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## The Equal Rights Trust

Parallel report submitted to the 55<sup>th</sup> session of the Committee on the Elimination of  
Discrimination Against Women in relation to the combined fourth and fifth periodic  
reports submitted by:

### Bosnia and Herzegovina

June 2013

#### Statement of Interest

1. The Equal Rights Trust (ERT) submits this parallel report to the United Nations Committee on the Elimination of Discrimination Against Women (the Committee) commenting on the combined fourth and fifth periodic reports by Bosnia and Herzegovina.
2. ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, it focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice.
3. ERT has been actively involved in the promotion of improved protection from discrimination in Bosnia and Herzegovina since 2011. In the project *Developing civil society capacity to combat discrimination and inequality in Bosnia and Herzegovina*, ERT has worked in partnership with the Helsinki Committee for Human Rights in Bosnia and Herzegovina (HCRC) based in Sarajevo, and the Center for Informative and Legal Aid (CIPP) based in Zvornik, and trained and consulted with many other civil society organisations from across the country. In the course of this project, ERT has undertaken research on patterns of discrimination and inequality in Bosnia and Herzegovina and on the legal and policy framework in place to prevent discrimination and promote equality.

4. This submission focuses on the extent to which Bosnia and Herzegovina has met its obligations to respect, protect and fulfil the right to non-discrimination against women. In particular, the submission is concerned with Bosnia and Herzegovina's performance under Articles 2(a) and (b) of the Convention. In assessing Bosnia and Herzegovina's adherence to its obligations under Articles 2(a) and (b), the submission relies on the interpretation of these provisions which has been provided by the Committee in its General Recommendation No. 28.<sup>1</sup> The submission is divided into two parts. The first part examines deficiencies and gaps within the existing legislative framework in Bosnia and Herzegovina such that it falls short of what is required under Article 2 of the Convention in certain key areas. The second part highlights a number of areas where, despite the existence of legislation, there has been a failure effectively to implement certain provisions so as to ensure that the rights to equality and non-discrimination are realised in practice, and thus the state has failed to discharge its obligations arising under Article 2.
5. The submission also relies upon the Declaration of Principles on Equality (the Declaration),<sup>2</sup> 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".<sup>3</sup> It has also been endorsed by the Parliamentary Assembly of the Council of Europe.<sup>4</sup>

## **Article 2: The Existing Legislative Framework**

6. Under Article 2(a) of the Convention, States Parties undertake to "condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women" and to "embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle". Further, under Article 2(b), States Parties undertake to "adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women".
7. The Committee, in its General Recommendation 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (General Recommendation 28), has elaborated on the nature of states' obligation arising under Article 2, stating that:

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<sup>1</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the core obligations of States parties under article 2*, CEDAW/C/GC/28, 2010.

<sup>2</sup> *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

<sup>3</sup> *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para. 93.

<sup>4</sup> 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](http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380).

*Article 2 is crucial to the full implementation of the Convention since it identifies the nature of the general legal obligations of States parties. The obligations enshrined in article 2 are inextricably linked with all other substantive provisions of the Convention, as States parties have the obligation to ensure that all the rights enshrined in the Convention are fully respected at the national level.*<sup>5</sup>

8. The Committee has further confirmed that the obligation on state parties under Article 2 has three elements. States are required to *respect* the right to non-discrimination by refraining from “making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights”;<sup>6</sup> to *protect* the right by “protect[ing] women from discrimination by private actors and tak[ing] steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes”;<sup>7</sup> and to *fulfil* the right by adopting a “wide variety of steps to ensure that women and men enjoy equal rights *de jure* and *de facto*, including, where appropriate, the adoption of temporary special measures”.<sup>8</sup>
9. Protection from discrimination in Bosnia is provided by both the Constitution and legislation, including, in particular, the Law on Prohibition of Discrimination. Article 4 of the Constitution of Bosnia and Herzegovina prohibits discrimination in “the enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution”<sup>9</sup> on “any ground”. However, the primary means by which individuals in Bosnia and Herzegovina are able to enforce their right to non-discrimination is the Law on Prohibition of Discrimination, adopted in 2009. In addition, the Law on Gender Equality, adopted in 2003, specifically addresses equality between men and women.
10. While these two pieces of legislation provide a degree of protection from discrimination and promote equality between women and men, each contains gaps meaning that they fall short of the standard of protection required by the Convention in a number of respects.

