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## The Equal Rights Trust

Proposals for the list of issues to be adopted by the Committee on Economic, Social and Cultural Rights at its 52<sup>nd</sup> Session (pre-sessional working group) in relation to the initial report submitted by:

### Indonesia

*October 2013*

#### Statement of Interest

1. The Equal Rights Trust (ERT) submits the following suggested questions for adoption by the Committee on Economic, Social and Cultural Rights (the Committee) based upon the initial report submitted by Indonesia for the Committee's 52<sup>nd</sup> session (pre-sessional working group).
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 has been actively involved in promoting improved protection from discrimination in Indonesia since 2010. ERT has undertaken research on patterns of discrimination and inequality in Indonesia, with a particular focus on religious discrimination, as well as on the whole legal and policy framework in place to prevent discrimination and promote equality.

4. This submission focuses on the extent to which Indonesia has met its obligations to respect, protect and fulfil the rights to equality and non-discrimination. In particular, the submission is concerned with Indonesia's performance under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (the Covenant). In assessing Indonesia's adherence to its obligations under Article 2(2), the submission relies on the interpretation of the Article which has been provided by the Committee in its *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*.<sup>1</sup> Thus, the submission reflects the importance which the Committee has placed on the need for effective protection from discrimination for the realisation of all Covenant rights:

*Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.*

*Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights.*<sup>2</sup>

5. The submission also relies upon the Declaration of Principles on Equality,<sup>3</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>4</sup> It has also been endorsed by the Parliamentary Assembly of the Council of Europe.<sup>5</sup>
6. Based on analysis of Indonesia's legal framework on equality and non-discrimination, the submission makes recommendations for questions which ERT would ask the Committee to put to Indonesia when it decides upon its list of issues.

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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 (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, 2009.

<sup>2</sup> *Ibid.*, Paras 1-2.

<sup>3</sup> *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

<sup>4</sup> *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para 93.

<sup>5</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).

## Article 2(2): The Legal Framework on Discrimination and Inequality

### Summary of Relevant Provisions

7. Under Article 2(2) of the Covenant, States Parties undertake:

*(...) to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

8. The rights to equality and non-discrimination in Indonesia are protected through the Constitution and national legislation, primarily the Law concerning Human Rights. The **Constitution of Indonesia** contains a number of provisions which provide protection from discrimination, or which provide guarantees of equal treatment. Article 28D(1) provides that all persons have the “right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law”. Most importantly, Article 28I(2) states that:

*Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment.*

9. In addition to this general prohibition on discrimination, Article 28D(3) provides a right to equal opportunities in government, albeit only for citizens, while Article 28B(2) provides a specific right for all children to protection from violence and discrimination. Article 28H(2) provides a right for all persons “to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness”. It is unclear whether the imprecise words “facilitation and special treatment” refer to reasonable accommodation, positive action or some different form of special treatment. Article 28J(2) creates a general and broad exception to the human rights protected under Chapter 10A by permitting limitations of the rights where these are:

*[E]stablished by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.*

10. The **Law concerning Human Rights** (the Law) contains a number of general provisions on equality, primarily in Article 3, which supplement the rights guaranteed in the Constitution.<sup>6</sup> Article 3(1) provides that “[e]veryone is born equal in dignity and human rights, and is bestowed with the intellect and reason to live with others in a spirit of brotherhood”. Article 3(2) provides that “[e]veryone has the right to be recognised, guaranteed, protected, and treated fairly before the law and is entitled to equal legal

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<sup>6</sup> Law No. 39 of 1999 concerning Human Rights, Laws of the Republic of Indonesia, adopted and entered into force 23 September 1999.

certitude and treatment before the law". Article 3(3) provides that "[e]veryone has the right without any discrimination, to protection of human rights and obligations". "Discrimination" is defined in Article 1 as:

