 2004 if the federal Government did not act.

In EGALE Canada Inc., the losing parties have appealed to the British Columbia Court of Appeal. In Halpern and Hendricks, the federal Government has appealed to the Courts of Appeal of Ontario and Québec respectively, "to keep its options open". At the same time, it has started a public consultation process involving hearings before a committee of the federal Parliament, to decide whether it should accept the Halpern and Hendricks decisions and change the law. If it does so, the Governments of Ontario, Québec and Manitoba have said that they are willing to issue marriage licenses to same-sex couples. Absent a change

⁶⁸ Hendricks, at para. 133 (unofficial translation).

in the federal law that would open up civil marriage to same-sex couples, the three cases are likely to be decided by the Courts of Appeal and reach the Supreme Court of Canada in late 2004 or early 2005. The best indication of how the Supreme Court might rule is its recent 8-1 decision in M. v. H. (see II.A. above), which effectively held that same-sex couples must be granted all the rights and duties of unmarried different-sex couples under federal, provincial and territorial law (and which has led to the amendment since 1999 of hundreds of laws) (see Appendix III).

In South Africa (estimated population of 43,000,000 in 1999), the first constitutional challenge to the exclusion of same-sex couples from civil marriage began in the Pretoria High Court (a trial court) on June 28, 2002: Marie Fourie and Cecilia Bonthuys v. Minister of Home Affairs.⁷⁰ Although the case was dismissed on Oct. 18, 2002, for technical reasons and not on the merits, the plaintiffs have expressed an intent to appeal. In addition, the Lesbian

⁶⁹ Id. at para. 134, quoting from Egan v. Canada, [1993] 3 F.C. 401 (Federal Court of Appeal of Canada) (dissenting opinion) (emphasis in original).

⁷⁰ Case No. 17280/02, High Court of South Africa, Transvaal Provincial Division, Pretoria. See

and Gay Equality Project has indicated its intent⁷¹ to initiate a second similar challenge to the constitutionality of the common-law rule prohibiting same-sex marriage.⁷² In view of the South African Constitutional Court's decisions in National Coalition for Gay and Lesbian Equality, Satchwell, and Du Toit (see II.A. above), and its willingness to require the extension of rights to same-sex couples with immediate effect, it seems likely that the Constitutional Court when faced with such a case will reformulate the common-law rule in a way that will open up civil marriage to same-sex couples, with immediate effect.

2. Several Nations Miss A Key Factor To Enable Their Final Appellate Courts to End the Exclusion of Same-Sex Couples from Civil Marriage on Constitutional Grounds.

It was the legislature and not the courts in the Netherlands that permitted same-sex couples to marry civilly (see III.B below). Only the legislature could have taken that step because Dutch courts do not have the power to strike down Acts of the Dutch Parliament that violate the equality provision of the Dutch Con-

<http://www.suntimes.co.za/business/legal/2002/07/08/carmel06.asp> (July 7, 2002).

⁷¹ See http://www.tiscali.co.za/news/news_center_Lesbia.538432.html.

stitution.⁷³ The Courts have the power to strike down laws that violate an international human rights treaty, but the Dutch Supreme Court has been reluctant to depart from the case-law of the European Court of Human Rights with respect to the right to marry. The Dutch courts also quite often refer controversial discrimination issues to Parliament, rather than find a violation of Article 14 of the European Convention on Human Rights, or of Article 26 of the International Covenant on Civil and Political Rights. Both the institutional constraints and the practices of judicial restraint led to the rejection by the Dutch Supreme Court in 1990 of a claim by two women who wanted to marry each other.⁷⁴

If any final appellate court in Europe were to hear a constitutional challenge by a same-sex couple today, it is quite likely that such a court would not follow the 1990 decision of the Dutch Supreme Court.⁷⁵

⁷² The Marriage Act 1961 (No. 25 of 1961) is silent on this question.

⁷³ See Kees Waaldijk, "Constitutional Protection Against Discrimination of Homosexuals," 13 J. Homosexuality 57 (1986-87).

⁷⁴ Hoge Raad [Supreme Court], Oct. 19, 1990, [1992] N.J. 129.

⁷⁵ Id., or the 1995 decision of the Hungarian Constitutional Court (as it relates to access to civil marriage), supra n. 40 or Herr S. & Herr W., German Fed-

First, there have been widespread changes in the treatment of same-sex couples around the world since 1990. The number of jurisdictions with laws recognizing same-sex partnerships in at least one area rose from 3 in 1990 to at least 45 as of October 2002.⁷⁶

Second, there has been a recent, dramatic change in the European Court of Human Rights' interpretation of Article 12 of the European Convention on Human Rights: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." Historically, the Court's interpretation had been that "Article 12 refers to the traditional marriage between persons of opposite biological sex". In 1998, the Court reaffirmed this interpretation (by 18 votes to 2) in Sheffield & Horsham v. United Kingdom, which concerned the right of a post-operative transsexual woman to marry a non-transsexual man (whose sex is different from her post-operative sex but the same as

eral Constitutional Court (Bundesverfassungsgericht), No. 1 BvR 640/93 (Oct. 4, 1993), [1993] Neue Juristische Wochenschrift 3058.

⁷⁶ See Appendix III; and Wintemute at 759-62 (38 jurisdictions as of October 2001).

her chromosomal or birth sex).⁷⁷ However, on July 11, 2002, the Court radically changed its interpretation of Article 12 in Goodwin v. United Kingdom, which dealt with the same issue.⁷⁸ The Court held unanimously (by 17 votes to 0):

98. Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and **the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision [the right to marry].**

...

100. It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria ... **There have been major social changes in the institution of marriage since the adoption of the Convention [in 1950] as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above ... that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. ... The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women** ... [Article 9 of the E.U. Charter reads:

⁷⁷ [1998] 3 FCR 141 (Eur. Ct. H.R. July 30, 1998) at para. 66.

