



The Equal Rights Trust

**Draft Law 0945**  
**“On the Introduction of**  
**Changes to Certain**  
**Legislative Acts of Ukraine**  
**(regarding protection of**  
**children’s rights in the safe**  
**information sphere)”**

**Submission to the Verkhovna Rada**

February 2013

## **About the Equal Rights Trust**

The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat all forms of 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, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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**Draft Law 0945 “On the Introduction of Changes to Certain Legislative Acts of Ukraine (regarding protection of children’s rights in the safe information sphere)”:**

**Submission of the Equal Rights Trust to the Verkhovna Rada**

1. This document is submitted by The Equal Rights Trust (ERT), an independent international human rights organisation whose purpose is to combat all forms of discrimination and promote equality as a fundamental human right and a basic principle of social justice. ERT is the only international human rights organisation which focuses exclusively on the rights to equality and non-discrimination as such. ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice. In the exercise of this mission, we sometimes send legal opinions on proposed legislation concerning the implementation and enforcement of these rights to governments and parliaments.
2. This legal opinion relates to Draft Law 0945 “On the Introduction of Changes to Certain Legislative Acts of Ukraine (regarding the protection of children’s rights in the safe information sphere)”.
3. ERT believes that Draft Law 0945 violates a number of human rights provisions in treaties to which Ukraine is party, including notably the right to freedom of expression and the rights to equality and non-discrimination, as set out the International Covenant on Civil and Political Rights and the European Convention on Human Rights.
4. ERT believes that Draft Law 0945, if adopted, would cause harm to members of the lesbian, gay and bisexual (LGB) community, to those who work with and support them, and to children – the group which the Draft Law purports to protect. In our view, enactment of the Draft Law would foster a culture of intolerance, division and stigmatisation incompatible with the “civil harmony” the Constitution of Ukraine seeks to promote.<sup>1</sup>

**Background**

5. ERT notes that Ukraine is a party to the International Covenant on Civil and Political Rights (the Covenant). Article 2(1) of the Covenant provides that:

*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>2</sup>*

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<sup>1</sup> Preamble to the Constitution of Ukraine.

<sup>2</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), Article 2(1).

6. Whilst Article 2(1) prohibits discrimination in the enjoyment of the rights contained within the Covenant, Article 26 provides for a freestanding right to non-discrimination:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

7. ERT further notes that in its Concluding Observations, when it last considered Ukraine in 2003, the United Nations Human Rights Committee urged Ukraine to:

*[P]rotect the freedom of opinion and expression, including the right to freedom of the press.<sup>3</sup>*

8. Similarly, the Committee urged Ukraine to:

*[E]nsure that there are clear standards protecting the right of individuals to engage in peaceful assembly and to exercise the right of free expression.<sup>4</sup>*

9. ERT further recalls that Ukraine signed the European Convention on Human Rights in November 1995 and ratified it in September 1997. Article 14 of the Convention provides that:

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>5</sup>*

10. ERT further recalls Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member states on measures to combat discrimination on grounds of sexual orientation or gender identity. Paragraphs 13 and 16 of the Recommendation state:

*13. Member states should take appropriate measures to ensure, in accordance with Article 10 of the Convention, that the right to freedom of expression can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity, including with respect to the freedom to receive and impart information on subjects dealing with sexual orientation or gender identity.*

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<sup>3</sup> United Nations Human Rights Committee, *Concluding Observations: Ukraine*, UN Doc. CCPR/C/UKR/CO/6, 28 November 2006, Para 14.

<sup>4</sup> *Ibid.*, Para 15.

<sup>5</sup> European Convention on Human Rights, Article 14.