*[A]ll limitations, affronts or ostracism, both direct and indirect, on grounds of differences in religion, ethnicity, race, group, faction, social status, economic status, sex, language, or political belief, that results in the degradation, aberration, or eradication of recognition, execution, or application of human rights and basic freedoms in political, economic, legal, social, cultural, or any other aspects of life.*

11. The Law also provides for equality between men and women in a number of specific fields: pay and working conditions (Article 38(3)); access to schooling and education (Article 48); and marriage, contact with children, and assets, during and after marriage (Article 51). In addition, the Law provides that every citizen has equal rights to vote and stand for election (Article 43(1)). The Law also specifically prohibits discrimination in the field of justice (Article 17) and in the rights enjoyed as a citizen (Article 26(2)). The Law provides for a right to "special facilities and treatment" for persons with disabilities, the elderly, women, and children (Article 41(2)), though these terms are not defined.
12. ERT has a number of concerns with the scope of protection from discrimination which is provided in the Constitution and the Law concerning Human Rights. Our first concern relates to the absence of specific and comprehensive equality legislation, as required by the Committee. ERT urges the Committee to ask Indonesia what plans it has to introduce such legislation, as it has clearly stated that states parties are required to do under Article 2(2). Our remaining concerns relate to specific problems with the protection from discrimination provided by the existing legal framework. ERT urges the Committee to seek answers from Indonesia on what steps it plans to take to address these problems.

### ***The adoption of specific and comprehensive equality legislation***

13. ERT is concerned that, beyond the relevant provisions of Article 28 of the Constitution and the single provision in the Law concerning Human Rights, Indonesia has no effective legal framework providing protection from discrimination. The Committee, other treaty bodies such as CEDAW,<sup>7</sup> and the authors and signatories of the Declaration of Principles on Equality,<sup>8</sup> have all recognized that in order to provide effective protection from discrimination, states must adopt specific anti-discrimination legislation. The Committee has made this point particularly robustly, stating that:

*Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore*

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<sup>7</sup> Committee on the Elimination of All Forms of Discrimination Against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 2010, Para 31.

<sup>8</sup> See above, note 3, Principle 15, p. 12.

*encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights.*<sup>9</sup>

14. Indonesia has neither a comprehensive equality law, nor specific legislation prohibiting discrimination and requiring the promotion of equality on a specific ground or grounds, or with respect to any human right. In the view of ERT, the protections provided in the Constitution and Law concerning Human Rights – even if amended to address numerous inconsistencies with Indonesia’s international legal obligations which are highlighted below – will not be sufficient to discharge the obligation elaborated by the Committee in its General Comment No. 20.
15. To make the right to non-discrimination effective in practice, specific, detailed legislation is necessary to define and prohibit all of the different forms of discrimination which fall within the scope of Article 2(2) of the Covenant.<sup>10</sup> Such equality legislation must prohibit discrimination which occurs on at least all those grounds (or any combination of those grounds) recognised by the Committee, should apply to both state and non-state actors in all areas of life regulated by law, and should define and prohibit direct discrimination, indirect discrimination and harassment. Such legislation should also define reasonable accommodation as a right held by all persons, with a corresponding obligation arising for the state and other actors. Such legislation should also define positive action as a necessary component of the right to equality, and an obligation arising wherever required to accelerate progress towards equality of particular groups.
16. ERT is also concerned that, in the absence of such legislation, provisions to ensure access to justice, such as provisions for the transfer of the burden of proof in civil cases and measures to ensure standing by associations or other interested parties, which are necessary for the effective protection of the right to equality, are absent from Indonesia’s legislative framework. Again, the Declaration of Principles on Equality provides a clear guide to best practice in this area, which ERT would recommend as a guide to how Indonesia can effectively meet its obligations in this regard.<sup>11</sup>

### **Suggested Questions**

- What plans, if any, does the state party have to introduce specific and comprehensive equality legislation?

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<sup>9</sup> See above, note 1, Para 37.

