



**Opinion by the Office of the United Nations High Commissioner for Refugees  
for the Inquiry by the National Human Rights Commission of Korea  
on the *Proposals for the Equality Act***

**Introduction**

1. These observations are submitted by the Office of the United Nations High Commissioner for Refugees (“UNHCR”)<sup>1</sup> in relation to inquiry of the National Human Rights Commission of Korea (“NHRCK”) on current legislative proposals for “Equality Act” pending in the National Assembly of the Republic of Korea (“Korea”).
2. UNHCR is the subsidiary organ entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions.<sup>2</sup> According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”<sup>3</sup> This supervisory responsibility is reiterated in Article 35(1)<sup>4</sup> of the 1951 Convention relating to the Status of Refugees (“1951 Convention”)<sup>5</sup> and Article II of the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”).<sup>6</sup>
3. The 1951 Convention is underpinned by a number of fundamental principles, including the principle of non-discrimination.<sup>7</sup> Most prominently, Article 3 (Non-Discrimination) of the 1951 Convention provides that the Convention’s provisions shall be applied to refugees

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<sup>1</sup> These submissions do not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law: UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, available at: <https://www.refworld.org/docid/3ae6b3902.html>.

<sup>2</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, A/RES/428(V), 14 December 1950, available at: <https://www.refworld.org/docid/3ae6b3628.html>.

<sup>3</sup> *Ibid.*, at para. 8(a).

<sup>4</sup> According to Article 35(1) of the 1951 Convention, States undertake to co-operate with UNHCR and “shall facilitate its [UNHCR’s] duty of supervising the application of the provisions of the Convention”.

<sup>5</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, pp. 137, available at: <https://www.unhcr.org/3b66c2aa10.pdf>.

<sup>6</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 4 October 1967, United Nations Treaty Series No. 8791, vol. 606, pp. 267, available at: <http://www.unhcr.org/3b66c2aa10.pdf>.

<sup>7</sup> UNHCR, *Introductory Note, Convention and Protocol Relating to the Status of Refugees*, 2010, p. 3, at <https://www.unhcr.org/3b66c2aa10>

“without discrimination as to race, religion or country of origin”, which has been reiterated and expanded through various guidelines and statements issued by UNHCR and the Executive Committee of the High Commissioner’s Programme (“ExCom”).<sup>8</sup> In addition, according to Article 5 of the 1951 Convention, nothing in that Convention shall impair any rights and benefits granted to refugees by other instruments. This includes rights and entitlements reflecting non-discrimination and equality. ExCom has recognized that the “refugee experience, in all its stages, is affected by the degree of respect by States for human rights and fundamental freedoms, given the multifaceted linkages between refugee issues and human rights”,<sup>9</sup> and has appealed to “States to combat intolerance, racism and xenophobia and to foster empathy and understanding through public statements, appropriate legislation and social policies, especially with regard to the special situation of refugees and asylum-seekers.”<sup>10</sup> In this regard, UNHCR has a direct interest in the matter.

4. UNHCR’s supervisory responsibility is exercised, among other ways, by the issuance of interpretive guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention and the 1967 Protocol.<sup>11</sup> UNHCR regularly provides information to decision-makers and courts of law concerning the proper interpretation and application of the provisions of the 1951 Convention and has a history of third-party interventions in many national and regional jurisdictions. The Office is often approached directly by courts or other interested parties to obtain UNHCR’s expertise<sup>12</sup> on particular legal issues.<sup>13</sup>

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<sup>8</sup> ExCom is an intergovernmental body currently comprised of 107 Member States of the United Nations and the Holy See. The Republic of Korea is an active member of ExCom. Chief among its duties, the ExCom advises UNHCR in the exercise of its protection mandate.

<sup>9</sup> ExCom Conclusion No. 95 (LIV), 2003

<sup>10</sup> ExCom Conclusion No. 77 (XLVI) (h), 1995

<sup>11</sup> Such guidelines include the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (“*UNHCR Handbook*”) which was subsequently complemented by a number of Guidelines on International Protection: HCR/1P/4/ENG/REV. 4, April 2019, available at: <https://www.refworld.org/docid/5cb474b27.html>.

<sup>12</sup> United Kingdom: Supreme Court, *R (on the application of EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, 19 February 2014, available at [https://www.refworld.org/cases,UK\\_SC,5304d1354.html](https://www.refworld.org/cases,UK_SC,5304d1354.html) at para. 72.

<sup>13</sup> Similar to many other judicial authorities, including the Supreme Courts of Canada, the United Kingdom, and the United States, Korean courts have found that the UNHCR’s authority in interpretation of the 1951 Convention needs to be respected, in the context of considering the value of the *UNHCR Handbook*. See, for example, *Chan v. Canada (M.E.I.)*, [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, [www.refworld.org/cases,CAN\\_SC,3ae6b68b4.html](http://www.refworld.org/cases,CAN_SC,3ae6b68b4.html) at paras. 46 and 119; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, [https://scc-csc.lexum.com/scc-csc/scc-csc/en/1023/1/document.do at pp. 713-714](https://scc-csc.lexum.com/scc-csc/scc-csc/en/1023/1/document.do%20at%20pp.%20713-714); *R v. Secretary of State for the Home Department, Ex parte Adan*, United Kingdom: House of Lords (Judicial Committee), 19 December 2000, [www.refworld.org/cases,GBR\\_HL,3ae6b73b0.html](http://www.refworld.org/cases,GBR_HL,3ae6b73b0.html); *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, [www.refworld.org/cases,USSCT,3ae6b68d10.html](http://www.refworld.org/cases,USSCT,3ae6b68d10.html); *Al-Sirri (FC) v Secretary of State for the Home Department*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, [www.refworld.org/cases,UK\\_SC,50b89fd62.html](http://www.refworld.org/cases,UK_SC,50b89fd62.html) at para. 36; *2019Nu47119* (Seoul High Court, 27 Sep 2019); *2014Nu52093* (Seoul High Court, 28 Jan 2015); *2013KuHap13617* (Seoul Administrative Court, 10 Oct 2013).

5. After the NHRCK has issued a recommendation to the Korean Government to legislate an “Act on Equality and Prohibition of Discrimination” on 30 June 2020,<sup>14</sup> there currently exists 4 legislative proposals for a comprehensive anti-discrimination act pending in the National Assembly (hereinafter collectively referred to as “Proposals for the Equality Act” or “Proposals”).<sup>15</sup> In this regard, the NHRCK has requested the following:

*UNHCR’s opinion on the Proposals, including, inter alia, on social integration and protection of persons under the UNHCR’s mandate, such as refugees, asylum seekers, and stateless persons, addressing the issue of racial discrimination including intersectional discrimination.*

6. UNHCR submits this opinion to provide neutral and expert information in order to assist the NHRCK in its deliberations. In this submission, UNHCR presents its opinion on the necessity of comprehensive legislation addressing discrimination, drawing from international laws and norms and Korea’s obligations deriving therefrom. It also presents its opinion on a comprehensive understanding of discrimination, including intersectional forms of discrimination, as well as the need for access to justice and effective remedies for victims of discrimination. UNHCR will only address issues of general legal principle arising from these points, focusing on protection of persons under UNHCR’s mandate.

