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5559173. Charity number  
1113288.

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## The Equal Rights Trust

Parallel report submitted to the 52<sup>nd</sup> session of the Committee on Economic, Social  
and Cultural Rights in relation to the sixth periodic report submitted by:

### Ukraine

March 2014

### Statement of Interest

1. The Equal Rights Trust (ERT) submits this written information to the United Nations Committee on Economic, Social and Cultural Rights (the Committee) commenting on the sixth periodic report by Ukraine submitted under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural 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 Article 2(2) of the Covenant which requires that states parties respect and ensure the enjoyment of the rights provided in the Covenant without discrimination of any kind.
5. In assessing Ukraine's adherence to its obligations under Article 2(2), the submission relies, in part, on the interpretation of the Article provided by the Committee in its General Comment No. 20.<sup>1</sup>
6. The submission also relies upon the Declaration of Principles on Equality (the Declaration),<sup>2</sup> 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".<sup>3</sup> It has also been endorsed by the Parliamentary Assembly of the Council of Europe.<sup>4</sup>
7. This submission is divided into three parts. The first addresses paragraph 3 of the list of issues to be taken up in connection with the consideration of the sixth periodic report of Ukraine, adopted by the Committee at its 52<sup>nd</sup> session, namely the implementation of the Law "On the principles of prevention and combating discrimination" adopted on 6 September 2012 ("the Law"), the principle legislation providing protection from discrimination in Ukraine. The second addresses paragraph 4 of the list of issues, namely the discrimination in employment in Ukraine. The third highlights other pieces of legislation in Ukraine which violate Article 2(2) of the Covenant by discriminating in the enjoyment of the rights protected thereunder.

## **List of Issues: Paragraph 3: Implementation of the Law "On Principles of Prevention and Combating Discrimination in Ukraine"**

8. The Committee asked Ukraine to:

*[P]rovide information on the implementation of the Law on the principles of prevention and combating discrimination in Ukraine (entered into force on 4 October 2012) and clarify whether the law provides for a definition of discrimination consistent with article 2,*

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<sup>1</sup> 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.

<sup>2</sup> *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

<sup>3</sup> *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para 93.

<sup>4</sup> 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](http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380).

*paragraph 2, of the Covenant, including direct and indirect discrimination.*<sup>5</sup>

### **Definition of Direct Discrimination**

9. The Law defines direct discrimination in Article 1(6) as:

*[D]ecisions, 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.*

10. The Committee has defined direct discrimination in its General Comment No. 20 as:

*[W]hen an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant).*<sup>6</sup>

11. 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.*

12. Comparing the definition in the Ukrainian legislation with the definitions used by the Committee and in the Declaration, 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. Secondly, the definition does not include the second situation in the Committee’s and the Declaration’s definition of direct discrimination, namely “detrimental acts or omissions on the basis of prohibited

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<sup>5</sup> Committee on Economic, Social and Cultural Rights, *List of issues in relation to the sixth periodic report of Ukraine*, UN Doc. E/C.12/UKR/Q/6, 19 December 2013, Para 3.

<sup>6</sup> See above, note 1, Para 10(a).

grounds where there is no comparable similar situation” (in General Comment No. 20) and “when, for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment” (in the Declaration). 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.

13. **ERT would therefore urge the Committee to recommend that the definition of direct discrimination in Article 1(6) of the Law be amended to bring it in line with the Committee’s General Comment No. 20 and the Declaration.**

#### **Definition of Indirect Discrimination**

14. The Law defines indirect discrimination in Article 1(3) as:

*[D]ecisions, 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.*

15. The Committee has defined indirect discrimination in its General Comment No. 20 as:

*[L]aws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination.<sup>7</sup>*

16. 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.*

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<sup>7</sup> *Ibid.*, Para 10(b).

17. The first half of Article 1(3), which defines what constitutes indirect discrimination, is broadly in line with the definitions in General Comment No. 20 and 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 General Comment No. 20 and the Declaration. General Comment No. 20 provides that exceptions to discrimination (including indirect discrimination) must be:

*[R]easonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.<sup>8</sup>*

18. Similarly, 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”.<sup>9</sup> The terminology of the exception in Article 1(3) appears to confuse justifiable indirect discrimination with positive action. ERT believes that the definition in Article 1(3) risks confusion and misinterpretation, and potentially injustice if interpreted strictly.
19. **ERT would therefore urge the Committee to recommend that the definition of indirect discrimination in Article 1(3) of the Law be amended to bring it in line with the Committee’s General Comment No. 20 and the Declaration.**

### **Other Gaps and Weaknesses in the Ukrainian Law “On Principles of Prevention and Combating Discrimination in Ukraine”**

20. In addition to the deficiencies in the definitions of direct and indirect discrimination in the Ukrainian Law, ERT also believes that the Law contains a number of other gaps and weaknesses such that it falls short of what is required under Article 2(2) of the Covenant, as interpreted in General Comment No. 20.