<sup>10</sup> The Declaration of Principles in Equality contains a principle on specificity of equality legislation, according to which “The realisation of the right to equality requires the adoption of equality laws and policies that are comprehensive and sufficiently detailed and specific to encompass the different forms and manifestations of discrimination and disadvantage.” (See above, note 3, Principle 15.)

<sup>11</sup> See above, note 3, Principle 18 (Access to Justice), Principle 21 (Evidence and Proof), Principle 20 (Standing), and Principle 22 (Remedies and Sanctions).

## ***Grounds of Discrimination***

17. In general, ERT is supportive of the comprehensive approach taken in Article 28I(2) of the Constitution, which prohibits discrimination on “any grounds whatsoever”. However, ERT is concerned by the failure to also explicitly list grounds upon which discrimination is prohibited, in line with the practice in international human rights instruments to which Indonesia is a party. While the use of an open-ended prohibition, interpreted in line with international law and best practice, should mean that the personal scope of protection from discrimination is broad, the omission of any specified grounds presents a number of practical problems. Without explicit inclusion of particular grounds, rights-holders, duty-bearers and interested parties such as government agencies and the judiciary will be unclear as to the personal scope of protection from discrimination. This will in turn limit the extent to which preventive acts are taken and policies put in place. Moreover, victims will be required to undertake legal proceedings in order to establish that grounds protected under international law are indeed recognised under Article 28I(2), rather than being able to rely on the protection immediately. Further, ERT is concerned that the Indonesian courts may fail to recognise some grounds requiring protection under the Covenant and other international human rights instruments when interpreting Article 28(2), given the lack of jurisprudence on discrimination in Indonesia.
  
18. ERT notes that the approach taken to the protection of characteristics in the Law concerning Human Rights is also at odds with that applied in the Constitution. Article 1 of the Law concerning Human Rights provides a closed list of protected grounds, prohibiting discrimination only on grounds of religion, ethnicity, race, group, faction, social status, economic status, sex, language, and political belief. This approach, while meeting the need for clarity and specificity which is lacking from the constitutional provision, has serious disadvantages, in that it excludes from protection a number of characteristics which have been recognised under international human rights law. Each of these omitted characteristics is included in the list of protected grounds provided under the Covenant or the Committee’s General Comment No. 20, or in other international human rights instruments. A list of the grounds which should be explicitly protected under the Law is below:
  - (a) **Colour:** Colour is a prohibited ground under Article 2(2) of the Covenant;
  
  - (b) **National or Social Origin:** National or social origin is an explicitly prohibited ground under Article 2(2) of the Covenant;
  
  - (c) **Property:** Property is an explicitly prohibited ground under Article 2(2) of the Covenant;
  
  - (d) **Birth:** Birth is an explicitly prohibited ground under Article 2(2) of the Covenant;
  
  - (e) **Disability:** The Committee has stated that disability is a prohibited ground falling within “other status” in Article 2(2) of the Covenant;<sup>12</sup>

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<sup>12</sup> See above, note 1, Para 28.

- (f) **Age:** The Committee has stated that age is a prohibited ground falling within “other status” in Article 2(2) of the Covenant;<sup>13</sup>
  - (g) **Nationality:** The Committee has stated that nationality is a prohibited ground falling within “other status” in Article 2(2) of the Covenant;<sup>14</sup>
  - (h) **Marital and Family Status:** The Committee has stated that marital and family status are prohibited grounds falling within “other status” in Article 2(2) of the Covenant;<sup>15</sup>
  - (i) **Sexual Orientation:** The Committee has stated that sexual orientation is a prohibited ground falling within “other status” in Article 2(2) of the Covenant;<sup>16</sup>
  - (j) **Gender Identity:** The Committee has stated that gender identity is a prohibited ground falling within “other status” in Article 2(2) of the Covenant;<sup>17</sup>
  - (k) **Health Status:** The Committee has stated that health status is a prohibited ground falling within “other status” in Article 2(2) of the Covenant;<sup>18</sup>
  - (l) **Place of Residence:** The Committee has stated that place of residence is a prohibited ground falling within “other status” in Article 2(2) of the Covenant;<sup>19</sup>
  - (m) **Descent:** Descent is a prohibited ground under Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination;
  - (n) **Pregnancy:** 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; and
  - (o) **Maternity:** Under Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, States must also take steps to protect women from discrimination on grounds of maternity.
19. Beyond the immediate problems with both instruments, ERT is concerned that the different approaches taken in the Constitution and the Law concerning Human Rights risk confusion and inconsistency in interpretation and application. In particular, we are