### **Obligations of the Republic of Korea under international laws on non-discrimination**

*Article 1(Purpose) The purpose of this Act is to realize human dignity and values by protecting the right to equality under our Constitution, through prohibiting discrimination in every aspect of political, economic, social or cultural life, effectively remedying the damages caused by discrimination.*

**Proposal for Act on Prohibition of Discrimination, 29 June 2020, No.2101116**

*Article 1(Purpose) The purpose of this Act is to realize human dignity and equality by prohibiting discrimination in every aspect, effectively remedying the damages caused by discrimination, preventing discrimination, and realizing substantive equality.*

**Proposal for Act on Equality, 16 June 2021, No.2110822**

*Article 1(Purpose) The purpose of this Act is to realize human dignity and equality by prohibiting discrimination in every aspect of political, economic, social or cultural life, effectively remedying the damages caused by discrimination and preventing discrimination.*

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<sup>14</sup> NHRCK, Press Release, ‘It’s Time to take a bold step forward towards “Equality for All”’, 30 June 2020 (in Korean), at <https://www.humanrights.go.kr/site/program/board/basicboard/view?boardtypeid=24&boardid=7605626&menuid=001004002001>

<sup>15</sup> Proposal for Act on Prohibition of Discrimination, 29 June 2020, No.2101116 (in Korean) at [https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_N2K0Y0Y6O2J9K1Y0N4I2J2X1D0Y0A5](https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_N2K0Y0Y6O2J9K1Y0N4I2J2X1D0Y0A5); Proposal for Act on Equality, 16 June 2021, No.2110822 (in Korean) at [https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_A2N1K0H6R1C6N1S2P4G9X5J9R4V7F8](https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_A2N1K0H6R1C6N1S2P4G9X5J9R4V7F8); Proposal for Act on Equality, 9 August 2021, No.2111964 (in Korean) at [http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_D2S1N0F8X0O9W1T6U3A4N5W6I2X5A3](http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_D2S1N0F8X0O9W1T6U3A4N5W6I2X5A3); Proposal for Act on Equality and Prohibition of Discrimination, 31 August 2021, No.2112330 (in Korean) at [http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_L2J1M0V8X3T1R1F5C2I7L5X7L6W5M9](http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_L2J1M0V8X3T1R1F5C2I7L5X7L6W5M9)

## **Proposal for Act on Equality, 9 August 2021, No.211964**

*Article 1(Purpose) The purpose of this Act is to realize human dignity and equality by prohibiting discrimination in every aspect of political, economic, social or cultural life, effectively remedying the damages caused by discrimination and preventing discrimination.*

## **Proposal for Act on Equality and Prohibition of Discrimination, 31 August 2021, No.2111964**

7. The Universal Declaration of Human Rights, adopted and proclaimed by UN General Assembly Resolution 217 A(iii) of 10 December 1948, provides the inspiration for other subsequent human rights instruments on non-discrimination, in particular through articles providing expressly for non-discrimination.<sup>16</sup> Other than the 1951 Convention and 1967 Protocol,<sup>17</sup> several international human rights treaties that Korea has ratified also provide for the duties of states parties of non-discrimination in respect of all persons. These include the International Covenant on Civil and Political Rights (ICCPR),<sup>18</sup> International Covenant on Economic, Social and Cultural Rights,<sup>19</sup> International Convention on the Elimination of All forms of Racial Discrimination,<sup>20</sup> the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>21</sup> the Convention on the Rights of the Child,<sup>22</sup> and the Convention on the Rights of Persons with Disabilities.<sup>23</sup>
8. 1954 Convention Relating to the Status of Stateless Persons (“1954 Convention”), to which the Republic of Korea is a State party, and 1961 Convention on the Reduction of Statelessness (“1961 Convention”) also establish States parties’ obligations to work on a non-discriminatory basis towards the prevention and reduction of statelessness within their territories.<sup>24</sup>
9. The interpretation of human rights treaties by competent treaty bodies expand upon the non-discrimination obligations of State parties. In particular, Human Rights Committee (“HRC”) has clarified that “the right to equality before the law and freedom from discrimination protected by Article 26 [of the ICCPR] requires states to act against discrimination by private,

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<sup>16</sup> “Article 1 All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2 Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 7 All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

<sup>17</sup> See above para. 3.

<sup>18</sup> In particular, Articles 1, 2, 3, 20.2 and 26

<sup>19</sup> In particular, Articles 1, 2, and 3

<sup>20</sup> In particular, Articles 1 and 2

<sup>21</sup> In particular, Articles 1, 2, 3, and 4

<sup>22</sup> In particular, Articles 2, 5, and 30

<sup>23</sup> In particular, Articles 2, 3, 4, 5, and 12

<sup>24</sup> Article 3 of the 1954 Convention; Article 9 of the 1961 Convention.

as well as public agents in all fields.”<sup>25</sup> It affirmed this positive obligation of States to combat discrimination in both the public and private sectors in its decisions on individual complaints.<sup>26</sup> It has also constantly interpreted the non-discrimination grounds under the ICCPR as non-exclusive, and expanded its scope to include, *inter alia*, discrimination based on sexual orientation,<sup>27</sup> age,<sup>28</sup> and marital status.<sup>29</sup>

10. The Committee on Economic, Social and Cultural Rights (CESCR) has in its General Comment stated that: “The Covenant ... [p]rohibits any discrimination, whether in law or in fact, whether direct or indirect, on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.”<sup>30</sup> It has also clarified that discrimination prohibited under the Convention includes both direct and indirect discrimination - measures which are not discriminatory at face value but are discriminatory in fact and in effect are also prohibited.<sup>31</sup>
11. The Committee on the Elimination of Racial Discrimination (CERD) has noted that, to the extent that private institutions influence the exercise of rights or the availability of opportunities, states parties must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.<sup>32</sup> In the case of *Miroslav Lacko v Slovakia*, the Committee found that the State was under a positive obligation to criminally investigate a private individual when he discriminated against another private individual on the basis of race.<sup>33</sup>
12. Other treaty bodies have similarly interpreted the treaties’ non-discrimination provisions as “open-ended” provisions that provide for states parties’ obligations to address and prevent discrimination on various grounds, both in public and private sectors, and includes indirect discrimination.

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<sup>25</sup> HRC, *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10, para. 31.

<sup>26</sup> “Under articles 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of the States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example employment.” HRC, *Nahlik v Austria* (No. 608/95), para. 8.2

<sup>27</sup> HRC, *Young v. Australia*, CCPR Communication NO. 941/2000, 6 August 2003

<sup>28</sup> HRC, *Love et al. v. Australia*, CCPR Communication No. 983/2001, 25 Mar 2003.

<sup>29</sup> HRC, *G. v. Australia*, CCPR Communication No. 2172/2012, 17 March 2017.

<sup>30</sup> CESCR, *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, para. 29

<sup>31</sup> CESCR, *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)*, 2 July 2009, E/C.12/GC/20, para. 10.