16. *Member states should take appropriate measures to prevent restrictions on the effective enjoyment of the rights to freedom of expression and peaceful assembly resulting from the abuse of legal or administrative provisions, for example on grounds of public health, public morality and public order.*<sup>6</sup>

11. 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”.<sup>7</sup> 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”.<sup>8</sup>
12. Our specific concerns in respect to Draft Law 0945 are set out below. As an expert organisation on the right to equality, ERT believes that the adoption of Draft Law 0945 would constitute a serious setback in Ukraine’s progress towards creating a society which respects international human rights law including the rights to non-discrimination and equality, and which is free from discrimination.
13. **ERT therefore strongly urges the Verkhovna Rada to reject Draft Law 0945 in its entirety.**

#### **Draft Law 0945**

14. ERT notes that Draft Law 0945 would amend a number of existing Laws, as well as the Criminal Code of Ukraine, to prohibit the “promotion of homosexuality” in different fields.
15. Article I-1 of Draft Law 0945 would amend Article 2 of the Law on the Protection of Public Morality, adding to a list of products whose production and distribution is prohibited those products which have the purpose to “promote homosexuality”. Article I-1 would also insert a new term into Article 1 of the Law on the Protection of Public Morality defining “homosexuality” as “sexual relations between persons of the same sex”.
16. Article I-2 of Draft Law 0945 would amend Article 3 of the Law on the Print Media (Press) in Ukraine, with the effect of prohibiting print media from “promoting homosexuality”.

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<sup>6</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe.

<sup>7</sup> Office of the High Commissioner for Human Rights, *Press briefing note - Ukraine / law on homosexuality, Guatemala killings*, 5 October 2012.

<sup>8</sup> *Ibid.*

17. Article I-3 of Draft Law 0945 would amend Article 6 of the Law on Television and Radio, with the effect of prohibiting the broadcasting of the “promotion of homosexuality”.
18. Article I-4 of Draft Law 0945 would amend Article 28 of the Law on Publishing, such that it prohibits the publication of pornographic products and products which promote the cult of violence, brutality, and homosexuality.
19. Article I-5 of Draft Law 0945 would amend Article 300 of the Criminal Code of Ukraine, with the effect of criminalising the importation, distribution, manufacturing, storage, transportation or other movement of products which “promote homosexuality”, including films and videos, into Ukraine.
20. ERT notes the reasoning behind Draft Law 0945, as set out in its Explanatory Note, that “[t]he spread of homosexuality is a threat to national security, as it leads to an epidemic of HIV/AIDS, as well as destroying the family institution and may lead to a demographic crisis”.<sup>9</sup> ERT also notes the desired effects of Draft Law 0945 as set out in its Explanatory Note as “bringing to justice those guilty of violating laws protecting Ukrainian national security, public order and morality”.<sup>10</sup> ERT further notes the references to homosexuality in the Explanatory Notes as “moral depravity”,<sup>11</sup> “sexual debauchery”<sup>12</sup> and “sexual perversion”.<sup>13</sup> ERT considers this reasoning and the terms in which it has been expressed as retrograde and a profound insult to the dignity of homosexuals.

## **International Law**

### *(i) International Covenant on Civil and Political Rights: Articles 19 and 2(1)*

#### Articles 19 and 2(1)

21. 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.*

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<sup>9</sup> Original text in Ukrainian: “Поширення гомосексуалізму складає загрозу національній безпеці, оскільки приводить до епідемії ВІЧ/СНІД, а також руйнує інститут сім’ї та може призвести до демографічного кризису.”

<sup>10</sup> Original text in Ukrainian: “притягнення до відповідальності осіб, винних у порушенні законодавства у сфері захисту основ національної безпеки України, громадського порядку та моральності.”

<sup>11</sup> Original text in Ukrainian: “моральна розбещеність”.

<sup>12</sup> Original text in Ukrainian: “сексуальної розпусти”.

<sup>13</sup> Original text in Ukrainian: “сексуальних збочень”.

22. 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”,<sup>14</sup> including the non-discrimination provisions of the Covenant.<sup>15</sup>
23. 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”.
24. 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.<sup>16</sup> 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.<sup>17</sup> However, in the more recent Communication in *Young v Australia* in 2003,<sup>18</sup> 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.
25. 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.*<sup>19</sup>

26. The Human Rights Committee has also made it clear that the prohibition on discrimination applies both to direct discrimination and indirect discrimination. The

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<sup>14</sup> 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.

<sup>15</sup> *Ibid.*, Para 26.

<sup>16</sup> Human Rights Committee, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, 1994.

<sup>17</sup> *Ibid.*, Para 8.7.

<sup>18</sup> Human Rights Committee, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000, 2003.

<sup>19</sup> Human Rights Committee, *General Comment No. 18: Non-discrimination*, U.N. Doc. HRI/GEN/1/Rev.1 at 26, 1994, Para 7.

