



REPUBLIC OF THE PHILIPPINES  
COMMISSION ON HUMAN RIGHTS

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**POSITION PAPER ON THE COMPREHENSIVE ANTI-DISCRIMINATION BILL  
AT THE HOUSE OF REPRESENTATIVES, 18<sup>TH</sup> CONGRESS**

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1. The Commission on Human Rights (CHR), as the country's national human rights institution (NHRI)<sup>1</sup> and in the exercise of its constitutional mandate to protect and promote human rights,<sup>2</sup> issues this Position Paper on the proposed Comprehensive Anti-Discrimination Bill filed in the House of Representatives<sup>3</sup> of the 18<sup>th</sup> Congress. In this submission, the CHR reiterates its position of strong support to the immediate passage and implementation of a comprehensive anti-discrimination law that will help enforce the constitutional guarantee against discrimination by defining specific acts or omissions that constitute discrimination as well as by defining positive acts by which both the State and non-state actors may promote equality and fight discrimination. This transcends mere penal legislation and takes a more holistic approach to truly reshaping societal attitudes.
2. Equality and non-discrimination are basic principles that underpin the rule of law and the human rights framework. These two principles are embedded in the international human rights obligations of the Philippines as a State-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), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICMW), the International Convention on the Rights of Persons with Disabilities (CRPD), and other international human rights laws. These principles are also at the

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<sup>1</sup> Based on the *Principles relating to the status of national institutions* or the *Paris Principles* in relation to the CHR mandates in the 1987 Constitution. National Institutions for the Promotion and Protection of Human Rights, G.A. Res. 48/134, Annex, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

<sup>2</sup> PHIL. CONST. art. XIII, sec. 18.

<sup>3</sup> H.B. No. 136, 18<sup>th</sup> Cong., 1<sup>st</sup> Reg. Sess. (2019), filed by Rep. Geraldine B. Roman; H.B. No. 4092, 18<sup>th</sup> Cong., 1<sup>st</sup> Reg. Sess. (2019), filed by Rep. Ronnie Ong; H.B. No. 4216, 18<sup>th</sup> Cong., 1<sup>st</sup> Reg. Sess. (2019), filed by Rep. Alfred Vargas; H.B. No. 4587, 18<sup>th</sup> Cong., 1<sup>st</sup> Reg. Sess. (2019), filed by Rep. Rodrigo Abellanos; H.B. No. 4647, 18<sup>th</sup> Cong., 1<sup>st</sup> Reg. Sess. (2019), filed by Rep. Luis Raymund Villafuerte, Jr.; H.B. No. 5356, 18<sup>th</sup> Cong., 1<sup>st</sup> Reg. Sess. (2019), filed by Rep. Precious Hipolito Castelo; H.B. No. 5969, 18<sup>th</sup> Cong., 1<sup>st</sup> Reg. Sess. (2019), filed by Rep. Bienvenido Abante, Jr. and the Minority Bloc; H.B. No. 6024, 18<sup>th</sup> Cong., 1<sup>st</sup> Reg. Sess. (2019), filed by Rep. Edurado Villanueva, Rep. Domingo Rivera; H.B. No. 6098, 18<sup>th</sup> Cong., 1<sup>st</sup> Reg. Sess. (2019), filed by Rep. Ferdinand Hernandez; H.B. No. 7217, 18<sup>th</sup> Cong., 2<sup>nd</sup> Reg. Sess. (2020), filed by Rep. Kristine Alexie B. Tutor.

core of the Universal Declaration of Human Rights (UDHR) and the 1987 Constitution.<sup>4</sup>

3. Special laws that protect and promote the human rights of vulnerable and marginalized sectors, such as persons with disability,<sup>5</sup> persons living with HIV,<sup>6</sup> and persons affected by mental health conditions,<sup>7</sup> among others, generally include non-discrimination provisions to emphasize its importance and to highlight that although international and domestic laws strictly prohibit discrimination in principle, members of these sectors continue to suffer from acts constituting the same. The vulnerability to discrimination is even more pronounced for sectors that do not have specific legislation that protect them against it. This is true especially for members of the LGBTQI community, persons in lower socioeconomic status, and older persons, among others.
4. For purposes of the discussion in this Position Paper, we refer to the draft consolidated bill disseminated by the Committee on Human Rights of the House of Representatives during its Technical Working Group Meeting on the bill held on September 16, 2020.

### Protected Attributes

5. The protected attributes are the list of grounds or characteristics where discrimination is prohibited. The International Bill of Rights<sup>8</sup> has an open-ended list of protected attributes that expressly include: **race, color, sex, language, religion, political or other opinion, national or social origin, property, birth and other status,**<sup>9</sup> where “other status,” as far as the ICESCR is concerned, includes: **disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation.**<sup>10</sup> In addition, under the CEDAW, States are obligated to take steps to protect women from discrimination on the grounds of **maternity and pregnancy.**
6. We have noted not all of the abovementioned protected attributes under the International Bill of Rights were included in the bill. As noted by The Equal

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<sup>4</sup> PHIL. CONST. art. II, sec. 2, art. III, sec. 1, 5, art. XIII, sec. 1, 3, 18.

