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Equal Rights Trust

Shadow report submitted to the 60th session of the
Committee on the Elimination of All Forms of Discrimination
against Women in relation to the fourth periodic report of

Kyrgyzstan

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Introduction

1. The Equal Rights Trust submits this shadow report to the United Nations Committee on the Elimination of Discrimination against Women (the Committee) in relation to the fourth periodic report of Kyrgyzstan submitted under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women (the Convention).
2. The Equal Rights Trust 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.
3. We undertake research on the patterns of discrimination and inequality – including discrimination and inequality affecting women – which prevail in different states, and on the adequacy of domestic legislation and policy to address these forms of discrimination and disadvantage. The Trust also undertakes projects, in partnership with civil society organisations, to develop the capacity of these organisations to undertake documentation, advocacy and litigation in order to enhance the realisation of the rights to equality and non-discrimination in their country.
4. The Equal Rights Trust has been actively involved in the promotion of improved protection from discrimination in Kyrgyzstan since 2013, working in partnership with the Kyrgyz civil society organisation Peremena to strengthen the capacity of civil society to combat discrimination and promote equality. In the course of this work, the Equal Rights Trust has undertaken research into patterns of discrimination and inequality in Kyrgyzstan and assessed the legal and policy framework in place to combat discrimination and promote equality.

5. This submission focuses on the extent to which Kyrgyzstan has met its obligations to respect, protect and fulfil the right of women to non-discrimination. In particular, the submission is concerned with Kyrgyzstan's performance under Articles 2(a) and (b) of the Convention. In assessing Kyrgyzstan'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. 28.¹
6. The submission also relies upon the Declaration of Principles on Equality (the Declaration),² 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".³ It has also been endorsed by the Parliamentary Assembly of the Council of Europe.⁴
7. The submission examines deficiencies and gaps within the existing legislative framework in Kyrgyzstan, together with problems in the implementation and enforcement of relevant laws, such that Kyrgyzstan falls short of the standards required under Article 2 of the Convention.

Article 2 – Constitutional and Legislative Provisions

8. 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".
9. The Committee, in its General Recommendation No. 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 No. 28), has elaborated on the nature of states' obligation arising under Article 2, stating that:

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.⁵

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

² *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

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

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.

⁵ See above, note 1, Para 1.

10. 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”;⁶ 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”;⁷ 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”.⁸
11. Protection from discrimination on grounds of sex in Kyrgyzstan is provided by both the Constitution and the Law of the Kyrgyz Republic on State Guarantees of Equal Rights and Equal Opportunities for Men and Women.⁹

Constitutional Provisions and Discriminatory Legislation

12. The most important non-discrimination provisions in the Constitution are Articles 16(2), 16(3) and 16(4). The relevant provisions are as follows:

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

Special measures defined by law and aimed at ensuring equal opportunities for various social groups in accordance with international commitments shall not be considered as discrimination.

3. In the Kyrgyz Republic everyone shall be equal before the law and the courts.

4. In the Kyrgyz Republic men and women shall have equal rights and freedoms and equal opportunities.¹⁰

13. Whilst legislation is the primary means by which discrimination is prohibited in Kyrgyzstan, the Constitution of Kyrgyzstan nonetheless has a particularly important place in that legislation which is incompatible with the constitution can be struck down by the

⁶ *Ibid.*, Para 9.

⁷ *Ibid.*

⁸ *Ibid.*

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.

¹⁰ Constitution of the Kyrgyz Republic, Article 16. (Unofficial translation from Russian, produced by the EU-UNDP Project on Support to the Constitutional and Parliamentary Reforms and the OSCE/ODIHR, available at: <http://www.legislationline.org/documents/id/5045>)

Supreme Court.¹¹ Thus, whilst legislation should prohibit discrimination by public and private actors, where it is legislation itself which is discriminatory, it can only be struck down in pursuance of Article 16 of the Constitution.

