



**Draft Law of the Republic of
Armenia
“On Ensuring Equality”
Legislative Analysis**

London, March 2018

About the Equal Rights Trust

The Equal Rights Trust is an independent international organisation whose objective is to combat discrimination and advance equality as a fundamental human right and a basic principle of social justice. We pursue and promote the right to equality as a right to participate in all areas of life on an equal basis, which requires taking a holistic, comprehensive approach to different inequalities. Since our foundation, this approach has provided the conceptual basis for all our work, which focuses on how to achieve equality through the enactment and implementation of equality law.

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Introduction

1. The Equal Rights Trust welcomes the opportunity to respond to the public consultation established by the Ministry of Justice to consider the Draft Law of the Republic of Armenia “On Ensuring Equality” (the Draft Law). In this submission, we provide an analysis of the Draft Law from the perspective of current international standards on the rights to equality and non-discrimination. Our aim is to support the Republic of Armenia (Armenia) to enact an equality law which is consistent with the state’s obligations under international law.
2. The Equal Rights Trust is an independent international organisation whose objective is to combat discrimination and advance equality as a fundamental human right and a basic principle of social justice. We pursue and promote the right to equality as a right to participate in all areas of life on an equal basis, which requires taking a holistic, comprehensive approach to different inequalities. Since our foundation, this approach has provided the conceptual basis for all our work, which focuses on how to achieve equality through the enactment and implementation of equality law.
3. In 2008, we launched the *Declaration of Principles on Equality*,¹ together with 128 international experts on equality from more than 40 different countries. The Declaration consolidates and elaborates international standards on the rights to equality and non-discrimination. The Declaration has informed the development of anti-discrimination legislation in numerous countries,² and its standards have also been reflected in the interpretations of the rights to equality and non-discrimination by numerous UN Treaty Bodies.³ In 2011, the Declaration was endorsed by the Parliamentary Assembly of the Council of Europe,⁴ which recommended the member states bring their national laws into line with its standards.
4. Since the adoption of the Declaration, we have worked to promote the adoption and implementation of comprehensive equality laws in line with its standards. As of 2018, we have established projects and partnerships in more than 45 countries, ranging from Azerbaijan to Zambia. Through these projects we have supported civil society movements to combat discrimination through reform and implementation of equality law. We are currently supporting civil society in Armenia to promote equality and combat discrimination, with a particular focus on supporting civil society engagement in the equality law reform process.
5. We welcome the move by the Government of Armenia towards the adoption of a comprehensive anti-discrimination law through its publication of the Draft Law. However,

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

² Including Albania, Australia, the Czech Republic, Kenya and Ukraine.

³ See *inter alia*, 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; Committee on the Elimination of Discrimination Against Women, *General Comment No. 28: On the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 2010. See also Committee on the Rights of Persons with Disabilities, draft *General Comment on Equality and Non-discrimination (Article 5)*, 31 August 2017, available at: <http://www.ohchr.org/Documents/HRBodies/CRPD/GCArt5.docx>.

⁴ 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.

our concern, as elaborated below, is that the current Draft Law is not in fact comprehensive and that it will not be effective in practice, due to limitations on its scope and a lack of measures to make it effective in practice. The Trust offers this analysis of the Draft Law in order to provide guidance to the Government on international standards and best practice, based on our expertise in this field and from our experience of the legislative process in respect of comprehensive anti-discrimination law in other countries.

6. This analysis is based upon international human rights instruments to which Armenia is a State party, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD), and the European Convention on Human Rights (ECHR). It also relies upon the international best practice standards provided in the aforementioned Declaration of Principles on Equality (the Declaration).

PART 1: SUBSTANTIVE ELEMENTS OF EQUALITY LAW

Article 1: Purpose

7. Article 1(1) of the Draft Law defines its purpose as being to create equal opportunities for the exercise of rights and freedoms. This provision is narrower than current international standards on the right to equality. There is a clear international consensus that equality of opportunity alone is inadequate if states are to fully realise the right to equality. Principle 1 of the Declaration provides that the right to equality as entailing a right to “participate on an equal basis with others” in civil, political, economic, social and cultural life.⁵ Similarly, the CRPD makes repeated references to the fact that the Convention aims to provide persons with disabilities with “full and effective participation in society on an equal basis with others”.⁶
8. Merely guaranteeing equal opportunity to exercise rights falls short of this standard, as securing equality of opportunity does not mean that everyone can in fact exercise such rights on an equal basis with others. A right to equality which encompasses participation on an equal basis with others goes much further and entails a recognition *inter alia* that positive action is a necessary constituent element of the right to equality, a point which is discussed in more detail below.
9. Moreover, Article 1(1) defines a narrower material scope for the Draft Law than is required at international law, and a narrower scope than is in fact provided under Article 3(1). Article 1(1) states that the purpose of the law is to ensure equal opportunities for the exercise of rights and freedoms. This is significantly narrower than the scope of the right to non-discrimination provided in Article 26 of the ICCPR, which the Human Rights Committee (HRC) has noted “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.⁷ Indeed, Article 3(1) of the Draft Law states that discrimination is prohibited in a wide range of areas of life, rather than solely in respect of the enjoyment of other rights.

⁵ See above, note 1, Principle 1.

⁶ Convention on the Rights of Persons with Disabilities, Preamble and Article 1

⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, Para 12.

Recommendations

- The Trust strongly recommends that the scope of the right to equality, as presented in Article 1 of the Draft Law be extended to guarantee “participation on an equal basis with others”, rather than “equal opportunities”.
- The Trust strongly recommends that the material scope the right to equality, as presented in Article 1 of the Draft Law, is amended to encompass equal participation in all areas of life regulated by law, rather than equality of opportunity in the enjoyment of other rights , thus ensuring consistency with Article 3(1).