⁷⁸ [2002] 2 FCR 577 (Eur. Ct. H.R. July 11, 2002).

'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.']

101. ... [I]t is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. **The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so [because her marriage would be legally same-sex in the United Kingdom]. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.** (Emphasis added.)⁷⁹

The Court's reasoning clearly leaves the door open to a future interpretation of Article 12 as requiring, as a result of "major social changes", not only that post-operative transsexual persons be permitted to contract "chromosomally same-sex" civil marriages, but also that lesbian, gay and bisexual persons be permitted to contract civil marriages.

While the European Court of Human Rights has yet to consider a case like the one before this Court, the United Nations Human Rights Committee did so in Joslin v. New Zealand.⁸⁰ The Committee found that the denial of civil marriage licenses to two lesbian couples did not violate the International Covenant on Civil and

⁷⁹ Goodwin at paras. 98-101.

Political Rights, holding tersely that use of the term "men and women" (rather than "everyone" or "all persons") in Article 23(2) of the Covenant ("The right of men and women of marriageable age to marry and to found a family shall be recognized.") meant that the Covenant only requires different-sex unions to be recognized as marriages. Joslin is not a persuasive authority in Massachusetts for three reasons: First, the Massachusetts Constitution does not contain a provision analogous to Article 23(2) of the Covenant on which the Joslin court based its holding. To the contrary, the Massachusetts Constitution includes express liberty protections, equal protection provisions and a prohibition on discrimination based on sex.⁸¹ Secondly, in adopting its rigid interpretation of "men and women", the Committee referenced pre-Goodwin decisions of the European Court, but not Goodwin, indicating that it was not aware that the European Court of Human Rights had changed its interpretation of the almost identical text of Article 12 of the European Convention only six days prior to the Committee's deci-

⁸⁰ (Communication No. 902/1999) (17 July 2002), U.N. Doc. CCPR/C/75/D/902/1999 (2002).

⁸¹ Mass. Const., Pt. 1, arts. I, VI, VII and X (as amended).

sion. Third, two concurring members of the Committee stressed that New Zealand grants rights and duties to unmarried couples (both same-sex and different-sex) in certain areas of the law, which is not the case in Massachusetts.⁸²

The factors making it more likely that a final appellate court will end the exclusion of same-sex couples from civil marriage on constitutional grounds have not been present to date in other democracies, such as Israel (which has only religious marriage and not civil marriage), Australia (which lacks a comprehensive constitutional bill of rights), and New Zealand (where the courts do not have the power to strike down Acts of Parliament inconsistent with the Bill of Rights).⁸³

⁸² See, e.g., Collins v Guggenheim, 417 Mass. 615 (1994).

⁸³ In Quilter v. Attorney-General, [1998] 1 N.Z.L.R. 523, <http://www.brookers.co.nz/legal/judgments>, all five judges of the New Zealand Court of Appeal (the country's highest court) agreed that the Marriage Act 1955 could not be interpreted as permitting same-sex couples to marry. Thus, whether or not the Act was discriminatory (Justice Thomas thought that it was), the Court could not strike it down because of s. 4 of the New Zealand Bill of Rights Act 1990: "No court shall, in relation to any enactment ... (a) Hold any provision ... in any way invalid or ineffective; or (b) Decline to apply any provision ... by reason only that the provision is inconsistent with any provision of this Bill of Rights." The case was then taken to

B. Some Legislatures Outside the United States Have Begun to End the Exclusion of Same-Sex Couples from Civil Marriage.

The first legislature in the world to end the exclusion of same-sex couples from civil marriage was the Parliament of the Netherlands (population of 15,800,000), which passed the "Act of 21 December 2000, amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage)".⁸⁴ The Act amended the Civil Code as follows:

Article 30(1). A marriage can be contracted by two persons of different sex or of the same sex.

The Act came into force on April 1, 2001, and the world's first civil marriages of same-sex couples were celebrated at Amsterdam City Hall shortly after midnight.

The Parliament of Belgium (population of 10,200,000) is likely to be the second legislature to open up civil marriage to same-sex couples. On June 22, 2001, the Cabinet (Conseil des Ministres) approved

the United Nations Human Rights Committee, sub nom. Joslin v. New Zealand, id.

⁸⁴ See Staatsblad 2001, No. 9, <http://www.eerstekamer.nl/9202266/d/w26672st.pdf> (Dutch), <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=69> (unofficial translation).

a draft bill (avant-projet de loi) that would amend the Civil Code so as to treat same-sex and different-sex couples equally in relation to marriage, except with regard to filiation (presumptions of parenthood) and joint adoption of children. According to the Government's press release:

... In our contemporary society, marriage is lived and felt as a (formal) relationship between two persons, having as its main object the creation of a lasting community of life. Marriage offers to the two partners the possibility of publicly affirming their relationship and the feelings that they have for each other. Mentalities having evolved, there is no longer any reason not to open marriage to persons of the same sex. ... The bill's starting point is ... equality of treatment, in relation to marriage, of homosexual and heterosexual couples. The bill removes, consequently, a discrimination found in our legislation because of an historical context. Marriage has nevertheless a great symbolic value and a legal impact on the status of a person. If two persons want to commit themselves to such a relationship, no discrimination based on sex or sexual relationships [*affinités sexuelles*] can be an obstacle to their intention. This means that the rules relating to ... marriage ... should, as far as possible, be applicable to a marriage between persons of the same sex.⁸⁵

⁸⁵ Communiqué de presse, "Mariage de personnes du même sexe" ("Marriage of persons of the same sex"), June 22, 2001, http://194.7.188.126/justice/index_fr.htm (Communiqués) (unofficial translation).

The bill was introduced in the Chamber of Representatives on March 14, 2002,⁸⁶ and would add the following provision to the Civil Code: "Article 143. Two persons of different sex or the same sex can contract a marriage."