14. The Equal Rights Trust is therefore concerned by the fact that there remain a number of legislative provisions in Kyrgyzstan which discriminate against women but which remain in force and are enforced, notwithstanding Article 16's purported prohibition of such discrimination. Such legislative provisions are largely found in the Labour Code. Many of these provisions, whilst purporting to benefit women, in fact constitute direct discrimination on the basis of sex and have the effect of limiting women's ability to make free choices about their employment on an equal basis with men.
15. Article 303 of the Labour Code prohibits absolutely the employment of women for certain forms of work, namely:
 - a. "Heavy work";
 - b. Work in "harmful and/or dangerous conditions";
 - c. Work which involves lifting or moving objects which exceed certain weights.
16. In addition, in 2000, the government of Kyrgyzstan issued Resolution No. 158 of 24 March 2000 "On the list of industries, jobs, professions and positions that have harmful and/or hazardous working conditions and in which employing the labour of women is prohibited". The resolution lists hundreds of different types of work which women are prohibited from undertaking, largely jobs which involve manual work or potentially dangerous or harmful substances.
17. Article 304 of the Labour Code prohibits women who are pregnant from working night shifts, working overtime, working at the weekend, and from undertaking work-related travel, unless they are certified as healthy to do so. Where a woman has a child under the age of three years old, Article 304 also permits her to refuse to work night shifts, to work overtime, to work at the weekend, and to undertake work-related travel, if she so wishes.
18. Whilst intended to protect women from certain forms of work, the Equal Rights Trust considers that these provisions fall foul of the prohibition of discrimination under the Covenant. In respect of Article 303 and Resolution No. 158 of 24 March 2000, the prohibition on women participating in certain forms of work is largely based on gender stereotypes and assumptions about women's physical strength and ability. In respect of article 304, the fact that mothers, but not fathers, are allowed to refuse certain forms of work reinforces stereotypical notions of fathers continuing to work after childbirth with mothers expected to undertake all aspects of child-raising. In addition, it seems likely that article 304 would make it more attractive for employers to hire men, given the greater flexibility permitted to employers with regards to their working hours.
19. That such overtly and directly discriminatory provisions are both in force and enforced indicates that the constitutional prohibition of discrimination in Article 16 is ineffective in addressing and eliminating discrimination against women in the sphere of employment. Indeed, the Equal Rights Trust is unaware of any instances in which Article 16 has been used by the Supreme Court to prohibit discrimination against women raising questions over its practical effectiveness.

¹¹ Article 97.6.1 of the Constitution provides that "The Constitutional Chamber of the Supreme Court (...) shall declare unconstitutional laws and other regulatory legal acts in the event that they contradict the Constitution".

Legislative Provisions Related to Gender Equality

20. The primary means by which women in Kyrgyzstan are able to enforce their right to non-discrimination is through the Law of the Kyrgyz Republic on State Guarantees of Equal Rights and Equal Opportunities for Men and Women (the Gender Equality Law).¹² Whilst this Law provides a degree of protection from discrimination, it falls short of the standard of protection required by the Convention in a number of respects. The Equal Rights Trust is also concerned at the apparent low level of awareness and understanding of the law amongst judges, lawyers, civil society organisations and victims of discrimination, reflected in the apparent absence of cases being brought under the law.

Grounds of Discrimination

21. The Gender Equality Law prohibits discrimination on grounds of sex. However, the Committee has stated that merely prohibiting discrimination on grounds of sex and gender is insufficient to ensure effective protection of women from all forms of discrimination given the prevalence of multiple, including intersectional, discrimination. As the Committee stated in its General Recommendation 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.*¹³

22. In addition to the Gender Equality Law, Article 9.2 of the Labour Code¹⁴ prohibits restrictions in labour rights and freedoms as well as benefits in their implementation based on gender, race, nationality, language, origin, property or employment status, age, place of residence, religion, political beliefs or membership of non-public associations or other circumstances unrelated to the professional qualities and the results of one's work. Article 9.3 prohibits unequal pay for equal work. Article 9.4 provides that distinctions, exclusions, preferences and limitations which amount to occupational requirements do not constitute discrimination.
23. Even taken together, the Gender Equality Law and the Labour Code fall short of what is required under the Convention, in two ways. First, they fail to ensure that women enjoy protection from discrimination on a full range of grounds other than sex in all fields of their lives protected under the Convention. Second, they do not ensure that women are protected from multiple, including intersectional discrimination. Indeed, neither the Gender Equality Law nor the Labour Code explicitly prohibits multiple discrimination. The Equal Rights Trust believes that these omissions limit the extent to which women can enjoy protection from all forms of discrimination, as required by the Convention, as well

¹² See above, note 9.

¹³ See above, note 1, Para 18.

¹⁴ Labour Code of the Kyrgyz Republic, Law No. 107 of 4 August 2004, as amended.

as by the Declaration of Principles on Equality which states, at Principle 12, that “Laws and policies must provide effective protection against multiple discrimination”.¹⁵

24. In light of the Committee’s concern that women enjoy protection from all forms of discrimination, not solely on the basis of their sex or gender, the absence of any provisions in the Gender Equality Law prohibiting discrimination against women on other grounds, and the absence of provisions prohibiting multiple discrimination, is a cause for concern..

