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Parallel report submitted to the 108th session of the Human Rights Committee in
relation to the seventh periodic report submitted by:

Ukraine

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Statement of Interest

1. The Equal Rights Trust (ERT) submits this parallel report to the United Nations Human Rights Committee (the Committee) commenting on the seventh periodic report by Ukraine submitted under Article 40 of the International Covenant on Civil and Political Rights (the Covenant).
2. ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, it focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice.
3. ERT is actively involved in the promotion of improved protection from discrimination in Ukraine. In December 2012, ERT initiated a project in partnership with Nash Mir (Our World) Gay & Lesbian Center in Ukraine focused on developing protection from discrimination on all grounds and in all areas of life. In the course of this project, ERT has undertaken research on the patterns of discrimination which prevail in Ukraine and on the legal and policy framework designed to provide protection from discrimination.

Introduction

4. This submission focuses on the extent to which Ukraine has met its obligations to respect, protect and fulfil the right to non-discrimination. Thus, the submission is concerned with Ukraine's performance under two articles of the Covenant: Article 2(1), which requires that states parties respect and ensure the enjoyment of the rights provided in the Covenant without distinction, and Article 26, which, as the Committee has stated, provides an "autonomous right"¹ to non-discrimination. The main focus of the recommendations made in this submission is on measures required to bring Ukraine's law, policy and practice in line with its obligations, arising under Article 26, to respect, protect and fulfil the right to non-discrimination as an autonomous right "not limited to those rights which are provided for in the Covenant".²
5. In assessing Ukraine's adherence to its obligations under Articles 2(1) and 26, the submission relies, in part, on the interpretation of these provisions which has been provided by the Committee in its General Comment No. 18. In particular, we hope that this submission will respond to the Committee's wish to be informed of the existence of discrimination in fact and about "legal provisions and administrative measures directed at diminishing or eliminating such discrimination".³
6. The submission also relies upon the Declaration of Principles on Equality (the Declaration),⁴ a document of international best practice on equality. The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as "the current international understanding of Principles on Equality".⁵ It has also been endorsed by the Parliamentary Assembly of the Council of Europe.⁶
7. This submission is divided into four parts. The first addresses paragraph 3 of the list of issues to be taken up in connection with the consideration of the seventh periodic report of Ukraine, adopted by the Committee at its 106th session, namely the protection of the rights to equality and non-discrimination in the Constitution and national law of Ukraine. The second addresses other problems with the Law "On the principles of preventing and combating discrimination" adopted on 6 September 2012, the principal legislation providing protection

¹ Human Rights Committee, *General Comment No. 18: Non-discrimination*, 1989, Para 12.

² *Ibid.*, Para 12.

³ *Ibid.*, Para 10.

⁴ *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

⁵ *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para. 93.

⁶ Parliamentary Assembly of the Council of Europe, *Resolution and Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe*, REC 1986 (2011), 25 November 2011, available at: http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380.

from discrimination in Ukraine. The third part of the submission addresses paragraph 4(b) of the list of issues, namely Draft Law 0945 (formerly Draft Law 8711) and its compatibility with the Covenant. The fourth and final part addresses other legislation in Ukraine – beyond Draft Law 0945 – which is incompatible with the right to equality.

List of Issues: Paragraph 3: Prohibition of Discrimination in the Constitutional and National Law

8. The Committee asked “whether Ukraine planned to include in the Constitution the right to equality and non-discrimination for all, (...) not just for citizens”.⁷ As the Committee has noted, the rights to equality and non-discrimination contained within Article 25 of the Constitution of Ukraine apply only to citizens. This is in contrast to other rights protected under the Constitution, such as the right to a private and family life (Article 32) and the right to freedom of thought and speech (Article 34), which are guaranteed to all persons in Ukraine.
9. As is stated in Article 1 of the Universal Declaration of Human Rights, “All human beings are born free and equal in dignity and rights”. Indeed, this is reflected in Article 21 of the Constitution of Ukraine itself which states that “All people shall be free and equal in their dignity and rights”. Similarly, the Covenant is clear that Covenant rights in Article 2 must be guaranteed for “all individuals within its [the State’s] territory” without discrimination, and Article 26 guarantees the right to non-discrimination for “all persons”. Principle 1 of the Declaration of Principles of Equality provides that the right to equality is the right “of all human beings”.⁸
10. The restriction of the constitutional rights to equality and non-discrimination to Ukrainian citizens, rather than all persons in Ukraine is therefore non-compliant with Articles 2(1) and 26 of the Covenant. It excludes significant groups of people, including stateless persons, immigrants, and other non-citizens in Ukraine, from the fundamental protection provided in Article 25. ERT is unaware of any plans by the Government of Ukraine to amend the Constitution so as to provide that Article 25 applies to all persons in Ukraine.
11. **ERT urges the Committee to recommend that Ukraine amend Article 25 of the Constitution as soon as practicable to ensure compliance with the Covenant.**
12. The Committee also asked whether the Law “On the principles of preventing and combating discrimination” adopted on 6 September 2012 (the Anti-Discrimination Law) **(a)** addresses

⁷ Human Rights Committee, *List of issues to be taken up in connection with the consideration of the seventh periodic report of Ukraine, adopted by the Committee at its 106th session (15 October–2 November 2012)*, 23 November 2012, UN Doc. CCPR/C/UKR/Q/7, Para 3.

⁸ See above, note 4, Principle 1, p. 5.

discrimination in all areas of life; **(b)** defines direct and indirect, as well as *de facto* and *de jure* discrimination; **(c)** contains a comprehensive list of grounds for discrimination, including discrimination based on sexual orientation and gender identity; **(d)** provides for remedies to victims of discrimination; and **(e)** establishes a mechanism for the effective implementation of its provisions in practice.⁹ We provide information in response to each of these questions below.

13. **(a)** The scope of the Anti-Discrimination Law is contained in Article 4 which covers many, but not all, areas of life where protection from discrimination is required. The scope is defined as: public and political activities; the civil service and local government; justice; labour relations; healthcare; education; social security; housing relations; access to goods and services; and other areas of public life. None of these terms is defined further in the Anti-Discrimination Law.
14. This list contains a number of omissions, many of which have been highlighted by Christian Ahlund and Winnie Sordrager of the European Commission against Racism and Intolerance in their comments on the Anti-Discrimination Law.¹⁰ In particular, Article 4 does not state clearly that the Anti-Discrimination Law applies to the private sector as well as public life. Whilst the scope does include areas such as labour relations, housing, and goods and services, the scope is defined by reference to “areas of public life” which could be interpreted as being restricted only to relations between individuals and state authorities. The term “justice” ought to be amended to “the judicial system”. Other key areas of life are clearly omitted, including membership of clubs and organisations, transport, welfare and pensions, training related to employment, and the exercise of economic activity.
15. The Human Rights Committee has interpreted Article 26 of the Covenant as “prohibit[ing] discrimination in law or in fact in any field regulated and protected by public authorities”.¹¹ Drawing inspiration from this, and other international human rights instruments, the Declaration of Principles of Equality defines the scope of the right to equality as “all areas of activity regulated by law”.¹² As the omissions listed above indicate, the scope of the Anti-Discrimination Law as defined in Article 4 does not cover “all areas of life regulated by law” and falls short of the requirements of the Covenant.

⁹ See above, note 7.

¹⁰ Ahlund, C., and Sorgdrager, W., Comments on the Draft Law on the Principles of Prevention and Combating Discrimination in Ukraine, 2012, available at: http://www.ombudsman.gov.ua/en/index.php?option=com_content&view=article&id=1383:comments-on-the-draft-law-on-the-principles-of-prevention-and-combating-discrimination-in-ukraine&catid=217:2012&Itemid=226.

¹¹ See above, note 1, Para 12.

¹² See above, note 4, Principle 8, p. 6.

16. **ERT therefore urges the committee to recommend that the scope of the Law in Article 4 be expanded to cover all areas of activity regulated by law.**

17. **(b)** The Law defines direct discrimination in Article 1(6) as:

(...) decisions, actions or inactions which result in instances whereby an individual and / or group of persons are treated less favourably based on certain attributes than other persons in a similar situation.