One reason why some European jurisdictions have delayed opening up civil marriage to same-sex couples, and have instead created "separate and not quite equal" institutions of "registered partnership" for same-sex couples, is that they wanted to exclude same-sex couples from second-parent adoption and joint adoption of children. Massachusetts, by comparison, has legally recognized joint legal parenting by same-sex couples for almost a decade.⁸⁷ At the same time, several European jurisdictions are also starting to accept the idea of a child having two legal parents of the same sex.

⁸⁶ Projet de loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil [Government bill opening up marriage to persons of the same sex and modifying certain provisions of the civil code], Chamber Bill No. 1692, <http://www.lachambre.be/documents/1692/1.pdf>; replaced by Proposition de loi (non-Government bill) ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil, Senate Bill No. 2-1173 (May 28, 2002), <http://www.senat.be> (Public, Pour aller plus loin, dossiers, dossiers, 2-1173, chercher).

The Netherlands introduced joint adoption of children living in the Netherlands by same-sex couples at the same time as it opened up civil marriage to same-sex couples, but made an exception for intercountry adoptions by same-sex couples.⁸⁸ The Swedish Parliament voted on June 5, 2002 to open up joint adoption, domestic and intercountry, to same-sex couples who have registered their partnerships.⁸⁹ Removal of this distinction between registered partnership and civil marriage, along with the abolition of a related restriction on access to donor insemination for lesbian couples (which does not exist in Massachusetts),

⁸⁷ See Adoption of Tammy, 416 Mass. 205 (1993); Adoption of Susan, 416 Mass. 1003 (1993).

⁸⁸ "Act of 21 December 2000 amending Book 1 of the Civil Code (adoption by persons of the same sex)", Staatsblad 2001, No. 10, <http://www.eerstekamer.nl/9202266/d/w26673st.pdf> (Dutch), <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=69> (Information about Law and Homosexuality) (unofficial translation).

⁸⁹ See SFS 2002:603, <http://www.notisum.se> (Författningar, SFS-Guiden). Joint adoption is also permitted in the Spanish autonomous community of Navarra, (subject to a challenge to the competence of the Navarra legislature in this area that is pending before the Tribunal Constitucional (Constitutional Court)) and would be permitted in England and Wales under an amendment to the Adoption and Children Bill passed by the United Kingdom's House of Commons by 301 votes to 174 on May 20, 2002 (but not yet accepted by the House of Lords). Second-parent adoption is permitted in the Netherlands, Sweden, Navarra (Spain), Denmark and Ice-

should pave the way for the opening up of civil marriage to same-sex couples in Sweden.

The National Assembly of Québec would probably have been the first legislature in North America to open up civil marriage to same-sex couples, were it not for a provision of the Canadian Constitution which has been interpreted as giving the federal Parliament the exclusive power to regulate capacity to marry (while provincial legislatures authorise the issuance of marriage licenses).⁹⁰ The National Assembly did the most that it was able to do and passed, on June 7, 2002, by 87 votes to 0, a bill creating a new institution of "civil union" that is parallel in all respects to civil marriage.⁹¹

The fact that civil marriage has been legislatively opened up to same-sex couples in the Nether-

land, and would be permitted in England and Wales under the pending bill.

⁹⁰ See Constitution Act, 1867, s. 91 ("... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within ... 26. Marriage and Divorce"), and s. 92 ("In each Province the Legislature may exclusively make Laws in relation to ... 12. The Solemnization of Marriage in the Province").

⁹¹ An Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, c. 6, 2nd session, 36th legislature, Bill 84, <http://publicationsduquebec.gouv.qc.ca/en/frame/index.html>, Laws and Regulations, Bills (English).

lands, is in the process of being opened up in Belgium, and would have been opened up in Québec (but for a constitutional obstacle), means that an end to the discriminatory exclusion of persons desiring to marry an individual of the same sex is far from being "unthinkable." On the contrary, it represents the only just outcome, an outcome that will eventually be common throughout democratic nations, and which this Court has the power and duty, by enforcing the rights protected under the Massachusetts Constitution, to bring to the people of the Commonwealth of Massachusetts without further delay.

Conclusion

For all of the above reasons, this Court should allow the appeal and enter an order declaring that civil marriage must be made available to the Appellants on the same terms as other individuals in the Commonwealth of Massachusetts.

AMICI CURIAE
INTERNATIONAL HUMAN RIGHTS
ORGANIZATIONS ET AL.

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Dated: November 8, 2002

CERTIFICATE OF SERVICE

I, Katharine Bolland, certify that on this 8th day of November, 2002, I caused this Brief of Amici Curiae International Human Rights Organizations et al. to be served upon counsel for the Appellants, Mary L. Bonauto, Gay & Lesbian Advocates & Defenders, 294 Washington St., Suite 301, Boston, MA 02108-4608, and counsel for the Appellees, Judith Yogman, Assistant Attorney General, One Ashburton Place, Boston, MA 02108, by hand delivery.

