

## 4. CONCLUSIONS AND RECOMMENDATIONS

### 4.1 Conclusions

The study of the prevailing patterns of inequality and the legal and policy frameworks in Malaysia has identified several **cross-cutting issues** specific to the Malaysian context: The first is the pervasive **importance of ethno-religious identity** which impacts upon all areas of life, not least as a result of the close alignment between race, religion and politics. The second is the role played by 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. Furthermore, **Syariah law**, although enacted at state rather than federal level, creating different treatment of Muslims living in different Malaysian states, on the whole exerts a conservative influence on social attitudes and practices, particularly on the role of women in society and in the family, the freedom to choose one's sexual partners, or the upbringing of children. Conservative attitudes provide a context in which discrimination against non-conforming individuals occurs in all areas of life. The third cross-cutting issue is the determinative **role of poverty** as a factor reinforcing or underlying the experience of 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 power position. For example, poverty among migrant workers is both a cause and a consequence of their disadvantaged, powerless status. Finally, the patterns of **political discrimination** typical of Malaysia reveal a strong democratic deficit that sets this country apart from societies in which equality is integral to a democratic political framework.

The main **patterns of inequality and discrimination** described in this report affect large sections of the population in Malaysia, defined by characteristics such as race and ethnicity, indigenous status, gender, religion or belief, sexual orientation, gender identity, health status, age, disability, citizenship and political opinion. The inadequate protection against discrimination in Malaysia is compounded by the existence of many discriminatory provisions within the country's legislation.

Some patterns of discrimination on the grounds of race and ethnicity which are endemic to Malaysia are interwoven with, or arise from controversial affirmative action policies developed with the purpose to empower the Ma-

lay and certain natives, but having long outlived their justification. Racially discriminatory practices have been observed in a number of areas, in particular education, employment, housing, and political participation. Articles 153 and 89 of the Malaysian Constitution establishing a privileged position for the Bumiputera fall short of the international law standards for legitimate positive action established under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). These provisions are not time-limited or function-limited. Continuing favourable treatment of the Bumiputera under these provisions means that race continues to be a key determinant of a person's life experiences and of disadvantage in Malaysian society.

Under Malaysia's Constitution, indigenous people are not only protected against discrimination, but are also accorded the special privileges of Article 153. In spite of this, indigenous people continue to experience disadvantage and discrimination across the full spectrum of economic, social, cultural, civil and political rights. Discrimination against indigenous groups persists in the areas of land entitlement, personal security, education, citizenship and birth registration, employment, health, political participation, and freedom of religion. The most important conclusion to be drawn from the research for this report regarding the discrimination affecting indigenous persons is the interconnectedness of their experiences in different areas of life, underpinned by issues of indigenous peoples' land rights.

Gender discrimination is widespread in respect to marriage and family relations, personal safety and security, education, employment, health, political participation, matters of criminal law, freedom of movement and expression, and citizenship rights. Discrimination against rural and indigenous women is particularly concerning. Despite Malaysia's accession to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995, the Committee on the Elimination of Discrimination against Women and the Gender Gap Index have highlighted that there is still a lot of progress to be made before Malaysia can confidently state compliance with its obligations under the Convention. Traditional customs and attitudes are partly responsible for maintaining a disadvantaged position in society for women in general. Gender-based violence, including domestic violence, rape, sexual harassment, and trafficking remains widespread, and female genital mutilation may also be found. Despite significant progress regarding gender equality in education, some categories of women have been left behind. Indigenous

women, for example, continue to face disadvantage in accessing education. The progress made with regard to access to education has not translated into improved equality for women in employment. There continue to be low levels of female participation in the labour force, particularly in high income and decision-making roles. Women face discrimination with regard to promotions and salary, and also in relation to health and safety in the workplace. Women also face unequal access to healthcare. The unequal participation of women in the political process serves to sustain their unequal position in other areas of life. Women are discriminated against in their ability to pass on citizenship and residence rights to their children and spouses.

