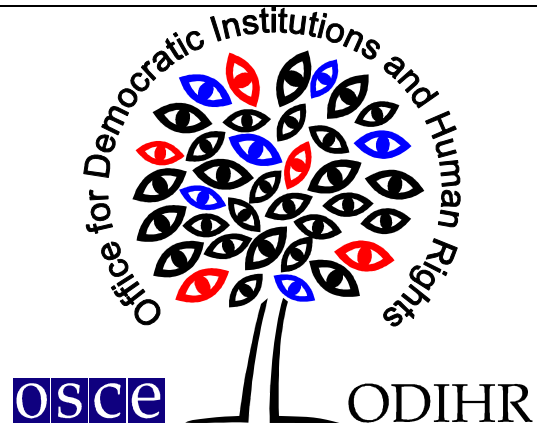


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OSCE/ODIHR COMMENTS

ON THE D R A F T

LAW ON PROHIBITION OF DISCRIMINATION

OF THE

REPUBLIC OF SERBIA

*Based on a translation of the draft Law on Prohibition of Discrimination provided by the
OSCE Mission to Serbia*

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I. INTRODUCTION

1. *In February 2009 the OSCE Mission to Serbia requested the OSCE/ODIHR to provide comments on the Draft Law on Prohibition against Discrimination of the Republic of Serbia, dated 9 January 2009.*
2. *This Draft Law is part of the social, political and economic reforms which have been launched in order to harmonize national legislation and practice with the international conventions and institutions which the Serbia is part to. The current draft is the result of a long consulting process among experts, representatives of the civil society and the government. It has reportedly been altered in the light of recommendations proposed at a public discussion held on December 11-12, 2008.*

II. SCOPE OF REVIEW

3. These Comments analyze the Draft Law on Prohibition of Discrimination of the Republic of Serbia (hereinafter referred to as “the Draft Law”) in terms of its compatibility with relevant international and regional standards and the OSCE Commitments.
4. International standards in the anti-discrimination field 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 Racial Discrimination (CERD). These standards have been elaborated and given detail by the European Court of Human Rights (ECtHR), the European Court of Justice (ECJ) and in numerous national courts’ decisions across the EU.
5. The Republic of Serbia is a signatory to, and has ratified, UN conventions on discrimination; these international treaties are directly applicable. Therefore CERD has direct effect, and sets standards; its implementation is overseen by a Committee and its most report considers both legislation and implementation.

6. A number of EU Directives (including the ‘Racial Equality Directive’¹, the ‘Employment Equality Directive’², the ‘Burden of Proof Directive, and many directives relating to sex discrimination) and related ECJ judgments are relevant and will be referred to in this review.
7. The Comments do not purport to be a comprehensive review. Rather they highlight the key issues, and seek to provide useful indicators of areas of concern that future drafts should take into account. One key criterion is the extent to which the legislation is 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.

III. EXECUTIVE SUMMARY:

8. First, it should be stated that the Draft Law contains certain admirable aspects. It is a well-organised measure. A wide range of discriminatory actions are prohibited. All the grounds of discrimination provided for in EU equality law are present in the Draft Law and indeed are significantly expanded. Specific measures are provided for some of these grounds. A Commissioner for Protection of Equality is established with wide-ranging powers of investigation and enforcement. Furthermore, in relation to enforcement, the Draft Law sets valuable provisions on ‘temporary measures’, on court orders other than compensation and the possibility of associations and organisations initiating and participating in court proceedings.
9. However, the Draft Law has some deficiencies. It is arguable that it is overburdened with anti-discrimination concepts and there is not consistent application of these concepts throughout the text. Some definitions are set out in a complicated and opaque fashion. Some phrases appear, in English, to be

¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; the full text of the Directive is available at http://europa.eu/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; the full text of the Directive is available at http://ec.europa.eu/employment_social/news/2001/jul/directive78ec_en.pdf

unfamiliar versions of familiar terminology in EU equality law. This may be due to translation into English. However, it is important that the authoritative text in Serbian does adopt the terminology of the EU equality directives in relation to core concepts and terms in order to avoid future confusion, in the courts and amongst administrative authorities, employers, providers of services and citizens, over whether the concepts and terms are intended to be synonymous.