November 8, 2002

Katharine Bolland

APPENDIX I

AMICI CURIAE:

INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND LAW PROFESSORS

Human Rights Organizations

Coalition gaie et lesbienne du Québec (Gay and Lesbian
Coalition of Québec), Québec City, Québec, Canada
EGALE Canada Inc., Ottawa, Ontario, Canada
Equality Now, New York, New York
Fédération internationale des ligues des Droits de
l'Homme (FIDH) (International Federation for Human
Rights), Paris, France
Human Rights Watch, New York, New York, USA
ILGA (International Lesbian and Gay Association),
Brussels, Belgium
ILGA-Europe (the European Region of the ILGA),
Brussels, Belgium
ILGA-North America (the North American Region of the
ILGA), Québec City, Québec, Canada and New York,
New York, USA
Inter-American Center for Human Rights, Fort Lauder-
dale, Florida, USA
Interights, London, United Kingdom
International Lesbian and Gay Law Association (IL-
GLaw),
Toronto, Ontario, Canada
Japan Association for the Lesbian and Gay Movement
(OCCUR), Tokyo, Japan
Lesbian and Gay Equality Project, Johannesburg, South
Africa
Lesbian and Gay Legal Equality, Wellington, New Zea-
land
Pink Cross (Swiss Gay Federation), Bern, Switzerland
Rechtskomitee (Law Committee) LAMBDA, Vienna, Austria

Law Professors (in the U.S. sense, except as otherwise indicated)

Rebecca Bailey-Harris
Faculty of Law, University of Bristol, United Kingdom

Nicholas Bamforth

Faculty of Law and Queen's College, University of Oxford,
United Kingdom

Mark Bell

Faculty of Law, University of Leicester, United Kingdom

Daniel Borrillo
Faculty of Law, Université de Paris X (Nanterre),
France

Donald Casswell
Faculty of Law, University of Victoria, British Colum-
bia, Canada

Nigel Christie (Ph.D. Candidate)
School of Law, University of Waikato, New Zealand

Brenda Cossman
Faculty of Law, University of Toronto, Ontario, Canada

Olivier De Schutter
Faculty of Law, Université Catholique de Louvain, Bel-
gium

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couver, Canada

Yuval Merin
School of Law, College of Management, Rishon LeZion,
Israel

Jenni Millbank
Faculty of Law, University of Sydney, New South Wales,
Australia

Wayne Morgan
Faculty of Law, Australian National University, Can-
berra

Bruce Ryder
Osgoode Hall Law School, York University, Toronto, On-
tario, Canada

Elsa Steyn

Rands Afrikaans University, Johannesburg, South Africa

Kristen Walker
Faculty of Law, University of Melbourne, Australia

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Fort Lauderdale, Florida, USA

Robert Wintemute
School of Law, King's College, University of London,
United Kingdom

Hans Ytterberg
Associate Judge of Appeal and Ombudsman against Discrimination
because of Sexual Orientation, Stockholm, Sweden

APPENDIX II⁹²

EUROPEAN TREATIES AND LEGISLATION AND NATIONAL CONSTITUTIONS AND LEGISLATION EXPRESSLY PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION⁹³

1. EUROPEAN TREATIES AND LEGISLATION

European Union

Treaty establishing the European Community, Rome, 25 March 1957, Article 13 (inserted as Article 6a and renumbered as Article 13 by the Treaty of Amsterdam, 2 October 1997), <http://europa.eu.int/eurllex/en/treaties/index.html> ("sexual orientation") (in force on 1 May 1999; authorises a legislative prohibition; is not itself a prohibition)

Council Directive 2000/78/EC of 27 November 2000 [adopted under Article 13 of the EC Treaty] establishing a general framework for equal treatment in employment and occupation, Official Journal [2000], series L, issue 303, p. 16, http://europa.eu.int/eurex/en/lif/dat/2000/en_300L0078.html ("sexual orientation") (must be implemented by 2 December 2003 in all fifteen European Union member states, and especially in Austria, Belgium, Germany, Greece, Italy, Portugal and the United Kingdom, which did not have any such national legislation as of August 2001)

2. NATIONAL (FEDERAL, STATE) CONSTITUTIONS

Brazil

States:

⁹² Appendices II and III were first published as part of Wintemute & Andenæs.

⁹³ Or a similar or broader ground which is intended to cover sexual orientation (or same-sex sexual orientation).

Mato Grosso - Constitution, 1989, Article 10.III
("orientação sexual")

Sergipe - Constitution, 1989, Article 3.II ("orientação sexual")

Ecuador - Constitution, 1998, Article 23(3),
<http://www.georgetown.edu/pdba/Constitutions/Ecuador/ecuador98.html> ("orientación sexual")

Fiji Islands - Constitution Amendment Act 1997, section
(s.) 38(2)(a),
[http://confinder.richmond.edu/Fiji](http://confinder.richmond.edu/Fiji_Islands.htm) Islands.htm
("sexual orientation")

Germany

States (*Länder*):

Berlin - Constitution, 1995, Article 10(2),
<http://www.datenschutz-berlin.de/gesetze/berlin/verfass/verfass.htm>
("sexuelle Identität")

Brandenburg - Constitution, 1992, Article 12(2),
http://www.landtag.brandenburg.de/rand_6e.htm
("sexuelle Identität")

Thuringia - Constitution, 1993, Article 2(3),
<http://www.thueringen.de/de>
(*Verfassung*) ("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 (No. 108 of 1996), Sections 9(3), 9(4) (final Constitution) ("sexual orientation");
texts at
<http://www.parliament.gov.za/acts/index.asp>

Switzerland - Federal Constitution, adopted on 18 April 1999, Article 8(2),
<http://www.admin.ch/ch/f/rs/101/index.html>
("Lebensform", "mode de vie", "modo de vita"; "way of life")

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

Argentina

Buenos Aires (Autonomous City of) - Constitution, 1 Oct. 1996, Article 11,
http://www.legislatura.gov.ar/llegisla/constcba.htm#_Toc0 ("*orientación sexual*")

Australia

Federal (Commonwealth) Level - Workplace Relations Act 1996, s. 170CK,
http://www.austlii.edu.au/au/legis/cth/consol_act/wra1996220 ("sexual preference"; dismissal only)

States and Territories:

Australian Capital Territory - Discrimination Act 1991, s. 7(1)(b),
http://www.austlii.edu.au/au/legis/act/consol_act/dal1991164 ("sexuality")

New South Wales - Anti-Discrimination Act 1977, Part 4C,

http://www.austlii.edu.au/au/legis/nsw/consol_act/aa1977204

("homosexuality" added in 1982)