<sup>5</sup> An Act Providing for the Rehabilitation, Self-Development and Self-Reliance of Disabled Persons and Their Integration into the Mainstream of Society and for Other Purposes [Magna Carta for Disabled Persons], Republic Act No. 7277, §§ 17, 32, 33, 34, 35, 36, 44 (1992).

<sup>6</sup> An Act Strengthening the Philippine Comprehensive Policy on Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) Prevention, Treatment, Care, and Support, and Reconstituting the Philippine National AIDS Council (PNAC), Repealing for the Purpose Republic Act No. 8504, Otherwise Known as the “Philippine AIDS Prevention and Control Act of 1998,” and Appropriating Funds Therefor [Philippine HIV and AIDS Policy Act], Republic Act No. 11166, §§ 2, 3, 10, 16, 23, 38, 40, 48, 49, 50 (2018).

<sup>7</sup> An Act Establishing a National Mental Health Policy for the Purpose of Enhancing the Delivery of Integrated Mental Health Services, Promoting and Protecting the Rights of Persons Utilizing Psychiatric, Neurologic and Psychosocial Health Services, Appropriating Funds Therefor and for Other Purposes [Mental Health Act], Republic Act No. 11036, §§ 4, 5, 44 (2018).

<sup>8</sup> UDHR, ICCPR, and ICESCR

<sup>9</sup> UDHR, art. 2; ICCPR, art. 2(1); ICESCR, art. 2(2).

<sup>10</sup> UN Committee on Economic, Social and Cultural Rights (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, available at: <https://www.refworld.org/docid/4a60961f2.html> (last accessed 14 Sep. 2020).

Rights Trust (ERT),<sup>11</sup> an international non-government organization, in their review of the national anti-discrimination bill/law of Armenia, a limited list of explicitly protected attributes that omit several grounds which are well-recognized under international human rights law would mean that individuals experiencing discrimination based on the omitted characteristics would need to seek a confirmation from the courts that the ground is a form of a protected attribute under “other status” for purposes of the law.<sup>12</sup> As further noted, such a scenario creates uncertainty for both rights-holders and duty-bearers and also creates the real risk that the courts will conclude that a ground which is well-recognized at international law is not a protected attribute for purposes of the law.<sup>13</sup>

7. We, thus, respectfully recommend that all these grounds be expressly included in the long title, Section 2 (Declaration of Policy), Section 3(b) (Definition of “discrimination”), Section 4 (Protected Attributes), and other sections which define or list all explicitly protected attributes. For brevity, the extended list of protected attributes may be expressly included under “other statuses” in Section 3(p) (Definition of “other status”).
8. In addition to these grounds or characteristics which are expressly protected under the core international human rights laws, we also recommend the inclusion of the following grounds or characteristics as explicitly protected attributes for the reasons as stated:
  - a. **Gender expression** – The Yogyakarta Principles Plus 10 (YP+10) included a reference to “gender expression.”<sup>14</sup> Although having the status of secondary or soft law, these Principles are used as a benchmark for the protection of human rights of LGBTI+ persons, and often have been referenced at international, regional and national levels including courts.
  - b. **Sex characteristics** – As noted by the University of the Philippines Gender Law and Policy Program in their draft SOGIE Equality Bill, people may be male, female or intersex on the basis of their sex characteristics.<sup>15</sup> To be more inclusive, therefore, the term sex characteristics should be included within the scope of the protection of the law. As further noted, in a study by the European Union Agency

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<sup>11</sup> The Equal Rights Trust (ERT) is an international non-government organization with a mission to combat discrimination and promote equality as a fundamental human right and a principle of social justice. In 2019, the ERT served as a resource speaker for the National General Assembly of the Stop the Discrimination Coalition, which includes the CHR as member, where they reviewed the draft Comprehensive Anti-Discrimination Bill of the House of Representatives, 17<sup>th</sup> Congress, and provided their recommendations to improve the bill. Available at <https://www.equalrightstrust.org/> (last accessed 28 Jul. 2020).

<sup>12</sup> The Equal Rights Trust, Draft Law of the Republic of Armenia “On Ensuring Equality” (paper published in London, March 2018) at 7-8, par. 15, available at <https://www.equalrightstrust.org/resources/law-ensuring-equality-armenia-legislative-analysis> (last accessed 28 Jul. 2020).

