

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

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**Statement to the Justice and Civil Rights Transition Team Regarding Issues Facing  
Lesbian, Gay, Bisexual and Transgender Persons**

**The Association of the Bar of the City of New York  
Committee on Lesbian, Gay, Bisexual and Transgender Rights**

**December 2008**

The New York City Bar Association (the “Association”), founded in 1870, is a private, non-profit organization of more than 23,000 attorneys, judges and law professors, and is one of the oldest bar associations in the United States. The Association’s Committee on Lesbian, Gay, Bisexual and Transgender (“LGBT”) Rights regularly addresses legal and policy issues on a local, state and national level affecting lesbians, gay men, bisexuals and transgendered persons. The Committee welcomes this opportunity to submit recommendations for President-Elect Barack Obama to consider as he develops priorities for his Administration. The recommendations, listed below in order of importance, highlight issues of great concern to the LGBT community, which is a marginalized and largely unprotected class of citizens.

**1. Repeal the Defense of Marriage Act.**

The Defense of Marriage Act (“DOMA”) denies same-sex couples the privileges, protections and basic equality that they are entitled to under law. The statute defines marriage as “a legal union between one man and one woman for purposes of all federal laws, and provides that states need not recognize a marriage from another state if it is between persons of the same sex.”<sup>1</sup> However, same-sex couples can legally marry in two jurisdictions, Massachusetts and Connecticut, in the United States and five countries around the globe including Spain, Canada, Belgium, the Netherlands and South Africa. DOMA effectively strips those couples of important legal rights they derive from their marriages, including but not limited to health insurance benefits, tax benefits, social security benefits, custodial rights, and protections in housing and employment. Further, as a matter of law, the statute is facially unconstitutional in that it nullifies the Full Faith and Credit Clause of the United States Constitution and offends core states’ rights in defining family law. States have historically determined, consistent with federal and state constitutions, the criteria to enter into a marriage and the resulting legal status of the parties. Federal law has not determined the marital status of individuals.

The repeal of DOMA is the Committee’s strongest recommendation, because LGBT families are presently living without the tangible protections they need. LGBT families are unable to move from one state to the next for fear that they will lose their legal status and the protections associated with it. They are unable to travel with their children on vacations, because they are

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<sup>1</sup> 28 U.S.C. 1738 (2008).

concerned that their marriages and their relationships with their children will be disrespected. DOMA does not protect these families. Rather, it attempts to invalidate and erase them from recognition. The President-Elect has, on numerous occasions, emphatically expressed his support for repealing DOMA. For the sake of the families affected, the Committee strongly urges the Administration to provide resources to achieve that goal.

## **2. Endorse and Sign Into Law An Employment Non-Discrimination Act Prohibiting Discrimination Based on Sexual Orientation and Gender Identity.**

Surveys show that up to 44% of gay and lesbian workers have experienced employment discrimination at some point in their careers, and that gay and bisexual men earn 27% less than their heterosexual male counterparts.<sup>2</sup> While overt bigotry based on race, sex or religion is now widely repudiated as unacceptable, bias based on sexual orientation and gender identity remains largely unconstrained in many work settings. For example, although racist and sexist jokes are widely accepted as off limits in the workplace, jokes targeting lesbians and gay men frequently are still tolerated.<sup>3</sup>

Federal statutes do not expressly prohibit discrimination in employment based on sexual orientation or gender identity. Title VII of the Civil Rights Act repeatedly has been held not to prohibit sexual orientation or gender identity discrimination.<sup>4</sup> To effectively address discrimination that affects millions of Americans who have no protections in their workplaces, the Committee recommends that President-Elect Obama endorse and, if passed, sign into law an Employment Non-Discrimination Act prohibiting discrimination in employment based on sexual orientation and gender identity. A statute that only protects against sexual orientation and not gender identity perpetuates the current statutory and regulatory framework of exclusion.

## **3. Repeal Don't Ask Don't Tell.**

LGBT individuals serve in the United States Armed Forces by denying their identity or running the risk of being actively excluded from serving their country. In 1981, the Department of Defense issued a policy statement which declared that homosexuality was in no way compatible with military service.<sup>5</sup> In 1993, President William Jefferson Clinton signed into law the Don't Ask, Don't Tell policy ("DADT") which states that military personnel will no longer be questioned about their sexual orientation, and current members can no longer be discharged for being gay.<sup>6</sup> Under the DADT policy, in order to be discharged from the military there needs to be a demonstration of a propensity to engage in sexual conduct with a member of the same sex.

The policy has resulted in the discharge of thousands of qualified individuals who identify as LGBT. For example, in 2002, the military discharged nine linguists, six of whom were fluent in Arabic but gay. This policy is contrary to the policy of military effectiveness in that highly qualified individuals with specialized skills needed during a time of war are discharged simply based on their sexual orientation. The policies of other countries are illustrative. Great Britain,

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<sup>2</sup> American Psychological Assoc., *Examining the Employment Nondiscrimination Act (ENDA): The Scientists Perspective* at p. 4, available at <http://www.apa.org/pi/lgbcc/publications/enda.html>.