Northern Territory - Anti-Discrimination Act 1992, s. 19(1)(c),

http://www.austlii.edu.au/au/legis/nt/consol_act/aa204 ("sexuality")

Queensland - Anti-Discrimination Act 1991, s. 7(1)(l),
<http://www.legislation.qld.gov.au/Legislation%20ocs/CurrentA.htm>
("lawful sexual activity")

South Australia - Equal Opportunity Act, 1984, ss. 5(1), 29(3),

http://www.austlii.edu.au/au/legis/sa/consol_act/eoa1984250 ("sexuality")

Tasmania - Anti-Discrimination Act 1998,
<http://www.thelaw.tas.gov.au/search>,
ss. 3, 16 ("sexual orientation", "lawful sexual activity")

Victoria - Equal Opportunity Act 1995, ss. 4, 6,

http://www.austlii.edu.au/au/legis/vic/consol_act/eoa1995250, as amended by Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000,

<http://www.dms.dpc.vic.gov.au> (Statute Book)
("lawful sexual activity", 1995; "sexual orientation", 2000)

Western Australia - Acts Amendment (Lesbian and Gay Law Reform) Act 2002 (royal assent, 17 April 2002),
[http://www.parliament.wa.gov.au/parliament/bills.nsf/BA3DE85EC7B2BF7548256B03003D16A6/\\$File/Bill+73-3.pdf](http://www.parliament.wa.gov.au/parliament/bills.nsf/BA3DE85EC7B2BF7548256B03003D16A6/$File/Bill+73-3.pdf) ("sexual orientation")

Austria

Federal Level - see European Union, Council Directive 2000/78/EC ("*sexuelle Ausrichtung*"); *Richtlinien-Verordnung* (Guidelines-Ordinance for Police Forces, not legislation), [1993] *Bundesgesetzblatt* Nr. 266, Paragraph 5(1),
<http://www.ris.bka.gv.at/bundesrecht> ("*sexuelle Orientierung*")

States (*Länder*):

Vienna - Youth Protection Law (*Jugendschutzgesetz*), *Landesgesetzblatt für Wien* 17/2002, Art. 10 par. 1 lit. 2),
<http://www.wien.gv.at/recht/landesrecht-wien/landesgesetzblatt/index.htm> ("*sexuelle Orientierung*")

Belgium - see European Union, Council Directive 2000/78/EC ("*seksuele geaardheid*", "*orientation sexuelle*")

Bosnia and Herzegovina

Entities:

Republika Srpska - Penal Code, article 141 (in force Oct. 2000) "sexual preferences")

Brazil

States:

Minas Gerais - *Lei* 14170 2002 (15 Jan. 2002) ("*orientação sexual*") São Paulo - *Lei No. 10.948, de 5 de novembro de 2001* (discrimination "*contra cidadão homossexual, bissexual ou transgênero*", "against a homosexual, bisexual or transgendered citizen")

For a list of around seventy municipalities with legislation prohibiting sexual orientation discrimination, including the cities (vs. states) of São Paulo

and Rio de Janeiro, see <http://www.rolim.com.br/ORSEXUAL.htm> ("orientação sexual")

Canada⁹⁴

Federal Level - Canadian Human Rights Act, Revised Statutes of Canada (R.S.C.) 1985, chapter (c.) H-6, ss. 2, 3(1), <http://laws.justice.gc.ca/en/H-6/index.html> ("sexual orientation" added in 1996)

Provinces and Territories:

British Columbia - Human Rights Code, R.S.B.C. 1996, c. 210, ss. 7-11, 13-14, http://www.qp.gov.bc.ca/statreg/stat/H/96210_01.htm ("sexual orientation" added in 1992)

Manitoba - Human Rights Code, R.S.M. c. H175, s. 9(2)(h), <http://www.gov.mb.ca/chc/statpub/free/legdbindexeng-m.html> ("sexual orientation" added in 1987)

New Brunswick - Human Rights Code, R.S.N.B. c. H-11, ss. 3-7, <http://www.gov.nb.ca/acts/acts/h-11.htm> ("sexual orientation" added in 1992)

Newfoundland - Human Rights Code, R.S.N. 1990, c. H-14, ss. 6-9, 12, 14 <http://www.gov.nf.ca/hoa/statutes/h14.htm> ("sexual orientation" added in 1997)

Northwest Territories - Human Rights Act, S.N.W.T. 200_, c. __, s. __ (Bill 1, 5th Session, 14th Legislative Assembly), <http://www.assembly.gov.nt.ca/HouseBusiness/Legislation/PDF/bill1.pdf> ("sexual orientation")

Nova Scotia - Human Rights Act, R.S.N.S. 1989, c. 214, s. 5(1)(n),

⁹⁴ "Sexual orientation" was "read into" Alberta's Human Rights, Citizenship and Multiculturalism Act, http://www.qp.gov.ab.ca/display_acts.cfm, by the Supreme Court in *Vriend v. Alberta*, *supra* n. 33. *Vriend* should also apply to the Northwest Territories' Fair Practices Act, http://legis.acjnet.org/TNO/Loi/a_en.html, and Nunavut Territory's Fair Practices Act (Nunavut), http://legis.acjnet.org/Nunavut/Loi/index_en.html.