### ***Grounds of Discrimination***

11. Taken together, the Law on Prohibition of Discrimination and the Law on Gender Equality provide protection on a wide range of grounds. The Law on Prohibition of Discrimination explicitly prohibits discrimination on grounds of “race, skin colour, language, religion, ethnic affiliation, national or

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<sup>5</sup> See above, note 1, Para. 6.

<sup>6</sup> *Ibid.*, Para. 9.

<sup>7</sup> *Ibid.*, Para. 9.

<sup>8</sup> *Ibid.*, Para. 9.

<sup>9</sup> The Convention on the Elimination of All Forms of Discrimination against Women is included in Annex I to the Constitution.

social origin, connection to a national minority, political or any other persuasion, property, membership in trade union or any other association, education, social status and sex, sexual expression or sexual orientation”.<sup>10</sup> However, ERT is concerned that this list omits a number of grounds which have been recognised under international law. ERT is concerned that the omission of these grounds from the list may limit the extent to which women can enjoy protection from all forms of discrimination, as required by the Convention. As the Committee has stated in its General Comment No. 28:

*The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.*<sup>11</sup>

12. ERT notes with concern that a number of grounds for which effective protection from discrimination is of particular importance to women, including notably **pregnancy, maternity and civil, family or carer status**, are omitted from the list of protected characteristics in both the Law on Prohibition of Discrimination and the Law on Gender Equality. ERT is further concerned that a number of grounds which intersect with sex, resulting in a “compounded negative impact on women”, including **age, disability, health status, and genetic or other predisposition toward illness** are also omitted from both Laws. Each of these omitted grounds is included in the list of explicitly protected grounds provided in Principle 5 of the Declaration of Principles on Equality, and each has been recognised either by other international human rights instruments, or by Treaty Bodies responsible for their interpretation and implementation.<sup>12</sup> In light of the Committee’s legitimate concern to ensure that women enjoy protection from all forms of discrimination, not

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<sup>10</sup> Law on Prohibition of Discrimination, 2009, Article 2.

<sup>11</sup> See above, note 1, Para 18.

<sup>12</sup> Under Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, States must take steps to protect **pregnant women** from discrimination; Under Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, States must also take steps to protect women from discrimination on grounds of **maternity**; the Human Rights Committee has stated that **marital status** is a protected ground under “other status” provided in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (*Danning v. the Netherlands* (Communication No. 180/1984), U.N. Doc. CCPR/C/OP/2 at 205 (1990); and *Sprenger v. the Netherlands* (Communication No. 395/1990), U.N. Doc. CCPR/C/44/D/395/1990 (1992)); the Committee on Economic, Social and Cultural Rights has stated that **age** is a prohibited ground falling within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (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, Para 29); discrimination on grounds of **disability** is expressly prohibited under Article 4 of the Convention on the Rights of Persons with Disabilities; the Committee on Economic, Social and Cultural Rights has stated that **health status** is a prohibited ground falling within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (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, Para 33); discrimination on grounds of **genetic heritage** is prohibited under Article 11 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (CETS No.: 164, adopted 4 April 1997).

solely on the basis of their sex or gender, the absence of these grounds from the list of explicitly protected grounds in the two Laws is a cause for concern.

