Submission to the Human Rights Committee regarding Ukrainian draft laws “banning propaganda of homosexualism”. 

List of issues to be taken up in connection with the consideration of the seventh periodic report of Ukraine, adopted by the Committee at its 106th session (15 October–2 November 2012)

Non-discrimination, equality between men and women, prohibition of advocacy of national, racial or religious hatred and rights of minorities (arts. 2, 3, 20, 26 and 27)

5. In light of reports about attacks and discrimination against lesbian, gay, bisexual or transgender (LGBT) persons, including violence, threats, illegal arrests and extortion by law enforcement bodies please outline the steps taken to combat discrimination and social exclusion of LGBT persons. Please provide information on the status of the following draft laws and explain whether these laws are compatible with the Covenant: (a) draft law No.10290, that bans the “promotion” of homosexuality; (b) draft law No. 8711 (adopted by the parliament at first reading on 2 October 2012), concerning the ban imposed on any production or publication of products “promoting” homosexuality, which provides for fines or deprivation of liberty of up to five years.

(a) The draft law No. 10290 (the author of the bill is Vadym Kolesnichenko, an MP of the Party of Regions) was approved for the first reading by the relevant Parliamentary Committee on Freedom of Speech and Information Issues on 6 June 2012. Since it had not been adopted at first reading before the expiration of the then Verkhovna Rada (the Ukrainian parliament) term of office, it was automatically cancelled. However, Mr. Kolesnichenko has been re-elected for the new convocation of the Verkhovna Rada and registered a new draft law with virtually the identical content as the previous one. The Draft Law No. 1155 of 24 December 2012 On Prohibition of Same-Sex Sexual Relations Propaganda Directed at Children was approved by the relevant Parliamentary Committee on Legislative Support of Law Enforcement Activities Issues on 3 April 2013. Now it has to be considered at a plenary sitting of the Verkhovna Rada.

Article 1 of the Draft Law No. 1155 gives the definition to the “same-sex sexual relations propaganda” as follows: [I]ntentional activity aimed at or manifesting itself in propagating any positive information on same-sex relations, which can exert negative influence on physical or mental health, moral and spiritual development of a child, in particular, form in a child the wrong notions on equal social worth of traditional and non-traditional marriage relations, and in the future influence on the child’s sexual orientation choice.

Article 5 of the Draft Law No. 1155 gives the definition to the forms of “same-sex sexual relations propaganda” as (1) any kinds of mass assemblies – demonstrations, meetings, pickets etc.; (2) any educational events; (3) mass media publications; (4) dissemination of information in preschool and educational institutions. (Note: There are two Articles 5 in the Draft Law, here is mentioned the first of them.)

Article 6 of the Draft Law No. 1155 reads as follows: In the territory of Ukraine there is prohibited propaganda, directed at a child, of same-sex sexual relations that can exert negative influence on physical or mental health, moral and spiritual development of a child in all spheres of social life, including education, culture, television and radio broadcasting, mass media.
Final Provisions of the Draft Law No. 1155 amends the Code of Ukraine on Administrative Offences and the Criminal Code of Ukraine, introducing penalties for infringement of this law in forms of fines, detention or imprisonment up to six years.

In the opinion of Nash Mir Centre, this draft law directly breaks Articles 2 (para. 1), 19 (paras. 1 and 2), and 26 of the International Covenant on Civil and Political Rights. The detailed substantiation of this opinion is given below, along with our opinion on the Draft Law No. 0945.

(b) The draft law No. 8711, adopted by the Parliament at first reading on 2 October 2012, has been re-registered for new convocation of the Verkhovna Rada (an administrative procedure not changing the text of the bill) and currently is the Draft Law No. 0945. Now it has to be considered in the relevant Parliamentary Committee and then at a plenary sitting of the Verkhovna Rada for the second reading. The Parliamentary Commissioner for Human Rights Ms. Valeriia Lutkovska has repeatedly condemned this bill and calls the Parliament to reject it. In the opinion of Nash Mir Centre, this draft law directly breaks Articles 2 (para. 1), 19 (paras. 1 and 2), and 26 of the International Covenant on Civil and Political Rights.