<sup>13</sup> *Id.*

<sup>14</sup> The Yogyakarta Principles Plus 10, available at <https://yogyakartaprinciples.org/introduction-yp10/>

<sup>15</sup> University of the Philippines Gender Law and Policy Program, “A DRAFT by the GENDER LAW AND POLICY PROGRAM of the U.P. College of Law of AN ACT PROHIBITING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, OR SEX CHARACTERISTICS (SOGIESC) AND PROVIDING PENALTIES THEREFOR,” *on file with author.*

for Fundamental Rights, it was found that intersex people are better protected by laws prohibiting discrimination based on sex and sexual characteristics rather than those based on sexual orientation or gender identity or expression, considering that “being an intersex concerns a person’s physical (sex) characteristics.”<sup>16</sup>

### **Declaration of Policy (Section 2)**

9. On the first paragraph of Section 2, we respectfully recommend for the complete list of the protected attributes be expressly provided, as noted in our comment in nos. 5-8 above.
10. On the third paragraph of Section 2, we respectfully recommend the inclusion of all core international human rights laws that have relevant provisions on the subject of discrimination discussed in the bill, as well as the relevant General Comments and General Recommendations of the UN Treaty-Bodies assigned to interpret these covenants and conventions, thus:

*“Towards this end, the State shall exert efforts to address all forms of discrimination and violence and to promote human dignity as enshrined in the United Nations Universal Declaration on Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, **International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of Persons with Disabilities, International Convention on the Protection of All Migrant Workers and Members of Their Families, and the relevant General Comments or Recommendations by the concerned UN Treaty-Bodies, and all other relevant and universally accepted human rights instruments and other international conventions to which the Philippines is a signatory of. Towards this end, discriminatory practices as defined herein shall be proscribed and penalized.**”*

### **Definition of Terms (Section 3)**

11. Considering that an important element of the definition of “discrimination” is the protected attributes, we believe that it is important to expressly define these attributes in the law, unless they have an ordinary meaning, e.g., “age.” Defining these attributes would provide better guidance for covered and mandated persons in determining policy and justiciable actions to implement the law.

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<sup>16</sup> *Id.*

12. “Color” and “race” are some of the expressly protected attributes under the International Bill of Rights. While these terms have ordinary meanings for the application of the law, it is best to ensure that “ethnic origin” is understood as subsumed under their meanings, consistent with the ICESCR,<sup>17</sup> thus, we recommend the inclusion of sub-sections under Section 3 on “color” and on “race”:

***“Color includes an individual’s ethnic origin.”***

***“Race includes an individual’s ethnic origin.”***

13. On the definition of “disability” in Section 3(b), we have noted that the definition was lifted from R.A. No. 7277 or the “Magna Carta for Disabled Persons”<sup>18</sup> which focuses on the medical condition and how it can restrict a person’s role and function in society.<sup>19</sup> In contrast with this definition, the CRPD, adopts the social model of disability which considers it as an evolving concept and focuses not on the limitation but on how society can better respond to the needs of persons with disability.<sup>20</sup> The definition in CRPD refocuses disability into a human rights issue which promotes accessibility, empowerment, and equality and ensures and acknowledges the contributions of persons with disability to society. With this, we respectfully recommend to use the CRPD definition of “disability” as it is more aligned with the objectives of the proposed law, thus:

***“Disability refers to long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder a person’s full and effective participation in society on an equal basis with others.”***

14. On the definition of “discrimination” in Section 3(c), we respectfully recommend for the complete list of the protected attributes to be expressly provided, as noted in our comment in nos. 5-8 above.
15. Also on Section 3(c), taking into account instances where a person is discriminated or excluded on the basis of his or her association with a person having the subject attributes considered as prejudicial, we respectfully recommend the inclusion of “association with a person who has, or is, believed to have any of these attributes” in the definition of “discrimination.”<sup>21</sup>
16. Furthermore, on Section 3(c), it must be noted that discrimination may be direct or indirect. It is important to further define these as it will help duty-

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<sup>17</sup> CESCR General Comment No. 20, par. 19, *supra*.

<sup>18</sup> R.A. No. 7277, sec. 4(c), *supra*.

<sup>19</sup> Vera Files, Inc., Getting It Right: Reporting on Disability in the Philippines at 4, available at <https://asiafoundation.org/wp-content/uploads/2018/03/Getting-It-Right.-Reporing-on-Disability-in-the-Philippines.pdf> (last accessed 28 Jul. 2020).

<sup>20</sup> *Id.*

<sup>21</sup> Commission on Human Rights, Position Paper on the Comprehensive Anti-Discrimination Bills in the 17<sup>th</sup> Congress, 2017.

bearers in performing their obligations to protect the rights of persons against discrimination. The definition of direct and indirect discrimination from the General Comment No. 20 of the UN Committee on Economic, Social, and Cultural Rights (CESCR) may be adopted for this purpose.

17. In view of our comments in nos. 14-16 above, we submit the following proposed language of Section 3(c) on the definition of “discrimination”:

*“Discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the protected attributes such as **race, color, sex, language, religion, political or other opinion, national or social origin, property, birth and other status, including disability, age, nationality, marital and family status, sexual orientation, gender identity, gender expression, sex characteristics, health status, place of residence, economic and social situation, maternity, and pregnancy**, and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of political, civil, economic, social, or cultural rights. **It also includes association with a person who has, or is believed to have any of these attributes.**”*

*Discrimination, which also includes incitement to discriminate and harassment, is a result of stigma.*

***Direct discrimination occurs when an individual is treated less favorably than another person in a similar situation for a reason related to a prohibited ground. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation.***

***Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of civil, political, economic, social, and cultural rights as distinguished by prohibited grounds of discrimination.”***