Article 3: Prohibition of Discrimination

Material scope

10. Article 3(1) provides that “[d]iscrimination is prohibited in political, economic, social, cultural and public life as well as other fields”. This is broadly in line with the Declaration of Principles on Equality, which provides that the right to equality “in any area of economic, social, political, cultural or civil life” and that it “applies in all areas of activity regulated by law”.⁸ In this respect, the Declaration reflects the ICCPR, Article 26 of which the Human Rights Committee (UN HRC) has stated “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.⁹

Penalties for discrimination

11. Article 3(2) of the Draft Law provides that discrimination may result in both civil and criminal liability. Unlike Article 3(1), this provision is not consistent with international best practice on equality and non-discrimination, which dictates that discrimination is a civil, rather than a criminal matter. This is necessary for a number of reasons related to the proper functioning of equality law:
- a) First, discrimination does not require intent or malicious motive on the part of the discriminator. Indeed, direct discrimination can occur in cases where the discriminating party believes that they are acting in the best interest of the victim, while indirect discrimination can occur in cases where the discriminating party applies a rule, provision or practice which, while disproportionately disadvantaging members of a particular group, nevertheless pursues a legitimate aim. In such cases, the application of criminal penalties would be disproportionate and unjustified.
 - b) Second, as discussed below, the effective functioning of equality law necessitates the adoption of specific rules relating to evidence and proof, including notably the transfer of the burden of proof, and requires the application of the civil standard of proof, rather than the higher standard applied in most criminal law regimes. Again, to apply criminal sanctions while applying these rules of evidence and proof would be an inappropriate response.
 - c) Third, the focus of remedies and sanctions in equality law is on providing effective remedy for the victim of discrimination, rather than sanction or punishment for the

⁸ See above, note 1, Principles 1 and 8.

⁹ See above, note 7.

party responsible. This aim is better achieved through the application of civil law remedies, rather than through the punitive remedies available in the criminal law.

Justification of discrimination

12. Article 3(3) provides a test for establishing cases in which otherwise discriminatory acts might be justified. It provides that discrimination can be justified where it “pursues a legitimate aim and is necessary in a democratic society (...) [and where] the means employed should be proportionate and appropriate”. This test is broadly in line with the approach taken by the European Court of Human Rights in its consideration of whether direct or indirect discrimination can be justified.
13. While the Trust does not object to the use of such an approach, we would urge the state to bear in mind the fact that the drafters of the Declaration adopted a rather different approach to the question of justification of discrimination. Under this approach, direct and indirect discrimination are treated differently. The Declaration provides that “[d]irect discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria”,¹⁰ while a test broadly similar to that above is provided in respect of indirect discrimination. This approach reflects the fact that it will be rare that cases of direct discrimination can be considered to be pursuing a legitimate aim.

Recommendations

- The Trust recommends that the material scope of the Draft Law, as presented in Article 3(1), is retained.
- The Trust strongly recommends that all references to “criminal liability” in Article 3(2) are deleted. For the avoidance of doubt, this should not affect the prohibition of hate crimes in the criminal law of Armenia.
- The Trust recommends that Article 3(3) is amended to add the following phrase at the end: “[d]irect discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria”.

Article 4: Discrimination and its types

List of Grounds

14. The Draft Law contains an open-ended list of prohibited grounds of discrimination (protected characteristics) in Article 4(1) with the following grounds receiving explicit protection: sex; race; colour; ethnic or social origin; genetic features; language; religion or belief; political or other opinion; belonging to an ethnic minority; property status; birth; disability and age.
15. While the use of an open-ended list is to be welcomed, the list of explicitly mentioned grounds is limited, omitting a number of grounds which are well-recognised under international human rights law and set out explicitly in the Declaration. The omission of these grounds from Article 4(1) means that individuals experiencing discrimination based on these characteristics would need to seek a confirmation from the courts that the ground is a form of “other personal or social circumstances”, for the purposes of the Law.

¹⁰ See above, note 1, Principle 5.

This creates uncertainty for both rights-holders and duty-bearers, and also creates the real risk that the courts will conclude that a ground which is well-recognised at international law is not a protected characteristic for the purposes of the Law. This risk is heightened by the inclusion in the Draft Law of an “interpretation clause”, which we discuss in more detail below.

16. 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 grounds in the Declaration goes beyond the list contained within Article 4(1) of the Draft Law. In particular, the Declaration, consistent with various international instruments and the interpretations of human rights treaty bodies, requires explicit protection from discrimination on the following grounds which are omitted from the Draft Law:

Descent

17. Descent is explicitly listed a protected ground under Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.¹¹

Pregnancy and Maternity

18. Under the CEDAW, States must take prohibit discrimination on the basis of both pregnancy and maternity.¹² Failure to include these grounds in the open-ended list is further inconsistent with the Law on Equal Rights and Equal Opportunities for Men and Women which prohibits discrimination based on the basis of pregnancy.¹³ Article 57 of the Constitution of Armenia further prohibits the dismissal from work due to reasons related to maternity, including pregnancy.¹⁴

Sexual Orientation

19. The UN HRC has stated that the prohibition on discrimination in Article 26 of the ICCPR includes discrimination based on sexual orientation.¹⁵ Similarly, the CESCR has stated that sexual orientation is a prohibited ground falling within “other status” in Article 2(2) of the ICESCR.¹⁶
20. The European Court of Human Rights has held that the prohibition on discrimination in Article 14 of the European Convention on Human Rights (ECHR) includes differentiation based on sexual orientation.¹⁷ The Council of Europe has further clarified that the list of protected grounds under Article 14 is the same under the free-standing right to non-

¹¹ International Convention on the Elimination of all forms of Racial Discrimination, Article 1(1)

¹² Convention on the Elimination of all forms of Discrimination against Women, Article 11(2)

¹³ Law of the Republic of Armenia 2011, Article 6(2)(1)

¹⁴ Constitution of the Republic of Armenia, 2015, Article 57.

