

## 貳、公約實質條文釋義

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### 第一部分

#### 第一條（對婦女歧視之定義）

在本公約中，「對婦女的歧視」一詞指基於性別而作的任何區別、排斥或限制，其影響或其目的均足以妨礙或否認婦女不論已婚未婚在男女平等的基礎上認識、享有或行使在政治、經濟、社會、文化、公民或任何其他方面的人權和基本自由。

#### 一、背景及概說

本條規定 CEDAW 名稱及所有在公約條文中所出現的「對婦女的歧視」一詞之定義，一方面是為該詞定義，另一方面明白宣示了本公約的基本精神。

#### 二、名詞解釋及重要內容

##### （一）名詞解釋

##### 1. 「基於性別」(on the basis of sex)

依照我國立法院通過的公約中文翻譯版本，對「婦女的歧視」是指基於「性別」而做的歧視，然而原文文字係以性（sex）所為的歧視，因此 CEDAW 委員會特別在第 28 號一般性建議中解釋對婦女的歧視包含了因為「性」以及因為「性別」(gender)所為的歧視。這裡的「性」指的是男性與女性的生理差異。而「性別」一詞指的是社會意義上的身份、地位和男女角色分工，以及社會對這類生理差異賦予的社會和文化意涵。正是這類生理差異導致男性與女性之間產生階層關係，並使男性在權力分配和權利行使上處於有利之地位，使女性處於不利地位。男性與女性的社會定位受到政治、經濟、文化、社會、宗教、意識形態和環境因素的影響，也可藉由文化、社會和社區的力量加以改變。(見一般性建議 28/5)

## 2. 「任何」(any)

(1) 包含任何有意或無意區別、排斥或限制之行爲本條之「任何」係指任何區別、排斥或限制行爲，其影響或目的足以妨礙或拒絕婦女了解、享有或行使其人權和基本自由。值得注意者，該項行爲不論是有意或無意皆可能構成歧視行爲。進一步而言，即使無前開區別、排斥或限制行爲，換言之，對女性與男性給予相同或中立的待遇，如果不承認婦女在性別方面本處於弱勢地位且遭遇不平等之現況，其後果可能導致婦女被拒絕行使其權利，則仍可能構成對婦女的歧視。(見一般性建議 28/5)

(2) 包含政府行爲及私人行爲：CEDAW 所指的歧視並不限於政府或以政府名義所爲的行爲（見 CEDAW 第 2 條(e)款、第 2 條(f)款和第 5 條）。例如，CEDAW 第 2 條(e)款呼籲締約國採取一切適當措施，以消除任何個人、組織或企業對婦女的歧視。締約國若未能盡力防止侵犯婦女權利或歧視，也可能爲該私人行爲承擔責任。(見一般性建議 19/9)

## 3. 「人權和基本自由」

依照CEDAW委員會的解釋，在本條中所指的人權和基本自由包含：

- (1) 生命權；
- (2) 免於遭受酷刑、或不人道待遇或汙辱人格的待遇或懲罰之權利；
- (3) 遭遇國內外武裝衝突時，保障其獲得人道主義之平等保護權利；
- (4) 自由和人身安全權利；
- (5) 法律之前平等保護權；
- (6) 家庭中的平等權；
- (7) 有權獲得最完善之身心健康保障；
- (8) 保障工作條件平等之權利。(見一般性建議19/7)

### (二) 重要內容

#### 1. 對婦女的歧視之定義擴及基於性別的暴力

CEDAW 委員會基於對婦女暴力保護的重視，於 1992 年作成一般性建議第 19 號，將歧視的意義擴及基於性別的暴力，包括施加身體的、心理的或性的傷害或痛苦、威脅施加這類行動、壓制和其他剝奪自由的行動等，都是基於性別的

暴力。基於性別的暴力可能違犯 CEDAW 之各條款，不論這些條款是否明文提到暴力。(見一般性建議 19/6)

### 三、我國相關法規例示

我國憲法第七條規定：「中華民國人民，無分男女、宗教、種族、階級、黨派，在法律上一律平等。」憲法增修條文第十條第六項也規定：「國家應維護婦女之人格尊嚴，保障婦女之人身安全，消除性別歧視，促進兩性地位之實質平等。」從增修條文解讀，我國憲法之男女平等是在促進性別之實質平等，與公約第一條的精神相同。

我國民法親屬編歷經數次修正，於 1985 年增修第 1030 條之一加入夫妻剩餘財產分配，確立家庭中夫妻財產之性別平等地位。又在 1994 年司法院釋字第 365 號，將過去民法第 1089 條規定，在父母對於子女之親權行使有不一致意見時，以父親之意見為優先之規定宣告違憲，該號解釋表示，「因教育普及，男女接受教育之機會已趨均等，就業情況改變，婦女從事各種行業之機會，與男性幾無軒輊，前述民法關於父母意思不一致時，由父行使之規定，其適用之結果，若父母雙方能互相忍讓，固無礙於父母之平等行使親權，否則，形成爭執時，未能兼顧母之立場，而授予父最後決定權，自與男女平等原則相違，亦與當前婦女於家庭生活中實際享有之地位並不相稱。」並揭櫫：「因性別而為之差別規定僅於特殊例外之情形，方為憲法之所許，而此種特殊例外之情形，必須基於男女生理上之差異或因此差異所生之社會生活功能角色上之不同，始足相當。」

【與本條相關之一般性建議】一般性建議第 28 號、第 19 號

【前文引用之一般性建議】

一般性建議 19/6

※聯合國官方中文版（簡轉繁）

《公約》第1條界定對婦女的歧視。歧視的定義包括基於性別的暴力，即因為是女人而對之施加暴力，或女人受害比例特大。包括施加身體的、心理的或性的傷害或痛苦、威脅施加這類行動、壓制和其他剝奪自由行動。基於性別的暴力可能違犯《公約》的具體條款，不論這些條款是否明文提到暴力。

※聯合國官方英文版

The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It

includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

#### 一般性建議 19/7

※聯合國官方中文版（簡轉繁）

基於性別的暴力損害或阻礙婦女依照一般國際法或具體的人權公約享受人權和基本自由，符合《公約》第1條所指的歧視。這些權利和自由包含：

- (a) 生命權；
- (b) 不受酷刑、不人道或有辱人格的待遇或懲罰的權利；
- (c) 在國際或國內武裝衝突時享受人道主義規範的平等保護的權利；
- (d) 自由和人身安全權利；
- (e) 法律之前平等保護權；
- (f) 家庭中的平等權；
- (g) 可達到的最高身心健康權；
- (h) 工作條件公平有利的權利。

※聯合國官方英文版

Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health;
- (h) The right to just and favourable conditions of work.

#### 一般性建議 19/9

※聯合國官方中文版（簡轉繁）

但是，應當指出，《公約》所指的歧視並不限於政府或以政府名義所作的行為(見第2條(e)款、第2條(f)款和第5條)。例如，《公約》第2條(e)款呼籲締約國採取一切適當措施，以消除任何個人、組織或企業對婦女的歧視。根據一般國際法和具體的人權盟約規定，締約國如果沒有盡力防止侵犯權利或調查暴力行為並施以懲罰及提供賠償，也可能為私人行為承負責任。

※聯合國官方英文版

It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

#### 一般性建議 28/5

※聯合國官方中文版（簡轉繁）

5.雖然《公約》僅僅提到性歧視，但結合對第一條和第二條(f)項和第五條(a)項的解釋表明，《公約》也涵蓋了對婦女的性別歧視。這裡的「性」一詞指的是男子與婦女的生理差異。而「性別」一詞指的是社會意義上的身份、歸屬和婦女與男子的作用，以及社會對這類生理差異賦予的社會和文化含義，正是這類生理差異導致男子與婦女之間的等級關係，還導致男子在權力分配和行使權利方面處於有利地位，婦女處於不利地位。婦女和男子的這種社會定位受到政治、經濟、文化、社會、宗教、意識形態和環境因素的影響，也可通過文化、社會和社區的力量加以改變。第一條所載關於歧視的定義明確表明，《公約》適用於基於性別的歧視。該定義指出，任何區別、排斥或限制行為，如果其影響或目的足以妨礙或否認婦女認識、享有或行使其人權和基本自由，這類行為都是歧視，即使這類歧視並非有意。這可能意味著，即使對婦女和男子給予相同或中性的待遇，如果不承認婦女在性別方面本來已處於弱勢地位且面臨不平等，上述待遇的後果或影響導致婦女被拒絕行使其權利，則仍可能構成對婦女的歧視。委員會對報告的審議、其一

般性建議、決定、意見或聲明、對個人來文的審議，以及根據《任擇議定書》開展的調查，均體現了委員會對這一事項的意見。

※聯合國官方英文版

Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women. The term “sex” here refers to biological differences between men and women. The term “gender” refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community. The application of the Convention to gender-based discrimination is made clear by the definition of discrimination contained in article 1. This definition points out that any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms is discrimination, even where discrimination was not intended. This would mean that identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face. The views of the Committee on this matter are evidenced by its consideration of reports, its general recommendations, decisions, suggestions and statements, its consideration of individual communications and its conduct of inquiries under the Optional Protocol.

## 第二條 (消除對婦女歧視之義務)

締約各國譴責對婦女一切形式的歧視，協議立即用一切適當辦法，推行消除對婦女歧視的政策。為此目的，承擔：

- (a) 男女平等的原則如尚未列入本國憲法或其他有關法律者，應將其列入，並以法律或其他適當方法，保證實現這項原則；
- (b) 採取適當立法和其他措施，包括在適當情況下實行制裁，以禁止對婦女的一切歧視；
- (c) 為婦女確立與男子平等權利的法律保護，通過各國的主管法庭及其他公共機構，保證切實保護婦女不受任何歧視；
- (d) 不採取任何歧視婦女的行為或做法，並保證政府當局和公共機構的行動都不違背這項義務；
- (e) 採取一切適當措施，消除任何個人、組織或企業對婦女的歧視；
- (f) 採取一切適當措施，包括制定法律，以修改或廢除構成對婦女歧視的現行法律、規章、習俗和慣例；
- (g) 廢止本國刑法內構成對婦女歧視的一切規定。

### 一、背景及概說

#### 1. 國家有尊重、保護和實現的義務

第二條所載之義務表示締約國有義務確保在國家層面充分遵守 CEDAW 所規定之所有權利(見一般性建議 28/6)。CEDAW 委員會所做成的第 28 號一般性建議指出，依照第二條規定，締約國必須履行其在 CEDAW 之下法律義務的所有方面「尊重、保護和實現」婦女不受歧視和享有平等的權利。換言之，締約國有義務尊重、保護和實現婦女不受歧視的權利，確保婦女的發展和進步，以改善她們的處境，實現法律上和實際上(*de jure and de facto*)之平等以及與男人間之實質平等(*substantive equality*)。(見一般性建議 28/9、16) 除此之外，一般性建議 28 號的第 37 段也提到締約國有促進的義務，因此依照該號一般性建議之統整綜合，締約國共有四項義務，說明如下：

#### (1) 「尊重的義務」(The obligation to respect)

要求締約國不得以制訂法律、擬定政策、行政計畫或措施等方式直接或間接導致剝奪婦女享有其在公民、政治、經濟、社會和文化等方面之平等權利。

(2) 「保護的義務」(The obligation to protect)

要求締約國保護婦女免於私人行為之歧視，並擬定步驟消除性別歧視之偏見、刻板印象、習俗和其他慣例。

(3) 「實現的義務」(The obligation to fulfil)

要求締約國採取各種措施、以保障男女在法律上和在實際中上享有平等之權利，包括採取CEDAW第四條第1款及一般性建議第25號所規定之暫行特別措施(temporary special measures)。擬定這些政策時應考慮滿足婦女的具體需要(the specific needs)為目標，使婦女能夠在與男性平等的基礎上充分發揮潛力。(見一般性建議28/9、10)此外，締約國還必須建立並持續改善性別統計資料庫(statistical databases)，並對一般婦女之歧視和針對特殊境遇婦女(women belonging to specific vulnerable groups)歧視之態樣加以分類並進行統計分析。(見一般性建議28/10)

(4) 「促進的義務」(The obligation to promote)

依照一般性建議第28號之第37段，締約國除前三項義務之外，亦應廣泛加強認識和支援其在《公約》之下的其他義務，稱為促進的義務。(見一般性建議28/37)

2.公約義務不因武裝衝突和緊急狀態而中止

當締約國發生因政治事件或自然災害導致的武裝衝突(armed conflict)或緊急狀態(states of emergency)時，對婦女平等之享有及其行使基本權利會產生嚴重影響和廣泛的後果。因此締約國的義務不因武裝衝突而停止。締約國應針對前開武裝衝突和緊急狀態擬定對於婦女之特殊保障策略並採取適當措施。(見一般性建議28/11)

3.公約應適用於公民及非公民(citizens and non-citizens)

締約國負有義務無歧視地保障在該國領土內或不在該國領土內、但受該國有效控制的公民或非公民，包括難民、尋求庇護者(asylum-seekers)、移徙工人(migrant workers)和無國籍者(stateless persons)。締約國對其影響人權的所有行動負責，不論受影響的個人是否在該國領土內。(見一般性建議28/12)

## 二、名詞解釋及重要內容

### 1. 「對婦女一切形式的歧視」

#### (1) 國家義務擴及私人行為所造成之歧視

所謂一切形式的歧視，包含透過作為或不作為所導致，也不論這種作為或不



作為是否是由國家或私人行為者造成的。例如在以下情況都有可能發生歧視：締約國未採取必要的立法措施，以確保婦女充分實現其權利(ensure the full realization of women's rights)；未制定實現男女平等的國家政策；未實施相關法律等。(見一般性建議28/10) 該條還要求締約國防止私人行為對婦女的歧視。在有些情況下，國際法可能將私人行為者的作為或不作為歸責於國家，因此，締約國有義務確保防止私人行為者違反CEDAW之規定產生對婦女的歧視。締約國有義務採取適當措施，對私人行為者進行監督，包括教育、就業、醫療政策等由私人行為者所提供之服務或設施。(見一般性建議28/13)

## (2) 包括直接或間接引起之歧視

「直接歧視」(Direct discrimination)包括明顯(explicitly)以性或性別差異為由(based on grounds of sex and gender differences)所實施的差別待遇(different treatment)。「間接歧視」(Indirect discrimination)指的是，一項法律、政策、方案或措施表面上對男性和女性無任何歧視，但在實際上產生歧視婦女的效果(discriminatory effect)。這是因為看似中性(neutral)的措施沒有考慮男女間既存的不平等狀況。此外，由於不正視歧視之結構和歷史模式以及忽略男女權力關係之不平等，有可能使間接歧視狀況更加惡化。(見一般性建議28/16)

## 2. 「譴責」(condemn)

締約國有立即和持續(immediate and continuous)譴責歧視的義務。它們有義務向其人民和國際社會宣稱(proclaim)，其各級政府和機關完全反對(total opposition)各種形式對婦女的歧視以及表達它們消除對婦女一切歧視的決心。譴責一切形式的歧視包括CEDAW條文未明確提及(not explicitly mentioned)或可能新形態(emerging)的歧視形式。(見一般性建議28/15)

## 3. 「立即」(without delay)

「立即」一詞表明締約國所承擔的義務具有急迫性(of an immediate nature)，應無條件的執行，不得遲延或故意選擇逐步執行(incremental implementation)。締約國不得以任何理由，包括政治、社會、文化、宗教、經濟、資源、或其它考慮因素或面臨的限制等理由，推遲CEDAW的執行。(見一般性建議28/29)