18. In view of our comments in nos. 5-8 and 11 above, we respectfully recommend that “gender expression,” “gender identity,” “sex characteristics,” and “sexual orientation” be defined in the law. The definitions from the Yogyakarta Principles and the YP+10 may be adopted for this purpose. Thus, sub-sections under Section 3 may be included as follows:

***“Gender Expression refers to a person’s presentation of their gender through physical appearance, including dress, hairstyles, accessories, cosmetics, and***

*mannerisms, speech, behavioral patterns, names and personal references.”<sup>22</sup>*

*“Gender Identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”<sup>23</sup>*

*“Sex Characteristics refer to a person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.”<sup>24</sup>*

*“Sexual orientation refers to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”<sup>25</sup>*

19. On Section 3(s) on the definition of “political inclination,” we respectfully recommend that the language consistent with the CDESCR General Comment No. 20 be adopted, thus:

*“Political or other opinion refers to a person's preference as regards membership or belief in a particular political party, organization or ideology. It covers both the holding and not-holding of opinions, as well as expression of views or membership within opinion-based associations, trade unions or political parties.”<sup>26</sup>*

20. On Section 3(w) on the definition of “religion,” we respectfully recommend the inclusion of “private manifestation” and “observance,” consistent with the CDESCR General Comment No. 20, thus:

*“Religion covers the profession of religion or belief of one’s choice, including the non-profession of any religion or belief, that may be*

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<sup>22</sup> Yogyakarta Principles Plus 10, Preamble, par. 4, available at <https://yogyakartaprinciples.org/preamble-yp10/>, accessed 22 Sep. 2020.

<sup>23</sup> Yogyakarta Principles, Preamble, par. 5, available at <http://yogyakartaprinciples.org/preamble/>, accessed 22 Sep. 2020.

<sup>24</sup> Yogyakarta Principles Plus 10, Preamble, par. 6, available at <https://yogyakartaprinciples.org/preamble-yp10/>, accessed 22 Sep. 2020.

<sup>25</sup> Yogyakarta Principles, Preamble, par. 4, available at <http://yogyakartaprinciples.org/preamble/>, accessed 22 Sep. 2020.

<sup>26</sup> CDESCR General Comment No. 20, par. 23, *supra*.

*publicly or **privately** manifested in worship, **observance, practice and teaching.***

21. In view of our comments in nos. 5-8 and 11 above, we respectfully recommend that “social origin” be defined in the law. The definition from the CESC General Comment No. 20 may be adopted for this purpose, thus:

***“Social origin refers to a person’s inherited social status.”***<sup>27</sup>

#### **Prohibited Grounds for Discrimination (Section 4)**

22. In the first paragraph of Section 4, we respectfully recommend for the complete list of the protected attributes to be expressly provided, as noted in our comment in nos. 5-8 above.
23. Also, we respectfully recommend the inclusion of a policy on determining whether a person belongs to or can be characterized or distinguished by any of the protected attributes. The CESC General Comment No. 20 provides guidance on this which may be adopted in the law for this purpose.<sup>28</sup>
24. In view of our comments in nos. 22-23 above, we respectfully submit the following proposed language for Section 4:

*“Prohibited Grounds for Discrimination. – For the purposes of this Act, discrimination that is directly or indirectly based on the actual or perceived **race, color, sex, language, religion, political or other opinion, national or social origin, property, birth and other status, including disability, age, nationality, marital and family status, sexual orientation, gender identity, gender expression, sex characteristics, health status, place of residence, economic and social situation, maternity, and pregnancy,** is prohibited. For purposes of this Act, these personal characteristics shall be collectively termed as Protected Attributes.*

***The protected attributes** that may be subjected to differentiation or any form of discrimination shall be interpreted in their most common or universal definitions and with due regard to the promotion of meaningful implementation of non-discrimination policy.*

***In determining whether a person is distinguished by one or more of the protected attributes, identification shall, if no justification exists to the contrary, be based upon self-***

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<sup>27</sup> *Id.*, at par. 24.

<sup>28</sup> *Id.*, at par. 16.

***identification by the individual concerned. Membership also includes association with a group characterized by one of the prohibited grounds or perception by others that an individual is part of such a group.”***

### **Acts of Discrimination (Section 5)**

25. On the first paragraph of Section 5, we respectfully recommend for the complete list of the protected attributes to be expressly provided, as noted in our comment in nos. 5-8 above.
26. Generally, where an act is committed in violation of a special law, criminal intent is immaterial. However, when the special law requires that the act be committed knowingly and willfully, criminal intent is required to be proved before criminal liability may arise. Guided by this principle, the bill may be modified to make the acts punishable only if the offender knowingly and deliberately committed the discriminatory act or conduct in such a way as to insult or spite the offended party. In contrast, where it can be shown that the respondent has no criminal intent, in which case, the burden is upon the respondent to show that the act was unintentional, then liability will not attach.<sup>29</sup>
27. We emphasize, however, that not all discriminatory acts are characterized by intent as there are cases where the act is not intentional but only has the effect of nullifying or impairing the recognition, enjoyment or exercise of human rights. As noted by the ERT, “discrimination does not require intent or malicious motive on the part of the discriminator.”<sup>30</sup> As further noted, “direct discrimination can occur in cases where the discriminating party believes that they are acting in the best interest of the victim, while indirect discrimination can occur in cases where the discriminating party applies a rule, provision or practice which, while disproportionately disadvantaging members of a particular group, nevertheless pursues a legitimate aim.”<sup>31</sup>
28. In view of our comments in nos. 26-27 above, we respectfully submit for the legislators to carefully review the proposed prohibited acts so as to ensure that the application of criminal penalties would not be disproportionate and unjustified.
29. Section 5(c)(2) under the sub-section on “denial of right to employment” penalizes the act of “less favorable treatment” of one applicant relative to another but omits mention of overt acts of discrimination. Under the text of this provision, an employer can face criminal liability for choosing one applicant over another even without any evidence of outright discrimination apart from not choosing the person belonging to a minority. Given that the