13. ERT welcomes the use of an “open-ended list” of grounds in the Law on Prohibition of Discrimination through use of the phrase “and every other circumstance” after the list of explicitly protected grounds provided in Article 2. An open-ended list such as this has the clear advantage that those exposed to discrimination on grounds which are not explicitly listed in the Law can claim protection. Given that each of the omitted grounds listed in paragraph 12 above enjoys protection from discrimination under international human rights law, the open-ended list of protected grounds in Article 2 must be read as including protection from discrimination on these grounds, if it is to be consistent with international law.
14. Nevertheless, ERT regrets the failure to include the listed grounds explicitly in Article 2 of the Law on Prohibition of Discrimination. ERT is concerned that without explicit recognition, victims of discrimination on those grounds may be required to undertake legal proceedings so as to establish that these grounds are recognised under Article 2, rather than being able to rely on the Law immediately. In addition, ERT is concerned that the Bosnian courts may fail to recognise some or all of these grounds when interpreting Article 2. As such, ERT believes that the explicit inclusion of these grounds in the Law on Prohibition of Discrimination is essential to avoid potential restrictive judicial interpretation.
15. In addition, ERT is concerned that the Law on Prohibition of Discrimination does not set down criteria by which further grounds are to be recognised as protected from discrimination. This further compounds the lack of certainty as to which further groups are likely to be recognised and protected by the courts among rights-holders, duty-bearers and those responsible for the Law’s implementation and enforcement. The absence of qualifying criteria creates the risk of litigation being brought seeking protection on grounds not needing or deserving protection and, conversely, of groups or individuals being unclear of the scope and whether they will enjoy protection. The drafters of the Declaration proposed a test to establish the admission of new grounds as the best approach to determine whether a new characteristic should be incorporated into the list of those enjoying protection:

*Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.<sup>13</sup>*

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<sup>13</sup> The approach of the Declaration of Principles on Equality reflects that used in the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000) in South Africa, which provides both a list of explicitly prohibited grounds and a condition that further grounds are to be prohibited if one of the three criteria listed is met. This legislation itself drew inspiration from the decision of the South African Constitutional Court in *Hoffman v. South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000), where it was held that the constitutional prohibition on discrimination in Section 9 extended to discrimination on grounds of HIV status, despite the fact that HIV status was not one of the explicitly listed prohibited grounds. See, in particular, Paras 28 and 29.

16. 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.

***Discrimination by Association and Discrimination on the basis of Perception***

17. Neither the Law on Prohibition of Discrimination nor the Law on Gender Equality prohibits discrimination by association, and only the Law on Prohibition of Discrimination prohibits discrimination on the basis of perception. The Declaration of Principles on Equality includes both these forms of discrimination in its definition of discrimination.<sup>14</sup> While the Convention does not explicitly prohibit discrimination by association or discrimination by perception, the Committee has stated in General Recommendation No. 28, in relation to Article 2 that:

*The term “discrimination in all its forms” clearly obligates the State party to be vigilant in condemning all forms of discrimination, including forms that are not explicitly mentioned in the Convention or that may be emerging.*<sup>15</sup>

18. Both discrimination by association and discrimination on the basis of perception have been recognised as forms of discrimination by other Treaty Bodies. For example, the Committee on Economic, Social and Cultural Rights has said in its General Comment No. 20, in relation to Article 2(2) of the International Convention on Economic, Social and Cultural Rights (which prohibits discrimination in the enjoyment of Convention rights) 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).*<sup>16</sup>

19. ERT recalls the Committee’s belief that the Convention: “is part of a comprehensive international human rights legal framework directed at ensuring the enjoyment by all of all human rights”.<sup>17</sup> As the Committee’s statement notes, the treaties which make up the international human rights framework are complementary and, wherever possible, should be interpreted consistently so as to provide the highest level of protection. As both discrimination by association and discrimination by perception have been recognised as forms of discrimination under other treaties, ERT believes that they should thus be recognised as forms of discrimination prohibited under the Convention. Consequently, the fact that the two Laws do not explicitly cover both of these forms of

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<sup>14</sup> See above, note 2, Principle 5, p. 6.

<sup>15</sup> See above, note 1, Para 15.

<sup>16</sup> 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, Para 16.

<sup>17</sup> See above, note 1, Para 3.

discrimination represents a failure of the state party to ensure that it effectively prohibits all forms of discrimination.

### ***Multiple Discrimination / Intersectionality***

20. The impact of the lack of protection from discrimination on a broader list of grounds, and of the omission of both discrimination by association and discrimination on the basis of perception is further exacerbated by the lack of provision for multiple, including intersectional, discrimination in either the Law on Prohibition of Discrimination or the Law on Gender Equality. In its General Recommendation No. 28, the Committee has explicitly stated that “[i]ntersectionality is a basic concept for understanding the scope of the general obligations of states parties contained in article 2”<sup>18</sup> and as such the absence of multiple discrimination protection in the two Laws is a cause for concern.

### ***Scope***

21. Article 2 of the Law on Gender Equality provides that “full gender equality shall be guaranteed in all spheres of society”; Articles 10 to 21 make specific provision on protection from discrimination in a number of areas of life.<sup>19</sup> ERT welcomes this broad scope as consistent with the Convention and other international human rights treaties.

