August 1, 2011

CSW Communications Procedure
Human Rights Section
UN Women
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New York, N.Y. 10017
U.S.A.

To whom it may concern:

In response to the United Nations Entity for Gender Equality and the Empowerment of Women's call for communications dated June 14, 2011 regarding allegations of human rights violations affecting the status of women,[i] we write to advise you of a legal development in the United States that compromises hard won sex-based classification protections for females.[ii] This legal development – in which gay, lesbian, bisexual and transgender ("GLBT") organizations[iii] and individual activists work to enact protections based on "gender identity" – thus far has occurred in Minnesota,[iv] Rhode Island,[v] New Mexico,[vi] California,[vii] District of Columbia,[viii] Illinois, [ix] Maine,[x] Hawaii,[xi] New Jersey,[xii] Washington,[xiii] Iowa,[xiv] Oregon,[xv] Vermont,[xvi] Colorado,[xvii] Connecticut[xviii] and Nevada.[xix] We anticipate that GLBT activists will push to enact similar legislation in additional states in upcoming years, including in Maryland and Massachusetts, the states in which the authors of this communication reside. In addition to compromising rational sex-based protections for females, "gender identity" legislation incorporates stereotypical ideas of "what is female" into law. Finally, individual GLBT activists have threatened individuals like us who oppose this development in an attempt to silence us from raising legitimate concerns about this legislation. These same GLBT activists have used the "gender identity" framework to undermine the justification for female-only space that falls outside of government regulation (i.e., private events on private property.) As lesbians, we are concerned about the impact of this legislation on our community, and our community's ability to meet free from male influence and involvement. More importantly, as females, we are concerned that in the attempt to provide protections for a few, we will compromise the protections of the many.[xx]

Specifically, the proliferation of legislation designed to protect "gender identity" and "gender expression" undermines legal protections for females vis-à-vis sex segregated spaces, such as female-only clubs, public restrooms, public showers, and other spaces designated as "female only." Females require sex-segregated facilities for a number of reasons, chief among them the documented frequency of male sexual violence against females and the uniquely female consequence of unwanted impregnation resulting from this relatively common form of violence.[xxi] Public policy, therefore, rationally permits sex segregation in certain settings where a reasonable expectation of privacy exists.

We do not single out individual males as predatory, nor do we think any particular is more likely to harm females. Further, we do not believe that transgender or transsexual women are any more likely to harm females.[xxii] In fact, we recognize the legitimate needs of transgender and transsexual women to operate in the world free from irrational discrimination. However, we cannot

deny the implications of this legislation – and the radical shift in priorities it represents for females. Female reproductive vulnerability has a long history of exploitation by males in the form of sexualized violence. As attorneys, as females, and as lesbians, we seek legal recognition and protection for the potential harm that females may experience because of our reproductive vulnerability.

Every state in the United States plus the District of Columbia has adopted a law that bans discrimination based on sex in employment, housing, and public accommodations, among other areas of public life.[xxiii] These "Anti-Discrimination Laws" stand as evidence of a public policy statement against irrational discrimination, which has no place in a free and open society. However, each of these Anti-Discrimination Laws also preserves an exception to the general policy against discrimination with regard to sex-segregated facilities. These exceptions operate as an admission by that state that females have an interest in sex-segregated facilities.

By way of example, consider the law of the state of Rhode Island. Rhode Island bans discrimination in public accommodations in its Criminal Offenses Title ("Title 11"). Specifically, "(n)o person, being the owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation, resort, or amusement shall directly or indirectly refuse, withhold from, or deny to any person on account of race or color, religion, country of ancestral origin, disability, age, sex, sexual orientation, gender identity or expression, any of the accommodations, advantages, facilities, or privileges of that public place."[xxiv]

Title 11 does not define "sex." Indeed, many of the Anti-Discrimination Laws do not define "sex." We believe that Title 11 did not define "sex" because it is a word whose plain meaning was so widely known and understood at the time the Rhode Island Legislature enacted this provision that to define it would have seemed absurd. We assume, rationally, that "sex" means "male" or "female."

