

**Submission to the 129th Session of the Human Rights Committee in Relation to
the Third Periodic Report of**

Armenia

1 June 2020

I Authors of the Submission

1. This joint submission is made by the Non-Discrimination and Equality Coalition (NDEC) of Armenia and the Equal Rights Trust (the Trust) to the 129th session of the Human Rights Committee (the Committee) in advance of its consideration of a list of issues to be raised with the Republic of Armenia (Armenia).
2. The Non-Discrimination and Equality Coalition unites organisations and individuals aiming to contribute to the realisation and protection of human rights and to promote respect for equality and human dignity in Armenia. The goal of the Coalition is to reduce manifestation of discrimination in policies, laws, societal norms, and practices by advocating for the adoption and enforcement of effective anti-discrimination legislation, by challenging the dominant discourse of inequality, exclusion and institutionalised discriminatory practices, as well as by empowering groups subjected to discrimination.
3. The Equal Rights Trust is an independent international organisation whose mission is to eliminate discrimination and ensure that everyone can participate in society on an equal basis. Over the course of the last decade we have worked in partnership with civil society in more than 40 different countries, supporting efforts to secure the adoption and implementation of comprehensive equality laws. The Trust has been supporting the work of the NDEC and civil society in Armenia since 2017.

II Background

4. This submission focuses on the enjoyment of the rights to equality and non-discrimination in the Republic of Armenia, as protected under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (the Covenant). In particular, we focus on the state's obligations to enact specific, comprehensive equality law. Armenia is required to adopt such legislation if it is to effectively guarantee non-discrimination, both in respect of the enjoyment of other rights protected by the Covenant and as a free-standing, fundamental right in itself.
5. Civil society efforts towards the adoption of comprehensive equality legislation have been underway in Armenia since 2013. In February 2018, the Ministry of Justice of Armenia published for public consultation a draft "Law on Ensuring Legal Equality". In March 2018, the Equal Rights Trust published a legislative analysis of the draft Law, which highlighted flaws, gaps and inconsistencies with international standards that would undermine protection of the rights to equality and non-discrimination in practice.¹
6. In 2018, the NDEC commissioned an expert research report on identifying the best model for an independent equality body for Armenia.² Following the completion of this research, and a series of civil society consensus discussions on the draft Law held in December 2018, a policy paper was adopted, which collated the issues identified by civil society and made a series of direct recommendations to government on the draft Law.³ Through various engagements during 2019, NDEC shared its recommendations – and those of the Equal Rights Trust – with relevant stakeholders, including the Ministry of Justice and the office of the Human Rights Defender.

¹ Equal Rights Trust, *Draft Law of the Republic of Armenia "On Ensuring Equality" Legislative Analysis*, 2018, available at:

https://www.equalrightstrust.org/ertdocumentbank/180311%20Equal%20Rights%20Trust%20-%20Law%20on%20Ensuring%20Equality%20-%20Armenia%20-%20Legislative%20Analysis_0.pdf.

² Aleksanyan, N., *Research on Identifying the Best Model of The Equality Body in Armenia*, 2018, available at: https://www.equalrightstrust.org/sites/default/files/images/Research_Effective-model-of-Equality-body-in-Armenia-Eng.pdf.

³ Non-Discrimination and Equality Coalition, *Policy Paper: On Effective Anti-Discrimination Legislation in Armenia*, 2018, available at: <https://www.equalrightstrust.org/sites/default/files/images/Policy-Paper-English.pdf>.

7. On 15 July 2019, the Ministry of Justice published a new draft of the Law on Ensuring Legal Equality for public consultation.⁴ Despite some positive changes (notably the removal of Article 6 of the previous draft which stated that the law should be interpreted in light of, *inter alia*, the “mission of the Armenian Apostolic Holy Church”), the new draft Law remained largely unchanged from the previous version. On 31 July 2019, NDEC commented on the draft, expressing concern on a number of issues, including *inter alia*:

- The incomplete list of explicitly prohibited grounds of discrimination (which omits reference to health status, sexual orientation and gender identity, amongst others) and the lack of criteria for interpreting the term "other personal and social circumstances";
- Weaknesses in the definition of discrimination, which fails to explicitly prohibit multiple and intersectional discrimination or adequately define "reasonable accommodation";
- The weak enforcement powers, and financial and technical resourcing of the human rights defender's office, which is designated as the equality body under the law;
- The lack of provision for non-material damages in cases concerning private bodies;

At the time of the initial consultation, each of these recommendations were rejected by government.

