



The Equal Rights Trust

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

Legal Analysis

October 2013

About the Equal Rights Trust

The Equal Rights Trust (ERT) is 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 has expertise in the area of equality and human rights law which it applies in assessing proposed policies from the point of view of compliance with non-discrimination and equality principles.

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

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Introduction

1. 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.
2. ERT has undertaken research on both the main patterns of discrimination which prevail in Ukraine and the legal and policy framework designed to provide protection from discrimination. As a result, ERT has concluded that the existing protections contained within the Law “On Principles of Prevention and Combating Discrimination in Ukraine” (the Anti-Discrimination Law) are insufficient to meet Ukraine’s obligations under international and European human rights law.
3. ERT is aware that the Cabinet of Ministers has put forward a Draft Law on Amendments to Certain Legislative Acts of Ukraine on Prevention and Combating Discrimination in Ukraine, which is currently undergoing scrutiny by the Verkhovna Rada. We offer this legal opinion on the existing Anti-Discrimination Law and the Draft Law in order to assist the ongoing debate in Ukraine on the need to improve the struggle against discrimination and ensure compliance with international legal standards and best practice.
4. This legal analysis is based upon those international human rights instruments to which Ukraine is party, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and the European Convention on Human Rights.
5. This analysis also relies on the Declaration of Principles on Equality (the Declaration),¹ 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”.² It has also been endorsed by the Parliamentary Assembly of the Council of Europe³ and has informed the development of anti-discrimination legislation in countries as diverse as Albania, Australia, the Czech Republic and Kenya.

¹ *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

² *Naz Foundation v Government of NCT of Delhi and Others* WP(C) No. 7455/2001, Para 93.

³ 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.

List of Grounds

6. The Anti-Discrimination Law contains an open-ended list of prohibited grounds (protected characteristics) in Article 1(2), with the following grounds receiving explicit protection: race; colour; political, religious and other beliefs; sex; age; disability; ethnic or social origin; family and property status; place of residence; and language.
7. While the use of an open-ended list of prohibited grounds is to be welcomed, the above listed of explicitly mentioned grounds is limited, omitting certain grounds which are well-recognised under international human rights law.
8. In its Principle 5, the Declaration of Principles on Equality provides an extensive but closed list of grounds, complemented by a test to establish whether additional grounds should be admitted for protection. The list of explicitly protected characteristics in the Declaration goes beyond the list contained within Article 1(2) of the Anti-Discrimination Law. ERT is of the view that, in order to be consistent with international instruments and the interpretations of United Nations treaty bodies, Ukrainian law should provide protection from discrimination on the following grounds which are not currently mentioned in the Anti-Discrimination Law:

Pregnancy

9. Under the Convention on the Elimination of All Forms of Discrimination against Women, States must take steps to protect pregnant women from discrimination.⁴ This includes prohibiting dismissal on the grounds of pregnancy, providing special protection to women during pregnancy in types of work proved to be harmful to them, and ensuring to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.⁵
10. In the European Union, discrimination on grounds of pregnancy is prohibited under Article 4(1)(a) of the Gender Equality (Goods and Services) Directive⁶ and Article 2(2)(c) of the Gender Equality (Employment) Directive.⁷
11. The Court of Justice of the European Union has also held that references to “sex” in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational

⁴ G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46.

⁵ *Ibid.*, Articles 11(2) and 12(2).

⁶ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

⁷ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

training and promotion, and working conditions includes discrimination on grounds of “pregnancy”.⁸

Maternity

12. Under the Convention on the Elimination of All Forms of Discrimination against Women, States must take steps to protect women from discrimination on grounds of maternity.⁹ This includes prohibiting dismissal on grounds of maternity leave and introducing maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.¹⁰
13. In the European Union, discrimination on grounds of maternity is prohibited under Article 4(1)(a) of Gender Equality (Goods and Services) Directive¹¹ and Article 2(2)(c) of the Gender Equality (Employment) Directive.¹²
14. It has been argued that pregnancy and maternity need not be specifically mentioned in the list of prohibited grounds in the Anti-discrimination Law as pregnant women and mothers enjoy various social protections under other Ukrainian legislation. However, social protections and related benefits are not the same thing as the fundamental human right to be free from discrimination. The enforcement of the rights of pregnant women and mothers under other legislation cannot substitute for the state’s obligation to outlaw discrimination on these grounds in all areas of life regulated by law. Both the principles on equality as a human right and the need to ensure effective protection from discrimination through a unified, harmonised, coherent normative framework facilitating the victims’ access to justice require that pregnancy and maternity be treated as protected characteristics in equality and anti-discrimination legislation so as to be addressed in ways consistent with the approach to other protected characteristics.

Birth

15. Birth is a prohibited ground under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights¹³ and Article 2(2) of the International Covenant on Economic,

⁸ See, for example, Case C-177/88, *Dekker v Stichting VJV* [1990] ECR I-3941 (ECJ) and Case C-438/99, *Jiménez Melgar v Ayuntamiento de los Barrios* [2001] ECR I-6915 (ECJ). Council Directive 76/207/EEC of 9 February 1976 has since been recast as Directive 2006/54/EC of 5 July 2006 (Gender Equality (Employment) Directive).

⁹ See above, note 4.

¹⁰ *Ibid.*, Article 11(2).

¹¹ See above, note 6.

¹² See above, note 7.

¹³ G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

Social and Cultural Rights.¹⁴ The Committee on Economic, Social and Cultural Rights has stated in its General Comment No. 20 that discrimination on grounds of birth includes discrimination against “those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons”.¹⁵ Under the European Convention on Human Rights, discrimination on grounds of birth is prohibited under Article 14 of and Article 1 of Protocol 12 to, the European Convention on Human Rights.

16. Despite the existing provisions in Ukrainian law which guarantee equality of persons born out of wedlock, to ensure comprehensiveness and consistency of the anti-discrimination law with international standards, as well as to prevent a very restrictive interpretation of “birth”, it is advisable that “birth” be an explicitly mentioned characteristic in the anti-discrimination law, which should function as *lex specialis* in relation to pre-existing norms related to equality.