¹⁵ See, for example, *Young v Australia* (Communication No. 941/2000), U.N. Doc. CCPR/C/78/D/941/2000 (2003).

¹⁶ 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 32.

¹⁷ 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.

discrimination under Article 1 of Protocol 12 to the ECHR which Armenia has ratified.¹⁸ Under European Union law, discrimination on grounds of sexual orientation in certain fields is prohibited under the Framework Directive.¹⁹

Gender Identity

21. The CESCR has stated that gender identity is a prohibited ground falling within “other status” in Article 2(2) of the ICESCR.²⁰
22. Similarly, the European Court of Human Rights has held that gender identity is a prohibited ground falling within “other status” under Article 14 and Article 1 of Protocol 12 to the ECHR.²¹ The European Court of Justice has held that discrimination on grounds of ‘sex’ includes discrimination against a person because he or she “intends to undergo, or has undergone, gender reassignment”.²²

Civil, family or carer status

23. The need to protect against discrimination on the basis of civil, family or carer status is set out in Principle 5 of the Declaration. While not using identical language, the CESCR has stated that marital and family status (including having ‘differing kinds of responsibility for children and dependant’) is a prohibited ground falling within “other status” in Article 2(2).²³

Health Status

24. The CESCR has stated that health status is a prohibited ground falling within “other status” in Article 2(2) of the ICESCR.²⁴

Nationality

25. The UN HRC has stated that the prohibition on discrimination in Article 26 of the ICCPR includes differentiation between nationals and non-nationals.²⁵ Similarly, the CESCR has stated that nationality is a prohibited ground falling within “other status” in Article 2(2) of the ICESCR.²⁶

¹⁸ Council of Europe, *Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI.2000, European Treaty Series No. 177, available at: <https://rm.coe.int/16800cce48>.

¹⁹ European Union, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*.

²⁰ See above, note 16, Para 32.

²¹ See, for example, *Christine Goodwin v the United Kingdom* (Application No. 28957/95), 11 July 2002.

²² See, for example *P. v S. and Cornwall County Council*, Case C-13/94, [1996].

²³ See above, note 16, Para 31.

²⁴ See above, note 16, Para 33.

²⁵ 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).

²⁶ See above, note 16, Para 30.

Economic Status

26. The CESCR has stated that economic situation is a prohibited ground falling within “other status” in Article 2(2) of the ICESCR.²⁷

Conclusion

27. The open-ended list of protected characteristics in Article 4(1) of the Draft Law must be read as including protection from discrimination on all of the above grounds in addition to those grounds already explicitly protected, if it is to be consistent with international law.
28. Nevertheless, the Trust regrets the failure to include these grounds explicitly in Article 4(1) of the Draft Law. Without explicit recognition, victims of discrimination on those grounds may be required to undertake legal proceedings to establish that these grounds are recognised under Article 4(1), rather than being able to immediately rely on the law. In addition, ERT has reason to be concerned that the Armenian courts, interpreting this provision in light of Article 6 of the Law, may fail to recognise some or all of these grounds when interpreting Article 4(1).

Test for Further Grounds

29. While the Trust welcomes the open-ended nature of the list of grounds in Article 4(1), there is some cause for concern that the Draft Law does not set down criteria by which further “individual or other personal or social circumstances, real or alleged” are to be recognised as protected from discrimination. While the use of an open-ended list creates an opportunity for new characteristics to be recognised as warranting protection, it does also create uncertainty about the scope of protection.
30. 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. The absence of such criteria thus creates the risk of litigation being brought seeking protection on grounds which do not need or deserve protection and, conversely, lack of clarity on part of groups or individuals of whether they will enjoy protection.
31. Having considered the Draft Law as a whole, we are particularly concerned that the words “individual or other personal or social circumstances, real or alleged” will be interpreted in a way which is not consistent with the approach taken under the ICCPR or ICESCR. This concern arises due to the inclusion, in the Article 6, of a requirement that the Draft Law be interpreted in “light of the special role of the state as a natural and fundamental nucleus of the family, religious organisations, freedom of religion, the specific role of the Armenian Apostolic Church, which is funded by the Constitution of the Republic of Armenia”. As discussed in more detail below, our concern is that interpretation of the Law in line with the precepts of the Armenian Apostolic Church will *inter alia* result in the non-recognition of sexual orientation and gender identity as protected characteristics, despite their long-standing recognition under international conventions to which Armenia is party.
32. 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: any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines

²⁷ See above, note 16, Para 35.

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.²⁸

33. This approach has the advantage of flexibility for further groups to be recognised and protected in the future and minimises the risk of unnecessary litigation, unfettered judicial discretion and of confusion among the general public as to which grounds should qualify.