Nash Mir Centre is a Ukrainian non-government LGBT human rights organisation. Currently we carry out a project in co-operation with the Equal Rights Trust, an international human rights organization focusing its activity on combating discrimination. Within the frameworks of our joint project, the ERT and Nash Mir Centre have developed a submission to the Verkhovna Rada of Ukraine regarding the second of the above-mentioned draft laws – No. 0945 (former No. 8711). The Equal Rights Trust worked out the section of the submission on the international treaties of Ukraine. Below we cite an excerpt of the submission containing the detailed legal analysis of this bill’s compliance with the International Covenant on Civil and Political Rights made by the ERT, which can also be applied to the Draft Law No. 1155 (having replaced the Draft Law No. 10290 for new convocation of the Ukrainian Parliament) without any changes. The full version of this submission is available at:


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

Articles 19 and 2(1)

21. Article 19(2) of the Covenant provides that: Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

22. Article 19(3) of the Covenant provides that the rights contained within Article 19(2) can only be restricted where necessary (a) for respect of the rights or reputations of others or (b) for the protection of national security or of public order, or of public health or morals. Furthermore, the Human Rights Committee (the Committee) has said that any restrictions under Article 19(3) must also be “compatible with the provisions, aims and objectives of the Covenant”, including the non-discrimination provisions of the Covenant.

23. The non-discrimination provisions of the Covenant are to be found in Article 2(1), which provides that the rights contained within the Covenant must be respected and ensured “without distinction of any kind”, and Article 26, which provides for a freestanding right to non-discrimination “on any ground”.

24. Although sexual orientation is not explicitly listed as a ground upon which discrimination is prohibited in Articles 2(1) and 26, the Human Rights Committee has repeatedly recognised sexual orientation as a protected ground under both Articles since its Communication in Toonen v Australia in 1994.16 Initially, the Committee took the view that sexual orientation was
included as an aspect of the ground of “sex” which is listed in the Articles. However, in the more recent Communication in Young v Australia in 2003, the Committee stated that sexual orientation was a prohibited ground in its own right under the term “other status”. The Committee has since maintained the position that sexual orientation is a form of other status under Articles 2(1) and 26.

25. The Human Rights Committee has defined “discrimination” in its General Comment No. 18 as follows: [T]he term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground (...) and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

26. The Human Rights Committee has also made it clear that the prohibition on discrimination applies both to direct discrimination and indirect discrimination. The Committee has defined indirect discrimination as encompassing rules or measures which are neutral on their face but have detrimental effects which exclusively or disproportionately affect persons on prohibited grounds.

27. The Human Rights Committee has also made it clear that differential treatment can only be justified: [I]f the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Case Law: Irina Fedotova v Russian Federation

28. In Irina Fedotova v Russian Federation the Committee examined a law in the Russian oblast of Ryazan, the provisions of which were very similar to those in Draft Law 0945. Section 3.10 of the Ryazan Region Law on Administrative Offences created an administrative offence of “public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism) among minors” punishable by a fine between 1,500 and 2,000 rubles. An LGBT activist, Irina Fedotova, was convicted of an offence under the law after displaying posters reading “Homosexuality is normal” and “I am proud of my homosexuality” near a secondary school.

29. The Committee held that there was “no doubt” that Ms Fedotova’s conviction under this law amounted to restrictions on her right to freedom of expression under Article 19(2) and, in particular, expression of her sexual identity and her search for understanding of that identity.

30. The Russian Federation put forward arguments that the restriction on freedom of expression was justified under Article 19(3) in that it was for the protection of the morals, health, rights and legitimate interests of children. ERT notes that the arguments put forward by the authors of Draft Law 0945 in the Explanatory Notes mirror those put forward by the Russian Federation in defence of the Ryazan Region Law.

31. In response to those arguments, the Committee recalled its General Comment No. 34 where it stated that: [T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations (...) for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations [under Article 19] must be understood in the light of universality of human rights and the principle of non-discrimination.

32. The Committee also recalled that any restrictions “must conform to the strict tests of necessity and proportionality”.