<sup>32</sup> CERD, *General recommendation XX on article 5 of the Convention*, Report of the Committee on the Elimination of Racial Discrimination, 1996, A/51/18, para. 5.

<sup>33</sup> CERD, *Miroslav Lacko v. Slovakia*, CERD/C/59/D/11/1998, 9 August 2001, para. 11.

13. Korea has been repeatedly recommended by treaty bodies to enact anti-discrimination legislations, including by the CESCR,<sup>34</sup> CERD,<sup>35</sup> Committee on the Elimination of Discrimination Against Women,<sup>36</sup> and Committee on Rights of Child.<sup>37</sup>
14. More recently, the Office of High Commissioner for Human Rights (“OHCHR”) has recommended that the Republic of Korea enact a “robust and inclusive Equality Bill that would encompass the diverse grounds protected under international human rights law,” including “discrimination based on race, colour, sex, gender, sexual orientation, gender identity, sex characteristics, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, property, economic position, marital or other family status, birth, age, disability, health, migrant status, or any other status.”<sup>38</sup>
15. Korea, as a State party to the international human rights treaties enumerated above, has an obligation to effectively address discrimination against and violations of rights and freedoms of all persons provided in such instruments, and the interpretation of treaty bodies thereof guide the Korean government in the interpretation of its obligations.
16. On 25 September 2015, Korea, along with the other 192 countries of the UN General Assembly, adopted the 2030 Development Agenda titled "Transforming our world: the 2030 Agenda for Sustainable Development" and committed to leave no one behind, “to combat inequalities within and among countries; to build peaceful, just and inclusive societies; that protect human rights and promote gender equality and ensure that all human beings can fulfil their potential.”<sup>39</sup>
17. UNHCR also notes that in regard to discrimination and intolerance against refugees and migrants, Korea has joined other States in endorsing the New York Declaration for Refugees and Migrants that condemned “acts and manifestation of racism, racial discrimination,

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<sup>34</sup> “The Committee urges the State party to adopt expeditiously a comprehensive anti-discrimination law that clearly spells out all the grounds for discrimination, as set out by article 2.2 of the Covenant and in line with the Committee’s general comment No. 20 on non-discrimination in economic, social and cultural rights (art. 2, para. 2)” CESCR, E/C.12/KOR/CO/3, para. 9

<sup>35</sup> “In this regard, the Committee encourages the State party to move expeditiously towards the drafting and the adoption of a discrimination prohibition act” CERD, CERD/C/KOR/CO/14, para. 13

“The Committee urges the State party to take immediate action on the finalization and adoption of the Discrimination Prohibition Act or other comprehensive legislation to prohibit racial discrimination in line with article 4 of the Convention” CERD, CERD/C/KOR/CO/15-16, para. 7

<sup>36</sup> “The Committee calls on the State party to take urgent steps towards the adoption of a comprehensive Anti-Discrimination Act, in line with articles 1 and 2 of the Convention and General Recommendation 28 (2010), which includes a clear prohibition of all forms of discrimination, covering both direct and indirect discrimination, and also taking into account article 2(4) of the National Human Rights Commission Act (Korea 2005), which prohibits discrimination on the grounds of sexual orientation.” CEDAW, CEDAW/C/KOR/7, para. 15.

<sup>37</sup> “The Committee urges the State party to: a) Expediently revise its anti-discrimination legislation with the objective of adopting legislation that is in full compliance with article 2 of the Convention” CRC, CRC/C/KOR/CO/3-4, para. 29.

<sup>38</sup> OHCHR, *Press briefing notes on Republic of Korea*, 17 Dec 2021, at <https://www.ohchr.org/en/press-briefing-notes/2021/12/press-briefing-notes-republic-korea>

<sup>39</sup> UN General Assembly, Resolution adopted by the General Assembly on 25 September 2015 [without reference to a Main Committee (A/70/L.1)], *Transforming our world: the 2030 Agenda for Sustainable Development*, [www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E)

xenophobia and related intolerance against refugees,”<sup>40</sup> and the Global Compact on Refugees that affirmed Member State’s commitment to end “exploitation and abuse, as well as discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, or other status.”<sup>41</sup>

### **Need for a comprehensive understanding of discrimination, including intersectional forms of discrimination, in order to provide protection to persons under UNHCR’s mandate**

#### ***Article 3(Scope of prohibited discrimination)***

*(1) Under this Act, discrimination shall be one of the following acts or situations.*

*1. Without reasonable grounds, separating, distinguishing, limiting, excluding, refusing or treating unfavorably a person or group of persons, on the grounds of gender, disability, age, language, State of origin, ethnic origin, race, color, region of origin, physical conditions such as appearance, marital status, pregnancy or childbirth, family type and situation, religion, political or other opinion, criminal record of a sentence that has lost its validity, sexual orientation, gender identity, academic career, type of employment, social status, etc. (hereinafter “gender, etc.”) in the following areas:*

*a. Employment (including enlistment, recruitment, training, assignment, promotion or advancement, payment of wage or other financial benefits, loan of funds, retirement age, retirement, dismissal, etc.)*

*b. Provision and use of goods, services, and institutions*

*c. Education, vocational training, or use of education institutions or vocational training institutions.*

*d. Provision or use of administrative services, etc.*

*2. An act that in appearance applies neutral standards on the items of subparagraph 1, but such standards cause unfavorable results to a particular group of persons or a person.*

*3. An act that causes harms to the other by sexual expressions or acts, or sexual demands on the items of subparagraph 1, and acts that causes disadvantage for not complying with such sexual demands, or acts that expresses intent to provide advantage for complying with such sexual demands*

*4. An act that violates human dignity by causing physical and mental damage, due to creation of aggressive or insulting environment, etc., for reasons of gender, etc. for items of subparagraph 1.*

*5. An act of advertisement that expresses or facilitates unfavorable treatment such as separating, distinguishing, limiting, excluding, refusing, etc. of a person or group of persons for reasons of gender, etc. without reasonable grounds.*

*6. Any act of subparagraph 1 through 5 that occurred due to combination of two or more grounds of prohibition of discrimination, such as gender, etc.*

*(2) Notwithstanding paragraph 1, acts that have reasonable grounds under one of the following subparagraphs shall not be considered as discrimination. For subparagraph 6 of paragraph 1, reasonable grounds under the following subparagraphs shall exist on each of the grounds that are basis for discrimination.*

*1. It is accepted that due to the nature of a particular duty or project, the essential part cannot be conducted by all or majority of persons in a particular group, and if such conditions are not*

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<sup>40</sup> New York Declaration for Refugees and Migrants, para. [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_71\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf)

<sup>41</sup> Global Compact on Refugees, para. 9: <https://www.unhcr.org/5c658aed4.pdf>

*applied, the essential function of the project is at risk. Provided, however, that if this can be accepted without undue burden, such condition shall not apply.*

*2. A temporary favorable treatment to a particular person or group of persons to solve the existing discrimination, and enactment or amendment of legislation and formulation or enforcement of policies to this effect.*

