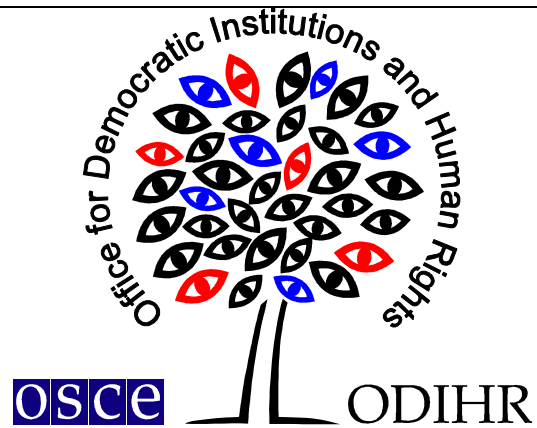


Warsaw, 11 September, 2008

Opinion-Nr: NDISCR – MOL/117/2008
(TND)

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OSCE/ODIHR COMMENTS
ON THE DRAFT LAW
OF THE REPUBLIC OF MOLDOVA
ON PREVENTING AND COMBATING
DISCRIMINATION

**based on an English translation of the draft Law on Preventing and Combating
Discrimination
of the Republic of Moldova
provided by the OSCE Mission to Moldova**

A draft law on preventing and combating discrimination and an informative note thereto was prepared by the Ministry of Justice of the Government of Moldova. These were forwarded with a request for a legislative review by the OSCE Mission to Moldova to the OSCE/ODIHR.

I - INTRODUCTION

In October 2007 the Ministry of Justice of Moldova established an Anti-Discrimination Working Group, ('the Working Group') and prepared a draft Law on Preventing and Combating Discrimination in June 2008 ('the draft law'). A meeting was held on 8 July 2008 with key civil society and official representatives to discuss the draft, at which the OSCE Mission to Moldova ('the Mission') was represented. Subsequently, the draft law together with an informative note was forwarded to the OSCE ODIHR by the Mission. A previous draft anti-discrimination law had been prepared in June 2007 by experts commissioned by the OSCE Mission ('the OSCE draft'), and forwarded to the Moldovan Ministry of Justice, together with a commentary. These materials have been considered by OSCE ODIHR for the purpose of this review.

Scope of Review

These comments analyze the draft Law of the Republic of Moldova on Preventing and Combating Discrimination (hereafter referred to as the 'draft law') from the viewpoint of its compatibility with the relevant international human rights standards and OSCE commitments¹. International standards in anti-discrimination law are extensive; they can be found in the European Convention on Human Rights ('ECHR'), European Union ('EU') law, and various conventions especially the UN Convention on the Elimination of all forms of Racial Discrimination ('CERD'). These standards have been elaborated and given detail by the European Court of Human Rights (ECtHR),

¹ Ministerial Council Decision 4/03 on Tolerance and Non-Discrimination reaffirmed the Ministerial Council's concern about discrimination in all participating States; Permanent Council Decision no. 621 on Tolerance and the Fights against Racism Xenophobia and Discrimination committed participating States to consider enacting, or strengthening, as appropriate legislation prohibiting discrimination.

the European Court of Justice (ECJ) and by numerous decisions of different national courts.

The international standards referred to in these comments are not restricted to only those that are legally binding on the Republic of Moldova.²

A number of EU Directives are relevant (including the ‘Racial Equality Directive’³, the ‘Employment Equality Directive’⁴, the ‘Burden of Proof Directive’⁵, and on the implementation of the principle of equal treatment for men and women as regards access to employment, and occupation (recast).⁶) and related ECJ judgments. These will be referred to in the text as appropriate without detailed elaboration.

These comments do not purport to be a comprehensive review. Rather the OSCE ODIHR highlights the key issues, and seeks to provide useful indicators of areas of concern in the draft law. A key criterion that has been used throughout is the extent to which the legislation would be effective in securing the rights desired: the law must be capable of full and meaningful implementation. Achieving this requires legislation which is concrete, with a clear appreciation of the social context, and the financial consequences to the implementing state.

The comments provided are without prejudice to any further comments or recommendations that the ODIHR may wish to make on the issue under consideration.

Relevant Moldovan law

This draft has been prepared in the context of a constitutional guarantee of equality and other legislation which relates to equality.

² Although Moldova is not a member of the EU, it aspires to meet the standards set by the EU in the field of anti-discrimination. The EU/Moldova Action Plan refers to the need to implement legislation on anti-discrimination and national minorities in line with EU standards, and also to fully execute judgements of the ECtHR. It also requires that Moldova continues efforts to ensure equality of men and women in society and economic life.