10. The ‘long list’ of discrimination grounds in Article 2.1 may bring within the scope of the Law a range of unintended scenarios which may destabilise the effectiveness of the Act. There are specific measures for some grounds but not others, which suggest a ‘hierarchy’ of non-discrimination grounds. In particular, race and ethnic origins, a key non-discrimination ground in both EU and international law, is not subject to specific measures. There is some concern that the protection of national minorities and disabled people is not adequately set out in the Draft Law and will be subject to special laws.
11. Finally, although discriminatory behaviour by public officers is covered, the protection from discrimination by public authorities appears to be less extensive than in other areas.
12. Therefore, although there are many positive aspects to the Draft Law, the main concern is that it is over-expansive in both non-discrimination concepts and non-discrimination grounds, resulting in the potential danger that these provisions will cause confusion in their implementation and may ultimately bring the Law, and those who enforce it, into disrepute.
13. Below is the list of the major recommendations outlined in these Comments:
 - It is recommended to consider a possibility to include objectives of the proposed law; [para. 15]
 - It is recommended that the Draft Law should contain a relatively short list of discrimination grounds; the Government should critically examine whether it is advantageous to expand this list on a ground-by-ground basis once the Law is seen to be operating effectively and fairly; [para. 16-29]

- It is recommended to better maintain the integrity of the Draft Law through circumscribing wide- ranging provision contained in Article 3 of the Draft Law; [para. 30-34]
- It is recommended to bring definition of direct discrimination in better compliance with Article 2(a) of the EC Framework Employment Equality Directive 2000 and refer to the grounds in Article 2.1, rather than more generalised ‘personal characteristics’; [para. 35-37]
- It is recommended that the Draft Law should refer to ‘particular disadvantage’ while defining indirect discrimination; [para. 38-40]
- It is recommended that a specific reference to those ‘involved in a complaint’ rather should be introduced in the Draft Law rather than merely those who give evidence in support of the complaint; [para. 44]
- It is recommended that a serious consideration should be given to modifying the drafting of the definition of harassment; [para. 46-51]
- It is recommended that the liability of public authorities should not be weaker than those of private parties; [para. 53-55]
- It is recommended that relevant provisions should be more explicit and cast light on how conflicts between rights to expression of religious beliefs and other non-discrimination rights, for example in relation to sexual orientation, will be resolved; [para. 56-58]
- It is recommended that the non-discrimination grounds should be limited to those governed by EU law and any other grounds considered particularly important to protect in Serbian law; [para. 59]
- It is recommended that ‘race and ethnic origins’ should be subject to a specific measure in their own right; [para. 59-61]
- It is recommended that racial discrimination should be explicitly covered by the Draft Law. [para. 61, 68]
- It is recommended that the concept of ‘reasonable accommodation’ for persons with disabilities should be articulated in the Draft Law; [para. 62]

- It is recommended that the Commissioner should be given adequate resources in order to protect its independence and to allow it to perform all the extensive competences bestowed upon it; [para. 63]
- It is recommended that the reversal of the burden of proof in EU law should explicitly apply to both direct and indirect discrimination; [para. 67]

IV. ANALYSIS AND RECOMMENDATIONS

14. Selected Articles within the Draft Law will be considered, including those which are worthy of positive comment but also those which raise concerns.
15. Article 1 introduces the Draft Law³. Although not essential to an anti-discrimination statute, many do benefit from a short, focused ‘purposes clause’ which sets out the objectives of the Law, thereby providing a valuable guide on interpretation of the Law to the courts and administrative authorities as well as employers, service providers and the citizens of the Republic of Serbia.
16. Article 2.1 sets out a comprehensive non-discrimination principle and a ‘long list’ of non-discrimination grounds. Article 2.1 is a key provision of the Draft Law⁴ but it is a cumbersome measure and may be over-expansive in two regards. First, the definition of “discrimination” and “discriminatory treatment” bear little relationship to the key definitions of direct and indirect discrimination which are set out in Articles 6 and 7⁵ or indeed other ‘forms of discrimination’,

³ The Draft Law, Article 1 reads that “[t]his Law shall regulate general prohibition of discrimination, forms and cases of discrimination as well as anti-discrimination protection measures. Commissioner for the protection of equality, an independent state body, acting independently under its jurisdiction, is herewith established.”