18. Principle 5 of the Declaration of Principles on Equality defines direct discrimination as follows:

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

19. Comparing the two, it is clear that the definition in the Law has two significant weaknesses. First, by using the present tense, “are treated less favourably (...) than other persons”, as opposed to the terminology used in the Declaration of Principles of Equality, namely “is treated less favourably than another person or another group of persons *is, has been, or would be treated*”, the definition is unnecessarily restrictive and excludes from its scope both historic and pre-emptive claims. Second, the definition does not include the second situation in the Declaration’s definition of direct discrimination, namely “when, for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment”. This second situation does not require there to be a comparator when assessing whether there has been discrimination, and so provides protection in situations where a person suffers harm because of their possession of a particular characteristic, but is unable to identify another person who benefits or does not suffer the harm because of the absence of such a characteristic. By failing to include this second situation in the definition, the level of protection is unnecessarily reduced.

20. The Committee should be aware that the Government of Ukraine has put forward a Draft Law which would amend the Anti-Discrimination Law,¹³ including the definitions in Article 1. The Draft Law would provide for a new definition of direct discrimination as follows:

(...) situations in which an individual and / or a group of persons, because of certain attributes, are treated, appear to be treated, or may be treated

¹³ Draft Law 2342 “On Amendments to Certain Legislative Acts of Ukraine on Prevention and Combating discrimination in Ukraine”.

less favourably than another individual and / or group of persons in a similar situation.

21. Whilst this new definition addresses the first weakness of the current definition, it fails to address the second.
22. **ERT would therefore urge the Committee to recommend that the definition of direct discrimination in Article 1(6) of the Anti-Discrimination Law be amended as soon as possible to bring it in line with the Declaration and the Covenant.**
23. The Law defines indirect discrimination in Article 1(3) as:

(...) decisions, actions or inactions, legal provisions or evaluation criteria, conditions or practices which are formally identical, but during their exercise or implementation restrictions or privileges in respect of an individual and / or a group of persons appear or may appear on grounds of certain attributes, unless such decisions, actions or inactions, legal provisions or evaluation criteria, conditions or practices are objectively justified by the aim of ensuring equal opportunities to an individual or groups of persons to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine.

24. Principle 5 of the Declaration of Principles on Equality defines indirect discrimination as follows:

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

25. The first half of section 1(3), which defines what constitutes indirect discrimination, is broadly in line with the definition in the Declaration. However, the second half of the definition in section 1(3), which provides an area of exception to the prohibition on indirect discrimination where an action is “objectively justified by the aim of ensuring equal opportunities to an individual or groups of persons to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine”, is clearly inconsistent with the Declaration. The Declaration provides that exceptions to indirect discrimination must be “objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”. This definition reflects that which has been used by the Committee itself, namely that “the criteria for [any] differentiation are reasonable and objective and if the aim is to

achieve a purpose which is legitimate under the Covenant”.¹⁴ The terminology of the exception in Article 1(3) appears to confuse justifiable indirect discrimination with positive action. Therefore, ERT believes that the definition in Article 1(3) risks confusion and misinterpretation, and potentially injustice if interpreted strictly.

26. The Draft Law would provide for a new definition of indirect discrimination as follows:

(...) situations in which, as the result of the exercise or application of formally neutral legal provisions, evaluation criteria, rules, requirements or practices for an individual and / or a group of persons, because of certain attributes, they are placed, or may be placed, in a less favourable position, except when the exercise or application pursues a legitimate, objectively reasonable aim, and the methods of achievement are appropriate and necessary.

27. ERT believes that this new definition would address the weaknesses in the current definition and would be in line with the Declaration and the Covenant.

28. **ERT would therefore urge the Committee to recommend that the definition of indirect discrimination in Article 1(3) be amended as soon as possible to bring it in line with the Declaration and the Covenant.**

29. In addition to defining and prohibiting both direct and indirect discrimination as detailed above, the Law also contains a separate, general definition of discrimination *per se*. Article 1(2) defines “discrimination” as:

(...) decisions, actions or inactions, which are directed to establish restrictions or create privileges to an individual and / or a group of persons on grounds of race, colour, political, religious or other beliefs, sex, age, disability, ethnic or social origin, marital and property status, place of residence, language or other characteristics (hereinafter – certain attributes) if they preclude the recognition and exercise of human and citizen’s rights and freedoms on equal grounds.

30. Christian Ahlund and Winnie Sordrager have highlighted two significant problems with this definition in their comments. First, international law and best practice dictates that discrimination should be defined as either “direct” or “indirect” and unambiguous definitions for both have been developed which are widely accepted. There is therefore no need for a separate definition of discrimination – this risks confusion and misinterpretation. Second, the definition of discrimination provided in Article 1(2) refers to “decisions, actions or inactions, which are *directed* to establish restrictions or create privileges” thereby appearing to require intent for discrimination to be established. This is contrary to the interpretation of the term

¹⁴ See above, note 1, Para 13.

“discrimination” in Article 26 of the Covenant, which the Committee has defined by reference to the “purpose or effect” of the distinction, exclusion, restriction or preference, thereby explicitly negating any requirement for intent for discrimination to be established.¹⁵ The drafters of the Declaration reached the same conclusion as the Committee, such that the final part of the definition of discrimination provided in Principle 5 reads: “[a]n act of discrimination may be committed intentionally or unintentionally”.

31. The Draft Law would provide for a new distinct definition of discrimination *per se* as follows:

(...) situations in which an individual and / or a group of persons, based on their race, colour, political, religious or other beliefs, sex, age, disability, ethnic or social origin, nationality, marital status, place of residence, language or other characteristic, whether former or present, and whether real or perceived (hereinafter – certain attributes), suffered, suffers or may suffer restrictions of any form.

32. Whilst the new definition of discrimination in the Draft Law addresses the second of Christian Ahlund and Winnie Sordrager’s concerns, it does not address the first. ERT shares that concern that the inclusion of a distinct definition of discrimination *per se* in addition to definitions of direct and indirect discrimination is unnecessary and risks confusion and misinterpretation.
33. **ERT would therefore urge the Committee to recommend that the distinct definition of discrimination in Article 1(2) of the Anti-Discrimination Law be deleted, rather than simply amended.**
34. **(c)** The Anti-Discrimination Law contains an open-ended list of protected grounds in Article 1(2), with the following grounds receiving explicit protection: race; colour; political, religious or other beliefs; sex; age; disability; ethnic or social origin; marital and property status; place of residence; and language.
35. While the use of an open-ended list of protected grounds is to be welcomed, the explicitly listed grounds of protection are limited, omitting a number of grounds which are well-recognised at international law. In its Principle 5, the Declaration of Principles on Equality provides an extensive but closed list of grounds, complemented by a test to establish whether additional grounds should be admitted for protection.
36. The list of explicitly protected grounds in the Declaration goes beyond the list contained within Article 1(2) of the Anti-Discrimination Law. In particular, the Declaration, consistent with various international instruments and the interpretations of human rights treaty bodies,

¹⁵ See above, note 1, Para 6.

requires explicit protection from discrimination on grounds of descent,¹⁶ pregnancy,¹⁷ maternity,¹⁸ civil status,¹⁹ carer status, birth,²⁰ national origin,²¹ sexual orientation,²² gender identity,²³ health status,²⁴ and genetic or other predisposition toward illness. These grounds currently enjoy protection from discrimination under international human rights law, as indicated either by their inclusion in the Covenant or other international instruments, or by the consistent practice of the Human Rights Committee or the Committee on Economic, Social and Cultural Rights in interpreting the “other status” provision in the Covenants as including these grounds. Thus, the open-ended list of protected grounds in Article 1(2) must be read as including protection from discrimination on these grounds, if it is to be consistent with international law.

37. Nevertheless, ERT regrets the failure to include these grounds explicitly in Article 1(2) of the Anti-Discrimination Law. It is concerning that without explicit recognition, victims of discrimination on those grounds may be required to undertake legal proceedings so as to establish that these grounds are recognised under Article 1(2), rather than being able to rely on the Anti-Discrimination Law immediately. In addition, ERT has reason to be concerned

¹⁶ Descent is a prohibited ground under Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.