Forms of Discrimination

34. Article 4(2) lists a number of "different types of discrimination", including *inter alia* direct and indirect discrimination and harassment. While we welcome the fact that the government has recognised a number of different forms of discrimination in its Draft, we are concerned that neither this Article nor Article 5 makes reference to one of the four recognised forms of discrimination: failure to make reasonable accommodation.
35. International best practice, as set out in the Declaration and clarified by the CESCR in its General Comment 20, dictates that there are four forms of discrimination: direct discrimination, indirect discrimination, harassment and denial of reasonable accommodation.²⁹ As discussed in more detail below, the omission of the last of these is a significant problem with the Draft Law, limiting the scope of protection it provides – particularly, though not only, for persons with disabilities – and leaving the Draft Law inconsistent with international standards, including the CRPD.³⁰
36. In addition to our concern with the omission of one of the recognised forms of discrimination from Article 4(2), we note with concern that paragraph (1) of the same Article begins with an alternative "general" definition of discrimination, as follows:

Discrimination is an action, inactivity or an arrangement that has been expressed against one's rights and freedom by differentiating, excluding, limitation, preference, without any objective foundation or legitimate aim and reasonable proportion of chosen methods (...)

37. This is problematic in a number of respects, First, as noted above, international best practice recognises four forms of discrimination, each of which has a specific legal definition. There is therefore no need for a separate or additional definition of discrimination – this risks confusion and misinterpretation. The relationship between this definition of discrimination in Article 4(1) and the list of types of discrimination in Article 4(2) is unclear; of greater concern, the definition in Article 4(1) is not broad enough to encompass all of these types of discrimination, as defined in Article 5. The Trust is concerned that to include this language in Article 4(1) risks creating confusion and introducing terms which are imprecise and potentially contradictory to the definitions of the four recognised forms of discrimination.
38. Second, the definition of discrimination provided in Article 4(1) refers to "action, inactivity or an arrangement that *has been expressed against* one's rights and freedom" (emphasis added) thereby appearing to require intent for discrimination to be

²⁸ See above, note 1, Principle 5, reflecting the test used in the *Promotion of Equality and Prevention of Unfair Discrimination Act* (Act 4 of 2000) of South Africa

²⁹ See above, note 1, Principle 5 and Principle 13; and, see above, note 16, Paras 7, 10 and 28.

³⁰ Convention on the Rights of Persons with Disabilities, Article 2

established. This is contrary to the interpretation of the term “discrimination” in Article 26 of the Covenant, which the HRC 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.³¹ 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”.

Temporary Measures and Reasonable Accommodation

39. Article 4(3) provides that temporary special measures and reasonable accommodation “do not constitute discrimination”. This provision is inconsistent with international best practice standards, which dictate that reasonable accommodation and temporary special measures are not mere exceptions to the right to non-discrimination but are, instead, necessary elements of the right to non-discrimination and the right to equality respectively.
40. As noted above, it is a matter of significant concern that the Draft Law does not provide that failure to make reasonable accommodation is a form of discrimination. As a party to the CRPD, Armenia has an obligation to prohibit discrimination on the basis of disability, which “includes all forms of discrimination, including denial of reasonable accommodation”.³² The Draft Law does not meet the requirements of the CRPD in this respect, as it neither defines nor prohibits the failure to provide reasonable accommodation. Instead, Article 4(3) notes that “procedure, timing and other specific processes related for reasonable accommodation are regulated by the legislation of the Republic of Armenia”. Irrespective of what provision is made elsewhere in Armenian law, it is a cause for concern that the proposed principal instrument of equality law in the country – which includes disability amongst its enumerated grounds – fails to define and prohibit failure to provide reasonable accommodation.
41. This shortcoming is significantly exacerbated by Article 4(3), which indicates that the reasonable accommodation is not a requirement of the right to non-discrimination but is instead an exception to this right. In the context of the failure to require reasonable accommodation – and to recognise a right to it – Article 4(3) creates the misleading effect that reasonable accommodation is an exception to the rule.
42. Article 4(3) also provides that “temporary special measures” are not an aspect of the right to equality, but rather an exception to it. Principle 3 of the Declaration provides that positive action – a more appropriate term for measures designed to redress past discrimination and disadvantage and to accelerate – are a required element of the right to equality.

*To be effective, the right to equality requires positive action. Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.*³³

43. This position is well supported by UN Treaty Bodies. The UN HRC has stated, in relation to

³¹ See above, note 1, Paras 6 and 7.

³² Convention on the Rights of Persons with Disabilities, Article 2

³³ See above, note 1, Principle 3.

equality between men and women, that state parties: “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”.³⁴ Similarly, the CESCR 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.*³⁵

44. Other UN Treaty bodies have also confirmed that positive action is required, not merely permitted as an exception to the prohibition on discrimination.³⁶

Recommendations

- Prohibited grounds: To be consistent with international standards, Trust strongly urges the Government to amend Article 4(1) of the Draft Law to explicitly include the following prohibited grounds: health status, descent, maternity, pregnancy, sexual orientation, gender identity, civil, family or carer status, nationality and economic status.
- Test for further grounds: The Trust recommends that the government consider adding a provision to Article 4 to include the criteria listed in the Declaration of Principles on Equality as a means 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”.
- Forms of discrimination: The Trust strongly recommends that, in order to ensure that the Draft Law is consistent with international standards, including in particular Armenia’s obligations under the Convention on the Rights of Persons with Disabilities, Article 4(2) is amended to add failure to provide reasonable accommodation as a form of discrimination in the Draft Law. The omission of this form of discrimination from the Draft Law presents a serious limitation to the scope of protection which it provides.
- Forms of discrimination: The Trust recommends that the phrase “[d]iscrimination is an action, inactivity or an arrangement that has been expressed against one’s rights and freedom by differentiating, excluding, limitation, preference, without any objective foundation or legitimate aim and reasonable proportion of chosen methods (...)” is removed from Article 4(1), as it presents an “alternative” general definition of discrimination which is inconsistent both with international standards and with the forms of discrimination defined under Article 5.
- Temporary Measures and Reasonable Accommodation: The Trust strongly urges that Article 4(3) is deleted in its entirety and is replaced by a provision(s) recognising that reasonable accommodation and positive action are both necessary elements of the right to equality, rather than exceptions to the right to non-discrimination.