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<sup>29</sup> Commission on Human Rights, Position Paper on Senate Bill No. 1081 Entitled “Anti-Religious and Ethnic Stereotyping Act,” 2013.

<sup>30</sup> ERT, Draft Law of the Republic of Armenia, p. 6, par. 11(a), *supra*.

<sup>31</sup> *Id.*

proposed law is largely penal in character, we respectfully submit that the proposed offense should be better defined.

30. On Section 5(h), we observe that the substance of this section on the prohibited act of discrimination in advertisements or mass media is vague and does not clearly define the prohibited act.<sup>32</sup> It is subjective in the sense that whether or not the advertisement or notice is discriminatory would depend on the subjectivity of the party assessing with due regard to his orientation and experiences as well as the surrounding circumstances.<sup>33</sup> It is, therefore, recommended that the scope and coverage of this particular section be clear enough as to distinguish the acts considered prohibited or punishable and the acts that fall within the boundaries of acceptable acts.<sup>34</sup> It is further recommended that this particular section should provide for reasonable and ascertainable standards of guilt<sup>35</sup> especially since the act imposes a test of “reasonableness” which would otherwise require judicial interpretation.
31. Also, on Section 5(h) clarity on what indicates or could reasonably be understood as an act of discrimination is crucial because a vague penal provision may be stricken out by the courts as unconstitutional because it runs counter with the right to due process under Article III<sup>36</sup> of the 1987 Constitution.<sup>37</sup> Here, Section 5(h) appears to be vague because it lacks comprehensible standards. In effect, ordinary citizens and law enforcers may differ in interpreting what advertisement or notice may be reasonably understood as an act of discrimination. The vague provision may violate due process because it fails to give the ordinary citizens fair notice on what kind of advertisement or notice should be avoided. It also gives the Government an unbridled discretion in determining whether the advertisement or notice indicates or could be reasonably understood as an act of discrimination.
32. Furthermore, on Section 5(h), given that the regulated subject is mass media, the definition of the offense should be very clearly worded and should, as much as possible, avoid such ambiguity as may bring it afoul of the constitutional guarantee of freedom of expression. Unless the act is described with particularity, this prohibition could amount to prior restraint and, as such, an infringement on freedom of speech. Punishing discrimination is a good thing but casting a wide net as to what may or may not constitute

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<sup>32</sup> Commission on Human Rights, Position Paper on Consolidated House Bill Nos. 401 and 659 Entitled “An Act Prohibiting Racial, Ethnic and Religious Discrimination,” issued on Feb. 11, 2015, at 8.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 9.

<sup>35</sup> *Id.*

<sup>36</sup> Phil. Const. art. III, § 1.

<sup>37</sup> In *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, the Court elucidated that a statute of act which suffers from the defect of vagueness violates a person’s right to due process, to wit: “A statute or act suffers from the defect of vagueness when it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ as to its application. It is repugnant to the Constitution in two respects: (1) it violates due process for failure to accord persons, especially the parties targeted by it, fair notice of the conduct to avoid; and (2) it leaves law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle.” G.R. No. 178552, Oct. 5, 2010, available at [https://lawphil.net/judjuris/juri2010/oct2010/gr\\_178552\\_2010.html](https://lawphil.net/judjuris/juri2010/oct2010/gr_178552_2010.html) (last accessed Mar. 18, 2020).

discrimination, especially in mass media, will create more problems than it solves.

33. On Section 5(i), we observe that this section on the prohibited act of discrimination by wrongful portrayal fails to consider those scenarios where the peculiarities or idiosyncrasies of certain individuals and/or groups are shown not to portray them inferiorly but simply to showcase their beliefs, traditions, and culture.<sup>38</sup> As in Section 5(h), it is respectfully recommended that reasonable and ascertainable standards of guilt be provided in the bill.