Nationality (in the Sense of Citizenship – “hromadianstvo”)

17. The Human Rights Committee has stated that the prohibition on discrimination in Article 26 of the International Covenant on Civil and Political Rights includes differentiation between nationals and non-nationals.¹⁶ Similarly, the Committee on Economic, Social and Cultural Rights has stated that nationality is a prohibited ground falling within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.¹⁷ In avoiding the possible confusion of the term “nationality” (“natsionalnist”) with the term ethnicity, which would be the non-technical meaning in the Ukrainian language, we stress that the characteristic which is meant to be protected under international law in this case is indeed citizenship (“hromadianstvo”).

Sexual Orientation

18. The Human Rights Committee has stated that the prohibition on discrimination in Article 26 of the International Covenant on Civil and Political Rights includes discrimination based on sexual orientation.¹⁸ Similarly, the Committee on Economic, Social and Cultural Rights has stated that sexual orientation is a prohibited ground falling within “other

¹⁴ G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3.

¹⁵ Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, U.N. Doc. E/C.12/GC/20, 2009, Para 26.

¹⁶ See, for example, *Gueye v France* (Application No. 1961/1983), U.N. Doc. CCPR/C/35/D/196/1985 (1989); *Adam v Czech Republic* (Application No. 586/1994), U.N. Doc. CCPR/C/57/D/586/1994 (1996); and *Karakurt v Austria* (Application No. 965/2000), U.N. Doc. CCPR/C/74/D/965/2000 (2002).

¹⁷ See above, note 15, Para 30.

¹⁸ See, for example, *Young v Australia* (Communication No. 941/2000), U.N. Doc. CCPR/C/78/D/941/2000 (2003).

status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.¹⁹

19. The European Court of Human Rights has held that the prohibition on discrimination in Article 14 of the European Convention on Human Rights includes differentiation based on sexual orientation.²⁰
20. Under European Union law, discrimination on grounds of sexual orientation in certain fields is prohibited under the Framework Directive.²¹

Gender Identity

21. The Committee on Economic, Social and Cultural Rights has stated that gender identity is a prohibited ground falling within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.²²
22. The European Court of Human Rights has held that gender identity is a prohibited ground falling within “other status” in Article 14 of and Article 1 of Protocol 12 to, the European Convention on Human Rights.²³
23. The European Court of Justice has held that discrimination on grounds of ‘sex’ also includes discrimination against a person because he or she “intends to undergo, or has undergone, gender reassignment”.²⁴

Health Status

24. The Committee on Economic, Social and Cultural Rights has stated that health status is a prohibited ground falling within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.²⁵

¹⁹ See above, note 15, Para 32.

²⁰ 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.

²¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

²² See above, note 15, Para 32.

²³ See, for example, *Christine Goodwin v the United Kingdom* (Application No. 28957/95), 11 July 2002.

²⁴ See, for example, *P. v S. and Cornwall County Council*, Case C-13/94, [1996].

²⁵ See above, note 15, Para 33.

Genetic or Other Predisposition toward Illness

25. Article 11 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine prohibits discrimination on grounds of a person's genetic heritage.²⁶

Conclusions

26. In the view of ERT, the open-ended list of protected characteristics in Article 1(2) of the Anti-Discrimination Law should be read as including protection from discrimination on all of the above grounds if it is to be consistent with international law.
27. Nevertheless, ERT regrets the failure to include these grounds explicitly in Article 1(2) of the Anti-Discrimination Law. ERT believes that without explicit recognition, victims of discrimination on those grounds may be required to undertake legal proceedings so as to establish that these grounds are recognised under Article 1(2), rather than being able to rely on the Anti-Discrimination Law immediately. In addition, the Ukrainian courts may fail to recognise some or all of these grounds when interpreting Article 1(2).

The following grounds should be explicitly included in the Anti-Discrimination Law: pregnancy; maternity; birth; citizenship; sexual orientation; gender identity; health status; and genetic or other predisposition toward illness.

Amendments Proposed by the Draft Law

28. Despite the concerns outlined above, the Cabinet of Ministers of Ukraine has not proposed the inclusion of any further grounds for protection in the Draft Law amending the Anti-Discrimination Law, with two exceptions: the Draft Law would add "citizenship" as a protected ground in the list in Article 1(2), and sexual orientation as a protected ground but only in Article 22 of the Labour Code which prohibits discrimination in the entering into, amendment of, and termination of employment contracts. Thus, the Draft Law would not extend protection from discrimination on grounds of sexual orientation into the other areas of life covered by the Anti-Discrimination Law itself, and would instead only provide protection in employment.
29. While any decision to increase the scope of protection from discrimination is welcome, ERT is concerned by the proposal to extend an explicit prohibition of sexual orientation discrimination only into the area of employment. ERT takes a holistic approach to the right to equality in which all grounds of discrimination are treated equally with no

²⁶ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Council of Europe Treaty Series (CETS) No. 164, adopted 4 April 1997.

hierarchy in respect to the level and scope of protection. Principle 6 of the Declaration of Principles on Equality provides that:

*Legislation must provide for equal protection from discrimination regardless of the ground or combination of grounds concerned.*²⁷