Particular challenges are faced by Muslim women and women who live and work in the rural areas of the country. As a result of Syariah law in Malaysia, Muslim women face multiple discrimination in some areas of life on the combined grounds of gender and religion. Such discrimination is most evident in the context of marriage and family life, which for Muslim women are governed by the provisions of Islamic family law. These provisions in their present form, and in the absence of long due reform, serve to sustain the subordinate position of women within the Muslim family. Further, many provisions of Syariah criminal law discriminate against Muslim women on the ground of gender, in relation to the particular crimes for which a Muslim woman may be punished and the form of punishment to which she may be subjected. Finally, the freedom of Muslim women to move around and dress as they choose is also restricted by locally imposed Syariah laws.

Inequality based on religion or belief is another big issue for Malaysian society. This is a complex area ranging from discriminatory limitations of the freedom to manifest, practise and change one's religion, to financial assistance for religious institutions and unequal access to justice under Syariah law. Article 3(1) of the Constitution of Malaysia places Islam in a privileged position, which is reflected in other provisions of the Constitution. Despite the dominance of Islam in Malaysia, there is discrimination not only against Hindus, Christians and other non-Muslims, but also against Malay Muslims, who are discriminated in the enjoyment of certain human rights. For example, discrimination on the basis of religion or belief is practiced through restrictions of expression. Restrictions have also been placed on the religious freedoms of adherents to minority Islam religions, which are considered to be "threatening" to the position of Islam, in order to protect the integrity of the official religion. Non-Muslims are particularly disadvantaged with respect to the financ-

ing of religious schools and religious education. Given the strong relationship between race and religion in Malaysia, such actions further compound the challenges identified above in relation to race discrimination. On the other hand, Muslims face restrictions which do not apply to other groups, including, most notably, their right to change religion and their right to engage in sexual relationships. Finally, there is belief-based discrimination against all Muslims who express beliefs not approved by official interpreters of Islam in respect of their right to participate in cultural life on an equal basis. Malaysia has therefore been unable to reconcile the position of Islam as the official religion with its obligation to protect the right to equality for members of all religions.

Malaysia was one of the 19 states which in June 2011 voted against the adoption of the UN Human Rights Council resolution condemning human rights violations of LGBTI persons and requesting the High Commissioner on Human Rights to conduct a study on violations of human rights suffered by persons of different sexual orientation or gender identity. This position reflects the lack of recognition of the equal rights of LGBTI persons in Malaysia. The most severe form of discrimination based on sexual orientation in Malaysia is the criminalisation of same-sex sexual conduct. The offences found in both civil and Syariah law create an environment in which the rights of LGBTI persons are violated systematically. In a society that persecutes and excludes them, members of the LGBTI community suffer discriminatory ill-treatment and restrictions on freedom of expression, as well as the denial of equal enjoyment of their economic, social and cultural rights. Trans persons face daunting problems related to their identity documents. Difficulties faced by trans persons in obtaining official documents recognizing their gender identity create a range of obstacles to their full participation in society. Restrictions on the discussion of LGBTI rights and a lack of statistical evidence combine to present significant hurdles for those wishing to challenge discrimination on the basis of sexual orientation and gender identity. An explicit commitment to the protection of such persons against discrimination is absolutely necessary if the problems described above are to be effectively addressed.

Discrimination against persons living with HIV/AIDS has not been successfully eliminated from Malaysian life. The evidence suggests that the impact of the HIV/AIDS epidemic in Malaysia is worsened by the discriminatory attitudes and actions taken towards persons living with HIV/AIDS, which hinders access to effective treatment, and can lead to economic and social isolation.

Discrimination against children takes the forms of violence and ill-treatment, as well as inadequate access to justice, and is most concerning in respect to particularly vulnerable groups of children, including indigenous and migrant children. Malaysia's ratification of the Convention on the Rights of the Child and its enactment of the Child Act 2001 has not been sufficient to eradicate patterns of discrimination against children in Malaysia. Child labour, child marriages, sexual exploitation and trafficking have been documented. The provisions of the Evidence Act 1950 are discriminatory against children on the ground of their age by failing to attach due weight to the testimony of children.