8. In January 2020, the amended draft Law was sent to the Prime Minister's Office. A further stage of review is anticipated before the draft is adopted by the Government and then introduced to the legislature for consideration. The new draft is supplemented by a package of legislative amendments to the Civil Procedural and Administrative Procedural Codes; and the Law on the Human Rights Defender, which extends the mandate of the Human Rights Defender's office to examine cases of discrimination against private entities in particular areas of life and to litigate cases of discrimination on behalf of complainants in general jurisdiction courts.

⁴ Ministry of Justice of the Republic of Armenia, *Draft Law on Ensuring Equality*, 2019, available at: <https://www.e-draft.am/projects/1801/about>.

9. The most recent draft Law on Ensuring Legal Equality has not yet been made available to civil society. However, based on our discussions with the Ministry of Justice, the partners are concerned that the draft Law – as it stands – does not address the concerns which we have raised in our various submissions to the government and that, as such, it does not go far enough to discharge Armenia’s non-discrimination obligations under the Covenant and other international human rights instruments to which it is party. The partners are concerned that the draft Law is not consistent with international legal standards and that it fails to address the issues raised by civil society in significant respects.

III Obligations under Articles 2(1) and 26 of the Covenant

10. Under Article 2(1) of the Covenant, state parties are required to respect and ensure the enjoyment of all rights provided in the Covenant without distinction. This Article is complemented by Article 26 ICCPR, which the Committee has stated provides an “autonomous right” to non-discrimination which “prohibits discrimination in law or in fact in any field regulated and protected by public authorities (...) [and] is not limited to those rights which are provided for in the Covenant”.⁵
11. As Article 26 of the Covenant states, protection of the right to non-discrimination necessitates the adoption of specific legislation: this is the only way in which states can meet their obligation to ensure that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground”.⁶ As the Committee has noted in its recommendations to various states, compliance with states’ obligations to “protect” from discrimination, necessitates, *inter alia*, the adoption of comprehensive anti-discrimination legislation.⁷ At its 105th session in 2012, the Committee expressed concern regarding the absence of comprehensive anti-discrimination legislation in Armenia and made relevant recommendations to the state.⁸

⁵ Human Rights Committee, *General Comment No. 18: Non-Discrimination*, 1989, Para 12.

⁶ International Covenant on Civil and Political Rights, Article 26.

⁷ See, for instance, Human Rights Committee, *Concluding Observations: Korea*, UN Doc. CCPR/C/KOR/CO/4, 3 December 2015, Paras 12-13. See also (non-exhaustively) UN Doc. CCPR/C/CPV/CO/1/Add.1 (Cabo Verde, 2019, Paras 9-10); UN Doc. CCPR/C/PRY/CO/4 (Paraguay, 2019, Paras 14-15); UN Doc. CCPR/C/JAM/CO/4 (Jamaica, 2016, Paras 15-16); UN Doc. CCPR/C/ISL/CO/5 (Iceland, 2012, Para 6); and UN doc. CCPR/C/AUS/CO/6 (Australia, 2017, Paras 17 and 18).

⁸ See Human Rights Committee, *Concluding Observations: Armenia*, UN Doc. CCPR/C/ARM/CO/2, 31 August 2012, Para 6.

12. The *Declaration of Principles on Equality*, a document of international best practice developed in 2008 by 128 experts from more than 40 different states, with the assistance of the Equal Rights Trust, sets out the principles which states should follow when developing comprehensive anti-discrimination legislation, in order to ensure compliance with their obligations under international law.⁹ These principles reflect international law standards, and have been influential in the development of guidance on states equality obligations from the Committee's sister Treaty Bodies.¹⁰

13. In order to be genuinely comprehensive, equality legislation should *inter alia*:

- define and prohibit direct and indirect discrimination, harassment and failure to make reasonable accommodation;¹¹
- on a comprehensive and open-ended list of characteristics,¹² on the basis of perception and association and on the basis of multiple, intersecting characteristics;¹³ in respect of all areas of life regulated by law;¹⁴
- establish the procedural safeguards necessary for the effective functioning of equality law, including provision for the transfer of the burden of proof;¹⁵ and
- require that states take positive action measures to accelerate progress towards equality for particular groups.¹⁶

⁹ *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

¹⁰ See, for example, Committee on the Rights of Persons with Disabilities (CRPD), *General Comment No. 6: Equality and Non-Discrimination*, UN Doc. CPRD/C/GC/6, 2018; Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc. E/C.12/GC/20, 2009.