#### ***Definition of Discrimination Per Se***

21. 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:

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<sup>8</sup> *Ibid.*, Para 13.

<sup>9</sup> *Ibid.*

*[D]ecisions, 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.*

22. Christian Ahlund and Winnie Sordrager, writing on behalf of the European Commission against Racism and Intolerance, have highlighted two significant problems with this definition in their Comments on the Draft Law on the Principles of Prevention and Combating Discrimination in Ukraine.<sup>10</sup> First, international law and best practice defines discrimination as either “direct” or “indirect” and unambiguous definitions for both have been developed which are widely accepted. If a general definition is proposed, it must subsume both kinds. This may be a difficult task. There is therefore no need for a general definition of discrimination, as inaccurate wording risks confusion.
23. Secondly, 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 assume intent for discrimination to be established. This is contrary to the interpretation of the term “discrimination” in Article 2(2) of the Covenant, which the Committee has defined by reference to the “*intention or effect*” (emphasis added) of the distinction, exclusion, restriction or preference or other differential treatment, thereby explicitly negating any requirement for intent for discrimination to be established.<sup>11</sup> The drafters of the Declaration reached the same conclusion as the Committee, such that the final part of Principle 5 reads: “An act of discrimination may be committed intentionally or unintentionally”.
24. **ERT would therefore urge the Committee to recommend that the general definition of discrimination in Article 1(2) of the Law be deleted.**

### ***Protected Grounds***

25. The 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.
26. 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-

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<sup>10</sup> 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](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).

<sup>11</sup> See above, note 1, Para 7.

recognised at international law. In its Principle 5, the Declaration of Principles on Equality provides an extensive list of grounds, complemented by a test to establish whether additional grounds should be admitted for protection.

27. The list of explicitly protected grounds in the Declaration goes beyond the list contained within Article 1(2) of the Law. In particular, the Declaration, consistent with various international instruments and the interpretations of human rights treaty bodies, requires explicit protection from discrimination on grounds of descent,<sup>12</sup> pregnancy,<sup>13</sup> maternity,<sup>14</sup> civil status,<sup>15</sup> carer status, birth,<sup>16</sup> national origin,<sup>17</sup> nationality,<sup>18</sup> sexual orientation,<sup>19</sup> gender identity,<sup>20</sup> health status<sup>21</sup> and economic status.<sup>22</sup> 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 Committee in interpreting the “other status” provision in the Covenant as including these grounds. Thus, the open-ended list of protected grounds in Article 1(2) must be read as

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<sup>12</sup> Descent is a prohibited ground under Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>13</sup> 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. Many national equality laws also contain pregnancy as a separate ground. See, for example, section 4 of the Equality Act 2010 (United Kingdom) and the Pregnancy Discrimination Act of 1978 (United States of America).

<sup>14</sup> 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. Many national equality laws also contain maternity as a separate ground. See, for example, section 4 of the Equality Act 2010 (United Kingdom)

<sup>15</sup> The Human Rights 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), UN Doc. CCPR/C/OP/2 at 205 (1990); and *Sprenger v. the Netherlands* (Communication No. 395/1990), UN Doc. CCPR/C/44/D/395/1990 (1992)).

<sup>16</sup> Birth is a prohibited ground under Articles 2(2) and 26 of the International Covenant on Economic, Social and Cultural Rights.

<sup>17</sup> National origin is a prohibited ground under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.

<sup>18</sup> The Committee has stated that nationality is a prohibited ground under “other status” in Article 2(2) of the Covenant: 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 30.

<sup>19</sup> The Committee has stated that sexual orientation is a prohibited ground under “other status” in Article 2(2) of the Covenant: *Ibid.*, Para 32.

<sup>20</sup> The Committee has stated that gender identity is a prohibited ground under “other status” in Article 2(2) of the Covenant: *Ibid.*, Para 32.

<sup>21</sup> The Committee has stated that health status is a prohibited ground under “other status” in Article 2(2) of the Covenant: *Ibid.*, Para 33.