<sup>3</sup> See, e.g., A. Friskopp & S. Silverstein, *Straight Jobs, Gay Lives* at 112 (1995).

<sup>4</sup> See, e.g., *Bibby v. Coca-Cola Bottling Co.*, 260 F.3d 257, 261 (3rd Cir. 2001) (collecting cases).

<sup>5</sup> Department of Defense Directive 1332.14, 1982

<sup>6</sup> "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" 10.U.S.C.654

Australia, Canada and Israel, to name a few, have successfully integrated their militaries. The results of other countries' successful integration of gay and lesbian soldiers into their militaries confirms that the continued official ban in the United States is not necessary to fulfill military objectives and in fact undermines military authority, and should be repealed.

President-Elect Obama has publicly stated that he supports an end to the ban. Although the President-Elect seeks to engage military leaders in developing effective methods for repealing the statute, we respectfully note that the President also has the power to issue Executive Orders that shape military policy. Further, the Secretary of Defense is a cabinet position and thus serves at the President's pleasure.<sup>7</sup> Accordingly, the President's plenary removal power over the Secretary of Defense allows the President to compel the Secretary to make substantive changes in military procedures. The successful repeal of Don't Ask, Don't Tell is critical to the lives of LGBT individuals in the Armed Forces and their families that are undoubtedly affected by a policy that brands them as unsuitable to serve their country.

#### **4. Endorse and Sign the United American Families Act.**

Not only do LGBT individuals face insurmountable obstacles in obtaining legal respect for their relationships (*see infra* DOMA discussion), but it is further compounded when a partner is a non-citizen. The United American Families Act ("UAFA")<sup>8</sup> is a bill to amend the Immigration and Nationality Act to eliminate discrimination in the immigration laws. The bill would permit permanent same-sex partners of United States citizens and lawful permanent residents to obtain lawful resident status in the same manner as spouses of citizens and lawful permanent residents. The Committee respectfully request that the President-Elect endorse the bill and, if passed, sign the UAFA into law.

#### **5. Support Comprehensive Sex Education**

There is currently no federal policy supporting comprehensive sex education in schools. Yet in 2008, \$176 million in federal funds were allocated to abstinence-only sex education programs.<sup>9</sup> In 2004, the Waxman Report<sup>10</sup> exposed the medical inaccuracies, religious content, and gender stereotyping inherent in many programs that receive such funding. Recent studies shed doubt on the effectiveness of these programs. Moreover, abstinence-only programs have a particularly harmful impact on LGBT youth. The central premise of such programs is that marriage is the only healthy or morally acceptable context for sexual activity. Because same sex marriage is not legal in any state except Massachusetts and Connecticut, abstinence-only-until-marriage programs send the message that there is never any appropriate way for LGBT youth to become sexually active, short of marrying someone of the opposite sex. In addition to sending this negative and harmful message to LGBT youth, according to a report recently released by the New York Civil Liberties Union, programs across the state of New York used curricula that have

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<sup>7</sup> *Myers v. United States*, 272 U.S. 52 (1926).

<sup>8</sup> H.R. 2221, S.1328

<sup>9</sup> Siecus (Sexuality Information and Education Council of the United States), "Abstinence Only Until Marriage: Fact Sheet" available at

<http://www.siecus.org/index.cfm?fuseaction=page.viewpage&pageid=522&grandparentID=477&parentID=523>

<sup>10</sup> U.S. House of Representatives Comm. on Government Reform, *The Content of Federally Funded Abstinence-Only Education Programs* (2004), available at <http://reform.democrats.house.gov/Documents/20041201102153-50247.pdf>.

been evaluated by experts and found to contain inaccurate, gender-biased, and homophobic content. *Fifty-seven percent* of the programs receiving abstinence-only-until-marriage funds were using at least one of these problematic curricula in 2005.

Nevertheless, substantial funding continues to be made available for abstinence-only programs. The Committee believes that federal funding should not be granted to programs that promote medically inaccurate information and religious agendas. With that in mind, the Committee respectfully urges the Administration to work with Congress to enact the Responsible Education About Life (REAL) Act (H.R.1653/S.972), rather than allocate additional federal funding for harmful abstinence-only sex education programs.

## **6. Retain an LGBT Community Liaison.**

In addition to the recommendations outlined above, there are several other issues that directly affect the lives of the LGBT community. To provide a mechanism for receiving, framing and responding to inquiries while demonstrating a continued commitment to meaningful engagement with the LGBT community, the Committee recommends that the Administration retain an LGBT Community Liaison dedicated to addressing LGBT issues.

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Because discrimination against lesbian, gay, bisexual and transgender individuals remains prevalent in employment, housing, and public accommodations, and federal law provides no expressed protections against such discrimination, we urge the President-Elect to strongly consider these recommendations. We appreciate the opportunity to comment and look forward to an agenda that is inclusive and supportive of all communities regardless of sexual orientation or gender identity. Please contact us if you have questions, would like more information, or would like to see further support for the matters we have raised above. You may reach the Committee by contacting Carmelyn Malalis, Committee Chair, at 212-245-1000 x4375 or [cpm@outtengolden.com](mailto:cpm@outtengolden.com).

Thank you very much for your attention and concern.