³ Directive 2000/43/EC

⁴ Directive 2000/78/EC

⁵ Directive 97/80/EC

⁶ Directive 2006/54/EC

Article 16(2) of the Constitution provides: “*All citizens of the Republic of Moldova shall be equal before the law and public authorities, regardless of the race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, property or social origin*”

Article 32(3) provides that “*The law shall forbid and prosecute all actions aimed at denying and slandering of the State and people, the instigation to sedition, war of aggression, national, racial or religious hatred, the incitement to discrimination, territorial separatism, public violence, or other manifestations encroaching upon the constitutional regime.*”

In the Criminal Code the breach of the right to equality is punished according to Article 176, which provides that *infringement of rights and liberties provided by the Constitution and other laws, based on gender, race, colour, language, religion, political opinions or any other opinions, ethnic or social origin, affiliation to a national minority, property or any other situation:*

a) committed by an officially person; and

b) which causes serious damages

- shall be punished with a fine or imprisonment for up to 3 years, in both cases with (or without) forfeiture of the right to hold certain positions or exercise a certain activity for a term of between 2 and 5 years.

According to the informative note, despite the existence of a number of provisions in the field of discrimination, there is no general law in this field at the national level yet, and the legal practice in the field of discrimination does not exist. Many legal provisions apparently import the principle of non-discrimination when referring to specific civil or criminal matters.⁷ Although the informative note does not refer to it, a

⁷ See the commentary on Draft Anti-Discrimination Law to the OSCE draft law, prepared by Lori J. Mann and Angelina Zaporozjan-Pirgari; paragraph 20.

Law on Ensuring Equal Opportunities for Women and Men⁸ ('Equal Opportunities Law'), which prohibits sex discrimination, was passed in 2006. An unofficial English translation has been provided to the ODIHR by the OSCE Mission.

Moldova is also a signatory to, and has ratified, a number of UN conventions on discrimination; these international treaties are directly applicable and, in the event of a conflict, take precedence over Moldovan law. Among them are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Elimination of All Forms of Racial Discrimination ('CERD').

II KEY ISSUES:

There are four pre-conditions for effective anti-discrimination measures:

- A. A clear definition of unlawful practices which actually bar progress towards equality;
- B. Remedies which provide incentives for voluntary compliance and effective means for change;
- C. A system of procedural law which permits presentation of serious claims; and
- D. Resources to implement the law.

This review will consider the draft law as a whole against each of these 4 criteria before considering individual clauses.

SUMMARY:

- The draft contains some definitions at variance with the Law on Equal Opportunities.

It is recommended that the law fully take into account the existing anti-discrimination mechanisms in the Law on Equal Opportunities

⁸ Law on Equal Opportunities between Women and Men, Law No. 5-XIV, 9 February 2006, Official Monitor No. 47-50/200, 24 March 2006.

- The draft adopts a comprehensive and ambitious approach to anti-discrimination legislation. It seeks to prohibit discrimination in *any* sphere of life by *any* person or institution against groups or individuals based on *any* group characteristic.

It is recommended that the scope of the law prohibits discrimination in specific areas of public, as opposed to private, life; and that it also focus on specific protected categories.

- The draft conflates the concepts of discrimination, indirect and direct discrimination and justification.

It is recommended that the definitions of direct and indirect discrimination and analogous terms are more precisely delineated and are made consistent with the Equal Opportunities Law. Racial segregation should be within the definition of discrimination, as should discrimination on assumed characteristics or association.

- The draft fails to preserve sufficiently clearly those acts of differential treatment which are not considered discrimination, aside from a broad definition of affirmative action

It is recommended that the draft provides for specific and detailed exemptions from the prohibition on discrimination so as to make clear which actions are not unlawful discrimination such as single-sex medical facilities, or actions for the protection of the rights of National Minorities.

- The enforcement tools are unclear and procedural mechanisms insufficiently detailed. The Ombudsman's powers to obtain information about suspected acts of discrimination are weak, and there is no power to compel remedial action.

- **It is recommended that the draft vest the Ombudsman with powers to require co-operation on certain matters without recourse to courts.**

- The legal mechanisms for enforcing rights are unclear and insufficiently detailed. It is not clear which courts have jurisdiction, and when a discriminatory acts lead to criminal, civil administrative or disciplinary penalties.

It is recommended that the draft clearly states which court or other procedure governs a claim of discrimination, and the nature of the penalty which attaches to such breaches.