Discrimination against persons with disabilities is far from being relegated to the past, despite the state's obligation under the Convention on the Rights of Persons with Disabilities (CRPD), the strong performance of the economy and the availability of resources. The absence of data relating to the participation of persons with disabilities in Malaysia in areas of economic, social, political or cultural life has made it difficult to identify the patterns of discrimination which are understood to be faced by this disadvantaged group. The authors' research has, however, identified patterns of discrimination faced by persons with disabilities in the fields of education and employment. Children with disabilities are often segregated and taught in separate special classes within mainstream schools. Further, in the absence of official statistics, field research has uncovered testamentary evidence of the discrimination faced by persons with disabilities in the field of employment and the accessibility of the built environment. The failure of the government to collect data regarding the participation of persons with disabilities in various areas of life represents, in and of itself, a denial of equality and a perpetuation of disadvantage for disabled persons, as without such evidence, it is very difficult to advocate or plan for improvements.

Non-citizens suffer discrimination in respect to their fundamental rights, the patterns of which include violence, discriminatory detention and deportation, lack of access to justice, deprivation of family life, limited or non-existent health care, education and housing. Discrimination against non-citizens affects several categories within the non-citizen population, including asylum-seekers and refugees, who experience discrimination and disadvantage in the process of refugee status determination and employment, as well as migrant workers, of whom domestic workers are a particularly vulnerable section. Non-citizens are not covered by those provisions in the Constitution which

enshrine the rights to equality and non-discrimination. This unprotected status is reflected throughout Malaysia's legal framework, which does not contain the legal recognition of refugees, does not accord migrant workers key rights under employment legislation, and, through its immigration rules, creates a situation of extreme vulnerability amongst migrant workers. As a result of this discrimination in the legal system, migrant workers are exposed to discrimination in all areas of life. Asylum seekers and others found to have committed immigration offences are subject to detention in appalling conditions. Some migrant workers are vulnerable to inhuman and degrading treatment owing to their situation of bonded labour. All non-citizens face insurmountable hurdles to accessing economic and social rights, and significant restrictions on their ability to enjoy a family life. Finally, their lack of rights under the law means that non-citizens are deprived of any meaningful redress.

The picture of inequalities in Malaysia would be strongly distorted without an understanding of discrimination based on political opinion. The main patterns of politically-based discrimination are related to voting rights and other political participation, arbitrary detention on political grounds, freedom of association and assembly, and freedom of expression. This report has revealed the extreme lengths to which the government will go in order to suppress opinions which are seen as "opposing" it, or which are viewed as "seditious", through raising obstacles to equal political participation, using arbitrary detention, and curtailing freedom of association and assembly. Domestic legislation, such as the Police Act 1967, has been enforced in a discriminatory manner so as to prevent public assemblies by political opponents of the government. In addition to the repression of freedom of association and assembly, the Malaysian government has also used the Internal Security Act to detain political opponents in a discriminatory manner. The Sedition Act, the Official Secrets Act and the Printing Press and Publication Acts have been used to silence, intimidate and punish critics of the government. Finally, opposition parties have been unable to participate in the political process on an equal basis with the ruling party due to a series of in-built and administrative biases in the Malaysian electoral system, and due to the discriminatory allocation of funds to elected representatives which favours members of the BN coalition. Such discriminatory practices on the grounds of political opinion present a fundamental challenge to principles of both equality and democracy, and also create an environment in which it is difficult to challenge the status quo and undo the disadvantage faced not only by political opponents but other groups discussed in this report.

Other patterns of discrimination and disadvantage that have not been well studied in Malaysia and have been only briefly referenced in this report include discrimination of grounds of age, place of residence, and occupation.

Malaysia has a relatively **weak legal and policy framework related to equality**. One aspect of this weakness is its poor participation in the major United Nations treaties relevant to equality rights; it is a party to only three of the major human rights treaties: CEDAW, CRC, and CRPD. Malaysia has not yet joined crucial international human rights treaties and, most significantly, is not yet a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, ICERD, the Convention relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons, and the ILO Convention No. 169 on Indigenous and Tribal Peoples, among others. Further, Malaysia's participation in CEDAW, CRC and CRPD is subject to significant declarations and reservations. It is also unfortunate that Malaysia has not signed up to the Optional Protocols to CEDAW and CRPD to which it is a party, making it impossible for persons under its jurisdiction to file individual complaints and seek remedy via the relevant complaint mechanisms. A further limitation is that the treaties to which Malaysia is a party have not been broadly understood to have direct application but rather must be implemented through domestic legislation. That said, the courts have recently created a precedent of direct application of international treaties to which Malaysia is a party in reaching decisions in fundamental rights cases, as demonstrated in the pregnancy discrimination case of *Noorfadilla* in which CEDAW has been applied.