⁴ The Draft Law, Article 2.1 states that “The expressions “discrimination“ and “discriminatory treatment“ stand for any unjustifiable differentiation or inequitable treatment, i.e. act of omission (exclusion, limitation or giving priority) regarding persons or groups, as well as their family members or people close to them, performed in an overt or concealed manner, on grounds of race, colour, descent, citizenship, national affiliation or ethnic origin, language, religious or political convictions, sex, gender identity, sexual orientation, economic status, birth, genetic characteristics, health condition, disability, marital status and family responsibilities, previous condemnations, age, physical appearance, membership of political organizations, trade unions and other workers and employers organizations and other real and/or imputed personal characteristics (hereinafter: personal characteristics);”

⁵ They are also explicitly covered in Article 21 of the Serbian Constitution, which reads that “All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.”

as set out in Article 5. This may be a source of confusion. It is not clear whether the direct and indirect discrimination principles apply across the full scope of the Law or only in the circumstances set out in Article 2.1.

17. It must be stated that there are laudable aspects to these definitions which should be accommodated within the Law. For example, Article 2.1 applies to groups as well as individuals, it applies to those associated with a person or group protected by the Draft Law and it covers ‘imputed’ characteristics, albeit only to ‘other characteristics’, whereas it would be preferable if the Draft Law made clear that imputation or perception can apply to all protected grounds.⁶
18. Nonetheless, there is a danger that the application of Article 2.1 may detract from the full force of the later non-discrimination concepts which are more familiar to EU equality and international human rights standards. For example, Article 2.1 refers to “unjustifiable differentiation or inequitable treatment” but these terms are not defined. Except for age discrimination, EU equality law only permits explicit exceptions to the direct discrimination principle. “Unjustifiable differentiation” in the context of a direct discrimination claim is not explicitly outlined. Neither is it clear whether other justifications can be put forward on the basis of Article 2.1. Similarly, it is important to identify ‘unfairness’ and “inequitable treatment” but an anti-discrimination statute is about *unlawful* discrimination which may well be unfair and inequitable also.
19. On this count, it is tempting to suggest that some aspects of Article 2.1, for example, these points on “unjustifiable differentiation or inequitable treatment” would be more appropriate in a ‘purposes clause’ rather than a definition clause, where the scope and content of anti-discrimination principles may be obscured. So also, some of the positive aspects of Article 2.1 are really clarifications of the application of discrimination principles, the key ones of which are already articulated in Article 21 of the Serbian Constitution [for example, to groups or in cases of ‘discrimination by association or imputation’] and could more easily be accommodated in relation to the definitions of forms of discrimination.

⁶ Explicit inclusion of ‘discrimination through association’ and ‘discrimination by imputation or perception’ is consistent with ECJ case law on the direct discrimination concept as well as with international instruments such as the European Framework Convention on the Rights of National Minorities; the full text of the Convention is available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm>

20. Secondly, what is an initially attractive list of non-discrimination grounds is likely to be counter-productive. Constitutional documents and international instruments can have quite long lists of grounds. Article 14 of the European Convention of Human Rights, which must be read in conjunction with other Convention rights, provides that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
21. So also Article 21 of the Serbian Constitution states that “[a]ll direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.”
22. Non-discrimination provisions in constitutional and international instruments are usually interpreted in relation to direct, rather than indirect, discrimination⁷ and, even then, can be subject to exceptions. They form a vital floor of fundamental rights to combat, in equality terms, the more blatant examples of discrimination.
23. A non-discrimination statute ought to build upon such fundamental rights by establishing an infrastructure of equality law and policy and by focusing on protection against identifiable incidents of discrimination either recognised in EU law or of particular significance in the state. Thereby the full effect of the statute can be applied to advancing the protection of disadvantaged and vulnerable members of the society.
24. It is preferable, in a context where anti-discrimination provisions in the ordinary law are a legal novelty to start with a narrow list of grounds, for example those in EU law, allowing for additions by legislative action, or judicial interpretation through an ‘other status’ ground. So also the Framework Convention on the Rights of National Minorities has particular pertinence in a State such as the Republic of Serbia. Although rights of national minorities can be subsumed with issues of racial and ethnic origins, explicit reference to

⁷ Article 21 of the Constitution is relatively unusual in this regard.

discrimination against national minorities could be seen as a positive development. Indeed, national minorities are given extensive protection in the Serbian Constitution.⁸