- The interaction between the draft law and existing civil procedure is unclear. Special measures to enable the court to draw an inference of discrimination, such as statistical evidence, should be included. The precise extent of the courts powers to rectify discriminatory behaviour should be clarified.

It is recommended that the draft takes specific account of the existing procedural provisions in civil law (including Equal Opportunities law); allows statistical evidence to be adduced; states the compensation and damages to which successful claimants are entitled; and allows other measures which might prevent repetition of the discriminatory behaviour.

A. DEFINITIONS

Scope:

Article 1 of the draft sets out the scope of the law and states that it applies in *'political, economic, social and cultural and other spheres of life'*. The effect of this Article is to impose no restriction at all on the situations in which this law is applicable. Article 1 apparently prohibits any form of discrimination in all human relationships based on any grounds. There is no distinction made between discrimination in public and in private contexts: requiring equal treatment in the 'social' or 'cultural' sphere purports to regulate private relationships. This law apparently could therefore regulate purely personal relationships, and if that is the case it is likely to breach the right to private and family life under Article 8 of the ECHR.

It is notable that states with mature anti-discrimination provisions usually prohibit discrimination in limited and specific circumstances, such employment, education, provision of goods and services, and provision of government services such as social security, and pensions. Article 1 should be amended so that the scope of the law is limited to the situations in the public realm, as provided for in the Discrimination Directives.

The law generally fails to make reference to or take into account the existence of the Law on Equal Opportunities. The anti-discrimination law needs to work in conformity with that law so as not to overlap with it, and to take a consistent approach in terms of

definitions. It is also necessary to make clear how the two laws inter-relate in cases of conflict between the two, or where a person believes they have been discriminated by virtue both of their sex and other characteristics which are protected by the draft law.

It is recommended that the scope of the law is reviewed so as to:

a. prohibit discrimination in specific areas of public, as opposed to private, life; and

b. take into account the existing anti-discrimination mechanisms in the Law on Equal Opportunities.

Protected characteristics:

Article 1 of the draft law prohibits discrimination, on the grounds of *‘colour of skin, gender, race, ethnicity, language, citizenship, social background, religion or conviction, education, opinion, political affiliation, personal or societal status, disability, age, sexual orientation, family or marital status, property status, belonging to a vulnerable group, health status or any other grounds’* (referred to hereafter as ‘protected characteristics’).

It is doubtful whether such an extensive list of protected characteristics can be given effect or meaningful protection in reality. An underpinning concept in discrimination law is that it is permissible to discriminate, or differentiate, between individuals based on relevant characteristics. However, it is not permissible to do so basing on *irrelevant* characteristics. This includes prejudiced or stereotyped views of a person based on their group membership. In other words, selection must base on rational objective criteria relevant to a particular situation. For example, using age as a selection criterion may be rational, objective and relevant to the decision to appoint an individual to a post as a sports player, but may not be so for a teacher. The law fails to provide a framework for determining in which situations a distinction can be made, based on a characteristic relevant to that situation.

Further, the draft law conflates two different issues: the protection generally of ‘vulnerable groups’ of persons is a question of social justice. Anti-discrimination law by contrast focuses on specific breaches of the right to equal treatment and

appropriate measures to correct them. The concept of ‘vulnerable person’ would include groups such as minors, severely mentally disabled persons or the homeless. Measures to mitigate their vulnerability are generally not within the scope of anti-discrimination law but rather the subject of special programmes which recognise their economic, education and other special social needs. Whilst a vulnerable group includes many persons with characteristics which are within the scope of EU anti-discrimination law (such as disability), the term ‘vulnerable group’ is much wider and rooted in sociological concepts which are not easily translated into clear legal concepts. This raises the problem again of the lack of legal certainty in such a definition and the danger that this will breach the European Convention for Human Rights (ECHR). It might therefore be preferable, in the interests of effectiveness, and legal certainty, to promulgate separate legislation for the protection of vulnerable groups, and focus anti-discrimination measures on specific protected characteristics.

The issue of which characteristics should be included in the legislation is one of the key decisions in drafting anti-discrimination measures. In states with a history of anti-discrimination laws, protected characteristics have started from a narrow group, and slowly widened. Protected groups are usually said to have ‘immutable characteristics’⁹ i.e. they share characteristics which are deeply personal and unchangeable. Consequently the main protected characteristics have been: ‘race’, ethnicity, sex/gender, religious affiliation. These characteristics can be expressed in other words; for instance discrimination based on membership of a national minority can also be said to be on the grounds of race or ethnicity. Sexual orientation has been found to come within the prohibition on sex discrimination by the European Court of Justice [ECJ]¹⁰.