- <http://www.gov.ns.ca/legi/legc/index.htm> (Statutes, Consolidated) ("sexual orientation" added in 1991)
- Ontario - Human Rights Code, R.S.O. 1990, c. H.19, ss. 1-3, 5-6, http://www.e-laws.gov.on.ca/tocStatutes_E.asp?lang=en ("sexual orientation" added in 1986)
- Prince Edward Island - Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 1(1)(d), <http://www.gov.pe.ca/law/statutes/index.php3> ("sexual orientation" added in 1998)
- Québec - *Charte des droits et libertés de la personne*, R.S.Q. c. C-12, s. 10, http://www.cdpdj.qc.ca/htmfr/htm/4_4.htm ("*orientation sexuelle*" added in 1977)
- Saskatchewan - Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, ss. 9-19, 25, 47, <http://www.gov.sk.ca/shrc> ("sexual orientation" added in 1993)
- Yukon Territory - Human Rights Act, S.Y.T. 1987, c. 3, ss. 6, 34, http://legis.acjnet.org/cgi-bin/folioisa.dll/e_stats.nfo/query=*/doc/{t43523}? ("sexual orientation")
- Costa Rica** - Law No. 7771 (*Ley General Sobre el VIH-SIDA*), *La Gaceta* No. 96 (20 May 1998), Article 48, http://www.pasca.org/cd/pasca/Dialogo/cr_ley.pdf ("*opción sexual*"; "sexual option")
- Czech Republic** - see, e.g., Law 167/1999 of 13 July 1999 (amending Law 1/1991 on Employment), [30 July 1999] 57 *Sbírka Zákonu* (Law Gazette) 3151, <http://www.mvcr.cz/sbirka/1999/sb057-99.pdf>, and Law 155/2000 of 18 May 2000 (amending Labour Code, Law 65/1965, Art. 1(4), and Law on Soldiers, Law 221/1999, Art. 2(4)), [21 June 2000] 49 *Sbírka Zákonu* 2290, 2318, <http://www.mvcr.cz/sbirka/2000/sb049-00.pdf> ("*sexuální orientace*")
- 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 ("*sekuellesse 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*"; "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, <http://www.legifrance.gouv.fr> (Codes) ("*moeurs*", "morals, manners, customs, ways", added by *Loi* No. 85-772, 25 July 1985, *Loi* No. 86-76, 17 January 1986); *Loi* No. 2001-1066 du 16 novembre 2001 relative à la lutte contre les discriminations, http://www.legifrance.gouv.fr/html/frame_jo.html (adding "*orientation sexuelle*" to various provisions of the *Nouveau Code pénal* and the *Code du travail*)

Germany

Federal Level - see European Union, Council Directive 2000/78/EC ("*sexuelle Ausrichtung*")

States (*Länder*):

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*")

Greece - see European Union, Council Directive 2000/78/EC ("*genetisios prosanatolismos*"; "sexual orientation")

Hungary - Act on Public Health, Act No. 154 of 1997, art. 7 ("*szexuális irányultság*"; "sexual orientation")

Iceland - General Penal Code, No. 19/1940, s. 180, as amended by Act No. 135/1996, s. 1, <http://www.althingi.is/alttext/stjt/1996.135.html> ("sexual orientation")

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), <http://www.irlgov.ie/bills28/acts/1998/a2198.pdf>; extended to education, goods, services, housing by Equal Status Act, 2000, No. 8, s. 3(2)(d), <http://www.irlgov.ie/bills28/acts/2000/a800.pdf> ("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*"; "sexual orientation")

Italy - see European Union, Council Directive 2000/78/EC ("*tendenze sessuali*")

Lithuania - Penal Code, art. 169, Law of 26 September 2000, Nr. VIII-1968 ("*seksualine orientacija*") (not yet in force)

Luxembourg - *Code pénal*, arts. 454-457, added by Law of 19 July 1997, http://www.etat.lu/memorial/T97_a/tablechr.html (Juillet 1997) ("*orientation sexuelle*", "*moeurs*")

Mexico

States:

Aguascalientes - Penal Code, art. 205 *bis* (as amended on 11 March 2001), <http://www.congresoags.gob.mx> (*Legislación, Código Penal*) ("*orientación sexual*")

Chiapas - Penal Code, art. 205 (adopted on _____ 2001) ("*orientación sexual*")

Federal District (Mexico City) - Penal Code, art. 281 *bis* (as amended on 2 Sept. 1999), <http://www.asambleadf.gob.mx/princip/Enl-06.htm> (*Códigos, Código Penal, Libro Segundo*) ("*orientación sexual*")

Namibia - Labour Act, 13 March 1992, No. 6, s. 107, <http://natlex.ilo.org/scripts/natlexcgi.exe?lang=E> (Namibia, General provisions, 1992-03-26) ("sexual orientation")

Netherlands - Penal Code, arts. 137f, 429 *quater* (inserted by Act of 14 Nov. 1991, *Staatsblad* 1991,

nr. 623); General Equal Treatment Act, arts. 1, 5-7 (Act of 2 March 1994, *Staatsblad* 1994, nr. 230); Dutch and English texts at <http://ruljis.leidenuniv.nl/user/cwaaldij/www/NHR/transl-anti-discr.htm> or <http://www.cgb.nl/> ("hetero- of homoseksuelegerichtheid"; "hetero-or homosexual orientation")

New Zealand - Human Rights Act 1993, s. 21(1)(m), and s. 145, Second Schedule (amending New Zealand Bill of Rights Act 1990, s. 19), <http://rangi.knowledge-basket.co.nz/gpacts/act-lists.html> ("sexual orientation")

Norway - Penal Code, para. 349a as amended by Law of 8 May 1981, nr. 14, ("*homofile legning, leveform eller orientering*"; "homophile inclination, lifestyle or orientation"); extended to employment by *Lov om arbeidervern og arbeidsmiljø m.v.*, Law of 4 Feb. 1977, nr. 4, para. 55A, as amended by Law of 30 April 1998, nr. 24 ("*homofile legning eller homofile samlivsform*"; "homophile inclination or form of cohabitation"); texts at <http://www.lovdatab.no/all/index.html> (*Søk, Hele teksten, homofile, Søk*, documents 2, 3)

Portugal - see European Union, Council Directive 2000/78/EC ("*orientação sexual*")

Romania - Law for the adoption of Government Emergency Ordinance No. 89/2001, published in Romania's *Official Gazette*, part I no. 65/30.01.2002 ("*orientarii sexuale*")