25. It is also appreciated that the draft Law includes ‘gender identity’ as a separate non-discrimination ground, in light of the internationally recognised Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.⁹
26. The dangers in this ‘long list’ approach are that the judicial and administrative systems, such as the Commissioner for Protection of Equality, are inundated with cases and complaints, which many may consider unmeritorious. It might be thought that the law can also be brought into disrepute by unexpected consequences of applying an intrusive concept such as indirect discrimination to grounds such as ‘social status’ or ‘property’, even if these grounds are already included in Article 21 of the Constitution. So also many legal regimes treat ‘previous condemnations’ as a matter for the law on rehabilitation of offenders and ‘genetic characteristics’ as a matter for specific legislation, rather than inclusion of their anti-discrimination laws. The impact is that what initially appears to be a positive attempt to prohibit ‘all’ discrimination on the basis of any ‘personal characteristics’ is in danger of being diluted by calling into question many aspects of human behaviour which ought not to be subject to a non-discrimination law, at least in its early stages of development.
27. Hence institutions involved in promoting equality and non-discrimination find their reputations tarnished and the expectations of those who promoted the legislation, and those who expected to be protected by it, are not realised. So also there is a danger that courts and tribunals ‘reinterpret’ non-discrimination principles to avoid unpalatable consequences, thereby inflicting damage to the principles in situations in which they might otherwise properly apply.

⁸ See the Constitution, Part Two, section 3, Articles 75-81; the full text of the Constitution is available at http://www.parlament.sr.gov.yu/content/eng/akta/ustav/ustav_ceo.asp

⁹ The principles composed by a group of distinguished experts in international law, under the auspices of the International Commission of Jurists and International Service for Human Rights and launched in Geneva on 26 March 2007 (http://www.yogyakartaprinciples.org/principles_en.htm).

28. This is not to say that the list of non-discrimination grounds in the Draft Law could not or even should not, be extended at some future date, but it is suggested that this expansion of the non-discrimination law regime should occur even a law based on a shorter, more focused list of non-discrimination grounds has ‘bedded down’ and is seen to operate effectively and fairly in protecting the most vulnerable members of Serbian society.
29. Taking into account all above-stated, it is recommended that the Draft Law should contain a relatively short list of discrimination grounds and the Government should critically examine whether it is advantageous to expand this list on a ground-by-ground basis once the Law is seen to be operating effectively and fairly.
30. Article 3 sets out some fundamental provisions. There is no difficulty with the first paragraph, placing obligations on both the courts and other public authorities¹⁰. It is clear from other parts of the Draft Law that it applies equally to non-public bodies. However, there may be some difficulty with the third paragraph¹¹. The reference to ‘unintended consequences’ is sensible but the prohibition on the exercise of rights under the Draft Law which are “intended to hurt or restrict other people’s rights” is very wide and may provide an opportunity for both the Serbian courts and public authorities to weaken the force of the Draft Law.
31. It is certainly true that, in EU equality law, some rights are protected from infringement in pursuit of the principle of equal treatment. For example, Article 2.5 of the Framework Employment Equality Directive 2000 (FEED) provides that “[t]his Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for

¹⁰ The Draft Law, Article 3.1 reads that “[a]ll persons shall have the right to effective protection against all forms of discrimination by the competent courts and other public authorities of the Republic of Serbia”.

¹¹ The Draft Law, Article 3.3 reads that “[t]he exercise of the rights stipulated under this Law, which is contrary to the effect to which they have been recognized or intended to hurt or restrict other people’s rights, shall be prohibited.”

the protection of health and for the protection of the rights and freedoms of others.”¹²

32. However, this provision only applies to the grounds governed by the FEED and not race and sex. It is also significantly circumscribed in a number of ways which do not appear to apply to the third paragraph of Article 3 of the Draft Law.
33. Two further points should be made. First, this provision appears to reduce the prominence which an anti-discrimination law ought to have in the Serbian legal system. This is particularly the case given that anti-discrimination law is recognised in both EU and international law as fundamental to the pursuit of human rights standards.
34. Secondly, the application of anti-discrimination law raises a vast range of conflicts between rights, including between anti-discrimination rights, but also with other rights in the Serbian legal system. It is not possible to maintain the integrity of the Draft Law unless this wide-ranging provision is significantly circumscribed.
35. Article 5 sets out the ‘forms of discrimination’¹³. These are further articulated in Articles 6-12.
36. Article 6 sets out the direct discrimination principle¹⁴. There may be issues of translation but the text does not repeat the EU definition of direct discrimination D, which, for example in Article 2(a) of the FEED, provides that “*direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the [prohibited] grounds.*”

¹² The full text of the Framework Employment Equality Directive 2000 can be found at http://www.yorkcollege.ac.uk/equalityanddiversity/pdfs/legislation/EU_Employment_Directive_2000.pdf

¹³ The Draft Law, Article 5 reads that “[t]he forms of discrimination are the following: direct and indirect discrimination as well as violation of the principle of equal rights and duties, victimization, forming of associations in order to exercise discrimination, hate speech and harassment and degrading treatment”.