30. In this regard, the Declaration reflects current expert opinion that any hierarchy of protection for different grounds of discrimination is inconsistent with the right to equality. It is also reflective of international law: no international human rights treaty, such as the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights, establishes a system of different levels of protection from discrimination on different grounds, whether explicitly recognised in the text or subsequently read into the “other status” provision. These instruments require instead that states respect and ensure the Covenant rights “without distinction of any kind”. While the Human Rights Committee and the Economic, Social and Cultural Rights Committee in their General Comments and Concluding Observations have provided extensive and detailed interpretations of the right to non-discrimination, they have never indicated or condoned the existence of a hierarchy of grounds in respect of the level of protection. Indeed, this approach is consistent with the well-established principles of universality and indivisibility of human rights in general, which is conferred by the Covenants and is reasserted powerfully in the 1993 Vienna Declaration and Programme of Action.
31. In the view of ERT, any hierarchy of protections based on different grounds has no place in a law designed to provide protection from discrimination and promote equality, and is clearly inconsistent with international law and best practice.
32. The decision to limit explicit protection from sexual orientation discrimination is even more troubling given the prevalence of discrimination on grounds of sexual orientation in Ukraine. There is extensive evidence of problems of discrimination and discriminatory violence directed at sexual and gender minorities in Ukraine, which points to the need for effective protection from discrimination in all spheres of life. ERT’s partner in Ukraine, Nash Mir, for example, has documented severe patterns of discriminatory ill-treatment directed at gay men and lesbians, in its recent reports, *One Step Forward, Two Steps Back: The State of LGBT persons in Ukraine in 2010-2011*,²⁸ and *LGBT-Vector Ukraine: Collection of Monitoring Reports*.²⁹ The International Lesbian, Gay, Bisexual, Trans and Intersex Association – Europe, published its second *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe: 2013* on 17 May 2013, which

²⁷ See above, note 1, Principle 6, p. 8.

²⁸ Nash Mir, *One Step Forward, Two Steps Back: The State of LGBT persons in Ukraine in 2010-2011*, 2012, available at: <http://www.gay.org.ua/our-publications> (available in Ukrainian and Russian only).

²⁹ Nash Mir, *LGBT-Vector Ukraine: Collection of Monitoring Reports*, 2013, available at: <http://www.gay.org.ua/our-publications> (available in Russian only).

examines the level of legal equality for LGBTI persons in all countries in Europe.³⁰ Ukraine received a score of just 12%, ranking 44th out of 49 countries in Europe.

Prohibiting discrimination on grounds of sexual orientation only in certain areas of life, as opposed to other grounds of discrimination cannot be justified. All grounds should be equally protected in the Anti-Discrimination Law, including sexual orientation.

Test for Further Grounds

33. In addition, ERT is concerned that the Anti-Discrimination Law does not set down criteria by which further grounds are to be recognised as protected from discrimination. While the use of an open-ended list creates a welcome opportunity for new characteristics to be recognised as meriting protection, it risks creating uncertainty about the Law's scope. The absence of any qualifying criteria means that the Law lacks certainty as to which further groups having certain characteristics are likely to be recognised and protected by the courts among rights-holders, duty-bearers and those responsible for the Law's implementation and enforcement. The absence of such criteria thus creates the risk of litigation being brought seeking protection on grounds not needing or deserving protection and, conversely, of groups or individuals being unclear of the scope and whether they will enjoy protection.
34. The drafters of the Declaration proposed a test to establish the admission of new grounds as the best approach to determine whether a new characteristic should be incorporated into the list of those enjoying protection:

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.

35. The approach of the Declaration of Principles on Equality reflects that used in the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000) in South Africa, 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 is met.³¹ This approach has the advantage of flexibility for further groups to be recognised and

³⁰ International Lesbian, Gay, Bisexual, Trans and Intersex Association – Europe, “Not “la vie en rose”: the most comprehensive overview of the LGBTI people rights and lives in Europe 2013”, 17 May 2013.

³¹ This legislation itself drew 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 constitutional prohibition on discrimination in Section 9 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.

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. Most importantly, in the Ukrainian context, it provides a basis for judicial interpretation which minimises the potential for jurisprudence which conflicts with international legal standards.

The Anti-Discrimination Law should be amended to incorporate criteria for the inclusion of additional characteristics as prohibited grounds of discrimination, using the criteria specified in the Declaration of Principles on Equality as the basis of the current international best practice on this matter.

Multiple Discrimination

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

Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.³²

38. Significantly, the Committee, in the same General Comment, stated that multiple discrimination may be considered as a prohibited ground falling within “other status” in Article 2(2) of the International Convention on Economic, Social and Cultural Rights.³³ More recently, the Committee on the Elimination of Discrimination Against Women, in its General Recommendation No. 28, has explicitly stated that:

Intersectionality is a basic concept for understanding the scope of the general obligations of states parties contained in article 2 (...) States

³² See above, note 15, Para 17.

³³ *Ibid.*, Para. 27.

*parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.*³⁴

The Anti-Discrimination Law should be amended so as to prohibit multiple discrimination, including both cumulative (additive) and intersectional discrimination.

Discrimination by Association and Discrimination by Perception

39. The Anti-Discrimination Law does not include provisions on discrimination by association or discrimination by 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.*³⁵

40. Such an understanding has also been expressed by the Committee on Economic, Social and Cultural Rights which, in its interpretation of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, has stated that:

*Membership [of a protected group] also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).*³⁶

41. The Court of Justice of the European Union, sitting as a Grand Chamber, has held that direct discrimination as defined by the Framework Directive³⁷ is not limited to persons with the protected characteristic. The Court, in the context of discrimination on grounds of disability, held that:

³⁴ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the core obligations of States parties under article 2*, CEDAW/C/GC/28, 2010, Para 18.

³⁵ See above, note 1, Principle 5, p. 6.

³⁶ See above, note 15, Para 16.

³⁷ See above, note 21.

The prohibition of direct discrimination laid down by those provisions [of the Framework Directive] is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).³⁸

The Anti-Discrimination Law should be amended so as to prohibit discrimination by association.

42. Although the Anti-Discrimination Law contains no provisions recognising discrimination by perception, the Draft Law which amends the Anti-Discrimination Law would amend Article 1(2), which distinctly defines discrimination *per se*, to include the phrase “whether real or perceived” after listing the protected grounds, and would therefore include discrimination by perception. This is very welcome.

The Anti-Discrimination Law should be amended so as to prohibit discrimination by perception, as per the amendment in the Draft Law.

Direct Discrimination

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

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

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

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.³⁹

³⁸ *Coleman v Attridge Law and Steve Law*, Case C-303/06 [2008] I-5603, 17 July 2008.

³⁹ See above, note 1, Principle 5, p. 6.