33. The Committee noted that the Ryazan Region Law restricted only propaganda of homosexuality, and not propaganda of heterosexuality or of sexuality generally, among minors, and that it thus made a distinction based on sexual orientation. The Committee was not convinced that such a restriction was based on reasonable and objective criteria and found no evidence whatsoever that would point to the existence of factors justifying such a distinction.
34. Although the Committee accepted that the protection of the welfare of children was a legitimate aim, it stated that Russia had failed to demonstrate why it was necessary, for any of the legitimate purposes in Article 19(3), to restrict an individual’s right to freedom of expression which involves expression of their sexual identity, calls for understanding of that sexual identity, or even engages children in discussion of issues relating to sexual orientation.

35. On that basis, the Committee held that the law violated Article 19(2), when read in conjunction with Article 26, in that it restricted freedom of expression and could not be justified under Article 19(3) of the Covenant.

Analysis of Draft Law 0945 with Articles 19 and 2(1)

36. Draft Law 0945 and the amendments which it makes to various other laws, including the Criminal Code of Ukraine, would constitute a significant restriction of the right to freedom of expression under Article 19(2), in that it would restrict the rights of persons in Ukraine to impart certain information and ideas in various media where such information or ideas were considered to “promote homosexuality”. This vague and undefined phrase could be understood to include: campaigning for, or supporting, equal rights for LGB persons; campaigning for, or supporting, legal recognition of same-sex couples; information on parades, marches and demonstrations by LGB people and LGB organisations; films, television shows, and articles about or featuring LGB people; sexual health awareness for LGB people; expressions of personal sexual identity; calls for understanding of that sexual identity; and any discussion of issues relating to sexual orientation.

37. Draft Law 0945 arguably goes considerably further than Section 3.10 of the Ryazan Region Law on Administrative Offences – which the Human Rights Committee held “no doubt” constituted a violation of Article 19(2) – in that it goes far beyond “public actions aimed at propaganda of homosexuality” and would cover production and distribution of products, the print media, broadcasting on television and radio, other publications, and would impose criminal sanctions for importing, distributing, manufacturing, storing, transporting or in any other way moving products, including films and videos, into Ukraine which “promote homosexuality”. As such, Draft Law 0945 goes far further than Section 3.10 of the Ryazan Region Law on Administrative Offences and therefore constitutes an even less permissible restriction under Article 19(2).

38. ERT is therefore of the firm belief that Draft Law 0945 constitutes a clear violation of Article 19(2) which cannot be justified under Article 19(3).

39. ERT is equally concerned that Draft Law 0945 constitutes a violation of Article 2(1) in that it discriminates against persons based on their sexual orientation in the enjoyment of the right to freedom of expression in a similar way to the Ryazan Region Law considered by the Human Rights Committee in Fedotova.

40. Draft Law 0945 undoubtedly makes a distinction based on sexual orientation in that it only applies to publications which promote homosexuality and not heterosexuality or sexuality generally. This distinction also amounts to an exclusion and a restriction in that it prohibits such publications and products with the threat of sanctions, including criminal sanctions, rather than merely regulating them in a different way.

41. As noted above at paragraph 27, the Human Rights Committee has made it clear that the prohibition on discrimination applies both to direct discrimination and indirect discrimination and has defined indirect discrimination as encompassing rules or measure which are neutral at face value but have detrimental effects which exclusively or disproportionately affect persons on prohibited grounds.

42. Whether it is the purpose of Draft Law 0945 or not, the effect of Draft Law 0945 is to impair the enjoyment of the right to freedom of expression by all persons on an equal footing. Although Draft Law 0945 formally applies to all persons rather than just LGB persons, and could
therefore be argued to be neutral at face value, it will inevitably have a disproportionate impact on LGB persons. It is self evident that LGB persons are more likely to wish to impart and publish information on LGB issues – whether this be campaigns for equal rights for LGB persons; information on parades, marches and demonstrations by LGB people and LGB organisations; or expressions of personal sexual identity – than non-LGB persons. Draft law 0945 will therefore have detrimental effects which disproportionately affect LGB persons, on the prohibited ground of sexual orientation.

43. Indeed, as the Human Rights Committee made clear in Fedotova, a law which prohibits “propaganda” or “promotion of homosexuality”, as opposed to heterosexuality or sexuality generally, will be considered as constituting differential treatment on grounds of sexual orientation in and of itself.