Title 11 does, however, define "place of public accommodation, resort, or amusement" to include rest rooms and bath houses,[xxv] but not "any place of accommodation, resort, or amusement (that) is in its nature distinctly private."[xxvi] Given that Title 11 defines "a place of public accommodation" to expressly include bathrooms and bath houses (i.e., showers), the Rhode Island Legislature rendered those spaces – which most females view as "private" – to be "public accommodations." We believe that the reference to places of accommodation that are "distinctly private" refers to privately owned spaces, not public facilities.

Recognizing that declaring rest rooms and bath houses as "public accommodation" and thus open to all people without regard to sex, the Rhode Island Legislature adopted an exception to the general rule against discrimination in public accommodations. Specifically, Title 11 provides that "(n)othing contained in (within Title 11) that refers to 'sex' shall be construed to mandate joint use of restrooms, bath houses, and dressing rooms by males and females."[xxvii]

The Rhode Island view of sex-based protections in its Anti-Discrimination Law is typical of most states. Unfortunately, these protections are not preserved for females in Rhode Island, as the addition of "gender identity" allows an end-run around these protections. Subsequent to the enactment of the ban on sex discrimination and the preservation of sex-segregated facilities for females, the Rhode Island Legislature amended Title 11 to ban discrimination based on "gender identity or expression," which includes a person's actual or perceived gender, as well as a person's

gender identity, gender-related self image, gender-related appearance, or gender-related expression, whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.[xxviii]

This definition of "gender identity" does not require any objective proof. Rather, it merely requires the person seeking protection to assert that he or she identifies as the sex opposite his or her sex at birth. Further, because Title 11 only permits discrimination in sex-segregated facilities based on sex, a person asserting gender identity as a basis to avoid "discrimination" must be permitted to use the rest room or bath house of their chosen "gender identity" – without regard to any action taken on the part of that individual to change their physiology to "become female" (i.e., sex reassignment surgery.)

The other states that have adopted protections based on "gender identity" have similarly broad definitions that not only incorporate stereotypes about males and females into law, but also allow any one asserting claim to a "gender identity" – including non-transgender and non-transsexual people – to invade all space rationally segregated by sex.

By way of example, we cite to several definitions found in the states that have banned this type of discrimination:

- Nevada defines "gender identity or expression" as a gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth.[xxix]
- Hawaii defines "gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.[xxx]
- New Jersey defines "gender identity or expression" as having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth.[xxxi]

These definitions – like the Rhode Island definition and like the definitions cited in the endnotes to this communication – provide no objective standard by which to assess the legitimacy of the "gender identity." These definitions would allow all males – including registered sex offenders or males subject to a domestic violence order of protection – to assert "gender identity" as a means to invade female-only space. Indeed, these laws provide a legal basis for males to be in sex-segregated space. It is well-documented that males as a class have a demonstrated history of harming females as a class by exploiting female biology (i.e., rape, sexual violence, unwanted pregnancy). Accordingly, definitions of "gender identity" that permit the individual to "self-identify" without any duration or medical documentation requirements present the potential for a human rights violation against all females.[xxxii]

As an additional matter, definitions of "gender identity" that suggest or codify into law that there are ways of expressing one's self (or behaviors or appearances) "consistent or congruent with biological sex" present a risk to females, as such definitions codify the notion of stereotypes based on sex into law. Traits stereotypically assigned to females – such as care-taking, emotionalism, and weakness – have served as sufficient legal justification for women's exclusion from employment,

participation in government, and many other critical social functions. Archaic stereotypes are directly responsible for the denial of female credibility and intellectual authority, in addition to causing the historical marginalization of females, lower social status vis-à-vis males, and lack of power to engage equally with males. Even where law has evolved to formally prohibit sex-stereotyping; women continue to suffer from the lingering effects of sexist ideologies about female inferiority. So although we support every individual's right to freely express their *gender identity*, it is absolutely critical that law not confuse "feminine expression" with female reproductive capacity or female genital presentation.[xxxiii] We believe that "gender identity" laws that codify the notion that there are traits, manners of expression, or modes of appearance that are inconsistent or consistent with one's biological sex violates United Nations conventions seeking to eradicate sex stereotyping.[xxxiv]

As stated repeatedly in this communication, we abhor irrational discrimination against transgender and transsexual people. However, we equally abhor the lack of concern for females that exists in the legislation promulgated by GLBT activists to remedy irrational discrimination against transgender and transsexual people.[xxxv] We look forward to your assistance with the concerns raised in this letter.