45. This definition draws inspiration from, and is reflected in, various sources of international human rights law. The International Covenant on Civil and Political Rights does not use the terms “direct” and “indirect” in its prohibition on discrimination in Articles 2(1) and 26. However, the Human Rights Committee, in interpreting Articles 2(1) and 26 has stated in General Comment No. 18 that:

*[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.*⁴⁰

46. While differential treatment having a certain “purpose” defined above and differential treatment having a certain “effect” as defined above are not equivalent to direct and indirect discrimination respectively, the scope of prohibited behaviours covered by the definition referring to “purpose or effect” is arguably coextensive with a prohibition of both direct and indirect discrimination.
47. The International Covenant on Economic, Social and Cultural Rights prohibits discrimination in Article 2(2). The Committee on Economic, Social and Cultural Rights has elaborated on this prohibition 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 (...) 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).*⁴¹

48. The European Court of Human Rights uses the formulation: A “difference in the treatment of persons in analogous, or relevantly similar, situations” which is “based on an identifiable characteristic”.⁴²
49. European Union law defines direct discrimination as:

⁴⁰ Human Rights Committee, *General Comment No. 18: Non-discrimination*, U.N. Doc. HRI/GEN/1/Rev.1 at 26, 1994, Para 7.

⁴¹ See above, note 15, Paras 7 and 10.

⁴² 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.

[W]here one person is treated less favourably than another is, has been or would be treated in a comparable situation [on a prohibited ground].⁴³

50. Comparing the definition of direct discrimination in the Anti-Discrimination Law with the definition in Principle 5, it is clear that the definition in the Anti-Discrimination Law has two significant weaknesses. First, by using the present tense, “are treated less favourably (...) than other persons”, as opposed to the terminology used in the Declaration of Principles of Equality, namely “is treated less favourably than another person or another group of persons *is, has been, or would be treated*”, the definition is unnecessarily restrictive and excludes from its scope both historic and pre-emptive claims.
51. Second, the definition does not include the second situation in the Declaration’s definition of direct discrimination, namely “when, for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment”. This second situation does not require there to be a comparator when assessing whether there has been discrimination, and so provides protection in situations where a person suffers harm because of their possession of a particular characteristic, but is unable to identify another person who benefits or does not suffer the harm because of the absence of such a characteristic. By failing to include this second situation in the definition, the level of protection is unnecessarily reduced.
52. ERT notes that Draft Law would amend the definition of direct discrimination in the Anti-Discrimination Law providing for a new definition as follows:

[S]ituations in which an individual and/or a group of persons, because of certain attributes, are treated, appear to be treated, or may be treated less favourably than another individual and/or group of persons in a similar situation.

53. Whilst this new definition addresses the first weakness of the current definition, it fails to address the second.

The definition of direct discrimination in Article 1(6) of the Anti-Discrimination Law should be amended to bring it in line with the Declaration.

Indirect Discrimination

⁴³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 2(2)(a); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2(2)(a); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 2(a); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 2(1)(a).

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

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

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

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

56. This definition draws inspiration from, and is reflected in, various sources of international human rights law. As discussed above, the International Covenant on Civil and Political Rights does not use the terms “direct” and “indirect” in its prohibition on discrimination in Articles 2(1) and 26. Instead, the Human Rights Committee, when interpreting Articles 2(1) and 26, has used the terms “purpose” and “effect” which, while not relating to direct and indirect discrimination respectively, cover the same range of prohibited conducts.⁴⁴ The Committee on the Elimination of Racial Discrimination has used the same language on “purpose or effect”, based on the wording of Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.⁴⁵

57. The Committee on Economic, Social and Cultural Rights, in interpreting the prohibition against discrimination in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, has stated:

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. For instance, requiring a birth registration

⁴⁴ See above, note 40, Para. 7.

⁴⁵ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 14: Definition of Racial Discrimination*, U.N. Doc. A/48/18 at 114, 1994, Para 1.

*certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.*⁴⁶

58. European Union law defines indirect discrimination occurring:

*[W]here an apparently neutral provision, criterion or practice would put persons [with a protected characteristic] at a particular disadvantage compared with other persons.*⁴⁷

59. The European Court of Human Rights has used the following formulation:

*[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.*⁴⁸

60. The first half of section 1(3) of the Law, which defines what constitutes indirect discrimination, despite the unclear use of the “identical” (identical to what?), is broadly in line with the definitions in EU law and Principle 5 of the Declaration. However, the second half of the definition in section 1(3), which provides an exception to the prohibition on indirect discrimination where an action is “objectively justified by the aim of ensuring equal opportunities to an individual or groups of persons to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine”, is clearly inconsistent with international standards. The Declaration provides that exceptions to indirect discrimination must be “objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”. Similar wording has been used by various UN Treaty Bodies, such as the Human Rights Committee, which uses the test of whether “the criteria for [any] differentiation are reasonable and objective and if the aim

⁴⁶ See above, note 15, Para 10.

⁴⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 2(2)(b); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2(2)(b); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 2(b); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 2(1)(b). It should be noted that Article 2(2)(b) of Council Directive 2000/78/EC of 27 November 2000 contains an exception where as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 of the Directive in order to eliminate disadvantages entailed by such provision, criterion or practice.

⁴⁸ 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.

is to achieve a purpose which is legitimate under the [International Covenant on Civil and Political Rights]”.⁴⁹ The terminology of the exception in Article 1(3) appears to confuse justifiable indirect discrimination with positive action. It creates an extremely high threshold of justification, such that a very large number of provisions, criteria or practices which would not be considered discrimination in any other jurisdiction would have to be defined as indirect discrimination in Ukraine. Therefore, ERT believes that the definition in Article 1(3) creates an unrealistic burden on all potential defendants, risks confusion and misinterpretation, and potentially injustice if the definition is not amended.

61. ERT notes that the Draft Law would provide for a new definition of indirect discrimination as follows:

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

62. ERT believes that this new definition would address the weaknesses in the current definition and would be in line with international standards.

The definition of indirect discrimination in Article 1(3) of the Anti-Discrimination Law should be amended, as proposed in the Draft Law, to bring it in line with international standards reflected in the Declaration.