³⁴ 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.

³⁵ See above, note 16, Para 9.

³⁶ See, for example, Committee on the Elimination of Discrimination Against Women, *General Comment No. 28: On the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 2010, Paras. 9, 18, 20, 24 and 37(d).

Article 5: Basic Concepts in the Law

Direct discrimination

45. The Draft Law defines direct discrimination in Article 5(1)(3) as:

[B]ehaviour towards an individual as a result of which the person appears in a less favourable situation than the other person in similar circumstances because of one or other protected characteristics or other characteristics associated with them. Women can be the subject of less favourable treatment because of being pregnant or becoming a mother.

46. 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.³⁷

47. Article 5(1)(3) falls short of this standard in one respect: it does not provide protection from discrimination in cases where there is no comparator, where the victim of discrimination “is subjected to a detriment”. The ICESCR prohibits discrimination in Article 2(2). The CESCR has elaborated on this prohibition in its General Comment No. 20, in terms which are very similar to those used in the Declaration. In this connection, the Committee has noted that:

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).³⁸

48. Thus, it can be seen that the Committee defines the position of women who are pregnant as an example of the broader phenomenon of persons being subjected to a detriment because of their protected characteristic. By referring only to the situation of pregnant women, the Draft Law provides a narrower definition of direct discrimination, limiting protection.

Indirect discrimination

49. The Draft Law defines indirect discrimination as:

Apparently neutral politics, treatment, conditions, standards, or practices, which if applied, a person, on grounds of one or more protected characteristics or in association with them, is placed in considerably less favourable situation compared to other persons in

³⁷ See above, note 1, Principle 5.

³⁸ See above, note 16, Paras 7 and 10.

similar circumstances or which has disproportionately adversely affected a group of people; or an equal treatment with respect to persons who are in nature in different conditions, with the exception of cases when application of such policies, treatment, conditions, of standards and practices pursues a legitimate aim, is necessary in a democratic society and means employed are proportionate.

50. We welcome the fact that this definition is in line with international best practice, defined, in Principle 5 of the Declaration, 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.³⁹

51. This definition draws inspiration from, and is reflected in, various sources of international human rights law. As discussed above, the ICCPR does not use the terms “direct” and “indirect” in its prohibition on discrimination in Articles 2(1) and 26. Instead, the UN HRC, 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 conduct.⁴⁰ 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.⁴¹ The CESCR, in interpreting the prohibition against discrimination in Article 2(2) of the ICESCR, 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.⁴²

52. 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.⁴³

Harassment

53. Article 5(1)(5) defines harassment as follows:

[U]nwanted treatment against a person on grounds of one or more protected characteristics or in association with them, with the effect or

³⁹ See above, note 1, Principle 5.

⁴⁰ See above, note 7, Para 7.

⁴¹ 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.

⁴² See above, note 16, Para 10.

⁴³ 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.

purpose of creating unfriendly, hostile, offensive, humiliating or rejecting atmosphere for that person

54. As with indirect discrimination, this definition is consistent with international best practice on this issue, as provided for in Principle 5 of the Declaration, which defines harassment as:

[U]nwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.⁴⁴

Failure to provide reasonable accommodation

55. Given how closely the definitions of direct and indirect discrimination and harassment in the Draft Law reflect those in the Declaration, it is both surprising and particularly concerning that the Draft Law does not define or prohibit the fourth recognised form of discrimination – failure to make provide reasonable accommodation. Instead, the Draft Law makes only passing reference to reasonable accommodation, in Article 4(3), which states that making reasonable accommodation is not a form of discrimination and notes that the “procedure, timing and other specific processes related for reasonable accommodation are regulated by the legislation of the Republic of Armenia”.

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

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

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.⁴⁵

57. This principle draws inspiration from a number of sources, particularly the Convention on the Rights of Persons with Disabilities (CRPD). As noted above, the definition of “discrimination” in Article 2 of the CRPD 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.

⁴⁴ See above, note 1, Principle 5.

⁴⁵ See above, note 1, Principle 13.

58. The interpretation of Article 2(2) of the ICESCR by the CESCR 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.*⁴⁶

59. The omission in the Draft Law of any prohibition on a failure to provide reasonable accommodation as a form of discrimination on grounds of disability is incompatible with Article 2(1) of the Covenant, and the Convention on the Rights of Persons with Disabilities (CRPD).
60. The definition of reasonable accommodation in the Declaration departs from the current understanding of reasonable accommodation in the CRPD, and other international instruments, in one important way, in that it applies to all grounds of discrimination rather than solely on grounds of disability. This reflects an emerging international consensus arising from the need to ensure consistent standards of legal protection between discrimination occurring on different grounds.⁴⁷

Incitement to discrimination

61. The Trust welcomes the inclusion of incitement to discrimination amongst the forms of discrimination covered by the Draft Law, and the definitions provided, which appear broadly consistent with international standards.
62. Nevertheless, in respect of incitement, the Trust would recommend that the state provide training to relevant administrative and judicial officials on what constitutes “an order, instruction or a call” to discriminate, in order to ensure that the application of the provision does not adversely impact upon freedom of speech. We would recommend that the state makes use of *inter alia* the *Camden Principles on Freedom of Expression and Equality*, which provides strong guidance on ensuring that freedom of speech is protected while incitement is effectively prohibited.