Regards,

Cathy Brennan[xxxvi]

Elizabeth Hungerford[xxxvii]

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i Please see http://www.unwomen.org/2011/06/call-for-communications-allegations-of-human-rights-violations-affecting-the-status-of-women/.

ii We know that other nations – most notably the United Kingdom – have adopted similar legislation. However, as we are based in the United States, and claim no knowledge of the laws of other nations, we limit our communication to the laws in the United States. However, with regard to the United Kingdom law, please see S. Jeffreys, They Know It When They See It: The UK Gender Recognition Act 2004, The British Journal of Politics & International Relations, Vol. 10, Issue 2, May 2008.

iii We note that the main organization proponents of gender identity legislation – the National Gay and Lesbian Task Force, the National Center for Lesbian Rights, Gay and Lesbian Advocates and Defenders, the National Center for Transgender Equality, and the Human Rights Campaign – have yet to adequately address the concerns raised in this communication. Additionally, we do not state that any of these organizations have encouraged violence against individuals who raise female-specific concerns with regard to this legislation. Rather, it is individual activists who have targeted those opposing "gender identity" as a concept because of the potential for harm to females with violent rhetoric and actions. At least one signer of this communication – Ms. Brennan – has received or been the subject of numerous threatening telephone calls, emails, and weblog posts due to her stated concern for females.

iv Minn. Stat. § 363A.11. Minnesota bans discrimination based on "gender identity" through its definition of "sexual orientation," which includes "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. § 363A.03, Subd. 44.

v R. I. Gen. Laws § 11-24-2. We discuss the definition of "gender identity" later in this communication.

vi N.M. Stat. Ann. § 28-1-7(F). "Gender identity" means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or

physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth. N.M. Stat. Ann. § 28-1-2(Q).

[vii] Unruh Civil Rights Act, Cal. Civ. Code § 51.5. The Unruh Civil Rights Act defines "sex" with reference to the definition of "gender" in the Penal Code as including a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. Cal. Civ. Code § 51(e)(4), Cal. Gov. Code § 12926(p), Cal. Pen. Code § 422.56(c).

[viii] D.C. Code § 2-1402.31. "Gender identity or expression" means a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth. D.C. Code § 2-1401.02 (12A).

[ix] 775 Ill. Comp. Stat. 5/5-102. Illinois bans discrimination based on "gender identity" through its definition of "sexual orientation," which "gender-related identity, whether or not traditionally associated with the person's designated sex at birth." 775 Ill. Comp. Stat. 5/1-103(O-1).

[x] 5 Me. Rev. Stat. § 4591. Maine bans discrimination based on "gender identity" through its definition of "sexual orientation," which includes a person's actual or perceived gender identity or expression. 5 Me. Rev. Stat. § 4553(9-C).

[xi] Haw. Rev. Stat. § 489-3.

[xii] N.J. Stat. § 10:5-4.

[xiii] Rev. Code Wash. § 49.60.215. "Sexual orientation" includes gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth. Rev. Code Wash. § 49.60.040(26)

[xiv] Iowa Code § 216.7. "Gender identity" means a gender-related identity of a person, regardless of the person's assigned sex at birth. Iowa Code § 216.2(10).

[xv] Or. Rev. Stat. § 659A.403. Oregon bans discrimination based on "gender identity" through the definition of "sexual orientation," which includes an individual's actual or perceived gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth. Or. Rev. Stat. § 174.100(6).

[xvi] 9 Vt. Stat. Ann. § 4502. "Gender identity" means an individual's actual or perceived gender identity, or gender-related characteristics intrinsically related to an individual's gender or gender-identity, regardless of the individual's assigned sex at birth. 1 Vt. Stat. Ann. § 144

[xvii] Colo. Rev. Stat. § 24-34-601. Colorado bans discrimination based on "transgender status" through its definition of "sexual orientation," which includes a person's transgender status or another person's perception thereof. Colo. Rev. Stat. § 2-4-401(13.5). Colorado law does not define "transgender status"

[xviii] Conn. Gen. Stat. § 46a-63. "Gender identity or expression" means a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person's core identity or not being asserted for an improper purpose. Conn. Gen. Stat. § 4a-60a(21). (Effective October 1, 2011).