¹⁷ Under Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, States must take steps to protect pregnant women from discrimination.

¹⁸ Under Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, States must also take steps to protect women from discrimination on grounds of maternity.

¹⁹ The Committee has stated that marital status is a protected ground under “other status” in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (*Danning v. the Netherlands* (Communication No. 180/1984), U.N. Doc. CCPR/C/OP/2 at 205 (1990); and *Sprenger v. the Netherlands* (Communication No. 395/1990), U.N. Doc. CCPR/C/44/D/395/1990 (1992)).

²⁰ Birth is a prohibited ground under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights.

²¹ National origin is a prohibited ground under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights.

²² The Committee has stated that sexual orientation is a protected ground under “other status” in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (*Young v. Australia* (Communication No. 941/2000), U.N. Doc. CCPR/C/78/D/941/2000 (2003)).

²³ The Committee on Economic, Social and Cultural Rights has stated that gender identity is a prohibited ground under “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights: Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 32.

²⁴ The Committee on Economic, Social and Cultural Rights has stated that health status is a prohibited ground under “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights: *Ibid.*, Para 33.

that the Ukrainian courts may fail to recognise some or all of these grounds when interpreting Article 1(2). For example, in its decision No. 8-рп/2007 of 16 October 2007, the Constitutional Court held that the characteristic of “age” did not fall within the scope of the “other grounds” provision in Article 24 of the Constitution (which prohibits discrimination). The Court reached this conclusion on the basis that age is a non-permanent classification and persons move from one age to another over the course of their lives. The Court stated: “Special terms and conditions, based on the specific requirements for work, do not restrict the right to work and guarantees of equal opportunities when choosing profession and employment.” As such, ERT believes that the explicit inclusion of these grounds in the Anti-Discrimination Law is essential to avoid potential restrictive judicial interpretation.

38. **ERT would therefore urge the Committee to recommend that the following grounds be explicitly included in the Anti-Discrimination Law: descent, pregnancy, maternity, civil status, carer status, birth, national origin, sexual orientation, gender identity, health status, and genetic or other predisposition toward illness.**
39. Despite the concerns outlined above, the Government of Ukraine has not proposed the inclusion of any further grounds for protection in the Draft Law amending the Anti-Discrimination Law, with one exception. The Draft Law would add sexual orientation as a protected ground but only in Article 22 of the Labour Code which prohibits discrimination in the entering into, amendment of, and termination of employment contracts. Thus, the Draft Law would not extend protection from discrimination on grounds of sexual orientation into the other areas of life covered by the Anti-Discrimination Law itself, and would instead only provide protection in employment.
40. While any decision to increase the scope of protection from discrimination is welcome, ERT is concerned by the proposal to extend an explicit prohibition of sexual orientation discrimination only into the area of employment. ERT takes a holistic approach to the right to equality in which all grounds of discrimination are treated equally with no hierarchy of protection. Principle 6 of the Declaration of Principles on Equality provides that:

Legislation must provide for equal protection from discrimination regardless of the ground or combination of grounds concerned.²⁵

41. In this regard, the Declaration reflects current expert opinion that any hierarchy of protection for different grounds of discrimination is inconsistent with the right to equality. It is also reflective of international law: neither the Covenant nor the International Covenant on Economic, Social or Cultural Rights establishes a system of different levels of protection from discrimination on different grounds, whether explicitly recognised in the text or subsequently read into the “other status” provision. These instruments require instead that states respect and ensure the Covenant rights “without distinction of any kind”. While the Human Rights Committee in its General Comments and Concluding Observations has provided extensive and

²⁵ See above, note 4, Principle 6, p. 8.

detailed interpretations of the right to non-discrimination, it has never indicated or condoned the existence of a hierarchy of grounds in respect of the level of protection. Indeed, this approach is consistent with the well-established principles of universality and indivisibility of human rights in general, which is conferred by the Covenant and is reasserted powerfully in the 1993 Vienna Declaration and Programme of Action.

42. In the view of ERT, any hierarchy of protections based on different grounds has no place in a law designed to provide protection from discrimination and promote equality, and is clearly inconsistent with international law and best practice.
43. The decision to limit explicit protection from sexual orientation discrimination is even more troubling given the prevalence of discrimination on grounds of sexual orientation in Ukraine. There is extensive evidence of problems of discrimination and discriminatory violence directed at sexual and gender minorities in Ukraine, which points to the need for effective protection from discrimination in all spheres of life. ERT's partner in Ukraine, Nash Mir, for example, has documented severe patterns of discriminatory ill-treatment directed at gay men and lesbians, in its recent report, *One Step Forward, Two Steps Back: The State of LGBT persons in Ukraine in 2010-2011*.²⁶ The International Lesbian, Gay, Bisexual, Trans and Intersex Association – Europe, published its second *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe: 2013* on 17 May 2013, which examines the level of legal equality for LGBTI persons in all countries in Europe.²⁷ Ukraine received a score of just 12%, ranking 44th out of 49 countries in Europe. In this context, providing legal protection for lesbian, gay and bisexual persons in employment alone, and not all other areas of life, is a worrying move.
44. **ERT believes that prohibiting discrimination on grounds of sexual orientation only in certain areas of life, as opposed to other grounds of discrimination cannot be justified, and urges the Committee to recommend that all grounds are equally protected.**
45. **(d)** Article 15 of the Anti-Discrimination Law sets out the remedies available, namely compensation for material damage and moral damage.
46. ERT believes that Article 15, which provides only for compensation for material damage and moral damage as a remedy, is insufficient. Although the Committee has stated in General Comment No. 31 that “the Covenant generally entails appropriate compensation”,²⁸ the Committee has also stated that:

²⁶ Nash Mir, *One Step Forward, Two Steps Back: The State of LGBT persons in Ukraine in 2010-2011*, 2012, available at: <http://www.gay.org.ua/publications/report2011-e.pdf>.

²⁷ International Lesbian, Gay, Bisexual, Trans and Intersex Association – Europe, “*Not “la vie en rose”: the most comprehensive overview of the LGBTI people rights and lives in Europe 2013*”, 17 May 2013.

²⁸ Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 2004, Para 16.

[W]here appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violation (...) In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.²⁹

47. This approach is reflected in Principle 22 of the Declaration of Principles on Equality which states that:

Sanctions for breach of the right to equality must be effective, proportionate and dissuasive. Sanctions must provide for appropriate remedies for those whose right to equality has been breached including reparations for material and non-material damages; sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality.³⁰

48. The amendments to the Anti-Discrimination Law contained within the Draft Law do not impact upon Article 15 and the available remedies which will therefore remain inadequate in effectively tackling discrimination, and insufficient to comply with the requirements of the Covenant as elaborated by the Human Rights Committee, and the requirements of the Declaration.
49. **ERT therefore urges the Committee to recommend that Article 15 of the Anti-Discrimination Law be amended, so as to provide for remedies which are effective, proportionate and dissuasive. In addition to compensation, such sanctions and remedies should include, as a minimum, the elimination of discriminatory practices; public apologies, public memorials, guarantees of non-repetition; and the implementation of structural, institutional, organisational, or policy change.**
50. **(e)** Article 14 of the Anti-Discrimination Law provides that a person who believes they have been subject to discrimination has the right to file a complaint with the Commissioner of the Verkhovna Rada of Ukraine on Human Rights and/or the courts. The Anti-Discrimination Law

²⁹ Ibid., Paras 16 and 17.

³⁰ See above, note 4, Principle 22, p. 13.

contains no other provisions on the process by which victims of discrimination may access justice, save for Article 16 which provides that persons found guilty of violating the law are to be held responsible in accordance with the laws of Ukraine.