The steps taken to promote equality for some protected groups may not be appropriate for all vulnerable groups. The law would be improved if it differentiated between the types of discrimination which are faced by different groups, and the different measures required to address them. Most EU states with mature discrimination laws

⁹ See: Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford University Press, 1995).

¹⁰ Court of Justice of the European Communities. *P v S and Cornwall* Case C-13/94, Judgement of court of 30 April 1996 <http://www.bailii.org/eu/cases/EUECJ/1996/C1394.html>.

prohibit discrimination based on only limited characteristics, and frequently have different legal provisions tailored to the needs of the group being protected, and the sphere of activity being regulated. For instance, steps to prevent discrimination on the grounds of disability are different to those relating to age discrimination. Thus, in the UK age discrimination is forbidden in the work place, but not in night clubs. Race discrimination is forbidden in all spheres. Similarly, securing meaningful equality for persons with disability has usually led states to require employers and service providers to make reasonable accommodation to those disabilities by, for example, installing ramps. This approach, by which anti-discrimination provisions focus on the needs of different groups, is more effective in securing meaningful and concrete improvements for discriminated groups.

Further, as some forms of gender segregation may arise from religious or welfare reasons, the bar on distinctions based on sex may give rise to situations which violate right to privacy¹¹ or the right freedom of religion or belief¹².

There is a danger that the draft law, by including so many protected characteristics and without tailoring the scope of the law to the situations when differential treatment is genuinely unacceptable, will not be effective. A law which is unrealistically wide carries the danger of being left too open to interpretation and inconsistent application. This in turn is likely to breach the ECHR requirement of legal certainty since the scope of the law cannot be reasonably anticipated by those affected by it. This is especially the case where, as here, the protected characteristics are left open-ended.

¹¹ Article 8 of the ECHR reads that: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

¹² Article 9 of the ECHR reads that “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Further, the law is less likely to be applied if it is too wide by trying to protect all possible groups in all possible circumstances. There is a danger of a loss of focus on the key immutable characteristics which need to be protected. It may be better to have a clear and limited list of groups which are protected than to aim for an unrealistically inclusive group. It is preferable to pass a narrow and specific law which will be given effect, rather than a comprehensive law which has little chance of being applied. This can also act as a starting point for adding more protected characteristics in the future.

It is recommended that:

- **The draft focus on specific and limited protected categories.**
- **that the law does not utilise an open-ended wording such as ‘vulnerable group’ or ‘any other criterion’; and**
- **that the requirement of legal certainty is taken into account in any new drafts.**

Discrimination, Direct discrimination and indirect discrimination:

Article 2 of the draft law contains a list of definitions. Some of the same terms appear in Article 2 of the Equal Opportunities Law but are defined in significantly different ways.¹³ They should be consistent; this could be achieved by amending the Equal Opportunities Law, or by drafting the definition in the anti-Discrimination law to conform to that definition.

The draft law throughout fails to distinguish between acts of direct and indirect discrimination, and uses the terms interchangeably or the undefined term ‘discriminatory’.

The definitions in Article 2 of ‘discrimination’, ‘direct discrimination’ and ‘indirect discrimination’ would not protect persons who are discriminated by virtue of assumed

¹³ For instance, Article 2 of the draft law defines discrimination as:– *any direct or indirect distinction, exclusion or restriction in the rights of a person, as well as supporting a discrimination conduct on any ground enumerated in this Law.* By contrast, Article 2 of the Equal Opportunities Law defines discrimination on the grounds of sex as: *distinction, exception, limitation or preference that is aimed at or followed by a limitation or impediment of recognition, exercise and/or implementation of fundamental human rights and freedoms, based on equality between men and women.*

characteristics (where a person is wrongly believed to belong to a particular group) or by association (because they associate with persons from a different, protected group). These are important grounds of discrimination and it is recommended that the definition include them¹⁴.

It is important that there are exceptions to the acts which are defined as discrimination. The law should be focussed so as to regulate those forms of prohibited conduct which are real barriers to equality. It is undesirable to rely on broadly worded definitions of discrimination and then create broad exemptions. It is preferable to create specific exemptions so that there is no scope for uncertainty. There are a number of situations where differential treatment should not be within the definition of discrimination. These include appropriate measures to compensate men and women for disadvantages linked to their sex, for example, where women are at greater risk of violence, taxi services may provide differential which takes this into account.

Another type of situation that could benefit from a specific exemption is in the religious or cultural sphere. For example, religious institutions frequently discriminate when appointing to certain posts, based on religious affiliation, or gender. This would amount to discrimination unless a religious belief can be said to be ‘objectively justified’ under Article 6(3)¹⁵, or fall within the exceptions in Article 8(2) or (3)¹⁶.

