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Equal Rights Trust

Suggestions for the list of issues to be adopted by the
Committee on Economic, Social and Cultural Rights
at its 54th Session (pre-sessional working group)
in relation to the second and third periodic reports submitted by:

Kyrgyzstan

October 2014

Statement of Interest

1. The Equal Rights Trust submits the following suggestions for questions to be adopted by the Committee on Economic, Social and Cultural Rights (the Committee) based upon the second and third periodic reports submitted to the Committee by Kyrgyzstan at the Committee's 54th session (pre-sessional working group).
2. The Equal Rights Trust is an international non-governmental organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. It focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice. The Equal Rights Trust has been actively involved in the promotion of improved protection from discrimination in Kyrgyzstan since 2012, working in partnership with the Kyrgyzstani non-governmental organisation Peremena on a project designed to strengthen the capacity of civil society and the media to combat discrimination and promote equality, including in respect to economic, social and cultural rights. In the course of this work, we have undertaken research and consulted with civil society actors on the main patterns of equality and non-discrimination in the country related to economic, social and cultural rights. In addition, we have conducted a detailed analysis of Kyrgyzstan's laws and policies on equality and non-discrimination, in order to assess the extent to which the state has a legal and policy framework in place which is adequate to meet its obligations under international law.

Introduction

3. This submission focuses on the extent to which Kyrgyzstan has met its obligations to respect, protect and fulfil the rights to equality and non-discrimination. In particular, the submission is concerned with Kyrgyzstan's performance under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (the Covenant). In assessing Kyrgyzstan's adherence to its obligations under Article 2(2), the submission relies on the interpretation of this Article which has been provided by the Committee in its General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights).¹ Thus, the submission reflects the importance which the Committee has placed on the need for effective protection from discrimination for the realisation of all Covenant rights:

Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.

*Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights.*²

4. The submission also relies upon the Declaration of Principles on Equality,³ a document of international best practice on equality. The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as "the current international understanding of Principles on Equality".⁴ It has also been endorsed by the Parliamentary Assembly of the Council of Europe.⁵
5. Based on our analysis of Kyrgyzstan's legal framework on equality and non-discrimination, the submission makes recommendations for questions which the Equal Rights Trust would ask the Committee to put to Kyrgyzstan when it decides upon its list of issues.

Article 2(2): The Legal Framework on Discrimination and Inequality

6. Under Article 2(2) of the Covenant, States Parties undertake:

[T]o guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex,

¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009.

² *Ibid.*, Paras 1-2.

³ *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

⁴ *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para 93.

⁵ 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.

language, religion, political or other opinion, national or social origin, property, birth or other status.

7. Protection from discrimination in Kyrgyzstan's domestic legal framework is extremely limited. Legal provisions prohibiting discrimination can only be found in Article 16 of the Constitution and a scattering of provisions in certain statutes which are limited in their scope and rarely, if ever, utilised by courts.
8. As noted in Kyrgyzstan's report to the Committee,⁶ Article 16(2) of the Constitution prohibits discrimination:

No one may be subject to discrimination on the basis of sex, race, language, disability, ethnicity, belief, age, political and other convictions, education, background, proprietary and other status as well as other circumstances.

9. Further, Article 16(3) provides that "[i]n the Kyrgyz Republic everyone shall be equal before the law and the courts", while Article 16(4) states that "[i]n the Kyrgyz Republic men and women shall have equal rights and freedoms and equal opportunities for their realization."
10. Whilst the broad guarantees proffered by Article 16 are laudable, there is a dearth of substantive and effective legislation providing for their practical realisation. As the Committee has stated in its General Comment No. 20:

Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights.⁷

11. Kyrgyzstan has no specific anti-discrimination legislation and was recently criticised by the Human Rights Committee for the absence of such legislation.⁸ There is only a law designed to achieve equality between men and women, together with a number of general equality provisions in legislation governing civil and criminal law, education and employment.
12. The principal piece of legislation providing for gender equality in Kyrgyzstan is the Law of the Kyrgyz Republic on State Guarantees of Equal Rights and Equal Opportunities for Men and Women.⁹ In a recent submission to the Committee on the Elimination of

⁶ Committee on Economic, Social and Cultural Rights, *Second and Third Reports Submitted by States Parties: Kyrgyzstan*, UN Doc. E/C.12/KGZ/2-3, 8 November 2013.

⁷ See above, note 1, Para 37.