## 4. 「一切適當辦法」(appropriate means)或「適當措施」(appropriate measures)

### (1) 「用一切適當辦法」(pursue by all appropriate means)

所謂用一切適當辦法是使締約國有極大的靈活度(a great deal of flexibility)，

可針對各締約國在消除對婦女歧視方面於其各國所存在的獨特障礙和阻力(particular obstacles and resistance)，制訂符合該國獨特之法律、政治、經濟、行政和體制框架(institutional framework)的政策。每個締約國都必須對該國選擇之獨特方式的適當性(appropriateness of the particular means)作出合理解釋，並應證明該方式能夠實現預期的成效和結果。(見一般性建議28/23)

CEDAW委員會曾經採取之措施的適當性(appropriateness)做過一些例示，例如：

- (a)採取步驟以預防、禁止和懲罰第三人(third parties)違反CEDAW的行為，包括在家庭和在社區中(community)實施的行為，並向受害者提供賠償(reparation)[保護]；
- (b)為了實現禁止性別歧視及達到男女平等應採取暫行特別措施[實現]；
- (c)為公務人員制訂行為守則(codes of conduct)，以確保尊重平等和不歧視的原則；
- (d)為所有政府機構、公務人員尤其是法律專業人士和司法機關，提供有關CEDAW原則和條款的教育和培訓方案並撰寫培訓教材；
- (e)開發和制訂有效之指標(valid indicators)，以評估婦女人權狀況和進展，建立和維護按性別分類以及與CEDAW具體條款相關的統計資料庫。(其他例示參見一般性建議28/37、38)

## (2) 「適當措施」

該政策必須為行動導向(action-oriented)和結果導向(results-oriented)，即必須制訂指標(indicators)、標竿(benchmarks)和時間表(timelines)，以確保給予所有相關單位適當資源，或允許這些單位在實現標竿和目標上發揮各自的作用。為此，該政策必須與主要的政府預算規劃配合以確保政策在所有方面得到充分的財源。(見一般性建議28/28)

## 5. 「男女平等的原則」

男性與女性間的平等、或性別平等原則的內在意涵係指所有人類，不論其性別(regardless of sex)，都有發展個人能力、從事其專業和作出選擇的自由，不受任何性別刻板印象(stereotypes)、僵化性別角色(rigid gender roles)和偏見(prejudices)的限制。締約國應避免在履行CEDAW義務時僅使用兩性公平(gender equity)的概念，因為在某些國家，兩性公平概念指的是，依照女性和男性各自的需要給予其公平(fair treatment)待遇。除了涵蓋平等待遇(equal treatment)之外，也有可能允許一些在權利、福利、義務和機會等方面不相同(different)但相當

(equivalent)的待遇。(見一般性建議28/22)

#### 四、特殊形式的歧視

##### 1.交叉形式之歧視

交叉形式(Intersectionality)<sup>1</sup>的歧視是理解第二條所載締約國一般義務範圍的根本概念。以性和性別為由對婦女歧視與影響婦女的一些其他因素息息相關，如種族、族裔、宗教或信仰、健康狀況、年齡、階級、種姓(caste)、性傾向(sexual orientation)和性別認同(gender identity)等。性別歧視對不同群體之婦女所為的影響在程度上並不相同。締約國必須從法律上認知到這些交叉形式歧視(intersecting forms of discrimination)之存在、承認其對這些婦女的綜合負面影響(compounded negative impact)並禁止這類歧視。締約國還需制訂和實施消除這類歧視的政策和方案，包括根據《公約》第四條第1款和25號一般性建議，酌情採取暫行特別措施。(見一般性建議28/18)

##### 2.對婦女的歧視包括基於性別的暴力

關於對婦女暴力行為的第19號一般性建議指出，以性和性別為由對婦女的歧視包括基於性別的暴力(gender-based violence)及因為婦女的性別而對之施加的暴力、或不成比例地(disproportionately)影響著婦女之暴力。這種歧視形式嚴重阻礙了婦女在與男性平等的基礎上享有人權和基本自由。這種歧視形式包括施加身體的、心理的或性的傷害或痛苦(harm or suffering)、或威脅施加這類傷害或痛苦、或者限制或剝奪自由之行為，也包含在家庭或任何其他入際關係中出現的暴力行為，或係因國家或國家公務人員所為或縱容(perpetrated or condoned)發生的暴力行為。基於性別的暴力可能違反CEDAW各條之規範，不論這些公約條款是否明文提及暴力。在防止、調查、起訴和懲處這類基於性別的暴力行為方面，締約國有恪盡職責的義務。(見一般性建議28/19)

##### 3.對於青少年的歧視

締約國有義務促進女童的平等權利、因為女童是女性這一廣泛群體的一部分。在獲得基礎教育(access to basic education)、販運人口(trafficking)、虐待或不當待遇(maltreatment)、剝削(exploitation)和暴力等方面，女童更易(vulnerable)遭受歧視。在這當中，對青少年(adolescents)的歧視情況則更為嚴重。因此，各國應關注青少年或女童的特殊需要，向她們提供有關性健康和生殖健康(sexual and

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<sup>1</sup> 又可稱多重形式

reproductive health)的教育、並實施旨在預防愛滋病毒/愛滋病(HIV/AIDS)、性剝削(sexual exploitation)和少女懷孕(teenage pregnancy)的方案。(見一般性建議28/21)

#### 四、各項之一般性法律義務

##### 1.提供法律保護和廢除或修訂歧視性法律和規章的義務

本條(a)、(f)和(g)項規定，締約國有提供法律保護和廢除或修訂歧視性法律和規章的義務。締約國必須確保憲法之增修或其它適當的立法手段，將男女平等和不歧視的原則載入國內法，並使之享有優先執行的地位(overriding and enforceable status)。締約國還必須頒布法律，禁止在CEDAW規定的婦女生活之所有領域(in all fields of women's lives)、及婦女的整個生命週期內(throughout their lifespan)對其加以歧視。締約國有義務修改(modify)或廢除(abolish)構成對婦女歧視的現行法律、規章(regulations)、習俗(customs)和慣例(practices)。特定群體的婦女，包括被剝奪自由的婦女、難民、尋求庇護者和移徙婦女(migrant women)、無國籍婦女、同性戀婦女(lesbian women)、身心障礙婦女(disabled women)、人口販運的女性受害者(women victims of trafficking)、喪偶婦女(widows)和老年婦女(elderly women)等尤其易受到民法、刑法、規章和習慣法(customary law)及慣例的歧視。(見一般性建議28/31)

締約國批准或加入CEDAW、即承諾將CEDAW納入(incorporate)其國內法律制度、或允許公約在其國內法律秩序中發揮適當的法律效力、以確保在國家層面執行CEDAW條款。在國家層面直接適用CEDAW條款的問題(direct applicability of the provisions of the Convention)，取決於各締約國依其憲法之規定認定條約在國內法律秩序中的地位。不過委員會認為，在依其憲法或法律使條約自動生效或經過特定納入國內法規範秩序之程序的國家中，CEDAW所載婦女之權利可能會受到更強而有力的保護。委員會敦促尚未將CEDAW納入國內法律秩序的締約國考慮將CEDAW納入其國內法，例如，可制訂有關平等的基本法(a general law on equality)以便充分實現第二條要求的CEDAW義務。(見一般性建議28/31)

##### 2.提供適當的救濟辦法

本條(b)項規定締約國有義務確保禁止歧視和促進男女平等的法律提供受違反 CEDAW歧視的婦女適當的救濟辦法(remedies)。這一義務要求締約國向其CEDAW權利受到侵犯的婦女提供賠償(reparation)。這類救濟辦法應包括不同形式的救濟，如金錢賠償(monetary compensation)、回復原狀 restitution)、復健(rehabilitation)和復職(reinstatement)；公開道歉(public apologies)、公開紀念(public

memorials)和保證不再犯(guarantees of non-repetition)等措施；修改相關法律和慣例；以及將侵犯婦女人權的加害人繩之以法等。(見一般性建議28/32)

### 3.基於平等原則對法律進行解釋

根據本條(c)項，締約國必須確保法院適用CEDAW所載的平等原則(the principle of equality)，盡最大可能(to the maximum extent possible)依照締約國在CEDAW之下的義務對法律進行解釋。然而，如果做不到這一點，法院應提請主管國家機關(the appropriate authorities)注意國內法，包括國家的宗教法和習慣法(religious and customary laws)與締約國之CEDAW義務不符之處，因為締約國絕不應該以國內法為由作為不履行國際義務的托詞。(見一般性建議28/33)

### 4.避免任何直接或間接歧視婦女的行為或作法

本條(d)項規定締約國有義務避免參與任何直接或間接歧視婦女的行為或作法。締約國必須確保國家機構、部門、法律和政策不得直接歧視婦女。還必須確保廢除任何導致歧視效果或結果的法律、政策或措施。(見一般性建議28/35)

### 5.消除公私領域對婦女之歧視

本條(e)項規定締約國有義務消除任何公共或私人行為對婦女的歧視。(e)在這方面被視為適當的措施種類不限於憲法或立法措施。這些措施包括：確保婦女能夠對侵犯其CEDAW權利之行為提出訴訟，並獲得有效的救濟；積極吸納婦女參與措施的制訂和實施；確保政府在國內應負起責任的課責制度(accountability)；通過教育系統和社區的力量促進教育，支援CEDAW目標的實現；鼓勵人權和婦女非政府組織開展工作；設立必要的國家人權機構或其它機制(national human rights institutions or other machineries)；提供足夠的行政和財務支援(adequate administrative and financial support)，以確保採取的措施使婦女的實際生活發生真正的改變。締約國應確保透過國家的管轄法庭或法院(competent national tribunals)和其它公共機構(other public institutions)，保護婦女免受任何歧視行為，並採取一切適當措施，消除任何個人、組織或企業(any person, organization or enterprise)對婦女的歧視，這些義務也適用於在海外從事業務的國家營利事業單位(national corporations operating extraterritorially)的行為。(見一般性建議28/36)

## 6. 訴訟權之保障

締約國必須確保婦女能夠援引法律上之平等原則(the principle of equality)，以作為對公務人員或私人違反CEDAW的歧視行為提出訴訟之依據。締約國還必須對婦女提供可負擔、可親近且即時的(affordable, accessible and timely)救濟管道，在必要時為其提供法律扶助(legal aid)和協助，使其主張在獨立、管轄法院或法庭(a competent and independent court or tribunal)中得到公正的聽審並獲得解決。如果對婦女的歧視還構成對生命權(right to life)和身體權(physical integrity)等其它人權的侵犯，如發生家庭暴力案件或其它形式的暴力，則締約國有義務啟動刑事訴訟程序，對加害者(perpetrators)進行審理並對其實施適當的刑事制裁。締約國應提供資金成立一些獨立的協會和中心向婦女提供法律資源(legal resources)、向婦女宣傳其平等權、並協助她們為所遭受的歧視尋求救濟。(見一般性建議28/34)

在某些國家，婦女訴訟權(woman's right to bring litigation)受到法律之限制，或實際上難以獲得法律服務。在某些國家，婦女作為證人的地位和其證詞並不如男性那樣受到尊重或不如男性有份量。這種法律或習俗限制了婦女有效地謀求或保有其平等財產的權利(equal share of property)，削弱了(diminish)她們成為在社區中之獨立、負責和受尊重成員的地位。當國家法律限制婦女的法律行為能力或允許個人或機構的這種做法時，實際上就剝奪了女性與男性平等的權利，限制了婦女養活自己和其撫養之人(dependents)的能力。(見一般性建議21/8)

## 五、我國相關法規例示

在我國法規旨在消除性別歧視者包含2002年所制訂之性別工作平等法、2004年制訂之性別平等教育法。在消除性別為基礎的暴力方面，我國有家庭暴力防治法、性侵害防治法。對於性騷擾的防治，需有適當措施使婦女受到性騷擾時有專責機構處理申訴案件，因此我國首先在性別工作平等法中保障婦女免於性騷擾，並於性別平等教育法中規定校園性騷擾的防治，並於性騷擾防治法中擴大對各領域之性騷擾防治，該法從防治、申訴及處罰，皆做了全面性的規範。

【與本條相關之一般性建議】一般性建議第21號、第28號

【與本條相關之CEDAW委員會個人申訴案件】  
申訴案件第7/2005號(CEDAW/C/39/D/7/2005)

本件申訴案件係關於一名西班牙婦女是否遭受該國貴族頭銜世襲規定歧視，該名婦女主張西班牙關於貴族頭銜繼承順序的法律規定，亦即長子女雖同樣

得繼承頭銜，但女性只有在沒有弟弟時才繼承。因此根據傳統，男性在貴族頭銜的繼承順序上較女子有優先權。西班牙的相關憲法法院及實務判決並認為貴族頭銜的相關規定來自於悠久的歷史慣例，且該優先順序的規定不違反憲法所保障的男女平等權。本申訴案件並未進入實質的審查，CEDAW委員會認為就本案件事實的發生是在CEDAW任擇議定書對西班牙生效之前，除非這些事實是在生效日後仍繼續存在，否則委員會不能受理該案件。CEDAW委員會認為，該事件在皇家繼承令發出日即發生且完成，並不具有持續性質，因此以程序不合法駁回該申訴，並未就該慣例和法令進行實質審查。

### 【前文引用之一般性建議】

#### 一般性建議 21/8

※聯合國官方中文版（簡轉繁）

在有些國家，婦女提出訴訟的權利受到法律限制，或受到難以得到法律諮詢、沒有能力向法院申訴的限制。在其他一些國家，婦女作為證人的地位和其證詞並不如男子那樣受到尊重，或不如男子那麼有份量。這種法律或習俗限制了婦女有效地謀求或保有其平等財產份額的權利，削弱了她們作為其所在社區的獨立、負責和受尊重成員的地位。當國家法律限制婦女的法律行為能力或允許個人或機構的這種做法時，實際上就剝奪了婦女與男子平等的權利，限制了婦女養活自己和其受撫養人的能力。

※聯合國官方英文版

A woman's right to bring litigation is limited in some countries by law or by her access to legal advice and her ability to seek redress from the courts. In others, her status as a witness or her evidence is accorded less respect or weight than that of a man. Such laws or customs limit the woman's right effectively to pursue or retain her equal share of property and diminish her standing as an independent, responsible and valued member of her community. When countries limit a woman's legal capacity by their laws, or permit individuals or institutions to do the same, they are denying women their rights to be equal with men and restricting women's ability to provide for themselves and their dependents.

#### 一般性建議28/6

※聯合國官方中文版（簡轉繁）

第二條對充分執行《公約》至關重要，因為該條明確了締約國一般法律義務的性

質。第二條所載義務與《公約》其他所有實質性條款有著不可分割的關係,締約國有義務確保在國家層面充分遵守《公約》所載所有權利。

※聯合國官方英文版

Article 2 is crucial to the full implementation of the Convention, since it identifies the nature of the general legal obligations of States parties. The obligations enshrined in article 2 are inextricably linked with all other substantive provisions of the Convention, as States parties have the obligation to ensure that all the rights enshrined in the Convention are fully respected at the national level.