**Proposal for Act on Prohibition of Discrimination, 29 June 2020, No.2101116**

**Article 2(General)** *All persons shall not be discriminated without reasonable grounds on all areas, such as employment, provision and use of goods and services, education, and provision and use of public services, for any grounds, including gender, disability, medical history, age, State of origin, ethnic origin, race, color, region of origin, physical conditions such as appearance or genetic information, marital status, pregnancy or childbirth, family type and situation, religion, political or other opinion, criminal record, sexual orientation, gender identity, academic career, type of employment, social status, etc., and shall be accorded dignity, values and right to equality as a human being.*

**Proposal for Act on Equality, 16 June 2021, No.2110822**

**Article 3(Definition of discrimination)** *(1) In this Act, “discrimination” means any act of, without reasonable grounds, on the grounds of gender, disability, medical history, age, State of origin, ethnic origin, race, color, region of origin, physical conditions such as appearance or genetic information, marital status, pregnancy or childbirth, family type and situation, religion, political or other opinion, criminal record, sexual orientation, gender identity, academic career, type of employment, social status, etc. (hereinafter “gender, etc.”), separating, distinguishing, limiting, excluding or treating unfavorably a person or group of persons in the following areas:*

- 1. Employment.*
- 2. Provision and use of goods and services.*
- 3. Education and vocational training of education institutions.*
- 4. Enforcement of legislation and policy.*

*(2) In cases an act in appearance applies neutral standards but such standards cause unfavorable results to a particular group of persons or a person, unless it can be demonstrated that the standards are reasonable and legitimate, the act is deemed discrimination defined in paragraph (1).*

*(3) Any harassment on the grounds of sex, etc. is deemed discrimination defined in paragraph (1).*

*(4) Sexual harassment is deemed discrimination.*

*(5) Any advertisement that shows or incites separating, distinguishing, limiting, excluding or treating unfavorably a person or group of persons is deemed discrimination.*

**Article 4(Exceptions)** *Any of the following act in the subparagraphs is not deemed discrimination:*

- 1. It is unavoidable due to the nature of a particular duty or project.*
- 2. A temporary favorable treatment to a particular person or group of persons to solve the existing discrimination, and enactment or amendment of legislation and formulation or enforcement of policies to this effect.*
- 3. Any act not deemed discrimination pursuant to provisions of another legislation.*

**Article 5(Prohibition of discrimination)** *No person shall act in discrimination as defined in Art.3.*

**Article 6(Determination of combined discrimination)** *When determining whether or not an act was discriminatory, if the act in question was on more than one prohibited grounds of*



*discrimination under Art.3(1) combined together, not only each grounds of discrimination but also a combination of the relevant grounds shall be considered.*

**Proposal for Act on Equality, 9 August 2021, No.2111964**

*Article 2(General) All persons shall not be discriminated without reasonable usage [sic] on areas of employment, provision and use of goods and services, education, and provision and use of public services for any grounds, including gender, disability, medical history, age, State of origin, ethnic origin, race, color, region of origin, physical conditions such as appearance or genetic information, marital status, pregnancy or childbirth, family type and situation, religion, political or other opinion, criminal record, sexual orientation, gender identity, academic career, type of employment, social status, etc., and shall be accorded dignity, values and right to equality as a human being.*

**Proposal for Act on Equality and Prohibition of Discrimination, 31 August 2021, No.2112330**

18. Proposals for the Equality Act all provide for comprehensive and non-exhaustive understanding of discrimination and includes both direct and indirect forms of discrimination.
19. UNHCR agrees with the Proposals' expanded ambit of indirect discrimination, which recognizes that apparently neutral criteria may disproportionately impact on particular groups on the exercise of their rights, in line with current international norms on non-discrimination.
20. UNHCR recognizes that racial discrimination and related intolerance can adversely affect persons under UNHCR's mandate, not simply as a (recurrent) cause of persecution, flight and statelessness<sup>42</sup>, but also by restricting access to asylum or negatively affecting the quality of asylum at the country of asylum, as well as denying them equal access to public services and rights.<sup>43</sup> Divisive discourse can also hinder refugees' integration into their host society, which is ultimately harmful.<sup>44</sup>
21. Indeed, the refugee experience, in all its stages, is affected by the degree of respect by States for human rights and fundamental freedoms, given the various linkages between refugee issues and human rights.<sup>45</sup> Respect for human rights, in particular for the principle of non-discrimination vis-à-vis all persons, is a precondition for the development and maintenance of a general culture of inter-ethnic tolerance. The creation of legal norms not only sanctions particular behaviour but, in the long-term, will influence value systems within society. In the

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42 See UNHCR, *Background Note on Discrimination in Nationality Laws and Statelessness*, October 2021, available at: [www.refworld.org/pdfid/616fda104.pdf?msclid=684d14e6c39611ec9dfb2a9b632c8d7b](https://www.refworld.org/pdfid/616fda104.pdf?msclid=684d14e6c39611ec9dfb2a9b632c8d7b) and UNHCR, *Background Note on Gender Equality, Nationality Laws and Statelessness 2021*, 5 March 2021, available at: <https://www.refworld.org/docid/604257d34.html>

43 UNHCR, *Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance through a Strategic Approach*, December 2009, p.3, available at: <https://www.refworld.org/docid/4b30931d2.html>

44 UNHCR, *A guide to international refugee protection and building state asylum systems*, 2017, Handbook for Parliamentarians N° 27, p.219, available at: <https://www.refworld.org/docid/5a9d57554.html> For this reason, UNHCR recommends for legislations aimed at combating racism, racial discrimination, xenophobia and related intolerance to not only criminalize racist and xenophobic acts, but also incitement to all forms of hatred, including hate speech. *Ibid.*, p.220.

45 ExCom Conclusion No. 85 (XLIX), 1998

context of international protection, discrimination and exclusion of displaced and stateless persons can adversely affect their social integration within the country of asylum, as well as successful implementation of durable solutions for them.<sup>46</sup>

22. Often, discrimination experienced by displaced and stateless persons may not be fully addressed by focusing on a single ground of discrimination, as a person's identity is multifaceted and intersectional. The concept of intersectionality in one's identity addresses the consequences of two or more combined systems of discrimination and captures the manner in which they contribute to create layers of inequality.<sup>47</sup> Such intersectional forms of discrimination and exclusion often give rise to a well-founded fear of being persecuted for one or more Convention grounds, and may exacerbate discrimination, hostility and violence, as well as incitement thereto, in the country of asylum. The intersectional perspective permits an understanding of how women, men, boys and girls, older persons, persons with disabilities, LGBTIQ+ persons who are displaced or stateless are affected differently by racism, racial discrimination, xenophobia and related intolerance.<sup>48</sup>
23. UNHCR also notes that it is often the case that various anti-discrimination legislation and procedures scattered in various laws and institutions, without a comprehensive definition of discrimination and overarching framework to address discrimination, fail to afford equal protection against all forms of discrimination, resulting in confusion and legal uncertainty.<sup>49</sup>
24. In recognition of the need to address the issue of multiple and intersectional discrimination, a comprehensive and non-exhaustive definition of the scope of discrimination is necessary. Such a definition would not only provide consistent remedies to victims of discrimination but would also foster an enhanced understanding within the society on what constitutes "discrimination".