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.<sup>20</sup>

27. 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.*<sup>21</sup>

Case Law: Irina Fedotova v Russian Federation

28. In *Irina Fedotova v Russian Federation*<sup>22</sup> 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.
29. 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 particular, expression of her sexual identity and her search for understanding of that identity.<sup>23</sup>
30. 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.
31. 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*

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<sup>20</sup> 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.

<sup>21</sup> See above, note 19, Para 13.

<sup>22</sup> Human Rights Committee, Communication No. 1932/2010, UN Doc. CCPR/C/106/D/1932/2010, 19 November 2012.

<sup>23</sup> *Ibid.*, Para 10.2.



*limitations [under Article 19] must be understood in the light of universality of human rights and the principle of non-discrimination.*<sup>24</sup>

32. The Committee also recalled that any restrictions “must conform to the strict tests of necessity and proportionality”.<sup>25</sup>
33. 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.<sup>26</sup>
34. 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.
35. 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)

36. 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.

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<sup>24</sup> Human Rights Committee, *General Comment No. 34: On Article 19: Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34 (2011), Para 32.

<sup>25</sup> See above, note 22, 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.

<sup>26</sup> See above, note 22, Para 10.6.

37. 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).
38. 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).
39. 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*.
40. 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.
41. As noted above at paragraph 27, 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 measure which are neutral at face value but have detrimental effects which exclusively or disproportionately affect persons on prohibited grounds.<sup>27</sup>
42. 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.
43. Indeed, as the Human Rights Committee made clear in *Fedotova*, a law which prohibits “propaganda” or “promotion of homosexuality”, as opposed to heterosexuality or

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<sup>27</sup> See above note 22, Para 10.2.

sexuality generally, will be considered as constituting differential treatment on grounds of sexual orientation in and of itself.

44. 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, as paragraphs 58 to 62 below demonstrate, 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.
45. 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.
46. 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.<sup>28</sup>*

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<sup>28</sup> 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.

47. 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.

(ii) International Covenant on Civil and Political Rights: Article 26

Article 26

48. As stated above in paragraph 24, 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 with the requirement of article 26 that its content should not be discriminatory.<sup>29</sup>*

49. As noted above in paragraph 28, 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”.<sup>30</sup>

Case Law: Irina Fedotova v Russian Federation

50. In *Irina Fedotova v Russian Federation*,<sup>31</sup> 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.

51. 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*

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<sup>29</sup> See above, note 19, Para 12.

<sup>30</sup> *Ibid.*, Para 13.

<sup>31</sup> See above, note 22.

*or sexuality generally – among minors is based on reasonable and objective criteria.*<sup>32</sup>

52. 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.*<sup>33</sup>

53. 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

54. 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 40 to 44, the legislation is clearly discriminatory.
55. 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 45 to 48 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”.
56. 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.

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<sup>32</sup> See above, note 22, Para 10.6.

<sup>33</sup> See above, note 22, Para 10.8.

(iii) Convention on the Rights of the Child

57. ERT recalls that Ukraine is bound by the Convention on the Rights of the Child. As with Article 2 of the International Covenant on Civil and Political Rights, Article 2(1) of the Convention on the Rights of the Child provides that the rights contained within the Convention must be ensured “without discrimination of any kind”. The Committee on the Rights of the Child has stated in its General Comment No. 4 that the provisions on non-discrimination in Article 2 of the Convention include sexual orientation.<sup>34</sup>
58. The Committee on the Rights of the Child has frequently referred to the importance of education and the right to receive information on sexuality and issues of health. In its General Comment No. 3, for example, the Committee stated that:

*States parties are reminded that children require relevant, appropriate and timely information which recognizes the differences in levels of understanding among them, is tailored appropriately to age level and capacity and enables them to deal positively and responsibly with their sexuality in order to protect themselves from HIV infection. The Committee wishes to emphasize that effective HIV/AIDS prevention requires States to refrain from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, and that, consistent with their obligations to ensure the right to life, survival and development of the child (art. 6), States parties must ensure that children have the ability to acquire the knowledge and skills to protect themselves and others as they begin to express their sexuality.*<sup>35</sup>

59. The Committee on the Rights of the Child has also stated that:

*Adolescents have the right to access adequate information essential for their health and development and for their ability to participate meaningfully in society. It is the obligation of States parties to ensure that all adolescent girls and boys, both in and out of school, are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practise healthy behaviours. This should include information on (...) safe and respectful social and sexual behaviours...*<sup>36</sup>

60. Far from protecting children therefore, a prohibition on information and ideas which are considered to “promote homosexuality”, and which could be understood to include information on the sexual health of LGB people, same-sex relationships, and same-sex sexual activity, is contrary to the obligation to ensure that children have access to information necessary to make informed decisions about their health.