¹⁴ Article 2 of the draft law gives the following definitions: *Discrimination* – any direct or indirect distinction, exclusion or restriction in the rights of a person, as well as supporting a discrimination conduct on any ground enumerated in this Law.

Direct Discrimination – any distinction, exclusion, restriction or preference that has as a purpose or effect of treating a person less favourably than they would have been treated in a comparable situation without a reasonable or objective justification of the distinction.

Indirect Discrimination – when the effect of an apparently neutral provision, criterion or practice places a person at a disadvantage in comparison with other persons, except the case when the said provision, criterion or practice has an objective justification and the means of achieving this objective are appropriate and necessary.

¹⁵ Article 6(3) of the draft law reads that “*The situation when the limitation of a certain right is objectively justified by a legal purpose, and the means for achieving this objective are appropriate and necessary is not considered as discrimination.*”

¹⁶ Article 8(2) and (3) of the draft law reads that “(2) *The refusal to employ, admit to programs for the enhancement of professional skills or promote a person shall be deemed ungrounded if made under the following pretexts:*

Since prohibiting discrimination in religious settings might conflict with the rights to freedom of religion or freedom of association under the ECHR Articles 9¹⁷ and 10¹⁸, it is important to ensure that appropriate exceptions are provided. However, prima facie, none of the exceptions apply, and the prohibition on discrimination could be applied. This situation is given as an illustrative example of the need to consider which situations the law is designed to cover which should be excluded.

It appears that attempts have been made in the draft to qualify the meaning of discrimination so as to allow this to happen, such as Article 6(2) and (3) but these could be clarified and made more concrete for the avoidance of doubt. Therefore, in the interest of clarity, the law should specify more clearly the nature and scope of the exceptions, rather than relying on the general exemptions.

The draft law is commended for including instigation to discrimination and also for attempting to deal with recruitment or selection procedures and announcements which demonstrate an intention to discriminate. These are required for compliance under the Discrimination Directives. However, the instigation to discrimination definition may

a) requiring the submission of some additional documents to those legally established or introducing additional criteria;

b) Alleging the non-conformity with other conditions that have nothing in common with the professional skills required for the solicited opportunity or it is required to be in compliance with any other illegitimate conditions with similar consequences.

(3) Any distinction, exclusion or preference taken with respect to a particular job shall not constitute discrimination, in case when the particular nature of the concerned activities or of the context in which they are carried out, certain professional skills are required, provided that the objective is legitimate.”

¹⁷ “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

¹⁸ “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

be too narrow in its requirement that a person abuses another's *subordinate* position. It may be that the instigation to discriminate emanates from a person who is not a 'superior' within the hierarchy of an organization. It may not include a client who instructs a contractor to discriminate for instance. It would be better to clarify this provision, and make clear the kind of relationships which are included.

It is recommended that the law defines discrimination and analogous terms

- a. to be consistent with the Law on Equal Opportunities;**
- b. to conform to Articles 9 and 10 of the ECHR;**
- c. by reference to specific situations rather than by reference to general concepts;**
- d. to more clearly express defences or justifications for discrimination**
- e. to include assumed membership of or association with members of a protected group.**

B. REMEDIES

In order to achieve the goals of improving social responses to discrimination, litigation alone is not recommended. There are many reasons why this is not optimal. First, litigation is expensive and generally slow. In terms of the remedies available this will depend on the legal context, but it is likely to be limited to financial penalties in the way of fines or compensation. This, in turn, depends on the means of the party who is complained of. Additionally, complainants may for many reasons feel reluctant to take legal action: it requires knowledge of their legal rights, and a willingness to be identified as a complainant. It also means enforcement can be haphazard.

The Government has given responsibility for enforcement of legislation partly to the Ombudsman and the Law Courts. It has also given a certain duties to other bodies,

under Article 12¹⁹. Experience suggests that it is good to use an approach which incorporates elements of administrative action, and conciliation, with litigation as one available element. This can be particularly valuable where there is a large gap between the aspirations of the legislation and the readiness of employers and society at large to implement the equality provisions in full. By giving a responsibility to foster equality and to educate as well as to adjudicate situations of discrimination the ombudsman can be more effective at long-term improvements to society. The government is commended for allowing the Ombudsman to initiate investigations without the need for an individual complaint under Article 14. This enables him or her to enquire into institutional practices which discriminate against groups or individuals. This can be a very effective tool.

