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The Equal Rights Trust

Parallel report submitted to the Committee on Economic, Social and Cultural Rights (CESCR) Pre-Sessional Working Group, 49th Session, in relation to the combined third and fourth periodic reports submitted by:

Jamaica

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Statement of Interest

1. The Equal Rights Trust (ERT) submits this parallel report to the United Nations Committee on Economic, Social and Cultural Rights ('the Committee') commenting on the combined third and fourth periodic reports by Jamaica, under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights ('the Covenant').
2. ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, it focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice.
3. In the course of its mission, ERT undertakes research on the patterns of discrimination and inequality – including discrimination and inequality of participation in economic, social and cultural life – which prevail in different states, and of the adequacy of domestic legislation and policy to address these forms of discrimination and disadvantage. In respect of Jamaica, ERT has undertaken research on patterns of discrimination which prevail in the country and on the legal and policy framework designed to provide protection from discrimination in the course of its global research and advocacy efforts.

Executive Summary

4. This report focuses on Jamaica's obligations in relation to Article 2(2) of the Covenant. It highlights a number of areas of concern and makes recommendations to inform the effective implementation of the Covenant. This report is divided into sections which concern the obligations to respect, protect and fulfil the Covenant rights respectively, providing examples of failures to meet obligations in relation to equality and non-discrimination.
5. The assessment of Jamaica's obligations in respect of the right to non-discrimination is informed by the Committee's elaboration of state obligations under Article 2(2) in its *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)* (General Comment 20) and by the Declaration of Principles on Equality (the Declaration), 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".¹ It has also been endorsed by the Parliamentary Assembly of the Council of Europe.²
6. Basing its analysis on these two documents, ERT recommends that the government take steps to improve the legal protection from discrimination in Jamaica. It recommends that the state review and amend or repeal any laws which discriminate or are open to discriminatory application. It also recommends amendments to Section 13(3)(i) of the Constitution of Jamaica, as recently amended by the *The Charter of Fundamental Rights and Freedoms (Constitutional Amendments Act) 2011*. It urges the Committee to call on Jamaica to improve its legislation on equality and non-discrimination, in particular through developing comprehensive anti-discrimination legislation. Finally, it recommends that the government ensures it fulfils its obligations through the adoption of a national equality policy, the establishment of an effective and independent National Human Rights Institution with a mandate including equality and non-discrimination and by establishing positive action in favour of groups suffering as a result of historic discrimination or persistent inequality and disadvantage.

Non-Discrimination and the Covenant: Article 2(2)

7. Under Article 2(2) of the Covenant state 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". The Committee, in its General Comment 20, has elaborated on the nature of states' obligation arising under Article 2(2), stating that:

*Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights.*³

¹ *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para. 93.

² 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.

³ Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para. 7.

8. Expanding on this statement, the Committee has confirmed that the obligation on state parties arising under Article 2(2) requires that “discrimination must be eliminated both formally and substantively”.⁴ States are required to *respect* the right to non-discrimination by “refraining from discriminatory actions”,⁵ by amending or repealing discriminatory laws and ensuring that appropriate constitutional and other measures are in place to prevent discrimination by state actors; to *protect* the right by “adopt[ing] specific legislation that prohibits discrimination in the field of economic, social and cultural rights”;⁶ and to *fulfil* the right by *inter alia* adopting “the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination”.⁷
9. Elsewhere in its General Comments, the Committee has examined how the obligation to ensure non-discrimination applies in the context of other rights guaranteed under the Covenant, including the rights to housing, food, education, health, water, work and social security. Through this body of General Comments, the Committee has clarified that the right to non-discrimination, *inter alia*, “is subject to neither progressive realization nor the availability of resources”;⁸ gives rise to an obligation to make reasonable accommodation for persons with disabilities;⁹ and creates an obligation to provide protection from gender-based violence.¹⁰