Definition of Discrimination Per Se

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

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

64. Christian Ahlund and Winnie Sordrager, writing on behalf of the European Commission against Racism and Intolerance, have highlighted two significant problems with this definition in their *Comments on the Draft Law on the Principles of Prevention and*

⁴⁹ See above, note 40, Para 13.

Combating Discrimination in Ukraine.⁵⁰ First, international law and best practice dictates that discrimination should be defined as either “direct” or “indirect” and unambiguous definitions for both have been developed which are widely accepted. There is therefore no need for a separate definition of discrimination – this risks confusion and misinterpretation. Second, the definition of discrimination provided in Article 1(2) refers to “decisions, actions or inactions, which are *directed* to establish restrictions or create privileges” thereby appearing to require intent for discrimination to be established. This is contrary to the interpretation of the term “discrimination” in Article 26 of the International Covenant on Civil and Political Rights, which the Human Rights Committee has defined by reference to the “purpose or effect” of the distinction, exclusion, restriction or preference, thereby explicitly negating any requirement for intent for discrimination to be established.⁵¹ The drafters of the Declaration reached the same conclusion as the Committee, such that the final part of the definition of discrimination provided in Principle 5 reads: “[a]n act of discrimination may be committed intentionally or unintentionally”.

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

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

66. Whilst the new definition of discrimination in the Draft Law addresses the second of Christian Ahlund and Winnie Sorgdrager’s concerns, it does not address the first. ERT shares that concern that the inclusion of a distinct definition of discrimination *per se* in addition to definitions of direct and indirect discrimination is unnecessary and risks confusion and misinterpretation.

The distinct definition of discrimination in Article 1(2) of the Anti-Discrimination Law should be deleted.

Reasonable Accommodation

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

⁵⁰ Ahlund, C. and Sorgdrager, W., *Comments on the Draft Law on the Principles of Prevention and Combating Discrimination in Ukraine*, 2012, available at: http://www.ombudsman.gov.ua/en/index.php?option=com_content&view=article&id=1383:comments-on-the-draft-law-on-the-principles-of-prevention-and-combating-discrimination-in-ukraine&catid=217:2012&Itemid=226.

⁵¹ See above, note 40, Para 6.

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

Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.⁵²

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

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

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

The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability. States parties should address discrimination, such as (...) denial of reasonable accommodation in public places such as public health facilities and the workplace, as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.⁵³

70. Despite prohibiting discrimination on grounds of disability, the Anti-Discrimination Law contains no reference to the provision of reasonable accommodation. Although a separate

⁵² See above, note 1, Principle 13, p. 10.

⁵³ See above, note 15, 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.

piece of legislation, the Law “On the Fundamentals of the Social Protection of the Disabled in Ukraine”, makes reference to the definition of discrimination on grounds of disability in Article 2 of the CRPD, and prohibits discrimination on grounds of disability, it does not set out any sanctions or remedies where such discrimination occurs, nor does it recognise failure to make reasonable accommodation as a form of discrimination . Instead, the legislation aims to enhance the ability of persons with disabilities to participate in various areas of life, for example through measures to assist persons with disabilities to find employment, and access public transport and buildings. Neither of these pieces of legislation therefore defines failure to provide reasonable accommodation as a form of discrimination.

71. ERT therefore believes that the omission in Ukrainian legislation of any provision defining failure to provide reasonable accommodation as a form of discrimination on grounds of disability is incompatible with Article 2(2) of the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities (CRPD).
72. The definition of reasonable accommodation in the Declaration goes further than the current understanding of reasonable accommodation in the CRPD, in that it may apply to other grounds of discrimination beyond disability. ERT believes that this reflects an emerging international consensus arising from the need to ensure consistent standards of legal protection between discrimination occurring on different grounds. Reasonable accommodation is particularly important in ensuring equality for persons of a different religion or belief, for example in modifying work times to enable observance of religious holidays.

The Anti-Discrimination Law should be amended so as to prohibit a failure to make reasonable accommodation on relevant grounds as a form of discrimination.

Positive Action

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

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

74. Article 7(1) of the Anti-Discrimination Law provides that “State policy in respect of preventing and combating discrimination shall be aimed at (...) taking positive action” but provides no further details on what action should be taken. Article 9 provides that the bodies empowered to prevent and combat discrimination in the Anti-Discrimination Law “may” take positive action.
75. ERT believes that to be effective, the right to equality *requires* positive action so as to “accelerate progress towards equality of particular groups”; indeed, the Declaration

defines positive action as a “necessary element within the right to equality”.⁵⁴ This approach reflects the current international consensus on positive action. The Human Rights Committee, for example, has stated that:

*[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.*⁵⁵

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

*The obligation to ensure to all individuals the rights recognized in the Covenant, established in articles 2 and 3 of the Covenant, requires that States parties take all necessary steps to enable every person to enjoy those rights (...). The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.*⁵⁶

77. Similarly, the Committee on Economic, Social and Cultural Rights has stated:

*In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination.*⁵⁷

78. In respect of equality between men and women, the Convention on the Elimination of All Forms of Discrimination Against Women provides at Article 4 that:

- 1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.*
- 2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.*

⁵⁴ See above, note 1, Principle 3, p. 5.

⁵⁵ See above, note 40, Para 10.

⁵⁶ Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (article 3)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10, 2000, Para 3.

⁵⁷ See above, note 15, Para 9.

79. The Convention, adopted in 1979, reflected an earlier understanding of the nature of special measures whereby they were considered an exception to the prohibition against discrimination. Today, special measures are considered not an exception to the prohibition against discrimination, but an integral element of the right to equality and non-discrimination. Reflecting this developed approach, the Committee on the Elimination of Discrimination Against Women stated in a General Comment in 2004 that:

[T]he application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.⁵⁸

80. ERT believes that there are at least two significant weaknesses in the Anti-Discrimination Law in relation to positive action. First, positive action is permissible rather than obligatory. Second, positive action is only permissible where it is aimed at eliminating inequality “in the opportunities (...) to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine”. This severely limits the situations where positive action measures may be taken, restricting its application to only those situations where access to Constitutional and legal rights is at issue. This definition excludes positive action measures being taken in other areas of life where legal or *de facto* inequality exists. Such a limitation is inconsistent with the scope of the rights to equality and non-discrimination, namely all areas of life regulated by law.⁵⁹
81. The Draft Law makes no amendments to Articles 7 or 9, but does amend the definition of positive action in Article 1(5), as follows:

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

82. The amendments made by the Draft Law address neither of the weaknesses within the current provisions. Indeed, a third weakness is added in that whereas Article 1(5) currently provides that positive action may be “temporary or permanent”, the Draft Law would provide that it could only be “temporary”. This limitation is unnecessarily restrictive and would not address discrimination which is systemic or structural, and which requires long-term and, in some instances, permanent measures of positive action to be taken so as to ensure substantive equality, for example positive measures to ensure equal treatment for the elderly.