Slovenia - Penal Code (Law of 29 Sept. 1994, published in *Uradni list*, 13 Oct. 1994), art. 141 ("*spolni usmerjenosti*"; "sexual orientation")

South Africa - Labour Relations Act (No. 66 of 1995), s. 187(1)(f) (dismissal); extended to other aspects of employment by Employment Equity Act (No. 55 of 1998), s. 6, and to hate speech and harassment by Promotion of Equality and Prevention of Unfair Discrimination Act (No. 4 of 2000), ss. 1(1)(xxii)(a), 10-11; see also, e.g., Rental Housing Act (No. 50 of 1999), s. 4(1),

Employment of Educators Act (No. 76 of 1998), s. 18(1)(k), as amended by Education Laws Amendment Act (No. 53 of 2000), s. 11; texts at <http://www.parliament.gov.za/acts/index.asp> ("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 - Penal Code (*Brottsbalk*), SFS 1962:700, c. 16, para. 9, as amended by Law of 4 June 1987, SFS 1987:610, <http://justitie.regeringen.se/propositionermm/ds/pdf/Penalcode.pdf> (English) ("*homosexuell läggning*"; "homosexual inclination"); extended to employment by Law of 11 March 1999, SFS 1999:133 ("*sexuell läggning*"; "sexual inclination"); Swedish texts at <http://www.notisum.se> (*Författningar, SLS, kronologiskt register*); see also <http://www.homo.se> (This is HomO, It is the Law)

United Kingdom - see European Union, Council Directive 2000/78/EC ("sexual orientation")

APPENDIX III

NATIONAL (FEDERAL, STATE, PROVINCIAL, REGIONAL, CANTONAL) LEGISLATION RECOGNISING SAME-SEX COUPLES⁹⁵

Australia

States and Territories:

Australian Capital Territory - Domestic Relationships Act 1994 ("parties to a domestic relationship"); Administration and Probate (Amendment) Act 1996, ("eligible partners"); Family Provision (Amendment) Act 1996("eligible partners")

New South Wales - Property (Relationships) Legislation Amendment Act 1999; Miscellaneous Acts Amendment (Relationships) Bill 2002 (pending in Legislative Assembly)("spouses", "de facto spouses", "de facto partners")

Queensland - Property Law Amendment Act 1999("de facto spouses"); Industrial Relations Act 1999, Schedule 5, definition of "spouse"("de facto spouses")

Victoria - Statute Law Amendment (Relationships) Act 2001 ("domestic partners")

Western Australia - Acts Amendment (Lesbian and Gay Law Reform) Act 2002 ("de facto partners")

Austria - Criminal Code (*Strafgesetzbuch*) 1975, Paragraph 72, as amended in 1998 ("*Personen, die miteinander in Lebensgemeinschaft leben*"; "persons living with each other in a community of life")

Belgium - *Loi du 23 novembre 1998 instaurant la cohabitation légale, Moniteur belge*, 12 Jan. 1999, p. 786 ("*cohabitants légaux*"; "statutory cohabitants")

Canada

Federal Level - Modernization of Benefits and Obligations Act, Statutes (S.) of Canada 2000, chapter (c.) 12; Immigration and Refugee Protection Act,

⁹⁵ Legislation dealing only with second-parent or joint adoption of children by same-sex partners is not included.

S.C. 2001, c. 27, s. 12(1) ("common-law partners", "*conjoints de fait*")

Provinces and Territories:

British Columbia - Family Relations Amendment Act, 1997, S.B.C. 1997, c. 20 ("spouses"); Definition of Spouse Amendment Act, 1999, S.B.C. 1999, c. 29 ("spouses"); Definition of Spouse Amendment Act, 2000, S.B.C. 2000, c. 24("spouses")

Manitoba - An Act to Comply with the Supreme Court of Canada Decision in *M. v. H.*, S.M. 2001, c. 37; Charter Compliance Act, S.M. 2002, c. 24 and Common-Law Partners' Property and Related Statutes Amendment Act, S.M. 2002, c. 48(registered and unregistered "common-law partners")

New Brunswick - Family Services Act, N.B. Acts, c. F-2.2, section (s.) 112(3), as amended in 2000(spousal support obligations of unmarried persons living in a family relationship)

Newfoundland - An Act to Amend the Family Law Act, S.N. 2000, c. 29("partners")

Northwest Territories - Family Law Act, S.N.W.T. 1997, c. 18, s. 1(1), and Adoption Act, S.N.W.T. 1998, c. 9, s. 1(1), both as amended by S.N.W.T. 2002, c. 6 ("spouses")

Nova Scotia - Law Reform (2000) Act, S.N.S. 2000, c. 29 (unregistered "common-law partners", registered "domestic partners")

Ontario - Amendments Because of the Supreme Court of Canada Decision in *M. v. H.* Act, S.O. 1999, c. 6 ("same-sex partners")

Québec - An Act to amend various legislative provisions concerning de facto spouses, S.Q. 1999, c. 14, 1st session, 36th legislature, Bill 32 ("de facto spouses"), and An Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, c. 6, 2nd session, 36th legislature, Bill 84 ("civil union spouses")

Saskatchewan - Miscellaneous Statutes (Domestic Relations) Amendment Acts, 2001, S.S. 2001, cc. 50-51, ("common-law partners", or persons "cohabiting as spouses" or "cohabiting in a spousal relationship")

Yukon Territory - Dependant's Relief Act, Revised (R.) S.Y. 1986 (Vol. 1), c. 44, s. 1, as amended by S.Y. 1998, c. 7, s. 116 ("common law spouses"); Family Property and Support Act, R.S.Y. 1986

(Vol. 2), c. 63, ss. 1, 30, 31, as amended by S.Y. 1998, c. 8, s. 10 ("spouses"); Estate Administration Act, S.Y.1998, c. 7, ss. 1, 74 ("common law spouses")

Denmark - Registered Partnership (*Lov om registreret partnerskab*), 7 June 1989, nr. 372 ("registrerede partnere"; "registered partners")

Finland - Law 9.11.2001/950, Act on Registered Partnerships (*Laki rekisteröidystä parisuhteista*) ("*parisuhteen osapuolet*"; "registered partners")

France - *Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité* ("partenaires"; "partners")

Germany

Federal Level - Law of 16 Feb. 2001 on Ending Discrimination Against Same-Sex Communities: Life Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*), [2001] 9 *Bundesgesetzblatt* 266, ("Lebenspartner"; "life partners")

Hungary - Civil Code, Article 685/A, as amended by Act No. 42 of 1996: "Partners - if not stipulated otherwise by law - are two people living in an emotional and economic community in the same household without being married."

