



# The Equal Rights Trust

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## The Equal Rights Trust

Submission to the 17<sup>th</sup> session of the Universal Periodic Review in relation to:

### Malaysia

March 2013

## Statement of Interest

1. The Equal Rights Trust (ERT) makes this submission to the Universal Periodic Review in relation to Malaysia. ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. ERT focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice.
2. ERT has been actively involved in the promotion of improved protection from discrimination in Malaysia since 2010, primarily through a two year project undertaken in partnership with Tenaganita, a Malaysian NGO, entitled "Empowering Civil Society to Combat Discrimination through Collective Advocacy and Litigation". As a result of this engagement, in November 2012, ERT published *Washing the Tigers: Addressing Discrimination and Inequality in Malaysia* (the report) in partnership with Tenaganita.
3. The report is the first ever comprehensive account of discrimination and inequalities on all grounds and in all areas of life in Malaysia. It brings together evidence of the lived experience of discrimination and inequality in Malaysia on a wide range of grounds, including race and ethnicity, sex, religion, sexual orientation, gender identity, disability, citizenship and political opinion, with an analysis of the laws, policies and institutions established to address discrimination and inequality.

4. The report is the product a two-year research and consultation process undertaken by ERT and Tenaganita which has sought to produce a comprehensive assessment of discrimination and inequality in Malaysia. This process included gathering direct testimony during field missions, including through structured interviews, focus groups discussions, and soliciting submissions from organisations working with those who are vulnerable to discrimination in Malaysia. The partners also reviewed research conducted by others, including human rights reports produced by non-governmental organisations (NGOs), academic articles, government statistics, and data compiled by international organisations. The partners also undertook detailed audit and analysis of laws and policies relevant to equality and non-discrimination, including the Constitution, specific anti-discrimination laws, non-discrimination provisions in other areas of law and government policies. In analysing the legal and policy framework governing discrimination and inequality in Malaysia the partners were advised by a Malaysian legal expert, and otherwise relied upon government websites containing details of government policy and legislation which is available online. As a result of the partnership between an international and national organisation, ERT and Tenganita were able to ensure that research is both properly responsive to the local context and based on comparative international expertise.
5. This submission is based on the findings and recommendations of the report, a copy of which is attached as Annex 1 to this submission.<sup>1</sup> It urges states participating in the review of Malaysia to endorse and adopt the recommendations in the report, which are attached as Annex 2. Given that the Human Rights Council has stated that “[t]he second and subsequent cycles of the review should focus on, inter alia, the implementation of the accepted recommendations and the developments of the human rights situation in the State under review”,<sup>2</sup> this submission focuses in particular on areas where the report brings to light new evidence of discrimination, or provides further information in areas where states made recommendations at the last review of Malaysia.

#### ***Washing the Tigers: Addressing Discrimination and Inequality in Malaysia: Summary of Findings***

6. The report identifies evidence of discrimination and inequality affecting persons in Malaysia on a wide range of grounds, including race and ethnicity, gender, religion and belief, sexual orientation, gender identity, health status, age, disability, citizenship and political opinion. It identifies discriminatory laws and severe examples of discrimination by agents of the state. It also finds ineffective protection from discriminatory violence against women and other groups, and evidence of discrimination in areas such as employment and education on a number of grounds.
7. In addition to documenting examples and patterns of discrimination against specific groups, the report identifies five key themes as central to the patterns of discrimination in Malaysia:
  - (i) The pervasiveness of the race relations issue which impacts upon all areas of life, not least as a result of the close alignment between race, religion and politics;
  - (ii) The dual legal system, according to which civil law and Syariah law operate in parallel and Muslims and non-Muslims are subject to different laws, particularly in the areas of family and criminal law;
  - (iii) The prominence of a conservative interpretation and implementation of Islam within Malaysian culture creates an environment in which societal attitudes and practices are governed by conservative perceptions of, inter alia, the role of women within society, and

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<sup>1</sup> Copies of *Washing the Tigers: Addressing Discrimination and Inequality in Malaysia* also available at: <http://www.equalrightstrust.org/newsstory%20121112/index.htm>.

<sup>2</sup> Human Rights Council, *Resolution 16/21: Review of the work and functioning of the Human Rights Council*, A/HRC/RES/16/21, April 2011, Annex 1, Para 6, available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/126/78/PDF/G1112678.pdf?OpenElement>.

the appropriateness of behaviour deemed to be “irreligious”, such as sex outside of wedlock, same-sex relationships and cross-dressing. Such attitudes provide a context in which discrimination against women, children, gay and transgender persons occurs in all areas of life;

- (iv) Poverty is a common thread running throughout most of the patterns of discrimination identified. The severity of discrimination experienced by individuals and groups is usually directly related to their socio-economic standing or their relative position of power;
- (v) Malaysia’s large migrant population is the target of discriminatory conduct and is denied the ability to participate in most areas of life on an equal basis with citizens, despite the reliance of the expanding Malaysian economy on this additional work force.