⁵⁸ Committee on the Elimination of Discrimination against Women, *General recommendation No. 25: On article 4, paragraph 1, on temporary special measures*, U.N. Doc. HRI/GEN/1/Rev.7 at 282, 2004, Para 14.

⁵⁹ See Paras 83 – 87 below.

The Anti-Discrimination Law should be amended so as to *require*, and not merely *permit*, positive action to be taken; for positive action to be taken in all areas of life, and not merely in relation to existing Constitutional and legal rights; for positive action to remain available either temporarily or permanently; and for Ukraine to take specific and substantial measures of positive action to accelerate progress towards equality of all disadvantaged groups.

Scope of Application

83. The scope of the Anti-Discrimination Law is contained in Article 4 which covers many, but not all, areas of life where protection from discrimination is required. The scope is defined as: public and political activities; the civil service and local government; justice; labour relations; healthcare; education; social security; housing relations; access to goods and services; and other areas of public life. None of these terms is defined further in the Anti-Discrimination Law.
84. This list contains a number of omissions, many of which have been highlighted by Christian Ahlund and Winnie Sordrager of the European Commission against Racism and Intolerance in their comments on the Anti-Discrimination Law.⁶⁰ In particular, Article 4 does not state explicitly that the Anti-Discrimination Law applies to the private sector as well as public life. Other key areas of life that should be explicitly mentioned include membership of clubs and organisations, transport, welfare and pensions, training related to employment, and the exercise of economic activity.
85. ERT notes that the Draft Law would amend Article 4 of the Anti-Discrimination Law to exclude relations regulated by the Family Code of Ukraine from the scope of the Anti-Discrimination Law.
86. The Human Rights Committee has interpreted Article 26 of the International Covenant on Civil and Political Rights as “prohibit[ing] discrimination in law or in fact in any field regulated and protected by public authorities”.⁶¹ Article 1 of Protocol 12 to the European Convention on Human Rights provides for a scope of “the enjoyment of any right set forth by law”. Similarly, the Declaration of Principles of Equality defines the scope of the right to equality as “all areas of activity regulated by law”.⁶²
87. As the omissions listed above indicate, the scope of the Anti-Discrimination Law as defined in Article 4 does not cover “all areas of life regulated by law” and falls short of the requirements of the International Covenant on Civil Political Rights and the European Convention on Human Rights.

⁶⁰ See above, note 50.

⁶¹ See above, note 40, Para 12.

⁶² See above, note 1, Principle 8, p. 6.

The scope of the Anti-Discrimination Law in Article 4 should be expanded to cover all areas of activity regulated by law. Relations regulated by The Family Code of Ukraine should not be excluded from the scope of the Anti-Discrimination Law.

Rights Holders

88. Regarding the question who are the right-holders, Principle 9 provides that:

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

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

Legal persons must be able to assert a right to protection against discrimination when such discrimination is, has been or would be based on their members, employees or other persons associated with a legal person having a status or characteristic associated with a prohibited ground.⁶³

89. Article 14(1) of the Anti-Discrimination Law provides that complaints may only be brought by “a person.” Article 13 provides that non-governmental organisations, individuals and legal entities are able to “represent the interests of persons and/or groups who have been discriminated against in courts”. Although other legislation in Ukraine guarantees the right to bring complaints to legal persons as well as natural persons, the Anti-Discrimination Law contains no provisions which explicitly permit associations or other legal persons to assert a right to protection against discrimination on their own behalf as right-holders.

ERT would therefore recommend that Articles 13 and 14 of the Anti-Discrimination Law be clarified so as to ensure that claims may be brought by both individuals and groups of persons, and to ensure that legal persons are able to assert a right to protection from discrimination.

Duty-Bearers

90. Principle 10 of the Declaration provides that:

States have a duty to respect, protect, promote and fulfil the right to equality for all persons present within their territory or subject to their jurisdiction. Non-state actors, including transnational corporations

⁶³ See above, note 1, Principle 9, pp. 8-9.

*and other non-national legal entities, should respect the right to equality in all areas of activity regulated by law.*⁶⁴

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

The Anti-Discrimination Law should be reviewed and amended so as to ensure that the government of Ukraine and its agents are required, rather than solely empowered, to respect, protect, promote and fulfil the right to non-discrimination. The Law should also be reviewed and amended so as to ensure that non-state actors and other non-national legal entities respect the right to equality in all areas of activity regulated by law.

Access to Justice

93. Article 14 of the Anti-Discrimination Law provides that a person who believes they have been subject to discrimination has the right to file a complaint with the Commissioner of the Verkhovna Rada of Ukraine on Human Rights and/or the courts. The Anti-Discrimination Law contains no other provisions on the process by which victims of discrimination may access justice, save for Article 16 which provides that persons found guilty of violating the law are to be held responsible in accordance with the laws of Ukraine.
94. The Draft Law would amend Articles 14 and 16. The revised Article 14 would provide that a person who believes that they have been subject to discrimination has the right to file a complaint with state authorities, the authorities of the Autonomous Republic of Crimea, local governments and their officials, the Verkhovna Rada of Ukraine on Human Rights and/or the court in the manner prescribed by law, although it is unclear from the text

⁶⁴ *Ibid.*, Principle 10, p. 9.

which “law” prescribes the manner by which a person can file a complaint of discrimination. Article 16 would be amended slightly to provide that persons found guilty of violating the law would bear “civil, administrative and criminal responsibility”.