⁸ See Human Rights Committee, *Concluding Observations: Kyrgyzstan*, CCPR/C/KGZ/CO/2, 23 April 2014, Para 8: "The Committee remains concerned about a lack of comprehensive anti-discrimination legislation prohibiting discrimination on grounds such as race, language, disability and ethnic origin, and about the lack of disciplinary sanctions for State officials acting in a discriminatory manner (arts. 2 and 26). The State party should review its domestic legislation and bring it in to line with the principle of non-discrimination to ensure that it includes a comprehensive prohibition of discrimination on all the grounds set out in the Covenant."

⁹ Law of the Kyrgyz Republic on State Guarantees of Equal Rights and Equal Opportunities for Men and Women, Law No. 184 of 4 August 2008, as amended by Law No. 97 of 14 July 2011.

Discrimination against Women, the Equal Rights Trust undertook an analysis of this law.¹⁰ Our analysis found that, whilst broad in its scope, the Law nevertheless contained a number of gaps, weaknesses and deficiencies such that it was insufficient in effectively prohibiting all forms of discrimination against women. Specifically, we found that that:

- (a) The law failed to prohibit multiple, including intersectional, discrimination;
- (b) The law did not include a definition of indirect discrimination consistent with international standards.

13. In addition, we expressed concern that the state is not taking steps to implement the law, further undermining the protections provided therein. Specifically, we found that Kyrgyzstan has failed to take temporary special measures and that it has failed to promote and raise awareness of the Law resulting in a near-absence of cases before the courts.

14. Aside from the Law of the Kyrgyz Republic on State Guarantees of Equal Rights and Equal Opportunities for Men and Women, laws governing particular areas of life contain a small number of stand-alone equality provisions. These provisions include:

- (a) Articles 2(1), 52(1), 56(3) and 223(3) of the Civil Code;¹¹
- (b) Article 7(1) of the Civil Procedure Code;¹²
- (c) Article 3(1) of the Criminal Code;¹³
- (d) Article 16(1) of the Criminal Procedure Code;¹⁴ and
- (e) Article 4 of the Law on Education.¹⁵

15. None of these provisions explicitly prohibits discrimination within the particular legal field; rather, each is a general statements on equality before the law or equal treatment of all persons. There is no evidence to suggest that the provisions are used by courts or that victims of discrimination have been able to make claims using them.

16. One notable exception to this trend is Article 9 of the Labour Code, which provides:

¹⁰ The Equal Rights Trust, Suggested issues and questions to be adopted at the 60th session of the Committee on the Elimination of Discrimination against Women (pre-sessional working group) in relation to the fourth periodic report submitted by: Kyrgyzstan, June 2014.

¹¹ Article 2(1) provides that “The civil law is based on the recognition of the equality (...) of the parties”; Article 52(1) provides that “The ability to have civil rights and obligations (civil capacity) is recognised equally for all citizens.”; Article 56(3) provides that “All citizens have equal capacity, unless otherwise stipulated by legislative acts.”; and Article 223(3) provides that “The rights of all property owners are protected equally.”.

¹²Article 7(1) provides that “Justice on civil cases is carried out on the basis of equality in front of law and court of all citizens regardless of gender, race, nationality, language, religion, political and religious beliefs, origin, financial or official status, place of residence and any other conditions and circumstances of private and public nature and also all legal entities regardless of ownership form, location, subordination and other circumstances”.

¹³ Article 3(1) provides that “The Criminal Code is based on the principles of the (...) equality of citizens before the law (...)”.

¹⁴ Article 16(1) provides that “Justice is carried out based on equality regardless of social origin, financial or official status, race or national belonging, gender, education, language, relation to religion, beliefs, belonging to public unions, place of residence and other circumstances.”

¹⁵ Article 4 provides that one of the main principles of education is “Equal rights for all citizens of the Kyrgyz Republic to quality education”.

Everyone has an equal opportunity to exercise their labour rights and freedoms.

No one may be limited in their labour rights and freedoms, or receive any advantages in their realisation on the basis of gender, race, nationality, language, origin, property and official status, age, place of residence, attitude to religion, political beliefs, membership of non-public associations, as well as other factors not related to the quality and results of their work.

Unequal pay for equal work is prohibited.

Distinctions, exclusions, restrictions and preferences, which are determined by the particular type of work inherent in the requirements established by law or due to the special care of the State to persons in need of social and legal protection shall not constitute discrimination.

Persons who believe they have been discriminated against in employment have the right to apply to court with an appropriate application for redress, compensation for pecuniary and non-pecuniary damage.