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<sup>13</sup> See above, note 1, Para 29.

<sup>14</sup> See above, note 1, Para 30.

<sup>15</sup> See above, note 1, Para 31.

<sup>16</sup> See above, note 1, Para 32.

<sup>17</sup> See above, note 1, Para 32.

<sup>18</sup> See above, note 1, Para 33.

<sup>19</sup> See above, note 1, Para 34.

concerned that those implementing these instruments, including the courts, will interpret the broad-based prohibition contained in the Constitution in light of the restrictive approach taken in the Law.

20. ERT believes all of the grounds listed in paragraph 18 of this submission should be explicitly included in both Article 28I(2) of the Constitution and Article 1 of the Law concerning Human Rights. ERT also believes that the words “upon any grounds whatsoever” should be retained in Article 28I(2) of the Constitution and added to the end of the listed grounds in the Law concerning Human Rights, thus bringing the provisions into line with each other and, more importantly, ensuring consistency with international law.
21. Finally, ERT is concerned that the Constitution does not set down criteria by which further grounds are to be recognised as protected from discrimination, in line with the phrase “any grounds whatsoever”. This compounds the lack of certainty as to which further groups are likely to be recognised and protected by the courts among rights-holders, duty-bearers and those responsible for the Constitution’s implementation and enforcement. The absence of qualifying criteria creates the risk of litigation being brought seeking protection on grounds not needing or deserving protection and, conversely, of groups or individuals in need of protection being unclear whether they will enjoy protection. The drafters of the Declaration of Principles on Equality have proposed a test to establish the admission of new grounds as the best approach to determine whether a new ground should be incorporated:

*Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.<sup>20</sup>*

22. This approach has the advantage of flexibility for further groups to be recognised and protected in the future and minimises the risk of unnecessary litigation, unfettered judicial discretion and of confusion among the general public as to which grounds should qualify. ERT therefore believes that both the Constitution and the Law concerning Human Rights should be amended to provide for a test for recognition of further grounds in line with the Declaration.

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<sup>20</sup> The approach of the Declaration of Principles on Equality reflects that of the principal anti-discrimination legislation in South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000) which provides both a list of explicitly prohibited grounds and a condition that further grounds are to be prohibited if one of the three criteria listed above is met. This provision draws inspiration from the decision of the South African Constitutional Court in *Hoffman v. South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000), where it was held that the prohibition on discrimination in Section 9 of the Constitution of South Africa extended to discrimination on grounds of HIV status, despite the fact that HIV status was not one of the explicitly listed prohibited grounds. See, in particular, Paras 28 and 29.



### Suggested Questions

- How does the state party understand and interpret the phrase “any grounds whatsoever” in Article 28I(2) of the Constitution of Indonesia?
- Does the state party consider that the phrase “any grounds whatsoever” in Article 28I(2) includes prohibition of discrimination on those grounds omitted from the Law concerning Human Rights, namely: Colour; National or Social Origin; Property; Birth; Disability; Age; Nationality; Marital and Family Status; Sexual Orientation; Gender Identity; Health Status; Place of Residence; Descent; Pregnancy and Maternity?
- What plans, if any, does the state party have to amend the Law concerning Human Rights in order to ensure that the list of grounds on which discrimination is prohibited reflects those contained in the Covenant and considered by the Committee to be examples of “other status” in the Covenant?