一般性建議28/9

※聯合國官方中文版（簡轉繁）

第二條規定，締約國必須履行其在《公約》之下法律義務的所有方面，尊重、保護和實現婦女不受歧視和享有平等的權利。尊重的義務要求締約國避免通過制訂法律、政策、規章、方案、行政程式和體制結構等方式，直接或間接導致剝奪婦女享有在公民、政治、經濟、社會和文化方面的平等權利。保護的義務要求締約國保護婦女免受私人行為者的歧視，並採取步驟，其直接目標就是要消除主張某一性別低於或高於另一性別的偏見、習俗和所有其他慣例，以及對男子和婦女社會功能的陳舊的刻板觀念。實現的義務要求締約國採取各種步驟，保證男女在法律上和在实际中享有平等權利，包括根據《公約》第四條第1款和關於《消除對婦女一切形式歧視公約》第四條第1款(暫行特別措施)的第25號一般性建議，酌情採取暫行特別措施。這一點牽涉到手段或行為義務及結果義務。締約國應考慮，它們必須履行對所有婦女的法律義務，以滿足婦女的具體需要為目標制訂公共政策、方案和體制框架，使婦女能夠在與男子平等的基礎上充分發揮潛力。

※聯合國官方英文版

Under article 2, States parties must address all aspects of their legal obligations under the Convention to respect, protect and fulfil women's right to non-discrimination and to the enjoyment of equality. The obligation to respect requires that States parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights. The obligation to protect requires that States parties protect women from discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of



inferiority or superiority of either of the sexes, and of stereotyped roles for men and women. The obligation to fulfil requires that States parties take a wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto, including, where appropriate, the adoption of temporary special measures in line with article 4, paragraph 1, of the Convention and general recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures. This entails obligations of means or conduct and obligations of results. States parties should consider that they have to fulfil their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men.

#### 一般性建議28/10

※聯合國官方中文版（簡轉繁）

締約國有義務避免通過行為或不行為導致對婦女的歧視；還有義務對歧視婦女的行為作出正當反應，不論這種行為或不行為是否是由國家或私人行為者造成的。在以下情況下都有可能發生歧視：締約國未採取必要的立法措施，確保婦女充分實現其權利；未制訂旨在實現男女平等的國家政策；未實施相關法律等。此外，締約國還承擔以下國際責任：創建並持續改善統計資料庫；對一般歧視婦女和歧視某些特定弱勢群體婦女的所有形式進行分類。

※聯合國官方英文版

States parties have an obligation not to cause discrimination against women through acts or omissions; they are further obliged to react actively against discrimination against women, regardless of whether such acts or omissions are perpetrated by the State or by private actors. Discrimination can occur through the failure of States to take necessary legislative measures to ensure the full realization of women's rights, the failure to adopt national policies aimed at achieving equality between women and men and the failure to enforce relevant laws. Likewise, States parties have an international responsibility to create and continuously improve statistical databases and the analysis of all forms of discrimination against women in general and against women belonging to specific vulnerable groups in particular.

#### 一般性建議 28/11

※聯合國官方中文版（簡轉繁）

在政治事件或自然災害導致的武裝衝突或緊急狀態時期，締約國的義務不應停止。這類情況對婦女平等享有和行使其根本權利產生嚴重影響和廣泛的後果。締約國應針對武裝衝突和緊急狀態時期婦女的特殊需求制訂戰略並採取措施。

※聯合國官方英文版

The obligations of States parties do not cease in periods of armed conflict or in states of emergency resulting from political events or natural disasters. Such situations have a deep impact on and broad consequences for the equal enjoyment and exercise by women of their fundamental rights. States parties should adopt strategies and take measures addressed to the particular needs of women in times of armed conflict and states of emergency.

#### 一般性建議 28/12

※聯合國官方中文版（簡轉繁）

雖然受國際法約束，但各國主要行使領土管轄權。然而，締約國的義務應毫無歧視地適用於在該國領土內或不在該國領土內但受該國有效控制的公民或非公民，包括難民，尋求庇護者，移徙工人和無國籍者。締約國對其影響人權的所有行動負責，不論受影響的個人是否在該國領土內。

※聯合國官方英文版

Although subject to international law, States primarily exercise territorial jurisdiction. The obligations of States parties apply, however, without discrimination both to citizens and non-citizens, including refugees, asylum-seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory. States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory.

#### 一般性建議 28/13

※聯合國官方中文版（簡轉繁）

第二條並不限於制止締約國直接或間接引起對婦女的歧視。該條還要求締約國履行恪盡職責的義務，防止私人行為對婦女的歧視。在有些情況下，國際法可能將私人行為者的行為或不行為歸咎於國家，因此，締約國有義務確保防止私人行為者參與實施《公約》定義的對婦女的歧視。締約國有義務採取適當措施，對私人

行為者的行動進行監管，包括教育、就業、醫療政策和做法、工作條件和工作標準等領域，以及銀行和住房等由私人行為者提供服務或設施的其他領域。

※聯合國官方英文版

Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor's acts or omission of acts may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention. The appropriate measures that States parties are obliged to take include the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work standards, and other areas in which private actors provide services or facilities, such as banking and housing.

#### 一般性建議 28/15

※聯合國官方中文版（簡轉繁）

第二條開頭部分提出，締約國的第一項義務是「譴責對婦女一切形式的歧視」。締約國有立即和持續譴責歧視的義務。它們有義務向其人民和國際社會宣稱，其各級政府和各類政府機關完全反對各種形式對婦女的歧視，以及它們有決心消除對婦女的歧視。「一切形式的歧視」一語明確要求締約國本著謹慎的態度，譴責一切形式的歧視，包括《公約》未明確提及或可能新出現的歧視形式。

※聯合國官方英文版

The first obligation of States parties referred to in the chapeau of article 2 is the obligation to “condemn discrimination against women in all its forms”. States parties have an immediate and continuous obligation to condemn discrimination. They are obliged to proclaim to their population and the international community their total opposition to all forms of discrimination against women to all levels and branches of Government and their determination to bring about the elimination of discrimination against women. The term “discrimination in all its forms” clearly obligates the State party to be vigilant in condemning all forms of discrimination, including forms that are not explicitly mentioned in the Convention or that may be emerging.

#### 一般性建議28/16

##### ※聯合國官方中文版（簡轉繁）

締約國有義務尊重、保護和實現婦女不受歧視的權利，確保婦女的發展和進步，以改善她們的處境，實現法律上和事實上或實質性的男女平等。締約國應確保不對婦女實施直接或間接歧視。對婦女的直接歧視包括明顯以性或性別差異為由實施區別待遇。對婦女的間接歧視指的是，一項法律、政策、方案或做法看似對男性和女性無任何傾向，但在實際中有歧視婦女的效果。因為明顯中性的措施沒有考慮原本存在的不平等狀況。此外，因為不承認歧視的結構和歷史模式以及男女之間不平等的權力關係，可能使現有的不平等狀況因間接歧視更為惡化。

##### ※聯合國官方英文版

States parties are under an obligation to respect, protect and fulfil the right to nondiscrimination of women and to ensure the development and advancement of women in order that they improve their position and implement their right of de jure and de facto or substantive equality with men. States parties shall ensure that there is neither direct nor indirect discrimination against women. Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure. Moreover, indirect discrimination can exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men.

#### 一般性建議 28/18

##### ※聯合國官方中文版（簡轉繁）

交叉性是理解第二條所載締約國一般義務範圍的根本概念。以性和性別為由對婦女的歧視與影響婦女的一些其他因素息息相關，如種族、族裔、宗教或信仰、健康狀況、年齡、階級、種姓、性取向和性別認同等。以性或性別為由的歧視對這類群體婦女的影響程度或方式不同於對男子的影響。締約國必須從法律上承認這些交叉形式的歧視以及對相關婦女的綜合負面影響，並禁止這類歧視。締約國還需制訂和實施消除這類歧視的政策和方案，包括根據《公約》第四條第 1 款和 25

號一般性建議，酌情採取暫行特別措施。

※聯合國官方英文版

Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and general recommendation No. 25.

一般性建議 28/19

※聯合國官方中文版（簡轉繁）

關於對婦女的暴力行為的第19號一般性建議指出，以性和性別為由對婦女的歧視包括基於性別的暴力及因為婦女的性別而對之施加的暴力或不成比例地影響婦女的暴力。這種歧視形式嚴重阻礙婦女在與男子平等的基礎上享有和行使其人權和基本自由。這種歧視形式包括施加身體的、心理的或性的傷害或痛苦、威脅施加這類行動、壓制和其他剝奪自由行動、在家庭內部、家庭單位或任何其他入際關係中出現的暴力行為，或由國家或國家公務人員所做或縱容發生的暴力行為，不論這類行為發生在何處。基於性別的暴力可能違反《公約》的具體條款，不論這些條款是否明文提到暴力。在防止、調查、起訴和懲處這類基於性別的暴力行為方面，締約國有恪盡職責的義務。

※聯合國官方英文版

Discrimination against women on the basis of sex and gender comprises, as stated in general recommendation No. 19 on violence against women, gender-based violence, namely, violence that is directed against a woman because she is a woman or violence that affects women disproportionately. It is a form of discrimination that seriously inhibits women's ability to enjoy and exercise their human rights and fundamental freedoms on the basis of equality with men. It includes acts that inflict physical,

mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, the violence that occurs within the family or domestic unit or within any other interpersonal relationship, or violence perpetrated or condoned by the State or its agents regardless of where it occurs. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence. States parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender-based violence.

#### 一般性建議 28/21

※聯合國官方中文版（簡轉繁）

具體而言，締約國有義務促進女童的平等權利，因為女童是婦女這一廣泛群體的一部分，在獲得基礎教育、販運人口、虐待、剝削和暴力等方面，女童更易遭受歧視。如果受害者是青少年，所有這些歧視的情況都更為嚴重。因此，各國應關注(青少年)女孩的特殊需要，向她們提供有關性健康和生殖健康的教育，並實施旨在預防愛滋病毒／愛滋病、性剝削和少女早孕的方案。

※聯合國官方英文版

States parties in particular are obliged to promote the equal rights of girls since girls are part of the larger community of women and are more vulnerable to discrimination in such areas as access to basic education, trafficking, maltreatment, exploitation and violence. All these situations of discrimination are aggravated when the victims are adolescents. Therefore, States shall pay attention to the specific needs of (adolescent) girls by providing education on sexual and reproductive health and carrying out programmes that are aimed at the prevention of HIV/AIDS, sexual exploitation and teenage pregnancy.

#### 一般性建議 28/22

※聯合國官方中文版（簡轉繁）

男子與婦女之間的平等，或兩性平等原則的內在含義指的是，所有人類，不論其性別，都有發展個人能力、從事其專業和作出選擇的自由，不受任何陳舊觀念、僵化的性別角色和偏見的限制。締約國應僅僅使用男女平等或兩性平等的概念，避免在履行《公約》義務時使用兩性公平的概念。在一些司法管轄區，後一概念指的是根據婦女和男子各自的需要給予其公平待遇。這一概念可能包括平等待遇，或包括在權利、福利、義務和機會等方面有區別但被視為同等的待遇。

※聯合國官方英文版

Inherent to the principle of equality between men and women, or gender equality, is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices. States parties are called upon to use exclusively the concepts of equality of women and men or gender equality and not to use the concept of gender equity in implementing their obligations under the Convention. The latter concept is used in some jurisdictions to refer to fair treatment of women and men, according to their respective needs. This may include equal treatment, or treatment that is different but considered equivalent in terms of rights, benefits, obligations and opportunities.

一般性建議 28/23

※聯合國官方中文版（簡轉繁）

締約國還協議「用一切適當辦法」，推行消除對婦女歧視的政策。採用各種辦法或某種行為方式的義務使締約國有了極大的靈活度，可針對締約國在消除對婦女歧視方面存在的獨特障礙和阻力，制訂適合該國獨特的法律、政治、經濟、行政和體制框架的政策。每個締約國都必須對該國選擇的獨特方式的適當性作出合理解釋，並證明該方式能夠實現預期的效力和結果。締約國是否為充分實現《公約》承認的權利確實在國家層面採取了一切必要措施，最終由委員會認定。

※聯合國官方英文版

States parties also agree to “pursue by all appropriate means” a policy of eliminating discrimination against women. This obligation to use means or a certain way of conduct gives a State party a great deal of flexibility for devising a policy that will be appropriate for its particular legal, political, economic, administrative and institutional framework and that can respond to the particular obstacles and resistance to the elimination of discrimination against women existing in that State party. Each State party must be able to justify the appropriateness of the particular means it has chosen and demonstrate whether it will achieve the intended effect and result. Ultimately, it is for the Committee to determine whether a State party has indeed adopted all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the Convention.

## 一般性建議 28/28

### ※聯合國官方中文版（簡轉繁）

該政策必須以行動和結果為導向，即必須制訂指標、基準和時間表，確保向所有相關行為者提供適當資源，或允許這些行為者在實現商定的基準和目標方面發揮各自的作用。為此，該政策必須與主要的政府預算進程掛鉤，以確保政策的所有方面得到充分資金。應創造條件，設立收集按性別分類相關資料的機制，支援有效監測，為持續評估提供便利，考慮對現有措施進行修改或補充，並確定可能適當的新的措施。此外，該政策必須確保在政府的行政機構內部設立實力雄厚的專門機構(全國婦女機構)，由這些機構提出倡議，對法律、政策和方案的籌備和執行情況進行必要的協調和監督，以履行締約國在《公約》之下的義務。這類機構應獲得授權，可直接向最高級別政府提供建議和分析。該政策還應確保設立獨立的監測機構，如國家人權機構或獨立的婦女委員會，或賦予現有的國家機構增進和保護《公約》保障權利的任務。該政策必須吸納企業、媒體、組織、社區團體和個人等私營部門的參與，爭取在它們的參與下制訂措施，以促進私營經濟領域實現《公約》目標。

### ※聯合國官方英文版

The policy must be action- and results-oriented in the sense that it should establish indicators, benchmarks and timelines, ensure adequate resourcing for all relevant actors and otherwise enable those actors to play their part in achieving the agreed benchmarks and goals. To this end, the policy must be linked to mainstream governmental budgetary processes in order to ensure that all aspects of the policy are adequately funded. It should provide for mechanisms that collect relevant sex-disaggregated data, enable effective monitoring, facilitate continuing evaluation and allow for the revision or supplementation of existing measures and the identification of any new measures that may be appropriate. Furthermore, the policy must ensure that there are strong and focused bodies (national women's machinery) within the executive branch of the Government that will take initiatives, coordinate and oversee the preparation and implementation of legislation, policies and programmes necessary to fulfil the obligations of the State party under the Convention. These institutions should be empowered to provide advice and analysis directly to the highest levels of Government. The policy should also ensure that independent monitoring institutions, such as national human rights institutes or independent



women's commissions, are established or that existing national institutes receive a mandate to promote and protect the rights guaranteed under the Convention. The policy must engage the private sector, including business enterprises, the media, organizations, community groups and individuals, and enlist their involvement in adopting measures that will fulfil the goals of the Convention in the private economic sphere.

#### 一般性建議 28/29

※聯合國官方中文版（簡轉繁）

「立即」一詞表明，締約國採用一切適當辦法推行政策的義務具有緊迫性。這一要求是無條件的，不允許推遲或故意選擇逐步執行締約國在批准或加入《公約》時承擔的義務。還表示不得以任何理由，包括政治、社會、文化、宗教、經濟、資源，或締約國的其它考慮因素或面臨的限制等理由，推遲《公約》的執行。如果締約國受資源限制，或需要技術或其它專門知識幫助其執行《公約》義務，則該國應尋求國際合作，以克服上述困難。

※聯合國官方英文版

The words “without delay” make it clear that the obligation of States parties to pursue their policy, by all appropriate means, is of an immediate nature. This language is unqualified, and does not allow for any delayed or purposely chosen incremental implementation of the obligations that States assume upon ratification of or accession to the Convention. It follows that a delay cannot be justified on any grounds, including political, social, cultural, religious, economic, resource or other considerations or constraints within the State. Where a State party is facing resource constraints or needs technical or other expertise to facilitate the implementation of its obligations under the Convention, it may be incumbent upon it to seek international cooperation in order to overcome these difficulties.