<sup>22</sup> The Committee has stated that economic and social situation, a term the meaning of which contains “social status”, is a prohibited ground under “other status” in Article 2(2) of the Covenant: *Ibid.*, Para 35.

including protection from discrimination on these grounds, if it is to be consistent with international human rights law.

28. Nevertheless, ERT regrets the failure to include these grounds explicitly in Article 1(2) of the 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 Law immediately.
29. The exclusion of explicit protection from discrimination on the basis of sexual orientation and gender identity is particularly troubling given the prevalence of such discrimination 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 reports, *One Step Forward, Two Steps Back: The State of LGBT persons in Ukraine in 2010-2011*<sup>23</sup> and *On the Threshold: The Situation of LGBT people in Ukraine in 2013*.<sup>24</sup> 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.<sup>25</sup> Ukraine received a score of just 12%, ranking 44<sup>th</sup> out of 49 countries in Europe.
30. **ERT would therefore urge the Committee to recommend that the following grounds be explicitly included in the Law: descent, pregnancy, maternity, civil status, carer status, birth, national origin, nationality, sexual orientation, gender identity, health status and economic situation.**

### ***Multiple Discrimination***

31. The Law does not prohibit multiple, including intersectional, discrimination. This phenomenon has been recognised by the Committee in its General Comment No. 20 which states:

*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*

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<sup>23</sup> 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>.

<sup>24</sup> Nash Mir, *On the Threshold: The Situation of LGBT people in Ukraine in 2013*, 2013, available at: [http://www.gay.org.ua/publications/lgbt\\_ukraine\\_2013-e.pdf](http://www.gay.org.ua/publications/lgbt_ukraine_2013-e.pdf).

<sup>25</sup> 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.



*unique and specific impact on individuals and merits particular consideration and remedying.*<sup>26</sup>

32. 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 Covenant.<sup>27</sup>
33. Principle 5 of the Declaration of Principles of Equality also prohibits multiple discrimination through the use of the term “or a combination of any of these grounds” after listing an extensive range of 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”. The inclusion of multiple discrimination in the Declaration reflects the 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.
34. **ERT would therefore urge the Committee to recommend that the Law be amended so as to explicitly recognise and prohibit multiple discrimination in line with the Committee’s General Comment No. 20 and the Declaration.**

#### ***Discrimination by Association and Discrimination by Perception***

35. The Law does not include provisions on discrimination by association or discrimination by perception. The Committee has emphasised the importance of recognising and prohibiting these particular forms in its interpretation of Article 2(2) in General Comment No. 20, which states 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).*<sup>28</sup>

36. Similarly, 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.*

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<sup>26</sup> See above, note 1, Para 17.

<sup>27</sup> *Ibid.*, Para 27.

<sup>28</sup> See above, note 1, Para 16.

37. This Principle draws inspiration from a number of sources of international human rights law and reflects the current international understanding of the right to non-discrimination.
38. **ERT would therefore urge the Committee to recommend that the Law be amended so as to recognise and 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.**

### *Scope*

39. The scope of the 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 Law.
40. 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 Law.<sup>29</sup> 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. 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.
41. The Committee has interpreted Article 2(2) of the Covenant as “require[ing] States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant”.<sup>30</sup> The Declaration of Principles of Equality, drawing inspiration from various sources of international human rights law, defines the scope of the right to equality as “all areas of activity regulated by law”.<sup>31</sup> As the omissions listed above indicate, the scope of the 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 and other international human rights instruments.
42. **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.**

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<sup>29</sup> See above, note 10.

<sup>30</sup> See above, note 1, Para 7.

<sup>31</sup> See above, note 2, Principle 8.

### **Reasonable Accommodation**

43. Despite prohibiting discrimination on grounds of disability, the 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 Convention on the Rights of Persons with Disabilities (CRPD), it does not actually prohibit discrimination on grounds of disability. Instead, the law 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.
44. The interpretation of Article 2(2) of the Covenant by the Committee in its General Comment No. 20, however, 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.<sup>32</sup>*

45. Similarly, Principle 13 of the Declaration 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.*

46. This principle draws inspiration from a number of sources, particularly the 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

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<sup>32</sup> See above, note 1, 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.