51. The Draft Law would amend Articles 14 and 16. The revised Article 14 would provide that a person who believes that they have been subject to discrimination has the right to file a complaint with state authorities, the authorities of the Autonomous Republic of Crimea, local governments and their officials, the Verkhovna Rada of Ukraine on Human Rights and / or the court in the manner prescribed by law, although it is unclear from the text which “law” prescribes the manner by which a person can file a complaint of discrimination. Article 16 would be amended slightly to provide that persons found guilty of violating the law would bear “civil, administrative and criminal responsibility”.
52. The Declaration of Principles contains a number of principles on the effective implementation of the right to equality in practice. Regarding the question who are the right-holders, Principle 9 provides that:

The right to equality is inherent to all human beings and may be asserted by any person or a group of persons who have a common interest in asserting this right.

The right to equality is to be freely exercised by all persons present in or subject to the jurisdiction of a State.

Legal persons must be able to assert a right to protection against discrimination when such discrimination is, has been or would be based on their members, employees or other persons associated with a legal person having a status or characteristic associated with a prohibited ground.³¹

53. Article 14(1) of the Anti-Discrimination Law provides that complaints may only be brought by “an individual”, although it places no limitation on the ability of any individual in Ukraine to bring a complaint. Article 13 provides that non-governmental organisations, individuals and legal entities are able to “represent the interests of persons and/or groups who have been discriminated against in courts”. However, there are no provisions which would permit associations or other legal persons to assert a right to protection against discrimination on their own behalf as right-holders.
54. **ERT would therefore urge the Committee to recommend that Articles 13 and 14 of the Anti-Discrimination Law be clarified so as to ensure that claims may be brought by both individuals and groups of persons, and to ensure that legal persons are able to assert a right to protection from discrimination.**

³¹ See above, note 4, Principle 9, pp. 8 – 9.

55. Principle 10 of the Declaration provides that:

States have a duty to respect, protect, promote and fulfil the right to equality for all persons present within their territory or subject to their jurisdiction. Non-state actors, including transnational corporations and other non-national legal entities, should respect the right to equality in all areas of activity regulated by law.

56. Article 6(2) of the Anti-Discrimination Law provides that the following entities are prohibited from discriminating: state authorities, authorities of the Autonomous Republic of Crimea, local governments and their officials, legal and natural entities. Complaints of discrimination may be brought against any of these. Article 9(1) provides that the bodies which are empowered to prevent and combat discrimination are: the Verkhovna Rada of Ukraine; the Ukrainian Parliamentary Commissioner on Human Rights; the Cabinet of Ministers of Ukraine; other state bodies, the authorities of the Autonomous Republic of Crimea, and local governments; NGOs, individuals and legal entities. Articles 10 to 13 provide for specific functions and powers for each of these bodies in order to combat discrimination. Importantly however, none of these bodies – all state entities – is *required* to protect, promote or fulfil the right. In addition, the Anti-Discrimination Law contains no provisions explicitly providing that the right to equality must be respected by non-state actors, including transnational corporations and other non-national legal entities.

57. **ERT urges the Committee to recommend that the Anti-Discrimination Law be reviewed so as to ensure that the government of Ukraine is required, rather than solely empowered, to protect, promote and fulfil the right to non-discrimination. ERT also urges the Committee to recommend that the Law be reviewed and amended so as to ensure that non-state actors and other non-national legal entities respect the right to equality in all areas of activity regulated by law.**

58. Principle 18 of the Declaration provides that:

Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.³²

59. The Anti-Discrimination Law makes no explicit reference to measures designed to ensure access to justice for victims of discrimination, whether in the form of procedural or other measures to ensure access to legal redress, or legal aid provision. While it is possible that

³² See above, note 4, Principle 18, p. 12.

provisions to this effect are contained in other pieces of Ukrainian legislation, ERT is firm in its view that all anti-discrimination legislation should be as accessible and easy to use as possible, and would therefore advocate the inclusion of any provisions on access to justice in the Anti-Discrimination Law itself. In addition, ERT believes that both procedures for access to justice and legal aid schemes should be reviewed and adjusted, as necessary, to ensure that they meet the needs of victims of discrimination.

60. **ERT therefore urges the Committee to recommend that the Anti-Discrimination Law be amended to include specific provisions on the procedures through which victims of discrimination may seek redress, and the legal aid schemes in place to facilitate effective access to justice.**

61. Principle 19 of the Declaration provides that:

States must introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions.³³

62. Neither the Anti-Discrimination Law nor the Draft Law contains any provisions which prohibit victimisation.

63. **ERT urges the Committee to recommend that the Anti-Discrimination Law be amended so as to prohibit victimisation and to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings brought under the Law.**

64. Principle 20 of the Declaration provides that:

States should ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.³⁴

65. As noted above, Article 13 provides that non-governmental organisations, individuals and legal entities are able to “represent the interests of persons and/or groups who have been

³³ See above, note 4, Principle 19, p. 12.

³⁴ See above, note 4, Principle 20, pp. 12 – 13.

discriminated against in courts”. However, it is necessary to allow legal entities to act on their own behalf.

66. Principle 21 of the Declaration provides that:

Legal rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (prima facie case), it shall be for the respondent to prove that there has been no breach of the right to equality.³⁵

67. Reflecting the international consensus in this area, the Committee on Economic, Social and Cultural Rights has stated in General Comment No. 20, in relation to Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, that:

Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.³⁶

68. As is stated elsewhere in this submission, ERT believes that the similar nature and purpose of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights and Article 2(1) of the International Covenant on Civil and Political Rights indicates that the two articles should be construed consistently with each other, and that therefore the interpretations of the articles by the relevant Treaty Bodies should be similarly consistent.

69. The Anti-Discrimination Law contains no provisions providing for a reverse burden of proof, however the Draft Law would amend Article 59 of the Code of Civil Procedure, adding a new paragraph which would provide that:

When the claimant brings facts providing sufficient for an assumption that there has been discrimination, the burden of proof for unfounded claims in this part lies on the defendant.

While this formulation is problematic, it at least addresses the issue and, with some improvement, would allow the courts to reverse the burden of proof in civil proceedings.

³⁵ See above, note 4, Principle 21, p. 13.

³⁶ Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 40.

70. **ERT therefore urges the Committee to recommend that the amendments to the Anti-Discrimination Law in the Draft Law which provide for a reversal of the burden of proof in civil proceedings be adopted as soon as possible.**

Other Problems with the Anti-Discrimination Law

71. In addition to the issues raised in the above paragraphs for which the Committee has explicitly requested information, ERT also believes that the Anti-Discrimination Law falls short of what is required under the Covenant in a number of other respects.

Discrimination by Association and Discrimination by Perception

72. Principle 5 of the Declaration of Principles on Equality provides *inter alia*:

*Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.*³⁷

73. This Principle draws inspiration from a number of sources of international human rights law. Whilst not drawing directly from the Covenant or from the Committee's General Comments, this principle reflects the current international understanding of the right to non-discrimination. Such an understanding has been expressed by the Committee on Economic, Social and Cultural Rights which, in its interpretation of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, has stated that:

*Membership [of a protected group] also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).*³⁸

74. As is stated elsewhere in this submission, ERT believes that the similar nature and purpose of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights and Article 2(1) of the International Covenant on Civil and Political Rights indicates that the interpretations of the articles should be consistent. ERT believes that discrimination by

³⁷ See above, note 4, Principle 5, p. 6.

³⁸ See above, note 36, Para 16.

association and discrimination by perception, both of which are thus prohibited under Article 2(2) of the Covenant on Economic, Social and Cultural Rights, must therefore also, by implication, be prohibited under Article 2(1) of the International Covenant on Civil and Political Rights.