### **Access to justice and effective remedies for victims**

*Article 41 (Petition, etc.) (1) For the discriminatory acts under this Act, the victim of the discriminatory act or a person or organization who is aware of the fact may file a petition to the National Human Rights Commission of Korea (hereinafter referred to as the "Commission").*  
*(2) Unless otherwise provided by this Act, matters related to investigation and remedies under paragraph (1) shall be governed by the National Human Rights Commission Act.*

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<sup>46</sup> UNHCR, *Contribution to the OSCE Conference on Anti-Semitism and Other Forms of Intolerance*, 9 June 2005, PC.DEL/534/05.

<sup>47</sup> UN Secretary-General, *Report of the Expert Group Meeting on Gender and Racial Discrimination: note by the Secretary-General*, 11 May 2001, A/CONF.189/PC.2/20, at <https://digitallibrary.un.org/record/440520>.

<sup>48</sup> UNHCR, *Guidance on Racism and Xenophobia*, 2020, p.24, at <https://www.unhcr.org/5f7c860f4.pdf>. The intersecting forms of discrimination, and its effect on persons in need of international protection, is also recognized in UNHCR's Guidelines for International Protection. UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, available at: <https://www.refworld.org/docid/50348afc2.html>.

<sup>49</sup> In this regard, see also Rabat Plan of Action, which recommends States to consider including robust definition of key terms such as hatred, discrimination, violence, hostility, among others when adopting comprehensive anti-discrimination national legislations. Human Rights Council, *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, 2013, A/HRC/22/17/Add.4.

**Article 42 (Corrective Orders)** (1) If a person, who has received the recommendation under Article 44 of the National Human Rights Commission Act for the discriminatory acts prohibited by this Act, fails to implement the recommendation without justifiable grounds, the Commission may order correction at the request of the victim or ex officio;

(2) As an order for correction under paragraph (1), the Commission may order a person who has committed a discriminatory act prohibited under this Act (hereinafter referred to as “discriminating person”) to take any of the following measures:

1. To discontinue the discriminatory act;
2. To restore the damages;
3. To take measures to prevent further recurrence of discriminatory acts;
4. To take other measures necessary for rectifying discriminatory acts.

(3) The Commission, in issuing an order for correction under paragraphs (1) and (2), shall do so in writing with detailed grounds for such order and have it delivered to both the discriminating person and the victim.

(4) Matters necessary for the period, procedure, method, etc. for ordering measures necessary to correct discrimination shall be prescribed by Presidential decree.

**Article 43 (Provision of Opportunities to Submit Opinions)** (1) The Commission shall provide to persons who received recommendations with an opportunity to submit their opinions before issuing a correction order pursuant to Article 42.

(2) In the case of paragraph (1), the parties or interested persons may present verbal or writing opinions or submit necessary materials to the Commission.

**Article 44 (Charges for Compelling Compliance)** (1) The Commission may impose charges for compelling compliance not exceeding thirty million won on a person who has received a correction order under Article 42 for failure to comply with such corrective order within the specified period.

(2) In the case of imposing charges for compelling compliance pursuant to paragraph (1), the Commission shall give written notice of the amount, the grounds for imposition, the payment deadline, the receiving institution, the methods for filing an objection, and the institutions with which an objection can be filed.

(3) If a person who has received a correction order continues to fail to comply with the details of the correction order, the Commission may reimpose charges for compelling compliance under paragraph (1) until such order is complied with, as prescribed by Presidential Decree.

(4) The procedures for imposing, collecting, paying, refunding, and filing an objection shall be prescribed by Presidential Decree.

**Article 49 (Support for Litigation)** (1) Among the cases recognized as discriminatory, if the respondent does not comply with the decision of the Commission and the case is deemed to be serious, the Commission may provide support for the litigation of the case.

(2) Requirements and procedures, etc. for litigation support under paragraph (1) shall be prescribed by Presidential Decree.

**Article 50 (Remedial Measures by Court)** (1) If discrimination against a victim is demonstrated by the victim, upon request by the victim, before filing the lawsuit or during the course thereof regarding a discriminatory act prohibited under this Act, the court may order appropriate interim measures, such as discontinuation of the discriminatory act, until judgment on the merits is rendered.

*(2) The court may render judgment to discontinue a discriminatory act, to improve working conditions, such as wages, to take proactive measures to rectify such act, and to pay compensation for damages, upon request by the victim.*

*(3) In relation to paragraph (2), if the court determines that proactive measures, such as discontinuation of discriminatory acts and rectification of discrimination, are necessary, it may specify the time period the implementation thereof, if not implemented, order adequate compensation for any period of delay. In such cases, Article 261 of the Civil Execution Act shall apply mutatis mutandis.*

**Article 51 (Compensation for Damages)** *(1) A person who causes damage to another person in violation of the provisions of this Act shall be responsible for compensating for damage to the person damaged by such violation; provided, that the foregoing shall not apply where the discriminating person proves that there was no intention or negligence for his/her part.*

*(2) When it is found that harm has been suffered due to an act in violation of this Act but the victim of such discriminatory act is unable to prove monetary loss, monetary gains obtained by the discriminating person from such act shall be deemed to be monetary loss suffered by the victim.*

*(3) If discriminatory acts prohibited under this Act are deemed to be malicious, the court may render judgment that a person who has committed discriminatory acts pays compensation by more than two times up to five times the amount of compensation besides the amount of property loss as prescribed in paragraph (2). Provided, that the lower limit of compensation shall not be less than 5 million won.*

*(4) Whether the act referred to in paragraph (3) is malicious shall be determined based on the following:*

- 1. Willfulness of the discrimination.*
- 2. Persistence and repetitiveness of the discrimination.*
- 3. Retaliatory nature against the victim.*
- 4. Details and scope of loss suffered from discrimination.*

*(5) In applying paragraph (1), Articles 756, 757, and 760 of the Civil Act shall apply mutatis mutandis.*

**Article 52 (Burden of Proof)** *In resolution of dispute under this Act, if a party claims to have suffered discrimination, the other party shall prove that such discriminatory act was not committed, the discriminatory act committed was not based on gender, etc., or such act had legitimate grounds.*

**Proposal for Act on Prohibition of Discrimination, 29 June 2020, No.2101116**

**Article 34 (Support for Litigation)** *(1) Among the cases recognized as discriminatory, if the respondent does not comply with the decision by the Commission without justifiable grounds and the case is deemed to be serious, the Commission may provide support for litigation of the case.*

*(2) For the support pursuant to paragraph (1), the Commission may operate a group of attorney-at-laws supporting litigation (hereinafter referred to as the "litigation supporting group") and matters necessary for the installation and operation of the litigation supporting group shall be governed by the rules of the Commission.*

*(3) Expenses pursuant to paragraphs (1) and (2) shall be borne by the State.*

*(4) Matters necessary for the support procedure, support details, etc. under paragraph (1) shall be prescribed by Presidential Decree.*

**Article 35 (Remedial Measures by Court)** (1) If discrimination against a victim is demonstrated by the victim, upon request by the victim, before filing the lawsuit or during the course thereof regarding discrimination prohibited under this Act, the court may order appropriate interim measures, such as discontinuation of the discriminatory act, until judgment on the merits is rendered.