### **Exceptions (Section 8)**

34. The CHR is of the view that where a genuine distinction is necessary, exceptions must be provided. Thus, it should not be unlawful to provide a difference of treatment based on a characteristic if the particular conduct or requirement constituting the differentiation or distinction is justifiable, that is, genuine and proportionate, and the objective is legitimate. To quote the UN Human Rights Committee, which is the group of experts tasked to interpret the provisions of the International Covenant on Civil and Political Rights, “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”<sup>39</sup> Indeed, a difference of treatment may be considered as having an objective or reasonable justification if it is for a legitimate purpose compatible with the human rights obligations of the State.
35. For example, a Muslim woman wearing a Niqab or a Burqa must still be allowed entry to and do business in banks or other private establishments despite the no-masks policies in these establishments. However, as a matter of policy, the establishment may impose an additional security requirement before allowing entry, while still ensuring that the dignity of the person involved is still respected. In this case, the client may remove her veil in a private room and show her ID in the presence of a female employee. This differentiation in treatment is reasonable, has a legitimate objective and proportionate requirement, and does not constitute discriminatory treatment.
36. In view of this, the CHR respectfully recommends a thorough discussion on cases where a difference of treatment based on a protected attribute, whether preferential or otherwise, is not unlawful. If needed, a provision on exceptional circumstances and the standards for allowing exceptions may be provided while ensuring that these exceptions are not too broad to the point of nullifying the very purpose of the law. One reference which can be used for this purpose is the “substantial differentiation” doctrine applied to

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<sup>38</sup> CHR, Position Paper issued on Feb. 11, 2015, at 9.

<sup>39</sup> UN Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, ¶ 13, available at <https://www.refworld.org/docid/453883fa8.html> (last accessed Feb. 20, 2020).

constitutional questions of equal protection of the law where the classification, to be reasonable, must conform to the following requirements: based upon substantial distinctions; germane to the purposes of the law; limited to existing conditions only; and apply equally to all members of the class.<sup>40</sup>

### **Creation of Non-Discrimination and Equality Committees (Section 10)**

37. It seems that the bill mandates the creation of a Committee in every public and private entity, as a measure to address discrimination. This may be superfluous if the agency already has a robust human resources team that effectively caters to grievances within the institution, including acts of discrimination. In fact, the creation of the Committee could be an added bureaucracy in finding administrative remedial measures when we have the CSC for government offices and the Labor Arbiters or NLRC for private entities.
38. CHR recommends, as an alternative that the first line of defense should still be the internal grievance mechanisms of the public or private entities. If the aggrieved party finds it necessary, then he or she should be able to file a complaint before an independent office that can decide on cases of discrimination as provided in this proposed law. The independent agency with quasi-judicial powers may be another independent agency or maybe the CHR, if the legislators wish to elevate the powers of the Commission, so it can properly hear and decide on cases of discrimination. This will ensure that there is a body that can perform appropriate remedial measures and possibly propose policy reform to avoid or prevent discrimination.
39. Notwithstanding our comments in nos. 37-38 above, we respectfully recommend to renaming the proposed Committee to “Equality and Non-Discrimination Committee.” To merely guarantee “equal opportunity” is narrower than guaranteeing equality as the latter encompasses participation on an equal basis with others and entails a recognition that positive action is a necessary constituent element of the right.<sup>41</sup> Thus, it is more appropriate to call this body, given its mandate, an “Equality Committee,” rather than merely an “Equal Opportunity Committee.”

### **Duty of the CHR (Section 11)**

40. The CHR is an independent constitutional body and an NHRI. It is established under the 1987 Constitution <sup>42</sup> and organized by virtue of Executive Order No. 163.<sup>43</sup> Through the enactment of laws, the mandate of the CHR has been further elaborated and expanded over the years.

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<sup>40</sup> Isagani Cruz, *Constitutional Law*, 2007, at 128.

<sup>41</sup> ERT, *Draft Law of the Republic of Armenia*, p.5, par.8.

<sup>42</sup> PHIL. CONST. art. XIII, sec. 18-19.

<sup>43</sup> Declaring the Effectivity of the Creation of the Commission on Human Rights as Provided for the 1987 Constitution, Providing Guidelines for the Operation Thereof, and for Other Purposes, Executive Order No. 163, series of 1987.

41. As an NHRI, the CHR's core mandate is to protect and promote human rights which include investigation (and complaint handling), human rights education, monitoring human rights situation, and making recommendations on law and policy reform. While it is part of the State apparatus and is funded by the State, the CHR operates and functions independently from the government.<sup>44</sup> By virtue of the language of the relevant provisions in the 1987 Constitution, it is not part of the executive, legislative, and judicial branches of government.
42. We have noted the various proposals on the duties of the CHR to ensure the effective implementation of the Comprehensive Anti-Discrimination Act and we appreciate the authors of the bills in recognizing our role in human rights protection and promotion. We defer to the wisdom of the legislature on which best mechanism to enact, however, we respectfully recommend that the language be adopted in the final version of the bill stay within the ambit of the CHR's constitutional mandates and the nature of the CHR as an NHRI. We, thus, submit the following comments on the proposed language of Section 11.
43. On the first paragraph which provides the duty "*to prevent or deter the commission of acts of discrimination*" – We welcome and accept this proposed mandate as the duty to protect and promote human rights, which includes the prevention or deterrence of human rights violations, is the core mandate of the institution. It should be emphasized, however, that this provision should not be used to justify nonfulfillment by other government instrumentalities of their similar duty to prevent or deter discriminatory acts.
44. On the first paragraph which provides the duty "*to assist, review, and recommend procedures for the resolution, settlement or prosecution of acts of discrimination*" – We welcome and accept this proposed mandate as it is congruent with the institution's constitutional mandates particularly on human rights promotion and policy advisory functions.
45. On sub-section (a) which provides the duty to "*ensure the creation of committees on non-discrimination and equal opportunity in all agencies, corporations, companies and educational institutions, whether private or public*" – We observe that this proposed duty may demand the exercise of powers that are best delegated to the executive branch of government which has administrative powers over government agencies in the executive branch and private entities. We submit our reservation on this particular proposal as it may go beyond the boundaries of the CHR's constitutional mandates. The CHR, however, may monitor the implementation of the law by agencies, corporations, organizations, etc. including the creation of the Non-Discrimination Committees and call them out if this particular duty is not being implemented.