Recent Developments in Jamaica

10. ERT notes and welcomes the recent adoption of *The Charter of Fundamental Rights and Freedoms (Constitutional Amendments Act) 2011* (the Charter) which amends the Constitution of Jamaica to include a new Charter of Fundamental Rights and Freedoms which represents a significant improvement on the human rights provisions in the original Constitution. ERT notes that section 13(3)(i) of the Charter provides a right to non-discrimination on a number of grounds, and welcomes the inclusion of this right in the Charter. It also notes and welcomes the fact that section 13(3)(i) omits a number of important exceptions found in its predecessor under the Constitution before its amendment, which substantially restricted the scope of the right to non-discrimination.
11. However, ERT is concerned that the state party’s focus on adopting the Charter has led it to interpret its obligations under Article 2(2) too narrowly, contrary to the Committee’s explicit recommendations in General Comment 20 and elsewhere. In ERT’s view, section 13(3)(i) of the Charter is insufficient to ensure that Jamaica’s obligations to respect the right to non-discrimination in respect of economic, social and cultural rights are met. Furthermore, the absence of either comprehensive or specific anti-discrimination law means that the state party falls short of its

⁴ *Ibid.*, Para 8.

⁵ *Ibid.*, Para 36.

⁶ *Ibid.*, Para 37.

⁷ *Ibid.*, Para 8.

⁸ Committee on Economic, Social and Cultural Rights, *General Comment 13: The Right to Education (article 13 of the Covenant)*, 1999, Para 31.

⁹ Committee on Economic, Social and Cultural Rights, *General Comment 5: Persons with Disabilities*, 1994, Para 15.

¹⁰ Committee on Economic, Social and Cultural Rights, *General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (article 3 of Covenant)*, 2005, Para 27.

obligation to protect the right to non-discrimination in these areas of life and is inadequately served in its attempts to fulfil the right.

Measures to Respect and Protect the Right to Non-discrimination

Discriminatory Laws

12. A critical element of the obligation to respect the right to non-discrimination, which has been recognised by both the Committee¹¹ and the treaty bodies responsible for implementing other instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹² is the amendment or repeal of laws which discriminate on particular grounds or against specific groups of people. States which retain laws that directly or indirectly discriminate are failing in their most basic obligation to ensure that people within their jurisdiction can enjoy their rights without discrimination.
13. There exist in Jamaica a number of laws which contain discriminatory provisions and which therefore fail this first test of Jamaica's commitment to giving effect to the right to non-discrimination. Discriminatory laws in Jamaica include the *Offences Against the Person Act* which criminalises male same-sex activity,¹³ thus discriminating against gay men and men who have sex with men. In addition, the *Married Women's Property Act* and the *Sexual Offences Act* both contain provisions which discriminate against women. For example, while marital rape has been criminalised by the *Sexual Offences Act*, an offence exists only under certain prescribed circumstances, thus weakening and offering insufficient protection to women. It is a matter of great concern that these discriminatory provisions remain in force, and that the opportunity offered by the Charter to repeal such laws was not taken.
14. The Equal Rights Trust urges the Committee to recommend that the government undertake, in consultation with civil society and other stakeholders, an audit of discriminatory legal provisions and provisions which are open to discriminatory application, and introduce legislation to amend or repeal all such provisions, including, but not limited to those highlighted in paragraphs 13 and 14 above.

Constitutional Provisions

15. In addition to ensuring that laws do not discriminate, states are required to ensure that state actors do not discriminate in the performance of their duties. This is an essential element of the state's obligation to respect the right to non-discrimination by refraining from discrimination in law and action, and of the obligation to provide protection from discrimination by both public and private actors. This requires, at minimum, a clear prohibition on discrimination in the Constitution, and measures to ensure that state actors act in accordance with this prohibition.

¹¹ *Ibid.*, Para 8(a).

¹² 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.