(2) The court may render judgment to discontinue a discriminatory act, to improve working conditions, such as wages, to take proactive measures to rectify discrimination, upon request by the victim.

(3) If the court determines that proactive measures are necessary to discontinue discriminatory acts, restore the damages, and rectify discrimination, it may specify the time period for the implementation thereof and, if not implemented, order adequate compensation for any period of delay. In such cases, Article 261 of the Civil Execution Act shall apply *mutatis mutandis*.

**Article 36 (Compensation for Damages)** (1) A person who has inflicted harm on others in violation of the provisions of this Act shall be liable for damages to the victim.

(2) When it is found that harm has been suffered due to an act in violation of the provisions of this Act but the victim of such discriminatory act is unable to prove monetary loss, monetary gains obtained by the discriminating person from such act shall be deemed monetary loss suffered by the victim.

(3) Notwithstanding paragraph (2), if it is difficult to prove such facts as necessary for certifying the amount of monetary loss suffered by the victim of a discriminatory act due to the nature of applicable facts, the court may acknowledge a reasonable amount of loss based on the whole contents of pleadings and the factual findings.

(4) If damage is caused to a victim by discriminatory acts, and such acts are prohibited under this Act and deemed to be malicious, the court may set the amount of compensation within the range of not less than three times up to five times the amount of damage. Provided, that the lower limit of the compensation shall not be less than 5 million won.

(5) Whether the act referred to in paragraph (4) is malicious shall be determined based on the following:

1. Willfulness of the discrimination.
2. Persistence and repetitiveness of the discrimination.
3. Retaliatory nature against the victim.
4. Details and scope of loss suffered from discrimination.

**Article 37 (Allotment of Burden of Proof)** (1) In resolution of dispute under this Act, the person who claims to be discriminated shall prove that an act separating, distinguishing, limiting, excluding or treating unfavorably under Art.4(2) has occurred.

(2) The other party to the person who claims to be discriminated shall prove that the act under paragraph (1) had legitimate grounds.

**Proposal for Act on Equality, 16 June 2021, No.2110822**

**Article 33 (Application for remedy, etc.)** (1) Victims of discriminatory acts as prescribed by this Act, or a person or organization who is aware of the fact may file a petition to the Commission.

(2) Unless provided otherwise by this Act, matters related to investigation and remedies under paragraph (1) shall be governed by the National Human Rights Commission of Korea Act.

**Article 34 (Corrective Orders)** (1) If a person, who has received the recommendation under Article 44 of the National Human Rights Commission Act for the discriminatory acts prohibited by this Act, fails to implement the recommendation without justifiable grounds, the Commission may order correction at the request of the victim or *ex officio*;

*(2) As an order for correction under paragraph (1), the Commission may order a person who has committed a discriminatory act prohibited under this Act (hereinafter referred to as “discriminating person”) to take any of the following measures:*

- 1. To discontinue the discriminatory act;*
- 2. To restore the damages;*
- 3. To take measures to prevent further recurrence of discriminatory acts;*
- 4. To take other measures necessary for rectifying discriminatory acts.*

*(3) The Commission, in issuing an order for correction under paragraphs (1) and (2), shall do so in writing with detailed grounds for such order and have it delivered to both the discriminating person and the victim.*

*(4) Matters necessary for the period, procedure, method, etc. for ordering measures necessary to correct discrimination shall be prescribed by Presidential decree.*

**Article 35(Opportunities to present opinions)** *(1) The Commission shall provide to persons who received recommendations with an opportunity to submit their opinions before issuing a correction order pursuant to Article 34.*

*(2) In the case of paragraph (1), the parties or interested persons may present verbal or writing opinions or submit necessary materials to the Commission.*

**Article 36(Charges for compelling compliance)** *(1) The Commission may impose charges for compelling compliance not exceeding 30 million won to a person who received a corrective order under Article 34 and failed to comply within the specified period.*

*(2) In the case of imposing charges for compelling compliance pursuant to paragraph (1), the Commission shall give written notice of the amount, the grounds for imposition, the payment deadline, the receiving institution, the methods for filing an objection, and the institutions with which an objection can be filed.*

*(3) If a person who has received a correction order continues to fail to comply with the details of the correction order, the Commission may reimpose charges for compelling compliance under paragraph (1) until such order is complied with, as prescribed by Presidential Decree.*

*(4) The procedures for imposing, collecting, paying, refunding, and filing an objection shall be prescribed by Presidential Decree.*

**Article 37(Appeal)** *(1) A person who objects a corrective order issued by the Commission under Art.34 may file an appeal with the reasons for appeal within 30 days from the date of receiving the order.*

*(2) The Commission shall decide on an appeal under paragraph (1) within 30 days. However, if it is unable to reach a decision within the period due to unavoidable circumstances, the Commission may extend such period for up to 30 days.*

*(3) Procedures for appeal, review and decision shall be prescribed by the rules of the Commission.*

**Article 38(Suspension of execution of corrective orders)** *(1) In cases a person who received a corrective order under Art.34 filed an appeal or litigation, and it is deemed necessary to prevent irreparable damages from executing the order or continuing the procedures, the Commission may decide on suspension of the execution of the order or continuation of the procedures (hereinafter “suspension of execution”) upon request of the party or ex officio.*

*(2) The Commission may revoke the decision on the suspension of execution after the decision if the cause for the suspension no longer exists, upon request of the party or ex officio.*

**Article 39(Support for litigation)** *(1) Among the cases recognized as discriminatory, if the respondent does not comply with the decision by the Commission without justifiable grounds*

*and the case is deemed to be serious, the Commission may provide support for litigation of the case.*

*(2) For the support pursuant to paragraph (1), the Commission may operate a group of attorney-at-laws supporting litigation (hereinafter referred to as the “litigation supporting group”) and matters necessary for the installation and operation of the litigation supporting group shall be governed by the rules of the Commission.*

*(3) Expenses pursuant to paragraphs (1) and (2) shall be borne by the State.*

*(4) Matters necessary for the support procedure, support details, etc. under paragraph (1) shall be prescribed by Presidential Decree.*

**Article 40(Judicial remedies)** *(1) If discrimination against a victim is demonstrated by the victim, upon request by the victim, before filing the lawsuit or during the course thereof regarding discrimination prohibited under this Act, the court may order appropriate interim measures, such as discontinuation of the discriminatory act, until judgment on the merits is rendered.*

*(2) The court may render judgment to discontinue a discriminatory act, to improve working conditions, such as wages, to take proactive measures to rectify discrimination, upon request by the victim.*