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:

*[N]ecessary 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.*

47. ERT therefore believes that the lack of recognition in Ukrainian legislation of the denial of reasonable accommodation as a form of discrimination on grounds of disability is incompatible with Article 2(2) of the Covenant, and the Convention on the Rights of Persons with Disabilities.
48. **ERT therefore urges the Committee to recommend that the Law be amended so as to recognise a failure to make reasonable accommodation as a form of discrimination on grounds of disability in order to comply with Article 2(2) of the Covenant.**
49. 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. 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.
50. **ERT would also urge the Committee to take a progressive interpretation of the right to non-discrimination in Article 2(2) of the Covenant, in line with Principle 13 of the Declaration of Principles of Equality, and interpret Article 2(2) 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 Law.**

### ***Positive Action***

51. 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".<sup>33</sup> The need for states to take positive action measures to ensure the enjoyment of all economic, social and cultural rights in the Covenant has been recognised by the Committee in various concluding observations.<sup>34</sup>

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<sup>33</sup> See above, note 2, Principle 3, p. 5.

<sup>34</sup> See, for example, Committee on Economic, Social and Cultural Rights: *Concluding Observations: Germany*, UN Doc. E/C.12/1993/17, 5 January 1994, Para 10, and Committee on Economic, Social and Cultural Rights: *Concluding Observations: Costa Rica*, UN Doc. E/C.12/CRI/CO/4, 4 January 2008, Para 39.

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

*[S]pecial 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.*

53. 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.

54. ERT believes that there is a significant weakness in the Anti-Discrimination Law in relation to positive action, namely that positive action is permissible rather than obligatory. ERT is concerned that, given the language in Articles 7(1) and 9, these provisions may be interpreted as permitting positive action only in exceptional circumstances, and indeed as an exception to the right to non-discrimination itself. This permissive approach contrasts with the emerging international consensus that positive action is a necessary element of the right to equality, rather than merely an exception to it. Principle 3 of the Declaration states:

*To be effective, the right to equality requires positive action.*

*Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular group, is a necessary element within the rights to equality.*

55. **ERT would therefore urge the Committee to recommend that the Law be amended so as to *require*, and not merely permit, positive action to be taken and for Ukraine to take specific and substantial measures of positive action to accelerate progress towards equality of all disadvantaged groups.**

### ***Access to Justice***

56. Article 14 of the 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 Law 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.

57. The importance of effective access to justice in giving effect to the right to equality cannot be understated and ERT is concerned by the absence of detailed provisions governing the procedure to bring a case of discrimination in the 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.*

59. The 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 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 for victims of discrimination 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. In practice, “access to justice” comprises a number of elements, amongst them access to judicial and/or administrative procedures, and independent and impartial investigative bodies. The Committee has stated that States should ensure the existence of suitable institutions to deal with allegations of discrimination, which “customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons”.<sup>35</sup> Such institutions “should be accessible to everyone without discrimination”.<sup>36</sup> The Committee has also stated that:

*These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations (...) including actions or omissions by private actors.*<sup>37</sup>

61. **ERT therefore urges the Committee to recommend that the 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.**

### ***Right-Holders***

62. Principle 9 of the Declaration provides that:

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<sup>35</sup> See above, note 1, Para 40.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

*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.*

63. Article 14(1) of the 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. There are no provisions which would permit legal persons to assert a right to protection against discrimination.
64. **ERT would therefore urge the Committee to recommend that the Law be clarified so as to ensure that legal persons are able to assert a right to protection against discrimination.**

### ***Victimisation***

65. 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.*

66. The Law does not contain any provisions which prohibit victimisation.
67. **ERT urges the Committee to recommend that the 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.**

### ***Standing***

68. 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.*

69. 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, it is necessary to allow legal entities to act on their own behalf.
70. **ERT urges the Committee to recommend that the Law be amended so as to allow legal entities to engage in judicial proceedings on their own behalf.**

### ***Evidence and Proof***

71. The Law contains no provisions for a reversal of the burden of proof in civil cases and indeed no procedural rules at all related to civil or administrative mechanisms of eliminating discrimination. The reversal (or transfer) of the burden of proof is a well-recognised norm in equality laws around the world, seen as necessary to ensure that victims are able to access justice and secure redress for the discrimination which they have experienced. Indeed, reflecting the international consensus in this area, the Committee has stated in General Comment No. 20, in relation to Article 2(2) of the Covenant, 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.<sup>38</sup>*

72. Similarly, 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.*

73. **ERT therefore urges the Committee to recommend that the Law be amended to provide for a reversal of the burden of proof in civil proceedings.**

### ***Remedies***

74. Article 15 of the Law sets out the remedies available, namely compensation for material damage and moral damage.

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<sup>38</sup> See above, note 1, Para 40.