44. Such differential treatment will only be justified if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. The protection of the welfare of children – presented in the Draft Law’s title and the Explanatory Notes as the reason for its introduction – is undoubtedly a legitimate aim under the Covenant. However, the proponents of Draft Law 0945 have not shown why restricting the ability of persons to undertake activities which could be interpreted as “promoting homosexuality” is necessary to protect the welfare of children. Indeed, as paragraphs 58 to 62 below demonstrate, Draft Law 0945 is in fact likely to harm the welfare of children and violate a number of provisions of the Convention on the Rights of the Child.

45. In Fedotova, the Human Rights Committee found that Russia had failed to show that a restriction on the right to freedom of expression in relation to “propaganda of homosexuality” among minors as opposed to propaganda of heterosexuality or sexuality generally was based on any reasonable and objective criteria. Furthermore, the Committee found no evidence whatsoever which would point to the existence of factors justifying the distinction based on sexual orientation. Given the close similarity between the nature and purpose of Draft Law 0945 and the Ryazan Region Law considered in Fedotova, the same concerns will be valid for the Draft Law.

…

47. Draft Law 0945 therefore constitutes a discriminatory restriction of Article 19(2) taken in combination with Article 2(1) which cannot be justified and therefore amounts to a violation of both of those Articles.

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

Article 26

48. As stated above in paragraph 24, whereas Article 2(1) prohibits discrimination in the enjoyment of the rights contained within the Covenant, Article 26 provides a freestanding and autonomous right to non-discrimination. The Human Rights Committee has elaborated on what this means in practice in its General Comment No. 18: [A]rticle 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.

49. As noted above in paragraph 28, the Human Rights Committee also provided in General Comment No. 18 the test by which differential treatment will not amount to unlawful discrimination: the criteria for the differential treatment must be “reasonable and objective” and “the aim [must be] to achieve a purpose which is legitimate under the Covenant”.

Case Law: Irina Fedotova v Russian Federation
50. In *Irina Fedotova v Russian Federation*, the Human Rights Committee also analysed Section 3.10 of the Ryazan Region Law on Administrative Offences for its compatibility with Article 26. The Committee adopted the same reasoning as in relation to its compatibility with Article 19 and concluded that the differential treatment on grounds of sexual orientation could not be justified.

51. In respect of the first limb of the test to assess justification of the differential treatment, the Committee concluded that the Russian Federation [had] not shown that a restriction on the right to freedom of expression in relation to “propaganda of homosexuality” – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria.

52. In respect of the second limb of the test, although the Committee accepted that protecting the welfare of children was a legitimate aim under the Convention, it concluded that the Russian Federation had failed to show why: ... it was necessary, for one of the legitimate purposes of article 19, paragraph 3, of the Covenant to restrict the author’s right to freedom of expression on the basis of section 3.10 of the Ryazan Region Law, for expressing her sexual identity and seeking understanding for it, even if indeed, as argued by the State party, she intended to engage children in the discussion of issues related to homosexuality.

53. As such, although the purported aim was legitimate, the Russian Federation was not able to show why the law was necessary to further that aim. The Committee therefore held that the law also violated Article 26 of the Convention.

**Analysis of Draft Law 0945 with Article 26**

54. Draft Law 0945 clearly falls within the scope of Article 26 as it is both “law” and impacts upon fields “regulated and protected by public authorities” namely the media, including film, television, radio, and print media, as well as all publications generally. The content of the law must not, therefore, be discriminatory. In the view of ERT, for the reasons set out in paragraphs 40 to 44, the legislation is clearly discriminatory.

55. Differential treatment will only not be discriminatory under Article 26 “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”. As noted in paragraphs 45 to 48 above, while the stated aims of this legislation – the protection of public health and the protection of the moral welfare of children – may be considered legitimate, the draconian and oppressive nature of the legislation can in no way be considered “reasonable and objective”.

56. Thus, it can be seen that the Draft Law constitutes differential treatment which is neither reasonable nor objective, and which cannot be said to aim to achieve a purpose which is legitimate under the Covenant. For those reasons, in addition to violating Article 19 both alone and in combination with Article 2, Draft Law 0945 also violates Article 26.