Discrimination by Association and on the basis of Perception

63. Principle 5 of the Declaration of Principles on Equality provides *inter alia* that:

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

⁴⁶ See above, note 16, 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.

⁴⁷ Petrova, D., “The Declaration of Principles on Equality: A Contribution to International Human Rights”, in *Declaration of Principles on Equality*, pp. 30 – 31, available at: <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20cropepd%2016%20Oct%20dimitrina%20comment.pdf>.

*ground.*⁴⁸

64. Such an understanding has also been expressed by the CESCR which, in its interpretation of Article 2(2) of the ICESCR, 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).*⁴⁹

65. Thus, the Trust welcomes the protection against discrimination by association defined in Article 5(1)(9). We note however that neither Article 4(2), which lists the types of discrimination prohibited by the Draft Law, nor Article 5 makes explicit reference to discrimination on the basis of perception. However, we note that Article 4(1) appears to make provision for discrimination on the basis of perception, through the inclusion of the words “actual or perceived” following the list of protected characteristics.

Multiple Discrimination

66. Principle 12 of the Declaration of Principles of Equality states that “[l]aws and policies must provide effective protection against multiple discrimination, that is, discrimination on more than one ground”.⁵⁰ This is reinforced by the fact that Principle 5 includes the phrase “or a combination of any of these grounds” after listing the protected grounds.⁵¹ The Declaration requires that states provide protection from two types of multiple discrimination: “discrimination on more than one ground in an additive (cumulative) sense” and “discrimination on more than one ground in a syncretic sense, based on a combination of grounds, where it is only the combined characteristics of discrimination occurring on one or more prohibited grounds where the combination of the grounds triggered discrimination” (intersectional).⁵²
67. The CESCR in its General Comment No. 20 on Article 2(2) of the Covenant on Economic, Social and Cultural rights, has recognised the need to provide protection from intersectional discrimination in similar terms.⁵³ The CEDAW Committee also recognised the centrality of intersectionality to an effective equality guarantee in the context of the Convention which it interprets.⁵⁴
68. As such, the Trust welcomes the recognition in the Draft Law definitions of direct and indirect discrimination, and harassment under Article 5(1) respectively that such discrimination can occur on the basis of “one or more protected characteristics”.

⁴⁸ See above, note 1, Principle 5.

⁴⁹ See above, note 16, Para 16.

⁵⁰ See above, note 1, Principle 12.

⁵¹ See above, note 1, Principle 5.

⁵² See above, note 48, p. 38.

⁵³ See above, note 16, Para 17.

⁵⁴ See above, note 36, Para 18.

Temporary Special Measures and Positive Action

69. Article 5(1)(9) defines “temporary special measures”, the objective of which are to “eliminate the inequality against a person or a group of people by ensuring restoration and observance of equality with other members of the society”. As noted above, the Declaration of Principles on Equality uses the term “positive action”, rather than temporary special measures. This reflects the fact – increasingly well-recognised – that positive measures to redress past disadvantage and accelerate progress towards equality are a required element of the right to equality and as such should be considered as neither “special” nor, necessarily, “temporary”. We would urge Armenia to adopt the term positive action in the Draft Law.
70. More broadly, as noted above, we would reiterate our concern that the treatment of temporary special measures in Article 4(3) as an exception to the right to non-discrimination means that the Draft Law is inconsistent with current international standards on equality and non-discrimination. As noted above, Principle 3 of the Declaration, reflecting a growing international consensus, provides that positive action is a “necessary element of the right to equality”, giving rise to an obligation to take measures where a substantive inequality is identified in fact.

Recommendations

- Failure to provide reasonable accommodation: The Trust strongly recommends that the Government add failure to provide reasonable accommodation as a form of discrimination in Article 4(2) and provides a definition of this form of discrimination under Article 5(1) which is consistent with the Declaration of Principles on Equality.
- Direct discrimination: The Trust strongly recommends that Article 5(1)(3) of the Draft Law is amended to include protection from direct discrimination in cases “when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment”.
- Discrimination on the basis of perception: For the sake of clarity and consistency, the Trust suggests that discrimination on the basis of perception is defined in Article 5(1), alongside discrimination by association.
- Temporary special measures: The Trust urges the Government to adopt the term “positive action” rather than “temporary special measures” for the reasons set out in paragraph 69. We strongly urge that Article 5(9)(1) is amended to clarify that such measures are not an exception to the right to non-discrimination, but a necessary element of the right to equality.
- Incitement to discrimination: Training on what constitutes “an order, instruction or a call” should be provided to the judiciary and administrative officials to ensure that the application of this provision does not impact negatively on freedom of expression.

Article 6: Interpretation

71. The Equal Rights Trust has grave concerns about both the purpose and the effect of Article 6 of the Draft Law, titled “Interpretation of the Law”, and considers that this provision should be deleted in its entirety before the Draft Law is enacted. Article 6 states as follows:

The provisions of this Law shall be interpreted in the light of the special care of the state towards the family, as a natural and fundamental unit of the society, rights related to the freedom of religion of religious organisations the exclusive mission of the Armenian Apostolic Holy Church, which is stipulated by the Constitution of the Republic of Armenia.