The forthcoming ASEAN Declaration on Human Rights could prove to be a pivotal step forward in the promotion and protection of human rights in the region. Malaysia should ratify any future regional treaties and protocols which serve to enhance the protection of the right to equality, and take an active part in strengthening the regional human rights system at the ASEAN level.

The national legal framework related to equality includes protection provisions in the Federal Constitution, particularly Articles 8, 12 and 136, as well as affirmative action provisions. Article 8 forms the cornerstone of the constitutional protection of the rights to equality and non-discrimination, with Article 8(1) guaranteeing equality before the law and equal protection of the law, and Article 8(2) prohibiting discrimination against citizens on the grounds of religion, race, descent, place of birth or gender. Article 12 expands

the protection from discrimination in relation to certain protected grounds to the area of education. Article 136 provides protection from differential treatment within state employment on the ground of race. While the Federal Constitution contains some protection of the right to equality, 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 means that matters of 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. Among the strongest causes for concern is the continued existence of Articles 89 and 153 creating ethnic preferences which, failing to meet the criteria for positive action, amount to racial discrimination.

Malaysia **lacks comprehensive equality legislation** and equality enforcement bodies across all grounds. Given the limitations of the constitutional equality protections, the lack of legislation prohibiting all forms of discrimination by both the state and private individuals represents a failure to meet obligations under CEDAW, CRPD, CRC and international customary law.

The only specific equality and anti-discrimination Act in Malaysia is the Persons with Disabilities Act 2008. This Act represents a positive step towards the protection of the rights of persons with disabilities. Regrettably, however, the Persons with Disabilities Act does not include operative provisions setting out the rights to equality and non-discrimination of persons with disabilities, but it does incorporate some of Malaysia's obligations under CRPD in a manner which arguably serves to overcome some elements of the disadvantage faced by persons with disabilities. In order for this Act to comply fully with Malaysia's obligations under the Convention, it will require significant amendment.

Some non-discrimination provisions are found in legislation governing other legal fields: criminal law, family law, and law related to domestic violence. However, this protection is rarely rights based, and is very limited, patchy and inconsistent. There is no prohibition of discrimination on any ground in legislation constituting the fields of employment law, education law or health law in Malaysia. Protection from discrimination in these fields of law is thus possible only on the basis of the Constitution and international treaties. Overall, the normative framework is not sufficient to meet Malaysia's obligations under international human rights law.

Malaysian criminal law endeavours to provide protection for women from gender-based violence which has been defined by the Committee on the Elimination of Discrimination against Women as a form of discrimination. It does not, however, provide adequate protection for married women as they are not covered by the anti-rape provisions set out in the Malaysian Penal Code. In addition, the definition of rape in the Penal Code is not sufficiently broad to cover all forms of sexual assault and therefore leaves women unprotected from certain forms of gender-based violence. The protection from gender based violence is confounded by the provisions of the Evidence Act 1950 that limit protection offered to women under the Penal Code as a result of the restrictions which it imposes on evidence at trials for rape. Further, the evidential requirements relating to rape in Syariah law fail to give adequate protection to Muslim women who have been raped. On the positive side, the Evidence Act 1950 goes some way towards reasonable accommodation for persons with disabilities. The Anti-Trafficking in Persons Act 2007 and its problematic amendment of 2010 contain a number of serious weaknesses, including an inadequate definition of human trafficking that does not comply with international criminal law, and the conflation of trafficking and smuggling in a way that deprives victims of smuggling from any protection rights, even if they are refugees. Malaysia ought to revise its anti-smuggling laws to protect undocumented migrants from discriminatory ill-treatment.