*(3) If the court determines that proactive measures are necessary to discontinue discriminatory acts, restore the damages, and rectify discrimination, it may specify the time period for the implementation thereof and, if not implemented, order adequate compensation for any period of delay. In such cases, Article 261 of the Civil Execution Act shall apply mutatis mutandis.*

**Article 41(Compensation for damages)** *(1) A person who in violation of this Act caused damages to another person is liable for compensation to the victim. However, the same shall not apply if the perpetrator of the discrimination demonstrates the lack of intent or negligence.*

*(2) When it is found that harm has been suffered due to an act in violation of the provisions of this Act but the victim of such discriminatory act is unable to prove monetary loss, monetary gains obtained by the discriminating person from such act shall be deemed monetary loss suffered by the victim.*

*(3) Notwithstanding paragraph (2), in cases it is difficult for the victim to prove facts related to the damages to property they suffered due to the nature of such facts, the court may recognize a reasonable amount for damages based on the whole contents of pleadings and the factual findings.*

*(4) In cases where discrimination prohibited by this Act is recognized as malicious and having caused damages to the victim, the court may set compensation as at least 3 times up to 5 times of the amount for damages. However, the minimum amount of the compensation shall be more than 5 million won.*

*(5) In determining if discrimination was malicious under paragraph (4), the following shall be considered:*

- 1. Willfulness of the discrimination.*
- 2. Persistence and repetitiveness of the discrimination.*
- 3. Retaliatory nature against the victim.*
- 4. Details and scope of loss suffered from discrimination.*

**Article 42(Allotment of Burden of proof)** *(1) In resolution of dispute under this Act, the person who claims to be discriminated shall prove that an act separating, distinguishing, limiting, excluding or treating unfavorably under Art.3(1) has occurred.*

*(2) The other party to the person who claims to be discriminated shall prove that the act under paragraph (1) is not discrimination on the grounds of gender, etc., or that it had legitimate grounds.*

## **Proposal for Act on Equality, 9 August 2021, No.2111964**

**Article 32 (Application for Remedy, etc.)** (1) A victim of discriminatory acts as prescribed by this Act or a person or organization who is aware of the fact may file a petition to the Commission.

(2) Unless provided otherwise by this Act, matters related to investigation and remedies under paragraph (1) shall be governed by the National Human Rights Commission Act.

**Article 33 (Corrective Orders)** (1) If a person, who has received the recommendation under Article 44 of the National Human Rights Commission Act for the discriminatory acts prohibited by this Act, fails to implement the recommendation without justifiable grounds, the Commission may order correction at the request of the victim or ex officio;

(2) As an order for correction under paragraph (1), the Commission may order a person who has committed a discriminatory act prohibited under this Act (hereinafter referred to as “discriminating person”) to take any of the following measures:

1. To discontinue the discriminatory act;
2. To restore the damages;
3. To take measures to prevent further recurrence of discriminatory acts;
4. To take other measures necessary for rectifying discriminatory acts.

(3) The Commission, in issuing an order for correction under paragraphs (1) and (2), shall do so in writing with detailed grounds for such order and have it delivered to both the discriminating person and the victim.

(4) Matters necessary for the period, procedure, method, etc. for ordering measures necessary to correct discrimination shall be prescribed by Presidential decree.

**Article 34 (Provision of Opportunities to Submit Opinions)** (1) The Commission shall provide to persons who received recommendations with an opportunity to submit their opinions before issuing a correction order pursuant to Article 33.

(2) In the case of paragraph (1), the parties or interested persons may present verbal or writing opinions or submit necessary materials to the Commission.

**Article 35 (Charges for Compelling Compliance)** (1) The Commission may impose charges for compelling compliance not exceeding 30 million won on a person who has received a correction order under Article 33 for failure to comply with such corrective order within the specified period.

(2) In the case of imposing charges for compelling compliance pursuant to paragraph (1), the Commission shall give written notice of the amount, the grounds for imposition, the payment deadline, the receiving institution, the methods of filing an objection, and the institutions with which an objection can be filed.

(3) If a person who has received a correction order continues to fail to comply with the details of the correction order, the Commission may reimpose charges for compelling compliance under paragraph (1) until such order is complied with as prescribed by Presidential Decree.

(4) The procedures for imposing, collecting, paying, refunding, and filing an objection shall be prescribed by Presidential Decree.

**Article 38 (Support for Litigation)** (1) Among the cases recognized as discriminatory, if the respondent does not comply with the decision of the Commission without justifiable grounds and the case is deemed to be serious, the Commission may provide support for the litigation of the case.



*(2) For the support pursuant to paragraph (1), the Commission may operate a group of attorney-at-laws supporting litigation (hereinafter referred to as the “litigation supporting group”) and matters necessary for the installation and operation of the litigation supporting group shall be governed by the rules of the Commission.*

*(3) Expenses pursuant to paragraphs (1) and (2) shall be borne by the State.*

*(4) Matters necessary for the support procedure, support details, etc. under paragraph (1) shall be prescribed by Presidential Decree.*

**Article 39 (Submission of Opinions to the Courts and the Constitutional Court)** *(1) Where proceedings on the respondent’s non-compliance with the decision by the Commission without justifiable grounds for the case that is recognized as discriminatory are pending, the Commission may, if requested by a court or the Constitutional Court, or deemed necessary by the Commission, present its opinions on de facto and de jure matters to the competent division of the court or the Constitutional Court.*

*(2) The victim of discriminatory acts may request to the Commission submission of opinions pursuant to paragraph (1) if the pending proceedings under paragraph (1) fall under any of the following:*

- 1. When the degree of damage is deemed to be serious, and the impact on the public interest is recognized to be significant;*
- 2. Where it is recognized that it may set a precedent for similar discrimination litigations in the future.*

**Article 40 (Remedial Measures by Court)** *(1) If discrimination against a victim is demonstrated by the victim, upon request by the victim, before filing the lawsuit or during the course thereof regarding discrimination prohibited under this Act, the court may order appropriate interim measures, such as discontinuation of the discriminatory act, until judgment on the merits is rendered.*

*(2) The court may render judgment to discontinue a discriminatory act, to improve working conditions, such as wages, to take proactive measures to rectify discrimination, upon request by the victim.*

*(3) If the court determines that proactive measures are necessary to discontinue discriminatory acts, restore the damages, and rectify discrimination, it may specify the time period for the implementation thereof and, if not implemented, order adequate compensation for any period of delay. In such cases, Article 261 of the Civil Execution Act shall apply mutatis mutandis.*

**Article 41 (Compensation for Damage)** *(1) A person who causes damage to another person in violation of the provisions of this Act shall be responsible for compensating for damage to the person damaged by such violation; provided, that the foregoing shall not apply where the discriminating person proves that there was no intention or negligence for his/her part.*

*(2) When it is found that harm has been suffered due to an act in violation of the provisions of this Act but the victim of such discriminatory act is unable to prove monetary loss, monetary gains obtained by the discriminating person from such act shall be deemed monetary loss suffered by the victim.*

*(3) Notwithstanding paragraph (2), in cases it is difficult for the victim to prove facts related to the damages to property they suffered due to the nature of such facts, the court may recognize a reasonable amount for damages based on the whole contents of pleadings and the factual findings.*