72. Our concerns are fourfold:

- a) First, the provision is itself directly discriminatory, in that it explicitly favours one religious group – the Armenian Apostolic Holy Church (the Church) – indicating that the interpretation of the Draft Law should be informed and influenced by the positions and views of this Church.
- b) Second, by mandating that the interpretation of the Draft Law should be informed by a consideration of the “exclusive mission” of the Church, the Article provides a basis for discriminatory interpretation, enforcement and implementation of the rights provided therein. There are reasons for concern that interpretation of the Draft Law in light of the teachings or practices of the Church could lead to cases of discrimination against women, other religious groups and lesbian, gay, bisexual and transgender (LGBT) persons being decided in ways which are not consistent with international standards.
- c) Third, by indicating that interpretation should be “in light of the special care of the state towards the family”, the Article provides the basis for the exclusion of LGBT persons from the protection of the Draft Law. As noted above, the omission of the grounds of sexual orientation and gender identity from the list of explicitly protected grounds in Article 4(1) is a cause for significant concern, given that these grounds have long been recognised as protected characteristics by various UN Treaty Bodies and the European Court of Human Rights. Nevertheless, the phrased “other personal or social circumstances” in the same Article, interpreted properly, entails protection on the basis of sexual orientation and gender identity. However, our concern is that the requirement to interpret the Draft Law – and thus Article 4(1) – “in light of the special care of the state towards the family” could lead the courts in Armenia to conclude that sexual orientation and gender identity are not protected characteristics falling within Article 4(1). This is because Article 35 of the Constitution of Armenia, as amended in 2015, provides as follows: “**A man and a woman** of marriageable age shall have the right to marry each other **and found a family** by free expression of their will” (emphasis added). Given this constitutional definition of family, there is a significant risk that the Armenian courts could interpret Article 4(1) to exclude the grounds of sexual orientation and gender identity, in conflict with its obligations under international law and the ECHR.

Recommendations

- The Trust strongly urges the Government to delete Article 6 of the Draft Law in its entirety.

PART 2 PROCEDURAL ELEMENTS OF EQUALITY LAW

73. The Trust notes that Articles 8 and 9 of the Draft Law touch on various issues relating to the procedural elements of equality law and the enforcement of the rights to non-discrimination and equality. Our overarching concern with these provisions is that they

provide insufficient clarity and detail for potential claimants as to how they can bring their claims to court, and insufficient guidance for the courts on how to implement and enforce the rights provided in the Draft Law. We are also concerned by a number of inconsistencies within these two Articles, and the number of necessary procedural safeguards which are absent or ill-defined.

74. If the Draft Law is to be effective in practice, it must establish a framework in which victims of discrimination can secure access to justice and – ultimately – receive a remedy for the harm which they have experienced. In the absence of such a framework, the Draft Law risks becoming an ineffective instrument for those whom it is intended to benefit.
75. With this in mind, the Trust strongly recommends a wholesale review of Articles 8 and 9, leading to the creation of a new chapter on Enforcement, covering the following areas: (i) Access to Justice; (ii) Victimisation; (iii) Standing; (iv) Evidence and Proof; and (v) Remedies and Sanctions. Below, we discuss each of these areas in turn, noting where relevant those areas in which the Draft Law already makes the necessary provisions. In each area, our starting point is the relevant Principle from the Declaration of Principles on Equality. Each of these Principles is based on recommendations made by one or more UN Treaty Bodies for the effective implementation of the instruments for which they bear responsibility.⁵⁵

Article 8: Legal and judicial protection against discrimination

Access to Justice

76. Article 8(1) is the only part of the Draft Law dealing explicitly with the process whereby individuals who believe that they have been subject to discrimination can bring their claims to court. The Draft Law contains no other provisions on the process by which victims of discrimination may access justice, through for example clear direction to, or amendment of, rules on civil procedure. Article 8(1) states:

Each individual who has any foundation to think that he/she has been subject to discrimination, has the right to apply to court, the Human Rights Defender or a respective administrative body to restore his rights and demand compensation for financial and moral damages.

77. Principle 18 of the Declaration, which deals specifically with access to justice, 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.⁵⁶

78. Principle 18 is, in effect, a more detailed elaboration of principles already established by various UN Treaty Bodies. For example, the UN HRC has attached importance to “[s]tates

⁵⁵ See, in particular: 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.; and 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.

⁵⁶ See above, note 1, Principle 21.

parties establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law”.⁵⁷ Indeed, in some respects, the Principle reflects a specific recommendation made by a Treaty Body: the CEDAW Committee, for example, has need for States to ensure recourse to remedies “with legal aid and assistance”.⁵⁸

79. When compared with Principle 18, Article 8(1) clearly has a number of significant shortcomings. In essence, Article 8 corresponds only to the first sentence of Principle 18, in that it guarantees a right to seek legal redress and effective remedy. Beyond this right however, neither Article 8(1) nor any other provision in the Draft Law provides the means to ensure that access to justice is *effective* in practice. Principle 18 requires *inter alia* that persons subjected to discrimination should have access to appropriate legal aid to enable them to access to judicial procedures, and that there should not be “undue obstacles” to effective enforcement. The Draft Law makes no reference to legal aid, nor to measures which would remove obstacles to access to justice – such as the special procedural mechanisms which have been established in many countries. Thus, there is a concern that while Article 8(1) provides a right of access to justice, without further detail in the Draft Law, this right will not be effective in practice.
80. A further significant concern with Article 8(1) is the lack of clarity within the provision itself as to the avenues for victims to secure access to justice. The Article provides that any claimant “has the right to apply to court, the Human Rights Defender or a respective administrative body”. However, it does not indicate the respective roles, powers or obligations of these different bodies, the relationship between them, or how individuals should bring their claim to one or other of these bodies. This lack of clarity risks being a serious impediment to the effective implementation of the Draft Law.