Various provisions within Malaysian family law legislation serve to protect the rights to equality and non-discrimination. While falling short of implementing the full suite of obligations assumed by Malaysia under the CRC, the Child Act 2001 does seek to protect children from various forms of violence, ill-treatment and abuse which they suffer as a result of their age. The Guardianship of Infants Act 1961, after amendment by the Guardianship of Infants (Amendments) Act 1999, addresses the issue of potential inequality of parental rights by granting equal guardianship rights to mothers and fathers. Similar gender equality provisions are found in the Inheritance (Family Provision) Act 1971 and the Distribution Act 1958 which have both been made gender-neutral. Finally, the Law Reform (Marriage and Divorce) Act 1976 criminalises the act of compelling an individual to marry against their will. While each of these provisions is a small step towards greater equality for children and women within the realm of family law, the piecemeal and scattered approach to the protection of the rights to equality and non-discrimination is unfortunate.

Legislation addressing specific violations of the equal right to personal security without any discrimination includes the Domestic Violence Act 1994 and the Domestic Violence (Amendment) Act 2012. Whereas these statutes address significant issues of gender-based violence in Malaysia, they have been criticised both in relation to their content and their enforcement, which is viewed as inadequate.

Employment law also offers some protection. The Employment Act specifically states that nothing in the employment contract shall restrict the right of a worker to join, participate in or organise a trade union. Both the Employment Act 1955 and the Industrial Relations Act cover migrant workers. Section 60L of the Employment Act makes it an offence for an employer to practice any form of discrimination between migrant workers and local workers. Migrant workers should receive the same rights and protections as local workers. Notwithstanding the lack of a constitutional guarantee in this regard, the Trade Union Act permits migrant workers to become members of trade unions and take part in trade union activities, but they cannot hold executive positions. However, given the patterns of discrimination against migrants set out in Part 2 of this report, it is clear that these provisions are not being adequately implemented.

National policies impacting on discrimination and inequality include policies related to the economy, the national culture, women, social welfare, the elderly, HIV/AIDS in the workplace, and social policies. But despite the written policies, Malaysia has a rather poor record of implementation and enforcement of equality rights, including in respect to access to justice, administrative mechanisms, legal aid, and remedies and sanctions. Jurisprudence on equality and non-discrimination is weak, as is the implementation of existing law and policies. Despite the necessity of effective legal redress and remedies in order to ensure that the rights to equality and non-discrimination are effective, the enforcement mechanisms available to victims of discrimination in Malaysia are inadequate. In the absence of a single equality body with responsibility for overseeing the enforcement of the rights to equality and non-discrimination set out in the Federal Constitution, the Human Rights Commission of Malaysia arguably has a role to play in this regard. This body has, however, been criticised for its lack of independence and effectiveness. Further, victims of discrimination face additional obstacles in seeking legal redress and remedies as a result of legal aid provision being unavailable for claims of discrimination, a very nar-

row interpretation of the right to equality by the Federal Court and Court of Appeal, and a lack of sanctions which can be imposed upon discriminators.

## 4.2 Recommendations

In the light of the foregoing conclusions, The Equal Rights Trust and Tenaganita offer to the government of Malaysia a set of recommendations, whose purpose is (i) to strengthen the protection from discrimination and the entire legal and policy framework in respect to equality in Malaysia; and (ii) to enable Malaysia to meet its obligations under international law to respect, protect and fulfil the rights to non-discrimination and equality. All recommendations are based on international law related to equality, and on the Declaration of Principles on Equality, a document of international best practice which sums up the most essential elements of international law related to equality.

**Central among the recommendations are those related to (i) the need to amend discriminatory provisions, particularly those related to “positive action” favouring the Bumiputera, and (ii) the need to develop comprehensive equality legislation reflecting the current international understanding of the principles of equality.**

The recommendations to the Government of Malaysia are presented below:

### **(1) Strengthening of International Commitments**

(1)(a) Malaysia is urged to join the following international treaties and other instruments which are relevant to the rights to equality and non-discrimination:

#### ***United Nations Instruments:***

- Convention relating to the Status of Refugees (1951);
- Convention relating to the Status of Stateless Persons (1954);
- International Convention on the Elimination of All Forms of Racial Discrimination (1965), additionally making a Declaration under its Article 14 allowing individual complaints;
- UNESCO Convention against Discrimination in Education (1960);
- International Covenant on Civil and Political Rights (1966) and Optional Protocol I to the International Covenant on Civil and Political Rights (1976);

- International Covenant on Economic, Social and Cultural Rights (1966) and Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990);
- Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (1999);
- International Convention for the Protection of All Persons from Enforced Disappearances (2006);
- Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006);
- Optional Protocol III to the Convention on the Rights of the Child (2011).