95. 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.*⁶⁵

96. International law requires States to provide effective access to justice for victims of discrimination. Article 2(3)(a) of the International Covenant on Civil and Political Rights requires States:

*To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.*⁶⁶

97. Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination requires States:

*[To] assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.*⁶⁷

98. Article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women requires States:

To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and

⁶⁵ *Ibid.*, Principle 18, p. 12.

⁶⁶ See above, note 13.

⁶⁷ G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195.

*other public institutions the effective protection of women against any act of discrimination.*⁶⁸

99. Article 13 of the European Convention on Human Rights states that:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

100. In practice, “access to justice” comprises a number of elements some of which are listed below.

Access to Judicial and/or Administrative Procedures

101. Article 2(3)(b) of the International Covenant on Civil and Political Rights requires States:

*To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State (...).*⁶⁹

102. The Human Rights Committee has attached importance to “States Parties establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law”.⁷⁰ The Committee on Economic, Social and Cultural Rights has stated that suitable bodies “customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons”,⁷¹ and that such bodies “should be accessible to everyone without discrimination”.⁷²

103. In the European Union, all the Equality Directives require Member States to ensure that:

[[Judicial and/or administrative procedures, including where (...) appropriate conciliation procedures, for the enforcement of obligations under [the Directive] are available to all persons who consider themselves wronged by failure to apply the principle of equal

⁶⁸ See above, note 4.

⁶⁹ See above, note 13.

⁷⁰ Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 2004, Para 15.

⁷¹ See above, note 15, Para 40.

⁷² *Ibid.*

*treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.*⁷³

Legal Aid

104. The Committee on the Elimination of Discrimination against Women has stated that: “States must further ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary”.⁷⁴

Undue Obstacles

105. The Committee on the Elimination of Discrimination against Women has states that victims of discrimination must have access to redress which is “affordable, accessible and timely”.⁷⁵ At a minimum, this must include ensuring that any undue obstacles are eliminated. Obstacles could include high court costs which make it impossible for victims of discrimination to bring claims, restrictive rules on *locus standi* which prevent interested parties from participating in court proceedings, and excessive delays in cases being heard before a court once a claim is brought, or in the execution of judgments.

Independent and Impartial Investigative Bodies

106. The Human Rights Committee has stated that:

*Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.*⁷⁶

107. The Committee on Economic, Social and Cultural Rights has stated that:

⁷³ See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 7(1); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 9(1); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 8(1); and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 17(1).

⁷⁴ See above, note 34, Para 34.

⁷⁵ *Ibid.*

⁷⁶ See above, note 70, Para 15.

*These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations (...) including actions or omissions by private actors.*⁷⁷

108. The Committee on the Elimination of Discrimination against Women has stated that:

*States must further ensure that women have recourse to (...) remedies (...) to be settled in a fair hearing by a competent and independent court or tribunal, where appropriate.*⁷⁸

109. In the European Union, three of the Equality Directives make clear the need for specialised equality bodies whose mandates must include, at a minimum, “the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin”⁷⁹ and “the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex”.⁸⁰ The competence of the body or bodies must include: providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination, and publishing independent reports and making recommendations on any issue relating to such discrimination.⁸¹

Bringing Perpetrators to Justice

110. The Human Rights Committee has stated that:

*Where (...) investigations (...) reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.*⁸²

111. The Committee on the Elimination of Discrimination against Women has stated that:

⁷⁷ See above, note 15, Para 40.

⁷⁸ See above, note 34, Para 34.

⁷⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 13.

⁸⁰ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 12; Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 20.

⁸¹ See above, notes 78 and 79.

⁸² See above, note 70, Para 18.

Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate criminal proceedings, bring the perpetrator(s) to trial and impose appropriate penal sanctions.⁸³

112. The Anti-Discrimination Law makes no explicit reference to measures designed to ensure access to justice for victims of discrimination, whether in the form of procedural or other measures to ensure access to legal redress, or legal aid provision. While it is possible that provisions to this effect are contained in other pieces of Ukrainian legislation, ERT is firm in its view that all anti-discrimination legislation should be as accessible and easy to use as possible, and would therefore advocate the inclusion of any provisions on access to justice in the Anti-Discrimination Law itself. In addition, ERT believes that both procedures for access to justice and legal aid schemes should be reviewed and adjusted, as necessary, to ensure that they meet the needs of victims of discrimination.

The Anti-Discrimination Law should be amended to include specific provisions on the procedures through which victims of discrimination may seek redress, and the legal aid schemes in place to facilitate effective access to justice. Amendments to the Anti-Discrimination Law should reflect international standards on: access to judicial or administrative procedures; legal aid; the removal of undue obstacles preventing access to justice; independence and impartiality of investigative bodies; and the need to bring perpetrators to justice.

Standing

113. Article 13 of the Law provides that non-governmental organisations, individuals and legal entities are able to “represent the interests of persons and/or groups who have been discriminated against in courts”.
114. Principle 20 of the Declaration provides that:

States should ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.⁸⁴

⁸³ See above, note 34, Para 34.

⁸⁴ See above, note 1, Principle 20, pp. 12 – 13.

115. In the European Union, provisions granting standing to such associations, organisations and legal entities are contained within all Equality Directives.⁸⁵
116. As noted above, Article 13 provides that non-governmental organisations, individuals and legal entities are able to “represent the interests of persons and/or groups who have been discriminated against in courts”. However, it is necessary to allow legal entities to act on their own behalf.

The Anti-Discrimination Law should be amended so as to permit associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, to engage in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.

Evidence and Proof

117. The Anti-Discrimination Law contains no provisions regarding the reversal of the burden of proof in civil proceedings on discrimination cases. 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.⁸⁶

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

⁸⁵ See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 7(2); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 9(2); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 8(3); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 17(2).

⁸⁶ See above, note 1, Principle 21, p. 13.