#### 一般性建議 28/31

※聯合國官方中文版（簡轉繁）

(a)、(f)和(g)項規定，締約國有提供法律保護和廢除或修訂歧視性法律和規章的義務，作為消除對婦女的歧視政策的一部分。締約國必須確保通過憲法修訂或其它適當的立法手段，將男女平等和不歧視的原則載入國內法，並使之享有優先和強制執行的地位。締約國還必須頒佈法律，禁止在《公約》規定的婦女生活的所有領域及婦女的整個生命期內對其加以歧視。締約國有義務採取步驟，修改或廢

除構成對婦女歧視的現行法律、規章、習俗和慣例。一些特定群體的婦女，包括被剝奪自由的婦女、難民、尋求庇護者和移徙婦女、無國籍婦女、同性戀婦女、殘疾婦女、人口販運的女性受害者、喪偶和老年婦女等，尤其易受到民法和刑法、規章和習慣法和慣例的歧視。締約國批准或加入《公約》，即承諾將《公約》納入其國內法律制度，或允許公約在其國內法律秩序中發揮適當的法律效力，以確保在國家層面執行《公約》條款。在國家層面直接適用《公約》條款的問題涉及憲法法律的規定，取決於各條約在國內法律秩序中的地位。然而，委員會認為，在《公約》自動地或通過特定融合程式成為國內法律秩序的組成部分的國家，《公約》所載婦女在其生命週期內在生活的所有領域不受歧視和享有平等的權利可能受到更強有力的保護。委員會敦促尚未將《公約》納入國內法律秩序的締約國考慮將《公約》納入其國內法，例如，可制訂有關平等的一般法，以便為充分實現第二條要求的《公約》權利提供便利。

※聯合國官方英文版

Subparagraphs (a), (f) and (g) establish the obligation of States parties to provide legal protection and to abolish or amend discriminatory laws and regulations as part of the policy of eliminating discrimination against women. States parties must ensure that, through constitutional amendments or by other appropriate legislative means, the principle of equality between women and men and of non-discrimination is enshrined in domestic law with an overriding and enforceable status. They must also enact legislation that prohibits discrimination in all fields of women's lives under the Convention and throughout their lifespan. States parties have an obligation to take steps to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Certain groups of women, including women deprived of their liberty, refugees, asylumseeking and migrant women, stateless women, lesbian women, disabled women, women victims of trafficking, widows and elderly women, are particularly vulnerable to discrimination through civil and penal laws, regulations and customary law and practices. By ratifying the Convention or acceding to it, States parties undertake to incorporate the Convention into their domestic legal systems or to give it otherwise appropriate legal effect within their domestic legal orders in order to secure the enforceability of its provisions at the national level. The question of direct applicability of the provisions of the Convention at the national level is a question of constitutional law and depends on the status of treaties within the domestic legal order. The Committee takes the view, however, that

the rights to non-discrimination and equality in all fields of women's lives throughout their lifespan, as enshrined in the Convention, may receive enhanced protection in those States where the Convention is automatically or through specific incorporation part of the domestic legal order. The Committee urges those States parties in which the Convention does not form part of the domestic legal order to consider incorporation of the Convention to render it part of domestic law, for example through a general law on equality, in order to facilitate the full realization of Convention rights as required by article 2.

#### 一般性建議 28/32

※聯合國官方中文版（簡轉繁）

(b)項規定締約國有義務確保禁止歧視和促進男女平等的法律向受到違反《公約》行為歧視的婦女提供適當的補救辦法。這一義務要求締約國向其《公約》權利受到侵犯的婦女提供賠償。不提供賠償意味著沒有履行提供適當補救辦法的義務。這類補救辦法應包括不同形式的賠償，如金錢賠償、恢復原狀、康復和復職；公開道歉、樹立公共紀念碑和保證不重犯等滿足措施；修改相關法律和慣例；以及將侵犯婦女人權的肇事者繩之以法等。

※聯合國官方英文版

Subparagraph (b) contains the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention. This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.

#### 一般性建議 28/33

※聯合國官方中文版（簡轉繁）

33.根據(c)項，締約國必須確保法院適用《公約》所載的平等原則，盡最大可能

依照締約國在《公約》之下的義務對法律進行解釋。然而，如果做不到這一點，法院應提請主管國家機關注意國內法，包括國家的宗教和習慣法與締約國的《公約》義務不符之處，因為締約國絕不應以國內法為由作為不履行國際義務的托詞。

※聯合國官方英文版

33. According to subparagraph (c), States parties must ensure that courts are bound to apply the principle of equality as embodied in the Convention and to interpret the law, to the maximum extent possible, in line with the obligations of States parties under the Convention. However, where it is not possible to do so, courts should draw any inconsistency between national law, including national religious and customary laws, and the State party's obligations under the Convention to the attention of the appropriate authorities, since domestic laws may never be used as justification for failures by States parties to carry out their international obligations.

一般性建議 28/34

※聯合國官方中文版（簡轉繁）

締約國必須確保婦女能夠援引平等原則，作為對公務人員或私人行為者違反《公約》的歧視行為提出起訴的依據。締約國還必須確保婦女能夠及時利用可負擔和可獲得的補救辦法，在必要時為其提供法律援助和幫助，由獨立的主管法院或法庭進行公正審訊，妥善處理其投訴。如果對婦女的歧視還構成對生命權和人身完整等其它人權的侵犯，如發生家庭暴力案件和其它形式的暴力，則締約國有義務啟動刑事訴訟程式，對肇事者進行審訊並對其實施適當的刑事制裁。有一些獨立的協會和中心向婦女提供法律資源，向婦女宣傳其平等權，幫助她們為所遭受的歧視尋求補償，締約國應向這類組織提供資金支援。

※聯合國官方英文版

States parties must ensure that women can invoke the principle of equality in support of complaints of acts of discrimination contrary to the Convention, committed by public officials or by private actors. States parties must further ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary, to be settled in a fair hearing by a competent and independent court or tribunal, where appropriate. Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate criminal proceedings, bring the perpetrator(s) to trial and

impose appropriate penal sanctions. States parties should financially support independent associations and centres providing legal resources for women in their work to educate women about their rights to equality and assist them in pursuing remedies for discrimination.

#### 一般性建議 28/35

※聯合國官方中文版（簡轉繁）

(d)項規定締約國有義務避免參與任何直接或間接歧視婦女的行為或做法。締約國必須確保國家機構、部門、法律和政策不直接或明確歧視婦女。還必須確保廢除任何導致歧視效果或結果的法律、政策或行動。

※聯合國官方英文版

Subparagraph (d) establishes an obligation of States parties to abstain from engaging in any act or practice of direct or indirect discrimination against women. States parties must ensure that State institutions, agents, laws and policies do not directly or explicitly discriminate against women. They must also ensure that any laws, policies or actions that have the effect or result of generating discrimination are abolished.

#### 一般性建議 28/36

※聯合國官方中文版（簡轉繁）

(e)項規定締約國有義務消除任何公共或私人行為者對婦女的歧視。在這方面可能被視為適當的措施種類不限於憲法或立法措施。締約國應採取措施，確保在實際中真正消除對婦女的歧視，實現男女平等。這些措施應：確保婦女能夠對侵犯其《公約》權利的行為提出起訴，並獲得有效的補救辦法；積極吸納婦女參與措施的制訂和實施；確保政府在國內的問責制；通過教育系統和社區的力量促進教育，支援《公約》目標的實現；鼓勵人權和婦女非政府組織開展工作；設立必要的國家人權機構或其它機制；提供適當的行政和資金支援，以確保採取的措施使婦女的實際生活發生真正改觀。締約國承諾的這些義務要求其在與男子平等的基礎上提供對婦女權利的法律保護，確保通過主管國家法庭和其它公共機構有效保護婦女免受任何歧視行為，及採取一切適當措施，消除任何個人、組織或企業對婦女的歧視，這些義務也適用於在海外從事業務的國家公司的行為。

※聯合國官方英文版

Subparagraph(e)establishes an obligation of States parties to eliminate discrimination by any public or private actor. The types of measures that might be considered

appropriate in this respect are not limited to constitutional or legislative measures. States parties should also adopt measures that ensure the practical realization of the elimination of discrimination against women and women's equality with men. This includes measures that: ensure that women are able to make complaints about violations of their rights under the Convention and have access to effective remedies; enable women to be actively involved in the formulation and implementation of measures; ensure Government accountability domestically; promote education and support for the goals of the Convention throughout the education system and in the community; encourage the work of human rights and women's non-governmental organizations; establish the necessary national human rights institutions or other machineries; and provide adequate administrative and financial support to ensure that the measures adopted make a real difference in women's lives in practice. The obligations incumbent upon States parties that require them to establish legal protection of the rights of women on an equal basis with men, ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination and take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise also extend to acts of national corporations operating extraterritorially.

#### 一般性建議 28/37

※聯合國官方中文版（簡轉繁）

##### A. 執行

為了滿足「適當性」的要求，締約國採取的辦法必須覆蓋其在《公約》之下的一般義務的所有方面，包括尊重、保護、促進和實現婦女不受歧視的權利以及與男子享有平等權。因此，《公約》第二條和其它條款中使用的「適當辦法」和「適當措施」的說法包含的措施，應確保締約國：

- (a) 避免從事、資助或縱容任何違反《公約》的做法、政策或措施(尊重)；
- (b) 採取步驟，預防、禁止和懲治協力廠商違反《公約》的行為，包括在家庭和社區中實施的行為，並向這類侵權行為的受害者提供賠償(保護)；
- (c) 廣泛加強認識和支援其在《公約》之下的義務(促進)；
- (d) 為了在實際中實現性方面的不歧視和兩性平等採取暫行特別措施(實現)。

※聯合國官方英文版

##### **A. Implementation**

In order to satisfy the requirement of “appropriateness”, the means adopted by States parties must address all aspects of their general obligations under the Convention to respect, protect, promote and fulfil women’s right to non-discrimination and to the enjoyment of equality with men. Thus the terms “appropriate means” and “appropriate measures” used in article 2 and other articles of the Convention comprise measures ensuring that a State party:

- (a) Abstains from performing, sponsoring or condoning any practice, policy or measure that violates the Convention (respect);
- (b) Takes steps to prevent, prohibit and punish violations of the Convention by third parties, including in the home and in the community, and to provide reparation to the victims of such violations (protect);
- (c) Fosters wide knowledge about and support for its obligations under the Convention (promote);
- (d) Adopts temporary special measures that achieve sex non-discrimination and gender equality in practice (fulfil).

#### 一般性建議 28/38

締約國還應採取另外一些適當的執行措施，例如：

- (a) 根據《北京宣言和行動綱領》制訂和實施國家行動計畫及其它相關政策和方案，以促進婦女的平等權，並劃撥充足的人力和資金資源；
- (b) 為公務人員制訂行為守則，以確保尊重平等和不歧視的原則；
- (c) 確保廣泛散發載有適用《公約》平等和不歧視原則條款的法院決定的報告；
- (d) 提供有關《公約》原則和條款的教育和培訓方案，培訓物件為所有政府機構、公務人員，尤其是法律從業人員和司法機關；
- (e) 吸收所有媒體參與有關男女平等的公共教育方案，尤其確保說明婦女認識到她們不受歧視的平等權利，締約國為執行《公約》採取的措施，以及委員會對締約國的報告提出的結論性意見；
- (f) 開發和制訂有效指標，說明實現婦女人權的狀況和進展，創建和維護按性別分類以及與《公約》具體條款相關的資料庫。

※聯合國官方英文版

States parties should also adopt other appropriate measures of implementation such as:

- (a) Promoting equality of women through the formulation and implementation of national plans of action and other relevant policies and programmes in line with the

Beijing Declaration and Platform for Action, and allocating adequate human and financial resources;

(b) Establishing codes of conduct for public officials to ensure respect for the principles of equality and non-discrimination;

(c) Ensuring that reports of court decisions applying the provisions of the Convention on the equality and non-discrimination principles are widely distributed;

(d) Undertaking specific education and training programmes about the principles and provisions of the Convention directed to all Government agencies, public officials and, in particular, the legal profession and the judiciary;

(e) Enlisting all media in public education programmes about the equality of women and men, and ensuring in particular that women are aware of their right to equality without discrimination, of the measures taken by the State party to implement the Convention, and of the concluding observations by the Committee on the reports of the State party;

(f) Developing and establishing valid indicators of the status of and progress in the realization of human rights of women, and establishing and maintaining databases disaggregated by sex and related to the specific provisions of the Convention.



### 第三條 (推動婦女發展進步之義務)

締約各國應承擔在所有領域，特別是在政治、社會、經濟、文化領域，採取一切適當措施，包括制定法律，保證婦女得到充分發展和進步，以確保婦女在與男子平等的基礎上，行使和享有人權和基本自由。

#### 一、背景及概說

相較於第二條之消除歧視義務，本條係課予締約國積極保障婦女得就其權利和自由上能得到充分實現和發展的義務，明白告揭締約國其 CEDAW 之義務不僅止於消除歧視，更應積極幫助婦女在政治、社會、經濟、文化領域實現其權利。

#### 二、落實 CEDAW 義務之專責機構之設立

CEDAW 委員會重視由專責機構來負責國家婦女事務，以消除對婦女之歧視、促進性別之實質平等，並保障婦女在各領域得到充分發展和進步，因此曾在一般性建議中指出，締約國必須確保在政府的行政機構內部設立強而有力的專門機構 (strong and focused bodies) —— 全國婦女機構 (national women's machinery) —— 以實現 CEDAW 所載第二條及第三條的義務。締約國應由這些機構提出倡議，對法律、政策和方案的籌備和執行情況進行必要的協調和監督，以履行締約國之義務。這類機構應有權直接向最高級別政府 (the highest levels of Government) 提供建議和分析。該政策還應確保設立獨立的監督機構 (independent monitoring institutions)，如國家人權機構 (national human rights institutes) 或獨立的婦女委員會 (independent women's commissions) 或賦予現有的國家機構，增進和保障 CEDAW 權利的任務。該政策必須吸納企業、媒體、組織、社區團體 (community groups) 和個人等私部門 (private sector) 的參與，爭取在它們的參與下制訂措施以促進私營經濟領域 (private economic sphere) 實現 CEDAW 目標。(見一般性建議 28/28)

而締約國若有必要依照 CEDAW 第四條對某些領域採行暫行特別措施時，締約國可在現有之國家機構內或設立新機構以承擔這一責任，如婦女部 (women's ministries)、各部或總統辦公室內的婦女部門 (women's departments)、監察員 (ombudspersons)、法庭 (tribunals) 或其它公營或私營實體 (entities) 等，這些機構都應具有擬訂具體方案、監督方案執行及評價方案影響和成果的任務規定。此外，CEDAW 委員會還特別建議締約國與公民社會和代表各婦女團體的非政府組織進行合作 (collaboration) 和諮詢 (consultation)。(見一般性建議 25/34)

### 三、我國相關法規例示

我國為促進婦女權益之實質平等，行政院特於 1997 年 5 月 6 日成立任務編組的「行政院婦女權益促進委員會」。自 2002 年 2 月開始，婦權會採三層級模式運作，以有效推動婦女權益各項政策與措施。第一層級為議題分工小組會議，依「就業、經濟及福利」、「教育、媒體及文化」、「健康及醫療」、「人身安全」、「國際參與」五組分工運作，研擬相關提案，期以強化本會專業運作功能。第二層級為會前協商會議，針對委員會議程及各分工小組所提議案進行協調整合，充分溝通以凝聚共識。第三層級為委員會會議，就已協調完竣並具共識之重要議案做最後確認。為完成行政院之組織改造，2012 年 1 月起婦權會改名為性別平等會，與行政院之性別平等處為我國婦女權益與性別平等之專責機構。

為因應行政院組織改造以及 CEDAW 之施行，我國於 2012 年 1 月 1 日在行政院下設性別平等處以落實性別專責機構之要求。性別平等處將專責推動性別平等事務，並作為行政院性別平等會之幕僚單位，行政院性別平等會除將維持現行之三級制度及性別聯絡人等運作模式外，並使性別平等扎根部會及地方政府。

【與本條相關之一般性建議】一般性建議第 21 號、第 25 號、第 28 號

【前文引用之一般性建議】

一般性建議25/34

※聯合國官方中文版（簡轉繁）

根據第三條，請締約國提出報告，說明負責擬訂、執行、監督、評價和推行此類暫行特別措施的機構。現有或計畫設立的國家機構可承擔這一責任，如婦女部、各部或總統辦公室內的婦女司、監察員、法庭或其它公營或私營實體等，這些機構都應具有擬訂具體方案、監督方案執行及評價方案影響和成果的任務規定。委員會建議，締約國確保婦女，特別是受影響的婦女，在擬訂、執行和評價此類方案方面發揮作用。此外，還特別建議與民間社會和代表各婦女團體的非政府組織進行合作和協商。

※聯合國官方英文版

Under article 3, States parties are invited to report on the institution(s) responsible for designing, implementing, monitoring, evaluating and enforcing such temporary special measures. Such responsibility may be vested in existing or planned national institutions, such as women's ministries, women's departments within ministries or presidential offices, ombudspersons, tribunals or other entities of a public or private nature with the requisite mandate to design specific programmes, monitor their

implementation, and evaluate their impact and outcomes. The Committee recommends that States parties ensure that women in general, and affected groups of women in particular, have a role in the design, implementation and evaluation of such programmes. Collaboration and consultation with civil society and non-governmental organizations representing various groups of women is especially recommended.

