

HUMAN RIGHTS WATCH

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Washington, DC, April 9, 2012

Honorable Camilo Escalona Medina, Presidente del Senado
Honorable Nicolás Monckeberg Díaz, Presidente de la
Cámara de Diputados
Honorable Hernán Larraín Fernández, Presidente de la
Comisión de Constitución, Legislación, Justicia y Reglamento del Senado
Honorable Cristián Monckeberg Bruner, Presidente de la Comisión de
Constitución, Legislación y Justicia de la Cámara de Diputados

Dear Congressmen,

The recent tragic death of 24-year old Daniel Zamudio following a brutal attack by alleged neo-nazis has brought the scourge of homophobic violence to world attention and cast a spotlight on Chile's lack of legislation to protect and defend the rights of vulnerable minorities.

Human Rights Watch believes that the adoption of an anti-discrimination law is an historic opportunity for Chile to address the longstanding problem of intolerance towards its most vulnerable minorities. However, we believe that the proposed law needs substantial modification if it is to meet and most appropriately fulfill the standards set by international human rights bodies for States to deal with discrimination, homophobic violence and so-called hate crimes.

We welcome President Piñera's announcement on April 4 that the Chilean government will introduce amendments to the version approved by the Senate in November 2011 to address serious shortcoming in that bill.

By adopting a law that fully reflects the standards of international human rights law, Chile has an opportunity of creating landmark legislation, of significance not just for Chile, but for the region as a whole.

Let me say at the outset that some of the articles approved by the Chamber of Deputies on April 4 have positive elements. We welcome, in particular, the explicit inclusion in Article 2 of sexual orientation and gender identity as prohibited grounds of discrimination. This is an important breakthrough that reflects principles of international human rights law in regard to the right of sexual minorities to enjoy all human rights without restriction.

We also welcome that the law envisages a special judicial process aimed at providing rapid redress to victims of discriminatory acts. Importantly, judges would now have powers to suspend or halt potentially discriminatory actions or measures until they have completed their investigation and order them to be reversed if found to be discriminatory, as well as to provide protection to victims where necessary. These are significant advances.

The proposed law also reinforces judicial protection of potential victims of hate crimes, by treating as an aggravating circumstance the fact that a crime was committed due to the victim's perceived status. This too is welcome, since if rigorously enforced the stiffer penalties demonstrate society's condemnation of such grave crimes and might help to deter them.

However, during its long passage through the Senate the contents of the original bill presented during the administration of Ricardo Lagos were hedged and diluted to such an extent that its effectiveness as an anti-discrimination measure has been greatly diminished. In particular, we would like to draw your attention to four major problems in the present draft and also to the principles according to which they should be addressed:

1. The language in paragraph 3 of Article 2 is inconsistent with international human rights law. According to the paragraph in question, "distinctions, exclusions and restrictions will always be considered reasonable which, although based on one of the criteria mentioned in the first section..." (including sexual orientation and gender identity) "...are justified by the legitimate exercise of other fundamental rights, especially those referred to in sections 4, 6, 11, 12, 15, 16, and 21 of Art. 19 of the Constitution." The rights to which these sections refer include freedom of conscience and religion, freedom of teaching, and freedom to engage in economic activities, among others.

Whatever the intentions of the drafters of this paragraph, it can be interpreted as providing automatic justification to anyone who, in exercise of one of these constitutional rights, discriminates against another person. To take one example, it could be accepted as a justification by private schools that refuse admission to the children of separated parents, as some schools reportedly do. This would deprive the parents and children of their right to redress and frustrate the law's core objectives, even though this practice is an egregious example of arbitrary discrimination.

I understand that this paragraph was introduced in the Senate as a safeguard to prevent possible abuse of the antidiscrimination law in sensitive areas like freedom of religion and freedom to educate, etc. The present language of this article, however, is extremely unfortunate in that to determine *a priori* that other rights have precedence over the right not

to be discriminated against is inconsistent with a basic principle of international human rights law and jurisprudence, which asserts that human rights are equal and interdependent. Conflicts between them, therefore, must be resolved by the courts by evaluating in each case the justification of any restriction or exclusion as against a complaint of discrimination. There are recent precedents in comparative law of courts that have upheld other rights such as religious freedom against plaintiffs who have alleged discrimination.¹In short, such conflicts are for the courts to resolve and the law should state this clearly rather than prejudge the issue.

2. While strengthening judicial protection against discrimination, the proposed law does not commit the State to taking any action whatsoever to prevent or diminish it. The bill originally presented in 2005 took a wider, proactive view of the State's responsibilities. Its first article referred to the purpose of the law as "to prevent and eliminate" discrimination, while paragraph 1 of Article 2 assigned to the State a responsibility to "draw up policies and take actions" to this effect. This language has been removed, and the first article of the current version refers only to the objective of installing a judicial mechanism to "effectively re-establish the rule of law," once a discriminatory action has taken place.