¹¹ See, for example, *ibid*, CRPD, Para 18.

¹² See, for example, Note 10, CESCR, Paras. 15-35.

¹³ See, for example, Note 9, Principle 5.

¹⁴ The Committee has interpreted Article 26 of the Covenant as “prohibit[ing] discrimination in law or in fact in any field regulated and protected by public authorities” (See above, note 6).

¹⁵ See, for example, Note 10, CRPD, Para 31.

¹⁶ See for example, *ibid.*, Paras 28 and 29. See also, above Note 10, CESCR, Para 9.

14. The draft Law on Ensuring Legal Equality does not currently conform to these standards.

IV Concerns

15. At present, the draft Law contains gaps and weaknesses which may undermine protection of the rights to equality and non-discrimination in practice and which must be addressed by the state as part of the legislative review process if the law as adopted is to meet the state's obligations under international law. We highlight our most significant concerns below:

- a) Definition of Discrimination

16. Whilst some positive amendments were made to the original draft, the definition of discrimination in the draft Law does not fully conform to international standards.
 17. Under Article 4 of the draft Law, discrimination is defined as an "action, inactivity, regulation, attitude or policy that has been expressed by differentiating, excluding, limitation, preference of one's rights and freedoms, without any objective foundation or legitimate aim and reasonable proportion of chosen methods (...)" . Whilst some changes have been made to this Article since our 2018 analysis – our concern, set out in Para 37, remains valid: this provision presents an alternative "general" definition of discrimination which is inconsistent both with international standards and with the forms of discrimination defined under Article 5 of the draft Law. Its inclusion risks both creating confusion for the courts in interpreting the right to non-discrimination and creating a situation where certain acts of discrimination may not be protected.
 18. Discrimination based on perception is not clearly prohibited under the draft Law, despite reference to "actual or perceived" characteristics in Article 4(1). As a result, persons experiencing such discrimination do not have certainty on the scope of their protection.

- b) Protected Characteristics

19. Whilst the definition of discrimination provided in Article 4(1) of the draft Law provides an "open-ended" list of protected characteristics, several grounds which are well-recognised at international law – including health status, descent, maternity, pregnancy, sexual orientation, gender identity, civil, family or carer status, nationality and economic

status – are not explicitly referenced. As set out in paras 14-28 of our 2018 legal analysis, each of these grounds is well-recognised at international law, owing to the evidence of harm caused by discrimination on these grounds.¹⁷ While the open-ended list of protected characteristics in Article 4(1) must be read as including protection from discrimination on all of these grounds, the omission of these characteristics from the draft Law means victims of discrimination on those grounds may be required to undertake legal proceedings to establish that these grounds are recognised, rather than being able to immediately rely on the law. Moreover, the omission of these characteristics creates a *de facto* hierarchy of characteristics, and risks creating confusion as to the prohibition of discrimination on the basis of grounds which are not explicitly listed.

20. There is no means, under Article 4 of the draft Law, for assessing which further grounds can be added to the current list of explicit grounds as forms of “individual or other personal or social circumstances”. As detailed in paras 29-33 of our 2018 analysis, while we welcome the open-ended nature of the list of grounds in Article 4(1), the inclusion in the draft Law of qualifying criteria would provide some 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 implementation and enforcement.¹⁸

c) Enforcement

21. Further to Article 2 of the Amendments to the Law on the Human Rights Defender, the Human Rights Defender of Armenia (HRD) will be granted the power to investigate claims of discrimination and issue relevant recommendations to both public and private bodies. In respect of the private sector, however, the mandate of the Human Rights Defender's is limited to those discrimination claims which arise in the fields of education, healthcare, social protection, and labour. This results in a significant gap in protection. For example, under the current draft legislation, the HRD does not have power to investigate a claim of discrimination made against a private company in the provision of goods and services. Moreover, where recommendations are issued by the HRD, there are no legal mechanisms to ensure the enforcement. Whilst the HRD will be empowered to refer a case to the

¹⁷ See, for instance, in respect of sexual orientation and gender identity.