### **Multiple Discrimination**

23. The impact of the lack of protection from discrimination on a broader list of grounds is exacerbated by the lack of provision for multiple, including intersectional, discrimination in either the Constitution or the Law concerning Human Rights. In its General Comment 20, the Committee has stated that multiple discrimination may amount to discrimination on the grounds of “other status” under Article 2(2).<sup>21</sup> As the Committee has noted in its General Recommendation No. 20:

*Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.<sup>22</sup>*

24. Principle 5 of the Declaration of Principles of Equality prohibits multiple discrimination through the use of the term “or a combination of any of these grounds” after listing 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”.
25. ERT believes that Article 28I(2) should be interpreted in line with the Committee’s recommendation that multiple discrimination is a form of other status, and therefore subject to the same protection as any individual characteristic. In addition, ERT believes that the Constitution and the Law concerning Human Rights should be amended to explicitly recognise and prohibit multiple discrimination in line with the Committee’s General Recommendation and the Declaration of Principles on Equality.

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<sup>21</sup> See above, note 1, Para 27.

<sup>22</sup> See above, note 1, Para 17.

### Suggested Questions

- Does the state party consider that the phrase “any grounds whatsoever” in Article 28I(2) includes prohibition of multiple discrimination?
- What plans, if any, does the state party have to amend the Law concerning Human Rights in order to ensure that multiple discrimination is explicitly prohibited?

### ***Discrimination by Association and Discrimination on the Basis of Perception***

26. Neither the Constitution nor the Law concerning Human Rights includes provisions prohibiting discrimination by association or discrimination on the basis of perception. 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.*<sup>23</sup>

27. 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. The Committee, in its General Comment No. 20, has also reflected this understanding, stating 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>24</sup>

28. Recognition of these forms of discrimination is particularly important where religious discrimination is widespread, as it is in Indonesia. Since a person’s religion is not necessarily or obviously identifiable, discrimination may often be directed based simply on one person’s assumption of the religious belief of another. The stigma which attaches to certain religious minorities – such as the Ahmadiyya – in Indonesia means that those who publically support or advocate on their behalf, or who associate with them in other ways may be exposed to discrimination simply on the basis of that association.
29. ERT believes that Article 28I(2) of the Constitution and Article 3 of the Law concerning Human Rights should be interpreted in line with the Committee’s recommendation that membership of a protected group includes association with that group, or perception by

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<sup>23</sup> See above, note 3, Principle 5, p. 6.

<sup>24</sup> See above, note 1, Para 16.

others that a person is part of such a group. Furthermore, ERT therefore recommends that the Constitution and the Law concerning Human Rights should be amended to explicitly prohibit discrimination by association and discrimination on the basis of perception in line with the Covenant and the Declaration of Principles on Equality.

### **Suggested Questions**

- Does the state party consider that Article 28I(2) of the Constitution of Indonesia and Article 3 of the Law concerning Human Rights should be interpreted in line with the Committee's recommendation that membership of a protected group includes association with that group, or perception by others that a person is part of such a group
- What plans, if any, does the state party have to amend the Law concerning Human Rights in order to ensure that discrimination by association and discrimination on the basis of perception are explicitly prohibited?

### ***Definitions of Direct and Indirect Discrimination***

30. ERT is concerned that the Constitution does not clearly prohibit the forms of discrimination which are considered part of a modern equality guarantee. While the Law concerning Human Rights uses the phrase "both direct and indirect" in Article 1, it does not define direct and indirect discrimination in line with the requirements of international human rights law, or indeed provide any definition at all.
31. Principle 5 of the Declaration of Principles on Equality provides a definition of discrimination which reflects international law and best practice. The relevant part of Principle 5 states:

*Discrimination may be direct or indirect.*

*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.*

*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.*<sup>25</sup>

32. The Committee used similar definitions of direct and indirect discrimination in its General Comment No. 20:

*Direct discrimination occurs when 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);*

*Indirect discrimination refers to laws, 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>26</sup>

33. ERT therefore recommends that the Law should be amended to define and prohibit direct and indirect discrimination, using definitions which reflect the current international understanding of these concepts.