¹³ The Offences Against the Person Act, Sections 76 and 77 (*Unnatural Offences*) and Section 79 (*Outrages on Decency*)

16. As noted above, the recent amendment of the Constitution of Jamaica has introduced a number of important reforms which extend the legal rights available to people in Jamaica and bind the state and its agents. Section 13(3)(i) of the Constitution of Jamaica, as amended by the Charter, establishes “the right to freedom from discrimination on the ground of (i) being male or female; (ii) race, place of origin, social class, colour, religion or political opinions”.¹⁴ Section 13(4) states that the provisions of the Charter apply “to all law and binds the legislature, the executive and all public authorities”.
17. Section 13(3)(i) of the Charter represents an improvement on the provision which it replaced in the unamended Constitution, in a number of ways. Notably, it omits a number of exceptions contained in subsections (4) to (8) of the unamended Constitution. The exceptions in subsections (4) to (6) limited the application of the right to non-discrimination such that it did not apply with respect to, *inter alia*, non-citizens, laws related to “adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law”, measures taken by the government in respect of taxation or appropriation of revenue and qualifications required for positions in employment in the service of the state. Of particular concern, subsection (7) excluded the application of limitations on a number of civil and political rights from the scope of the prohibition on discrimination, while subsection (8) excluded the exercise of “any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings” from this prohibition. Taken together, these exceptions provided substantial scope for the state to engage in the adoption of discriminatory laws or the implementation of discriminatory actions. The result was a large area of impunity for the state in respect of discriminatory acts against particular groups or individuals. Thus, the fact that section 13(3)(i) of the Charter does not reproduce these provisions is welcome.
18. However, ERT is concerned that section 13(3)(i) falls short of the standard set by the Covenant in a number of ways. The first area of concern is the personal scope of the protection from discrimination which is provided by the list of specified grounds on which discrimination is prohibited. The section provides that discrimination should be prohibited on grounds of sex and gender, race, place of origin, social class, colour, religion and political opinion. By contrast, the Covenant prohibits any discrimination on the express grounds of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹⁵ In General Comment 20, the Committee has provided an interpretation of the scope of “other status”, noting that “the inclusion of ‘other status’ indicates that this list is not exhaustive and other grounds may be incorporated in this category”¹⁶ and that “a flexible approach to the ground of ‘other status’ is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of comparable nature to the express recognized grounds in article 2, paragraph 2”.¹⁷ The list of other grounds which the Committee recognised as within the scope of other status in Article 2(2) includes: disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social condition.¹⁸ Thus, the Charter omits protection on a significant number of grounds recognised by the Covenant and the Committee including notably disability, age, nationality, language, sexual orientation, gender identity, marital or family status and health status.

¹⁴ The Constitution of Jamaica, Chapter III, Section 13(3)(i), as amended by The Charter of Fundamental Rights and Freedoms (Constitutional Amendments) Act, 2011

¹⁵ International Covenant on Economic, Social and Cultural Rights, Article 2(2).

¹⁶ See above, note 2, Para 15.

¹⁷ See above, note 2, Para 27.

¹⁸ See above, note 2, Paras 28-35.