#### 一般性建議 28/28

※聯合國官方中文版（簡轉繁）

該政策必須以行動和結果為導向，即必須制訂指標、基準和時間表，確保向所有相關行為者提供適當資源，或允許這些行為者在實現商定的基準和目標方面發揮各自的作用。為此，該政策必須與主要的政府預算進程掛鉤，以確保政策的所有方面得到充分資金。應創造條件，設立收集按性別分類相關資料的機制，支援有效監測，為持續評估提供便利，考慮對現有措施進行修改或補充，並確定可能適當的新的措施。此外，該政策必須確保在政府的行政機構內部設立實力雄厚的專門機構(全國婦女機構)，由這些機構提出倡議，對法律、政策和方案的籌備和執行情況進行必要的協調和監督，以履行締約國在《公約》之下的義務。這類機構應獲得授權，可直接向最高級別政府提供建議和分析。該政策還應確保設立獨立的監測機構，如國家人權機構或獨立的婦女委員會，或賦予現有的國家機構增進和保護《公約》保障權利的任務。該政策必須吸納企業、媒體、組織、社區團體和個人等私營部門的參與，爭取在它們的參與下制訂措施，以促進私營經濟領域實現《公約》目標。

※聯合國官方英文版

The policy must be action- and results-oriented in the sense that it should establish indicators, benchmarks and timelines, ensure adequate resourcing for all relevant actors and otherwise enable those actors to play their part in achieving the agreed benchmarks and goals. To this end, the policy must be linked to mainstream governmental budgetary processes in order to ensure that all aspects of the policy are adequately funded. It should provide for mechanisms that collect relevant sex-disaggregated data, enable effective monitoring, facilitate continuing evaluation and allow for the revision or supplementation of existing measures and the identification of any new measures that may be appropriate. Furthermore, the policy must ensure that there are strong and focused bodies (national women's machinery)

within the executive branch of the Government that will take initiatives, coordinate and oversee the preparation and implementation of legislation, policies and programmes necessary to fulfil the obligations of the State party under the Convention. These institutions should be empowered to provide advice and analysis directly to the highest levels of Government. The policy should also ensure that independent monitoring institutions, such as national human rights institutes or independent women's commissions, are established or that existing national institutes receive a mandate to promote and protect the rights guaranteed under the Convention. The policy must engage the private sector, including business enterprises, the media, organizations, community groups and individuals, and enlist their involvement in adopting measures that will fulfil the goals of the Convention in the private economic sphere.

#### 一般性建議 28/34

※聯合國官方中文版（簡轉繁）

締約國必須確保婦女能夠援引平等原則，作為對公務人員或私人行為者違反《公約》的歧視行為提出起訴的依據。締約國還必須確保婦女能夠及時利用可負擔和可獲得的補救辦法，在必要時為其提供法律援助和幫助，由獨立的主管法院或法庭進行公正審訊，妥善處理其投訴。如果對婦女的歧視還構成對生命權和人身完整等其它人權的侵犯，如發生家庭暴力案件和其它形式的暴力，則締約國有義務啟動刑事訴訟程式，對肇事者進行審訊並對其實施適當的刑事制裁。有一些獨立的協會和中心向婦女提供法律資源，向婦女宣傳其平等權，幫助她們為所遭受的歧視尋求補償，締約國應向這類組織提供資金支援。

※聯合國官方英文版

States parties must ensure that women can invoke the principle of equality in support of complaints of acts of discrimination contrary to the Convention, committed by public officials or by private actors. States parties must further ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary, to be settled in a fair hearing by a competent and independent court or tribunal, where appropriate. Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate criminal proceedings, bring the perpetrator(s) to trial and

impose appropriate penal sanctions. States parties should financially support independent associations and centres providing legal resources for women in their work to educate women about their rights to equality and assist them in pursuing remedies for discrimination.

#### 第四條 (暫行特別措施)

- 1.締約各國為加速實現男女事實上的平等而採取的暫行特別措施，不得視為本公約所指的歧視，亦不得因此導致維持不平等的標準或另立標準；這些措施應在男女機會和待遇平等的目的達到之後，停止採用。
- 2.締約各國為保護母性而採取的特別措施，包括本公約所列各項措施，不得視為歧視。

#### 一、背景及概說

##### (一) 締約國之義務不僅是純粹之法律義務

CEDAW條文第一至五條和二十四條構成CEDAW所有實質性條款(substantive articles)的一般性解釋框架(general interpretative framework)，締約國應努力的主要義務有以下三點，締約國應以整合性方式(an integrated fashion)履行這些義務，它們已超出男女平等待遇(equal treatment of women with men)的純粹正式法律義務(purely formal legal obligation)的範疇：(1)締約國有義務確保在其法律中沒有直接或間接歧視婦女的内容，並透過管轄法庭及制裁和其它補救辦法確保婦女在公私領域都不受到行政機關、司法機關、機構、企業或私人的歧視。(2)締約國有義務透過實行具體、有效的政策和方案改善婦女的實際狀況。(3)締約國有義務處理普遍的性別關係(prevaling gender relations)及因性別所生之刻板印象(gender-based stereotypes)，這一切不僅透過個人的個別行為而且不論在法律本身、法律及社會結構中(legal and societal structures)或是制度中都對婦女產生影響。(見一般性建議25/6、7)

然而，僅只採取正式法律或方案皆不足以實現兩性間的實際平等(de facto equality)、亦即實質平等(substantive equality)。CEDAW不僅要求男女立足點平等(an equal start)，並期待透過創造有利於實現結果平等(equality of results)的環境以賦予(empowered)婦女權力。另外，僅只保證男女待遇相同(identical)是不夠的。必須考慮到女性和男性的生理差異以及社會和文化造成的差異(socially and culturally constructed differences)。在某些情況下，必須給予男女不同之待遇(non-identical treatment)，以處理(address)這些差異。為了實現實際上的平等還需要實施其他有效的策略，例如解決婦女代表名額不足(underrepresentation)的現象，或在男女之間重新分配(redistribution)資源和權力。(見一般性建議25/8)

## （二）結果平等

欲追求兩性實際上平等或實質平等，講求結果平等(equality of results)會是一種合理的概念(logical corollary)。結果平等所追求者可能是數量和（或）品質(quantitative and/or qualitative in nature)的結果，例如追求女性與男性在各領域中受相關權利或保障之人數要幾乎相等(in fairly equal numbers)、享有同等的收入(the same income levels)、以及擁有同等的決策和政治影響力(equality in decision-making and political influence)等。(見一般性建議25/9)

## （三）暫行特別措施(temporary special measures)之性質

根據CEDAW採取暫行特別措施是實現婦女實際上或實質平等的手段之一，而不是不歧視或平等原則的例外(the norms of non-discrimination and equality)。(見一般性建議25/14) 締約國必須有效處理歧視婦女和男女不平等的根本原因(underlying causes)，才能改善婦女的狀況。委員會在審視女性和男性的生活狀況時必須考慮到其社會與歷史脈絡(in a contextual way)，並採取措施以促進機會、機構和制度的真正改變，不再以歷史沿襲的(historically determined)男性權力模式(male paradigms of power)和生活方式為基礎。(見一般性建議25/10)

在考慮男女之實質平等時，應區別婦女因生理而來的永久需求(permanent needs)，以及因為經歷下列情況所造成的其他需求：過去和現在對婦女的歧視；社會中主宰的性別意識形態(dominant gender ideology)；社會、文化結構和機構中歧視婦女的各種表現。旨在實現婦女實際上或實質平等的法律、方案和措施需要持續監測，以避免使可能已失去正當理由的不同待遇永久化(perpetuation of non-identical treatment)。(見一般性建議25/11)

## （四）交叉性歧視的特別注意

某些婦女群體除受性別歧視外，還因種族、宗教(religious identity)、身體或精神障礙、年齡、階級、或其它因素的多重形式的歧視(multiple forms of discrimination)。此類歧視首先可能影響到這些群體的婦女，也可能在不同程度上或以不同方式影響到男性。締約國可能需要採取具體的暫行特別措施，消除對婦女的多重形式的歧視及其對婦女產生的綜合性負面影響(compounded negative impact)。(見一般性建議25/12)

## (五) 第四條第1項和第2項之間的關係

### 1. 第四條第一項之暫行特別措施

締約國根據第四條第1項採取的措施應旨在加速婦女在政治、經濟、社會、文化、或其它各領域的平等參與(equal participation)。暫行特別措施是締約國實現實際上或實質男女平等的必要策略之一。委員會認為，根據CEDAW採取並執行此類措施的締約國並沒有因採取暫行措施而歧視男性。雖然實施暫行特別措施往往補救(remedies)了過去歧視婦女(past discrimination against women)所造成的結果，但不論(irrespective of)過去歧視婦女的證據如何，締約國仍應承擔CEDAW規定的義務，改進婦女狀況以實現實際上或實質之男女平等。(見一般性建議25/18)

締約國應明確區分根據第四條第1項採取的暫行特別措施和其它一般性社會政策(general social policies)，前者旨在加速實現婦女實際上或實質平等的具體目標，後者旨在改善婦女和女童的狀況。並非所有可能有利於或將有利於婦女的措施都是暫行特別措施。提供一般條件(general conditions)以保證婦女和女童的公民、政治、經濟、社會和文化權利並確保她們過著有尊嚴、不受歧視的生活，這些不能稱之為暫行特別措施。(見一般性建議25/19)

### 2. 第四條第2項是永久性特別措施

第四條第2項中「特別措施」和第四條第1項之目的明顯不同。第四條第1項的目的是加速改善婦女狀況以實現實際上或實質的男女平等，尋求必要的結構、社會和文化變革，以糾正過去和現在歧視婦女的形式和後果，並向婦女提供補償。這些措施是暫行特別措施。(見一般性建議25/15)第四條第2項係針對因男女生理上的差異而給予他們的不同待遇(non-identical treatment)作出了規定，這些措施是永久性措施(of a permanent nature)，至少直至CEDAW第11條第3款中提到的科學技術知識證明有理由進行重新審視。(見一般性建議25/16)

## 二、名詞解釋及重要內容

### (一) 「暫行特別措施」(temporary special measures)

在CEDAW準備文件(travaux préparatoires)中，曾使用不同的術語表示第四條第1款中的「暫行特別措施」。委員會在以前的一般性建議中也使用各種術語。締約國往往把矯正、補償和促進意義(in its corrective, compensatory and promotional sense)的術語「特別措施」(special measures)，與「平權行動」



(affirmative action)<sup>2</sup>、「積極行動」(positive action)、「積極措施」(positive measures)、「反向歧視」(reverse discrimination)和「積極的區別對待」(positive discrimination)等術語等同起來。美國將對於矯正、補償和促進實質平等的用語稱為「積極優惠待遇」(affirmative action)，而在歐洲或某些聯合國文件則稱為「積極行動」(positive action)但「積極行動」在國際人權法中有另一個含義，用於說明「積極的國家行動」(國家採取行動的義務相對於國家不採取行動的義務)。因此，「積極行動」這個術語不明確，因為其意思不限於CEDAW第四條第 1 款中所理解的暫行特別措施。「反向歧視」(reverse discrimination)或「積極的差別待遇」(positive discrimination)這兩個術語也被專家批評不恰當。(見一般性建議25/注4) 根據審議締約國報告的慣例，委員會要求締約國於報告中統一使用第四條第1項之「暫行特別措施」這一術語。(見一般性建議25/17)

## (二)「暫行」(temporary)

第四條第 1 項明確指出此類特別措施的「暫行」性質。因此，不應將此類措施視為永久的需要，即使「暫行」其實是意味著長期將採取此類措施。暫行特別措施的延續時間應根據處理具體問題的效果而定，不應預先確定。如果預期效果已實現並持續了一段期間，則必須中止暫行特別措施。(見一般性建議25/20)

## (三)「特別」

雖然「特別」這一術語與人權論述相符，但仍然應對其作出謹慎之解釋。有時，使用該術語會讓婦女和其它受歧視的群體顯得脆弱、易受傷害或是需要額外或特別的措施才能參與社會或在社會中競爭。但在制定第四條第1項時，「特別」的真正含義是這些措施旨在實現特定具體目標。(見一般性建議25/21)

## (四)「措施」(measures)

### 1. 定義

「措施」這一術語廣泛包括各種立法、執行、行政和管制手段及政策和慣例，如：資源的分配和(或)重分配；優惠待遇(preferential treatment)；符合特定目標之招募、雇用和升遷(targeted recruitment, hiring and promotion)；在一定期間設定數量指標和配額制度等。(見一般性建議25/22)

採取並執行暫行特別措施可能導致對於某些問題的討論，例如：受到保護的

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<sup>2</sup> 在台灣通常將 affirmative action 譯為「優惠性差別待遇」

群體或個人是否具有應有之資格(qualifications)和能力(merit)? 以及是否會特別保障在政治、教育和就業等領域資格或能力較低於男性的婦女。由於暫行特別措施旨在加速實現實際上或實質之平等,所以締約國應認真審查資格和才能問題是否涉及性別偏見,特別是在公私部門就業領域,因為資格和才能往往是由規範和文化認定的,因此在任命、甄選或選舉擔任公職和政治職務的人員時,除資格和才能以外的因素或許也應該納入考量,包括實行民主公正原則和投票選擇因素(electoral choice)。(見一般性建議25/23)

其他有些人權公約也允許暫行特別措施,如《消除一切形式種族歧視國際公約》(International Convention on the Elimination of All Forms of Racial Discrimination)。包括聯合國消除種族歧視委員會(Committee on the Elimination of Racial Discrimination)、聯合國經濟、社會和文化權利委員會(Committee on Economic, Social and Cultural Rights)和聯合國人權事務委員會(the Human Rights Committee)在內的條約監測機構的慣例都顯示,這些機構認為,要想達成各該條約的目標,必須執行暫行特別措施。在國際勞工組織(International Labour Organization)主持下通過的各項公約和聯合國教育、科學及文化組織的各種文件也都規定採取此類措施。聯合國婦女問題世界會議通過的成果文件,包括1995年第四次婦女問題世界會議行動綱要及其2000年後續行動審查,皆提到暫行特別措施是實現實質平等的工具。(見一般性建議25/注3)