75. ERT believes that Article 15, which provides only for compensation for material damage and moral damage as a remedy, is insufficient. The Committee itself has stated that institutions dealing with allegations of discrimination, including courts, should be empowered to provide “effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies”.<sup>39</sup>

76. 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.*

77. **ERT therefore urges the Committee to recommend that Article 15 of the 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.**

**List of Issues: Paragraph 4(a): Prohibition of Discrimination in Employment on Grounds of Age, Sexual Orientation and Nationality**

78. The Committee asked Ukraine to:

*[I]ndicate (...) whether discrimination in employment on grounds of age, sexual orientation and nationality is prohibited (...)*<sup>40</sup>

79. Discrimination in employment in Ukraine is prohibited under two separate pieces of legislation: the aforementioned Law “On Principles of Prevention and Combating Discrimination in Ukraine” and the Labour Code.

**Law “On Principles of Prevention and Combating Discrimination in Ukraine”**

80. Article 4 of the Law “On Principles of Prevention and Combating Discrimination in Ukraine” (“the Law”) sets out the scope and includes “labour relations” as an area in which discrimination is prohibited. However, Article 1(2) of the Law, which sets out the grounds upon which discrimination is prohibited, omits both sexual orientation and

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<sup>39</sup> *Ibid.*

<sup>40</sup> See above, note 5, Para 4.

nationality, both of which have been recognised by the Committee as requiring protection under the “other status” provision in Article 2(2).<sup>41</sup> Age is included.

## **Labour Code**

81. Article 2 of the Labour Code of Ukraine states:

*Ukraine provides for equal employment rights for all citizens regardless of their origin, social and property status, race and ethnicity, gender, language, political opinion, religion, occupation, residence and other circumstances.*

82. While not explicitly stating so, this provision does appear to prohibit discrimination in the enjoyment of “employment rights”, however it is unclear whether the scope of these employment rights covers the entirety of Articles 6 and 7 of the Covenant which provide for the right to work and the right to just and favourable conditions of work respectively.

83. In any event, Article 2 does not include age, sexual orientation or nationality. While the term “other circumstances” could potentially be interpreted so as to include age and sexual orientation, this can in no way be guaranteed. Indeed, in its decision No. 8-рп/2007 of 16 October 2007, the Constitutional Court of Ukraine held that the phrase “other characteristics” in Article 24 of the Constitution (which prohibits discrimination) did not include age. Although the Anti-Discrimination Law contains age as a protected characteristic, indicating that the legislature intended for discrimination on the basis of age to be prohibited, the Labour Code itself was not so amended. There has been no jurisprudence on whether sexual orientation is a protected ground via the “other circumstances” / “other characteristics” provisions in the Constitution, the Law “On Principles of Prevention and Combating Discrimination in Ukraine” or the Labour Code.

84. Article 2 of the Labour Code probably excludes nationality from recognition as a protected characteristic under “other circumstances” by stating that equal employment rights are enjoyed only by “citizens”. Although the term “citizens” is meant very broadly in the Ukrainian legal tradition and is usually synonymous with “person”, it would be preferable for the law to be amended to include a general prohibition of discrimination on the basis of nationality in the area of employment, and formulate narrow exceptions if necessary.

## **Other Pieces of Legislation in Ukraine which Violate Article 2(2) of the Covenant**

85. As the Committee has stated in its General Comment No. 20, the obligations of states parties under Article 2(2) requires that:

*Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to*

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<sup>41</sup> See above, note 1, Paras 32 and 30 respectively.

*discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.*<sup>42</sup>

86. Similarly, Principle 11(b) of the Declaration require states to “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”.<sup>43</sup>
87. 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 discriminate in relation to the exercise and enjoyment of Covenant rights.

### **Family Code of Ukraine and Ministry of Health Care Order No. 479 of 20 August 2008**

88. Article 21(1) of the Family Code of Ukraine provides that a marriage is a “family union between a woman and a man” thus excluding same-sex couples from marriage. Article 74, which recognises the right to common joint ownership of property, applies only to unmarried opposite-sex couples and not unmarried same-sex couples. Article 211(3) prohibits same sex couples from adopting children.
89. Article 10(1) of the Covenant states that:

*The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.*

90. ERT believes that the provisions of the Family Code referred to in paragraph 92 violate Article 10(1) of the Covenant both alone and in combination with Article 2(2). Whilst the Committee has not yet provided a definition of “the family” in Article 10(1), ERT believes that the term should not be considered to exclude same-sex couples living together in a manner equivalent to spouses or cohabiting opposite-sex couples, particularly given that some same-sex couples will be raising children. An inclusive interpretation such as this would be consistent with the recognition of the Committee that Article 2(2) prohibits discrimination on the basis of sexual orientation which, by its logical extension, should extend to same-sex couples. To protect only single LGBT people in the enjoyment of their economic, social and cultural rights and not same-sex couples – personal relationships being the natural expression of one’s sexual orientation – of certain economic, social and cultural rights, particular the enjoyment of the right to protection and assistance to the family provided under Article 10(1), would be to deny that same-sex couples, with or without children, can constitute a family contrary to the growing international consensus that such families are as valid as “traditional” families.