### **Suggested Questions**

- Does the state party consider that the phrase “discriminative treatment” in Article 28I(2) of the Constitution of Indonesia encompasses both direct and indirect discrimination?
- What plans, if any, does the state party have to amend the Law concerning Human Rights to include clear definitions of the concepts of direct discrimination and indirect discrimination, reflecting the definitions used by the Committee?

### **Harassment**

34. The Law concerning Human Rights does not prohibit harassment as a form of discrimination. Harassment has been recognised as a form of discrimination within the scope of Article 2(2) of the Covenant by the Committee in its General Comment No. 20.<sup>27</sup> Principle 5 of the Declaration of Principles on Equality prohibits harassment as a form of discrimination, defining it as follows:

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<sup>25</sup> See above, note 3, Principle 5, p. 6.

<sup>26</sup> See above, note 1, Para 10.

<sup>27</sup> See above, note 1, Para 7.

*Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.*<sup>28</sup>

### **Suggested Question**

- What plans, if any, does the state party have to amend the Law concerning Human Rights to include harassment as a form of discrimination and to prohibit it accordingly?

### **Reasonable Accommodation**

35. The Law concerning Human Rights does not prohibit failure to make reasonable accommodation, though it is now a well-established principle of international human rights law that failure to make reasonable accommodation is a form of discrimination. The definition of “discrimination” in Article 2 of the Convention on the Rights of Persons with Disabilities (CRPD) states that discrimination on the basis of disability “includes all forms of discrimination, including denial of reasonable accommodation”. Article 5 of the CRPD requires States Parties to “take all appropriate steps to ensure that reasonable accommodation is provided”. “Reasonable accommodation” is defined as:

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

36. The interpretation of Article 2(2) of the Covenant in the Committee’s General Comment No. 20 also reflects this understanding. 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>29</sup>

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<sup>28</sup> See above, note 3, Principle 5, p. 6.

<sup>29</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.

37. ERT therefore submits that failure to make reasonable accommodation should be defined as a form of discrimination on grounds of disability in the Law concerning Human Rights in order to comply with Article 2(2) of the Covenant.

### Suggested Question

- What plans, if any, does the state party have to amend the Law concerning Human Rights to include failure to make reasonable accommodation as a form of discrimination and to prohibit it accordingly?

38. The Declaration of Principles on Equality recognises that reasonable accommodation is required to give effect to the right to equality, as set down in the CRPD and recognised by the Committee and others. However, it also goes further, expanding the obligation to make reasonable accommodation to other grounds of discrimination, in addition to disability. Principle 13 of the Declaration of Principles on Equality recognises that:

*To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds (...)<sup>30</sup>*

39. Thus, the definition of reasonable accommodation in the Declaration applies to all grounds of discrimination. ERT is of the view that this reflects an emerging consensus among equality lawyers arising from the need to ensure consistent standards of legal protection between discrimination occurring on different grounds.
40. There are certain of grounds of discrimination, in addition to disability, where failure to make reasonable accommodation will result in denial of the right to equality. For example, reasonable accommodation is particularly important in ensuring equality for persons who have a different religion or belief from the majority, which might require modification to customary working practices, codes or hours to enable observance of religious doctrines. Given the well-established patterns of discrimination and disadvantage in Indonesia arising on grounds of religion and belief, the extension of the obligation to make reasonable accommodation to religion – and perhaps other grounds – appears particularly relevant.
41. ERT therefore suggests to the Committee to take a progressive interpretation of the right to equality in Article 2(2) of the Covenant, in line with Principle 13 of the Declaration of Principles of Equality, and interpret the Article as both prohibiting a failure to make reasonable accommodation as a form of discrimination, and extending its application to other relevant recognised grounds of discrimination.