¹⁸ An example provision drafted based on the South African Promotion of Equality and Prevention of Unfair Discrimination Act can be found in Paragraph 2 of Principle 5 of the Declaration of Principles on Equality.

courts, the partners are concerned that the office remains under-resourced – both financially and technically – which will limit the availability of this remedy in practice.

d) Procedural Safeguards

22. Under Article 7(1) of the draft Law, standing to bring a discrimination claim is limited to an individual who believes that discrimination has been carried out “against him/her”. There is no right under the draft Law for associations, organisations and groups of individuals to bring claims on behalf of an individual where they have a legitimate interest in the realisation of the right to equality and with the approval of the individual in question. As reflected in the recommendations of the Committee’s sister Treaty bodies, standing in discrimination cases must not be limited to the individual who is bringing a claim of discrimination; organisations and other interested parties play an essential role in ensuring access to justice and realisation of the right to non-discrimination and must be granted standing.¹⁹
23. The need for the reversal or transfer of the burden of proof in discrimination cases in civil proceedings is well established at international law.²⁰ Provisions relating to the transfer of the burden of proof have been included in a package of legislative amendments to the Civil Procedural and Administrative Procedural Codes, which are attached to the draft Law and will become law upon its adoption. However, following a review of these amendments, which were shared by the Ministry of Justice with NDEC in February 2020, the partners are concerned that the burden of proof in discrimination cases will be shared equally by the respondent and appellant. This position is inconsistent with international law and best practice,²¹ which require a shift in the burden of proof to the respondent once facts from which it may be presumed that there has been discrimination (a *prima facie* case) have been established.
24. Under the draft Law, remedies and sanctions for acts of discrimination are limited to restitution and compensation of material and non-material damages. However, non-material damages can be granted only in cases when the violating party is a public institution, but not private entity. The provisions of the draft Law dealing with remedies

¹⁹ See, for instance, Note 10, CRPD, Para 31(d).

²⁰ See, for instance, Note 10, CRPD, Para 73(i); CESCR, Para 40.

²¹ *Ibid.* See also Note 9, Principle 21.

and sanctions for violation of the right to non-discrimination should provide for non-material damages in all cases of discrimination, including those where the body responsible is a private actor. Failing to provide for non-material damages in the large proportion of cases of discrimination which occur in the private sector²² – and thus providing restitution as the only remedy – will act as a significant disincentive to survivors of discrimination to bring claims, and have the effect that sanctions for breach of the right are not “effective, proportionate and dissuasive” and do provide “appropriate remedies” as required under the Convention.²³

V Proposed Questions

25. In view of the above, the Non-Discrimination and Equality Coalition, and the Equal Rights Trust urge the Committee to ask Armenia the following questions.

Timeline and Procedure

26. What plans does the state have for the introduction of the draft Law on Ensuring Equality to the legislature and when is the law expected to be adopted?
27. What steps has the state taken, and what further steps does the state intend to take to ensure that the law as adopted complies with its obligations under Article 2(1) and 26 of the Covenant and best practice standards?
28. What steps has the state taken, and what steps does the state intend to take to ensure the inclusion, consultation, and participation of civil society in the legislative process?

Content of Anti-Discrimination Legislation

29. What measures has Armenia undertaken to stipulate a legal definition of discrimination that accords with international human rights standards, including by specifying all recognised manifestations of discrimination, such as multiple, associative and perceptive

²² According to official statistical data, in 2017 the number of employed in the public sector was 247,600, compared to 764,200 in the private sector. See: <https://www.armstat.am/file/doc/99510748.pdf>.

²³ See, for instance, Note 9, Principle 22; Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, Paras 8 and 15-17.

discrimination; and explicitly referencing all prohibited grounds of discrimination, such as health status, sexual orientation and gender identity?

Enforcement and Procedural Guarantees

30. What measures have been undertaken by Armenia to ensure that individuals will be able to bring claims of discrimination in all areas of life regulated by law, including *inter alia* discrimination in the provision of goods and services in the private sector?
31. What measures have and will be taken to ensure the adequate financial and technical resources of Human Rights Defender's office, in order that it can fulfil its functions as the national equality body?
32. What measures has Armenia undertaken to ensure access to justice for the victims of discrimination, particularly in respect of providing the right to NGOs to present *actio popularis* cases to Armenian courts in discrimination cases?
33. What measures have been undertaken by Armenia to ensure that the burden of proof is reversed in discrimination cases, following the establishment of a *prima facie* case, in line with international standards and best practice?
34. What measures have been undertaken by Armenia to ensure that sanctions for breach of the right to non-discrimination are effective, proportionate and dissuasive; and include the availability of non-material damages in cases concerning the private sector?