However, there is a lack of enforcement power granted to the Ombudsman which is likely to lead to hamper the ability to require employers to change their behaviour. It appears that the Ombudsman cannot compel action, nor impose sanctions: it is required under Article 18(1) resort to the Law Courts, ‘competent bodies’ or to initiate administrative proceedings. It is unclear what this means, nor when each of these procedures applies. There should be more clearly delineated the situations when each option is available to the Ombudsman.

Issues that require further clarifications include: whether the reference to law courts means that the courts are able to review the Ombudsman’s decisions *ab initio*, hence re-opening the full facts of the case. Whether the respondent can be represented and defend the Ombudsman’s application. It is unclear what the consequences will be of a failure by a third party to implement the Ombudsman’s recommendation, under Article 18(1)b. There needs to be some definition of ‘administrative proceedings’ in Article 18(1)c: it could be that this is a reference to the Ombudsman’s own powers or to some other tribunal or body.

¹⁹ Article 12 of the draft law reads that “*The following shall be vested with duties in the field of preventing discrimination:*

- a) *Ombudsman’s Office;*
- b) *Governmental Committee for Prevention and Combating Discrimination;*
- c) *Authorities of the central and local public administration;*
- d) *Public Associations.”*

These and other procedural issues need to be clarified and given detailed effect as otherwise the legislation will be ineffective and unenforceable.

C. PROCEDURE

The Race Directive explicitly refers to the need for ‘effective proportionate and dissuasive sanctions’²⁰.

The draft, while clearly assuming there will be legal action, makes no clear provision for sanction or punishments, nor for the procedure to be undertaken whether by the . Chapter IV, while making certain declaratory statements as to litigation, does not contain a detailed procedure for claims under the law. It is unclear which acts of discrimination would constitute civil, criminal administrative or disciplinary breaches. The corollary of this is that it is unclear when a particular breach could lead to deprivation of liberty or of financial consequences. Article 7 of the ECHR prohibits retroactive punishments and Article 6 imposes procedural requirements on the interference with civil or criminal. The lack of clarity in Article 22²¹ raises a strong likelihood that Article 6 and 7 would be breached.

Creating routes for litigation without ensuring there are adequate procedural mechanisms to enable applications to be made is a serious weakness. Therefore, the mechanisms for responding to discrimination should be made more effective. The powers of the Ombudsman are insufficiently clear and there are no powers of compulsion to recover data or require co-operation. All powers appear to be dependent under Article 18(1), on legal or administrative proceedings to ensure compliance. This is likely to be expensive, time-consuming and slow.

The procedures for court actions are vague and unclear. There is no specialist court mandated to undertake this kind of work. No time limits are given as to when claims may be filed, responded to, or the level of damages. The draft should take into

²⁰ COUNCIL DIRECTIVE 2000/43/EC of 29 June 2000 “Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin”, paragraph 26

²¹ Article 22 of the draft law: **Liability for Discriminatory Actions** - *Discriminating actions are liable to criminal, administrative, civil and disciplinary punishment, under the current legislation.*

account the existing procedural provisions in civil law and ensure that they are conducive to active pursuance of claims under the anti-discrimination law. It also should contain procedural provisions which conform to those under the Equal Opportunities law.

Consideration should be given to introducing special provisions to allow statistical evidence to be adduced in court to prove discrimination has occurred.

It is commended that Article 25²² of the draft law shifts the burden of proof in accordance with the Burden of Proof Directive²³. This allows a shift of the burden of proof once the claimant has brought a certain level of evidence that discrimination has occurred. However, this shift is not permissible for breaches of the criminal law, as Article 6 of the ECHR protects the presumption of innocence. The law should therefore make clear in what type of cases Article 25 applies.

It is recommended that the Government consider make specific provision:

- **limiting Article 25 to cases that are not criminal law breaches;**
- **allowing statistical evidence to be adduced to support a claim of discrimination;**
- **stating the level of compensation and damages to which successful claimants are entitled; and**
- **take into account the existing procedural provisions in civil law and ensure that they are conducive to active pursuance of claims under the anti-discrimination law; and**
- **contains procedural provisions which conform to those under the Equal Opportunities law.**

²² Article 25 of the draft law reads that “(1) *The person who initiate an action in the Law Court shall prove:*

- a) that he/she is a member of a protected class;*
- b) facts from which discrimination presumably occurred;*
- c) caused moral and material damage;*

(2) The responded bears the obligation to prove the absence of discrimination.