¹⁴ The Draft Law, Article 6 reads that “[d]irect discrimination occurs if a person or group in a comparable situation, is being or have been put at disadvantage due to their personal characteristic/s, or might be disadvantaged by way of any document, action or act of omission”.

37. There may be interesting innovations here. Some commentators would prefer the direct discrimination definition to be based on ‘disadvantage due to a prohibited factor’. But this formulation is to avoid a contentious aspect of the application of direct discrimination, namely the need to find a comparator with whom the circumstances of the complainant can be compared. However, the direct discrimination definition includes the phrase “person or group in a comparable situation”, indicating that some element of comparison.
38. An additional point is that the prohibition applies to ‘personal characteristics’, reflecting the breadth of Article 2.1. As indicated earlier, the list of non-discrimination grounds ought to be considered. It would be preferable if this Article, and those following, follows the precedent of Article 2(a) of the FEED, refers to the grounds in Article 2.1, rather than this more generalised ‘personal characteristics’.
39. Moreover, Article 6 is, in translation, inelegantly phrased. Unless some innovations in the direct discrimination principle is intended, it would be preferable to repeat the EU definition, as the Serbian courts would be able to apply the case law of the ECJ without any uncertainty as to whether that case law is fully applicable.
40. In Article 7¹⁵, defining indirect discrimination, there is another key principle which may be inelegantly phrased in translation. Once again, it is worth setting out the EU definition of indirect discrimination, as in Article 2(b) of the FEED, which states that “*indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;*”

¹⁵ The Draft Law, Article 7 reads that “[i]ndirect discrimination occurs if a person or group, due to their personal characteristic/s, is being disadvantaged by way of a document, action or act of omission, which is only nominally based on the principle of equality and prohibition of discrimination, unless these cases have a legitimate aim and the means for the fulfilment of the aim are both adequate and necessary”

41. As indicated above in relation to direct discrimination, it is preferable that the indirect discrimination definition refers to the prohibited discrimination grounds, rather than ‘personal characteristics’. The vital element in this EU definition is the concept of a “particular disadvantage”. Article 7 only refers to ‘disadvantage’. There is some disagreement over whether “particular” refers to a ‘substantial’ disadvantage or a ‘specific’ disadvantage that is specific to the prohibited ground. In any event, the scope of the indirect discrimination principle in Article 7 is very wide, requiring justification for any disadvantage “due to” prohibited grounds. It is perfectly reasonable for an EU Member State to have higher standards than the minimum requirements of EU directives. However, through the excising “particular” from the indirect discrimination definition, the Draft Law brings within the scope of judicial scrutiny a wide range of human activities, multiplied by the ‘long list’ approach in Article 2.1.
42. The danger arises of unanticipated consequences, in that the Commissioner for Protection of Equality and the courts will be required to rule on scenarios which were never intended to be governed by the Draft Law, thereby bringing the Law, and those required to enforce it, into disrepute. Thus, Article 7 should refer to ‘particular disadvantage’.
43. Article 8 is entitled ‘Violation of the principle of equal rights and duties’. As with earlier Articles, it is preferable if this provision refers to the specific non-discrimination grounds in Article 2.1, rather than ‘personal characteristics’. This provision is not typical of anti-discrimination laws. It is not clear what Article 8 adds to the core provisions on direct discrimination, indirect discrimination, harassment and victimisation.
44. Article 9 on ‘victimization’ covers many of those who ought to be protected from victimisation, in particular those who assist complainants as well as the complainants themselves. It might be preferable if there was specific reference to those ‘involved in a complaint’ rather than merely those who give evidence in support of the complaint.
45. Articles 10 and 11 set out valuable provisions on discriminatory associations and hate crime.