19. The grounds specified in the Covenant and elaborated by the Committee include many, but not all, of the grounds specified in Principle 5 of the Declaration. The experts involved in drafting the Principles agreed that ethnicity, descent, pregnancy, maternity, association with a national minority and genetic or other predisposition toward illness should also be included in any list of prohibited grounds,¹⁹ in addition to those specified by the Committee. In addition to omitting those grounds referred to in paragraph 19 above, the Charter omits all of those additional grounds specified in the Declaration, and is thus below the standard of agreed best practice.
20. ERT is further concerned by the restricted scope of section 13(3)(i) which results from the use of a “closed” list of protected grounds. The construction of section 13(3)(i) is such that only those experiencing discrimination on the listed grounds can claim protection under the Constitution. Yet, as the Committee has noted in its discussion of “other status” in Article 2(2), a flexible approach should be adopted when examining the question of which grounds of discrimination merit legal protection. The Declaration, in addition to providing an extensive list of specified grounds, provides a three-part “test” by which further characteristics can be admitted as protected grounds of discrimination. This test requires that “[d]iscrimination 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.”²⁰ The drafters of the Declaration regarded this use of a “conditionally open” list of grounds as a best-practice approach to this question, allowing both for flexibility on the part of the courts as the need to extend protection arises, and an important degree of certainty for both rights-holders and duty-bearers.²¹
21. Finally, the personal scope of the protection provided by section 13(3)(i) is limited by the failure to prohibit discrimination on multiple grounds, including both cumulative and intersectional discrimination. The Committee has noted that some individuals or groups of individuals, such as disabled women, face multiple discrimination on two or more protected grounds.²² The Committee has stressed that “such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying”.²³
22. In addition to these limitations on the personal scope of protection provided under section 13(3)(i), it is clear that this definition of discrimination in that section falls short of that recognised by the Committee, and considered a norm of international best practice, in a number of other ways. The Committee has clarified that:

¹⁹ *Declaration of Principles on Equality*, published by The Equal Rights Trust, London 2008, Principle 1, p. 5, available at:

<http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>.

²⁰ *Ibid.*

²¹ See discussion in: Petrova, D., “The Declaration of Principles on Equality: A Contribution to International Human Rights”, in *Declaration of Principles on Equality*, p. 31, available at <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20cropped%2016%20Oct%20dimitrina%20comment.pdf>.

²² See above, note 2, Para 17.

²³ *Ibid.*

*[D]iscrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights (...)
Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant.²⁴*

23. The right to non-discrimination provided by the Charter does not explicitly prohibit both direct and indirect discrimination, as required by General Comment 20 and by the Declaration.²⁵ In the view of ERT, the fact that section 13(3)(i), which simply provides “the right to freedom from discrimination”, does not explicitly cover indirect discrimination as well as direct discrimination represents a failure of the state party to ensure that its Constitution effectively prohibits all forms of discrimination and that it provides for substantive, rather than solely formal equality, as required by the Committee.
24. As well as requiring the prohibition of direct and indirect discrimination, both the Declaration, and the Committee, have recognised that harassment is a form of discrimination which should be prohibited.²⁶ Again, section 13(3)(i) falls short in this respect, making no reference to harassment as a form of discrimination. Similarly, the Charter does not explicitly prohibit incitement to discrimination, which has been recognised as a form of prohibited conduct by the Committee in its General Comment 20,²⁷ or discrimination by association or discrimination on the basis of perception both of which are recognised as forms of discrimination under the Declaration, and should be considered essential elements of a modern equality guarantee.²⁸
25. Further, the Committee has noted the critical importance of reasonable accommodation if the equality rights of disabled persons are to be effective. State parties are required to make reasonable accommodation to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others.²⁹ The Committee has also clarified that the denial of reasonable accommodation constitutes discrimination: according to General Comment 5, “disability-based discrimination” includes the denial of “reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.”³⁰ The omission of a right of reasonable accommodation for disabled persons under the Charter means that the Jamaican Constitution fails to address, and remove, those physical and social barriers which prevent persons with disabilities from exercising their economic, social and cultural rights on an equal basis with others, as guaranteed by the Covenant.

²⁴ See above, note 2, Paras 7 and 10.

²⁵ See above, note 20, Principle 5, p. 6.

²⁶ See above, note 20, Principle 5, p. 6 and above, note 2, Para 7.

²⁷ See above, note 2, Para 7.

²⁸ See above, note 20, Principle 5, p. 6.

²⁹ See above, note 2, Paras 8(b) and 9.

³⁰ See above, note 8, Para 15.