8. In respect of the legal and policy framework on equality, the report finds that Malaysia has a relatively weak framework of protections, characterised by significant gaps, inconsistencies and limitations. In particular, it concludes that:

- (i) Malaysia has a poor record of participation in the major United Nations treaties relevant to equality rights. Malaysia is not a party to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention against Torture (CAT), among others. In addition, the state’s commitment to the Convention on the Elimination of Discrimination Against Women, Convention on the Rights of the Child and Convention on the Rights of Persons with Disability is subject to significant declarations and reservations.
- (ii) Discriminatory laws remain in force on a number of grounds and in various areas of life. For example, affirmative action policies enshrined in Article 153 of the Constitution advantage ethnic Malays and natives of the States of Sabah and Sarawak (often identified as “Bumiputera”) but fail to meet the criteria for positive action, thus amounting to racial discrimination. Article 10(4) of the Constitution and laws such as the Police Act 1967 have been enforced in a discriminatory manner against political opponents of the government. Section 377 of the Penal Code contains offences of “carnal intercourse against the order of nature” and “gross indecency” (section 377) which are enforced through practices that amount to criminalisation and discriminatory ill-treatment of LGBTI persons.
- (iii) The national legal framework on equality is weak, providing severely limited protection from discrimination. While the Federal Constitution contains some protection, its provisions are inadequate in a number of ways, most notably in relation to the restricted list of protected grounds, the failure to protect both citizens and non-citizens, and the breadth of exceptions which mean that personal law (which has been interpreted to include the majority of Syariah law) are not subject to the prohibition on discrimination contained in the Constitution. Malaysia lacks comprehensive equality legislation and equality enforcement bodies across all grounds, a significant factor contributing to the persistence of the patterns of discrimination and inequality identified in the report. While some non-discrimination provisions are found in legislation governing other legal fields: criminal law, family law, and law related to domestic violence, this protection is rarely rights-based, and is very limited, patchy and inconsistent.

## Recommendations

9. Based on the comprehensive review of both the lived experience of discrimination and inequality, and the legal and policy framework, the report makes a series of recommendations for reforms to laws, policies and practices to bring these into line with international law and best practice on equality. In particular, the recommendations set out the steps which Malaysia must take to bring its legal and policy framework into line the Declaration of Principles on Equality

(the Declaration), a document of international best practice on equality. The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as “the current international understanding of Principles on Equality”.<sup>3</sup> It has also been endorsed by the Parliamentary Assembly of the Council of Europe.<sup>4</sup>

10. **ERT urges all states participating in the review of Malaysia to endorse and adopt the recommendations from the *Washing with Tigers* report.** In particular, ERT wishes to highlight areas where its findings indicate that recommendations made at the last Universal Periodic Review have not been implemented, and urge states to adopt the recommendations made in its report:
11. **Ratification of ICCPR, ICESCR, CERD and CAT:** Malaysia indicated in its response to recommendations made by the United Kingdom, Finland and others at the last Universal Periodic Review that it was “progressively studying the proposal to ratify ICCPR and CAT” and was seeking to resolve issues with its domestic legislation.<sup>5</sup> With respect to ICESCR and CERD, accepted the recommendation of Algeria that it “continue to take appropriate steps” with respect to ratifying these instruments.<sup>6</sup> Section 3.1.1 of ERT's report identifies that Malaysia has not ratified any of these instruments, and that it remains to ratify a range of others directly relevant to the protection of the right to equality. **ERT therefore urges states participating in the review of Malaysia to adopt recommendation 1.1 from the Recommendations of the report *Washing with Tigers: Addressing Discrimination and Inequality in Malaysia* (provided as Annex 2 to this submission).**
12. **Withdrawal of reservations to CEDAW and CRC:** Malaysia indicated in its response to recommendations made by Finland, Belgium, Mexico and France that it was “progressively reviewing the reservations to CEDAW” and that it was taking steps to improve protection of children's rights.<sup>7</sup> Section 3.1.1.1 and 3.1.1.2 of ERT's report finds that Malaysia retains a large number of reservations to each of these instruments, which critically undermine the efficacy of the protections provided therein. In addition, section 3.1.1.3 highlights a significant reservation to CRPD. **ERT therefore urges states to adopt recommendation 1.2 from Annex 2.**
13. **Bringing domestic law into conformity with CEDAW:** Malaysia responded to a recommendation from Chile that it was “strengthening existing legislation” and engaging stakeholders to translate CEDAW into domestic law.<sup>8</sup> ERT's report presents extensive evidence that Malaysia's domestic law is inconsistent with its CEDAW obligations: section 2.3 presents evidence of a number of discriminatory laws which remain in place; section 3.2.1 finds a number of shortcomings with the non-discrimination provisions in the Constitution; while section 3.2.2 notes that Malaysia has neither specific nor comprehensive equality legislation, as required by the Article 2 of CEDAW. **ERT urges states to adopt recommendations 2.1(v), 2.2, 2.5(ii) and (iii), 2.6, 2.7(i), 2.8(i) and recommendation 3 from Annex 2.**
14. **Enactment of laws pertaining to anti-discrimination:** In response to a recommendation by Ukraine that it enact anti-discrimination laws, Malaysia stated that “protection from