22. However, ERT is concerned that the scope of the Law on Prohibition of Discrimination may not be consistent with the requirements of the Convention, as elaborated by the Committee. In particular, ERT is concerned that the scope of the protection from discrimination in the Law is unclear, given two apparently inconsistent provisions making reference to the scope of the right.

23. Article 6 of the Law on Prohibition of Discrimination provides that the right to non-discrimination applies to “all public bodies, all natural and legal persons, in public and private sector, in all spheres” before providing an extensive, non-exhaustive list of areas of life in which discrimination should be prohibited.<sup>20</sup> However, Article 2 of the Law defines discrimination as treatment “with a purpose or a consequence to disable or endanger recognition, enjoyment or realization, of rights and freedoms in all areas of public life”.

24. ERT is concerned by the apparent contradiction between Article 6 of the Law on Prohibition of Discrimination, which prohibits discrimination in “all spheres”, and the definition of discrimination

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<sup>18</sup> See above, note 1, Para. 18.

<sup>19</sup> Law on Gender Equality, 2003: The Law includes specific provisions on discrimination in the areas of: Education (Article 10); Employment and Labour (Article 12 and 13); Social Protection (Articles 16 and 17); Health Protection (Article 18); Sports and Culture (Article 19); “Public Life” (State Administration) (Article 20); Public Information and the Media (Article 21).

<sup>20</sup> Law on Prohibition of Discrimination, 2009, Article 6: The Article explicitly lists the following areas of life in which the prohibition on discrimination shall apply: Employment and Labour; Education; Sports and Culture; Social Protection; Health Protection; Training; Judiciary and Administration; Housing; Public Information and the Media; Membership in professional organizations; Goods and services; Performing entrepreneurship; “Public Life” (State Administration).

provided in Article 2, which limits its prohibition to “areas of public life”. ERT is concerned that narrow interpretation of the Law relying upon the definition in Article 2 would have the effect of denying protection to victims of discrimination in areas of private or family life in which the Convention clearly requires that discrimination should be prevented. As the Committee has stated in its General Recommendation No. 28, States parties are required to prohibit discrimination in “all fields of women’s lives under the Convention and throughout their lifespan”.<sup>21</sup> Moreover, we are concerned that this risks confusion for rights-holders, duty-bearers and those responsible for implementing and enforcing the law.

### ***Exceptions***

25. In addition to the concerns noted above about the limited personal and material scope of the protection from discrimination provided by anti-discrimination laws in Bosnia and Herzegovina, ERT is concerned that the Law on Prohibition of Discrimination provides a number of exceptions which permit discrimination against women in ways which are inconsistent with the Convention.
26. ERT is aware that General Recommendation No. 28 makes no explicit reference to any exceptions to the rights to equality and non-discrimination. In line with the current international consensus, however, the Declaration of Principles of Equality sets out rules to assess the validity of limitations or exceptions to the protection from different forms of discrimination. Under Principle 5 of the Declaration, *direct discrimination* “may be permitted only very exceptionally, when it can be justified against strictly defined criteria”, while *indirect discrimination* may be permitted only where it can be “objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.
27. Although the Law on Gender Equality contains no provisions for exceptions, the Law on Prohibiting Discrimination contains a number of exceptions to the prohibition on discrimination which are of concern. In particular, Article 5 provides that the following measures shall not be considered discrimination:
  - Measures based on a distinction, exclusion or providing an advantage in relation to employment as a staff member of an institution if it is done in compliance with the doctrines, basic presumptions, dogmas, beliefs or teachings of the confession or religion, bearing in mind that every distinction, exclusion or providing an advantage is done consciously in order not to offend religious feelings of members of that confession or religion;
  - Measures which put an individual in a less favourable position, in defining the rights and obligations within family relations, provided it is defined within the Law, and especially in order to protect the rights and interests of children, which has to be justified with legitimate purpose, the protection of public morals, along with favouring marriage in accordance with provisions of the family laws.

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<sup>21</sup> See above, note 1, Para. 31.