26. The experts involved in drafting the Declaration sought to expand on the content of reasonable accommodation as a concept, reflecting an emerging international consensus that reasonable accommodation should be extended beyond disability, to cover other forms of disadvantage and difference which hamper the ability of individuals to participate in any area of economic, social, political, cultural or civil life.³¹ The omission from the Charter of any right or duty related to reasonable accommodation therefore represents a further failure to effectively guarantee the right to non-discrimination for other groups, such as those with specific requirements arising from their adherence to certain religious beliefs, who require reasonable accommodation in order to be able to participate in life on an equal basis with others.
27. ERT is concerned that the scope and definition of the right to non-discrimination provided in section 13(3)(i) of the Charter of Fundamental Rights and Freedoms is so limited as to critically undermine the effective protection of discrimination in Jamaica. As such, ERT believes that the Charter does not achieve its intended purpose of providing “more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica”.³² ERT therefore calls on the Committee to urge the government of Jamaica to amend section 13(3)(i), in particular by ensuring that the constitutional provision(s) on the rights to equality and non-discrimination:
- a. Explicitly prohibits discrimination on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness;
 - b. Provides a “conditionally open” list of grounds, with a test for the incorporation of new grounds of discrimination in line with that recommended in the Declaration of Principles on Equality;
 - c. Provides for protection from multiple discrimination as required by both the Committee and the Declaration of Principles on Equality;
 - d. Explicitly prohibits direct and indirect discrimination, harassment, discrimination on the basis of perception and discrimination by association;
 - e. Provides a right to reasonable accommodation for persons facing barriers which prevent their equal participation either because of disability or some other ground of discrimination.

Other Measures to Protect the Right to Non-discrimination

28. In addition to its obligation to respect the right to non-discrimination by refraining from discrimination in laws or actions of the state and its agents, Jamaica is obliged to provide effective protection from discrimination by both public and private actors. As discussed above, the Constitution, as amended by the Charter, provides a right to protection from discrimination by state actors, by virtue of section 13(4). In addition, as amended by the Charter, the Constitution, meets the obligation to provide protection from discrimination by private actors to a limited extent: section 13(5) clarifies that each provision of the Charter, including the right to non-discrimination

³¹ See above, note 20, Principle 13 p. 10-11. For further discussion, see above, note 22, at p. 39.

³² Charter of Fundamental Rights and Freedoms (Constitutional Amendments) Act, 2011, Preamble.

provided under section 13(3)(i), “binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right”.

29. As has been noted above, despite improving on its predecessor, section 13(3)(i) is problematic in a number of ways, providing inadequate protection from discrimination, both in respect of the grounds on which discrimination is prohibited, and the forms of discriminatory action which are explicitly covered by the provision.
30. Moreover, the Committee, other treaty bodies such as CEDAW,³³ and the authors and signatories of the Declaration,³⁴ have all recognized that in order to provide effective protection from discrimination, states are required to go beyond a simple prohibition of discrimination in their Constitution, and must also 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 encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights.*³⁵

31. Jamaica has neither comprehensive anti-discrimination legislation, nor specific legislation prohibiting discrimination on a specific ground or grounds, with the only exceptions being a number of laws dealing with specific aspects of discrimination against women. The *Employment (Equal Pay for Men and Women) Act, 1975* states that employers who fail to provide equal pay for equal work discriminate between male and female employees and are subject to penalty. Thus, it discharges one aspect of Jamaica’s obligation to provide protection from discrimination in respect of women’s participation in employment. Similarly, the *Domestic Violence (Amendment) Act 2004* and the *Offences Against the Person (Amendment) Act* provide protection from different forms of gender based violence. Taken together, these laws provide some minimal measure of legislative protection from gender discrimination for women in Jamaica, though significant gaps in the legal protection for women remain, while there is a notable absence of protection in respect of other grounds of discrimination.
32. 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.³⁶ Such anti-discrimination legislation must cover discrimination on at least all those grounds (or any combination of those grounds) of discrimination recognised by the Committee, should apply to both state and non-state actors, 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.

³³ See above, note 11.

³⁴ See above, note 20, Principle 15, p. 12.