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<sup>42</sup> See above, note 1, Para 37.

<sup>43</sup> See above, note 2, Principle 11(b).

91. The Family Code of Ukraine offers significant protection to married couples in Ukraine. That such protections are not offered to families headed by a same-sex couple constitutes a violation of Article 10(1) in and of itself through the state's failure to offer the "widest possible protection and assistance" to the family by providing such protection and assistance to some, but not all, families.
92. Further, the Family Code violates Articles 2(2) and 10(1) taken in combination by discriminating on the ground of sexual orientation as to which families receive protection and assistance. The Family Code provides protection and assistance only to families headed by an opposite-sex (and therefore heterosexual) couple and not a same-sex (and therefore homosexual or bisexual) couple, thereby making a distinction solely on the ground of the sexual orientation of the couple.
93. Article 211(3) of the Family Code causes particular harm by preventing same-sex couples from adopting children, and from preventing one party in a same-sex couple from adopting the child of the other party, where such a child was born, for example, as part of a previous opposite-sex relationship. This leaves such children with no legal ties or protection to one of its two parents, despite both parents raising the child together, and leaves the child at significant risk were its biological parent to fall ill or die.
94. Similarly, Ministry of Health Care Order No. 479 of 20 August 2008 prohibits transgendered persons from adopting children by including all conditions contained within F64 (gender identity disorders) in the International Statistical Classification of Diseases and Related Health Problems (ICD-10) in the list of "diseases" which render a person ineligible to adopt.
95. **ERT therefore urges the Committee to recommend that Articles 21(1), 74 and 211(3) be amended to ensure that same-sex couples are permitted to adopt children and to ensure that families headed by same-sex couples receive the same level of protection and assistance afforded to families headed by married opposite-sex couples under the Family Code. ERT also urges the Committee to recommend that Ministry of Health Care Order No. 479 of 20 August 2008 be amended so as not to prevent transgendered persons from adopting children.**

#### **Ministry of Health Care Order No. 60 of 3 February 2011**

96. Article 12(1) of the Covenant sets out the right of everyone "to the enjoyment of the highest attainable standard of physical and mental health". As with all other rights under the Covenant, Article 2(2) requires that this right be enjoyed "without discrimination of any kind".
97. The right to health under Article 12(1) has been interpreted broadly by the Committee to include "the right to control one's health and body, including sexual and reproductive freedom".<sup>44</sup> ERT believes that this should be interpreted to include the right to medical intervention, where necessary, for a person whose gender identity does not match their

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<sup>44</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4, 2000, Para 8.

biological or physical gender in part or in whole, and who wishes to undergo corrective surgery.

98. Although Article 51 of the Law on “Fundamentals of Legislation of Ukraine on Health Care” (change (“correction”) of sex) does not set out any preconditions for an individual to undergo sex reassignment surgery, Ministry of Health Care Order No. 60 of 3 February 2011, No. 60 (On improving the delivery of health care to those in need of a change (correction) of sex) does. Order No. 60 sets out a long list of cases in which sex reassignment may not be carried out. The list includes:
  - Where the person lives with someone under the age of 18;
  - Where the person is homosexual; and
  - Where there are “gross violations of social adaptation” such as unemployment, homelessness, alcoholism, drug abuse or antisocial behaviour.
99. ERT believes that these restrictions are unjustifiable limitations on the right to the highest attainable standard of physical and mental health, particularly the right to control one’s health and body, including sexual and reproductive freedom.
100. Further, at least one of these restrictions amounts to unjustifiable discrimination contrary to Article 2(2) of the Covenant in that it discriminates against persons on the basis of their sexual orientation.
101. **ERT would therefore urge the Committee to recommend that Ministry of Health Care Order No. 60 of 3 February 2011 be amended so as to remove discriminatory provisions, and for Ukraine to reform the law on sex reassignment so as to remove any unnecessary obstacles for transgender persons.**