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<sup>44</sup> Commission on Human Rights, Position Paper on Strengthening the Commission on Human Rights as a National Human Rights Institution Under the Constitution, issued on Apr. 2, 2018, at 2-3.

46. On sub-section (b) which provides the duty to “*monitor the implementation of this Act by agencies, corporations, companies and educational institutions, whether private or public*” – We welcome and accept this proposed mandate as it is congruent with the institution’s constitutional mandates as an independent monitoring body. However, we submit that for the CHR to be able to effectively perform its functions under this law, it would require expanding the physical reach of the office by increasing its field offices and officers. Right now, the Commission only has up to regional offices.
47. On sub-section (c) which provides the duty to “*establish guidelines and mechanisms that will facilitate access of discriminated persons to legal remedies under this Act and related laws, and enhance the protection and promotion of the rights of the Filipino people against discrimination*” – We welcome and accept this proposed mandate as it is congruent with the institution’s constitutional mandate to protect and promote human rights. However, we emphasize that this provision should not be used to justify nonfulfillment by other government instrumentalities, such as the Department of Justice (investigation and prosecution), the Public Attorney’s Office (provision of legal aid), and the courts, of their similar duty to protect and promote the right of all persons to be free from discrimination.
48. On sub-section (d) which provides the duty to “*coordinate with the Department of Education (DepEd) and the Commission on Higher Education (CHED) for the promotion of understanding and appreciation of cultural diversity, racial harmony and non-discrimination in schools and other learning modalities, and ensuring that books, reference materials and other learning resources used in education programs, including those that portray indigenous peoples or discuss religious practices, are free from discriminatory content*” – We welcome and accept this proposed mandate as it is congruent with the institution’s constitutional mandate particularly on human rights education. However, we believe that the primary duty to ensure books, reference materials and other learning materials are free from discriminatory content should be primarily lodged with the government instrumentalities exercising administrative powers over the domain of education, such as the Department of Education and the Commission on Higher Education. The role of the CHR, in this regard, should therefore be supplementary or complementary to these institutions.
49. On sub-section (e) which provides the duty to “*conduct consultations with indigenous peoples and religious organizations and other organizations representing vulnerable groups*” – We welcome and accept this proposed mandate as it is congruent with the institution’s constitutional mandate. To further improve this particular provision, we respectfully recommend that the duty to consult should not only be with organizations but also with individuals belonging to vulnerable and marginalized groups. Also, it should be emphasized that this provision should not prevent other government instrumentalities from exercising the same functions, e.g., consultations by the National Commission on Indigenous Peoples with indigenous

peoples/indigenous cultural communities, by the National Council on Disability Affairs with Persons with Disabilities, and by the National Commission of Senior Citizens with older persons, among others.

50. On sub-section (f) which provides the duty to “*assist in the filing of cases against individuals, agencies, institutions or establishments, whether private or public, that violate the provisions of this Act*” including: “(1) *provide legal assistance to victims of discrimination, such as through the preparation of necessary pleadings, referral letters and counseling; (2) forge Memoranda of Agreement with bar associations, nongovernmental organizations, law firms, and organizations that provide legal aid to victims of discrimination to ensure adequate and competent legal representation for the complainants; and (3) create an efficient system of case referrals to appropriate government departments or agencies*” – We welcome and accept this proposed mandate as it is congruent with the institution’s constitutional mandates

### **Other institutional mechanisms for the effective implementation of the law**

51. To provide stronger institutional mechanisms for the effective implementation of the law, we respectfully recommend the express elaboration of general duties of relevant national government agencies in a separate section of the law, e.g., the promulgation of necessary rules and regulations by the Department of Education, Commission on Higher Education, and Technical Education and Skills Development Authority, Department of Labor and Employment, Department of Health, Department of Trade and Industry, Department of the Interior and Local Government, and Department of Transportation, among others. In particular, considering the importance of avoiding discrimination in the workplace, the DOLE should receive prominent mention alongside CHED and DepEd and take the lead in formulating rules and regulations aimed at reducing discrimination against minority/vulnerable groups.
52. We also respectfully recommend the express elaboration of the duty of the Bangsamoro Government to establish its institutional mechanism to protect and promote the right of all persons against discrimination on the basis of the protected attributes. While the CHR, as a national institution, has the power to operate within the whole country, in practice, it has operated in the (formerly) Autonomous Region in Muslim Mindanao with due regard to its relative autonomy as a region. At present, the CHR does not run an office inside the Bangsamoro Autonomous Region in Muslim Mindanao but it had maintained a harmonious working relationship with its former counterpart – the ARMM Regional Human Rights Commission.
53. In some existing laws where the CHR is specifically mandated to perform special functions, internal organizational arrangements are provided to facilitate the implementation of these special functions, i.e., under the Mental