³⁵ See above, note 2, Para 37.

³⁶ 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 20, Principle 15.)

33. 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 Jamaica'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 Jamaica can effectively meet its obligations in this regard.³⁷
34. ERT calls on the Committee to urge the government of Jamaica to enact comprehensive anti-discrimination legislation, ensuring that it:
- a. Explicitly prohibits discrimination on those grounds specified in paragraph 28(a) above, provides a "conditionally open" list of grounds, with a test for the incorporation of new grounds of discrimination and provides for protection from multiple discrimination;
 - b. Prohibits discrimination in all areas of life governed by law, including but not limited to: education, employment, social security (including pensions and housing), provision of goods and services (including public services), clubs and associations;
 - c. Prohibits direct and indirect discrimination, harassment, discrimination on the basis of perception and discrimination by association;
 - d. Provides a right to reasonable accommodation for persons facing barriers which prevent their equal participation either because of disability or any other ground of discrimination;
 - e. Provides measures for legal aid provision, the transfer of the burden of proof, the standing of interested parties in cases related to discrimination and other measures necessary to ensure adequate access to justice for victims of discrimination;
 - f. Provides sanctions which are effective, proportionate and dissuasive and which provide appropriate remedies for those whose right has been breached; and
 - g. Requires the state to take all necessary measures to eliminate discrimination and promote equality, including through the adoption of special measures, and sets out conditions for the appropriate implementation of such measures.

Measures to Fulfil the Right to Non-discrimination

35. In addition to refraining from discrimination in law and actions of the state, and providing protection from discrimination by private actors, state parties to the Covenant must ensure that the right to non-discrimination is fulfilled by ensuring its enjoyment in practice. This entails a number of specific obligations, including the adoption of policy measures establishment of institutions and monitoring of the efficacy of legislation and policies.
36. The Committee has stated that states should develop and implement appropriate strategies, plans and policies "in order to address both formal and substantive discrimination by public and private actors in the area of Covenant rights" on all prohibited grounds".³⁸ It has specifically advised that the principles of equality and non-discrimination should be taught in formal and non-formal education,

³⁷ See above, note 20, Principle 18 (Access to Justice), Principle 21 (Evidence and Proof), Principle 20 (Standing), and Principle 22 (Remedies and Sanctions).

³⁸ See above, note 2, Para 38,

“with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote tolerance between different groups in society”.³⁹ It has further noted that “national legislation, strategies, policies and plans” should provide for the establishment of mechanisms and institutions to address discrimination,⁴⁰ and that the state has a duty to effectively monitor the implementation of measures to comply with Article 2(2) of the Covenant, including through the collation of data and the use of “appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination”.⁴¹

37. In its report to the Committee, Jamaica cites a number of policies designed to address discrimination and disadvantage addressing, *inter alia*, the position of women,⁴² older persons,⁴³ youth⁴⁴ and disabled persons.⁴⁵ While these policy measures are welcome, it is notable that many grounds are not specifically covered and that no general policy on equality and non-discrimination is referred to. Additionally, a number of the policies cited by the state do not cover the full range of areas of life in which discrimination should be prohibited, or address discrimination in respect of all economic, social and cultural rights. For example, the Jamaican government sights the *National Policy for Senior Citizen* which covers health, education and media, income security, housing and national infrastructure but does not address employment.⁴⁶
38. As noted above, the Committee has highlighted that states should “provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights.”⁴⁷ The Declaration provides specific guidance on the achievement of this objective, stating that:

*[S]tates must establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. States must ensure the independent status and competences of such bodies in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.*⁴⁸

39. Jamaica has an Office of the Public Defender which has certain investigative powers in relation to constitutional rights.⁴⁹ However, this institution has not been accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human

³⁹ *Ibid.*

⁴⁰ See above, note 2, Para 40.

⁴¹ See above, note 2, Para 41.