46. Article 12 sets out a harassment definition¹⁶. It is not necessary for every concept and definition in the Draft Law to repeat precisely every EU concept and definition, as long as a deliberate effort is made to improve on those standards. However, the definition of harassment is a particular product of EU equality legislation and a complicated issue. Therefore, it is important that the EU definition is carefully compared with the definition in the Draft Law.
47. For example, Article 3.3 of the FEED provides that “[h]arassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.”
48. Article 12 appears to be a genuine attempt to apply this definition in the Draft Law. Two points can be identified. First, a ‘degrading environment’ is included in the EU harassment definition and in the Draft Law definition. In these circumstances, it may cause confusion to include a separate concept of ‘degrading treatment’.
49. Secondly, the English translation uses the term an ‘unfriendly’ environment, which is a weaker term than those used in the EU definition. It is important to ensure that the harassment provision is not too wide as an over-extensive application of the principle can create conflicts between anti-discrimination law and other rights, particularly in fields outside of employment. These can include possible conflicts with freedom of speech, for example, in a theatrical performance or conflicts between freedom of religion and rights of sexual minorities in a range of situations, including in education. For example, controversy has arisen in the UK on the interaction of religious belief and sexual orientation discrimination in non-employment situations.¹⁷ Hence, it is

¹⁶ The Draft Law, Article 12 reads that “[h]arassment and degrading treatment with the purpose or effect of violating a person’s or group’s dignity based on their personal characteristic/s, especially if this results in fear or an unfriendly, degrading and offensive environment, shall be prohibited”

¹⁷ These difficulties have arisen in the UK where a harassment provision in the Equality Bill 2006, in relation to religious belief discrimination in the provision of goods and services, was defeated in the legislature. A harassment provision was also excluded from corresponding provisions on sexual

important that the translation from Serbian is accurate in this respect: if it could also be rendered as ‘unfriendly’, there is a real danger of infringing other fundamental rights.

50. It is not suggested that these difficulties are insurmountable but the difference between the EU standards and the Draft Law are problematic and the drafting of the definition of harassment needs to carefully consider these differences.
51. Article 13 sets out ‘Severe forms of discrimination’¹⁸. This is a sensible and powerful measure but there does not appear to be any further reference to it later in the Draft Law. For example, the ‘temporary measures’ provision (Article 46) could apply to Article 13 scenarios. So also it could be provided that specific penal sanctions (Articles 57-63) could be more severe in Article 13 scenarios.
52. Article 14 entitled ‘Special temporary measures’, as it stands, is a sensible positive action measure¹⁹. However, this might be better entitled ‘Permissible positive action’ so as to avoid confusion with Article 46 that sets general temporary measures.

orientation discrimination in the provision of goods and services. A harassment provision was included in Northern Ireland legislation on sexual orientation discrimination in the provision of goods and services but was struck out by way of judicial review.

¹⁸ The Draft Law, Article 13 reads that “[s]evere forms of discrimination are as follows:

1. Incitement and instigation of hatred, dissent or intolerance on grounds of national, racial or religious affiliation, language, political affiliation, sex, gender identity, sexual orientation and disability, and especially the advocacy of racial, national or religious superiority, misogyny and homophobia;
2. Advocacy of discrimination or actual discrimination done by the public authorities and in the proceedings before the public authorities;
3. Propagation of discrimination in the media;
4. Slavery, human trafficking, apartheid, genocide, ethnic cleansing and their advocacy;
5. Discrimination against persons on basis of two or more personal characteristics (multi- or cross-discrimination);
6. Discrimination which has occurred more than once (repeated discrimination) or discrimination that has happened over a longer period of time (extended discrimination) towards the same person or group.
7. Discrimination which leads to serious consequences for a person, other persons or property that have been discriminated against, especially if it is a punishable act, the perpetration of which was mainly or exclusively fuelled by hatred or intolerance towards the offended, which is based on his personal characteristic.

¹⁹ The Draft Law, Article 14 reads that “[s]pecial measures of a temporary nature, which are introduced in accordance with the law or some other regulation in order to achieve full equality, protection and prosperity of a disadvantaged person or group, shall not be deemed to be discrimination”.