## 2. 區分暫行特別措施與一般性政策

締約國應明確區分暫行特別措施和其它一般性社會政策,前者旨在加速實現婦女實際上或實質平等的具體目標,後者旨在改善婦女和女童的狀況。締約國應注意,並非所有現在或將來可能會有利於婦女的措施都是暫行特別措施。(見一般性建議25/26)締約國在實施暫行特別措施以加速實現婦女實際上或實質平等時,應分析婦女在所有生活領域以及特定、有針對性之領域中的狀況。締約國應評估暫行特別措施對國內特定目標的潛在影響,並採取它們認為最適當的暫行特別措施來加速實現婦女實際上或實質平等。(見一般性建議25/27)

## 3. 暫行特別措施之選擇

締約國應說明選擇一種措施而不選擇另一種措施的理由。實施此類措施的理由應包括:說明婦女或受交叉形式歧視之特定婦女群體的實際生活狀況,包括決定其生活和機會的各種條件和影響;以及實施此類暫行特別措施將加速改進她們在締約國的狀況。與此同時,亦應闡明這些措施和一般性措施與努力改善婦女狀

況之間的關係。(見一般性建議25/28)締約國應就未採取暫行特別措施作出充分的解釋，且不能以下列方式為理由不採取相關暫行特別措施：例如聲稱無能為力；或宣稱不行動的原因是因為市場力量或政治力量對該歧視占有主導地位。(見一般性建議25/29)

#### 4. 暫行特別措施之特別報告

締約國可就若干條款提出關於暫行特別措施的報告。根據第二條，請締約國就這些措施的法律或其它依據提出報告，並說明選擇某種措施的理由。此外，還請締約國詳細說明關於暫行特別措施的立法，特別是對該暫行特別措施的強制性質或自願性質作出說明。(見一般性建議25/30)根據有關條款提出的報告應提到具體的目標和指標、時間表、選擇特定措施的理由、讓婦女能夠參與這些措施的步驟以及負責監督執行情況和進展的機構。同時還請締約國說明受某措施影響及因暫行特別措施而有機會參加某領域的婦女人數，或說明國家打算在多長時間內向多少婦女重新分配多少資源和權力。(見一般性建議25/36)

#### 5. 暫行特別措施之法源

締約國應在其憲法或國家法律中規定，允許採取暫行特別措施。委員會提請締約國注意，全面的反歧視法、機會平等法或關於男女平等的行政命令等立法應能指示應採取哪種暫行特別措施，以實現特定領域的一個或數個特定目標。關於就業或教育的具體立法也可提供此類指導。關於不歧視和暫行特別措施的有關立法之規範對象應包括政府及私營組織或企業。(見一般性建議25/31)這類暫行特別措施可包括公務員制度、政治領域以及私營教育和就業部門。委員會還提請締約國注意，公營或私營就業部門的社會夥伴 (social partners) 也可通過談判達成此類措施，或由公營或私營企業、組織、機構和政黨在自願的基礎上予以實施。(見一般性建議25/32)

#### 6. 暫行特別措施之行動計畫

委員會重申，應根據具體國情和問題之具體性質，擬訂、實施和評估暫行特別措施行動計畫。委員會建議，締約國在報告中詳細說明旨在實現下列目標的行動計畫：例如為婦女創造機會，克服她們在某些領域任職人數不足的問題；在某些領域重新分配資源和權力；和（或）開始進行體制改革，消除過去或現在的歧視現象。報告還應說明，此類行動計畫是否考慮到此類措施可能意外造成的有害影響，以及為保護婦女免受這種影響可能採取的行動。締約國還應在其報告中說明暫行特別措施的成果，並評估可能致使這種措施失敗的因素。(見一般性建議

25/33)

## 7. 暫行措施之性別統計

委員會提請注意並重申其關於婦女狀況統計資料的一般性建議第9號，建議締約國提供按性別分類的資料，以便衡量在實現婦女實際上或實質平等方面取得的進展和暫行特別措施的效果。(見一般性建議25/35)

### 三、我國相關法規例示

以性別平等相關的決策或諮詢機構為例，為了保障女性之觀點和經驗能在性別平等相關決策中受到重視，對於這些機構的成員皆有對於婦女之成員比例有一定之保障。2005年行政院婦女權益促進委員會通過「行政院各部會所屬委員會(小組)委員性別比例改善原則任一性別比例應達全體委員之 1/3 以上」原則，大幅提升女性參與比例。符合性別比例規定的委員會從 2006 年的 53.91% 提升至 2011 年 92.63%，促進男女共同參與決策。在性別平等教育法第 8 條也規定直轄市、縣(市)主管機關之性別平等教育委員會，其中女性委員應占委員總數二分之一以上。性騷擾防治法第 6 條也規定直轄市、縣(市)政府應設性騷擾防治委員會的委員，其中女性代表不得少於二分之一。對於這些性平機構及委員會之組織結構，應定期檢視相關性別統計以檢討其成效。

【與本條相關之一般性建議】一般性建議第21號、第25號

【前文引用之一般性建議】

#### 一般性建議25/6

※聯合國官方中文版(簡轉繁)

第一至五和二十四條構成《公約》所有實質性條款的一般性解釋框架，指出締約國努力的三項主要義務去消除對婦女的歧視。這些義務應以綜合方式履行這些義務，它們已超出男女平等待遇的純粹正式法律的義務範疇。

※聯合國官方英文版

A joint reading of articles 1 to 5 and 24, which form the general interpretative framework for all of the Convention's substantive articles, indicates that three obligations are central to States parties' efforts to eliminate discrimination against women. These obligations should be implemented in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men.

#### 一般性建議 25/7

※聯合國官方中文版（簡轉繁）

首先，締約國有義務確保在其法律中沒有直接或間接歧視婦女的內容，並通過主管法庭及制裁和其它補救辦法確保婦女在公共和私人領域都不受到公共當局、司法機構、機關、企業或私人的歧視。第二，締約國有義務通過實行具體、有效的政策和方案改善婦女的實際狀況。第三，締約國有義務處理普遍的性別關係及基於性別的定型觀念，這一切不僅通過個人的個別行為而且在法律、立法和社會結構和機構中都對婦女產生影響。

※聯合國官方英文版

Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination — committed by public authorities, the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties' obligation is to improve the de facto position of women through concrete and effective policies and programmes. Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.

#### 一般性建議25/8

※聯合國官方中文版（簡轉繁）

委員會認為，僅僅採取正式法律或方案的方式不足以實現委員會解釋為實際平等的事實上的男女平等。此外，《公約》要求男女起點平等，並通過創造有利於實現結果平等的環境賦予婦女權力。僅僅保證男女待遇相同是不夠的。必須考慮到婦女和男子的生理差異以及社會和文化造成的差別。在某些情況下，必須給予男女不同待遇，以糾正這些差別。實現實際平等還需要有效的戰略，目的是糾正婦女代表名額不足的現象，在男女之間重新分配資源和權力。

※聯合國官方英文版

In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to

achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

#### 一般性建議25/9

※聯合國官方中文版（簡轉繁）

結果平等是事實上或實際平等可想而知的必然結果。這些結果可能是數量和／或品質性質的結果；即婦女與男子在各領域享有有關權利的人數幾乎相等，享有同等的收入、以及同等的決策權和政治影響力，和婦女不遭受暴力。

※聯合國官方英文版

Equality of results is the logical corollary of de facto or substantive equality. These results may be quantitative and/or qualitative in nature; that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence, and women enjoying freedom from violence.

#### 一般性建議25/10

※聯合國官方中文版（簡轉繁）

必須有效處理歧視婦女和男女不平等的根本原因，才能改善婦女的狀況。在審視婦女和男子的生活時必須考慮到這方面的前因後果，並採取措施以促進機會、機構和制度的真正改變，不再以歷史沿襲的男性權力和生活方式的規範為基礎。

※聯合國官方英文版

The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.

#### 一般性建議 25/11

※聯合國官方中文版（簡轉繁）

應區分婦女生理上決定的長期不變的需要和經歷和下列情況造成的其它需要：過去和現在對婦女的歧視個體行為；占主導地位的性別意識形態；社會、文化結構和機構中歧視婦女的各種表現。由於正在採取步驟消除對婦女的歧視，婦女的需  
要可能改變或消失，或成為男女的共同需要。因此，需要繼續監測旨在實現婦女事實上或實際平等的法律、方案和措施，以避免使可能已失去理由的不同待遇永久化。

※聯合國官方英文版

Women's biologically determined permanent needs and experiences should be distinguished from other needs that may be the result of past and present discrimination against women by individual actors, the dominant gender ideology, or by manifestations of such discrimination in social and cultural structures and institutions. As steps are being taken to eliminate discrimination against women, women's needs may change or disappear, or become the needs of both women and men. Thus, continuous monitoring of laws, programmes and practices directed at the achievement of women's de facto or substantive equality is needed so as to avoid a perpetuation of nonidentical treatment that may no longer be warranted.

#### 一般性建議25/12

※聯合國官方中文版（簡轉繁）

某些婦女群體除受性別歧視外，還受到基於種族、族裔或宗教、殘疾、年齡、階級、種姓或其它因素的多種形式的歧視。此類歧視首先可能影響到這些群體的婦女，也可能在不同程度上或以不同方式影響到男子。締約國可能需要採取具體的暫行特別措施，消除對婦女的多種形式的歧視及其對婦女產生的複合不利影響。

※聯合國官方英文版

Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.

#### 一般性建議25/14

※聯合國官方中文版（簡轉繁）

《公約》所針對是過去和現在阻礙婦女享受人權和基本自由的社會和文化上的歧視，其目標是消除對婦女一切形式歧視，包括消除事實上或實際不平等的根源和後果。因此，根據《公約》採取暫行特別措施是實現婦女事實上或實際平等的手段之一，而不是不歧視和平等準則的例外。

※聯合國官方英文版

The Convention, targets discriminatory dimensions of past and current societal and cultural contexts which impede women's enjoyment of their human rights and fundamental freedoms. It aims at the elimination of all forms of discrimination against women, including the elimination of the causes and consequences of their de facto or substantive inequality. Therefore, the application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.

#### 一般性建議25/15

※聯合國官方中文版（簡轉繁）

第四條第1款和第四條第2款中「特別措施」的目的明顯不同。第四條第1款的目的是加速改善婦女狀況以實現事實上或實際男女平等，尋求必要的結構、社會和文化變革，以糾正過去和現在歧視婦女的形式和後果，並向婦女提供補償。這些措施是暫行措施。

※聯合國官方英文版

There is a clear difference between the purpose of the “special measures” under article 4, paragraph 1, and those of paragraph 2. The purpose of article 4, paragraph 1, is to accelerate the improvement of the position of women to achieve their de facto or substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation. These measures are of a temporary nature.

#### 一般性建議 25/16

※聯合國官方中文版（簡轉繁）



第四條第2款對由於婦女與男子生理上的差異而給予他們的不同待遇作出了規定。這些措施是永久性措施，至少直至第十一條第3款中提到的科學技術知識證明有理由進行審查。

※聯合國官方英文版

Article 4, paragraph 2, provides for non-identical treatment of women and men due to their biological differences. These measures are of a permanent nature, at least until such time as the scientific and technological knowledge referred to in article 11, paragraph 3, would warrant a review.

#### 一般性建議25/17

※聯合國官方中文版（簡轉繁）

在《公約》的準備材料中使用了不同術語表述第四條第1款中的「暫行特別措施」。委員會在以前的一般性建議中也使用各種術語。締約國往往把糾正、補償和促進意義的術語「特別措施」與「平權行動」、「積極行動」、「積極措施」、「反向歧視」和「積極的區別對待」等術語等同起來。這些術語源自討論和各國在不同情況下採取的各種措施。在本一般性建議中，根據審議締約國報告的慣例，委員會按照第四條第1款的要求只使用「暫行特別措施」這一術語。

注4：在美利堅合眾國和一些聯合國文件中使用「平權行動」，而在歐洲和許多聯合國文件中目前普遍使用「積極行動」。但「積極行動」在國際人權法中有另一個含義，用於說明「積極的國家行動」（國家採取行動的義務相對於國家不採取行動的義務）。因此，「積極行動」這個術語不明確，因為其意思不限於《公約》第四條第1款中所理解的暫行特別措施。一些評論家批評「反向歧視」或「積極的區別對待」這兩個術語不恰當。

※聯合國官方英文版

The travaux préparatoires of the Convention use different terms to describe the “temporary special measures” included in article 4, paragraph 1. The Committee itself, in its previous general recommendations, used various terms. States parties often equate “special measures” in its corrective, compensatory and promotional sense with the terms “affirmative action”, “positive action”, “positive measures”, “reverse discrimination”, and “positive discrimination”. These terms emerge from the discussions and varied practices found in different national contexts. In the present general recommendation, and in accordance with its practice in the consideration of reports of States parties, the Committee uses solely the term “temporary special

measures”, as called for in article 4, paragraph 1.

Note 4: The term “affirmative action” is used in the United States of America and in a number of United Nations documents, whereas the term “positive action” is currently widely used in Europe as well as in many United Nations documents. However, the term “positive action” is used in yet another sense in international human rights law to describe “positive State action” (the obligation of a State to initiate action versus a State’s obligation to abstain from action). Hence, the term “positive action” is ambiguous inasmuch as its meaning is not confined to temporary special measures as understood in article 4, paragraph 1, of the Convention. The terms “reverse discrimination” or “positive discrimination” are criticized by a number of commentators as inappropriate.

#### 一般性建議25/18

※聯合國官方中文版（簡轉繁）

締約國根據第四條第1款採取的措施應旨在加速婦女在政治、經濟、社會、文化、民間或其它任何領域的平等參與。委員會認為，實施這些措施並非不歧視準則的例外，而是作出一種強調，即暫行特別措施是締約國的一項必要戰略的組成部分，其目的是在享受人權和基本自由方面實現事實上或實際男女平等。雖然實施暫行特別措施往往補救過去歧視婦女的造成的結果，但不管過去歧視婦女的證據如何，締約國仍應承擔《公約》規定的義務，改進婦女狀況以實現事實上或實際男女平等。委員會認為，根據《公約》通過並執行此類措施的締約國沒有歧視男子。

※聯合國官方英文版

Measures taken under article 4, paragraph 1, by States parties should aim to accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field. The Committee views the application of these measures not as an exception to the norm of non-discrimination, but rather as an emphasis that temporary special measures are part of a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms. While the application of temporary special measures often remedies the effects of past discrimination against women, the obligation of States parties under the Convention to improve the position of women to one of de facto or substantive equality with men exists irrespective of any proof of

past discrimination. The Committee considers that States parties that adopt and implement such measures under the Convention do not discriminate against men.

#### 一般性建議25/19

※聯合國官方中文版（簡轉繁）

締約國應明確區分根據第四條第1款採取的暫行特別措施和其它一般性社會政策，前者旨在加速實現婦女事實上或實際平等的具體目標，後者旨在改善婦女和女童的狀況。並非所有可能或將會有利於婦女的措施都是暫行特別措施。提供一般條件保證婦女和女童的公民、政治、經濟、社會和文化權利並確保她們過上有尊嚴、不受歧視的生活，這些不能稱為暫行特別措施。

※聯合國官方英文版

States parties should clearly distinguish between temporary special measures taken under article 4, paragraph 1, to accelerate the achievement of a concrete goal for women of de facto or substantive equality, and other general social policies adopted to improve the situation of women and the girl child. Not all measures that potentially are, or will be, favourable to women are temporary special measures. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of women and the girl child, designed to ensure for them a life of dignity and nondiscrimination, cannot be called temporary special measures.