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

<sup>4</sup> Parliamentary Assembly of the Council of Europe, *Resolution and Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe*, REC 1986 (2011), 25 November 2011, available at: [http://assembly.coe.int/ASP/Doc/ATListingDetails\\_E.asp?ATID=11380](http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380).

<sup>5</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia – Addendum*, A/HRC/11/30/Add.1, June 2009, p. 2

<sup>6</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia*, A/HRC/11/30, June 2009, Para 104.1.

<sup>7</sup> See above, note 5.

<sup>8</sup> *Ibid.*, p. 3.

discrimination on the grounds of religion, race, descent, gender or place of birth” is provided in the Constitution, and that additional protection is provided in other legislation.<sup>9</sup> Sections 3.2.2 and 3.2.3 of ERT’s report assess the adequacy of legislative protections from discrimination in both specific anti-discrimination laws and in legislation in other fields. These sections assess the adequacy of legislative protections from discrimination on all grounds and in all areas of life, against the standards set out in the Declaration of Principles on Equality, and find that these provide inadequate protection. ERT therefore urges states to adopt recommendations 3.2 – 3.7 from Annex 2.

15. **Adoption of measures necessary to guarantee freedom of religion:** Chile and the Holy See recommended that Malaysia take steps to guarantee religious freedom; Malaysia responded that the Constitution guarantees freedom of religion and that it considered restrictions to the right provided in the Constitution to be “fully consistent with relevant provisions of international law”.<sup>10</sup> Section 2.4 of the report identifies significant problems of discrimination on grounds of religion and belief, related in part to the privileged legal position provided to Islam in the Constitution and the dual legal system, according to which civil law and Syariah law operate in parallel and Muslims and non-Muslims are subject to different laws. The section provides robust evidence that the Constitutional guarantee of freedom of religion is both excessively limited in scope and poorly enforced, with the result that the religious freedom of non-Muslims is not fully guaranteed. ERT therefore urges states to adopt recommendations 2.1(iv), 2.4(i) and 2.8(ii) and recommendations 3 and 4 from Annex 2.
16. **Review and amend laws such as the Sedition Act, Printing Press and Publications Act etc:** In response to a recommendation from Canada that it review and amend a number of laws in order to ensure full enjoyment of the right to freedom of opinion and expression, Malaysia stated that it believed existing legislation “provides sufficient guarantees to ensure that the right to freedom of opinion and expression may be exercised fully”.<sup>11</sup> Section 2.10 of the report finds that discrimination on grounds of political opinion, and the denial of political freedoms, remain significant problems in Malaysia. It identifies a number of constitutional provisions and pieces of legislation which are applied in ways which discriminate against and restrict the activities of, political opponents of the government. ERT therefore urges states to adopt recommendations 2.1(iii) and 3 from Annex 2.
17. Finally, ERT would urge all states participating in the review of Malaysia to strongly consider endorsing and adopting the recommendations from the report in full. In order to comply with the stated aim of the second round of the Universal Periodic Review, ERT has focussed above on those past recommendations where its report identifies that implementation has been absent or poor. Given the nature of these prior recommendations, some important issues – such as the need to repeal affirmative action policies which constitute direct ethnic discrimination – have been omitted from this list.
18. Moreover, it should be noted that the recommendations from the *Washing the Tigers* report are the product of a comprehensive assessment of the legal and policy framework on discrimination and equality, measured against prevailing international law and best practice. The recommendations reflect a unified human rights framework on equality, as expressed in the Declaration of Principles on Equality, which brings together inequalities based on different grounds and inequalities in different areas of life, and which emphasises the overarching aspects of these different strands and types of inequality. We therefore urge states to consider adopting the broader, more comprehensive language of the recommendations, in particular in areas where previous recommendations have focussed on one particular ground of discrimination, but our research has highlighted problems affecting other groups.

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<sup>9</sup> Ibid., p. 3.

<sup>10</sup> Ibid., p. 6.

<sup>11</sup> Ibid., p. 6.