17. Article 9 of the Labour Code thus goes some way towards meeting the requirement in Article 2(2) of the Covenant to ensure the enjoyment of Covenant rights without discrimination, when taken in combination with Article 6 (the right to work) and Article 7 (the right to the enjoyment of just and favourable conditions of work). However the Article is problematic in a number of respects. It provides a limited list of explicitly protected grounds, omitting a number of grounds recognised by the Committee, such as sexual orientation, gender identity and disability. It does not specifically define or prohibit the different forms of discrimination such as direct discrimination, indirect discrimination, harassment and failure to make reasonable accommodation. In addition, it apparently limits the available remedies to financial compensation.
18. Our assessment indicates that the legal framework in Kyrgyzstan is inadequate to meet the requirements of Article 2(2) of the Covenant, in particular in respect of the obligation to enact specific and comprehensive anti-discrimination law. Therefore, we urge the Committee to seek information from the state on what plans it has to strengthen its legal framework in order to bring it into line with its obligations under the Covenant.

Suggested Questions

- What plans, if any, does the state party have to introduce specific and comprehensive anti-discrimination legislation which prohibits discrimination in the enjoyment of all economic, social and cultural rights protected under the Covenant?
- What assessment has the state party made of the Law of the Kyrgyz Republic on State Guarantees of Equal Rights and Equal Opportunities for Men and Women in eliminating discrimination against women in the enjoyment *inter alia* of their economic, social and cultural rights? How many cases have been brought under the Law and what remedies, aside from compensation, are courts able to provide?

- What assessment has the state party made of the effectiveness of Article 9 of the Labour Code which prohibits discrimination in the enjoyment of labour rights? How many cases have been brought under Article 9 and what remedies, aside from compensation, are courts able to provide?
- What legislation, if any, exists to protect individuals from discrimination in the enjoyment of economic, social and cultural rights other than the rights to work and to just and favourable conditions of work?

Violations of Article 2(2): Draft Law “On Amendments to Some Legislative Acts of the Kyrgyz Republic”

19. As the Committee has stated, in addition to the enactment of comprehensive anti-discrimination legislation:

Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.¹⁶

20. In early 2014, the Draft Law “On Amendments to Some Legislative Acts of the Kyrgyz Republic” (the Draft Law) was introduced into the parliament of Kyrgyzstan (the Jogorku Kenesh). The Draft Law would amend the Criminal Code, the Code of Administrative Responsibility, the Law “on Peaceful Assembly” and the Law “on Mass Media” to prohibit acts aimed at creating a “positive attitude towards non-traditional sexual relations” in different fields.
21. The Draft Law will, if enacted, institutionalise discrimination against lesbian, gay, bisexual and transgender (LGBT) persons and those associated with them, including non-governmental organisations, limiting their rights to freedom of expression, assembly and association. In the view of the Equal Rights Trust, the effect of this Law, in addition to directly violating the civil and political rights of these people, will be to create an environment in which LGBT persons are unable to exercise their economic, social and cultural rights without discrimination on the basis of sexual orientation.
22. Article 1 of the Draft Law would insert a new Article 133-1 into the Criminal Code of the Kyrgyz Republic entitled “Formation of positive attitudes towards non-traditional sexual relations through the media”. New Article 133-1(1) would criminalise acts “aimed at creating a positive attitude towards non-traditional sexual relations, using the media or information and telecommunications networks, including the internet” punishable by imprisonment of between one and six months or a fine of between twenty and fifty calculated indices. New Article 133-1(2) would provide that where such acts are aimed towards minors or undertaken by a person previously convicted of offences under articles in that chapter of the Criminal Code, the punishment is between six months and one year’s imprisonment or a fine of between thirty and sixty calculated indices.
23. Article 2 of the Draft Law would insert a new Article 66-12 into the Code of Administrative Responsibility of the Kyrgyz Republic. New Article 66-12 would create an administrative offence of acts aimed at “creating a positive attitude towards non-traditional sexual relations” where the action does not include the aggravating

¹⁶ See above, note 1, Para 37.

circumstances for criminal liability, punishable by an administrative fine. Article 3 of the Draft Law would insert a new Article 10(3)(3) into the Law “on Peaceful Assembly” (Responsibilities of participants and organisers of peaceful assembly). New Article 10(3)(3) would prohibit participants at assemblies from performing “any act aimed at creating a positive attitude towards non-traditional sexual relations”. Such offences would be punishable under new Article 66-12 of the Code of Administrative Responsibility.