***International Labour Organisation Conventions:***

- ILO Convention No. 111 on Discrimination in Employment and Occupation (1958);
- ILO Convention No. 169 on Indigenous and Tribal Peoples (1989);
- ILO Convention No. 189 on Domestic Workers (2011).

(1)(b) Malaysia is urged to review and remove its reservations to the Convention on the Elimination of all forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

**(2) Repeal of Discriminatory Legislation and Policies**

(2)(a) There are a significant number of directly discriminatory provisions in Malaysian legislation, and a number which – while they do not appear to discriminate directly – are either indirectly discriminatory or open to discriminatory application. The existence of this legislation is in breach of Malaysia's international human rights obligation to respect the right to be free from discrimination. Moreover, the existence of such legislation can serve to legitimise stigma and stereotyping of vulnerable groups, which can have direct im-

pact in perpetuating the patterns of discrimination identified in Part 2 above. Malaysia is urged to undertake a review of all federal and state legislation and policies in order to: (i) assess compatibility with the right to equality; and (ii) amend, and where necessary, abolish existing laws, regulations, and policies that conflict or are incompatible with the right to equality. This process should include the repeal of all discriminatory laws, provisions and policies. In particular, the following discriminatory provisions should be repealed or amended to remove discriminatory elements:

***Constitutional Provisions:***

- All provisions in the Federal Constitution which offer protection of the rights of only citizens rather than of the rights of all persons within the territory or under the jurisdiction of Malaysia, including Articles 5(4), 8(2), 9, 10 and 12(1);
- Article 9, which is discriminatory on the grounds of place of residence;
- Article 10, which is discriminatory on the grounds of political opinion;
- Article 11, which is discriminatory on the ground of religion;
- Articles 14, 15, 24 and 26, which discriminate against women in relation to citizenship rights;
- Articles 89, 153 and 161 which discriminate on the basis of race or ethnicity.

(2)(b) Malaysia is urged to amend its Syariah law legislation, fatwas and policies in order to remove those aspects which are discriminatory, particularly on the grounds of gender, sexual orientation and gender identity. Malaysia is urged to adopt progressive interpretations of Syariah law which respect the right to equality. In particular, the following discriminatory provisions should be amended or repealed:

***Syariah Law:***

- Syariah criminal legislation, including sections 23, 25, 26, 27, 28, 41 and 56 of the Syariah Criminal Offences (Federal Territories) Act 1997 and the equivalent criminal legislation in all other states;
- Syariah family law, including sections 8, 10, 13, 14, 23, 47, 49, 50, 52, 59, 83, 84 and 88 of the Islamic Family Law (Federal Territories) Act 1984 and the equivalent family law legislation in all other states.

(2)(c) Malaysia is urged to amend its criminal law to remove discriminatory provisions, in particular:

***Criminal Law:***

- Sections 376 and 377 of the Penal Code regarding whipping;
- Sections 375 and 375A of the Penal Code regarding marital rape;
- Section 377A of the Penal Code regarding “carnal intercourse against the order of nature”;
- Section 21 of the Minor Offences Act 1955 which should not be used to prosecute transgender individuals or anyone else for simply expressing their gender identity;
- Section 133A of the Evidence Act 1950 regarding evidence provided to court by children;
- Section 146A of the Evidence Act 1950 regarding evidence during a rape trial.

(2)(d) Malaysia is urged to amend its education law to remove discriminatory provisions, in particular:

***Education Law:***

- Those provisions of the Education Act 1996 which privilege Malay Muslim students over students belonging to other ethnic groups and religions, for example sections 50 and 52;
- The Education (Special Education) Regulations) 1997 should be amended to remove the distinction between “educable” and “uneducable” children with disabilities;
- Any provisions and policies which prevent non-citizen children from attending primary and/or secondary school.

(2)(e) Malaysia is urged to amend its employment law to remove discriminatory provisions, in particular:

***Employment Law:***

- The protections under the Employment Act 1955 must be extended to all workers, including domestic workers, as a bare minimum level of protection which can be improved upon but not reduced in employment contracts;

- Sections 34 and 35 of the Employment 1955, which are discriminatory against women;
- The Workmen's Compensation Act 1952 should be amended to remove provisions which are discriminatory against women, and to include protection for all migrant workers.