The elimination of a preventive focus in the current version of the law is an unfortunate step backwards. International human rights bodies have stressed states' obligations in this regard. The Human Rights Committee has described non-discrimination as "a basic and general principle" relating to the protection of human rights. It has pointed out that "Article 2, paragraph 1, of the International Covenant on Civil and Political Rights *obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status* (our italics).²

Recent recommendations of the Human Rights Committee on Poland and by the Committee on the Elimination of all Forms of Discrimination against Women (CEDAW) on South Africa refer to specific preventive actions that these states should take against homophobic

¹ A notable recent case was *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission et al.*, U.S. Supreme Court, January 2012. The Court held that "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."

²UN Human Rights Committee, General Comment No. 18. 10/11/1989.

violence, such as police training and public awareness campaigns.³ In its recent report on discriminatory laws and practices and violent attacks on members of the lesbian, gay, bisexual and transgender (LGTB) community, the UN High Commission on Human Rights calls on states to:

Implement appropriate sensitization and training programmes for police, prison officers, border guards, immigration officers and other law enforcement personnel, and support public information campaigns to counter homophobia and transphobia among the general public and targeted anti-homophobia campaigns in schools.⁴

In its decision in the case of *Ayala Riffo y Niñas v. Chile* the Inter-American Court of Human Rights has ordered Chile to continue implementing permanent education and training courses for public servants and particularly judges and court officials in human rights, sexual orientation, and non-discrimination, in order to overcome gender stereotypes affecting the LGBT community.⁵ We are aware that the government is already implementing some programs aimed at raising consciousness about these issues. To ensure their continuity and to stimulate further preventive action, the anti-discrimination law should refer explicitly to the State's duties in this regard.

3. The original version of the anti-discrimination bill contained a clause (Art. 6.2) allowing plaintiffs to claim compensation for acts found by the court to be discriminatory. Unfortunately, this clause has been omitted from the current version, which provides only that the person directly responsible for arbitrary discrimination (whether an official or a private party) pay a fine to the State. Not only does the present version fail to provide a mechanism for compensation, it actually discourages complaints of discrimination by making complainants also liable to a fine if their complaint is found to be entirely without basis.

Those who have suffered discrimination are often subject to financial loss, moral damage or emotional upset. In many countries with anti-discrimination statutes civil courts are charged with settling compensation claims payable by the agent responsible (often employers) to the plaintiff according to the losses and pain and suffering incurred. By following this model, Chile would be complying fully with the obligation of states not only to sanction violations of human rights but also to ensure that victims are compensated (if a government

³CCPR/C/USA/CO/3, September 15, 2006, at para. 25; CAT, Concluding Observations (Poland); CEDAW, Concluding Observations (South Africa), CEDAW/C/ZAF/CO/4, 5 April 2011, at paras. 39-40.

⁴Recommendation of the UN High Commissioner on Human Rights, Para 84 (g), Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. *Report of the United Nations High Commissioner for Human Rights*, November 17, 2011.

⁵ Interamerican Court of Human Rights, *Ayala Riffo y Niñas v. Chile*, February 24, 2012, at paras. 268-272.

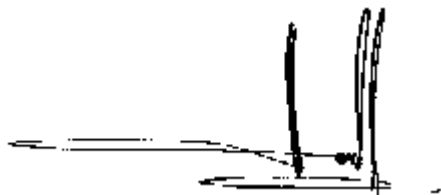
official is responsible), or have ready access to a means of securing compensation if a private agent is involved. Apart from their value in repairing harm caused, compensation claims can act as a powerful financial deterrent against arbitrary discrimination.

4. Finally, we note that Article 17, which establishes that a discriminatory motive is to be considered an aggravating circumstance in the commission of a crime, while generally reflecting the categories of discrimination in Art. 2,1, omits any reference to socio-economic situation, gender identity, civil status, language, and unionization or the lack of it. Since it would be arbitrary to distinguish between any form of discrimination we believe that Art. 17 should exactly reflect the categories listed in Art. 2.1. Moreover, transgender persons are particularly vulnerable to acts of physical violence and their protection is a vital objective of this law.

As I pointed out earlier, we are glad to see that Chile has made it a priority at this time to pass anti-discrimination legislation. In itself, such legislation represents an important step forward and we trust that Congress will ensure that it is effective and achieves its goals. It is in this constructive spirit that we have formulated the above recommendations.

Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'José Miguel Vivanco', with a horizontal line extending to the left.

José Miguel Vivanco

CC: President Sebastián Piñera Echenique