Health Act, the CHR is tasked to appoint a focal commissioner;<sup>45</sup> under the Magna Carta of Women, the CHR is tasked to designate one commissioner and/or its Women’s Human Rights Center;<sup>46</sup> under the Juvenile Justice and Welfare Act of 2006, the CHR’s already existing Child Rights Center is recognized;<sup>47</sup> and under the Special Protection of Children in Situations of Armed Conflict Act, the CHR is tasked to designate investigators for cases involving the law.<sup>48</sup> These provisions help the CHR in justifying its requests for additional resources, including personnel, to effectively implement its mandates. Thus, it is strongly recommended that a similar provision is included in the law. The following language may be adopted for this purpose:

*“The CHR, consistent with its mandate under this Act, shall designate a focal commissioner and/or create an Anti-Discrimination Center/Office to be primarily responsible for formulating and implementing programs and activities relating to the right of all persons against discrimination, including the investigation and handling of complaints of violations of this Act.”*

### **Administrative Proceedings and Sanctions (Section 16)**

54. We welcome and accept the proposed mandate for the CHR under Section 16, however, it must be noted that the proposed mandate appears to grant the CHR with a quasi-judicial power which we recommend to be explicitly stated to avoid doubts as to whether the grant of new power - a quasi-judicial power - is within what the drafters of the 1987 Constitution envisioned when it included Article XIII, Section 18(11) which states that the Commission may “perform such other duties and functions as may be provided by law.”

### **Reparation to Victims (Section 17)**

55. We recommend the inclusion of “guarantees of non-repetition” and “public apologies” in the available remedies for victims of discrimination, consistent with the CESCR General Comment No. 20,<sup>49</sup> thus, sub-section (a) and (b) of Section 17:

*“Reparation to Victims. - ...*

*(a) The court, administrative agency, or quasi-judicial body shall follow the principles relating to the reparations to, or in respect of victims, including restitution, compensation, rehabilitation, **guarantees of non-repetition, and public apologies.** In their decisions, the court, administrative agency, or quasi-judicial*

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<sup>45</sup> Mental Health Act, sec. 31(b).

<sup>46</sup> The Magna Carta of Women, sec. 39(b).

<sup>47</sup> Juvenile Justice and Welfare Act of 2006, sec. 11.

<sup>48</sup> Special Protection of Children in Situations of Armed Conflict Act, sec. 17.

<sup>49</sup> CESCR General Comment No. 20, par. 40.

*body may, either upon request or on their own volition, in exceptional circumstances, determine the scope and extent of any damage, loss or injury to the victims, stating therein the principles on which they are acting;*

*(b) The court, administrative agency, or quasi-judicial body may make an order directly against a convicted person, specifying appropriate reparation to, or in respect of, victims, including restitution, compensation, rehabilitation, **guarantees of non-repetition, and public apologies**; and...*"

## **Burden of Proof**

56. We respectfully recommend the inclusion of a provision on the reversal of the burden of proof in adjudicating civil and/or administrative liability. As stated in the CESCR General Comment No. 20: "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."<sup>50</sup> In other words, where normally the burden to prove is on the person alleging that there was harm done, in cases of discrimination, there should be a reversal of this burden, such that it will be on the respondent in a discrimination case to prove that there was no discriminatory act done. The following language may be adopted for this purpose:

***"Section \_\_. Burden of Proof. – When persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (prima facie case), it shall be for the respondent to prove that there has been no breach of the right to equality. This rule shall apply to civil and administrative proceedings."***

## **Implementing Rules and Regulations (Section 19)**

57. We recommend that a lead agency to draft the IRR be identified and expressly provided. Should the legislature assign this mandate to the CHR, we respectfully welcome and accept this duty.
58. To end, the CHR, fully committed to ensuring the respect, protection, and fulfillment of the human rights of all persons, including the right to equality and against discrimination, expresses its full support to the enactment of a comprehensive anti-discrimination law that will give "flesh and teeth" to the constitutional guarantee of equality and non-discrimination.

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<sup>50</sup> CESCR General Comment No. 20, par. 40.

**ISSUED** this 19<sup>th</sup> day of October 2020, Quezon City, Philippines.



**JOSE LUIS MARTIN C. GASCON**  
Chairperson



**KAREN S. GOMEZ DUMPIT**  
Commissioner



**GWENDOLYN LL. PIMENTEL-GANA**  
Commissioner



**LEAH C. TANODRA-ARMAMENTO**  
Commissioner

**ROBERTO EUGENIO T. CADIZ**  
Commissioner