Forms of Discrimination

25. Article 1 of the Gender Equality Law defines “gender discrimination (direct, indirect)” as:

[A]ny distinction, exclusion or preference which restricts the rights and interests of persons on grounds of sex; aimed at weakening or limiting the recognition, enjoyment or exercise of equality of men and women in political, economic, social, cultural, civil or any other field of public life.

26. Article 5 prohibits “direct and indirect gender discrimination in any sphere of activity in relation to persons of both sexes”. “Direct discrimination” is defined in Article 1 as “discrimination, directly referencing gender” and “indirect discrimination”, in the same Article, as “discrimination without directly referencing gender”.

27. The Committee has elaborated on the forms of discrimination which must be prohibited if laws are to reflect the requirements of the Convention. The Committee has defined direct discrimination and indirect discrimination in its General Recommendation No. 28:

***Direct discrimination** against women constitutes different treatment explicitly based on grounds of sex and gender differences. **Indirect discrimination** against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure.¹⁶ (emphasis added)*

28. These definitions largely mirror those contained within Principle 5 of the Declaration of Principles on Equality.¹⁷ The Declaration also includes harassment as a form of discrimination, defining it as follows:

Harassment constitutes discrimination when unwanted 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.¹⁸

29. Whilst it can be seen that the definition of “direct discrimination” in Article 1 of the Gender Equality Law largely reflects the definition provided in General Recommendation No. 28, the definition of “indirect discrimination” does not. The Equal Rights Trust is

¹⁵ See above, note 2, Principle 2, p. 5.

¹⁶ See above, note 2, Para 16.

¹⁷ See above, note 2, Principle 5, p. 6.

¹⁸ See above, note 2, Principle 5, p. 6.

concerned that a simple statement in Article 1 that indirect discrimination is discrimination which does not directly reference the protected characteristic(s) is unclear, imprecise and risks creating confusion. This weakness is remedied, in part, by Article 5 of the Law which provides, *inter alia*, that:

Indirect gender discrimination includes:

- *The reproduction of gender stereotypes in the media, education and culture;*
- *The establishment of conditions, requirements, which result or may result in negative consequences in terms of harm to persons of a particular sex.*

30. By including “the establishment of conditions, requirements, which result or may result in negative consequences in terms of harm to persons of a particular sex” as an example of indirect discrimination, the legislation does thus prohibit indirect discrimination largely in accordance with the definition provided for by the Committee in General Comment No. 28. However, we are concerned that by making the *definition* of indirect discrimination an *example* of discrimination, the Gender Equality Law remains confusing. To add to the confusion, Article 5 includes a second example of indirect discrimination – reproducing gender stereotypes in the media, education and culture – which is not an example of indirect discrimination, within the definition used by the Committee and by the Declaration of Principles on Equality.
31. The Equal Rights Trust believes that the lack of clarity and the inconsistency in the Gender Equality Law’s necessitates its amendment so that the Law provides clear and consistent definitions of direct and indirect discrimination which are also in line with international standards, as elaborated by the Committee in its General Comment. In the view of the Trust, such definitions should be distinct from any examples which are also included in the Gender Equality Law.

Temporary Special Measures

32. Article 5 of the Gender Equality Law provides that “special measures” and “affirmative action” are not to be considered as a form of discrimination, reflecting a similar provision in Article 16(2) of the Constitution. Temporary special measures are therefore expressly permitted under the Gender Equality Law. Article 6 specifically require the state to adopt “special measures to correct the imbalance between women and men”.
33. Despite this, only one example of a temporary special measure is noted in the State Party’s Report: a cap of 70% maximum of candidates on electoral lists for local elections to be of the same sex, together with a rule that there should be no more than a two position gap in the placement of men and women on lists of priority nominees submitted by political parties.¹⁹

¹⁹ Committee on the Elimination of Discrimination against Women, *Consideration of reports submitted by States parties under article 18 of the Convention: Kyrgyzstan*, UN Doc. CEDAW/C/KGZ/4, 1 May 2013, Para 39.