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<sup>34</sup> Committee on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/4, 2003, Para 6.

<sup>35</sup> Committee on the Rights of the Child, *General Comment No. 3: HIV/AIDS and the Rights of the Child*, UN Doc. CRC/GC/2003/3, 2003, Para 16.

<sup>36</sup> See above, note 34, Para 26.

61. The Draft Law 0945 violates the rights of children 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” (Article 13 of the Convention on the Rights of the Child), to have “access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social (...) well-being and physical and mental health” (Article 17 of the Convention on the Rights of the Child), particularly LGB children and adolescents, and the right “to the enjoyment of the highest attainable standard of health” (Article 24 of the Convention on the Rights of the Child).

(iv) Conclusion

62. ERT therefore is of the view that Draft Law 0945, if adopted, would constitute a significant and serious violation of international human rights treaties to which Ukraine is a party, including in particular:

(i) The right to freedom of expression when read in conjunction with the right to non-discrimination (Articles 19 and 2(1) of the Covenant);

(ii) The right to non-discrimination (Article 26 of the Covenant);

(iii) The right of the child to freedom of expression, to information, and to healthcare (Articles 2(1), 13, 17 and 24 of the Convention on the Rights of the Child).

### **The European Convention on Human Rights**

#### Articles 10 and 14 of the European Convention on Human Rights

63. Ukraine ratified the European Convention on Human Rights (the Convention) in September 1997. Article 10 of the Convention provides that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...” Article 14 of the Convention prohibits discrimination in the enjoyment of the rights under the Convention “without distinction on any ground”. The European Court of Human Rights (the Court) has long recognised sexual orientation as a prohibited ground falling within “other status” in Article 14 of the Convention.<sup>37</sup>

#### Case Law of the European Court of Human Rights

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<sup>37</sup> See, for example, *Salgueiro da Silva Mouta v. Portugal* (Application No. 33290/96), 21 December 1999; *Smith and Grady v. the United Kingdom* (Application Nos. 33985/96 and 33986/96), 27 September 1999; *Karner v. Austria* (Application No. 40016/98), 24 July 2003; *Bączkowski and Others v. Poland* (Application No. 1543/06), 3 May 2007; and *E.B. v. France* (Application No. 43546/02), 22 January 2008.

64. The European Court of Human Rights has recently ruled on a number of cases brought before it where the rights of individuals to freedom of association (Article 11) were denied due to their sexual orientation. Whilst the prohibition in these cases relates to freedom of association rather than freedom of expression, the close connection between the protection of these rights means that the principles expressed in the court's judgments are useful in assessing how the court would approach Draft Law 0945.
65. In *Bączkowski and Others v Poland*,<sup>38</sup> the applicants, a group of individuals and a representative of the Foundation for Equality, wished to hold an assembly (a march) in Warsaw to raise awareness on discrimination against various groups, including LGBT people, national and ethnic minorities, religious minorities, women and persons with disabilities. They also wished to hold a number of stationary assemblies, some of which were to raise awareness specifically about discrimination against LGBT persons. The Mayor of Warsaw refused to give permission to the stationary assemblies. In an interview given shortly before this decision was made, the Mayor of Warsaw stated that he would not allow demonstrations amounting to "propaganda of homosexuality".
66. The applicants alleged that the refusal to permit the stationary assemblies was a violation of their right to association under Article 11 of the Convention, when taken in combination with the prohibition of discrimination under Article 14 of the Convention.
67. The Court held that the prohibition of an assembly engaged Article 11 of the Convention, and that "it may be reasonably surmised that [the Mayor's] opinions could have affected the decision-making process in the present case and, as a result, impinged on the applicants' right to freedom of assembly in a discriminatory manner." The Court concluded that there had been a violation of Article 14 in conjunction with Article 11 of the Convention.
68. In *Alekseyev v Russia*,<sup>39</sup> the applicant, together with other individuals, organised a march to draw public attention to discrimination against LGB people in Russia, to promote respect for human rights and freedoms and to call for tolerance on the part of the Russian authorities and the public towards them. The march was entitled "Pride March" in the first year, and "Gay Pride" in subsequent years. Over a number of years, the applicant made a number of applications for permission to march, all of which were refused by the Government of Moscow.
69. The applicants alleged that the ban on the marches was a violation of their right to association under Article 11 of the Convention, when taken in combination with the prohibition of discrimination under Article 14 of the Convention.
70. The court first held that the ban of a march engaged Article 11 of the Convention. After re-stating that sexual orientation was a protected ground under Article 14 of the