75. The Committee should be aware that the Draft Law which amends the Anti-Discrimination Law would amend Article 1(2), which distinctly defines discrimination *per se*, includes the phrase “whether real or perceived” after listing the protected grounds, and would therefore include discrimination by perception.³⁹ There is no equivalent amendment which would prohibit discrimination by association.
76. **ERT would therefore urge the Committee to recommend that the Anti-Discrimination Law be amended so as to prohibit discrimination by association and discrimination on the basis of perception. The prohibition on discrimination by association and discrimination on the basis of perception should apply with respect to both direct and indirect discrimination.**

Multiple Discrimination

77. Neither the Anti-Discrimination Law nor the Draft Law prohibits multiple discrimination. Principle 5 of the Declaration of Principles of Equality prohibits multiple discrimination through the use of the term “or a combination of any of these grounds” after listing the protected grounds. This is further reinforced in Principle 12, which states that “[l]aws and policies must provide effective protection against multiple discrimination, that is, discrimination on more than one ground”.
78. The inclusion of multiple discrimination in the Declaration reflects an emerging consensus at the international and national levels that discrimination must be prohibited on intersecting grounds, in addition to on individual grounds, if the law is to reflect the myriad complex ways in which discrimination affects individuals. This is also reflected by the Committee on Economic, Social and Cultural Rights in its General Comment No. 20 on Article 2(2) of the Covenant on Economic, Social and Cultural rights, as follows:

Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.⁴⁰

³⁹ See Para 31 of this submission.

⁴⁰ See above, note 36, Para 17.

79. Significantly, the Committee, in the same General Comment, stated that multiple discrimination may be considered as a prohibited ground falling within “other status” in Article 2(2) of the International Convention on Economic, Social and Cultural Rights.⁴¹ More recently, the Committee on the Elimination of Discrimination Against Women, in its General Recommendation 28, has explicitly stated that “[i]ntersectionality is a basic concept for understanding the scope of the general obligations of states parties contained in article 3”.⁴²
80. ERT believes that multiple discrimination, which is prohibited under Article 2(2) of the Covenant on Economic, Social and Cultural Rights as a form of “other status”, must also, by implication, be prohibited under Article 2(1) of the International Covenant on Civil and Political Rights.
81. **ERT would therefore urge the Committee to recommend that the Anti-Discrimination Law be amended so as to prohibit multiple discrimination.**

Reasonable Accommodation

82. Principle 13 of the Declaration of Principles on Equality recognises that:

To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.

Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.⁴³

83. This principle draws inspiration from a number of sources, particularly the Convention on the Rights of Persons with Disabilities (CRPD). For example, the definition of “discrimination” in Article 2 of the CRPD states that discrimination on the basis of disability “includes all forms of discrimination, including denial of reasonable accommodation”. Article 5 requires States Parties to “take all appropriate steps to ensure that reasonable accommodation is provided”. “Reasonable accommodation” is defined as:

⁴¹ Ibid. Para. 27.

⁴² Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the core obligations of States parties under article 2*, CEDAW/C/GC/28, 2010, Para 18.

⁴³ See above, note 4, Principle 13, p. 10.

(...) necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

84. The interpretation of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights in its General Comment No. 20 also reflects the current international consensus that failure to make reasonable accommodation is a form of discrimination. The Committee has stated that:

The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability. States parties should address discrimination, such as (...) denial of reasonable accommodation in public places such as public health facilities and the workplace, as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.⁴⁴

85. As with other concepts discussed above where the interpretation of Article 2(2) of the of the International Covenant on Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights gives rise to an assumption that Article 2(1) of the Covenant, given its common content, should be interpreted in the same way, ERT believes that it should be assumed that failure to make reasonable accommodation should also be considered a form of prohibited conduct under the Covenant.
86. Despite prohibiting discrimination on grounds of disability, the Anti-Discrimination Law contains no reference to the provision of reasonable accommodation. Although a separate piece of legislation, the Law “On the Fundamentals of the Social Protection of the Disabled in Ukraine”, makes reference to the definition of discrimination on grounds of disability in Article 2 of the CRPD, the law does not actually prohibit discrimination on grounds of disability. Instead, the legislation aims to enhance the ability of persons with disabilities to participate in various areas of life, for example through measures to assist persons with disabilities to find employment, and access public transport and buildings. Neither of these pieces of legislation therefore defines failure to provide reasonable accommodation as a form of discrimination.
87. ERT therefore believes that the omission in Ukrainian legislation of any prohibition to provide reasonable accommodation as a form of discrimination on grounds of disability is incompatible with Article 2(1) of the Covenant, and the Convention on the Rights of Persons with Disabilities (CRPD).

⁴⁴ See above, note 36, Para 28, repeating, in part, Committee on Economic, Social and Cultural Rights, *General Comment 5: Persons with disabilities*, U.N. Doc E/1995/22 at 19, 1995, Para 15.

88. **ERT therefore urges the Committee to recommend that the Anti-Discrimination Law be amended so as to prohibit a failure to make reasonable accommodation as a form of discrimination on grounds of disability.**

89. The definition of reasonable accommodation in the Declaration departs from the current understanding of reasonable accommodation in the CRPD, and other international instruments, in one important way, in that it applies to all grounds of discrimination rather than solely on grounds of disability. Again however, ERT believes that this reflects an emerging international consensus arising from the need to ensure consistent standards of legal protection between discrimination occurring on different grounds. In her legal commentary to the Declaration, Dr. Dimitrina Petrova has explained the relationship between Principle 13 and these other sources:

The concept of reasonable accommodation is well established in equality law, particularly in legislation related to disability rights. The definition of accommodation in Principle 13 [Accommodating Difference] is based on the definition contained in the UN Convention on the Rights of Persons with Disabilities, but it is extrapolated to cover other forms of disadvantage beyond disability, as well as, more generally, differences which hamper the ability of individuals to participate in any area of economic, social, political, cultural or civil life.⁴⁵

90. **ERT would also urge the Committee to take a progressive interpretation of the right to equality in Articles 2(1) and 26 of the Covenant, in line with Principle 13 of the Declaration of Principles of Equality, and interpret those articles as prohibiting a failure to make reasonable accommodation as a form of discrimination on all grounds, and thus call on Ukraine to make similar provision in the Anti-Discrimination Law.**

Positive Action

91. ERT believes that to be effective, the right to equality *requires* positive action so as to “accelerate progress towards equality of particular groups”; indeed, the Declaration defines positive action as a “necessary element within the right to equality”.⁴⁶ The Committee itself has stated that:

⁴⁵ Petrova, D., “The Declaration of Principles on Equality: A Contribution to International Human Rights”, in *Declaration of Principles on Equality*, above note 4, pp. 30 – 31.

⁴⁶ See above, note 4, Principle 3, p. 5.

(...) the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.⁴⁷

92. The Committee has also stated, in relation to equality between men and women, that:

The obligation to ensure to all individuals the rights recognized in the Covenant, established in articles 2 and 3 of the Covenant, requires that States parties take all necessary steps to enable every person to enjoy those right (...). The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.⁴⁸

93. Article 1(5) of the Anti-Discrimination Law defines positive action as:

(...) special temporary or permanent measures aimed at eliminating legal or de facto inequality in the opportunities of individuals and / or groups of persons to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine.

94. Article 7(1) of the Anti-Discrimination Law provides that “State policy in respect of preventing and combating discrimination shall be aimed at (...) taking positive action” but provides no further details on what action should be taken. Article 9 provides that the bodies empowered to prevent and combat discrimination in the Anti-Discrimination Law “may” take positive action.

95. ERT believes that there are at least two significant weaknesses in the Anti-Discrimination Law in relation to positive action. First, positive action is permissible rather than obligatory. This permissive approach runs contrary to the Committee’s interpretation of the Covenant which “requires” States Parties to adopt measures of positive action so as to achieve effective equality. Second, positive action is only permissible where it is aimed at eliminating inequality “in the opportunities (...) to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine”. This severely limits the situations where positive action measures may be taken, restricting its application to only those situations where access to Constitutional and legal rights is at issue. This definition excludes positive action measures being taken in other areas of life where legal or de facto inequality exists. Such a limitation is contrary to the Committee’s interpretation of the Covenant which, as the Committee has

⁴⁷ See above, note 1, Para 10.

⁴⁸ Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (article 3)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10, 2000, Para 3.

stated, “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.⁴⁹

96. The Draft Law makes no amendments to Articles 7 or 9, but does amend the definition of positive action in Article 1(5). The new definition defines positive action as:

(...) special temporary activities implemented by law and in pursuance of a legitimate, objectively reasonable aim directed aimed at eliminating legal or de facto inequality in the opportunities of individuals and / or groups of persons to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine.