53. Articles 15 and 17 cover public functions and the provision of goods and services to the public. Considering Article 17 first, the English translation refers to ‘Discrimination in the provision of public services and the use of facilities and land’. In English, this appears to govern the provision of services *by* a public authority while it is obvious from the text that it refers to provision of services *by* a ‘business or profession’. Therefore the provision of services by a public authority does not appear to be covered. Article 15 does state, “Discriminatory behaviour of an officer, i.e. a responsible person employed in any public authority, shall be deemed to be a serious violation of professional duties.” But this seems to relate to possible breaches in administrative law and refers to the liability of the ‘responsible officer’ rather than the liability of the public authority for discrimination, harassment and other breaches of non-discrimination principles. This is supported by the provisions of Article 52 which sets out a specific sanction against the public officer, not the public authority. Hence the liability of public authorities appears to be much weaker than those of private parties.
54. Two further points on Article 17 are, first, that under EU Directives, the provision of goods should be covered as well as the provision of services. Secondly, it is typical to make specific reference to ‘education and vocational training’ as in Article 19 but to provision of housing. Although the second paragraph of Article 17 does cover the ‘use of facilities and land’, it would be preferable if a specific provision on housing was included.
55. Article 16, on ‘Employment’, appears to give wide protection in the labour market. However, there may be complications here also. Article 16.1 uses the term ‘regarding violation of equal opportunities’. ‘Equal opportunities’ is not otherwise referred to or defined in the Draft Law, although it might refer to ‘equal opportunities between women and men’. Again, this may be an issue of translation. It may be preferable if the phrase ‘regarding violation of equal opportunities’ is omitted as ‘discrimination’ (as defined in Article 5) already includes the core forms of discrimination, namely direct discrimination, indirect discrimination and harassment.

56. Article 18 governs ‘Discrimination regarding religious rights’²⁰. The first paragraph concerns impartiality between religious beliefs. This article is underpinned by Universal Declaration of Human Rights (UDHR) which provides fundamental protection to freedom of thought, conscience and religion²¹ and further expanded in the International Covenant on Civil and Political Rights (ICCPR).
57. Furthermore, Article 9 of the European Convention of Human Rights provides 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 protections can be found in the Framework Convention for the Protection of National Minorities, which states that “1. The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons’ ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media. 2 The Parties undertake to take appropriate measures to protect persons who may be subject

²⁰ The Draft Law, Article 18, reads that “Discrimination occurs when churches and religious communities are treated contrary to the principle of impartiality of the state towards these institutions, especially if special freedoms and rights are granted to individuals belonging to certain religion systems or churches, or if some religious communities are unfairly denied their recognition. Discrimination occurs when the principle of freedom of expressing one’s religious beliefs is breached, i.e. if a person or group is denied their right to adopt, maintain, express or change their religious beliefs, or to behave in accordance with their religious beliefs.”

²¹ UN Universal Declaration of Human Rights, Article 18 states that “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one’s religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”; the full text of the Declaration is available at <http://www.un.org/Overview/rights.html>

to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.”²²

58. The second paragraph of Article 18 of the Draft Law gives wider protection against discrimination in relation to expression of religious beliefs. It is not clear, though, how conflicts between rights to expression of religious beliefs and other non-discrimination rights, for example in relation to sexual orientation, will be resolved.
59. Articles 20-27 set out specific provisions on some non-discrimination grounds. Many of these provisions are impressive provisions but it is not clear why some non-discrimination grounds are given this specific protection while others are not. This reinforces the proposition that the ‘long list’ of non-discrimination grounds in Article 2.1 is too extensive. Certainly, there is a danger of a hierarchy of non-discrimination grounds between those which enjoy specific protection and those which do not. It is suggested that the solution is to limit the non-discrimination grounds to those governed by EU law and any other grounds considered particularly important to protect in Serbian law.
60. Furthermore, ‘Gender identity’ in Article 21 subsumes issues of transexualism. The Yogyakarta Principles gives the following definition of ‘gender identity’: *“[u]nderstanding ‘gender identity’ to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”²³*. The protection from direct discrimination shall be extended to those who are preparing for, are undergoing or have undergone gender reassignment.
61. A serious omission from these specific provisions concerns ‘race and ethnic origins’. This is a particular non-discrimination ground both in the UN

²² The CoE Framework Convention for the Protection of National Minorities, Article 6; the full text of the Convention is available at <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>

²³ Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity; the full text is available at http://www.yogyakartaprinciples.org/principles_en.htm

Convention on the Elimination of Racial Discrimination and in the EU Race Directive. Article 24 states, “Discrimination against national minorities and their members based on national affiliation, ethnic background, religious beliefs and language shall be prohibited.” This is an important measure, particularly in the context of the European Framework Convention on the Protection of National Minorities, but it is essential that ‘race and ethnic origins’ was subject to a specific measure in their own right.