#### 一般性建議25/20

※聯合國官方中文版（簡轉繁）

第四條第1款案文闡明此類特別措施的「暫行」性質。因此，不應將此類措施視為永久的需要，即使「暫行」其實是意味長期採取此類措施。暫行特別措施的延續時間應根據處理具體問題的效果而定，不應預先確定。如果預期效果已實現並持續了一段期間，則必須中止暫行特別措施。

※聯合國官方英文版

Article 4, paragraph 1, explicitly states the “temporary” nature of such special measures. Such measures should therefore not be deemed necessary forever, even though the meaning of “temporary” may, in fact, result in the application of such measures for a long period of time. The duration of a temporary special measure should be determined by its functional result in response to a concrete problem and not by a predetermined passage of time. Temporary special measures must be

discontinued when their desired results have been achieved and sustained for a period of time.

#### 一般性建議25/21

※聯合國官方中文版（簡轉繁）

雖然「特別」這一術語與人權論述相符，但仍然應對其作出縝密解釋。有時使用該術語會讓婦女和其它受歧視群體顯得脆弱、易受傷害並需要額外或「特別」措施才能參與社會或在社會中競爭。但在制定第四條第1款時，「特別」的真正含義是這些措施旨在實現具體目標。

※聯合國官方英文版

The term “special”, though being in conformity with human rights discourse, also needs to be carefully explained. Its use sometimes casts women and other groups who are subject to discrimination as weak, vulnerable and in need of extra or “special” measures in order to participate or compete in society. However, the real meaning of “special” in the formulation of article 4, paragraph 1, is that the measures are designed to serve a specific goal.

#### 一般性建議25/22

※聯合國官方中文版（簡轉繁）

「措施」這一術語廣泛包括各種立法、執行、行政和其它管理文書及政策和慣例，如：推廣方案或支助方案；分配和／或重新分配資源；優惠待遇；定向徵聘、雇用和晉升；與一定時期有關的數目指標和配額制度。選擇特定「措施」將取決於第四條第1款適用的情況，以及旨在實現的具體目標。

※聯合國官方英文版

The term “measures” encompasses a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems. The choice of a particular “measure” will depend on the context in which article 4, paragraph 1, is applied and on the specific goal it aims to achieve.

#### 一般性建議25/23

※聯合國官方中文版（簡轉繁）

通過並執行暫行特別措施可能導致討論其物件群體或個人的資格和才幹，並提出理由反對在政策、教育和就業等領域優待據稱資格低於男子的婦女。由於暫行特別措施旨在加速實現事實上或實際平等，所以應認真審查資格和才幹問題是否涉及性別偏見，特別是在公營和私營部門就業領域，因為資格和才幹是由規範和文化確定的。在任命、甄選或選舉擔任公職和政治職務的人員時，除資格和才幹以外的因素或許也應起作用，包括實行民主公正原則和選舉原則。

※聯合國官方英文版

The adoption and implementation of temporary special measures may lead to a discussion of **qualifications** and merit of the group or individuals so targeted, and an argument against preferences for allegedly lesser-qualified women over men in areas such as politics, education and employment. As temporary special measures aim at accelerating achievement of de facto or substantive equality, questions of qualification and merit, in particular in the area of employment in the public and private sectors, need to be reviewed carefully for gender bias as they are normatively and culturally determined. For appointment, selection or election to public and political office, factors other than qualification and merit, including the application of the principles of democratic fairness and electoral choice, may also have to play a role.

一般性建議25/26

※聯合國官方中文版（簡轉繁）

締約國應明確區分暫行特別措施和通過並執行的其它一般性社會政策（general social policies），前者旨在加速實現婦女事實上或實際平等的具體目標，後者旨在改善婦女和女童的狀況。締約國應注意，並非所有現在或將來可能會有利（favourable）於婦女的措施都是暫行特別措施。

※聯合國官方英文版

States parties should clearly distinguish between temporary special measures aimed at accelerating the achievement of a concrete goal of women's de facto or substantive equality, and other general social policies adopted and implemented in order to improve the situation of women and the girl child. States parties should bear in mind that not all measures which potentially are or would be favourable to women qualify as temporary special measures

一般性建議25/27

※聯合國官方中文版（簡轉繁）

締約國在實施暫行特別措施以加速實現婦女事實上或實際平等時，應分析婦女在所有生活領域以及特定、有針對性的領域中的狀況。締約國應評估暫行特別措施對國內特定目標的可能影響，並採取它們認為最適當的暫行特別措施來加速實現婦女事實上或實際平等。

注3：例如，見《消除一切形式種族歧視國際公約》，其中准許暫行特別措施。包括消除種族歧視委員會、經濟、社會和文化權利委員會和人權事務委員會在內的條約監測機構的慣例表明，這些機構認為，要想達成各該條約的目標，必須執行暫行特別措施。在國際勞工組織主持下通過的各項公約和聯合國教育、科學及文化組織的各種檔都明確或含蓄規定採取此類措施。促進和保護人權小組委員會審議了這一問題，並指定一名特別報告員編寫報告供小組委員會審議和採取行動。婦女地位委員會於1992年審查了採取暫行特別措施的情況。聯合國婦女問題世界會議通過的成果文件，包括1995年第四次婦女問題世界會議行動綱要及其2000年後續行動審查，提到積極行動是實現事實上平等的工具。聯合國秘書長採取暫行特別措施是婦女就業領域的實例，包括在秘書處實行關於婦女招聘、晉升和職位安排的行政指示。這些措施的目的是在各級、特別是較高級別實現50/50的男女比例。

※聯合國官方英文版

States parties should analyse the context of women's situation in all spheres of life, as well as in the specific, targeted area, when applying temporary special measures to accelerate achievement of women's de facto or substantive equality. They should evaluate the potential impact of temporary special measures with regard to a particular goal within their national context and adopt those temporary special measures which they consider to be the most appropriate in order to accelerate the achievement of de facto or substantive equality for women.

Note3: See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, which mandates temporary special measures. The practice of treaty monitoring bodies, including the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, and the Human Rights Committee, shows that these bodies consider the application of temporary special measures as mandatory to achieve the purposes of the respective treaties. Conventions adopted under the auspices of the International Labour Organization, and various documents of the United Nations Educational, Scientific

and Cultural Organization also explicitly or implicitly provide for such measures. The Subcommission on the Promotion and Protection of Human Rights considered this question and appointed a Special Rapporteur to prepare reports for its consideration and action. The Commission on the Status of Women reviewed the use of temporary special measures in 1992. The outcome documents adopted by United Nations world conferences on women, including the Platform for Action of the 1995 Fourth World Conference on Women and its follow-up review of 2000, contain references to positive action as a tool for achieving de facto equality. The use of temporary special measures by the Secretary-General of the United Nations is a practical example in the area of women's employment, including through administrative instructions on the recruitment, promotion and placement of women in the Secretariat. These measures aim at achieving the goal of 50/50 gender distribution at all levels, but at the higher echelons in particular.

#### 一般性建議25/28

※聯合國官方中文版（簡轉繁）

締約國應說明選擇一種措施而不選擇另一種措施的理由。實施此類措施的理由應包括：說明婦女或受到多種形式的歧視的特定婦女群體的實際生活狀況，包括決定其生活和機會的各種條件和影響；實施此類暫行特別措施將加速改進她們在締約國的狀況。與此同時，應闡明這些措施和一般性措施與努力改善婦女狀況之間的關係。

※聯合國官方英文版

States parties should explain the reasons for choosing one type of measure over another. The justification for applying such measures should include a description of the actual life situation of women, including the conditions and influences which shape their lives and opportunities — or that of a specific group of women, suffering from multiple forms of discrimination — and whose position the State party intends to improve in an accelerated manner with the application of such temporary special measures. At the same time, the relationship between such measures and general measures and efforts to improve the position of women should be clarified.

#### 一般性建議25/29

※聯合國官方中文版（簡轉繁）

締約國應就未採取暫行特別措施作出充分解釋。不能以下列方式證明有理由不採取暫行特別措施：聲稱無能為力；或說明不行動的原因是占主導地位的市場力量或政治力量，如私營部門、私人組織或政黨所固有的這些力量。此外，提請締約國注意，應參照其它各條解釋的《公約》第二條要求締約國對這些行動者的行動負責。

※聯合國官方英文版

States parties should provide adequate explanations with regard to any failure to adopt temporary special measures. Such failures may not be justified simply by averring powerlessness, or by explaining inaction through predominant market or political forces, such as those inherent in the private sector, private organizations, or political parties. States parties are reminded that article 2 of the Convention, which needs to be read in conjunction with all other articles, imposes accountability on the State party for action by these actors.

#### 一般性建議25/30

※聯合國官方中文版（簡轉繁）

締約國可就若干條款提出關於暫行特別措施的報告。根據第二條，請締約國就這些措施的法律或其它依據提出報告，並說明選擇某種辦法的理由。此外，還請締約國詳細說明關於暫行特別措施的立法，特別是該立法是否對暫行特別措施的強制性質或自願性質作出規定。

※聯合國官方英文版

States parties may report on temporary special measures under several articles. Under article 2, States parties are invited to report on the legal or other basis for such measures, and their justification for choosing a particular approach. States parties are further invited to give details about any legislation concerning temporary special measures, and in particular whether such legislation provides for the mandatory or voluntary nature of temporary special measures.

#### 一般性建議25/31

※聯合國官方中文版（簡轉繁）

締約國應在其憲法或國家立法中規定，允許採取暫行特別措施。委員會提請締約國注意，全面反歧視法、機會平等法或關於男女平等的行政命令等立法能夠指導應採取哪種暫行特別措施，以實現特定領域的一個或數個特定目標。關於就業或



教育的具體立法也可提供此類指導。關於不歧視和暫行特別措施的有關立法應涉及政府行動者及私營組織或企業。

※聯合國官方英文版

States parties should include, in their constitutions or in their national legislation, provisions that allow for the adoption of temporary special measures. The Committee reminds States parties that legislation, such as comprehensive anti-discrimination acts, equal opportunities acts or executive orders on women's equality, can give guidance on the type of temporary special measures that should be applied to achieve a stated goal, or goals, in given areas. Such guidance can also be contained in specific legislation on employment or education. Relevant legislation on non-discrimination and temporary special measures should cover governmental actors as well as private organizations or enterprises.

#### 一般性建議25/32

※聯合國官方中文版（簡轉繁）

委員會提請締約國注意，暫行特別措施還可基於國家、區域或當地行政部門包括公共就業和教育部門制定並通過的指令、政策指示和／或行政準則。這類暫行特別措施可包括公務員制度、政治領域以及私營教育和就業部門。委員會還提請締約國注意，公營或私營就業部門的社會夥伴也可通過談判達成此類措施，或由公營或私營企業、組織、機構和政黨在自願的基礎上予以實施。

※聯合國官方英文版

The Committee draws the attention of States parties to the fact that temporary special measures may also be based on decrees, policy directives and/or administrative guidelines formulated and adopted by national, regional or local executive branches of government to cover the public employment and education sectors. Such temporary special measures may include the civil service, the political sphere and the private education and employment sectors. The Committee further draws the attention of States parties to the fact that such measures may also be negotiated between social partners of the public or private employment sector or be applied on a voluntary basis by public or private enterprises, organizations, institutions and political parties.

#### 一般性建議25/33

※聯合國官方中文版（簡轉繁）

委員會重申，應根據具體國情和打算克服的問題的具體性質，擬訂、實施和評價暫行特別措施行動計畫。委員會建議，締約國在報告中詳細說明旨在實現下列目標的行動計畫：為婦女創造機會，克服她們在某些領域任職人數不足的問題；在某些領域重新分配資源和權力；和／或開始進行體制改革，消除過去或現在的歧視現象，加速實現事實上的平等。報告還應說明，此類行動計畫是否考慮到此類措施可能意外造成的有害影響，以及為保護婦女免受這種影響可能採取的行動。締約國還應在其報告中說明暫行特別措施的成果，並評估可能致使這種措施失敗的因素。

※聯合國官方英文版

The Committee reiterates that action plans for temporary special measures need to be designed, applied and evaluated within the specific national context and against the background of the specific nature of the problem which they are intended to overcome. The Committee recommends that States parties provide in their reports details of any action plans which may be directed at creating access for women and overcoming their underrepresentation in certain fields, at redistributing resources and power in particular areas, and/or at initiating institutional change to overcome past or present discrimination and accelerate the achievement of de facto equality. Reports should also explain whether such action plans include considerations of unintended potential adverse side-effects of such measures as well as on possible action to protect women against them. States parties should also describe in their reports the results of temporary special measures and assess the causes of the possible failure of such measures.

#### 一般性建議25/35

※聯合國官方中文版（簡轉繁）

委員會提請注意並重申其關於婦女狀況統計資料的第9號一般性建議，建議締約國提供按性別分列的資料，以便衡量在實現婦女事實上或實際平等方面取得的進展和暫行特別措施的效果。

※聯合國官方英文版

The Committee draws attention to and reiterates its general recommendation No. 9, on statistical data concerning the situation of women, and recommends that States parties provide statistical data disaggregated by sex in order to measure the achievement of progress towards women's de facto or substantive equality and the effectiveness of

temporary special measures.

#### 一般性建議 25/36

※聯合國官方中文版（簡轉繁）

締約國應報告根據《公約》有關條款在具體領域採取的暫行特別措施類型。根據有關條款提出的報告應提到具體的目標和指標、時間表、選擇特定措施的理由、讓婦女能夠參與這些措施的步驟以及負責監督執行情況和進展的機構。還請締約國說明受某措施影響及因暫行特別措施而有機會參加某領域的婦女人數，或說明國家打算在多長時間內向多少婦女重新分配多少資源和權力。

※聯合國官方英文版

States parties should report on the type of temporary special measures taken in specific fields under the relevant article(s) of the Convention. Reporting under the respective article(s) should include references to concrete goals and targets, timetables, the reasons for choosing particular measures, steps to enable women to access such measures, and the institution accountable for monitoring implementation and progress. States parties are also asked to describe how many women are affected by a measure, how many would gain access and participate in a certain field because of a temporary special measure, or the amount of resources and power it aims to redistribute to how many women, and within what time frame.