*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.*⁸⁷

119. That the adoption of appropriate rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced is also recognised in European Union law, and provisions on the burden of proof are contained within all of the Equality Directives in the following terms:

*[W]hen persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*⁸⁸

120. ERT notes that the Draft Law would amend Article 60 of the Code of Civil Procedure, adding a new paragraph which would provide that:

When the claimant demonstrates facts sufficient for an assumption that there has been discrimination, the burden of proof for that the claim is unfounded lies on the defendant.

The Code of Civil Procedure should be amended, as per the Draft Law, to provide for a reversal of the burden of proof in civil proceedings.

Remedies and Sanctions

121. Article 15 of the Anti-Discrimination Law sets out the remedies available, namely compensation for material damage and moral damage. Article 16(1) provides that:

Persons guilty of violation of legislation on preventing and combating discrimination shall bear responsibility in accordance with the laws of Ukraine.

⁸⁷ See above, note 15, Para 40.

⁸⁸ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 8; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 10; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 9; Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 19.

122. “The laws of Ukraine” include the Criminal Code of Ukraine, which, at Article 161, establishes an offence of, *inter alia*:

[D]irect or indirect restriction of rights or direct or indirect privileges on grounds of race, colour, political, religious or other beliefs, sex, ethnic or social origin, property, residence, language or other features.

123. ERT has two main concerns with Articles 15 and 16(1) of the Anti-Discrimination Law and Article 161 of the Criminal Code. First, ERT believes that the remedies provided by Article 15 are insufficient. Second, ERT believes that, irrespective of the fact that discrimination can be an aspect of certain criminal offences (hate crimes), discrimination as such should not be treated as a criminal offence, but should be addressed and prohibited through civil law.

Civil Liability

124. 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 implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality.⁸⁹

125. This Principle draws from a wide range of sources of international law. Articles 2(3)(a) and (c) of the International Covenant on Civil and Political Rights, for example, requires States:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

(...)

(c) To ensure that the competent authorities shall enforce such remedies when granted.

126. The Human Rights Committee has stated that:

⁸⁹ See above, note 1, Principle 22, p. 13.

Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.⁹⁰

127. The Human Rights Committee has also stated that “remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children”.⁹¹

128. In terms of reparation including “guarantees of non-repetition and changes in relevant laws and practices”, the Human Rights Committee has stated:

In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party’s laws or practices.⁹²

129. The Committee on Economic, Social and Cultural Rights 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.⁹³

130. Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination requires States:

⁹⁰ See above, note 70, Para 16.

⁹¹ *Ibid.*, Para 15.

⁹² See above, note 70, Para 17.

⁹³ See above, note 15, Para 40.

[To] assure to everyone within their jurisdiction effective (...) remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

131. The Committee on the Elimination of Racial Discrimination has stated that:

[T]he right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination (...) is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.⁹⁴

132. The Committee on the Elimination of Discrimination Against Women has stated that Article 2(b) of the Convention on the Elimination of All Forms of Discrimination Against Women⁹⁵ requires States:

[T]o provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.⁹⁶

133. In the European Union, all Equality Directives require sanctions to be “effective, proportionate and dissuasive”.⁹⁷

⁹⁴ Committee on the Elimination of Racial Discrimination, *General Recommendation 26: The right to seek just and adequate reparation or satisfaction*, U.N. Doc. A/55/18, annex V at 153, 2000, Para 2.

⁹⁵ Article 2(b) reads: “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake (...) (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”.

⁹⁶ See above, note 34, Para 32.

⁹⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 15; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 17; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 14; Council Directive

134. The amendments to the Anti-Discrimination Law contained within the Draft Law do not impact upon Article 15 and the available remedies which will therefore remain inadequate in effectively tackling discrimination, and insufficient to comply with the requirements of the Declaration and international human rights law.

Article 15 of the Anti-Discrimination Law be amended, so as to provide for remedies which are effective, proportionate and dissuasive. In addition to compensation, such sanctions and remedies should include, as a minimum, the elimination of discriminatory practices; public apologies, public memorials, guarantees of non-repetition; and the implementation of structural, institutional, organisational, or policy change.

Criminal Liability

135. While states must prohibit discrimination, ERT believes that this should be done through civil liability and not through the criminal law for a number of reasons. First, discrimination does not require intent and may, indeed, be entirely unintentional, whereas a key principle of criminal law is the presence of *mens rea*, i.e. that the person had an intention to commit the offence (or was at least negligent or reckless). In cases where the discrimination was entirely unintentional, criminal liability would not be appropriate. Second, a key evidential requirement in discrimination cases is the reversal of the burden of proof, described in paragraphs 117 to 120 above. In criminal law, however, the presumption of innocence is a well-established principle under international and European law⁹⁸ and the reversal of the burden of proof would be entirely incompatible with this principle. As a result, it is much harder to establish liability for discrimination in criminal proceedings than in civil proceedings. Third, the focus of criminal proceedings is on punishment of the offender, whereas a key purpose of anti-discrimination law is to provide the victim with an effective remedy.
136. ERT notes that the Draft Law would amend Article 16(1) to read:

Persons guilty of violation of legislation on preventing and combating discrimination shall bear civil, administrative and criminal responsibility.

137. The Draft Law would also amend Article 161 of the Criminal Code to repeal the offence of discrimination.
138. While supportive of the amendment of Article 161 of the Criminal Code to repeal the offence of discrimination, ERT is concerned that the Anti-Discrimination Law would still make reference to “criminal responsibility”, without making it clear what exactly is the

2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 25.

⁹⁸ See, for example, Article 6(2) of the European Convention on Human Rights.

link between criminal offences committed for a discriminatory motive (which should be an aggravating circumstance in determining the penalty), and discrimination as such, the definition of which does not require a purpose, intent, or *animus* of any kind, and depends only on the finding of a certain result, or effect – namely, the less favourable treatment in case of direct discrimination, or the same treatment putting persons with a protected characteristic at a particular disadvantage.

Article 161 of the Criminal Code should be amended, as per the Draft Law, to repeal the offence of discrimination. Article 16(1) of the Anti-Discrimination Law should be amended to make clear that violations of the Law bear liability under civil proceedings