62. Both Articles 24 and 26, ‘Discrimination against persons with disabilities’, are subject to ‘special laws’. These are complicated matters which may require further legislation. However, Article 26 sets out a modest provision on disability discrimination. Both the UN Convention of the Rights of Disabled Persons²⁴ and the FEED introduce the concept of ‘reasonable accommodation’ of disabled people. It is essential that the concept of ‘reasonable accommodation’ is articulated in the Draft Law.
63. Articles 29-34 set out the remit and competences of the Commissioner for Protection of Equality. These appear to be impressive provisions, setting out what may be considered to be ‘best practice’ in relation to such bodies. For example, Article 31 ensures the independence of the Commissioner in accordance with the UN ‘Paris principles’ on National Human Rights Institutions²⁵. However it is essential that the Commissioner is given adequate resources in order to protect its independence and to allow it to perform all the extensive competences bestowed upon it.²⁶
64. Article 33 sets out a broad range of competences. An important provision is set out in Article 33.9 which states that “[e]stablish and maintain cooperation with

²⁴ The full text of the Convention is available at <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

²⁵ The Draft Law, Article 31 reads that “[c]ommissioner shall be autonomous and independent in performing their duty. Commissioner shall have the right to a salary that is equal to the salary of a Supreme Court judge, as well as the right to be reimbursed costs they incurred in performing their function. Commissioner shall enjoy immunity that is enjoyed by deputies of the National Assembly”

²⁶ UN ‘Paris principles’ on National Human Rights Institutions provide that “[t]he national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the government and not be subject to financial control which might affect this independence”; the full text of the UN “Paris Principles” is available at <http://www2.ohchr.org/english/law/parisprinciples.htm>

independent authorities and bodies competent for achieving equality and human rights protection at the level of local self-government and territorial autonomy”.

The Commissioner’s relationship with Ombudsman and other such bodies will be a significant element in its work.

65. Some might consider that there is a danger of the proliferation of equality and human rights bodies. However, it is ‘best practice’ across the EU to have a ‘specialised body’, dedicated to the promotion and enforcement of non-discrimination law, within which an authoritative reputation in non-discrimination law and policy can be developed. It should be noted that an over-extensive list of non-discrimination grounds may deflect the Commissioner from the task of promoting equality for the most disadvantaged groups in Serbian society and protecting them from discrimination.
66. Articles 35-41 set provisions on ‘Proceedings before the Commissioner’. These again appear to reflect ‘best practice’. In Article 35, paragraph 3, it is particularly valuable that organisations and others can make a complaint on behalf of the person whose rights have been violated, with that person’s consent. These competences are underpinned by the power of the Commissioner to launch legal proceedings under Article 48 and there is a specific sanction under Article 63 for failure to abide by the Commissioner’s recommendations.
67. Articles 42-48 set out provisions on ‘Court Protection’ providing a comprehensive range of ‘judicial protection’ measures. However, there appears to be a discrepancy in Article 47 in that the reversal of the burden of proof in EU law applies to both direct and indirect discrimination²⁷. Article 48 sets out important provisions giving ‘standing’ to the Commissioner and human rights organisations to bring legal proceedings with the consent of the person whose rights have been infringed.²⁸

²⁷ See Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); the full text of the Directive is available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_204/l_20420060726en00230036.pdf

²⁸ Article 9.2 of the Framework Employment Equality Directive 2000 provides that “*Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of*

68. Articles 52- 63 set out ‘Penal provisions’. These articles provide in a clear manner that contravention of the specific non-discrimination provisions in Articles 20 -27 is subject to penal sanctions. This again raises the issue of a hierarchy of non-discrimination grounds, which could be avoided by a more focused list of non-discrimination grounds. Racial discrimination should be explicitly covered.

V. CONCLUSION

67. This Draft Law contains positive aspects as outlined in the previous section. A major concern is that they appear to be included in an expansive attempt to create formal non-discrimination without a focus on real, substantive equality and non-discrimination for the most marginalised members of the Serbian society.
68. Some of the key non-discrimination principles are phrased in a complicated and confusing fashion. It is generally considered preferable to adopt the definitions in EU law unless a conscious decision is made to provide a higher level of protection than that in the ‘minimum guarantee’ provided in EU directives and international standards.
69. The provisions on the Commissioner on Protection of Equality and on judicial protection appear to set out ‘best practice’ on the promotion and enforcement and anti-discrimination law. However, it is essential that the Commissioner enjoys adequate resources to achieve its objectives. It is also essential that there is a commitment on the part of the Government as well as on the part of public and judicial authorities in Serbia to eliminate discrimination and to promote equality for disadvantaged members of Serbian society.

obligations under this Directive.”; the full text is available at http://www.yorkcollege.ac.uk/equalityanddiversity/pdfs/legislation/EU_Employment_Directive_2000.pdf