## 第五條 (社會文化之改變與母性之保障)

締約各國應採取一切適當措施：

- (a) 改變男女的社會和文化行為模式，以消除基於性別而分尊卑觀念或基於男女任務定型所產生的偏見、習俗和一切其他做法；
- (b) 保證家庭教育應包括正確了解母性的社會功能和確認教養子女是父母的共同責任，當然在任何情況下都應首先考慮子女的利益。

### 一、背景及概說

CEDAW 關切社會習俗和文化對於社會上性別結構的影響，各國文化皆存在某些對於女性歧視和強化男尊女卑觀念的實踐，這些實踐使得男女平等之達成困難重重，因此打破習俗和文化對於刻板印象所生之偏見，是消除對婦女歧視並達成實質平等的重要工作。

### 二、CEDAW 對幾項文化習俗的一般性建議

#### 1. 女性生殖器殘割(female circumcision)

CEDAW 委員會關切某些國家女性生殖器殘割習俗和對婦女健康有害的其他傳統習俗仍然存在，因此向各締約國建議採取適當有效措施以根除女性生殖器殘割習俗，並要求締約國在其國家衛生政策內明確載明旨在消除女性生殖器殘割的適當策略。(見一般性建議第14號)

#### 2. 一夫多妻制婚姻

CEDAW 委員會表示一夫多妻婚姻抵觸男女平等之原則，會給婦女和受其撫養之人帶來嚴重的情感和經濟方面的後果，這種婚姻應予限制和禁止。有些締約國在憲法上保障平等權利，卻按照屬人法或習慣法允許一夫多妻的婚姻，這違反了婦女的憲法權利，也有違CEDAW第5條(a)項的規定(見一般性建議21/14)

### 三、我國相關法規例示

我國之民法歷次修正大幅度修改了舊有對於婦女之限制和不平等的習俗與慣例，包括取消招贅婚與嫁娶婚的差異、子女得從母姓等。以子女之從姓為例，我國傳統上傳遞宗祠香火的觀念相當深厚，因此子女的從姓過去以從父姓為唯一的選項，僅在招贅婚的情況下可以從母姓。1985年民法修改從姓的規定開放讓因為女性家族無兄弟可以傳遞娘家香火之情況下，可以讓子女從母姓，但該規定仍然以傳遞家族之父姓為思考基礎，仍然有違男女平等原則。民法遂於2007年進一步修改夫妻間得約定子女之從姓，使得子女之從姓以夫妻間之約定為原則，即在

法律的層次上打破了過去子女從父姓的習慣。我國仍有許多不利於婦女的習俗尙未能修改，例如祭祀、喪禮中重男輕女的習俗，以及單身女性於死後不能歸於宗祠或祖墳的習俗。這些文化和習俗仍有待改進。

【與本條相關之一般性建議】一般性建議第14號、第21號第14段

【前文引用之一般性建議】

#### 一般性建議第 14 號

※聯合國官方中文版（簡轉繁）

消除對婦女歧視委員會，關切到女性生殖器殘割習俗和對婦女健康有害的其他傳統習俗仍然繼續存在，滿意地注意到那些存在這種習俗的國家的政府全國婦女組織、非政府組織以及聯合國系統各機關，諸如世界衛生組織、聯合國兒童基金會以及人權委員會及其防止歧視及保護少數小組委員會，特別認識到女性生殖器殘割等一類傳統習俗對婦幼造成嚴重的健康和其他後果，正在繼續認真對待處理這個問題，感興趣地注意到關於影響婦幼健康的傳統習俗的特別報告員研究報告以及關於傳統習俗的特別工作組研究報告，認識到婦女自己正採取重要行動以確認對婦幼健康和福利有害的習俗並與之進行鬥爭。相信婦女和所有有關團體現正採取的重要行動需要各國政府的支援和鼓勵，嚴重關切地注意到促成延續諸如女性生殖器殘割的有害習俗的文化、傳統和經濟壓力仍然存在，向各締約國建議：

- (a) 各締約國採取適當有效措施以期剷除女性生殖器殘割習俗。這種措施應包括：大學、醫學或護理協會、全國婦女組織或其他機構搜集和散播關於這種傳統習俗的基本資料；支援國家和地方等級的婦女組織努力消除女性生殖器殘割和其他對婦女有害的習俗；鼓勵政治家、專業人員，各等級的宗教和社區領導人，包括大眾傳媒和藝術在內，進行合作以影響對剷除女性生殖器殘割的態度；舉辦以女性生殖器殘割所引起的問題的研究結果為依據的適當的教育和培訓方案及研討會；
- (b) 在其國家衛生政策內載列旨在剷除公共保健中女性生殖器殘割的適當戰略。這種戰備可包含衛生人員(包括傳統助產人員)負有特別責任解釋女性生殖器殘割的有害效果；
- (c) 請聯合國系統有關組織提供援助、資料和諮詢意見以支援和協助進行中的關於消除有害的傳統習俗的工作；
- (d) 在向委員會提出的報告中在《消除對婦女一切形式歧視公約》第十和第十二條之下的部分載列關於消除女性生殖器殘割的措施的資料。

※聯合國官方英文版

The Committee on the Elimination of Discrimination against Women,

Concerned about the continuation of the practice of female circumcision and other traditional practices harmful to the health of women,

Noting with satisfaction that Governments, where such practices exist, national women's organizations, non-governmental organizations, and bodies of the United Nations system, such as the World Health Organization and the United Nations Children's Fund, as well as the Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities, remain seized of the issue having particularly recognized that such traditional practices as female circumcision have serious health and other consequences for women and children,

Taking note with interest the study of the Special Rapporteur on Traditional Practices Affecting the Health of Women and Children,<sup>4</sup> and of the study of the Special Working Group on Traditional Practices,<sup>5</sup>

Recognizing that women are taking important action themselves to identify and to combat practices that are prejudicial to the health and well-being of women and children,

Convinced that the important action that is being taken by women and by all interested groups needs to be supported and encouraged by Governments,

Noting with grave concern that there are continuing cultural, traditional and economic pressures which help to perpetuate harmful practices, such as female circumcision,

Recommends that States parties:

(a) Take appropriate and effective measures with a view to eradicating the practice of female circumcision. Such measures could include:

(i) The collection and dissemination by universities, medical or nursing associations, national women's organizations or other bodies of basic data about such traditional practices;

(ii) The support of women's organizations at the national and local levels working for the elimination of female circumcision and other practices harmful to women;

(iii) The encouragement of politicians, professionals, religious and community leaders at all levels, including the media and the arts, to co-operate in influencing attitudes towards the eradication of female circumcision;

(iv) The introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female

circumcision;

(b) Include in their national health policies appropriate strategies aimed at eradicating female circumcision in public health care. Such strategies could include the special responsibility of health personnel, including traditional birth attendants, to explain the harmful effects of female circumcision;

(c) Invite assistance, information and advice from the appropriate organizations of the United Nations system to support and assist efforts being deployed to eliminate harmful traditional practices;

(d) Include in their reports to the Committee under articles 10 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women information about measures taken to eliminate female circumcision.

#### 一般性建議 21/14

※聯合國官方中文版（簡轉繁）

締約國報告還表明在一些國家有一夫多妻的習俗。一夫多妻婚姻與男女平等的權利相牴觸，會給婦女和其受撫養人帶來嚴重的情感和經濟方面的後果，這種婚姻應予抑制和禁止。委員會關切地注意到，有些締約國其憲法保障平等權利，卻按照屬人法或習慣法而允許一夫多妻的婚姻，這違反了婦女的憲法權利，也有違《公約》第五條(a)項的規定。

※聯合國官方英文版

States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.

## 第六條 (禁止販賣婦女與使婦女賣淫)

締約各國應採取一切適當措施，包括制定法律，以禁止一切形式販賣婦女及意圖營利使婦女賣淫的行為。

### 一、 背景及概說

貧窮和失業增加販賣婦女(trafficking in women)的機會。除既有的販賣婦女形式外，還有新形式的性剝削(sexual exploitation)，例如性觀光(sex tourism)，或向發展中國家徵聘勞工到發達國家去工作，安排發展中國家婦女同外國人結婚，這些做法與婦女平等享有權利以及尊重其權利和尊嚴都不相容(incompatible)。它們使婦女特別容易受到暴力和虐待。(見一般性建議19/14)貧窮和失業促使很多婦女包括年輕少女從事色情行業。娼妓尤其容易受到暴力，她們由於地位不合法，往往被邊緣化(marginalize)。她們需要平等的法律保護，使她們不受到性侵害或是其他形式的暴力。(見一般性建議19/15)戰爭、武裝衝突、占領領土(occupation of territories)等往往導致娼妓人數以及販賣婦女和對婦女進行性攻擊(sexual assault)的行為增加，需要採取具體的保護和懲罰性措施(punitive measures)。(見一般性建議19/16)

### 二、 聯合國禁止人口販運的公約和議定書

1. 《聯合國禁止販賣人口及取締意圖營利使人賣淫的公約》(Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others)之規定

聯合國於 1949 年於大會通過「禁止販賣人口及取締意圖營利使人賣淫的公約」，關切「淫業以及因此而起之販人操淫業之罪惡，侮蔑人格尊嚴與價值，危害個人、家庭與社會之幸福」因此將人口販運和意圖營利使人賣淫的行為認定為國際間所譴責之罪行。依據該公約的規定：

(1)第一條 本公約締約國同意：對於意圖滿足他人情欲而有下列行為之一者，一應處罰：

- a.凡招雇、引誘或拐帶他人使其賣淫，即使得本人之同意者；
- b.使人賣淫，即使得本人之同意者。

(2)第二條

本公約締約國並同意對於有下列行為之一者，一應處罰：

- a.開設或經營妓院，或知情出資或資助者；
- b.知情而以或租賃房舍或其他場所或其一部供人經營淫業者。



### (3) 締約國之義務包括

A. 第十六條 本公約各締約國同意經由其公私教育、衛生、社會、經濟及其他有關機關採取或推進各種措施以防止淫業並對淫業及本公約所指罪行之被害人使之復原並改善其社會地位。

B. 第十七條 本公約締約國擔允對移入或移出人口遷動，依照本公約所規定之義務，採取或續施必需辦法，取締販賣男女以賣淫為業。各締約國特為擔允：

a. 制定必要之規章，對移入國境或移出國境之人等尤其婦女兒童，在其抵境及離境地點與途中，予以保護；

b. 設法為適當之宣傳，曉諭民眾，告以上述販人賣淫之危險；

c. 採取適當辦法，於火車站、飛機場、海港、沿途以及其他公共場所，嚴為監督，以防止國際販賣人口賣淫為業；

d. 採取適當辦法使顯係從事此種販賣之主犯及從犯或被害人抵境時，主管當局即能獲悉。

C. 第十九條 本公約締約國擔允，依本國法律之規定，並在不妨礙因犯法而須予追訴或採取其他行動之情形下，盡可能：

a. 在國際販賣人口使操淫業之貧困受害者遣送回籍辦法籌畫竣事以前，對於此等人暫時妥予照料並維持其生活；

b. 將第十八條所稱之人自願被送回籍者或由聲明負責管理之人認領者，或依法判令驅逐出境者遣送回籍。遣送回籍應於獲得送往國知悉被遣送人之形貌、國籍及抵達邊境之地點、日期等事表示同意後始得為之。本公約各締約國應予此等人以通過其領土之便利。

前項所稱之人如無力自償回籍費用，又無配偶、親戚或監護人為之代付，則將其送至距向原籍國之最近邊境或登船埠頭或飛機場之回籍費用，應由其現居國家擔負，至其餘途中費用，則應由原籍國擔負。

D. 第二十條 本公約締約國應採取必要辦法，對各種介紹職業之機關加以監察，以防求謀就業之人，尤其婦女兒童，有被誘賣淫之危險。

## 2. 預防禁止和懲治販運人口特別是婦女和兒童行為的補充議定書

根據 2000 年聯合國通過《打擊跨國有組織犯罪公約》(U.N. Convention Against Transnational Organized Crime) 中在其附錄二有《預防禁止和懲治販運人口特別是婦女和兒童行為的補充議定書》(Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children) 係針對婦女與兒童的人口販運，此議定書的目的是在規定締約國應採取有效行動預防和打擊國際販運人口，

特別是婦女和兒童，必須採取全面性的國際作法(comprehensive international approach)，包括人口販運之被害人之原住地國、過境國和目的地國(the countries of origin, transit and destination)皆應採取預防販運、懲治販運者(traffickers)和保護販運被害人的措施,包括透過保護被害人國際公認的人權對他們進行保護。該第三條所規定的人口販運係指：「為剝削目的而通過暴力威脅或使用暴力手段，或通過其他形式的脅迫，通過誘拐、欺詐、欺騙、濫用權力或濫用脆弱境況(a position of vulnerability)，或通過授受酬金或利益取得對另一人有控制權的某人的同意等手段招募(recruitment)、運送(transportation)、轉移(transfer)、窩藏(harboring)或接收(receipt)人員。剝削(exploitation)應至少包括利用他人賣淫進行剝削或其他形式的性剝削、強迫勞動或服務(forced labour or services)、奴役(slavery)或類似奴役的做法、勞役(servitude)或切除器官(removal of organs)」(聯合國打擊跨國有組織犯罪公約關於預防、禁止和懲治販運人口特別是婦女和兒童行為的補充議定書序言)

### 三、我國相關法規例示

為避免青少年或女童遭性剝削及從事性交易，我國制定兒童及少年性交易防制條例。另人口販運防制法對於人口販運也加以明確規範：

1.指意圖使人從事性交易、勞動與報酬顯不相當之工作或摘取他人器官，而以強暴、脅迫、恐嚇、拘禁、監控、藥劑、催眠術、詐術、故意隱瞞重要資訊、不當債務約束、扣留重要文件、利用他人不能、不知或難以求助之處境，或其他違反本人意願之方法，從事招募、買賣、質押、運送、交付、收受、藏匿、隱避、媒介、容留國內外人口，或以前述方法使之從事性交易、勞動與報酬顯不相當之工作或摘取其器官。

2.指意圖使未滿十八歲之人從事性交易、勞動與報酬顯不相當之工作或摘取其器官，而招募、買賣、質押、運送、交付、收受、藏匿、隱避、媒介、容留未滿十八歲之人，或使未滿十八歲之人從事性交易、勞動與報酬顯不相當之工作或摘取其器官。

【與本條相關之一般性建議】一般性建議第 19 號

【前文引用之一般性建議】

一般性建議 19/14

※聯合國官方中文版（簡轉繁）

貧窮和失業增加販賣婦女的機會。除既有的販賣婦女形式外，還有新形式的性剝

削，例如性旅遊，向發展中國家徵聘勞工到發達國家去工作，安排發展中國家婦女同外國人結婚，這些做法與婦女平等享有權利以及尊重其權利和尊嚴都不相容。它們使婦女特別容易受到暴力和虐待。

※聯合國官方英文版

Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries, and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.

#### 一般性建議 19/15

※聯合國官方中文版（簡轉繁）

貧窮和失業還逼良為娼，包括年輕少女。妓女尤其容易受到暴力，她們由於地位不合法，往往受到排斥。她們需要平等的法律保護，使她們不被強姦和受到其他形式的暴力。

※聯合國官方英文版

Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.

#### 一般性建議 19/16

※聯合國官方中文版（簡轉繁）

戰爭、武裝衝突、占領領土等往往導致娼妓人數以及販賣婦女和對婦女進行性攻擊的行為增加、需要採取具體的保護和懲罰性措施。

※聯合國官方英文版

Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.

【聯合國打擊跨國有組織犯罪公約關於預防、禁止和懲治販運人口特別是婦女和兒童行為的補充議定書】

序言

※聯合國官方中文版（簡轉繁）

本議定書締約國，

宣布採取有效行動預防和打擊國際販運人口特別是婦女和兒童，必須在原地國、過境國和目的地國採取綜合性國際做法，包括預防這種販運、懲治販運者和保護這種販運活動被害人的措施，包括通過保護被害人國際公認的人權對他們進行保護。

※聯合國官方英文版

*The States Parties to this Protocol,*

*Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights.*

第三條第一項

※聯合國官方中文版（簡轉繁）

在本議定書中：

(a) 「人口販運」係指為剝削目的而通過暴力威脅或使用暴力手段，或通過其他形式的脅迫，通過誘拐、欺詐、欺騙、濫用權力或濫用脆弱境況，或通過授受酬金或利益取得對另一人有控制權的某人的同意等手段招募、運送、轉移、窩藏或接收人員。剝削應至少包括利用他人賣淫進行剝削或其他形式的性剝削、強迫勞動或服務、奴役或類似奴役的做法、勞役或切除器官

※聯合國官方英文版

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.