⁴² Committee on Economic, Social and Cultural Rights, *Combined Third and Fourth Periodic Report of State Parties: Jamaica*, UN Doc. E/C.12/JAM/3-4, 2011, Paras 100-102.

⁴³ *Ibid.*, Paras 118-119.

⁴⁴ *Ibid.*, Paras 20-21.

⁴⁵ *Ibid.*, Paras 120-123.

⁴⁶ *Ibid.*, Paras 118-119.

⁴⁷ See above note 2, Para 40.

⁴⁸ See above, note 20, Principle 23, p. 13.

⁴⁹ Public Defender (Interim) Act, 1999.

Rights.⁵⁰ ERT submits that a National Human Rights Institution which complies with the Paris Principles is necessary if Jamaica is to effectively fulfil its obligations in respect of the rights to equality and non discrimination.

40. In order to eliminate substantive discrimination, the Committee has stated that “states parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination.”⁵¹ Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* inequalities and are discontinued when substantive equality has been sustainably achieved. Indeed, as the Declaration of Principles on Equality has recognised, positive action is required to give effect to the right to equality.⁵²
41. As discussed above, there is an absence of anti-discrimination legislation in Jamaica. This means that there is inadequate legal provision for the institution and regulation of positive action measures. Despite this lack of legislation, the government of Jamaica has provided the Committee with some examples of positive action measures it has taken. For example, the government notes that vocational institutions are establishing quotas for women in fields traditionally dominated by men.⁵³ While such measures are to be welcomed, ERT submits that the absence of a legislative framework governing these activities is likely to limit their effectiveness, reducing these measures to policy aspirations rather than substantive legal obligations. Further, ERT is concerned that the absence of a legislative framework means that positive action measures may not themselves be established in line with the principles of non-discrimination, and may in fact concentrate on the perceived needs of only certain groups.
42. ERT calls on the Committee to recommend that the government of Jamaica takes measures to give effect to the right to non-discrimination in practice, including by:
 - a. Developing, adopting and implementing a national policy on equality and non-discrimination, in consultation with civil society and groups vulnerable to discrimination;
 - b. Enacting legislation which establishes a National Human Rights Institution, with a mandate including the right to non-discrimination and the right to equality, which meets all of the requirements of the Paris Principles.
 - c. Ensuring, in line with the recommendation at paragraph 35(g) above, that comprehensive anti-discrimination legislation expressly provides for positive action.

Conclusion

43. The amendment of the constitution through *The Charter of Fundamental Rights and Freedoms (Constitutional Amendments) Act, 2011* represents a positive step towards improved protection from

⁵⁰ International Coordinating Committee Of National Institutions For The Promotion And Protection Of Human Rights, *Chart of the Status of National Institutions*, December 2011, available at: [http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20\(DIC%202011\).pdf](http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20(DIC%202011).pdf).

⁵¹ See above, note 2, Para 9.

⁵² See above, note 20, Principle 3, p. 5.

⁵³ See above note 43, Para 18.

discrimination in all areas of life in Jamaica, including in respect of the economic, social and cultural rights guaranteed by the Covenant. However, as this report makes clear, Jamaica must go further if it is to ensure that it meets its obligations under Article 2(2) and effectively respects, protects and fulfils the right to non-discrimination.

44. ERT recommends that the government of Jamaica must amend or repeal any discriminatory legal provisions and undertake further reform of its constitution. It recommends that Jamaica enacts comprehensive equality legislation providing protection from all forms of discrimination on all grounds and in all areas of life governed by law. Further, it recommends that the government must also adopt a national equality policy, establish a National Human Rights Institution with a mandate covering the rights to equality and non-discrimination and establish appropriate positive action measures.
45. These recommendations are offered in order to assist the state party in ensuring that the improvement in protection from discrimination provided as a result of the adoption of the Charter become effective in practice, that the spirit of the Charter is realised and that Jamaica brings its system of constitutional, legislative and policy measures into line with its obligations under the Covenant.