24. Article 4 of the Draft Law would insert a new Article 23(1)(л) into the “Law on Mass Media”. New Article 23(1) would add “creating a positive attitude towards non-traditional sexual relations” to the list of information prohibited from public broadcast.
25. The phrase “non-traditional sexual relations” is not defined in the Draft Law, but it is clear that the Draft Law’s authors intend it to cover same-sex sexual relations. In describing the objectives of the Draft Law, the authors give as examples of non-traditional sexual behaviour “homosexuality [and] lesbianism”.¹⁷ The authors also state that the Draft Law “legislatively specifies the inadmissibility of popularising homosexuality in society and promoting the ‘homosexual lifestyle’, especially among minors”.¹⁸
26. In the opinion of the Equal Rights Trust, the Draft Law would lead to discrimination in relation to the exercise and enjoyment of Covenant rights, particularly the right to the highest attainable standard of physical and mental health (Article 12 of the Covenant). It would further violate a number of international human rights instruments to which Kyrgyzstan is party, e.g. Articles 2(1), 21 and 26 of the International Covenant on Civil and Political Rights and Articles 2(1), 13, 17 and 24 of the Convention on the Rights of the Child.
27. The Committee has made clear through its General Comment No. 20 that sexual orientation is a protected ground falling within “other status” in Article 2(2) of the Covenant thereby prohibiting discrimination in the enjoyment of all Covenant rights, including the right to the highest attainable standard of physical and mental health under Article 12.¹⁹ Indeed, in its General Comment No. 14, the Committee specifically stated that:

*By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of (...) sexual orientation.*²⁰
28. As noted above, Articles 1 and 2 of the Draft Law would amend the Criminal Code and the Code of Administrative Responsibility to introduce offences of “creating a positive attitude towards non-traditional sexual relations”, including same-sex sexual relations. “Creating a positive attitude” is not defined in the Draft Law but, if interpreted broadly, could cover

¹⁷ Jogorku Kenesh, “Public discussion on March 26 2014 on a draft Law of the Kyrgyz Republic ‘On amendments to some legislative acts of the Kyrgyz Republic’”, available at: http://www.kenesh.kg/RU/Articles/21466-Na_obshhestvennoe_obsuzhdenie_26_marta_2014_goda_vynositsya_proekt_Zakona_Kyrgyzskoj_Respubliki_O_vnesenii_dopolnenij_v_nekotorye_zakonodatelnye_akty_Kyrgyzskoj_Respubliki.aspx.

¹⁸ *Ibid.*

¹⁹ See above, note 1, Para 32.

²⁰ Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E.C.12/2000/4, 11 August 2000, Para 18.

the provision of sexual health advice to lesbian, gay and bisexual persons including the provision of condoms and other forms of protection from sexually transmitted infections as well as sexual health advice more generally. Any provision of such education, information or advice could be interpreted as condoning same-sex sexual activity and thus “creating a positive attitude” towards same-sex sexual relations. Whether this is the intention of the Draft Law’s drafters or not, there is a real risk that individual healthcare providers may avoid providing such education, information or advice through fear of falling foul of the prohibitions.

29. In addition to these concerns, the Equal Rights Trust is concerned that if this Draft Law is adopted and enforced, it will have a deleterious effect on the situation of LGB persons in Kyrgyzstan more broadly. The vague wording of Article 2 in particular gives rise to the risk that LGB persons or those associated with them could be penalised in a wide range of contexts. This in turn could restrict their ability to access employment, education and social services, thus limiting their enjoyment of a number of Covenant rights. Moreover, there is a strong likelihood that the enactment of such explicitly discriminatory legislation will legitimise discrimination against LGB persons, thus increasing the risk of discrimination on the basis of sexual orientation in respect of economic and social rights.

Suggested Questions

- What assessment has the state party made of the possible consequences of the Draft Law “On Amendments to Some Legislative Acts of the Kyrgyz Republic” on the enjoyment of all persons to the economic, social and cultural rights protected by the Covenant?
- What impact does the state party foresee of the Draft Law, if enacted, having on the enjoyment of the right to the enjoyment of the highest attainable standard of physical and mental health by LGB persons?
- What legislation, if any, currently exists to protect individuals from discrimination on grounds of sexual orientation and gender identity in the enjoyment of their right to the highest attainable standard of physical and mental health?
- What training guidance or guidance is provided to healthcare providers to respond appropriately and adequately to the specific sexual health needs of LGBT people?