(2)(f) Malaysia is urged to amend its family law to remove discriminatory provisions, in particular:

***Family Law:***

Sections 10, 49 and 77 of the Law Reform (Marriage and Divorce) Act 1976, which are discriminatory on the ground of gender.

(2)(g) Malaysia is urged to amend its nationality and immigration law to remove discriminatory provisions, in particular:

***Nationality and Immigration Law:***

- Section 12 of Immigration Act 1959/1963 should be amended to allow women equal rights to endorse the name of their spouse and children on their passport;
- The Immigration Regulations 1963 should be amended to ensure that a foreign husband of a Malaysian woman is entitled to a dependant's pass on an equal basis as a foreign wife of a Malaysian man.

(2)(h) Malaysia is urged to amend its tax law to remove discriminatory provisions, in particular:

***Tax Law:***

- Section 47(1) of the Income Tax Act 1978 should be amended so as to remove discrimination on ground of gender;
- Those provisions which permit Muslims to benefit from tax deductions in relation to the religious taxes which they pay whilst members of other religions are entitled to no such deductions.

(2)(i) Malaysia is urged to review its **economic policies** to ensure that any privileges which are granted on the ground of race and ethnicity, or any other protected characteristic, with the intention of overcoming past disadvantage, are kept under regular review so as to ensure the continued legitimacy of purpose and proportionality.

### **(3) Laws Protecting the Rights to Equality and Non-discrimination**

(3)(a) Malaysia is urged to adopt appropriate constitutional and legislative measures for the implementation of the right to equality. Such measures should ensure comprehensive protection across all grounds of discrimination and in all areas of activity regulated by law. The constitutional protections of the rights to equality and non-discrimination are currently severely limited. It is therefore recommended to **amend the Federal Constitution** in order for Malaysia to comply fully with its international human rights obligations. Such amendments should include:

- (i) ensuring that both citizens and non-citizens benefit from the protections of the rights to equality and non-discrimination, through amendment of Article 8(2) of the Federal Constitution, among others;
- (ii) broadening the list of grounds of discrimination found in Articles 8 and 12 so as to include all grounds referenced in Principle 5 of the Declaration of Principles on Equality – including political opinion, sexual orientation, gender identity, age, disability, health status and nationality; and allow for a test for the inclusion of additional grounds, so that such grounds could be incorporated as necessary over time without requiring constitutional amendments;
- (iii) providing a clearer definition of what behaviours are prohibited as discrimination;
- (iv) extending the protection of the rights to equality and non-discrimination to all areas of activity regulated by law;
- (v) ensuring that the rights to equality and non-discrimination are enjoyed in both the public and private sector;
- (vi) removing the exclusion of personal laws from the prohibition of discrimination;

(vii) ensuring that any provisions permitting positive action in order to overcome past disadvantage and to accelerate the progress towards equality of particular groups meet criteria established in international law and best practice, such as time limits and proportionality;

(viii) removing from Article 8(5) of the Federal Constitution the list of exceptions to the prohibition on discrimination or ensuring that any exceptions to the principle of equality are only permitted to the extent that they accord with strictly defined criteria, and are justified as a proportionate means of achieving a legitimate objective;

(ix) removing the provision by the state of preferential treatment in the form of establishing and maintaining Islamic educational institutions.

(3)(b) It is further recommended that Malaysia should also consider strengthening the existing constitutional protections of the rights to equality and non-discrimination through the **enactment of comprehensive equality legislation**.

(3)(c) The enactment of comprehensive equality legislation should give effect to the principles of equality under international law and ensure the expanded constitutional protection against discrimination and the promotion of the right to equality. Equality legislation should aim at eliminating direct and indirect discrimination and harassment in all areas of life regulated by law; cover all prohibited grounds listed in Principle 5 of the Declaration of Principles on Equality; and attribute obligations to public and private actors, including in relation to the promotion of substantive equality and the collection of data relevant to equality.