97. The amendments made by the Draft Law address neither of the weaknesses within the current provisions. Indeed, a third weakness is added in that whereas Article 1(5) currently provides that positive action may be “temporary or permanent”, the Draft Law would provide that it could only be “temporary”. This limitation is unnecessarily restrictive and would not address discrimination which is systemic or structural, and which requires long-term and, in some instances, permanent measures of positive action to be taken so as to ensure substantive equality. Such measures might include, for example, positive measures to ensure equal treatment for the elderly.
98. **ERT would therefore urge the Committee to recommend that the Anti-Discrimination Law be amended so as to *require*, and not merely *permit*, positive action to be taken; for positive action to be taken in all areas of life, and not merely in relation to existing Constitutional and legal rights; for positive action to remain available either temporarily or permanently; and for Ukraine to take specific and substantial measures of positive action to accelerate progress towards equality of all disadvantaged groups.**

List of Issues: Paragraph 4(b): Draft Law 0945 (formerly known as Draft Law 8711)

99. The Committee referred to Draft Law 0945 (formerly known as Draft Law 8711) and requested “information on the status of the [draft law] and (...) whether [the law is] compatible with the Covenant”.⁵⁰ Draft Law 0945 “on Amendments to Certain Legislative Acts (to protect children's rights to safe information space)” was re-introduced into the Verkhovna Rada on 12 December 2012. It is currently on the agenda of the second session of the Verkhovna Rada in its current convocation although no specific date has been set for its further consideration.

⁴⁹ See above, note 1, Para 12.

⁵⁰ See above, note 7, Para 5.

100. ERT shares the concern of many other organisations that Draft Law 0945 would constitute a violation of many international human rights instruments, including the Covenant. In particular, ERT shares the belief of the United Nations High Commissioner for Human Rights that Draft Law 0945 is “clearly discriminatory and runs counter to Ukraine’s international commitments to ensure freedom of expression and information”.⁵¹ ERT agrees that unless Draft Law 0945 is rejected, it raises “serious question marks over the country’s adherence to fundamental human rights values, as contained in the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human rights and Fundamental Freedoms”.⁵²
101. In February 2013, ERT wrote to the Verkhovna Rada expressing its concerns and providing a detailed assessment of the Draft Law with Ukraine’s international human rights obligations. That assessment concluded that the adoption of Draft Law 0945 would violate, amongst others:
- (a) Articles 2(1), 19 and 26 of the International Covenant on Civil and Political Rights;
 - (b) Articles 2(1), 13, 17 and 24 of the Convention on the Rights of the Child; and
 - (c) Articles 10 and 14 of the European Convention on Human Rights.
102. The relevant portions of ERT’s assessment of the compatibility of Draft Law 0945 with the Covenant are provided in Annex I to this submission.
103. **ERT would therefore urge the Committee to recommend that Draft Law 0945 be rejected in its entirety as incompatible with Ukraine’s international human rights obligations, including its obligations under the Covenant.**

Discriminatory Legislation

104. As part of ERT’s research and engagements with civil society in Ukraine, ERT has examined a number of pieces of legislation in Ukraine which are, either in whole or in part, discriminatory. Principle 11 of the Declaration of Principles on Equality requires *inter alia*, states to “(b) Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that conflict or are incompatible with the right to equality”.⁵³ ERT believes that discriminatory legislation constitutes a fundamental breach of a State’s obligation to respect the right to equality. This approach is inspired, in part, by the Committee’s recognition that Article 26 of the Covenant in particular is

⁵¹ Office of the High Commissioner for Human Rights, *Press briefing note - Ukraine / law on homosexuality, Guatemala killings*, 5 October 2012.

⁵² *Ibid.*

⁵³ See above, note 4, Principle 11, p. 10.

“concerned with the obligations imposed on States parties in regard to their legislation and the application thereof”.⁵⁴ As the Committee has stated in its General Comment No. 18, “(...) when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.”⁵⁵

105. In addition, Principle 11 draws from a number of sources of international human rights law. In addition to Articles 2(1)(c) of the International Convention on the Elimination of All Forms of Racial Discrimination,⁵⁶ Articles 2(f) and (g) of the Convention on the Elimination of All Forms of Discrimination Against Women,⁵⁷ and Article 4(1)(b) of the Convention on the Rights of Persons with Disabilities,⁵⁸ Principle 11 draws inspiration from Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, in relation to which the Committee on Economic, Social and Cultural Rights has stated that:

*(...) [L]aws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.*⁵⁹

106. As is stated elsewhere in this submission, ERT believes that the similar nature and purpose of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights and Article 2(1) of the International Covenant on Civil and Political Rights indicates that the two articles should be construed consistently with each other, and that therefore the interpretations of the articles by the relevant Treaty Bodies should be similarly consistent.

⁵⁴ See above, note 1, Para 12.

⁵⁵ See above, note 1, Para 12.

⁵⁶ Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

⁵⁷ States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.

⁵⁸ States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake: (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

⁵⁹ See above, note 36, Para 37.

107. ERT wishes therefore to raise its concern in relation to a number of legislative provisions which conflict with the right to equality, most notably by discriminating against persons based on their sexual orientation or gender identity.
108. Numerous provisions of Ukrainian law discriminate against same-sex couples based on their sexual orientation. Article 51 of the Constitution of Ukraine and Article 21 of the Family Code define marriage as between a man and a woman, discriminating against same sex couples in access to marriage. In addition, Article 74 of the Family Code which recognises the right to common joint ownership of joint matrimonial property applies only to unmarried opposite-sex couples and not unmarried same-sex couples. Article 211(3) of the Family Code prohibits same sex couples from adopting children.
109. This denial of legal recognition of same-sex couples has further consequences. Article 9 of the Law “On Citizenship of Ukraine” provides that the mandatory five-year term of residence in Ukraine in order to obtain citizenship does not apply to spouses of Ukrainian citizens. As Ukrainian law does not recognise same-sex partnerships and same-sex marriages, this clause directly discriminates against same-sex partners of Ukrainian citizens.
110. Article 4 of the Law “On Immigration” provides for the establishment of a quota for spouses of immigrants, but provides that spouses of Ukrainian citizens can receive permits for immigration regardless of this quota, thereby directly discriminating against same-sex partners of Ukrainian citizens and permanent residents in Ukraine with regards to immigration permits.
111. **ERT would therefore urge the Committee to recommend that Ukraine amend Article 51 of the Constitution and Articles 21 and 74 of the Family Code so as to provide legal recognition and protection for same-sex relationships. ERT also urges the Committee to recommend that Article 211(3) of the Family Code, Article 9 of the Law “On Citizenship of Ukraine” and Article 4 “Of the Law on Immigration” be amended to as not to discriminate between same-sex couples and opposite-sex couples.**
112. Official recognition of a sex change (and the corresponding change of name of a transgender person in relevant documents) is impossible without complex and costly surgical procedures. Although the law (“Fundamentals of Legislation of Ukraine on Health Care”, Article 51) contains no requirement for there to be corrective surgery before a medical certificate of a change of sex may be issued, such a requirement has been made via an order of the Ministry of Health Care of 3 February 2011, No. 60 “On improving the delivery of health care to those in need of a change (correction) of sex”.⁶⁰ As a result, a transsexual person who does not have the wish, or the means, to carry out corrective surgery, or whose health prevents such treatment, is forced to live with documents that do not match his/her psychological gender, appearance, and behaviour.

⁶⁰ Para 13 of the Procedures for observation of persons in need of change (correction) of sex.