[xix] Nev. Rev. Stat. §651.070. Numerous municipalities in the United States also have adopted similar local ordinances. See, e.g., New York City (http://www.nyc.gov/html/cchr/pdf/trans_guide.pdf).

[xx] The authors favor anti-discrimination protections for transgender and transsexual individuals; however, we do not favor such protections at the expense of protections for females based on sex.

[xxi] Please see "Men in Women's Restrooms," http://ts-is-liberation.org/Men+in+womens+restrooms, an article cataloguing the presence of males in female-only space on the TS-IS Liberation website maintained by transsexual activist Dana Lane Taylor. Our sincere thanks to Ms. Taylor for compiling this information.

[xxii] Throughout this communication, we refer to "transgender" and "transsexual." These terms do not have definitions in any of the legislation cited in this communication. However, the definition of "gender identity" intends to capture both "transgender" and "transsexual." For perspective on these terms, we refer you to http://ts-si.org, an excellent resource website operated by Sharon Gaughan and Lisa Jain Thompson. Please also see S. Gaughan, "What About Non-op Transsexuals? A No-op Notion," http://ts-si.org/content/view/1409/995/, 2006.

[xxiii] These laws – the "Anti-Discrimination Laws" – abrogate the common law rule in most states that employment is "at will." This communication expresses no concern or grievance with laws that ban discrimination in employment or housing based on "gender identity." We support full access to employment and housing opportunities unfettered by irrational discrimination.

[xxiv] R. I. Gen. Laws § 11-24-2.

[xxv] R.I. Gen. Laws § 11-24-3(5).

[xxvi] R.I. Gen. Laws § 11-24-3(5).

[xxvii] R.I. Gen. Laws § 11-24-3.1. The Rhode Island Legislature adopted this exception in 1979. P.L. 1979, ch. 144, § 5.

[xxviii] R.I. Gen. Laws § 11-24-2.1(i). The addition of "gender identity" took effect July 13, 2001. 2001 R.I. Pub. Ch. 340; 2001 R.I. HB 5920.

[xxix] Nev. Rev. Stat. §651.050(4).

[xxx] Haw. Rev. Stat. § 489-2.

[xxxi] N.J. Rev. Stat. 10:5-5(rr).

[xxxii] We note that the Connecticut definition attempts to limit the potential for this harm, but we believe it falls short of that goal because it ultimately allows an individual's "sincerely held" belief to trump objective medical evidence.

[xxxiii] We fully support anti-discrimination protections for transgender and transsexual people that do not run rough-shod over laws that protect females. We support the following definition of "gender identity" – a person's identification with the sex opposite her or his physiology or assigned sex at birth, which can be shown by providing evidence including, but not limited to, medical history, care or treatment of a transsexual medical condition, or related condition, as deemed medically necessary by the American Medical Association." Such a definition would protect the classification of sex, while simultaneously providing a cause of action for discriminatory practices on the basis of a persistent and documented "gender identity." We welcome people who fit into this definition into space segregated by sex in recognition of their perceived need for access and in the fervent hope that we can achieve such protection for identifiably transgender or transsexual people without harming females.

[xxxiv] See, e.g., Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW"). We understand that the United States has signed, but not ratified, the CEDAW.

[xxxv] This disregard for female-specific concerns with regard to sex-segregated facilities is a foundational plank in the "gender identity" agenda. In 1996, at the International Conference for Transgender Law and Employment Policy, transgender activists adopted the "International Bill of Gender Rights." That document provides a "Right of Access to Gendered Space and Participation in Gendered Activity," which states that "(n)o individual should be denied access to a space or denied participation in an activity by virtue of a self-defined gender identity (that) is not in accord with chromosomal sex, genetalia, assigned birth sex, or initial gender role." See Transgender Rights, edited by P. Currah, R. Juang, and S. Minter, International Bill of Gender Rights, Appendix at page 327 (2006). This assertion of a "right" to access space segregated by sex stands in stark opposition to the need for females to have female-only facilities.

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