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<sup>38</sup> Application No. 1543/06, 3 May 2007 (European Court of Human Rights).

<sup>39</sup> Application Nos. 4916/07, 25924/08 and 14599/09, 21 October 2010 (European Court of Human Rights).



Convention, the Court examined when differential treatment based on sexual orientation would amount to discrimination. The Court stated:

*[When] the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention.*

71. The Court concluded that “the main reason for the ban imposed on the events organised by the applicant was the authorities' disapproval of demonstrations which they considered to promote homosexuality”. As a result, the Court held that “the applicant suffered discrimination on the grounds of his sexual orientation and that of other participants in the proposed events” and that “the Government did not provide any justification showing that the impugned distinction was compatible with the standards of the Convention”.
72. The Court therefore concluded that there had been a violation of Article 14 in conjunction with Article 11 of the Convention.
73. In *Genderdoc-M v Moldova*,<sup>40</sup> the applicant was a non-governmental organisation whose aim was to provide information to and to assist the LGBT community. The organisation applied to Chişinău Municipal Council for permission to hold a peaceful demonstration in front of the Parliament of Moldova to encourage the adoption of laws protecting LGBT people. The organisation was ultimately refused permission to hold the demonstration.
74. The applicant alleged that the prohibition of the demonstration was a violation of their right to association under Article 11 of the Convention, when taken in combination with the prohibition of discrimination under Article 14 of the Convention.
75. The Court first held that the prohibition of a peaceful demonstration engaged Article 11 of the Convention. The court then examined whether there was differential treatment under Article 14 of the Convention. Moldova argued that there was no differential treatment and that the reason the demonstration was not permitted was due to a general public intolerance of demonstrators. The Court rejected that argument. Instead the Court determined that the reason for the ban imposed on the event was the authorities' “disapproval of demonstrations which they considered to promote homosexuality”.

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<sup>40</sup> Application No. 9106/06, 12 June 2012 (European Court of Human Rights).

76. The Court reiterated the fact that differential treatment amounts to discrimination under Article 14 if “it has no objective and reasonable justification”, i.e. “it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised”. The Court repeated its earlier findings in *Alekseyev v Russia*.
77. As the reasons for the difference in treatment in the case was the authorities’ disapproval of demonstrations which they considered to promote homosexuality, the difference was clearly made on grounds of sexual orientation. The ban therefore amounted to a violation of Article 14 in conjunction with Article 11 of the Convention.
78. The jurisprudence of the European Court of Human Rights regarding sexual orientation discrimination is therefore clear and well established. Where there is an interference with one of the substantive rights contained within the Convention, any differential treatment in the enjoyment of that right based on sexual orientation will require “particularly weighty reasons” before the Court will accept them as justification. Furthermore, “the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for achievement of the aim sought; it must also be shown that it was necessary in the circumstances.”