Iceland - Law on Confirmed Cohabitation (*Lög um staðfesta samvist*), 12 June 1996, nr. 87 ("parties to a confirmed cohabitation")

Netherlands - Act of 5 July 1997 amending Book 1 of the Civil Code and the Code of Civil Procedure, concerning the introduction therein of provisions relating to registered partnership (*geregistreerd partnerschap*), *Staatsblad* 1997, nr. 324 ("*geregistreerde partners*"; "registered partners"); Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage), *Staatsblad* 2001, nr. 9,

<http://ruljis.leidenuniv.nl/user/cwaaldij/www>
(English) ("echtgenoten"; "spouses")

New Zealand - Electricity Act 1992, s. 111 ("near relatives"); Domestic Violence Act 1995, s. 2 ("partners"); Harassment Act 1997, s. 2 ("partners"); Accident Insurance Act 1998, s. 25 ("spouses"); Housing Restructuring (Income-Related Rents) Amendment Act 2000, s. 5 ("partners"); Property (Relationships) Amendment Act 2001 ("de facto partners"); Family Proceedings Amendment Act 2001 ("de facto partners"); Family Protection Amendment Act 2001 ("de facto partners"); Administration Amendment Act 2001 ("de facto partners")

Norway - Law on Registered Partnership (*Lov om registrert partnerskap*), 30 April 1993, nr. 40 ("registrerte partnere"; "registered partners")

Portugal - *Lei No. 7/2001 de 11 de Maio, Adopta medidas de protecção das uniões de facto*, [2001] 109 (I-A) *Diário da República* 2797("uniões de facto"; "de facto unions")

South Africa - see, e.g., Special Pensions Act (No. 69 of 1996), s. 31(2)(a)("spouses"); Basic Conditions of Employment Act (No. 75 of 1997), s. 27(2)(c)(i) ("life partners"); Employment Equity Act (No. 55 of 1998), s. 1 (definition of "family responsibility") ("partners"); Domestic Violence Act(No. 116 of 1998), s. 1(vii)(b) (definition of "domestic relationship"); Medical Schemes Act (No. 131 of 1998), s. 1 (definition of "dependant") ("partners"); Revenue Laws Amendment Act (No. 59 of 2000), s. 1(1) (definition of "spouse") ("partners")

Spain

Spanish State - see, e.g., Law on Urban Leasing (*Ley de Arrendamientos Urbanos*) of 24 Nov. 1994, Articles 12, 16, 24, *disposición transitoria segunda B(7)*: housing rights granted to a person cohabiting "in a permanent way in an emotional relationship analogous to that of spouses, without regard to

its sexual orientation [con independencia de su orientación sexual]"

Autonomous Communities (Comunidades Autónomas):

Aragón - *Ley relativa a parejas estables no casadas*, (26 March 1999) 255 *Boletín Oficial de las Cortes de Aragón*, ("parejas estables no casadas"; "un-married stable couples")

Asturias - *Ley 4/2002, de 23 de mayo, de Parejas Estables* ("parejas estables"; "stable couples")

Balearic Islands - *Llei 18/2001 de 19 de decembre, de parelles estables* ("parelles estables"; "stable couples")

Catalonia - *Llei 10/1998, de 15 de juliol, d'unions estables de parella*, (10 July 1998) 309 *Butlletí Oficial del Parlament de Catalunya* (BOPC) 24738 ("unions estables de parella"; "stable unions of couples")

Madrid - *Ley de Uniones de Hecho de la Comunidad de Madrid*, (28 Dec. 2001) 134 *Boletín Oficial de la Asamblea de Madrid (V Legislatura)* 160003 ("uniones de hecho"; de facto unions)

Navarra - *Ley Foral 6/2000, de 3 de julio, para la igualdad jurídica de las parejas estables*, [7 July 2000] 82 *Boletín Oficial de Navarra* ("parejas estables"; "stable couples")

Valencia - *Ley por la que se regulan las uniones de hecho*, (9 April 2001) 93 *Boletín Oficial de las Cortes Valencianas* 12404 ("uniones de hecho"; "de facto unions")

Sweden - *Homosexual Cohabitees Act (Lag om homosexuella sambor)*, SFS 1987:813; *Law on Registered Partnership (Lag om registrerat partnerskap)*, 23 June 1994, SFS 1994:1117, ("registrerade partner"; "registered partners")

Switzerland

Canton of Geneva - *Loi sur le partenariat du 15 février 2001* (7611) (RSG E 1 27) ("partenaires"; "partners")

Canton of Zürich - *Law on the Registration of Same-Sex Couples (Gesetz über die Registrierung gleichgeschlechtlicher Paare)* of 21 Jan. 2002, (16 Aug. 2002) 33 *Amstblatt des Kantons Zürich* ("registri-

erte Partner oder Partnerinnen"; "registered partners")

United Kingdom

Scotland - Adults with Incapacity (Scotland) Act 2000, s. 87(2) ("nearest relative"); Housing (Scotland) Act 2001, s. 108 ("family members" or "spouses")