34. Given the significant patterns of discrimination against women which were highlighted by the Committee when it last reviewed Kyrgyzstan in 2008,²⁰ the Committee's own conclusion that temporary special measures "are not sufficiently employed as a method of accelerating the achievement of de facto or substantive equality between women and men in all areas of the Convention"²¹ and its recommendations that Kyrgyzstan "give consideration to the further use of temporary special measures" and "include in its equality legislation provisions to encourage the use of temporary special measures, in both the public and private sectors",²² the adoption by Kyrgyzstan of a single measure in six years is of significant concern. The Equal Rights Trust believes further measures should be taken as a matter of priority.
35. Additionally, the Equal Rights Trust notes that the section of Kyrgyzstan's report to the Committee on temporary special measures includes information on "special measures to protect motherhood" under Article 11 of the Convention.²³ Measures established to ensure that women and men have equal opportunities in employment, including support and protection from discrimination for women before and after childbirth are *not* temporary special measures for the purpose of Article 4 of the Convention. Article 11(2) of the Convention states that four categories of "appropriate measures" are required "in order to prevent discrimination against women on the grounds of marriage or maternity": the prohibition of dismissal on the grounds of pregnancy or maternity leave; the introduction of maternity leave with pay; the encouragement of provision for necessary supporting social services to enable parents to combine work and family obligation; and the provision of special protection to women during pregnancy. These measures are required in order to ensure the elimination of discrimination against women in employment; they should not be understood or presented as either special or temporary. In this respect, the Equal Rights Trust recalls the Committee's General Recommendation No. 25, in which it stated that:

*States parties should clearly distinguish between temporary special measures taken under article 4, paragraph 1, to accelerate the achievement of a concrete goal for women of de facto or substantive equality, and other general social policies adopted to improve the situation of women and the girl child.*²⁴

36. In light of this, the Equal Rights Trust is concerned that the state party misunderstands the precise nature of temporary special measures under the Convention.

Implementation and Enforcement

37. The Gender Equality Law has been in force in Kyrgyzstan since 2008 and is the primary legislative tool for women who have suffered discrimination to access redress. However,

²⁰ Committee on the Elimination of Discrimination against Women, *Concluding Observations: Kyrgyzstan*, UN Doc. CEDAW/C/KGZ/CO/3, 14 November 2008.

²¹ *Ibid.*, Para 31.

²² *Ibid.*, Para 32.

²³ See above, note 19, Para 49.

²⁴ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, UN Doc. CEDAW/C/GC/28, 2004, Para 19. See also Para 26.

Kyrgyzstan's report to the Committee contains little information on measures taken to ensure its effective implementation and enforcement.

38. Under Article 30 of the Gender Equality Law, victims of gender discrimination are able to bring cases to a number of bodies including the Ombudsman (Akyikatchy), prosecuting authorities, courts, other state bodies and local authorities. However, Kyrgyzstan's report is unclear on how many cases of gender discrimination have actually been brought and heard. The Report states that in 2011, the Ombudsman's Office received 12 reports of discrimination on the basis of gender and 3 reports in the first quarter of 2012.²⁵ No statistics are provided on the number of cases brought before prosecuting authorities, courts, other state bodies or local authorities.
39. The low number of cases brought before the Ombudsman indicates that there may be a lack of public awareness both of the Law and the means by which victims of gender discrimination can seek redress. In its previous Concluding Observations, the Committee raised concerns over the low level of public awareness of the Convention and the rights contained therein.²⁶ The Equal Rights Trust shares this concern and believes that it also extends to the Gender Equality Law and the protections offered therein.

Suggested Recommendations for Kyrgyzstan

On the basis of the above, the Equal Rights Trust urges the Committee to make the following recommendations to Kyrgyzstan in its concluding observations:

- The state party should amend Articles 303 and 304 of the Labour Code, Resolution No. 158 of 24 March 2000, and any other legislative provisions which limit women's choices in employment.
- The state party should conduct a thorough audit of its legislation to ensure its consistency with the requirement that laws should not "directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights".²⁷
- The state party should amend the Law of the Kyrgyz Republic on State Guarantees of Equal Rights and Equal Opportunities for Men and Women so as to (i) include provisions recognising and prohibiting multiple discrimination on all protected characteristics; (ii) ensure appropriate definitions all forms of discrimination, including direct and indirect discrimination; and (iii) provide for a range of appropriate remedies, in addition to compensation, including those listed by the Committee in General Comment No. 28.
- The state party should utilise Article 6 of the Law of the Kyrgyz Republic on State Guarantees of Equal Rights and Equal Opportunities for Men and Women to its fullest, taking special measures in all areas of women's lives where there remains inequality of opportunity and treatment.
- The state party should make a concerted effort to raise awareness amongst judges, lawyers, civil society organisations and victims (and potential victims) of discrimination of the

²⁵ See above, note 19, Para 14.

²⁶ See above, note 20, Para 10 and 14.

²⁷ See above, note 1, Para 9.

Law of the Kyrgyz Republic on State Guarantees of Equal Rights and Equal Opportunities for Men and Women so as to make the Law practical and effective.

- The state party should encourage victims of discrimination to bring complaints to the Ombudsman and to ensure that the Ombudsman has sufficient resources in order to deal adequately with complaints which are brought.