- Measures involving establishing employment relations, membership, and actions that are in compliance with preaching and operations of registered churches and religious communities in Bosnia and Herzegovina, and other public or private organisations working in accordance with the Constitution and laws, if demanded by religious doctrines, beliefs or goals.
28. ERT is unconvinced that exceptions to the prohibition on discrimination against women which are based on “public morals” or “religious doctrines, beliefs or goals” can ever be justified. Bearing in mind the historic discrimination that women have suffered which has been based on “public morals” or “religious doctrines, beliefs of goals”, ERT believes that any exceptions to the right to non-discrimination based on such aims should be scrutinised closely. Indeed, any such exceptions should be explicitly stated in legislation, rather than left to judicial interpretation.
29. In conclusion, ERT is concerned that the scope and definition of the right to non-discrimination provided by the Law on Prohibition of Discrimination and the Law on Gender Equality is inconsistent with the requirements placed on states by Article 2, as elaborated by the Committee in its General Recommendation No. 28. ERT therefore calls on the Committee to urge the government of Bosnia and Herzegovina to amend these two laws, in particular by ensuring that they both:
- a. Explicitly prohibit discrimination on at least the grounds of pregnancy; maternity; civil, family or carer status; age; disability; health status; and genetic or other predisposition toward illness, in addition to those grounds currently protected;
  - b. Provide a test for the incorporation of new grounds of discrimination in line with that recommended in the Declaration of Principles on Equality;
  - c. Explicitly prohibit discrimination by association and discrimination by perception;
  - d. Explicitly prohibit multiple discrimination;
  - e. Provide protection from discrimination in all fields of women’s lives; and
  - f. Provide only for strictly limited exceptions to the right to non-discrimination, in accordance with the Declaration of Principles on Equality.

## **Article 2: Implementation of Legislation**

30. As noted in the statement of interest, ERT has been working in partnership with the Helsinki Committee for Human Rights in Bosnia and Herzegovina (HCRC) based in Sarajevo, and the Center for Informative and Legal Aid (CIPP) based in Zvornik, since 2011. In the course of this partnership, and in consultation with other civil society organisations engaged through this project, ERT has been repeatedly made aware of concerns about delays in the full implementation of the Law on

Prohibition of Discrimination, and in particular about the failure of the Ministry of Human Rights and Refugees (the Ministry) to discharge a number of obligations created by Article 8 of the Law. We highlight three such concerns below:

31. First, the Ministry has failed to report, through the Council of Ministers, to the Parliamentary Assembly on cases and other manifestations of discrimination or to propose concrete legislative or other measures with regards to such discrimination, despite its obligation to do so under Article 8 of the Law. Second, the Ministry had failed to produce any annual reports (or special ad hoc reports) for the Council of Ministers containing proposals for measures for the prevention and suppression of discrimination in Bosnia and Herzegovina. Finally, the Ministry has failed to establish a central database of cases of discrimination.
32. ERT notes that in April 2013, over three years after the deadline set down in the Law, the Ministry issued a Rulebook on methods for data collection on cases of discrimination. However, we share the concerns of our partners in Bosnia and Herzegovina about the delay in producing such a Rulebook, and the impact which this has had on the efficacy of efforts of state and non-state actors to combat discrimination.
33. ERT believes that the failure to implement the provisions set out in Article 8 of the Law in a timely manner weakens the ability of Bosnia and Herzegovina to tackle discrimination against women. Aside from their value to the Parliament and Council of Ministers, the reports, guidelines and database which the Ministry was required to establish are important tools for the public and non-governmental organisation. ERT is concerned that the failure of the government to implement these provisions and the lengthy delay in their implementation indicates that the Ministry is either disinclined, or otherwise unable to fulfil its obligations under the Law.
34. In conclusion, ERT is concerned that the failure of the government to discharge the obligations created by Article 8 of the Law on Prohibition of Discrimination weakens the ability of both state and non-state actors to effectively tackle discrimination against women and undermines the effectiveness of the Law as a whole. The Committee, in its General Recommendation No. 28, has repeatedly emphasised the importance of full and effective implementation of laws and policies to tackle discrimination as required under Article 2. ERT therefore calls on the Committee to urge the government of Bosnia and Herzegovina to ensure full and effective implementation of Article 8 and all other outstanding provisions of the Law on Prohibition of Discrimination as soon as possible.