²³ COUNCIL DIRECTIVE 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex

D. RESOURCES

In view of the likely costs imposed on public administration and private business as a result of these provisions, it is recommended the Government undertake a cost analysis of implementation. In light of that, it will be essential to ensure adequate resources are allocated to enable the body charged with implementation, the courts and affected enterprises. Further, prior to implementation it will be important to ensure adequate training in the law to the legal community, and to publicise the new law widely.

It is recommended that the informative notes are supplemented by an assessment of the financial impacts of the draft law.

III INDIVIDUAL CLAUSES

Article 1:

Issues raised by Article 1 have already been addressed in Part II under the heading ‘*Scope*’.

Article 2

Many issues raised by Article 2 have already been discussed in Part II under the heading ‘*protected characteristics*’, but there remain some detailed drafting issues to consider:

- The definition of discrimination requires a ‘distinction, exclusion or restriction in the rights of a person...’ This formulation is unclear. The ‘rights’ of a person are not defined, and there are many areas of life in which a person’s rights are not infringed, yet where discrimination would still need to be prohibited. There is no right, for instance, to enter a restaurant or join a social club, yet these are some of the core areas in which the law will operate.

The words ‘supporting a discrimination conduct on any ground enumerated in this law’ is unclear. In particular, it is unclear what is being referred to by the word ‘ground’: it appears to be referring to the protected grounds in Article 1 of the draft law. If this is the case, this should be clarified.

- The definition of direct discrimination allows justifications – normally this is not permissible. Direct discrimination should not be generally open to a defence of justification (although in some special instances, such as on the grounds of age for certain occupation it is.) Also the definition refers to how that same person would have been treated in a *comparable* situation. This wording needs to be more precise. Justification should refer to a different person in a comparable situation *differentiated only by the fact of their belonging to a protected group*.

- It is not necessary to define discrimination independently of the definitions of direct and indirect discrimination. While the difference between direct and indirect discrimination is, on the whole, clear there is no need to further define discrimination. It tends to add confusion since the relationship between these 3 concepts is unclear.

- The definition of positive measures is vague. Terms used in the definition are themselves in need of further definition: it is neither clear what time scale would qualify an action as temporary nor what is meant by ‘specific’. It is unclear what is meant by a ‘situation of inequality related to discrimination’. The clause is not limited to particular groups or situations. The relationship between this Article and discrimination is entirely unclear. If it is intended to provide an additional defence or justifications for discrimination, it should be drafted accordingly. This clause is widely drafted, and is in danger of being too wide, and failing to comply with EU law. The ECJ considered an affirmative action programme in the case of *Abrahamsson and Anderson v Fogelqvist*²⁴ that allowed less qualified female candidates to be appointed for posts in order to create a better balance of representation. They found the terms of the scheme to be in breach of Article 2(4) of the Equal Treatment Directive. This Article should be re-drafted to define which situations justify affirmative action; and lay down conditions which would ensure compliance with EU restrictions on affirmative action.

²⁴ Case C-407/98 [2000]

- Racial segregation is defined but there are no operative provisions relating to it in the rest of the draft. It therefore has no effect.
- The definition of ‘vulnerable persons’ is vague – if the same term appears in other legislation (e.g. social security provisions) it should be defined in the same way and cross-referenced.
- The definition of ‘disability’ is unclear as it does not describe the level of incapacity required, as it refers only to ‘capacity to perform certain activities’, and uses as a reference point persons having ‘full capacity’. Since it is unclear what full capacity amounts to, this is a circular definition.
- There is no reference made to the Equal Opportunity Law which contains definitions and enforcement mechanisms with which the anti-discrimination law should be consistent.

Article 4

- Although this Article defines serious forms of discrimination, no operative provisions or measures are put into place regarding them so it has no legal effect. If these provisions were given some effect, Article 4(c) would risk infringing the right to free expression by limiting expressions of opinion or thought in such broad terms. Articles 4(a) and 4(d) include acts which may be more appropriately in the criminal code²⁵.

Article 5

- Is purely declaratory and has no legal effect.

²⁵ Article 4 of the draft law reads that “*Serious forms of discrimination are:*
a) *causing inequality and hostility or instigation to inequality or hostility;*
b) *promoting or practicing discrimination by the public administration authorities;*
c) *supporting discrimination via mass-media;*
d) *placing discriminating messages or symbols in public places;*
e) *discriminating persons on the grounds of two or more personal characteristics, or presumed personal characteristics*”.

Article 6

- The prohibition on direct and indirect discrimination is unlimited in its scope: in most states discrimination law relates to areas such as employment, social security, and education. This provision should be clarified so as to specify to whom the prohibition is addressed. The paragraph also refers to the principle of non-discrimination. This term is undefined. If it exists in the other legal or constitutional provisions that should be made clear and referred to.
- Article 6(2) and (3) overlap with each other and are different to the justifications which form part of the definitions of direct and indirect discrimination in Article 2.