113. Order No. 60 contains a number of prerequisites for a sex change, many of which can be considered entirely unreasonable; in particular, a change of sex is prohibited in the following cases:
- Where the person is under the age of 18;
 - Where the person is homosexual or a transvestite;
 - Where the person has any “sexually perverse tendencies”;
 - Where the person has morphological features which would make it difficult for them to adapt to their desired gender (such as androgyny or development of sex disorders);
 - Where hormonal or surgical intervention is not possible due to existing diseases;
 - Where such corrective surgery would be incompatible with the scope of sex change procedures recommended by the Commission on Change (Correction) of Sex of the Ministry of Health.
114. **ERT would therefore urge the Committee to recommend that Ministry of Health Care Order No. 60 of 3 February 2011 “On improving the delivery of health care to those in need of a change (correction) of sex” be amended so as to remove discriminatory provisions, and for Ukraine to reform the law on change of sex so as to remove any unnecessary obstacles for transgender persons.**
115. Article 212(1)(8) of the Family Code prohibits the adoption of children by persons suffering from diseases specified on a list approved by the Ministry of Health. An order of the Ministry of Health (No. 479 of 20 August 2008) included transsexualism on the list of diseases, thereby discriminating against persons on grounds of gender identity.
116. **ERT would therefore urge the Committee to recommend that Ministry of Health Care Order No. 479 of 20 August 2008 be amended so as to remove transsexualism from the list of diseases which prevent a person from adopting a child, and of Ukraine to reform the law on adoption so as to remove any limitations which unjustifiably discriminate on grounds of sexual orientation, gender identity, or health status.**

Annex I: Assessment of the Compatibility of Draft Law 0945 with the Covenant

Articles 19 and 2(1) of the Covenant

1. Article 19(2) of the Covenant provides that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

2. Article 19(3) of the Covenant provides that the rights contained within Article 19(2) can only be restricted where necessary (a) for respect of the rights or reputations of others or (b) for the protection of national security or of public order, or of public health or morals. Furthermore, the Human Rights Committee (the Committee) has said that any restrictions under Article 19(3) must also be “compatible with the provisions, aims and objectives of the Covenant”,⁶¹ including the non-discrimination provisions of the Covenant.⁶²
3. The non-discrimination provisions of the Covenant are to be found in Article 2(1), which provides that the rights contained within the Covenant must be respected and ensured “without distinction of any kind”, and Article 26, which provides for a freestanding right to non-discrimination “on any ground”.
4. Although sexual orientation is not explicitly listed as a ground upon which discrimination is prohibited in Articles 2(1) and 26, the Human Rights Committee has repeatedly recognised sexual orientation as a protected ground under both Articles since its Communication in *Toonen v Australia* in 1994.⁶³ Initially, the Committee took the view that sexual orientation was included as an aspect of the ground of “sex” which is listed in the Articles.⁶⁴ However, in the more recent Communication in *Young v Australia* in 2003,⁶⁵ the Committee stated that sexual orientation was a prohibited ground in its own right under the term “other status”. The Committee has since maintained the position that sexual orientation is a form of other status under Articles 2(1) and 26.

⁶¹ Human Rights Committee, *General Comment No. 34: On Article 19: Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34, 2011, Para 26. See also *Toonen v Australia*, Human Rights Committee, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, 1994, Para 8.3.

⁶² *Ibid.*, Para 26.

⁶³ Human Rights Committee, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, 1994.

⁶⁴ *Ibid.*, Para 8.7.

⁶⁵ Human Rights Committee, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000, 2003.

5. The Human Rights Committee has defined “discrimination” in its General Comment No. 18 as follows:

[T]he term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground (...) and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁶⁶

6. The Human Rights Committee has also made it clear that the prohibition on discrimination applies both to direct discrimination and indirect discrimination. The Committee has defined indirect discrimination as encompassing rules or measures which are neutral on their face but have detrimental effects which exclusively or disproportionately affect persons on prohibited grounds.⁶⁷
7. The Human Rights Committee has also made it clear that differential treatment can only be justified :

[I]f the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁶⁸

Case Law: Irina Fedotova v Russian Federation

8. In *Irina Fedotova v Russian Federation*⁶⁹ the Committee examined a law in the Russian oblast of Ryazan, the provisions of which were very similar to those in Draft Law 0945. Section 3.10 of the Ryazan Region Law on Administrative Offences created an administrative offence of “public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism) among minors” punishable by a fine between 1,500 and 2,000 rubles. An LGBT activist, Irina Fedotova, was convicted of an offence under the law after displaying posters reading “Homosexuality is normal” and “I am proud of my homosexuality” near a secondary school.
9. The Committee held that there was “no doubt” that Ms Fedotova’s conviction under this law amounted to restrictions on her right to freedom of expression under Article 19(2) and, in

⁶⁶ Human Rights Committee, *General Comment No. 18: Non-discrimination*, U.N. Doc. HRI/GEN/1/Rev.1 at 26, 1994, Para 7.

⁶⁷ See Human Rights Committee, *Althammer et al. v. Austria*, Communication No. 998/2001, U.N. Doc. CCPR/C/78/D/998/2001, 2003, Para 10.2.

⁶⁸ See above, note 66, Para 13.

⁶⁹ Human Rights Committee, Communication No. 1932/2010, UN Doc. CCPR/C/106/D/1932/2010, 19 November 2012.

particular, expression of her sexual identity and her search for understanding of that identity.⁷⁰

10. The Russian Federation put forward arguments that the restriction on freedom of expression was justified under Article 19(3) in that it was for the protection of the morals, health, rights and legitimate interests of children. ERT notes that the arguments put forward by the authors of Draft Law 0945 in the Explanatory Notes mirror those put forward by the Russian Federation in defence of the Ryazan Region Law.
11. In response to those arguments, the Committee recalled its General Comment No. 34 where it stated that:

*[T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations (...) for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations [under Article 19] must be understood in the light of universality of human rights and the principle of non-discrimination.*⁷¹

12. The Committee also recalled that any restrictions “must conform to the strict tests of necessity and proportionality”.⁷²
13. The Committee noted that the Ryazan Region Law restricted only propaganda of homosexuality, and not propaganda of heterosexuality or of sexuality generally, among minors, and that it thus made a distinction based on sexual orientation. The Committee was not convinced that such a restriction was based on reasonable and objective criteria and found no evidence whatsoever that would point to the existence of factors justifying such a distinction.⁷³
14. Although the Committee accepted that the protection of the welfare of children was a legitimate aim, it stated that Russia had failed to demonstrate why it was necessary, for any of the legitimate purposes in Article 19(3), to restrict an individual’s right to freedom of expression which involves expression of their sexual identity, calls for understanding of that sexual identity, or even engages children in discussion of issues relating to sexual orientation.

⁷⁰ Ibid., Para 10.2.

⁷¹ Human Rights Committee, *General Comment No. 34: On Article 19: Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34 (2011), Para 32.

⁷² See above, note 69, Para 10.3. See also Human Rights Committee, *General Comment No. 34: On Article 19: Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34, 2011, Para 22.

⁷³ See above, note 69, Para 10.6.

15. On that basis, the Committee held that the law violated Article 19(2), when read in conjunction with Article 26, in that it restricted freedom of expression and could not be justified under Article 19(3) of the Covenant.

Analysis of Draft Law 0945 with Articles 19 and 2(1)

16. Draft Law 0945 and the amendments which it makes to various other laws, including the Criminal Code of Ukraine, would constitute a significant restriction of the right to freedom of expression under Article 19(2), in that it would restrict the rights of persons in Ukraine to impart certain information and ideas in various media where such information or ideas were considered to “promote homosexuality”. This vague and undefined phrase could be understood to include: campaigning for, or supporting, equal rights for LGB persons; campaigning for, or supporting, legal recognition of same-sex couples; information on parades, marches and demonstrations by LGB people and LGB organisations; films, television shows, and articles about or featuring LGB people; sexual health awareness for LGB people; expressions of personal sexual identity; calls for understanding of that sexual identity; and any discussion of issues relating to sexual orientation.
17. Draft Law 0945 arguably goes considerably further than Section 3.10 of the Ryazan Region Law on Administrative Offences – which the Human Rights Committee held “no doubt” constituted a violation of Article 19(2) – in that it goes far beyond “public actions aimed at propaganda of homosexuality” and would cover production and distribution of products, the print media, broadcasting on television and radio, other publications, and would impose criminal sanctions for importing, distributing, manufacturing, storing, transporting or in any other way moving products, including films and videos, into Ukraine which “promote homosexuality”. As such, Draft Law 0945 goes far further than Section 3.10 of the Ryazan Region Law on Administrative Offices and therefore constitutes an even less permissible restriction under Article 19(2).
18. **ERT is therefore of the firm belief that Draft Law 0945 constitutes a clear violation of Article 19(2) which cannot be justified under Article 19(3).**
19. ERT is equally concerned that Draft Law 0945 constitutes a violation of Article 2(1) in that it discriminates against persons based on their sexual orientation in the enjoyment of the right to freedom of expression in a similar way to the Ryazan Region Law considered by the Human Rights Committee in Fedotova.
20. Draft Law 0945 undoubtedly makes a distinction based on sexual orientation in that it only applies to publications which promote homosexuality and not heterosexuality or sexuality generally. This distinction also amounts to an exclusion and a restriction in that it prohibits such publications and products with the threat of sanctions, including criminal sanctions, rather than merely regulating them in a different way.