(3)(d) Comprehensive equality legislation could either take the form of:

(i) A single Equality Act, which offers consistent protection against discrimination across all grounds of discrimination and in all areas of life regulated by law; or

(ii) A coherent system of Acts and provisions in other legislation which together address all grounds of discrimination in all areas of life regulated by law.

(3)(e) Members of groups who may be distinguished by one or more of the prohibited grounds should be given the opportunity to participate in the decision-making processes which lead to the adoption of such legislative measures.

(3)(f) It is recommended that a thorough review of the Persons with Disabilities Act 2008 is carried out in order to bring it into line with Malaysia's obligations under CRPD. Most importantly, the rights enshrined in the Act must be made enforceable, either through the civil courts, or through an enforcement mechanism designed for this specific purpose.

(3)(g) In order to ensure that the right to equality is effective in Malaysia, the government is urged to consider taking positive action, which includes a range of legislative, administrative and policy measures, in order to overcome past disadvantage and to accelerate progress towards equality of particular groups, including women and persons with disabilities.

#### **(4) Ensuring Consistency between Syariah and Secular Law Provisions**

Malaysia is urged to take all necessary steps to remove discriminatory effects of the legal dualism arising from the co-existence and unclear relationship between secular and Syariah legislation at the national as well as the state level. It must be ensured that, especially in family and religious matters, for which Muslims are subject to Syariah law and to the jurisdiction of Syariah courts and for which non-Muslims are subject to the provisions of secular law and to the jurisdiction of the secular courts, these two systems apply in a way that does not discriminate on any prohibited ground. Malaysia is urged to review in particular the relationship between the two systems so as to address legal disputes between non-Muslim mothers and fathers who have converted to Islam.

#### **(5) Education on Equality**

Malaysia is urged to take action to raise public awareness about equality, and to ensure that all educational establishments, including private, religious and military schools, provide suitable education on equality as a fundamental right. Such action is particularly necessary in order to modify social and cultural patterns of conduct and to eliminate prejudices and customary practices which are based on the idea of the inferiority or superiority of one group within society over another.

#### **(6) Enforcement**

(6)(a) Malaysia is urged to ensure that persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy.

They must have effective access to judicial and administrative procedures, and appropriate legal aid for this purpose.

(6)(b) Malaysia is urged to introduce legislation or other measures to protect individuals from victimisation, defined as any adverse treatment or consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions.

(6)(c) Malaysia is urged to ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.

(6)(d) Malaysia is urged to adapt legal rules related to evidence and proof in order to ensure that victims of discrimination are not unduly inhibited from obtaining redress. In particular, rules on evidence and proof in civil proceedings should be adapted to ensure that 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, it shall be for the respondent to prove that there has been no breach of the right of equality.

(6)(e) Malaysia must ensure that sanctions for breach of the right to equality are effective, proportionate and dissuasive. Appropriate remedies should include reparations for material and non-material damages. Sanctions should also include the elimination of discriminatory practices and the implementation of structural, institutional, organisational or policy changes that are necessary for the realisation of the right to equality.

(6)(f) Malaysia is urged to establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. Such bodies must have independent status and competences, in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.

(6)(g) Malaysia is urged to establish a focal point within government to coordinate policy and action relating to the right to equality.

### **(7) Duty to Gather Information**

During the research for this report, it has been established that there is a significant lack of information, including statistics available in relation to key indicators of equality in Malaysia. Malaysia is therefore urged to collect and publicise information, including relevant statistical data, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality. Wherever statistics are collected in relation to key indicators of equality, they should be disaggregated in order to demonstrate the different experiences of disadvantaged groups within Malaysian society. Malaysia should further ensure that such information is not used in a manner that violates human rights.

### **(8) Dissemination of Information**

Laws and policies adopted to give effect to the right to equality must be accessible to all persons. Malaysia must take steps to ensure that all such laws and policies are brought to the attention of all persons who may be concerned by all appropriate means.

### **(9) Prohibition of Regressive Interpretation**

In adopting and implementing laws and policies to promote equality, Malaysia should not allow any regression from the level of protection against discrimination that has already been achieved.

### **(10) Derogations and Reservations**

No derogation from the right to equality should be permitted. Any reservation to a treaty or other international instrument, which would derogate from the right to equality, should be considered null and void.