Victimisation

81. The Trust welcomes the inclusion in the Draft Law of the concept of victimisation under Article 8(2) and its definition under Article 5(1)(8). Related to this provision, Article 8(3) further specifies that information regarding a claimant’s private and family life shall be kept confidential in accordance with domestic law.
82. Protection against victimisation is a necessary element of an equality law framework as it ensures that individuals can bring claims without fear of reprisal. Principle 19 of the Declaration sets out that States must provide protection in their national legal systems to ensure that individuals who file complaints or bring proceedings to enforce equality law provisions do not face adverse treatment or consequences.⁵⁹

Standing

83. 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

⁵⁷ 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.

⁵⁸ See above note 36, Para 34.

⁵⁹ See above, note 1, Principle 19.

*judicial and/or administrative procedure provided for the enforcement of the right to equality.*⁶⁰

84. In contrast to Principle 19, Article 8(1) of the Draft Law limits standing to an individual who believes that discrimination has been carried out “against him/her”. This is a significant limitation to the ability of individuals to secure remedy for acts of discrimination which they have experienced and is inconsistent with international standards.

Article 9: Transfer of the Burden of Proof

85. The need for the reversal of the burden of proof in discrimination cases in civil proceedings is a well-established at the international level. Principle 21 of the Declaration states that evidence and proof must be adapted to ensure that victims of discrimination can obtain redress. This includes the need to reverse the burden of proof, as follows:

*[W]hen 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.*⁶¹

86. Similarly, the CESCR has stated in General Comment No. 20, in relation to Article 2(2) of the ICESCR, that:

*Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.*⁶²

87. Thus, the Trust welcomes the inclusion in the Draft Law of a reference to the reversal of the burden of proof in cases where discrimination is alleged. Article 9(1) of the Draft Law provides that where a claimant has presented facts from which it may be concluded that discrimination was a potential factor, “[t]he obligation to prove the lack of discrimination is the responsibility of the defendant”. We also welcome the fact that the Draft Law proposes a corresponding amendment to Article 48(1) of the Civil Procedure Code to include a reference to the need to reverse the burden of proof in civil proceedings involving discrimination.

Remedies and Sanctions

88. Principle 22 of the Declaration provides 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

⁶⁰ See above, note 1, Principle 20.

⁶¹ See above, note 1, Principle 21.

⁶² See above, note 16, Para 40.

*implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality.*⁶³

89. While the application of remedies and sanctions is a matter largely for the enforcement of the Draft Law, rather than the text of the Draft Law itself, we nevertheless consider that the Draft Law should state clearly the principle that “sanctions for breach of the right to equality must be effective, proportionate and dissuasive” and that they must provide “appropriate remedies” for claimants. Such a provision should also mandate the range of material and non-material damages which a claimant could be eligible for, in case of a finding in their favour.

Recommendations

- Trust recommends a wholesale the review and replacement of current Articles 8 and 9, with a new chapter on Enforcement, covering the following areas: (i) Access to Justice; (ii) Victimisation; (iii) Standing; (iv) Evidence and Proof; and (v) Remedies and Sanctions.
- Access to justice: In respect of access to justice, the Trust strongly recommends that the Draft Law is amended as necessary to ensure that persons bringing claims of discrimination have a clear and accessible means to access justice. Such amendments should provide clarity that persons bringing claims of discrimination are eligible to receive legal aid, and set out the mechanisms by which such legal aid is provided. The Draft Law should also provide for a clear, accessible and obstacle-free route for persons bringing claims of discrimination to access justice, including – if necessary – through the establishment of special procedural mechanisms. Further, clarity must be provided as to the different routes for victims to secure access to justice, the respective roles of different bodies, and the relationship between them.
- Standing: Standing in discrimination cases must not be limited to the individual who bringing a claim of discrimination. The Trust urges that the Government amends Article 8(1) so that it extends standing also to 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 the approval of the individual in question
- Remedies and sanctions: The Draft Law should state clearly that sanctions should be “effective, proportionate and dissuasive” and provide “appropriate remedies”. The Draft Law should provide for a wide range of material and non-material damages for those found to have experienced discrimination.

PART 3: EQUALITY COUNCIL

90. Chapter 3 of the Draft Law deals with the establishment of a new equality Body, referred to as the Council of Equality, to be established within the Office of the Human Rights Defender. The Council has various objectives and functions under the Draft Law, set out in Article 17, including the power to receive complaints of discrimination, to make recommendations to the Human Rights Defender on use of their powers, raising public awareness, and conducting research.

⁶³ See above, note 1, Principle 22.

91. Principle 23 of the Declaration deals with the question of specialised equality bodies. It states:

States must establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. States must ensure the independent status and competences of such bodies in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.⁶⁴

92. Through our work in Armenia over the last year, we have become aware of significant concerns amongst civil society organisations as to the nature and functions of the Equality Council, and in particular about its ability to operate effectively and independently, while operating under the aegis of the Human Rights Defender. While we are not able to verify these concerns, we have no reason to disbelieve equality defenders committed to ensuring that Armenia has improved protection from discrimination.
93. As an international non-governmental organisation, it is not our place to question the government as to the precise structure and powers of the equality body – these are matters for national discretion. However, we would urge the government to ensure that the body which it establishes through this Draft Law is independent, adequately funded, competent and effective.

Recommendations

- We urge the Government to ensure that the body which is to be established through this Draft Law is independent, adequately resourced, competent and effective.
- Furthermore, we urge in the strongest terms that the government engages with civil society to ensure that the body which is established is considered by this critical group to be independent and adequately resourced, and is perceived by this group to be a legitimate and objective actor.

⁶⁴ See above, note 1, Principle 23.