21. As noted above at paragraph 6, the Human Rights Committee has made it clear that the prohibition on discrimination applies both to direct discrimination and indirect discrimination and has defined indirect discrimination as encompassing rules or measures which are neutral at face value but have detrimental effects which exclusively or disproportionately affect persons on prohibited grounds.⁷⁴
22. Whether it is the purpose of Draft Law 0945 or not, the effect of Draft Law 0945 is to impair the enjoyment of the right to freedom of expression by all persons on an equal footing. Although Draft Law 0945 formally applies to all persons rather than just LGB persons, and could therefore be argued to be neutral at face value, it will inevitably have a disproportionate impact on LGB persons. It is self-evident that LGB persons are more likely to wish to impart and publish information on LGB issues – whether this be campaigns for equal rights for LGB persons; information on parades, marches and demonstrations by LGB people and LGB organisations; or expressions of personal sexual identity – than non-LGB persons. Draft Law 0945 will therefore have detrimental effects which disproportionately affect LGB persons, on the prohibited ground of sexual orientation.
23. Indeed, as the Human Rights Committee made clear in *Fedotova*, a law which prohibits “propaganda” or “promotion of homosexuality”, as opposed to heterosexuality or sexuality generally, will be considered as constituting differential treatment on grounds of sexual orientation in and of itself.
24. Such differential treatment will only be justified if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. The protection of the welfare of children – presented in the Draft Law’s title and the Explanatory Notes as the reason for its introduction – is undoubtedly a legitimate aim under the Covenant. However, the proponents of Draft Law 0945 have not shown why restricting the ability of persons to undertake activities which could be interpreted as “promoting homosexuality” is necessary to protect the welfare of children. Indeed, Draft Law 0945 is in fact likely to harm the welfare of children and violate a number of provisions of the Convention on the Rights of the Child.
25. In *Fedotova*, the Human Rights Committee found that Russia had failed to show that a restriction on the right to freedom of expression in relation to “propaganda of homosexuality” among minors as opposed to propaganda of heterosexuality or sexuality generally was based on any reasonable and objective criteria. Furthermore, the Committee found no evidence whatsoever which would point to the existence of factors justifying the distinction based on sexual orientation. Given the close similarity between the nature and purpose of Draft Law 0945 and the Ryazan Region Law considered in *Fedotova*, the same concerns will be valid for the Draft Law.

⁷⁴ See above note 69, Para 10.2.

26. A further argument put forward in the Explanatory Notes as a reason for the introduction of the Draft Law is that it is necessary to prevent the spread of HIV/AIDS. Yet Draft Law 0945 cannot be considered as a reasonable method to achieve this aim for a number of reasons. First, Draft Law 0945 would only apply to the promotion of homosexuality, whereas HIV/AIDS affects both homosexuals and heterosexuals. Second, the Draft Law is entirely free of any reference to education on sexual health, healthcare measures, the use of contraceptives or anything else which could reasonably be considered relevant to the spread of HIV/AIDS. Indeed, the United Nations Development Programme HIV/AIDS Group has explicitly condemned the Draft Law, stating:

The proposed legislation is also motivated by the assumption that media discussion of same-sex relations creates conditions conducive to the spread of HIV. There is no evidence to support this assumption. On the contrary, it has been asserted that censoring information and HIV/AIDS awareness activities presents a threat to the health and life of men who have sex with men and the wider population, and may only exacerbate the HIV prevalence. Discrimination on the basis of sexual orientation, as promoted by the proposed legislation, may hamper access to health care information and services, increasing the risk of contracting sexually transmitted infections, including HIV.⁷⁵

27. Draft Law 0945 therefore constitutes a discriminatory restriction of Article 19(2) taken in combination with Article 2(1) which cannot be justified and therefore amounts to a violation of both of those Articles.

Article 26

28. Whereas Article 2(1) prohibits discrimination in the enjoyment of the rights contained within the Covenant, Article 26 provides a freestanding and autonomous right to non-discrimination. The Human Rights Committee has elaborated on what this means in practice in its General Comment No. 18:

[A]rticle 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply

⁷⁵ United Nations Development Programme, HIV/AIDS Group, *Law Amendments Banning the Promotion of Homosexuality, "On introduction of Changes to Certain Legislative Acts of Ukraine (regarding protection of children's rights on the safe information sphere)", Draft Law Initiative #8711, Frequently Asked Questions*, June 2012.

*with the requirement of article 26 that its content should not be discriminatory.*⁷⁶

29. As noted above in paragraph 7, the Human Rights Committee also provided in General Comment No. 18 the test by which differential treatment will not amount to unlawful discrimination: the criteria for the differential treatment must be “reasonable and objective” and “the aim [must be] to achieve a purpose which is legitimate under the Covenant”.⁷⁷

Case Law: Irina Fedotova v Russian Federation

30. In *Irina Fedotova v Russian Federation*,⁷⁸ the Human Rights Committee also analysed Section 3.10 of the Ryazan Region Law on Administrative Offences for its compatibility with Article 26. The Committee adopted the same reasoning as in relation to its compatibility with Article 19 and concluded that the differential treatment on grounds of sexual orientation could not be justified.

31. In respect of the first limb of the test to assess justification of the differential treatment, the Committee concluded that the Russian Federation

*(...) [had] not shown that a restriction on the right to freedom of expression in relation to “propaganda of homosexuality” – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria.*⁷⁹

32. In respect of the second limb of the test, although the Committee accepted that protecting the welfare of children was a legitimate aim under the Convention, it concluded that the Russian Federation had failed to show why:

*... it was necessary, for one of the legitimate purposes of article 19, paragraph 3, of the Covenant to restrict the author’s right to freedom of expression on the basis of section 3.10 of the Ryazan Region Law, for expressing her sexual identity and seeking understanding for it, even if indeed, as argued by the State party, she intended to engage children in the discussion of issues related to homosexuality.*⁸⁰

⁷⁶ See above, note 66, Para 12.

⁷⁷ Ibid., Para 13.

⁷⁸ See above, note 69.

⁷⁹ See above, note 69, Para 10.6.

⁸⁰ See above, note 69, Para 10.8.

33. As such, although the purported aim was legitimate, the Russian Federation was not able to show why the law was necessary to further that aim. The Committee therefore held that the law also violated Article 26 of the Convention.

Analysis of Draft Law 0945 with Article 26

34. Draft Law 0945 clearly falls within the scope of Article 26 as it is both “law” and impacts upon fields “regulated and protected by public authorities” namely the media, including film, television, radio, and print media, as well as all publications generally. The content of the law must not, therefore, be discriminatory. In the view of ERT, for the reasons set out in paragraphs 20 to 23, the legislation is clearly discriminatory.
35. Differential treatment will only not be discriminatory under Article 26 “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”. As noted in paragraphs 24 to 26 above, while the stated aims of this legislation – the protection of public health and the protection of the moral welfare of children – may be considered legitimate, the draconian and oppressive nature of the legislation can in no way be considered “reasonable and objective”.
36. Thus, it can be seen that the Draft Law constitutes differential treatment which is neither reasonable nor objective, and which cannot be said to aim to achieve a purpose which is legitimate under the Covenant. For those reasons, in addition to violating Article 19 both alone and in combination with Article 2, Draft Law 0945 also violates Article 26.