*(4) In cases where discrimination prohibited by this Act is recognized as malicious and having caused damages to the victim, the court may set compensation as at least 3 times up to 5 times of the amount for damages. However, the minimum amount of the compensation shall be more than 5 million won.*

*(5) Whether the act referred to in paragraph (4) is malicious shall be determined based on the following:*

- 1. Willfulness of the discrimination.*
- 2. Persistence and repetitiveness of the discrimination.*
- 3. Retaliatory nature against the victim.*
- 4. Details and scope of loss suffered from discrimination.*

**Article 42 (Allotment of Burden of Proof)** *(1) In resolution of dispute under this Act, the person who claims to be discriminated shall prove that an act subject to determination of discrimination has occurred.*

*(2) The other party to the person who claims to be discriminated shall prove that the act under paragraph (1) is not discrimination on the grounds of gender, etc., or that it had legitimate grounds.*

**Article 43 (Information Disclosure Obligations)** *(1) Any person who claims to have suffered discrimination, as a subject to the relevant administrative disposition in relation to employment, may request for written disclosure of information to the employer or the appointing authority on the criteria, ranking table for each evaluation criteria compared to the target group to which the person belongs, and other matters prescribed by Presidential Decree, and such requests shall not be refused the employer or the appointing authority.*

*(2) The employer or the appointing authority shall disclose the details within 30 days from the date on which such request for information disclosure was received under paragraph (1). In such cases, the type of information shall not be limited to documents.*

*(3) If the employer or the appointing authority refuses to disclose information or fails to disclose it within the period set in paragraph (2), the employer or the appointing authority shall be presumed to have discriminated against the person requesting the disclosure of information under paragraph (1). Provided, that they do not have justifiable grounds.*

**Article 44 (Prohibition of Disadvantageous Measures)** *(1) The employer, the appointing authority, and heads of educational institutions (hereinafter referred to as “employers, etc.” in this Article) shall not take disadvantageous measures regarding position or treatment, such as dismissal, transfer, punishment, and expelling from school, against the person who claims to have been discriminated, as well as persons related or associated with the person, for filing petition or litigation, submitting the statement, testimony, materials or answers (hereinafter referred to as “petition, etc.” in this article) in the course of preparing and proceeding with the remedial procedures prescribed in this Act. In such cases, the disadvantageous measures include the matters prescribed in subparagraphs of Article 2 (6) of the Protection of Public Interest Reporters Act.*

*(2) The disadvantageous measures by the employer, etc. under paragraph (1) shall be invalidated.*

*(3) The employer, etc. who violated paragraph (1) shall bear liability for paying compensation, pursuant to Article 41 (4), to the person who claims to have suffered discrimination or those involved.*

*(4) In a dispute related to the provisions of paragraphs (2) through (3), the other party of the person claiming that the disadvantageous measures have been taken against shall prove that such measures under paragraph (1) were not due to petition, etc.*

**Proposal for Act on Equality and Prohibition of Discrimination, 31 August 2021, No.2112330**

25. All Proposals include provisions to facilitate access to justice and an effective remedy for victims of discrimination. Access to justice and an effective remedy for victims is a cornerstone of international human rights law. For victims of discrimination, several international human rights treaties specifically affirm victims' right to an effective remedy,<sup>50</sup> and UNHCR agrees that adequate remedies need to be put in place in anti-discrimination legislation in order to prevent a culture of impunity from developing and give effect to the principle of non-discrimination.<sup>51</sup>
26. There is growing consensus among international treaty bodies that access to an effective remedy requires a shift from traditional rules of evidence and burden of proof. This is in recognition that those who discriminate rarely do so overtly and will not leave evidence of the discrimination within the victim's ability to acquire it. In particular, the Committee on the Elimination of Racial Discrimination has recommended that States parties should "regulate burden of proof in civil proceedings involving discrimination based on race, colour, descent, and national or ethnic origin so that once a noncitizen has established a *prima facie* case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment."<sup>52</sup> Other treaty bodies<sup>53</sup> and regional bodies<sup>54</sup> have similarly affirmed the possibility of shifting the burden of proof.
27. UNHCR underlines that all displaced and stateless persons who are victims of discrimination should have the means to an effective remedy and access to justice, regardless, *inter alia*, of their legal status, nationality, or protected status. Especially, attention should be given to those

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<sup>50</sup> For example, Article 6 of the Convention on Elimination of Racial Discrimination provides that:

"States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts or racial discrimination, which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

<sup>51</sup> UNHCR, note 44 above, p.220.

<sup>52</sup> CERD, *CERD General Recommendation XXX on Discrimination Against Non-Citizens*, 5 August 2004, para. 24.

<sup>53</sup> CESCR pointed out 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." CESCR, note 31 above, para. 40. The HRC has also stated that 'substantive reliable documentation' would shift the burden of proof to the respondent state. HRC, *Chedi Ben Ahmed Karoui v Sweden*, CCPR Communications No. 185/2001, para. 10.

<sup>54</sup> See, for example, at the European Union (EU) level, Council Directive (EC) 97/80 on the burden of proof in cases of discrimination based on sex [1998] OJ L14/6; Race Directive, Art. 8, which has introduced the shifting of burden of proof to the defendant once the plaintiff has shown a *prima facie* case. European Court of Human Rights ("ECtHR") has established that in certain circumstances, where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, it falls to the authorities to provide a satisfactory and convincing explanation. See, for example, ECtHR, *Salman v. Turkey*, Appl. no. 21986/93, Judgment of 27 June 2000, para. 100. With regard to the type of information needed to establish a *prima facie* case of discrimination, the European Court of Human Rights has become much more flexible by recognizing that statistics, among other things, can be sufficient to shift the burden of proof to the respondent states. See ECtHR, *Hoogendijk v. the Netherlands* (dec.), Appl. no. 58641/00, Judgment of 6 January 2005; ECtHR, *D.H. and Others v. Czech Republic*, Appl. no. 57325/00, Judgment of 13 November 2007.

without legal status, so that their vulnerability does not limit their effective access to a remedy, such as fear of being reported for violation of any immigration laws.

## **Conclusion**

28. In summary, UNHCR submits that:

- The principle of non-discrimination is enshrined in international human rights law and norms, according to which States have a duty of non-discrimination in respect of all persons, including displaced and stateless persons.
- Racist and intolerant sentiments pose challenges to the protection of persons under UNHCR's mandate. In addition to being a cause for flight and seeking asylum, racist, discriminatory and xenophobic attitudes and populist politics can affect the quality of asylum. Racism and xenophobia can hinder refugees' integration into their host society.
- Often, discrimination experienced by displaced and stateless persons may not be fully addressed by focusing on a single ground of discrimination, and a comprehensive definition of discrimination, including direct and indirect discrimination, as well as multiple and intersectional discrimination is necessary to effectively address the discrimination experienced by any person under UNHCR's mandate.
- Adequate effective remedies need to be put in place in anti-discrimination legislation in order to give effect to the principle of non-discrimination.

**UNHCR**  
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