#### Analysis of Draft Law 0945 with Articles 10 and 14

79. Draft Law 0945 amends the Law on the Protection of Public Morality, Law on the Print Press (Media), the Law on Television and Radio, and provisions of the Criminal Code of Ukraine which regulate the production of products including films and videos.
80. As Draft Law 0945 will impact upon the material that can be broadcast and published – including on television, radio, film, and the print press – and it clearly has a negative effect on the ability of individuals to receive and impart information and ideas, in particular, information and ideas which are considered to “promote homosexuality”. Draft Law 0945 therefore clearly engages Article 10 of the Convention.
81. As Draft Law 0945 applies solely to homosexuality and not heterosexuality, the law makes a clear distinction based on grounds of sexual orientation.
82. ERT believes that this distinction in law constitutes direct discrimination, defined by the European Court of Human Right as a “difference in the treatment of persons in analogous, or relevantly similar, situations” which is “based on an identifiable characteristic”<sup>41</sup>, in this case, based on their sexual orientation. By prohibiting the promotion of “homosexuality” the law distinguishes between LGB persons and heterosexuals. Further, by prohibiting the “promotion” of the sexual orientation of LGB persons but not heterosexuals, the law stigmatises those persons and marks them out as

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<sup>41</sup> See, for example, *Carson and Others v. United Kingdom* (Application No. 42184/05), 16 March 2010; Para 61; *D.H. and Others v. the Czech Republic* (Application No. 57325/00), 13 November 2007, Para 175; and *Burden v. United Kingdom* (Application No. 13378/05), 29 April 2008, Para 60.

“different” in society; it attaches negative connotations to LGB persons by indicating that “promotion” of their sexual orientation is a threat necessitating legal intervention but that this is not the case for the sexual orientation of heterosexuals.

83. The European Court of Human Rights has held – as seen in the case-law above – that differential treatment based on sexual orientation requires “particularly weighty reasons” before it will accept them as justification. It has also held that “the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for achievement of the aim sought; it must also be shown that it was necessary in the circumstances”.
84. The Explanatory Note to Draft Law 0945 suggests that the reasons for introducing the Draft Law include the protection of the welfare of children and the prevention of HIV/AIDS. For the reasons outlined in paragraphs 45 to 48 above, ERT believes that there are no valid reasons for introducing such a discriminatory law, let alone “particularly weighty reasons”. While the stated aims for the introduction of the Draft Law may be considered legitimate, the draconian and oppressive nature of the legislation itself means that it can in no way be considered “necessary” to meet those aims.
85. Further, although the law applies to all persons in Ukraine – both heterosexual and homosexual – it nevertheless also constitutes indirect discrimination against homosexual people following the case-law of the European Court of Human Rights. The Court has stated that the definition of discrimination under Article 14 is not limited solely to direct discrimination but also includes indirect discrimination which the Court has defined as:
- [A] difference in treatment [which takes] the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.*<sup>42</sup>
86. ERT believes that a law which prohibits publications which promote homosexuality will inevitably impact on LGB people to a greater extent than heterosexuals, given that they are more likely than heterosexuals to wish to receive and impart information and ideas on homosexuality, including information and ideas which could be considered to promote homosexuality such as calling for greater protection from discrimination, raising awareness of LGB people and their concerns, or raising awareness of sexual health for LGB people. Draft Law 0945 clearly impacts disproportionately upon LGB people and therefore amounts to indirect discrimination as recognised by the European Court of Human Rights.
87. As is stated in paragraph 86, the European Court of Human Rights has held that differential treatment based on sexual orientation requires “particularly weighty

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<sup>42</sup> See, for example, *D.H. and Others v. the Czech Republic* (No. 57325/00), 13 November 2007; and *Zarb Adami v. Malta* (No. 17209/02), 20 June 2006, Para 80.

reasons” before it will accept them as justification. It has also held that “the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for achievement of the aim sought; it must also be shown that it was necessary in the circumstances”. For the reasons outlined in paragraphs 45 to 48, 85 and 86 above, ERT does not believe that the test for justification is met.

88. ERT therefore is of the view that Draft Law 0945, if adopted, would constitute a significant and serious violation of Articles 10 and 14 of the European Convention on Human Rights.

### **Conclusion**

89. Based on ERT’s analysis of Draft Law 0945 with international and European human rights law, ERT concludes that Draft Law 0945 would constitute a violation of:
- (i) Articles 2(1), 19 and 26 of the International Covenant on Civil and Political Rights;
  - (ii) Articles 2(1), 13, 17 and 24 of the Convention on the Rights of the Child; and
  - (iii) Articles 10 and 14 of the European Convention on Human Rights.
90. **ERT therefore strongly urges the Verkhovna Rada to reject Draft Law 0945 in its entirety.**