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<sup>30</sup> See above, note 3, Principle 13, p. 10.

### Suggested Question

- What plans, if any, does the state party have to prohibit failure to make reasonable accommodation for to accommodate religious or other difference?

### *Positive Action*

42. Both the Constitution and the Law concerning Human Rights contain provisions which could be interpreted as permitting some form or forms of positive action. Article 28H(2) of the Constitution provides a right for all persons “to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness”. It is unclear, however, whether the imprecise words “facilitation and special treatment” refer to reasonable accommodation, positive action or some different form of special treatment. Article 41(2) of the Law concerning Human Rights provides for a right to “special facilities and treatment” for persons with disabilities, the elderly, women, and children, though again these terms are not defined.
43. ERT is concerned that, given the vague language used in these provisions, they may be interpreted as permitting positive action only in exceptional circumstances, and as an exception to the right to non-discrimination. This contrasts with the 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 groups, is a necessary element within the right to equality.<sup>31</sup>*

### Suggested Question

- What plans, if any, does the state party have to amend Article 28H(2) of the Constitution and / or Article 41(2) of the Law concerning Human Rights to explicitly define positive action as a necessary element of the right to equality, and to establish a clear obligation to take positive action measures where necessary to accelerate progress towards equality of particular groups?

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<sup>31</sup> See above, note 3, Principle 3, p. 5.

## ***Access to Justice***

44. Article 90 of the Law concerning Human Rights provides that individuals and groups may submit complaints of violations of their right to non-discrimination to the National Commission on Human Rights. However, the Law fails to provide further detail on how cases are resolved by the Commission, the enforcement of any rulings, and the availability of legal aid. ERT is concerned by the absence of detailed provisions governing the procedure to bring a case of discrimination in the Law concerning Human Rights.
45. The importance of effective access to justice in giving effect to the right to equality cannot be understated. 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.<sup>32</sup>*

46. The Committee has also highlighted the obligations on states to ensure that cases of discrimination are effectively addressed in its General Comment No. 20:

*Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2, including actions or omissions by private actors.<sup>33</sup>*

### **Suggested Question**

- Can the state party clarify what procedures and mechanisms are in place to ensure that persons experiencing discrimination have effective access to justice?

## ***Burden of Proof***

47. Neither the Constitution nor the Law concerning Human Rights contains a provision providing for a reversal of the burden of proof in cases involving 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

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<sup>32</sup> See above, note 3, Principle 18, p. 12.

<sup>33</sup> See above, note 1, Para 40.



secure redress for the discrimination which they have experienced. 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.<sup>34</sup>*

48. Reflecting the international consensus in this area, the Committee has stated in its General Comment No. 20 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>35</sup>*

#### **Suggested Question**

- What plans, if any, does the state party have to provide for the reversal of the burden of proof in discrimination claims?

#### **Remedies and Sanctions**

49. The Constitution does not specify what remedies are available where the right to equality has been violated. Article 90 of the Law concerning Human Rights provides that individuals and groups may submit complaints of violations of their right to equality to the National Commission on Human Rights, but the Law does not say what remedies and sanctions the National Commission on Human Rights may provide.

50. Principle 22 of the Declaration of Principles on Equality 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*

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<sup>34</sup> See above, note 3, Principle 21, p. 13.

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

*implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality.*<sup>36</sup>

51. The Committee has stated:

*These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented.*<sup>37</sup>

#### **Suggested Question**

- What plans, if any, does the state party have to provide sanctions in cases of discrimination which are effective, proportionate and dissuasive, and which provide appropriate remedies for those whose right has been breached?

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<sup>36</sup> See above, note 3, Principle 22, p. 13.

<sup>37</sup> See above, note 1, Para 40.