Article 11

- The effect of Article 11(2) is unclear because it refers to ‘current legislation’ without specifying what that legislation is. In the absence of more information about this, it appears to prohibit religious schools requiring their pupils’ families to be of the same faith. It would also be impermissible to establish educational institutions (perhaps as a program of affirmative action) that catered to under-represented groups unless it is made clear this falls within the exceptions set out in Chapter I of the Law.
- The reference to a ‘protected group’ must be clarified as this phrase has not previously been defined in the law.

Article 12:

- All the bodies listed here should be referred to be their proper legal titles. It appears that there is currently no legal entity in Moldova known as ‘the Ombudsman’, although there is a law establishing the office of the Parliamentary Advocate (‘PA’). The PA may be known colloquially as the Ombudsman but if the intention is to vest powers in the PA, the proper legal title is required. A similar issue may arise with the other bodies listed, depending on the Moldovan law. The term ‘authorities of the central and local public administration’ may also lack clarity: which bodies will

fall within this description is unclear. For instance, prima facie, the PA would be such an authority, and the requirements in Article 20 would apply to the PA.

- It is recommended that the Government require one of the four PA's to take specific responsibility for the issue of equality and non-discrimination as has already been done for the rights of the child.

Article 13:

- The power of the Ombudsman is a key issue and needs to be very clearly defined. Referring to persons who are victims of, or believe themselves to be victims of 'discrimination' is insufficiently clear. Instead it should be explicit that those persons who believe they to have been the subject of direct or indirect discrimination, harassment, victimisation or racial segregation should be eligible to approach the Ombudsman. This should be consistent throughout Chapter 3.
- The breadth of the law means that extremely large numbers of persons are likely to fall within the entitlement to file a complaint. The Ombudsman should be given powers to exclude complaints that are malicious or frivolous, but given sufficient resources to respond to the likely number of complaints. In the absence of such resources, the law is likely to fall into disuse or be discredited for lack of enforcement.
- The title for this Article is incorrect: it does not deal with the Ombudsman's competence but rather who may bring a complaint.

Article 15:

- The scope of this article is unclear. If an Ombudsman resolves a complaint and the complainant is dissatisfied it appears they can seek a court remedy, even if the ombudsman imposes a penalty on the respondent. This could be an expensive and onerous process for the respondent, especially if the complaint

is a frivolous one and there is a danger that the respondent is exposed to the risk of double penalties for the same acts.

- It should be clarified which courts are the appropriate venue to pursue claims of discrimination.

Article 17:

- Paragraph (1): There is a danger that personal information such as salaries and medical histories will have to be disclosed under this clause. It is important to make provision for information which is confidential or sensitive and which can be attributed to other individuals in the office. Without proper safeguards there is a danger that this will violate others' rights to privacy under Article 8 of the ECHR (which provides a right to respect for one's "private and family life, his home and his correspondence," subject to certain restrictions), the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and EU Directive 95/46/EC on the protection of personal data.
- Paragraph (3): the 'principle of non-discrimination' has not elsewhere been defined. It is preferable to refer to defined concepts which have been used elsewhere in the law.

Article 23:

- Although persons who are not direct victims of discrimination may file a complaint, the powers in Article 24 only refer to the victim as being able to pursue a case in the Law Courts.
- There is no requirement that the victim be aware of, or agree to having a complaint filed, and there is no allowance for a situation where a victim may not wish to pursue such a complaint.

Article 24:

- The provision in Article 24 (2) imposes a power to prohibit dissemination of personal information, but it is unclear on whom this prohibition may be imposed, whether it is addressed to the courts, the media or other third parties. In order to have effect, some sanction should be imposed for breaching the victim's confidentiality.
- This provision applies in accordance with the 'special rules on confidentiality' although it is unclear what these rules are or where they can be found. If they are legally defined in other legislation a cross-reference should be made so that it is clear to what this paragraph is referring. If they do not exist in written form, they should be defined in this law.
- The confidentiality provision could be in breach of the right to freedom of expression, especially if it curtails media reporting on cases of genuine public interest. Thus, it should be open to challenge by interested, relevant parties, such as the media or the respondent.

Article 25:

- Refers to a 'member of a protected class'. This phrase has not been defined and must be clarified. It may be intended to refer to the same concept as in Article 11 of 'protected group'; if so the terminology should be defined and consistent throughout.

[END]